

Federal Statute Applies State Conduct Rules To Prosecutors

BY JOHN Q. BARRETT

As Congress prepared to take its October 1998 pre-election recess, it passed the fiscal-year spending bill for the Department of Justice (DOJ). The bill is part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999. President Clinton acted promptly to sign the bill into law to keep federal law enforcement in business. Within the spending bill is a brief new provision that will subject federal prosecutors to the same state-driven rules of conduct that apply to other attorneys. The provision is scheduled to take effect in April, 1999 and is entitled "Ethical Standards for Federal Prosecutors." It appears on its face to resolve the controversy that has raged on this issue for more than ten years.

The new law originated as part of legislation proposed by Rep. Joseph McDade (R.-PA), whose interest in the conduct of federal prosecutors was shaped by his own experience as the target of a long-term federal criminal investigation. McDade was tried and acquitted on bribery charges in 1996. He was reelected later that year but chose to retire rather than seek reelection in 1998. The new law is one of his final legislative achievements, but he will not be around to defend it when Congress revisits the issue in 1999.

The McDade Amendment, which will be codified at 28 U.S.C. § 530B, provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where the attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in the State." It also directs the Attorney General to "make and amend rules of the Department of Justice to assure compliance with" this new provision. Its procedural effect is to replace Attorney General Reno's existing DOJ regulations with a federal law. Its substantive effect is to change the rules for federal prosecutors and other attorneys from those imposed by the Attorney General to those that are promulgated by the states and by the federal judges in those states.

Battle Lines Drawn

The new law is only the latest skirmish in a battle that has, at various times, pitted United States Attorneys General and federal prosecutors against criminal defense attorneys, federal judges, state court judges, state-level disciplinary bodies, the American Bar Association and, now, majorities in both houses of Congress. Despite the new law, the battle will continue because DOJ will insist on exclusive power to regulate its staff of attorneys and to promulgate the substantive rules that will permit them to perform traditional law enforcement functions. Many contending entities will continue to fight for their prerogatives as regulators and for their own positions on what rules of conduct should apply to federal prosecutors.

The battle between contenders is likely to overrun the new law itself. From President Clinton on down, the Executive Branch continues to oppose state limitations on the ability of federal prosecutors to do such things as contact represented persons directly rather than through their legal counsel, or to take other actions that are, in DOJ's view, necessary to federal law enforcement. The DOJ, and key members of Congress who share its view (such as Senate Judiciary Committee Chair Orrin Hatch (R.-UT)) are determined to undo the new law before it takes effect this spring. (One particular provision they will challenge is the apparent and wholly inadvertent absorption into federal law of state and local anti-bribery provisions that could be read to prohibit federal prosecutors from providing benefits, such as reduced sentences, to witnesses who cooperate in federal prosecutions.)

Who Will Make The Rules

The new law is the latest development in a string of events to determine who gets to make the rules that will govern the conduct of prosecutors and other attorneys who happen to be employed by the United States Department of Justice. The power to make rules is important because with it comes the power to investigate and prosecute possible violations and to punish attorneys who are found to have transgressed.

In the United States, the baseline system of attorney regulation is state-level control. Each state has promulgated rules of conduct that apply to all members of its state bar. In almost every instance, the states devised these rules by adopting (or adapting) model rules originally promulgated by the American Bar Association. Although the federal courts have local rules that apply to attorneys, including government attorneys who appear in federal court, these rules typically are based upon, if they do not mirror completely, the attorney conduct rules of the state in which the Federal District Court is located. Federal courts have fewer disciplinary enforcement resources than do the states. Federal attorney discipline determinations thus tend to follow, and often replicate, discipline that a state has imposed first after conducting its own investigation. The reality is that few, if any, prosecutors are ever disciplined for their conduct.

For more than a decade, the Department of Justice has strenuously resisted all efforts to hold federal employee attorneys to state rules of attorney conduct. In 1989, Attorney General Dick Thornburgh became alarmed that criminal defense attorneys would impede law enforcement by accusing federal prosecutors of violating state "no contact with represented persons" rules. State "no contact" rules tend to be found in provisions that are numbered "4.2" or, as in New York, "7-104(A)." Thornburgh therefore sought to preempt the issue by decree. The so-called "Thornburgh Memorandum" announced that state "no contact" rules did not apply to federal attorneys for conduct towards a client before indictment. In 1994, Attorney General Reno signed DOJ regulations that replaced the Thornburgh directive but generally carried forward the same position. Although some courts rejected these federal claims of immunity from state attorney rules and regulation, DOJ's federal regulations remained in lawful effect this year in all but one federal Circuit.

DOJ Strategy

The Department of Justice is likely to pursue multiple courses in responding to the new federal law. First, DOJ may seek simply to accomplish the repeal of the McDade Amendment before it takes effect in April. Of course, that would revive the prospect that criminal defendants and state bar officials would challenge the DOJ's self-proclaimed power to define and enforce rules of federal attorney conduct. A second, more

ambitious course of action for DOJ would be to seek new federal legislation that would do more than repeal McDade. The DOJ might seek to establish by statute the content of the so-called Reno regulations. That would be, from the Department's perspective, a total victory. As the passage of the McDade Amendment demonstrates, however, the legislative politics of these issues makes it very unlikely that DOJ could succeed in this effort.

At the same time that it pursues legislation to undo the McDade Amendment, the Department of Justice will continue its efforts to shape state attorney conduct rules themselves. The McDade Amendment, by elevating state rules, "elevates" state ethics rules to the status of federal rules. DOJ thus can mitigate the law's damage if it can persuade the states to enact attorney conduct amendments that permit federal attorney contacts with represented persons and other measures that the Department sees as essential to federal law enforcement.

Campaign To Amend ABA Model Rule 4.2

DOJ has already persuaded the Conference of Chief Justices, which represents the highest courts of the 50 states and the District of Columbia, to propose amendments to ABA Model Rule 4.2 that would permit government lawyers engaged in law enforcement to contact represented persons to the same extent as permitted in Attorney General Reno's 1994 regulations. In states which are persuaded to adopt this proposal, DOJ will have lost its claim to autonomy, but it will have won, at least for now, the substantive position it has taken about federal prosecutors' needs to be free to contact represented persons directly before they have been indicted. DOJ also will seek to influence the ABA's "Ethics 2000" Special Committee on Evaluation of the Rules of Professional Conduct as it considers possible changes to Model Rule 4.2, which in turn could affect the rules that states ultimately promulgate.

The Department of Justice also has been working to shape the local federal court rules that the McDade Amendment now incorporates as law. With the Department's input, a committee of the Judicial Conference of the United States has drafted proposed Federal Rules of Attorney Conduct that would, among other provisions, depart from the current ABA Model Rule 4.2 and permit federal attorneys to contact represented persons directly on the same general terms now permitted under the Reno regulations. Although these draft rules will have to travel a very long path before they are adopted by the federal courts, they present another route by which DOJ could get to the substantive "contact" rule that it seeks.

Not Clear Who Will Win

As each of these initiatives proceeds, it is important to recognize that counterweights make it far from clear that DOJ will succeed in any of its ventures. First, as the enactment of the McDade Amendment demonstrates, there is substantial skepticism among politicians in national government about the powers and conduct of federal prosecutors. Their skepticism is based on their own analyses and experiences, but it also may reflect a growing public opinion that is shaped and developed by media coverage of current events. There is considerable criticism in many quarters, for example, of the initial dealings that Independent Counsel Starr and his staff had with Monica Lewinsky.

The skepticism of politicians and the public about the powers of federal prosecutors is shared by many private attorneys. These are the advocates who represent the clients the Department of Justice has authorized its attorneys to contact directly. These attorneys will continue to be active in ABA, state and municipal bar association processes, and their loud voices will be heard as the debates and various regulatory processes unfold.

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