

Prosecutors' Use of Undercover Informant Armed With False Subpoena Does Not Violate No-Contact Rule

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U.S. v. Carona, ___ F.3d ___, 2011 WL 32581 (9th Cir. 2011)

Brief Summary

The U.S. Court of Appeals for the Ninth Circuit held that prosecutors did not violate the no-contact rule by using an undercover informant to gather information from a represented criminal suspect, even though the prosecutors armed the informant with false subpoenas designed to elicit incriminating information from the suspect.

Complete Summary

As part of an investigation into a sheriff's alleged witness tampering, federal prosecutors surreptitiously recorded the sheriff's conversation with an undercover informant who, by his own admission, had previously participated with the sheriff in unlawful activity. In order to elicit incriminating evidence during the conversation, the prosecutors armed the informant with fake subpoenas, which purported to demand records from the informant that would implicate the sheriff in unlawful activity. The U.S. District Court for the Central District of California held that the prosecutors violated Cal. R. Prof'l Conduct 2-100 (the "no-contact rule," prohibiting communication with a represented party), but declined to grant the sheriff any remedy for the violation, instead leaving the matter in the hands of the state Bar, which thereafter took no action.

The Ninth Circuit held that the prosecutors' conduct did not violate the no-contact rule. The court applied the "alter ego" test and noted that the no-contact rule generally does not preclude the use of undercover informants. The court then found that use of the false subpoena did not cause the informant to become any more of an alter

ego than he already was (thereby agreeing with the U.S. Court of Appeals for the Third Circuit and disagreeing with the U.S. Court of Appeals for the Second Circuit on that point).

Turning to the policy concern behind the no-contact rule—namely, that the represented party will be tricked by the opposing lawyer’s artful examination—the Ninth Circuit found that that concern was not present in the case before the court because the sheriff was not subjected to any interrogation and had not talked directly to a prosecutor. Moreover, the court held that it would be a perversion of the no-contact rule to let a wrongdoer immunize himself to undercover investigations simply by retaining counsel.

Finally, the court held that even if the prosecutors violated the no-contact rule, exclusion of evidence was not an appropriate judicial remedy. The court noted that evidence has never been suppressed based solely on a violation of this ethics rule without an accompanying Sixth Amendment violation. Moreover, the court held that the potential for attorney discipline serves as an adequate deterrent of Rule 2-100 violations.

Significance of Opinion

This opinion makes clear that prosecutors’ use of an informant to contact the target of a criminal investigation who is represented by counsel is not a *per se* violation of the no-contact rule, at least not in the courts of the Ninth Circuit. State Bars, however, remain free to take a different view in the disciplinary context depending on the facts of the case. Moreover, unless there is a concomitant Sixth Amendment violation, exclusion of evidence obtained from the contact would not be a judicial remedy for a violation of the ethics rule.

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