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Professional Responsibility

PROFESSIONAL RESPONSIBILITY

I. THE "NO-CONTACT" RULE AND PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct can come in many forms, including: asserting facts without evidence; importing one's own testimony; conflicts of interest; misstating the law in closing arguments; calling a witness to the stand knowing that they will claim a privilege against self-incrimination; failure to disclose material or exculpatory evidence; abuse of prosecutorial discretion; and improper opening arguments, direct examination, cross-examination, or closing arguments.[1] In *State v. Chisolm*[2] the South Carolina Supreme Court was confronted with allegations of two other forms, unauthorized contact with a represented defendant and surreptitious tape recording of conversations with a defendant. After reviewing the court's decision in *Chisolm*, this survey will discuss previous South Carolina decisions involving these latter two types of prosecutorial misconduct, consider recent developments in the federal system, and examine the remedies available to aggrieved defendants.

In *Chisolm* the supreme court upheld the denial of a motion to disqualify the solicitor and sustained the murder conviction of Carl Chisolm. The court held that although the solicitor "acted inappropriately" when he communicated with the accused and surreptitiously tape recorded the telephone conversation, the defendant failed to show any actual prejudice from the solicitor's conduct.[3]

Chisolm was arrested and charged for murder. After police read Chisolm his *Miranda* rights and counsel was appointed, Chisolm telephoned from the jail the assistant solicitor prosecuting his case. During the conversation, the assistant solicitor explained that he was the prosecutor on the case. Chisolm informed the solicitor that he understood the solicitor's role, but that he wanted to proceed with the conversation. The assistant solicitor recorded the conversation without Chisolm's knowledge.[4]

Three days later the assistant solicitor informed Chisolm's attorney of the conversation and gave her the taped recording. The assistant solicitor later asked defense counsel if Chisolm had requested his removal from the case. Defense counsel then wrote Chisolm a letter advising him of the ramifications of his communications with the prosecutor. Nevertheless, Chisolm signed a written waiver consenting to the assistant solicitor's continuation in the case.[5]

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1. For a comprehensive discussion and analysis of this topic see BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (1985).

2. ___ S.C. ___, 439 S.E.2d 850 (1994).

3. *Id.* at ___, 439 S.E.2d at 852.

4. *Id.* at ___, 439 S.E.2d at 851.

5. *Id.* at ___, 439 S.E.2d at 851.

Four months later, Chisolm moved to have the assistant solicitor and the Ninth Circuit Solicitor's office recused from the case. The trial judge found that the assistant solicitor's actions did not rise to the level of prosecutorial misconduct required to disqualify the assistant solicitor or the solicitor's office. At Chisolm's trial, neither the conversation nor the tape recording was mentioned. Chisolm was subsequently convicted of murder.[6]

On appeal, Chisolm argued that the Ninth Circuit Solicitor's Office should have been disqualified from prosecuting the case because the assistant solicitor violated principles of professional responsibility. Chisolm asserted that the solicitor violated Rule 4.2 of the South Carolina Rules of Professional Conduct[7] by communicating with a party known to be represented by counsel. Chisolm further argued that the assistant solicitor was guilty of ethical misconduct by surreptitiously tape recording the telephone conversation without his knowledge or consent. Because of these ethical violations, Chisolm contended that he was denied fair and even-handed treatment by the solicitor's office, evidenced by the solicitor's refusal to enter plea negotiations.[8]

Although the South Carolina Supreme Court recognized that the assistant solicitor "acted inappropriately," it sustained Chisolm's conviction because he failed to show that he had suffered actual prejudice from the trial court's refusal to disqualify the solicitor's office.[9] In finding that no prejudice was shown, the court stated that there is no constitutional right to a plea bargain.[10]

South Carolina applies a two-step analysis to claims of prosecutorial misconduct. A court will first review the circumstances to determine whether the prosecutor did commit some type of ethical, evidentiary or constitutional violation. If a violation occurred, then the court requires a showing of actual prejudice to the defendant to order a reversal.[11] This framework follows the general rule of appellate review of procedural and evidentiary trial errors known as the "harmless error doctrine."[12] *Chisolm* simply reflects this approach: the assistant solicitor violated ethical principles, yet the court

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6. *Id.* at ___, 439 S.E.2d at 851.

7. Rule 4.2 states, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 4.2.

8. *Chisolm*, ___ S.C. at ___, 439 S.E.2d at 851.

9. *Id.* at ___, 439 S.E.2d at 852.

10. *Id.* at ___, 439 S.E.2d at 852 (citing Weatherford v. Bursey, 429 U.S. 545 (1977)).

11. *See id.* at ___, 439 S.E.2d at 852 (citing State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), *cert. denied*, 460 U.S. 1088 (1983)); State v. Merriman, 287 S.C. 74, 79-80, 337 S.E.2d 218, 222 (Ct. App. 1985).

12. Certain constitutional errors, however, are not subject to harmless error analysis and may require a per se reversal. *See, e.g.*, Sullivan v. Louisiana, 113 S. Ct. 2078, 2081 (1993) (citing Arizona v. Fulminante, 499 U.S. 279, 298, *reh'g denied*, 500 U.S. 938 (1991)).

affirmed the conviction because the defendant failed to show any prejudice resulting from the misconduct.

South Carolina's approach to surreptitious prosecutorial tape recording of conversations with defendants is embodied in the Rules of Professional Conduct. Rule 8.4 states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[13] It further defines misconduct as engaging in "conduct that is prejudicial to the administration of justice."[14]

In a trilogy of cases applying Rule 8.4 and its predecessor under the Code of Professional Conduct, the South Carolina Supreme Court has characterized the secret recording of conversations without the knowledge and consent of parties to the conversation as attorney misconduct. In *In re An Anonymous Member of the South Carolina Bar*,[15] an attorney disciplinary proceeding, the court held that an attorney's secret tape recording of a telephone conversation with the unrepresented driver of a vehicle involved in an accident amounted to misconduct.[16] Similarly, in *In re Warner*[17] the court found misconduct where the attorney provided his client with a hidden recording device in an attempt to secretly record his client's conversation with a family court judge.[18] The court noted that "[i]t is *equally* reprehensible and impermissible for an attorney to secretly record another attorney or, indeed, another person."[19] In *In re An Anonymous Member of the South Carolina Bar*,[20] another attorney disciplinary proceeding, the court addressed the issue of whether an attorney may record a conversation as an alternative means of taking notes. The court held that the rule barring an attorney from recording a conversation without the prior knowledge and consent of all parties applied "irrespective of the purpose(s) for which such recordings were made, the intent of the parties to the conversation, whether anything of a confidential nature was discussed, and whether any party gained any unfair advantage from the recordings."[21]

In 1992 the court modified these rulings as applied to investigations conducted by law enforcement agencies. The court issued its opinion in *In Re Attorney General's Petition*[22] in response to the South Carolina Attorney General's assertions that previous rulings barring surreptitious tape recordings

13. S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 8.4(d).
14. S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 8.4(e).
15. 283 S.C. 369, 322 S.E.2d 667 (1984) (per curiam).
16. *Id.* at 371-72, 322 S.E.2d at 669.
17. 286 S.C. 459, 335 S.E.2d 90 (1985) (per curiam).
18. *Id.* at 461-62, 335 S.E.2d at 90-91.
19. *Id.* at 461, 335 S.E.2d at 91.
20. 304 S.C. 342, 404 S.E.2d 513 (1991).
21. *Id.* at 344, 404 S.E.2d at 514.
22. 308 S.C. 114, 417 S.E.2d 526 (1992).

caused problems in criminal investigations.[23] After considering these assertions, the court held that "it is not unethical for an attorney to surreptitiously record any conversation when that recording is made with the prior consent of, or at the request of, an appropriate law enforcement agency in the course of a legitimate criminal investigation."[24]

The exceptions outlined in *In re Attorney General's Petition* did not apply in *Chisolm*. The assistant solicitor neither informed nor sought consent from the defendant prior to recording the telephone conversation.[25] Thus, insofar as the court found that the prosecutor's surreptitious recording was misconduct, *Chisolm* is consistent with the general rule prohibiting such conduct.

In addition to the surreptitious tape recording, Chisolm also complained that the prosecutor's communication with him violated Rule 4.2 of the Rules of Professional Conduct. Application of this rule in the criminal context presented a novel issue in the South Carolina courts. However, the court's holding that the assistant solicitor's actions were inappropriate is consistent with the approach taken in other jurisdictions.[26] The plain language of the rule is clear: communications with a party represented by a lawyer are prohibited unless the lawyer attempting the communication has the consent of the other lawyer or is authorized by law to do so.[27] In *Chisolm* the assistant

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23. The Attorney General pointed to five situations where "ethical dilemmas" were created. The court accepted four:

> (1) Where an attorney who is receiving anonymous telephone threats wishes to record these calls;
> (2) Where an attorney wishes to record anonymous information received over the phone;
> (3) Where a government attorney wears a "wire" to surreptitiously record individual(s) attempting to bribe the attorney; [and]
> . . . .
> (5) Where an attorney, himself the subject of a criminal investigation, wishes to cooperate with law enforcement authorities in part by secretly recording conversations with other individuals.

Id. at 115, 417 S.E.2d at 526. The court rejected the following exception: "Where a criminal defendant, represented by an attorney, contacts the Attorney General's Office directly and alleges his attorney is part of the criminal enterprise." *Id.* In such a situation, the court opined that a caller should be told that "the attorney will be recording the conversation in order to maintain an accurate record should any questions later arise." *Id.* at 115, 417 S.E.2d at 527.

24. *Id.* at 115, 417 S.E.2d at 527.

25. Brief of Respondent at 3.

26. *See, e.g.*, United States v. Chavez, 902 F.2d 259, 265-66 (4th Cir. 1990) (noting that "[a]lthough the contact . . . was initiated by the defendant . . . the refusal of the government agent to terminate the conversations contributed to a further weakening of the attorney-client relationship . . . ."); State v. Ford, 793 P.2d 397, 399-400 (Utah Ct. App. 1990) (holding that "[t]here is unanimous and fully documented authority for the proposition that prosecutors are no less subject to the prohibitions against communications with a represented person than are members of the private bar." (citations omitted)).

27. S.C. APP. CT. R. 407, RULES OF PROFESSIONAL CONDUCT 4.2.

solicitor communicated directly with the defendant and did not notify the defense counsel until three days after the conversation.[28]

The "authorized by law" exception of Rule 4.2 has created considerable debate between the defense bar and federal prosecutors. The controversy can be traced to the Second Circuit Court of Appeals' decision in *United States v. Hammad* (*Hammad* I)[29] that when prosecutors direct informants to contact a criminal investigation suspect, they violate the rule barring communication.[30] Then Attorney General Richard Thornburgh responded with an internal Department of Justice memorandum "purporting to exempt all Justice Department lawyers from the ethics rule on the ground that by virtue of federal law their law enforcement activities were 'authorized by law' within the meaning of the rule."[31] This broad interpretation would allow federal prosecutors to engage in ex parte communications with represented defendants even during the postindictment periods of a prosecution.[32]

Federal courts were unwilling to adopt such an expansive approach to the "authorized by law" exception. For example, in *United States v. Lopez*[33] the district court squarely rejected the prosecutor's attempt to justify his conduct as within the authority of the Thornburgh memo. The court noted that "[t]here are profound flaws in the Attorney General's policy and they are demonstrated within the four corner's of the Thornburgh Memorandum."[34] The court concluded that "it is misguided and not premised on sound legal authority."[35] On appeal, the Court of Appeals for the Ninth Circuit noted, "[t]he government . . . has prudently dropped its dependence on the Thornburgh Memorandum in justifying [the prosecutor's] conduct, and has thereby spared us the need of reiterating the district court's trenchant analysis of the inefficacy of the Attorney General's policy statement."[36]

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28. *Chisolm*, ___ S.C. at ___, 439 S.E.2d at 851.

29. 846 F.2d 854 (2d Cir.), *rev'd*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990).

30. *Id.* at 859-60.

31. NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY IN THE PRACTICE OF LAW, (forthcoming 1996).

32. For various views on the Thornburgh memorandum, see Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversy over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 319-24 (1992); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. REV. 1389, 1446-47 (1993); Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515, 519-23 (1992); F. Dennis Saylor & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459, 485-87 (1992).

33. 765 F. Supp. 1433 (N.D. Cal. 1991) (finding misconduct where prosecutor conducted plea negotiations without consent of defense counsel), *vacated*, 4 F.3d 1455 (9th Cir. 1993).

34. *Id.* at 1446.

35. *Id.* at 1450.

36. United States v. Lopez, 4 F.3d 1455, 1458 (9th Cir. 1993); *see also In re* Doe, 801

The Second Circuit later withdrew its *Hammad* I decision. In *Hammad* II[37] the court held that "a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations."[38] Although the Department of Justice continues to assert its right to exempt government lawyers from the operation of state ethics rules under the Supremacy Clause, the Department has decided not to implement a wholesale exemption. Under the new rule,[39] federal attorneys "may not negotiate plea bargains, settlement agreements, immunity agreements, or similar arrangements without the consent of the individual's attorney."[40] However, direct contact is permitted in the "preindictment, prearrest investigative stage with any individual, whether or not he or she is represented by counsel."[41] Six specific exceptions are also provided to allow for communications with represented parties.[42] It is unclear how application of the new regulation will be received in the federal courts.[43]

A court may impose a variety of remedies when dealing with misconduct, including dismissal of the indictment, disqualification of the individual prosecutor or of the entire office, reversal, suppression of evidence, contempt, fines, public or private reprimand, imposition of a court's own disciplinary rules by temporarily suspending the prosecutor from practicing before the court, and removal.[44] Additionally, state bar associations can impose their own disciplinary sanctions, and, in certain circumstances, misconduct may form part of the basis for a civil action.[45]

In recent years some commentators have criticized the judiciary's control of prosecutorial excess as ineffective because of self-imposed restraint on the use of the judiciary's inherent supervisory powers.[46] The "supervisory

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F. Supp. 478, 487 (D.N.M. 1992).

37. United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990).

38. *Id.* at 839.

39. Communications with Represented Persons, 59 Fed. Reg. 39,910 (1994) (to be codified at 28 CFR § 77).

40. *Id.* at 39,912.

41. *Id.*

42. These include: (1) determining if representation exists; (2) discovery or judicial process; (3) imitation of communication by the represented party (includes discrete sub requirements); (4) waivers at the time of arrest; (5) investigation of additional, different or ongoing crimes or civil violations; and (6) threat to safety or life. *Id.*

43. In the rulemaking history portion of the regulation, the Department of Justice addressed three main concerns from critics: "(1) the need for the rule; (2) the constitutional and statutory authority for the rule; and (3) the sufficiency of the rule's internal enforcement mechanisms." 59 Fed. Reg. 39,913.

44. GERSHMAN, *supra* note 1, §§ 13.1-13.5.

45. *Id.* §§ 13.6-13.7.

46. *See, e.g.*, Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 433-36

doctrine has become an empty shell, liberating prosecutors from a potential check on their authority, and serving mostly as a reminder to lower federal courts not to usurp the prosecutor's prerogative."[47] Furthermore, United States Supreme Court rulings over the last two decades may have effectively left the supervisory doctrine toothless.[48]

Two interrelated judicial remedies for prosecutorial misconduct were at issue in *Chisolm*: disqualification of the solicitor's office and reversal of the conviction. Had Chisolm shown actual prejudice from the trial court's failure to disqualify the solicitor's office, reversal and retrial likely would have followed.[49] Reversal of a conviction because of prosecutorial misconduct is "strong medicine" that has evoked considerable controversy. Judge Learned Hand criticized appellate reversal as an inefficient way to penalize the prosecutor because "it would accomplish little towards punishing the offender, and would upset the conviction of a plainly guilty man . . . . [I]t seems to us that reversal would be an immoderate penalty."[50] Another traditional view against reversal is that ethics rules impose duties upon lawyers, and do not vest rights to third parties.[51]

Professor Bennett Gershman, however, has called the harmless error rule's prejudice requirement a "jurisdictional fiasco" that:

> modifies prosecutorial behavior in the most pernicious fashion: it tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt.[52]

Professor Gershman specifically asserts that the harmless error rule is a result-oriented approach that shifts the focus from fairness to guilt, "places the appellate court in the jury box," and results in such routine affirmances that

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(1992); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1568 (1981); Douglas P. Currier, Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment--A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077, 1094-98, (1984).

47. Gershman, *supra* note 46, at 433 (footnote omitted).

48. *See id.* at 431-35, (citing, *inter alia,* United States v. Hasting, 461 U.S. 499 (1983)); United States v. Payner, 447 U.S. 727 (1980); United States v. Russell, 411 U.S. 423 (1973).

49. *Chisolm*, ___ S.C. at ___, 439 S.E.2d at 852.

50. GERSHMAN, *supra* note 1, § 13.2 (quoting United States v. Lotsch, 102 F.2d 35, 37 (2d Cir. 1939)) (alterations in original).

51. *See* Cramton & Udell, *supra* note 32, at 350.

52. Gershman, *supra* note 46, at 425 (footnote omitted).

the courts, "by condoning prosecutorial lawlessness, are themselves promoting disrespect for the law."[53]

These criticisms are especially cogent when one considers the facts of *Chisolm*. First, the very nature of the case made it difficult to specifically identify or quantify the prejudice to the defendant. Because the State never introduced the taped recording, the defendant could not possibly show any different trial result. Furthermore, there was no practical way to show the impact that the conversation had on the State's investigation or case preparation. The court's insistence on a showing of actual prejudice, when combined with its refusal to consider anything other than the evidence actually introduced at trial, subtly shifts the focus of the inquiry away from whether the defendant was treated fairly to whether he was in fact guilty. It is difficult to imagine that the court's affirmance of the conviction had any deterrent effect on the assistant solicitor or the Ninth Circuit Solicitor's Office. The court neither chastised nor admonished the solicitor to refrain from such conduct in the future. Instead, the court euphemistically termed his two violations of ethical rules as merely "inappropriate." Such minimal condemnation is unlikely to have much deterrent effect on future prosecutorial transgressions.

In one sense, *State v. Chisolm* represents a step forward in that the court acknowledged further application of the Rules of Professional Responsibility to solicitors as well as private attorneys. In another sense, the holding perpetuates the *status quo* by declining to take more meaningful steps to deter solicitors from violating ethics rules. If the past is any indication, unless new standards are adopted, prosecutors need not be overly concerned with full compliance with the rules.

Robert Sneed

53. GERSHMAN, *supra* note 1, § 13.2(a)(1).