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Opinion: It's Time for a Bright-Line Test for the 'No Contact Rule'

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In law practice, ethical questions can be blurry; the rules governing them should not be. Yet since its 2000 decision in *United States v. Talao*, the U.S. Court of Appeals for the Ninth Circuit has obliged defense attorneys and prosecutors to guess at the exact parameters of the "no contact rule"—an ethical canon that applies to nearly every major covert criminal investigation, particularly those overseen by federal prosecutors. It is time that the Ninth Circuit resolve the ambiguity with a bright-line test.

Under both the American Bar Association Model Rules and the California Rules of Professional Conduct, an attorney cannot contact a represented party about the subject of the representation without permission from the party's attorney—a prohibition often shorthanded as the "no contact rule." But both the ABA and California Rules contain a carve-out for communications "authorized by law." This carve-out allows prosecutors to directly contact witnesses and suspects through certain means and in certain circumstances, even if those witnesses and suspects are represented by attorneys. In the typical scenario, prosecutors "wire up" an undercover agent or cooperating witness, who then tries to elicit incriminating statements from the represented party, unvarnished and unmediated by that party's attorney.

Before *Talao*, the Ninth Circuit largely aligned with most other circuits in applying a simple, bright-line test: prosecutors were permitted to directly contact a represented party so long as that contact was pre-indictment and noncustodial. But in *Talao*, the Ninth Circuit observed that the "timing of indictment was substantially within the control of the prosecutor," and that prosecutors could "manipulate grand jury proceedings" to avoid

ethical restrictions. Based on this reasoning, the Ninth Circuit explicitly rejected the bright-line rule, shifting its jurisprudence to incorporate a more fact-dependent, "case-by-case" (and after-the-fact) method of assessing whether a particular contact was ethically in bounds. This fact-based determination, the Ninth Circuit announced, would turn in part on whether the represented party and prosecutors had taken on "fully defined adversarial roles." Talao's fact-based approach resulted in at least three unintended consequences. Each of them unnecessarily complicates the strategic and ethical landscape for both defense attorneys and prosecutors.

First, *Talao* creates uncertainty about which contacts are permissible and which are not. Crucially, this uncertainty afflicts both the prosecution and the defense. Under *Talao*, in theory a court could sanction a prosecutor for pre-indictment contact in one case while approving even post-indictment contact in another. On such a fact-dependent test, no one knows where the line is until the judge draws it—long after the parties have made their own good faith judgments and acted on them. Second, this uncertainty creates unnecessary ethical perils for government attorneys. Even if a prosecutor acts in good faith, a court may take a different perspective months or years later, reviewing the prosecutor's decisions in the sometimes harsh glare of hindsight. If the court finds a violation, it can trigger not just the suppression of evidence, but also a state bar inquiry or ethical sanctions for the prosecutor. To be sure, courts can and should second-guess prosecutorial overreach, but *Talao*'s fact-based approach imposes too much uncertainty on ordinary line prosecutors when a bright-line rule could give them moral comfort while appropriately restricting their discretion.

Third, in the pre-indictment context, *Talao* places slight pressure on defense attorneys to identify themselves to prosecutors sooner rather than later—sometimes when it would otherwise be preferable to hold back and stay mum. In emphasizing "adversarial roles" as a factor in foreclosing prosecutors' ability to covertly probe the defense camp, *Talao* effectively encourages defense attorneys to surface, identify themselves and request that all communications go through counsel. Indeed, Talao and its descendants have even created an incentive to engage in plea negotiations that are otherwise premature. If this sounds theoretical, it shouldn't. Just last year, in United States v. Joel, a district court in San Diego found that a pre-indictment contact was permissible under Talao in part because the target in a criminal investigation had not yet initiated "discussions with the United States regarding a potential pre-indictment plea agreement" at the time the contact occurred.

Those familiar with *Talao* know it was predicated on quite unique facts. And certainly in our common law system, any shift in decisional law can result in unintended consequences. Fortunately, however, any of *Talao*'s unintended consequences can be remedied simply: by returning to a bright-line test that clarifies the rules for prosecutors and defense attorneys alike.

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