# Recent Case Report

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## U.S. v. Carona

(9th Cir. 2011) __ F.3d __ [2011 WL 32581]

### Issue

Did a prosecutor violate a California Rule of Professional Conduct when he arranged for an informant to elicit incriminating statements from an uncharged suspect about a crime for which the suspect was represented by counsel?

### Facts

In 2004, federal agents began investigating reports that Orange County Sheriff Michael Carona was taking bribes. In the course of the investigation, they learned that one of the bribers was Donald Haidl who would later testify that Carona "offered [him] the complete power of the sheriff's department for raising money and supporting him."

In 2007, after developing grounds to arrest and possibly charge Haidl, agents and federal prosecutors interviewed him and obtained a confession and plea agreement. As part of the deal, Haidl agreed "to meet with Carona and make surreptitious recordings of their meetings." At some point before or after this meeting, an attorney notified prosecutors that he had been hired by Carona to represent him in connection with the bribery probe.

Thereafter, Haidl met with Carona on two occasions but was unable to "provide enough evidence to satisfy the prosecutors." So they developed a new plan: They provided Haidl with two fake subpoena attachments which purportedly required Haidl to produce certain incriminating records pertaining to "cash payments Haidl provided to Carona" and to a "sham transaction" Haidl had used to conceal a gift of a speedboat to him. The ploy worked. When Haidl showed Carona the fake subpoena attachments, Carona made some damaging admissions and, more importantly, suggested that "he wanted Haidl to lie to the grand jury about theses transactions."

Carona was subsequently charged with, among other things, tampering with a grand jury witness. His case went to trial and he was found guilty of witness tampering, but was acquitted of the other charges.

### Discussion

Carona argued that the incriminating statements he made during his meeting with Haidl should have been suppressed because they were obtained in violation of California's Rules of Professional Conduct. Specifically, Rule 2-100 prohibits prosecutors from communicating directly or indirectly with a person who is represented by counsel if (1) the communication pertains to a crime for which he is represented, and (2) the person's attorney did not consent to the communication.

In *Carona*, the district court judge ruled that the prosecutor had, in fact, violated Rule 2-100 because "the use of the fake subpoena attachments made Haidl the alter ego of the prosecutor." But the judge also ruled that a violation of the rule does not constitute grounds to suppress evidence. (Instead, the judge referred the matter to the State Bar which declined to take disciplinary action.).

On appeal, the Ninth Circuit ruled that the prosecutor's actions did not, in fact, constitute a violation of Rule 2-100. Although it acknowledged that it has not formulated a "bright line" rule that covers the scope of Rule 2-100 as it pertain to prosecutors, it did point out that "our cases have more often than not held that specific instances of contact between undercover agents or cooperating witnesses and represented suspects did not violate Rule 2-100."[1]

The court then ruled that a violation of Rule 2-100 does not result when, as here, (1) prosecutors did not directly meet with the represented suspect but, instead, arranged for a third person to do so; (2) the interview "did not resemble an interrogation"; and (3) the represented suspect had not been charged with the crime under investigation. Said the court, "Haidl was acting at the direction of the prosecutor in his interactions with Carona, yet no precedent from our court or from any other circuit [with one exception[2]] has held such indirect contacts to violate Rule 2-100 or similar rules." The court added, "It would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained counsel."

The court also rejected the argument that the prosecutor's actions crossed the line when he provided Haidl with the fake subpoena attachments. Said the court, "The use of a false subpoena attachment did not cause the cooperating witness, Haidl, to be any more an alter ego of the prosecutor than he already was by agreeing to work with the prosecutor." The court added that "it has long been established that the government may use deception in its investigations in order to induce suspects into making incriminating statements."

Consequently the court affirmed Carona's conviction.

## Comment

It should be noted that, in the opinion of the California Attorney General, the CDAA's Ethics Committee, and several federal circuit courts, it is not unethical for prosecutors to directly question a represented suspect about a crime for which he has *not* been charged.[3] It is possible, however, that an ethics violation might result if the case was ready for charging but prosecutors intentionally delayed filing charges in order to circumvent this rule.[4]

As for post-charging questioning, it is likely that a violation would result if prosecutors questioned a suspect who was represented by counsel as to the charged crime or if prosecutors asked an officer to do so. Still, it would appear that a violation would not result if prosecutors truthfully informed officers of the law which permits them to

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[1] Citing *U.S.* v. *Powe* (9th Cir. 1993) 9 F.3d 68, 69; *U.S.* v. *Kenny* (9th Cir. 1981) 645 F.2d 1323, 1337-38.

[2] Citing *U.S.* v. *Hammond* (2nd Cir. 1988) 858 F.2d 834.

[3] See 75 Ops.Cal.Atty.Gen. 223, 232; *Professionalism,* A Sourcebook of Ethics and Civil Liability Principles for Prosecutors (2001, California District Attorneys Association) pp. VI-6 *et seq.*; Standard 24.6, National Prosecution Standards, Second Edition, 1991 [NPS-II] [Communications with Represented Defendants during Investigations]; *U.S.* v. *Kenny* (9th Cir. 1981) 645 F.2d 1323, 1338-39; *U.S.* v. *Powe* (9th Cir. 1993) 9 F.3d 68; *U.S.* v. *Fitterer* (8th Cir. 1983) 710 F.2d 1328, 1333; *US* v. *Ryans* (10C 1990) 903 F2 731, 739. NOTE: Prosecutors should always have a DA's inspector or other law enforcement officer conduct the interview or at least be present as a witness.

[4] See *U.S.* v. *Talao* (9th Cir. 2000) 222 F.3d 1133.

initiate contact with a charged and represented suspect, and question him if he waives his *Miranda* rights.[5] (This advice is not offered as a slippery way to avoid the ethics rule. It is based on the plain wording of the rule in light of the ethical duty of prosecutors to bring criminals to justice. In any event, there certainly can be no objection—ethical or otherwise—to a prosecutor informing an officer of the applicable law. Moreover, it would be absurd to interpret an "ethics" rule as requiring that prosecutors lie to officers and tell them they are prohibited from questioning a charged suspect.)

Two other things should be noted. The Rules of Professional Conduct do not prohibit questioning merely because suspect is represented by counsel in another case.[6] And it appears that prosecutors may communicate with a charged and represented defendant if (1) the defendant initiated the communication, (2) the purpose of the communication was to discuss an attempt by his attorney to suborn perjury in the case, and (3) the discussion was limited to the perjury allegation.[7] POV

[5] *Montejo* v. *Louisiana* (2009) __ US __ [129 S.Ct. 2079, 2086-87] ["No reason exists to assume that a defendant like Montejo, who has done nothing at all to express his intentions [to deal with the police through counsel], would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring."].

[6] See *People* v. *Maury* (2003) 30 Cal.4th 342, 48 [no ethical violation when defendant was represented by counsel only on an unrelated charge].

[7] See *U.S.* v. *Talao* (9th Cir. 2000) 222 F.3d 1133, 1140 ["It would be an anomaly to allow subornation of perjury to be cloaked by an ethical rule, particularly one manifestly concerned with the administration of justice."].