

Factual Background

On May 18, 1997, Defendant agreed to meet with two FBI agents regarding this matter. Although the Assistant U.S. Attorney approved of the interview, he did not participate in it. At the interview Defendant denied any wrongdoing.

Defendant seeks to suppress the statements she made at the interview because she claims that she told the agents that she was represented by counsel in this matter. The agents deny that she told them she was represented by counsel. The U.S. attorney who approved the interview also denies that he had any actual knowledge that Defendant was represented by counsel at the time of the interview.

Defendant claims that by conducting the interview the government violated: (1) her Fifth Amendment right against self-incrimination; (2) her Sixth Amendment right to counsel; and (3) her right to due process. Defendant also argues that by conducting the interview the U.S. attorney committed an ethical violation. We address Defendant's arguments below.

A. Fifth Amendment right against self-incrimination

Defendant argues that the government violated her constitutional right against self-incrimination when it interviewed her without given her a *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Government disagrees by

pointing out that the statements were not made during a custodial interrogation and therefore, no constitutional violation occurred. *United States v. Conley*, 156 F.3d 78, 82 (1st Cir. 1998) (without *Miranda* warning, statements made during custodial interrogation are inadmissible). The Court agrees. None of the facts asserted by Defendant in her motion or during oral argument suggest that Defendant's participation in the interview was anything but voluntary. Because the interview could not be termed a custodial interrogation, I recommend that the Court find that Defendant's right against self-incrimination was not violated.

B. Sixth Amendment right of counsel

Defendant next maintains that her Sixth Amendment right to counsel was violated because the agents continued with the interview after she told them she was represented by counsel. Putting aside for the moment that both agents deny that she ever made that statement, Defendant was not entitled to counsel even if the agents knew she was represented by counsel. The United States Supreme Court in *Moran v. Burbine*, 475 U.S. 412, 430 (1986), clearly stated that “[b]y its very terms, it [the Sixth Amendment right to counsel] becomes applicable only when the government’s role shifts from investigation to accusation.”² Here, the

² Defendant cites *Chrisco v. Shafran*, 507 F. Supp. 1312 (D. Del. 1981), for the proposition that a right to counsel may attach before the government files formal charges. To the extent *Chrisco* conflicts with the rule set forth five years

FBI conducted the interview twenty-two months before a grand jury indicted Defendant. Given the time period between the interview and the indictment, it cannot be said that the government's role shifted from investigation to accusation. Therefore, I recommend that the Court find that Defendant's Sixth Amendment right to counsel was not violated.

C. Defendant's right to due process

Defendant next argues that the Government violated her constitutional right to due process by violating her constitutional rights discussed above. Having found that the Government followed the constitutional parameters of the Fifth and Sixth Amendments, I recommend that the Court find that the Government did not violate Defendant's right to due process.

D. Alleged ethical violation

Defendant next maintains that by permitting agents to question her while she was represented by an attorney, the U.S. attorney committed an ethical violation under section 7-104(A)(1) of the ABA Code of Professional Responsibility. The section forbids a lawyer to "communicate or cause another to communicate on the subject of the representation with a party he knows to be

later in *Burbine*, it is overruled.

represented by a lawyer in that matter, unless he has prior consent of the lawyer representing such other party or is authorized by law to do so.”³

After reviewing the applicable case law, the Court is satisfied that no ethical violation occurred. In *United States v. Balter*, 91 F.3d 427, 436 (3rd Cir. 1996), the court considered whether to suppress evidence because Defendant alleged that the government violated a rule very similar to the one at issue here. The court denied the defendant’s motion holding that one only becomes a “party” under the rule in a criminal matter when a formal legal or adversarial proceeding is commenced, i.e. by complaint or indictment. *Id.* Here, the interview occurred twenty-two months before the grand jury indicted Defendant. Therefore, it can hardly be said that Defendant was a “party” under the Rule. Further, even if the Court determined that Defendant was a “party” under the Rule it agrees with the court in *Balter* that an ordinary pre-indictment investigation is within the

³ The Maine Bar Rules, which govern the conduct of attorneys in this District contain a similar provision:

During the course of representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Maine Bar Rule 3.6(f).

“authorized by law” exemption contemplated in the rule. *See Balter*, 91 F.3d at 436.⁴

Conclusion

For the reasons stated above, I recommend that the Court DENY Defendant’s motion to suppress.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

⁴ As pointed out in *Balter*, other circuits have similarly found that the Rule similar to the one at issue here does not apply to pre-indictment investigations by government attorneys. See *United States v. Powe*, 9 F.3d 68 (9th Cir.1993); *United States v. Ryans*, 903 F.2d 731 (10th Cir.); *United States v. Sutton*, 801 F.2d 1346 (D.C.Cir.1986); *United States v. Dobbs*, 711 F.2d 84 (8th Cir.1983); *United States v. Weiss*, 599 F.2d 730 (5th Cir.1979).

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on September 3, 1999.