

COMMENTS

ETHICS AND THE FEDERAL PROSECUTOR: THE CONTINUING CONFLICT OVER THE APPLICATION OF MODEL RULE 4.2 TO FEDERAL ATTORNEYS

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INTRODUCTION

On September 6, 1994, the Department of Justice (DOJ) regulation¹ authorizing federal prosecutors to approach persons represented by counsel in certain situations became effective.² The Department of Justice, through this regulation, attempts to reconcile the American Bar Association's Model Rule of Professional Conduct 4.2 (MR 4.2), and its predecessor, the Model Code of Professional Responsibility, Disciplinary Rule 7-104 (A) (1) (DR 7-104(A) (1)),³ with

1. Communications with Represented Persons, 59 Fed. Reg. 39,910 (1994) (to be codified at 28 C.F.R. pt. 77). Section 301 of title 5 of the United States Code establishes the authority of the Attorney General to issue regulations governing conduct of Department of Justice employees. 5 U.S.C. § 301 (1988).

The Department initially issued a similar proposed regulation under Attorney General Barr, 57 Fed. Reg. 54,737 (proposed Nov. 20, 1992), but due to heavy criticism and the change in Administrations, Attorney General Reno withdrew the initial regulation and resubmitted it. 58 Fed. Reg. 39,976, 39,977 (proposed July 26, 1993). The regulation was again withdrawn and resubmitted on March 3, 1994, in a substantially revised form. 59 Fed. Reg. 10,086 (proposed Mar. 3, 1994). After the final comment period, the Department of Justice made minor changes to the regulation and published it in its final form on August 4, 1994. 59 Fed. Reg. at 39,910-31.

2. Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,928-31 (1994) (to be codified at 28 C.F.R. pt. 77). Relevant sections of the final regulation are reprinted in the Appendix to this Comment. Commentary, including the section-by-section analysis of the final regulation, is not set out in the Appendix, but may be found *id.* at 39,910-28 [hereinafter Communications with Represented Persons Commentary].

3. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1992) (Model Code Comparison). Rule 4.2 retained almost all of the provisions contained in the predecessor to the

the duty of federal prosecutors to investigate and enforce federal law.⁴ Despite the Department's efforts to follow substantially the language of the anti-contact rule, the regulation is beyond the scope of the Department's statutory and constitutional authority to circumvent the power of state and federal courts that oversee the ethical conduct of federal attorneys. Furthermore, the Department's regulation departs in several significant areas from the interests protected by the ethical rule.⁵

The anti-contact rule, MR 4.2 and its predecessor DR 7-104(A)(1),⁶ mandate, in substance, that an attorney may not communicate with a person already represented by counsel concerning the subject matter of the representation without the other attorney's consent.⁷ Commentators have suggested that the model ethical rule serves several purposes.⁸ Some of the compelling reasons behind the model

current anti-contact rule, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1982). *Id.*

4. See Communications with Represented Persons, *infra* app., § 77.1; see also Communications with Represented Persons Commentary, *supra* note 2, at 39,911 (discussing need for uniform ethical rule). The Department actually asserts an exemption for both its civil and criminal litigators from the application of DR 7-104. Communications with Represented Persons, *infra* app., § 77.5; see also Thornburgh Memorandum, *infra* note 59, at 489-93 (asserting exemption from DR 7-104(A)(1) for both civil and criminal attorneys in Department). The justification for a civil law enforcement exemption is substantially the same for criminal law enforcement. *Id.* This Comment analyzes the application of DR 7-104(A)(1) to criminal law enforcement only. Civil law enforcement exemption may raise additional concerns beyond the scope of this Comment. See 58 Fed. Reg. 39,976, 39,988 (1993) (discussing commentary submitted to Department of Justice on proposed regulation's application to federal law civil enforcement).

5. See *infra* Part III (discussing divergence of Department's regulation from provisions of ethical rule).

6. Except as otherwise noted, this Comment will use the terms MR 4.2 and DR 7-104(A)(1) interchangeably because many States still apply the Model Code as opposed to the Model Rules, and because MR 4.2 and DR 7-104(A)(1) are substantially the same provision. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (Model Code Comparison); see also *infra* note 13 (discussing history of ethical rule).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2. 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." *Id.* Disciplinary Rule 7-104(A)(1) states:

(A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1).

8. See, e.g., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt., at 424 (1992) (discussing purposes of model rule and listing sources supporting these purposes); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 11.6.1 to .2 (1986) (articulating various goals of ethical rules MR 4.2 and DR 7-104(A)(1)); John Leubsdorf, *Communicating With Another's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683, 686-87 (1979) (outlining purported goals of DR 7-104(A)(1)).

ethical rule include: the protection of the attorney-client relationship,⁹ the protection of the uncounseled client in dealing with the trained lawyer,¹⁰ the preservation of the lawyer's ability to effectively monitor the client's case,¹¹ and the ability of a lawyer to represent his client most effectively without interference from the opposing counsel.¹²

Model Rule 4.2 has a long history;¹³ every State has adopted the rule in one form or another,¹⁴ as have most of the ninety-four federal districts through local court rules.¹⁵ Both state and federal courts have almost uniformly applied the rule to prosecutors.¹⁶

9. See *United States v. Batchelor*, 484 F. Supp. 812, 813 (E.D. Pa. 1980) (recognizing that anti-contact rule is intended to prevent impairment of attorney-client relationship); WOLFRAM, *supra* note 8, § 11.6.1 (noting that rule prevents overreaching and encroachment by opposing lawyer).

10. See, e.g., *United States v. Ryans*, 903 F.2d 731, 739 (10th Cir.) (positing that rule is intended to prevent opposing counsel from using calculated questions to trick uncounseled party (citing *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983)), *cert. denied*, 498 U.S. 855 (1990); *Batchelor*, 484 F. Supp. at 813 (observing that anti-contact rule attempts to compensate for uncounseled layperson's inability to manage information and lack of understanding necessary to conduct complex legal negotiations with opposing party); WOLFRAM, *supra* note 8, § 11.6.2 (voicing danger of contact by opposing lawyer to uncounseled party).

11. See WOLFRAM, *supra* note 8, § 11.6.2 (noting that requirement of "knowing" communication prevents lawyer bar from sabotaging opposing party); Leubsdorf, *supra* note 8, at 686 (stating that DR 7-104(A)(1) shields parties from being "bamboozled" by opposing lawyers).

12. See *Batchelor*, 484 F. Supp. at 813 (noting that rule intends to avoid handicapping lawyer by preventing opposing lawyer from interfering with his client); WOLFRAM, *supra* note 8, § 11.6.2 n.31 (observing that contact between attorney's client and opposing counsel may harm attorney-client relationship, thereby preventing attorney from providing effective services).

13. See *United States v. Jamil*, 546 F. Supp. 646, 651-52 (E.D.N.Y. 1982) (detailing history of current MR 4.2), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983). The court observed in *Jamil* that the Anglo-American bar has followed the rule from "time immemorial." *Id.* at 651. The American Bar Association originally introduced the rule in the Canons of Professional Ethics as Canon 9 in 1908. *Id.* at 652; see also Bruce A. Green, *A Prosecutor's Communications With Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 284 n.4 (1988) (discussing history of DR 7-104(A)(1)); Leubsdorf, *supra* note 8, at 684-85 (chronicling history of rule from its first mention in 1824 to DR 7-104(A)(1)).

14. See Green, *supra* note 13, at 284 (indicating that every State has adopted either MR 4.2 or DR 7-104(A)(1)).

15. See *Rand v. Monsanto Co.*, 926 F.2d 596, 601-02 (7th Cir. 1991) (detailing federal district courts that have adopted attorney disciplinary measures through local rules).

16. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) (demanding that prosecutors comply with ethical rule); *United States v. Hammad*, 858 F.2d 834, 838-40 (2d Cir. 1988) (asserting that prosecutors are subject to Model Rule 4.2, while upholding some actions of prosecutors as authorized by law), *cert. denied*, 498 U.S. 871 (1990); *United States v. Ferrara*, 847 F. Supp. 964, 968-70 (D.D.C. 1993) (holding that Supremacy Clause does not bar enforcement of disciplinary action against federal prosecutor before state ethics committee), *appealed*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994); *In re Doe*, 801 F. Supp. 478, 480 (D.N.M. 1992) ("It falls to this Court to disabuse the Government of its novel self-conceived notion that Government lawyers, unlike any other lawyer, may act unethically."); *Jamil*, 546 F. Supp. at 652 (citing numerous federal and state cases for proposition that DR 7-104(A)(1) applies to prosecutors); *Suarez v. State*, 481 So. 2d 1201, 1205 (Fla. 1985) (conceding that DR 7-104(A)(1) applies to prosecutors), *cert. denied*, 476 U.S. 1178 (1986); *People v. Green*, 274 N.W.2d 448, 452-53 (Mich. 1979) (holding that DR 7-104(A)(1) applies to prosecutors). *But see State v. Richmond*, 560 P.2d 41, 46 (Ariz. 1976) (asserting that DR 7-104 applies solely to civil litigation, and that

Disagreement exists, however, over the appropriateness of state ethics tribunals enforcing violations of the ethics provisions that occur in federal courts.¹⁷ Furthermore, a division of opinion remains as to whether the prohibition on communications with represented persons applies only after the Sixth Amendment right to counsel attaches, or whether the prohibition extends to the investigation before the official judicial process has begun against the individual.¹⁸ Finally, courts disagree about what remedy is suitable for a violation of the anti-contact rule. Options include the exclusion of evidence obtained in violation of the ethical standard, dismissal of the indictment, and reversal of the defendant's conviction.¹⁹

The Justice Department's new regulation exempts federal prosecutors from both state disciplinary proceedings and enforcement of the ethics rule by federal courts in which the prosecutors practice. The Attorney General may, however, authorize involvement of the state disciplinary board.²⁰ This authorization most likely would occur in rare cases. Although the previous version of the Department's proposed regulation recognized no limits on communications with represented persons prior to the attachment of the Sixth Amendment right to counsel,²¹ the most recent regulation recognizes a limited

law enforcement attorneys need only comply with requirements of Constitution), *cert. denied*, 433 U.S. 915 (1977).

17. Compare *Ferrara*, 847 F. Supp. at 968-70 (holding that Supremacy Clause does not bar enforcement in state forum of state ethics violation by federal prosecutors) and *Doe*, 801 F. Supp. at 484-85 (holding that because federal prosecutors must carry out duties ethically, state ethical standards in no way inhibit prosecutors performance, and thus leave no room for Supremacy Clause argument) with *Kolibash v. Committee on Legal Ethics*, 872 F.2d 571, 575 (4th Cir. 1989) (holding that Supremacy Clause bars enforcement of state ethics rule requiring judicial authorization for subpoena of attorneys before grand jury, because state disciplinary actions may hamper responsibilities of federal officials) and Communications with Represented Persons Commentary, *supra* note 2, at 39,916-17 (outlining Department of Justice's argument that Supremacy Clause bars enforcement of ethics violations in state forum) and 58 Fed. Reg. 39,976, 39,978-80 (1993) (clarifying that in situations where conflict between state and federal rules exists, Department of Justice attorneys must follow federal rules).

18. Compare *Hammad*, 858 F.2d at 839 (refusing to limit application of DR 7-104(A)(1) to postindictment contact with represented persons) with *United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993) (citing several cases for proposition that DR 7-104(A)(1) does not extend to contacts in investigatory stages before indictment).

19. Compare *Heinz*, 983 F.2d at 613 (noting that no federal court has ever suppressed evidence obtained in criminal cases in violation of DR 7-104(A)(1)) with *Lopez*, 4 F.3d at 1464 (reserving severe remedy of case dismissal for conduct "flagrant in its disregard for the limits of appropriate professional conduct") and *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.) (hinting at appropriateness of complaint's dismissal where ethical violation has prejudiced defendant's case), *cert. denied*, 451 U.S. 1021 (1981).

20. See Communications with Represented Persons, *infra* app., §§ 77.11, 77.12 (establishing that enforcement of violations to be conducted only by Department of Justice, not federal courts or state ethics tribunals). The regulation would allow state disciplinary action only when the Attorney General finds a willful violation of the Department's regulation. *Id.*

21. See Communications with Represented Persons, 58 Fed. Reg. 39,976, 39,983, 39,992 (1993) (28 C.F.R. § 77.5) (proposed July 26, 1993; later withdrawn) (establishing broad authority

respect for the attorney-client relationship prior to the attachment of the Sixth Amendment.²²

The new regulation, however, still authorizes contacts that may run afoul of the ethical rule and undermine the protections afforded by the rule.²³ Importantly, the regulation permits communication with a represented person after the commencement of formal proceedings in certain circumstances.²⁴ Critical exceptions for the purposes of this Comment include communication with the represented person when there is the need to investigate new or additional crimes;²⁵ overt communication with the represented person when the person initiates the contact;²⁶ communication when the represented person initiates the communication with an undercover agent;²⁷ communication when there is danger of death or serious bodily injury to any person;²⁸ and communication when the represented person waives his Sixth Amendment rights at the time of arrest.²⁹ Furthermore, the regulation provides for enforcement only through internal Department of Justice disciplinary proceedings,³⁰ does not create any right of enforcement in any third party,³¹ and does not permit the dismissal of charges or the suppression of evidence in a matter where a violation has occurred.³² Finally, the regulation contains an explicit preemption provision for both inconsistent state law and local federal court rules.³³ The Department of Justice asserts the "chilling effect on government attorneys" caused by the conflicting state ethics provisions and local federal court rules makes this departmental

to communicate with represented persons during investigation before attachment of Sixth Amendment right to counsel).

22. See Communications with Represented Persons, *infra* app., §§ 77.8, 77.9 (outlining restrictions on communication with represented persons where contact was made without consent of counsel).

23. Communications with Represented Persons, *infra* app., § 77.7; see also *infra* Part III (comparing Department's proposed regulation with ethical rule).

24. Communications with Represented Persons, *infra* app., § 77.6.

25. Communications with Represented Persons, *infra* app., § 77.6(e); see also *infra* notes 310-12 and accompanying text.

26. Communications with Represented Persons, *infra* app., § 77.6(c); see also *infra* Part III.E.1.

27. Communications with Represented Persons, *infra* app., §§ 77.7, 77.9; see also *infra* Part III.C.

28. Communications with Represented Persons, *infra* app., § 77.6(f); see also *infra* notes 326-34 and accompanying text.

29. Communications with Represented Persons, *infra* app., § 77.6(d); see also *infra* Part III.E.2.

30. Communications with Represented Persons, *infra* app., § 77.11(a).

31. Communications with Represented Persons, *infra* app., § 77.11(b).

32. Communications with Represented Persons, *infra* app., § 77.11(b); see also *infra* Part III.F.

33. Communications with Represented Persons, *infra* app., § 77.12; see also *infra* Part II.

regulation necessary.³⁴ The Department claims that the regulation codifies current case law and establishes a uniform rule where the courts are in disagreement.³⁵

Model Rule 4.2 accomplishes many important goals in leveling the playing field between the skilled attorney and the layperson.³⁶ The disparity between attorney and layperson exists to the same degree in law enforcement as in civil litigation.³⁷ On the other hand, courts have recognized the important role played by prosecutors in the direction of a criminal investigation, and have refused to hamper legitimate criminal investigations.³⁸ To remove the enforcement powers from the federal courts and state disciplinary boards, however, would exempt federal prosecutors from effective restraint in contacting represented persons where the Fifth or Sixth Amendments are inapplicable.³⁹ As one court has noted, "The prosecutor is a lawyer first; a law enforcement officer second. The provisions of the Code of Professional Responsibility are as applicable to him as they are to all lawyers."⁴⁰

The application of state ethics rules to federal prosecutors has been the subject of serious controversy.⁴¹ This Comment joins that debate by demonstrating that the Department's regulation is not the appropriate vehicle for accomplishing the goal of providing a uniform ethical provision. Part I outlines the development of the Department

34. See Communications with Represented Persons, *supra* note 21, at 39,977; see also Communications with Represented Persons Commentary, *supra* note 2, at 39,911 (explaining ostensible need for Department's regulation).

35. Communications with Represented Persons Commentary, *supra* note 2, at 39,911.

36. See *infra* notes 320-21 (citing authorities supporting this goal of MR 4.2).

37. See Green, *supra* note 13, at 286 n.12 (observing that ethical violation occurs by communication in criminal context to same degree as it would in civil proceedings (citing *People v. Hobson*, 348 N.E.2d 894, 898 (N.Y. 1976))).

38. See, e.g., *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) ("Our task, accordingly, is imposing adequate safeguards without crippling law enforcement."), *cert. denied*, 498 U.S. 871 (1990).

39. See Jerry E. Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203, 207 (1990) (concluding that reasoning of DOJ position allows Department to "pick and choose which if any ethical rule would apply to his office," effectively denying state agencies opportunity to regulate federal lawyer licensed by State); Mark Ballard, *ABA Notebook*, LEGAL TIMES, Aug. 15, 1994, at 7 (quoting ABA President R. William Ide, III as saying that DOJ regulation was "unilateral effort to exempt Justice attorneys from the ABA's Model Rule 4.2"). But see *id.* at 9 (quoting Deputy Attorney General Jamie Gorelick as stating that "Justice attorneys are [not] above law").

40. *State v. Morgan*, 646 P.2d 1064, 1070 (Kan. 1982).

41. See, e.g., Roger C. Cramton & Lisa Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (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 (1992). While these two articles deal specifically with the issue of the application of the anti-contact rule to federal prosecutors, the entire Volume 53, No. 2 of the *University of Pittsburgh Law Review* was dedicated more broadly to the issue of the application of state ethics rules to federal prosecutors. See generally 53 U. PITT. L. REV. 270, 270-541 (1992).

of Justice's current anti-contact regulation. Part II demonstrates that the new regulation encroaches on the fundamental interest of the States in regulating the attorneys who are licensed to practice in their jurisdiction. Part II also suggests that the regulation infringes unconstitutionally on the federal courts' inherent supervisory power to control the attorneys who appear before them as officers of the court. Part III illustrates the strengths and weaknesses of the Department of Justice's current regulation. Part III also endeavors to lay out an interpretation of MR 4.2 that follows the intended goals of the rule closely, while at the same time burdening legitimate law enforcement activities no more than a fair adherence to ethical principles demands.

I. DEVELOPMENT OF THE DEPARTMENT OF JUSTICE'S POSITION

The Department of Justice's assertion that its attorneys should be exempt from regulation by state code or local federal rule with respect to confronting suspects represented by counsel originates from an official memorandum issued during the Carter administration.⁴² Although there were several federal court opinions stating that federal prosecutors were subject to federal court or state bar ethics rules,⁴³ prior to 1988, no opinion took specific action to enforce the anti-contact provisions. This lack of enforcement probably was the reason that the Department of Justice did not forcefully attempt to seek exemption from the ethical rule.

A. *United States v. Hammad*

That perspective changed, however, with the Second Circuit's opinion in *United States v. Hammad*,⁴⁴ which caused the Department

42. See Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. Off. Legal Counsel 576, 601-02 (1980) (positing that only restraints on federal investigatory practices are those imposed by Constitution or federal statute, and that state enforcement of DR 7-104 is barred by both Supremacy Clause and language of Code).

43. See, e.g., *United States v. Partin*, 601 F.2d 1000, 1005 (9th Cir. 1979) (finding violation of DR 7-104(A)(1), but refusing to reverse defendant's conviction), *cert. denied*, 446 U.S. 964 (1980); *United States v. Thomas*, 474 F.2d 110, 111-12 (10th Cir.) (holding that while federal prosecutor is subject to DR 7-104(A)(1), reversal was not warranted), *cert. denied*, 412 U.S. 932 (1973); *United States v. Four Star*, 428 F.2d 1406, 1407 (9th Cir.) (emphasizing that ethical violation occurs when prosecutor conducts custodial interview of suspect in absence of counsel, even if suspect's Fifth Amendment rights have not been violated), *cert. denied*, 400 U.S. 947 (1970); *Coughlan v. United States*, 391 F.2d 371, 376-78 (9th Cir.) (finding that conduct of U.S. Attorneys violated both Fifth Amendment and Canon 9 [predecessor to DR 7-14(A)(1)]), *cert. denied*, 393 U.S. 870 (1968). It is noteworthy that in each of these cases the Fifth or Sixth Amendment right to counsel had also attached but no constitutional violation was found.

44. 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990).

of Justice to take a harder stance against the application of the anti-contact rule to federal prosecutors.⁴⁵ The United States District Court for the Eastern District of New York granted the defendant's motion to suppress audio recordings made in violation of DR 7-104(A)(1).⁴⁶ On appeal, the Second Circuit reversed the suppression of the conversations, but refused to accept the Department of Justice's argument that DR 7-104(A)(1) did not apply to investigations conducted before the commencement of formal adversarial proceedings.⁴⁷ In rejecting the argument that DR 7-104(A)(1) should be coextensive with the Sixth Amendment right to counsel, the Second Circuit reasoned that the Constitution establishes only a floor of protection below which rights of the defendant may not fall.⁴⁸ Specifically, the court noted that the Model Code of Professional Responsibility "secures protections not contemplated by the Constitution."⁴⁹ The court also refused to link the obligations of federal prosecutors under the anti-contact rule to the beginning of the adversarial process, expressing concern that federal law enforcement officials might manipulate the timing of grand jury proceedings in order to obtain the maximum amount of information from the suspect in the absence of the suspect's attorney.⁵⁰

In order to avoid "handcuffing law enforcement officers in their efforts to develop evidence,"⁵¹ the Second Circuit in *Hammad* took

45. See Thornburgh Memorandum, *infra* note 59, at 489-93 (detailing Department of Justice's position regarding application of DR 7-104(A)(1) to federal prosecutors).

46. *United States v. Hammad*, 678 F. Supp. 397, 400-01 (E.D.N.Y. 1987), *rev'd*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990). The facts of this case involved contact by the Assistant U.S. Attorney (AUSA) with the represented defendant before either the Fifth or Sixth Amendment rights to counsel had attached.

In July 1986, Taiseer Hammad's attorney contacted the AUSA to inform him that he represented Taiseer Hammad and his department store. See *Hammad*, 858 F.2d at 836. Despite this knowledge, the prosecutor instructed an associate of Hammad's, who had agreed to assist in the investigation, to telephone and record conversations with Hammad in regard to suspected Medicaid fraud. See *id.* at 835-36. The AUSA provided the informer with a sham subpoena in order to help him coax further information from Hammad. See *id.* On the basis of the recorded conversations and other evidence, the grand jury subsequently returned a 45-count indictment against Taiseer Hammad and his brother. See *id.* at 836.

The defendant did not argue that the conversations were recorded in violation of his Fifth Amendment rights, but rather that the prosecutor, knowing that Hammad was represented by counsel in the investigation, contacted Hammad through the informer in violation of the prosecutor's ethical obligations under DR 7-104(A)(1). See *id.* On the basis of this argument, the district court granted the defendant's motion to suppress the conversations obtained in violation of DR 7-104(A)(1). See *id.* at 837.

47. *Hammad*, 858 F.2d at 839.

48. *Id.*

49. *Id.*

50. See *id.* (suggesting that because prosecutor has control over return of indictment, tying Code's applicability to timing of indictment may cause manipulation by prosecutors).

51. *Id.* at 838.

a step away from broad statements about the ethical obligations of prosecutors.⁵² The court noted that, in most situations, the use of "legitimate investigative techniques" to collect statements from criminal suspects in the absence of their counsel is authorized by law, and, as a result, does not violate DR 7-104(A)(1).⁵³ Nonetheless, the Second Circuit found that the use of an informer and a sham subpoena were not "legitimate investigative techniques."⁵⁴ The court refused, however, to suppress the evidence because of the unsettled nature of this area of the law,⁵⁵ but explicitly noted that in proper situations suppression is an appropriate remedy for breach of an ethical rule.⁵⁶ Finally, the court refused to establish a "bright-line" test for determining when a violation of DR 7-104(A)(1) occurs, leaving it instead for "case-by-case adjudication."⁵⁷

Hammad went further than any prior decision by both establishing the applicability of the anti-contact rule in the investigatory stages of the judicial process, and by explicitly endorsing suppression as an appropriate remedy. Subsequent cases have interpreted *Hammad* as requiring an inquiry into the appropriateness of the prosecutor's conduct. As was true in *Hammad*, those cases consider preindictment, noncustodial contact with a represented person as "authorized by law" unless the conduct is inappropriate or goes beyond the scope of the prosecutor's duties.⁵⁸ The Department of Justice responded to

52. *Id.* at 839.

53. *Id.* Most states have adopted verbatim the ABA's version of the Model Code or Model Rules. Each provides for an exemption from the obligation to contact the opposing party's counsel when it is "authorized by law" to contact the opposing party directly. Although not applicable in this case, it is interesting to note that the Florida State Bar Association eliminated the "authorized by law" provision when it adopted the ethics code. FLORIDA RULES OF PROFESSIONAL RESPONSIBILITY Rule 4-4.2; *see also infra* Part III.A (addressing significance of this distinction).

54. *Hammad*, 858 F.2d at 840.

55. *Id.* at 842.

56. *See id.* at 840.

57. *See id.* (noting, however, that prosecutor's use of informants prior to indictment will not be subject to suppression because it falls within "authorized by law" exception).

58. *See, e.g.,* United States v. DeVillio, 983 F.2d 1185, 1192 (2d Cir. 1993) (recognizing that prosecutors may violate anti-contact rule in preindictment phase, but failing to find conduct egregious enough to warrant exclusion of evidence); United States v. Scozzafava, 833 F. Supp. 203, 207-10 (W.D.N.Y. 1993) (finding that prosecutor did not use "illegitimate investigative technique[s], akin to the sham subpoena in *Hammad*"); United States v. Santopietro, 809 F. Supp. 1008, 1012-14 (D. Conn. 1992) (citing lack of deceptive investigative tools as reason for finding no violation of anti-contact rule); United States v. Harloff, 807 F. Supp. 270, 276-77 (W.D.N.Y. 1992) (finding no violation of anti-contact rule because techniques used were not deceptive); United States v. Buda, 718 F. Supp. 1094, 1095-96 (W.D.N.Y. 1989) (finding that although prosecutor knew of contact with represented party, he did not "attempt[] to direct the content of [the informant's] conversation with the defendant so as to beguile him into giving his case away"); United States v. Chestman, 704 F. Supp. 451, 454 (S.D.N.Y. 1989) (concluding that prosecutor did not engage in "egregious misconduct" sufficient to warrant suppression of evidence).

Hammad with what has become known as the Thornburgh Memorandum.⁵⁹

B. The Thornburgh Memorandum

On June 8, 1989 then-Attorney General Richard Thornburgh issued a memorandum to all Justice Department litigators setting forth the Department's position regarding the impact of DR 7-104(A)(1) on federal law enforcement.⁶⁰ As noted earlier, the Thornburgh Memorandum was not the Department's first statement on the application of the anti-contact rule to federal prosecutors. Under the Carter administration, the Department of Justice issued an official opinion which claimed that federal prosecutors were limited only by the Constitution and federal statutes in carrying out their duties.⁶¹ Citing that 1980 Office of Legal Counsel Memorandum, Thornburgh asserted that the "extent to which the Department requires its attorneys to conform their conduct to judicial and bar association interpretations of DR 7-104 is solely a question of policy."⁶²

The Thornburgh Memorandum posited two main grounds for exempting federal litigators from the application of DR 7-104(A)(1). The Department first claimed that federal prosecutors are authorized by law to direct and supervise undercover law enforcement efforts.⁶³ This included communicating with individuals who have not been formally charged with a crime, irrespective of the representation of the person by counsel.⁶⁴ As previously noted, DR 7-104(A)(1) allows attorneys to confront a person represented by counsel, without the consent of that person's counsel, where they are authorized by law to do so.⁶⁵ The second point asserted by the Department for prosecutors' exemption from the anti-contact rule is that the Supremacy Clause of the Constitution bars the enforcement of the ethics rule at the state or local level.⁶⁶ The Memorandum concluded by throwing down the gauntlet, asserting that "in such an instance,

59. Richard Thornburgh, Memorandum to All Justice Department Litigators *Re Communications with Persons Represented by Counsel* (unpublished office memorandum, June 8, 1989) [hereinafter *Thornburgh Memorandum*], in *In re Doe*, 801 F. Supp. 478, 489-93 (D.N.M. 1992).

60. *Id.*

61. 4B Op. Off. Legal Counsel 576 (1980).

62. Thornburgh Memorandum, *supra* note 59, at 491.

63. Thornburgh Memorandum, *supra* note 59, at 492.

64. Thornburgh Memorandum, *supra* note 59, at 492.

65. See *supra* note 53 (noting that most states have adopted "authorized by law" clause).

66. Thornburgh Memorandum, *supra* note 59, at 493 (stating Department of Justice's intention to rely on Supremacy Clause in resisting local efforts to impede "legitimate federal law enforcement techniques").

that where the Constitution and federal law permit legitimate investigative contact, DR 7-104 does not present an obstacle.⁶⁷

C. *United States v. Lopez and Subsequent Case Law*

1. *United States v. Lopez*

The Thornburgh Memorandum threatened not only the inherent supervisory power of the federal judiciary over officers of the court, but also the ability of the States to oversee the ethical standing of the attorneys licensed in their respective jurisdictions. It is not surprising that some federal courts responded negatively to the Department's position, which clearly disregarded the holdings and *dicta* of prior case law. *United States v. Lopez*⁶⁸ was the first reported case in which a federal prosecutor used the Thornburgh Memorandum as justification for a violation of DR 7-104(A)(1).⁶⁹ The use of the Memorandum met with unfavorable reviews at both the district court and appellate court levels.⁷⁰

The district court in *Lopez* flatly rejected the assertions of the Thornburgh Memorandum.⁷¹ The court found no authority for the

67. Thornburgh Memorandum, *supra* note 59, at 493. The American Bar Association House of Delegates voted in its February 1990 Midyear Meeting to reject the Thornburgh Memorandum. See ABA Standing Comm. on Professional Discipline, Report No. 301 (Feb. 12, 1990) [hereinafter ABA Report No. 301] (recommending that House of Delegates adopt resolution condemning Thornburgh Memorandum and logic upon which it is based).

68. 765 F. Supp. 1433 (N.D. Cal. 1991), *vacated*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993).

69. *United States v. Lopez*, 765 F. Supp. 1433, 1445-50 (N.D. Cal. 1991), *vacated*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993). The case actually dealt with the application of State Bar of California Rules of Professional Conduct Rule 2-100, which was adopted by the federal district court as a local rule. See *id.* at 1445-46 n.19; see also N.D. CAL. R. 110-3. California Rule 2-100 is substantially the same as ABA Model Code of Professional Conduct DR 7-104(A)(1). See *Lopez*, 765 F. Supp. at 1444.

70. See *Lopez*, 4 F.3d at 1458 ("The government, on appeal, has prudently dropped its dependence on the Thornburgh Memorandum in justifying AUSA Lyons' 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."); *Lopez*, 765 F. Supp. at 1446 ("There are profound flaws in the Attorney General's policy and they are demonstrated within the four corners of the Thornburgh Memorandum.")

71. *Lopez*, 765 F. Supp. at 1446. In *Lopez*, the defendant, indicted for drug violations, retained the services of an attorney who informed Lopez that he refused to negotiate with the Government because he believed that Lopez had a viable defense. See *id.* at 1438. Subsequently, after talking with his co-defendant's lawyer (with the permission of Lopez's lawyer), Lopez agreed to meet with the prosecutor in order to work out a disposition of the case. See *id.* at 1439-40. Lopez did not inform his attorney of the meeting with the prosecutor, and did not retain additional counsel for the plea negotiations because he wanted to retain his counsel if he needed to go to trial. See *id.* AUSA Lyons suspected that Lopez' attorney's fees were being paid by a third party involved in the drug ring, and that Lopez or his family might be in danger if anyone found out about the plea negotiations. See *id.* at 1441-42. The attorney for Lopez' co-defendant told Lyons that Lopez was paying all his own attorney's fees, but did not want his attorney present during the plea negotiations because Lopez was afraid his attorney would not

proposition that DR 7-104 did not apply to federal prosecutors who attempt to contact defendants under indictment.⁷² Furthermore, the court rejected the Department's argument that the federal statutes which authorize the investigation and prosecution of criminal violations⁷³ were the type of exemption envisioned by the "authorized by law" language of DR 7-104(A)(1).⁷⁴ The court reasoned that, absent express statutory authorization to contact represented persons in the absence of counsel, the general enabling statutes were insufficient authorization.⁷⁵

The Department of Justice went on, however, to claim boldly that the constitutional doctrine of separation of powers⁷⁶ barred the federal courts from enforcing their own local anti-contact rules against federal prosecutors.⁷⁷ The Department argued that if the federal court enforced the ethical rule against federal prosecutors, the court would be interfering with the inherent power of the executive branch to carry out and enforce the law,⁷⁸ a position the court flatly rejected:

The government's suggestion that this court may not enforce its Local Rules against DOJ attorneys because of some perceived conflict with those attorneys' statutory responsibility to investigate criminal investigations is, to put it bluntly, preposterous. DOJ attorneys may not be exempted from the court rules which every other attorney must obey. Like every attorney, an attorney for the United States appears before the court in a dual role. "He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case, i.e., his demeanor, deportment and ethical

represent him at trial if he knew Lopez was negotiating with the Government. *See id.* at 1442-43.

Lyons agreed to meet with Lopez, but first sought judicial approval for the meeting. *See id.* at 1441-42. Lyons neglected to inform the court that he was told by the attorney for Lopez' co-defendant that the fears for Lopez' life and the safety of his family were completely unfounded. *See id.* at 1442. When Lopez' attorney found out about the secret meetings, he promptly filed papers with the court to withdraw as Lopez' attorney. *See id.* at 1444. Lopez then filed a motion to dismiss the indictment on the grounds that his Sixth Amendment right to counsel had been violated and that AUSA Lyons had violated the ethical requirements of California Rule 2-100. *See id.*

72. *Id.* at 1447.

73. *See infra* notes 238-40 and accompanying text (discussing general statutes authorizing Department of Justice to investigate and prosecute crimes).

74. *Lopez*, 765 F. Supp. at 1447.

75. *Id.* at 1448 (citing ABA Comm. on Prof. Ethics & Grievances, Informal Op. 985 (1967)).

76. *See infra* notes 198-200, 218-31 and accompanying text (discussing separation of powers doctrine).

77. *See Lopez*, 765 F. Supp. at 1453.

78. *See id.*

conduct"⁷⁹

Despite determining that the Government's conduct was "flagrant and egregious," and that the defendant was prejudiced by the withdrawal of his attorney,⁸⁰ the district court found that the misconduct did not rise to the level of a Sixth Amendment violation.⁸¹ Nonetheless, applying the court's inherent supervisory powers, the district court decided that the indictment against Lopez should be dismissed based on the violation of DR 7-104(A)(1).⁸²

On appeal, the Ninth Circuit adopted much of the district court's reasoning, but vacated the lower court's order dismissing the indictment against Lopez.⁸³ The court of appeals held that, despite the prosecutor's misconduct, the extreme remedy of dismissal was not appropriate.⁸⁴ The court refused, however, to rule out dismissal as an option to remedy prosecutorial misconduct,⁸⁵ narrowing the lower court's holding by requiring that "the government's conduct must have caused *substantial* prejudice to the defendant and been *flagrant* in its disregard for the limits of appropriate professional conduct."⁸⁶ Furthermore, despite the Ninth Circuit's broad statements about the duty of prosecutors to avoid contact with indicted individuals represented by counsel, the court refused to extend the application of the anti-contact rule to the preindictment, noncustodial setting.⁸⁷

2. *In re Doe and United States v. Ferrara*

While *Hammad* and *Lopez* involved a violation of the anti-contact

79. See *id.* at 1453-54 (quoting *United States v. Chanen*, 549 F.2d 1306, 1313 n.5 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977)). The court in *Lopez* noted that "the entire post-indictment conduct of a prosecutor is driven by the goal of completing the prosecution," and, therefore, in essence, the Department's argument would effectively exempt prosecutors from all supervision by the courts. *Id.* at 1447.

80. *Id.* at 1461.

81. *Id.* at 1456.

82. *Id.* at 1463. Having analyzed several less dramatic options, the court reasoned that "none of these alternative remedies would in any way deter government attorneys from continuing to pursue the dictates of the Thornburgh Memorandum and thus engaging in prosecutorial misconduct." *Id.* at 1461.

83. *Lopez*, 4 F.3d at 1464.

84. *Id.*

85. *Id.*

86. *Id.* (emphasis added).

87. *Id.* at 1461; see also *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (acknowledging holding of *Lopez*, but refusing to extend its application to preindictment, noncustodial setting (citing *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir. 1981))). In *Powe*, the prosecutor had promised to direct all interviews through Powe's attorney. See *id.* at 70. The government attorney, however, directed an undercover agent to record conversations with Powe. See *id.* at 69. The court reasoned that the prosecutor did not promise to forego undercover investigation merely by promising to direct all interviews through Powe's attorney. *Id.* at 70.

rule in federal court, the propriety of state disciplinary actions against federal prosecutors for violating DR 7-104(A)(1) was first explicitly addressed in two related cases.⁸⁸ In the case of *In re Doe*,⁸⁹ an Assistant U.S. Attorney (AUSA) attempted to remove his New Mexico state disciplinary action to federal court under the federal statute authorizing federal officers sued in state court for state criminal or civil violations to have their case heard in federal court.⁹⁰ The U.S. District Court for the District of New Mexico refused to allow the removal, holding that ethics disciplinary actions were not among the criminal or civil proceedings contemplated by Congress when it enacted the statute.⁹¹

Among Doe's many arguments was that the New Mexico ethics tribunal was barred from proceeding against him by the Supremacy Clause of the U.S. Constitution.⁹² The court rejected this argument, reasoning that the Justice Department policy put forth in the Thornburgh Memorandum did not constitute federal law for the purposes of preempting state law.⁹³ Furthermore, the court reasoned that the interpretation and enforcement of ethics rules could not be left to the very body that is governed by the rules.⁹⁴

Following the court's refusal to remove the action against Doe from the state disciplinary board to federal court, the United States filed a request for an injunction against the Chief Disciplinary Counsel of the Disciplinary Board of the Supreme Court of New Mexico.⁹⁵ The United States requested that U.S. District Court for the District of Columbia enjoin the inquiry by the New Mexico state ethics committee into Doe's actions as a federal prosecutor.⁹⁶

88. See *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992); *United States v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993), *appealed*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994); see also *Lopez*, 4 F.3d at 1464. In *Lopez*, the Ninth Circuit stated in *dicta* that possible options to remedy misconduct before federal courts included referral to the appropriate state bar ethics tribunal for disciplinary proceedings. *Id.*

89. 801 F. Supp. 478 (D.N.M. 1992).

90. *In re Doe*, 801 F. Supp. 478, 481 (D.N.M. 1992). After a federal judge found that Doe had violated DR 7-104(A)(1) in the course of prosecuting a case on behalf of the Department of Justice, she referred the case to the D.C. Disciplinary Board, which in turn referred the matter to the Disciplinary Board of New Mexico, where Doe was licensed to practice. See *id.* at 480-81. Doe attempted the removal under 28 U.S.C. § 1442 (1988). See *id.* at 481.

91. *Id.* at 482-83.

92. See *id.* at 484-86.

93. *Id.* at 487.

94. *Id.* at 486 ("The idea of placing the discretion for a rule's interpretation and enforcement solely in the hands of those governed by it not only renders the rule meaningless, but the notion of such an idea coming from the country's highest law enforcement official displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession.").

95. See *United States v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993), *appealed*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994).

96. *Id.* at 965.

The D.C. district court dismissed the case, relying primarily on a lack of personal jurisdiction over Virginia Ferrara, a New Mexico official.⁹⁷ The district court rejected in its alternative holding Doe's Supremacy Clause argument on three grounds. First, the court reasoned that the Thornburgh Memorandum did not preempt state law because it was only a policy statement of the Department of Justice, not federal law.⁹⁸ Second, under the doctrine of intergovernmental immunity, the state law must give way only when the duties of the federal officer are "necessary and proper" to the exercise of the officer's duties;⁹⁹ the court concluded that a violation of the state anti-contact rule was simply not necessary to the prosecution of the criminal defendant.¹⁰⁰ Finally, the court reasoned that even if it were necessary for a federal prosecutor to have ex parte contacts with the criminal defendant, "Congress . . . clearly contemplated compliance with State bar ethical standards by attorneys practicing in the Department of Justice."¹⁰¹

The United States has appealed the holding of the D.C. district court to the U.S. Court of Appeals for the D.C. Circuit on both the jurisdictional and Supremacy Clause grounds.¹⁰² The briefs focus primarily on the issue of whether the D.C. district court has personal jurisdiction to enjoin the disciplinary officer for the State of New Mexico because this was the primary reason for the district court's dismissal of the case.¹⁰³ Both parties also address in significant detail the issue of the power of New Mexico to investigate Doe for a

97. *Id.* at 967-68.

98. *Id.* at 969.

99. *Id.*

100. *Id.*

101. *Id.* at 969-70. There is one other reported case that deals with the application of state ethics proceedings against federal prosecutors. *In re Gorence*, 810 F. Supp. 1234 (D.N.M. 1992). Relying on *Doe*, the court in *Gorence* refused to allow the AUSA to remove his state disciplinary action to federal court. *Id.* at 1238. The court in *Gorence* also relied on the fact that the Supreme Court and lower federal courts have refused to review state disciplinary proceedings. *Id.*

The court in *Gorence* observed "that something more than mere black letter law is under scrutiny when a court describes a State rule of professional conduct as a 'fundamental principle.' . . . [O]ur society, through the legal system, has decided that it is good public policy to make *all* attorneys uniformly subject to the applicable state code of professional conduct." *Id.*

102. *United States v. Ferrara*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994).

103. See Brief for Appellant *United States* at 18-31, *United States v. Ferrara*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994) [hereinafter Brief for Appellant] (laying out jurisdictional argument of *United States*); Brief for Appellee *Ferrara* at 8-28, *United States v. Ferrara*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994) [hereinafter Brief for Appellee] (laying out *Ferrara*'s argument that D.C. district court lacked personal jurisdiction); see also *Ferrara*, 847 F. Supp. at 968 (relying primarily on lack of personal jurisdiction to dismiss case).

violation of New Mexico's anti-contact rule.¹⁰⁴ While the outcome of this appeal will no doubt have a substantial impact on the way in which these issues are viewed in other circuits, the D.C. Circuit is not directly faced with the validity of the new Department of Justice regulation because the conduct of Doe occurred before the Department's policy was clearly established.¹⁰⁵ Moreover, because *Ferrara* dealt with the authority of the state ethics tribunal to discipline a federal prosecutor, the issue of the authority of the federal court to discipline federal attorneys for a violation of the anti-contact rule is not before the court.

*D. The Department of Justice's Regulation Regarding
Communications with Represented Persons*

As asserted in the Thornburgh Memorandum,¹⁰⁶ and in response to the heavy criticism of the Justice Department's internal policy,¹⁰⁷ in late 1992 the Department of Justice published a regulation, governing all Justice Department litigators in their communications with persons represented by counsel.¹⁰⁸ Given the change in Administrations, and the importance of the issue, the regulation was resubmitted

104. Brief for Appellant, *supra* note 103, at 32-48; Brief for Appellee, *supra* note 103, at 28-40; see also *Ferrara*, 847 F. Supp. at 968-69 (finding that even if court had personal jurisdiction, case should be dismissed because New Mexico was not barred from proceeding against Doe). Appellee also raises two other grounds, not addressed by the district court, which could be used by the D.C. Circuit to avoid the anti-contact rule issue. In particular, Appellee contends that the United States is barred by the doctrine of collateral estoppel from litigating the issue of the anti-contact rule because that issue had been fully litigated in this case in *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992). Brief for Appellee, *supra* note 103, at 40-44; see also Reply Brief for Appellant at 19-23, *United States v. Ferrara*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994); Reply Brief for Appellee at 3-10, *United States v. Ferrara*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994). Alternatively, Appellee argues that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), prevents the federal court from intervening with ongoing state judicial proceedings. See Brief for Appellee, *supra* note 103, at 44-46; Reply Brief for Appellant, *supra*, at 23-29; Reply Brief for Appellee, *supra*, at 10-15.

105. Brief for Appellant, *supra* note 103, at 4 n.2 (noting that "the validity of the new Departmental policy is *not* now before this Court because it did not govern the conduct at issue").

106. Thornburgh Memorandum, *supra* note 59, at 493 (announcing intention to codify policy set out in Thornburgh Memorandum in Code of Federal Regulations).

107. See, e.g., Cramton & Udell, *supra* note 41, at 357-59 (proposing broader interpretation of anti-contact rule than that put forth in Department of Justice's policy); Bennett L. Gersham, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 448 (1992) (claiming that Department's policy has "disturbing" consequences for application of ethics principles to federal, as well as state, prosecutors). But see Saylor & Wilson, *supra* note 41, at 487 (asserting that application of MR 4.2 has caused "much uncertainty and mischief in law enforcement, and few, if any, benefits to the criminal justice system").

108. Communications with Represented Persons, 57 Fed. Reg. 54,737 (1992) (proposed Nov. 20, 1992).

for further comment on July 26, 1993.¹⁰⁹ In this resubmission, the Department responded to comments received on the Department's original proposed policy.¹¹⁰ Due in large part to the strong criticism of the Department's position, the proposed regulation was once again withdrawn for further consideration¹¹¹ and a new proposed regulation was published on March 3, 1994.¹¹² This version of the Department's position on communications with represented persons appeared to be a substantial shift away from earlier versions.¹¹³

The language in the March 1994 proposal was notably more deferential to state ethics rules.¹¹⁴ The proposed regulation also took significant steps toward accommodating the critics of the earlier versions.¹¹⁵ After yet another comment period, the Department of Justice published the final regulation on August 4, 1994.¹¹⁶ This regulation is substantially the same as the proposal from March.¹¹⁷

Despite these changes and the cogent analysis put forth by the Department on many of the issues surrounding DR 7-104(A)(1), the newly promulgated regulation falls short of accomplishing many of the goals of DR 7-104(A)(1). Furthermore, the fundamental defect in the Department's position—regulation of federal prosecutors by

109. Communications with Represented Persons, *supra* note 21; see also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 2 THE HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 4.2:101 (2d ed. 1993) (delineating history and criticism of initial promulgation of DOJ's position on MR 4.2 up to withdrawal of proposed regulation under Clinton administration); *Meetings Seek Solutions for Prosecutorial Contacts*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Oct. 20, 1993, at 301, 301-02 [hereinafter *Solutions for Prosecutorial Contacts*] (observing that initial publication of regulation was withdrawn and resubmitted due to change in Administrations, and in order to afford further opportunity for comment).

110. Communications with Represented Persons, *supra* note 21, at 39,977.

111. See Communications with Represented Persons, 59 Fed. Reg. 10,086, 10,086 (proposed Mar. 3, 1994) (noting that further comments were being solicited on prior rule because of substantial discussion generated by regulation).

112. *Id.*

113. Compare Communications with Represented Persons, *infra* app., §§ 77.7 to .9 (recognizing restrictions on contact with represented persons in investigative stages) with Communications with Represented Persons, *supra* note 21, at 39,992 (28 C.F.R. § 77.5; later withdrawn) (recognizing no limitations on contact with represented persons in investigative stages).

114. Compare Communications with Represented Persons, *infra* app., § 77.12 (allowing state disciplinary proceedings with approval of U.S. Attorney General) with Communications with Represented Persons, *supra* note 21, at 39,994 (28 C.F.R. §§ 77.15 to .16; later withdrawn) (recognizing no role for States in disciplining federal prosecutors who violate anti-contact regulation).

115. Communications with Represented Persons Commentary, *supra* note 2, at 39,912. The commentary to the proposal that immediately preceded the final regulation claimed: "This new proposal is the product of extensive review, comments and vigorous debate among judges, federal government attorneys, members of the private bar, disciplinary officials, academics and ethicists." Communications with Represented Persons, *supra* note 111, at 10,086.

116. Communications with Represented Persons Commentary, *supra* note 2. The regulation became effective on September 6, 1994.

117. Communications with Represented Persons Commentary, *supra* note 2, at 39,910.

the Department of Justice instead of by state tribunals and federal courts—remains unchanged.¹¹⁸ Finally, the new regulation suffers from the fatal flaw of holding federal prosecutors to a different ethical standard than state prosecutors and private attorneys.¹¹⁹ One court has noted that “[t]here is unanimous and fully documented authority for the proposition that prosecutors are no less subject to the prohibition against communication with a represented person than are members of the private bar.”¹²⁰

The interpretation and application of the anti-contact rule has caused substantial debate.¹²¹ The next sections of this Comment analyze the defects in the Department’s position, and propose an interpretation of the anti-contact rule that protects the goals of the rule without substantially hindering legitimate law enforcement techniques.

118. Communications with Represented Persons, *infra* app., §§ 77.11 to .12 (giving U.S. Attorney General exclusive authority to decide if anti-contact regulation has been violated and if state disciplinary action is appropriate). *But see* Communications with Represented Persons Commentary, *supra* note 2, at 39,915 (“One individual and a number of organizations, including the Conference of Chief Justices, posited that the Department is acting outside the scope of its congressionally delegated authority . . .”).

119. *See* Elkan Abramowitz & Fredrick H. Saal, *Can We Talk? The Need to Reform DR 7-104(A)(1)*, N.Y. L.J., May 4, 1993, at 3, 10 (noting that “the Justice Department appears to have unilaterally redefined the contours of DR 7-104(A)(1) and created a situation where government attorneys are immune from the rule while their adversaries—members of the criminal defense bar—are bound by it and thus fundamentally disadvantaged”); Norton, *supra* note 39, at 207 (positing that state prosecutors may be treated differently than federal prosecutors).

120. *United States v. Jamil*, 546 F. Supp. 646, 652 (E.D.N.Y. 1982) (citing extensive federal and state case law and ethics opinions), *rev’d on other grounds*, 707 F.2d 638 (2d Cir. 1983). In fact, however, the authority for the proposition that DR 7-104 applies to criminal as well as civil attorneys is not unanimous. The Arizona Supreme Court in *State v. Richmond* explicitly rejected the contention that DR 7-104(A)(1) applied in the criminal context. *State v. Richmond*, 560 P.2d 41, 46 (Ariz. 1976), *cert. denied*, 433 U.S. 915 (1977); *see also* H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1178 (1987) (positing that DR 7-104(A)(1)’s application to prosecutors is not universally accepted). It is interesting to note that Uviller cites *United States v. Vasquez*, 675 F.2d 16 (2d Cir. 1982), for the proposition that application of DR 7-104 is not universally accepted in the criminal context. Uviller, *supra*, at 1178. Uviller, however, emphasizes the wrong portion of that case. *Id.* The court in *Vasquez* did not question the application of DR 7-104 to federal prosecutors in all situations, only in “criminal investigations.” *Vasquez*, 675 F.2d at 17 (emphasis added).

121. *See, e.g., Jamil*, 546 F. Supp. at 651-61 (laying out detailed and cogent analysis of trouble spots in interpretation of anti-contact rule’s application to federal prosecutors); Cramton & Udell, *supra* note 41, at 333-59 (analyzing various facets of ethical provision); Saylor & Wilson, *supra* note 41, at 459-87 (examining purposes and scope of rule); Marc A. Schwartz, Comment, *Prosecutorial Investigations and DR 7-104(A)(1)*, 89 COLUM. L. REV. 940, 940-57 (1989) (exploring reasons why DR 7-104(A)(1) should not be applied to prosecutors).

II. APPLICATION OF STATE AND LOCAL FEDERAL ETHICS RULES TO PROSECUTORS

A. *State Ethics Rules and the Supremacy Clause*

The Department of Justice's stance toward state ethics requirements generally misconceives the concepts of federalism and the interests of the States in regulating the conduct of the attorneys whom they license. The Supremacy Clause¹²² ostensibly provides the basis for the exemption of federal prosecutors from the enforcement of state ethics inquiries according to the Department of Justice.¹²³ The Department justifies its own promulgation of the regulation by contending that the requirements imposed by state law vary widely from jurisdiction to jurisdiction, and are often ambiguous in their interpretation.¹²⁴ This, however, does not cause as grave a problem as the Department insinuates because the court is "entitled . . . to charge [an attorney] with the knowledge of and the duty to conform to the State code of professional responsibility."¹²⁵ One benefit of the Justice Department's regulation, of course, is that it provides a uniform, clear rule by which all federal prosecutors can guide their investigations.¹²⁶ This benefit, however, is outweighed by the fact that the regulation does not sufficiently address the important goals sought to be accomplished by DR 7-104(A)(1). Specifically, if the regulation does preempt state and local ethics standards, it would not

122. U.S. CONST. art. VI, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

123. See Communications with Represented Persons Commentary, *supra* note 2, at 39,916.

124. See Communications with Represented Persons Commentary, *supra* note 2, at 39,911; see also Communications with Represented Persons, *supra* note 21, at 39,977.

125. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); see also *id.* (stating that prerequisite for admission to federal court is admission to state court, and, therefore, federal courts may rely on an attorney's knowledge of state ethics rules). It is questionable whether widespread divergence exists between the States. See William W. Taylor, III, *Justice's Ethics: Bad Policy Redux*, N.J. L.J., Mar. 14, 1994, at 17 (observing that "[t]here is no crazy-quilt quality to application of the model rule, and certainly not to its application to federal prosecutors"). Taylor continues:

Moreover, ambiguity is a fact of life for criminal lawyers. All attorneys are responsible for knowing the rules of the courts in which they practice, and sometimes their conduct is not subject to clear rules. Why should federal prosecutors be different? If absolute uniformity in ethics justifies [DOJ's position], what would stop the department from exempting itself from any other rules that are not the same in all jurisdictions?

Id.

126. Communications with Represented Persons Commentary, *supra* note 2, at 39,911 (citing as one reason for rule that having federal attorneys subject to different ethical standards in different States caused uncertainty).

leave any room for the ethics boards of different jurisdictions to address the problems which they feel need to be addressed in that jurisdiction.¹²⁷

Although, in an earlier version of the regulation, the Department conceded the importance of the States in regulating federal prosecutors,¹²⁸ the final regulation has virtually eliminated any role for the States in regulating contact by federal prosecutors with represented persons.¹²⁹ The Department's position on the importance of States in regulating the ethical conduct of federal prosecutors is neatly summed up in language found in the most recent version of the regulation but not contained in previous versions of the regulation commentary. The Department currently maintains that "an important feature of this regulation is its express intention to preempt and supersede the operation of state and local federal court rules as they relate to contacts by Department attorneys, regardless of whether such rules are inconsistent with this regulation."¹³⁰ Furthermore, despite the fact that the Department claims that federal "attorneys are subject to the bar rules and disciplinary proceedings of the states in which they are licensed to practice,"¹³¹ the decision to allow state ethics proceedings against a federal attorney now lies with the U.S. Attorney General.¹³² By vesting the Attorney General with the power to determine when willful violations of the anti-contact provision have

127. See, e.g., Florida State Bar Ass'n Comm. on Professional Ethics, Op. No. 90-4 (July 15, 1990), available in Westlaw, 1990 WL 446959, at *2 (specifically rejecting exemption from anti-contact rule for federal attorneys). The comments following Rule 4.2 of the District of Columbia Rules of Professional Conduct Rule, on the other hand, explicitly exempt the law enforcement activities of the United States and the District of Columbia from the rule's coverage. D.C. RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 8 (1991). This rule sets out a clear exemption for these law enforcement officials, addressing the concern that prosecutors will be hampered by ABA Model Rule 4.2.

This divergence in concepts of legal ethics is the very engine of federalism, allowing different States to experiment in order to discover the best system to fit the conditions that confront their citizens. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . .").

128. Communications with Represented Persons, *supra* note 111, at 10,088 (noting that state courts "continue to play a primary role in regulating the conduct of all attorneys, including those who work for the federal government").

129. Communications with Represented Persons Commentary, *supra* note 2, at 39,912 (stating that DOJ "must be the final arbiter of the scope of policing with respect to ex parte contacts involving federal prosecutors").

130. Communications with Represented Persons Commentary, *supra* note 2, at 39,916. The Department reiterated its proposition that it has the ability to exempt federal attorneys from state ethics rules. *Id.* at 39,911. Recognizing the widespread acceptance of the anti-contact rule, however, the commentary to an earlier version of the regulation noted that "the Department has decided not to implement a wholesale exemption" from the anti-contact rules. Communications with Represented Persons, *supra* note 111, at 10,088.

131. Communications with Represented Persons Commentary, *supra* note 2, at 39,912.

132. Communications with Represented Persons, *infra* app., § 77.12.

occurred, the Department has implicitly rejected the position of the Special Committee of the Conference of Chief Justices "that it is the exclusive province of the state supreme courts to construe state disciplinary rules."¹³³

The U.S. Supreme Court had occasion to comment on the importance of state professional ethics rules in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*.¹³⁴ In that opinion, the Court observed that the "judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice. The State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance."¹³⁵ The Court held that so long as the state ethics process affords an attorney the opportunity to have constitutional concerns heard, the "National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."¹³⁶ In addition, States are not limited to regulating the ethical conduct of private attorneys.¹³⁷ "It is well settled that the regulation of the legal profession is a proper exercise of state power. . . . That power includes the authority to regulate the conduct of federal prosecutors."¹³⁸

In view of the importance of state regulation of attorney conduct, the cases cited by the Department of Justice in support of its

133. Communications with Represented Persons Commentary, *supra* note 2, at 39,916.

134. 457 U.S. 423 (1982).

135. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (citations omitted). In *In re Snyder*, the Court observed, "As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers." *In re Snyder*, 472 U.S. 634, 644 (1985). Because attorneys hold such a position, the "States undoubtedly have the 'authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.'" *Almond v. United States Court*, 852 F. Supp. 78, 89 n.13 (D.N.H. 1994) (quoting *Nix v. Whiteside*, 475 U.S. 157, 165 (1986)).

136. *Middlesex County Ethics Comm.*, 457 U.S. at 431 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). *Middlesex County Ethics Committee* dealt with disciplinary action against a state attorney. *Id.* at 427. The attorney claimed that the state disciplinary proceedings did not afford him a meaningful opportunity to address his constitutional claims. *Id.* at 429. Extending an earlier precedent established in *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that "[w]here vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.'" *Middlesex County Ethics Comm.*, 457 U.S. at 432 (quoting *Moore v. Sims*, 442 U.S. 415, 426 (1979)). The Court stressed the significance of the state interest in regulating members of the bar several times in the opinion, characterizing the interest as an "important state obligation," *id.*, "an extremely important interest," *id.* at 434, and an interest "of special importance." *Id.*

137. *United States v. Klubock*, 639 F. Supp. 117, 126 (D. Mass. 1986) (citations omitted), *aff'd by equally divided court*, 832 F.2d 664 (1st Cir. 1987) (en banc).

138. *Id.*

Supremacy Clause argument are inapposite.¹³⁹ In response to comments submitted on a previous draft, the Department of Justice maintained that the States need explicit authorization from Congress to police the ethical behavior of federal attorneys who are licensed by the States.¹⁴⁰ Although the commentary to the previous regulation was more deferential to the role of the States,¹⁴¹ the Department currently maintains that the extent to which the anti-contact rule applies to federal attorneys is "a policy question."¹⁴² More importantly, the regulation prohibits States from enforcing their version of the anti-contact rule unless the U.S. Attorney General finds that the federal prosecutor willfully violated the *Department's* regulation.¹⁴³ Where a state ethics rule conflicts with the Department's regulation,¹⁴⁴ or where the Attorney General does not find a willful violation of the Department's regulation (even if the state disciplinary board would have),¹⁴⁵ the States are prohibited from fulfilling "the important state obligation to regulate persons who are authorized to practice law."¹⁴⁶ In fact, the Department explicitly recognizes that its current regulation is intended to "state in more express terms" the Department's position on preemption of state ethics provisions.¹⁴⁷

The Department's position mischaracterizes the application of the Supremacy Clause to the States. The doctrine of preemption requires that where "compliance with both federal and state regulations is a physical impossibility,"¹⁴⁸ or when state law "stands as an obstacle

139. See Communications with Represented Persons, *supra* note 21, at 39,979 (laying out Department's justification for exemption from state ethics rules). The Department, for example, cites *Tennessee v. Davis*, 100 U.S. 257 (1879), for the proposition that a federal officer may not be brought to justice in a state court for an offense against a state law. Communications with Represented Persons, *supra* note 21, at 39,979. That case, however, dealt more exactly with the constitutionality and applicability of an explicit statutory provision allowing federal revenue officers to remove to federal court an action brought against them in state court. *Davis*, 100 U.S. at 261.

140. Communications with Represented Persons, *supra* note 21, at 39,980.

141. Compare Communications with Represented Persons, *supra* note 111, at 10,088 (recognizing prevalence of anti-contact rule in state ethics codes) with Communications with Represented Persons Commentary, *supra* note 2, at 39,916 (asserting that States have no power to interfere with duties of federal attorneys unless Attorney General first finds willful violation of rules) and *id.* at 39,979-80 and Thornburgh Memorandum, *supra* note 59, at 493 ("The Department will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques.").

142. Communications with Represented Persons Commentary, *supra* note 2, at 39,911.

143. Communications with Represented Persons, *infra* app., § 77.12.

144. Communications with Represented Persons, *infra* app., § 77.12; see also Communications with Represented Persons Commentary, *supra* note 2, at 39,916.

145. Communications with Represented Persons, *infra* app., § 77.12.

146. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432-33 (1982).

147. Communications with Represented Persons Commentary, *supra* note 2, at 39,916.

148. *Hillborough County v. Automated Medical Lab*, 471 U.S. 707, 713 (1985) (quoting *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963)).

to the accomplishment and execution of the full purposes and objectives of Congress,"¹⁴⁹ the state law must give way. The U.S. District Court for the District of New Mexico observed in *In re Gorence*¹⁵⁰ that there is no conflict between the state ethics rule and the duties of the federal prosecutor because the prosecutor "retains a duty to investigate crimes in a manner entirely consistent with the State rules of professional conduct."¹⁵¹

Furthermore, the Supreme Court has required that Congress provide a "clear and manifest" intent to preempt state law in an area "traditionally occupied" by state regulation.¹⁵² The U.S. Supreme Court and lower federal courts have repeatedly emphasized that the promulgation of ethics rules for members of a state bar is a fundamental state interest.¹⁵³ Every attorney in the Department of Justice is required by statute to be duly licensed in at least one State in the Union, evidencing Congress' acknowledgement of the predominance of the States in the area of attorney regulation.¹⁵⁴ There is, however, even more direct evidence that Congress has intended to have federal prosecutors governed by state ethics provisions. In 1990, the House Subcommittee on Government Information, Justice, and Agriculture held hearings on the Thornburgh Memorandum and other attempts by the Department of Justice to circumvent state ethics

149. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

150. 810 F. Supp. 1234 (D.N.M. 1992).

151. *In re Gorence*, 810 F. Supp. 1234, 1238 (D.N.M. 1992); see also *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993) (rejecting argument that federal prosecutor's duties conflicted with state anti-contact rule), *appealed*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994). The court in *Ferrara* reasoned that a violation of the anti-contact rule was not "necessary and proper" to the performance of the prosecutor's federal duties. *Id.* The court found that there was no showing that the prosecutor was prohibited from fulfilling his duties without violating the state anti-contact rule, and, therefore, the Supremacy Clause did not bar the application of the State ethics rule. *Id.*

152. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

153. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434-35 (1982) ("The State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance."). As recognized by one district judge:

"Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They are also responsible for the discipline of lawyers."

In re Doe, 801 F. Supp. 478, 484 (D.N.M. 1992) (quoting *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (*per curiam*)).

154. Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 3(a), 93 Stat. 1040, 1044 (1979). Analyzing the Appropriation Act, the court in *Ferrara* stated that "Congress . . . clearly contemplated compliance with State bar ethical standards by attorneys practicing in the Department of Justice." *Ferrara*, 847 F. Supp. at 969.

rules.¹⁵⁵ After considering arguments on both sides, the Subcommittee concluded, "We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules before the Federal courts before which they appear."¹⁵⁶ The Subcommittee went on to observe that "we are not persuaded of a need to exempt Departmental attorneys from Model Rule 4.2 as adopted by State bars and Federal courts."¹⁵⁷ Finally, the Subcommittee "urge[d] reconsideration and withdrawal of the Attorney General's June 8, 1989 memorandum, 'Communications with Persons Represented by Counsel.'"¹⁵⁸ In light of the findings and recommendations of the Subcommittee, Congress carried forward the Act requiring Department attorneys to be licensed in a State without change.¹⁵⁹

Congress' general authority to preempt state ethics rules is not in question.¹⁶⁰ Nor is it disputed that regulations promulgated by federal agencies have the same force as congressional statutes for purposes of preempting state law.¹⁶¹ The Supreme Court has established a two-prong test for determining if federal regulations preempt state law.¹⁶² First, the state law must conflict with or frustrate the purposes of the federal regulation.¹⁶³ Second, the regulation must be within the agency's congressionally delegated authority.¹⁶⁴

155. SUBCOMM. ON GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE, COMM. ON GOVERNMENT OPERATIONS, *Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required*, H.R. REP. NO. 986, 101st Cong., 2d Sess. (1990) [hereinafter H.R. REP. NO. 986].

156. *Id.* at 32.

157. *Id.*

158. *Id.*

159. Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 3(a), 93 Stat. 1040, 1044 (1979) (requiring licensing of Department of Justice attorneys in one or more States or territories of United States). The Act was carried forward by the Department of Justice and Related Agencies Appropriation Act, 1994, Pub. L. No. 103-121, 107 Stat. 1153, 1163 (1993).

160. See *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 384-85, 403-04 (1963) (holding that federal statute authorizing nonattorneys to practice before federal Patent Office supersedes state ethics rule prohibiting unauthorized practice of law).

161. See *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (recognizing that Supremacy Clause includes both "federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization"); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (recognizing that federal regulations may preempt state law where federal agency is acting within scope of its statutory authority).

162. *City of New York*, 486 U.S. at 64.

163. *Id.*

164. *Id.*; see also *First Gibraltar Bank, FSB v. Morales*, 19 F.3d 1032, 1040 (5th Cir. 1994) (noting that "state law can be preempted by regulations promulgated by federal agencies acting within the scope of their congressionally delegated authority as well as by federal legislation") (emphasis added).

As explained by the Supreme Court, the proper focus is not on whether there was "express

Even if the Department of Justice's anti-contact regulation satisfies the first prong of the test,¹⁶⁵ it fails the second, as the authority has not been congressionally delegated. The general statutory authority of the Department of Justice to promulgate regulations governing conduct of its employees¹⁶⁶ does not entitle the Department to override the States' fundamental interest in regulating the attorneys who they have licensed, especially where Congress has left the licensing and regulation of federal government attorneys to the States.¹⁶⁷

The Department of Justice asserts that the promulgation of a federal regulation will provide the "clear and manifest" intent necessary to preempt state disciplinary actions.¹⁶⁸ While the Department's intent to preempt state law is clear, the Department's regulation is outside the scope of authority granted to the Executive Branch by the U.S. Constitution and federal statutes and, therefore, cannot supersede state law.¹⁶⁹ Furthermore, the Supremacy Clause argument put forth by the Department of Justice interferes with the inherent power of federal courts to supervise attorneys¹⁷⁰ because many federal courts consider exclusion of evidence, dismissal of an indictment, and reversal of a conviction to be inappropriate remedies

congressional authorization to displace state law," but rather on the proper authority of the agency to regulate the area in question. *City of New York*, 486 U.S. at 64 (quoting *Fidelity Fed. Savs. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982)). The Court further noted that federal regulation should be allowed to preempt state law where it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute. . . ." *Id.* (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). The Court then cautioned, however, that the regulation will not be held to preempt state law where "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.*

165. See *infra* Part III (demonstrating inconsistency between Department's regulation and state ethics rules). But see *In re Gorence*, 810 F. Supp. 1234, 1238 (D.N.M. 1992) (asserting that duties of prosecutor do not conflict with ethical duties); *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993), *appealed*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994).

166. 5 U.S.C. § 301 (1988) (giving Attorney General authority to promulgate regulations governing conduct of Department of Justice employees).

167. In order for federal regulation to preempt state law, the regulation must be within the authority granted to the agency putting forth the regulation. *Ferrara*, 847 F. Supp. at 970 (refusing to interfere with disciplinary proceedings against federal prosecutor "[b]ecause state regulation of the federal function is here authorized by Congress" through Appropriation Act). In light of the Appropriation Act and a House subcommittee hearing regarding state regulation of DOJ attorneys, there is no evidence of Congress' intent to authorize the new regulation. See *supra* notes 155-59 and accompanying text.

168. See Communications with Represented Persons, *infra* app., § 77.12 (establishing preemption of state ethics rules by proposed regulation).

169. Cf. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 403 (1963) (holding that where Congress has not exceeded scope of authority granted to it, it may preempt state law).

170. See *infra* Part II.B.2 (discussing inherent power of federal courts to address discipline of attorneys who practice before them).

for a violation of the anti-contact rule.¹⁷¹ Without these remedies, the only option available to federal courts seeking to address ethical violations is referral to state disciplinary tribunals. Therefore, the Department's regulation fails the second prong of the preemption test; the regulation cannot be within the scope of the Department's congressionally delegated authority because it would interfere with judicial oversight of federal attorneys, thereby violating the separation of powers doctrine.

B. Supervisory Power of Federal Courts Over Conduct of Attorneys

The commentary to the final version of the Department of Justice regulation contains significant discussion of the relationship between the regulation and the federal courts' ability to enforce ethical principles utilizing their local rulemaking power or inherent supervisory powers.¹⁷² In previous commentary, the Department of Justice took the position that the separation of powers doctrine¹⁷³ prevents the federal courts from using either their local rulemaking power¹⁷⁴ or their inherent supervisory authority¹⁷⁵ to discipline federal prosecutors when they violate DR 7-104 during a federal investigation or prosecution.¹⁷⁶ Most of the commentary to the final regulation adopts the position taken in the earlier commentary.¹⁷⁷ The Department's position, however, is ill-conceived and misinterprets

171. See *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988) (holding that appropriate remedy for violation of DR 7-104(A) (1) is disciplinary action); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.) (concluding that reversal of conviction is not appropriate remedy for violation of DR 7-104), *cert. denied*, 412 U.S. 932 (1973).

172. Communications with Represented Persons, *infra* app., § 77.12 (setting out position that inconsistent local federal court rules are preempted by Department's regulation). *Accord* Communications with Represented Persons, *supra* note 111, at 10,096 (containing virtually no discussion of justification for Department regulation preempting local court rules and inherent supervisory authority).

173. See *Morrison v. Olson*, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting) (laying out, in detail, Founders' concerns underlying separation of powers doctrine); THE FEDERALIST No. 78, at 22 (Alexander Hamilton) (Roy P. Fairchild ed., 1981) ("It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive.").

174. See 28 U.S.C. § 2071 (1988) (authorizing federal courts to adopt local rules necessary for administration of judicial business); FED. R. CRIM. P. 57 (authorizing district courts to enact local court rules).

175. See *infra* Part II.B.2 (discussing scope and impact of inherent supervisory authority of federal courts).

176. See Communications with Represented Persons, *supra* note 21, at 39,980 (laying out Department's argument that federal case law inconsistent with proposed regulation is not controlling).

177. See Communications with Represented Persons Commentary, *supra* note 2, at 39,917 (stating that local district court rules, even those dealing with attorney discipline, may not displace legislatively authorized national rules of procedure).

the relationship of the Department's regulations to the federal courts' local rulemaking power and inherent supervisory authority.

1. *Federal courts' local rulemaking power to adopt ethics rules*

Congress has granted federal courts the ability to promulgate local rules to govern the administration of judicial business.¹⁷⁸ In addition, the Supreme Court has authorized federal courts to adopt local court rules that govern matters of detail.¹⁷⁹ The First Circuit in *United States v. Klubock*¹⁸⁰ recognized a four-part test for determining whether a district court has the authority to promulgate a particular local rule.¹⁸¹ In order for a local rule to be within the authority of the district court, the local rule: (1) cannot conflict with an Act of Congress; (2) cannot conflict with a procedure adopted by the Supreme Court; (3) cannot violate the Constitution; and (4) must deal with subject matter that is in the power of the federal court to govern.¹⁸²

In contending that these local court rules should give way to a regulation by the executive branch, the Department of Justice relies on two principle arguments.¹⁸³ First, the Department argues that the power of the federal courts to issue rules is narrowly pre-

178. 28 U.S.C. § 2071. The statute provides:

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Id.

179. FED. R. CRIM. P. 57. The Rule states:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

Id.; see also FED. R. CIV. P. 83 (providing for rulemaking in same manner as FED. R. CRIM. P. 57).

180. 832 F.2d 664 (1st Cir. 1987).

181. *United States v. Klubock*, 832 F.2d 664, 667 (1st Cir. 1987) (citing *Frazier v. Heebe*, 482 U.S. 641, 654 (1987) (Rehnquist, C.J., dissenting)).

182. *Id.*

183. See Communications with Represented Persons Commentary, *supra* note 2, at 39,917 (summarizing Department of Justice arguments); see also Communications with Represented Persons, *supra* note 21, at 39,980-81 (basing arguments on principle that state rules might interfere with duties of federal officials). The Department of Justice actually relies primarily on the fact that the regulation will satisfy the "authorized by law" provision of the model rule. Communications with Represented Persons Commentary, *supra* note 2, at 39,917. Because the "authorized by law" provision of DR 7-104(A)(1) and MR 4.2 concerns the interpretation of the anti-contact rule, it will be analyzed later in this Comment. See *infra* Part III.A. This section focuses on the authority of the Department to supersede the courts' oversight of attorney professional ethics.

scribed.¹⁸⁴ In earlier commentary, the Department relied primarily on *Baylson v. Disciplinary Board*¹⁸⁵ and the dissenting opinion of Judge Campbell in *United States v. Klubock*,¹⁸⁶ neither of which support the Department's position.¹⁸⁷ Both of these decisions deal with the conflict between a local district court rule prohibiting prosecutors from summoning an attorney to testify before a grand jury about the attorney's client¹⁸⁸ and Federal Rule of Criminal Procedure 17, which governs the issuance of grand jury subpoenas.¹⁸⁹ The district court in *Baylson* refused to apply the district court rule to federal attorneys because the rule created mechanisms for judicial review, rules of procedure, and evidentiary standards, all of which are prohibited by the local rulemaking authority.¹⁹⁰ These mechanisms are not present with judicial enforcement of DR 7-104(A)(1) when a federal court refers the violation of the anti-contact rule to the state ethics commission. Furthermore, the opinion in *Klubock* recognizes that ethical regulation of attorneys is a proper subject for the exercise of the court's local rulemaking authority.¹⁹¹ In the commentary to the final regulation, the Department makes a

184. Communications with Represented Persons Commentary, *supra* note 2, at 39,917 (asserting that supervisory power of federal courts does not extend to disciplining persons not before court); see also Communications with Represented Persons, *supra* note 21, at 39,980 (contending that local rulemaking authority of federal district courts is "narrowly limited").

185. 975 F.2d 102 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1578 (1993).

186. 832 F.2d 649, 658-60 & n.25 (1st Cir.) (Campbell, J., dissenting), *aff'd on reh'g by equally divided court*, 832 F.2d 664 (1st Cir. 1987) (en banc).

187. Communications with Represented Persons, *supra* note 21, at 39,980-81 (reading *Baylson* and *Klubock* as supporting proposition that federal district court rule that seeks to prohibit otherwise legal conduct of DOJ attorneys in exercise of their out-of-court investigatory duties would almost certainly exceed local rulemaking authority).

188. See Cramton & Udell, *supra* note 41, at 359-86 (giving detailed account of scope and application of subpoena rule to federal prosecutors). In both *Baylson* and *Klubock*, the local court rule was initially a state ethics provision, but was later adopted by the district court through its local rulemaking authority. See *Baylson v. Disciplinary Bd.*, 975 F.2d 102, 104-05 (3d Cir. 1992) (adopting Rules of Professional Conduct of Pennsylvania Supreme Court), *cert. denied*, 113 S. Ct. 1578 (1993); *United States v. Klubock*, 832 F.2d 664, 665-66 (1st Cir. 1987) (accepting rule requiring prior judicial approval before grand jury subpoenas may be served on attorneys).

189. See *Baylson*, 975 F.2d at 108 (noting that "neither Rule 17 nor any other provision in the federal rules or statutes allows for judicial intervention before a subpoena is served"); *Klubock*, 832 F.2d at 665 (stating that Rule 17 allows for nondiscretionary issuance of subpoenas).

190. See *Baylson*, 975 F.2d at 105 (adopting decision of district court, though on narrower grounds, that adopted rule is invalid because its adoption as federal law falls outside local rulemaking authority of federal district courts); see also *Almond v. United States Court*, 852 F. Supp. 78, 87 (D.N.H. 1994) (holding that attorney subpoena rule is unauthorized exercise of court's rulemaking authority because, although it "undoubtedly implicates 'latent' ethical concerns, . . . it requires the creation of . . . a novel form of grand jury procedure").

191. *Klubock*, 832 F.2d at 667 (recognizing that courts have inherent and statutory authority to control ethical matters in their forum); see also *Klubock*, 832 F.2d at 654-55 ("The ethical relationships between courts, attorneys and their clients, although obviously of interest to Congress and the Supreme Court, have been left traditionally to the primary regulation of the courts before whom those problems arise. The regulation by district courts of the ethical conduct of those who practice before it can hardly be called 'a fundamental change.'").

very compelling argument,¹⁹² contending that a "local rule inconsistent with a regulation lawfully issued under statutory authority is, as a matter of law, inconsistent with the underlying statute, and must yield to Congress's paramount authority as delegated to the department or agency issuing the regulation."¹⁹³

While this proposition is indisputably correct,¹⁹⁴ the operative language is "a regulation *lawfully issued*."¹⁹⁵ The regulation at issue here is outside the scope of the Department's rulemaking power. It conflicts with both Congress' intent to delegate the licensing of federal attorneys to the States¹⁹⁶ and the federal courts' inherent authority to supervise the attorneys who practice before them.¹⁹⁷ The local court rules, which adopt state or ABA ethics provisions, do not conflict with the congressional statute delegating authority to the Department of Justice because no authority to exempt federal prosecutors from state ethics provisions has been delegated to the Department.

The Department also argues that the separation of powers doctrine requires that where an executive and judicial rule conflict, the judicial rule must give way.¹⁹⁸ The Department of Justice cannot fashion a constitutional principle by simply declaring it to be true, and the sole case cited by the Department for this proposition simply does not support that contention.¹⁹⁹ Furthermore, as noted below, a more

192. Communications with Represented Persons Commentary, *supra* note 2, at 39,917 (relying on underlying principle that DOJ's legislative authority supersedes courts' local rulemaking authority).

193. Communications with Represented Persons Commentary, *supra* note 2, at 39,917.

194. See *supra* note 178 (quoting 28 U.S.C. § 2071, which clearly states that local rules may not be inconsistent with Act of Congress). Where Congress authorizes the Department of Justice to promulgate regulations, federal courts cannot promulgate local rules that conflict with Justice regulations without infringing on Congress' ability to delegate regulationmaking authority to its agencies. 28 U.S.C. § 2071 (1988).

195. Communications with Represented Persons Commentary, *supra* note 2, at 39,917 (emphasis added).

196. See *supra* Part II.A (setting forth position that Congress did not intend to delegate to Department of Justice power to promulgate regulations concerning attorney ethics).

197. See *infra* Part II.B.2.

198. Communications with Represented Persons, *supra* note 21, at 39,980-81.

199. See Communications with Represented Persons, *supra* note 21, at 39,981 (citing *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924)). *Michaelson* dealt with the inherent supervisory powers of the federal courts, not their rulemaking authority. See *Michaelson*, 266 U.S. at 65-66 (dismissing petitioner's argument that statute interfered with courts' inherent contempt power, because "the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law"). The statute at issue in *Michaelson* created a procedure for dealing with criminal contempt. See *id.* at 64. The Supreme Court upheld the statute on the ground that the statute merely governed the procedure for conducting criminal contempt and not the power of the court to use contempt to punish. *Id.* at 65-66. The Court held that the statute "does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined."

accurate application of the separation of powers doctrine would sustain the courts' supervisory authority over the Department's conflicting regulation.²⁰⁰

2. *Inherent supervisory power of federal courts to regulate conduct of attorneys*

The Supreme Court and lower federal courts have clearly laid out the inherent power of the federal courts to control the attorneys before them.²⁰¹ That supervisory power originates from the interests federal courts have in assuring that trials are conducted in a fair manner²⁰² and "ensuring that justice is done."²⁰³ In *United States v. Hastings*,²⁰⁴ the Supreme Court set out the three situations in which a court may exercise its inherent supervisory authority: (1) "to implement a remedy for violation of recognized rights"; (2) to preserve judicial integrity by assuring that the jury is allowed to consider only the evidence properly before it; and (3) to deter further illegal conduct.²⁰⁵

The Department of Justice claims that the courts' inherent power to supervise the attorneys who come before them is narrowly prescribed.²⁰⁶ The Department's position finds support in the Supreme Court's observation that federal courts do not have a "chancellor's foot" veto over law enforcement practices of which they

Id. at 66.

200. See *infra* notes 227-30 and accompanying text (positing that Department's regulation infringes on court's inherent supervisory authority over conduct of attorney who practices before court thereby violating separation of powers doctrine).

201. See, e.g., *United States v. Williams*, 112 S. Ct. 1735, 1742 (1992) ("The court's supervisory power . . . may be used as a means of establishing standards of prosecutorial conduct before the courts themselves."); *United States v. Hastings*, 461 U.S. 499, 505-06 (1983) (listing three purposes for which supervisory powers may be exercised), discussed *infra* text accompanying note 205; *McNabb v. United States*, 318 U.S. 332, 340 (1943) (holding that supervision of criminal justice is not limited to determination of constitutional or statutory violations of prosecutorial misconduct); *Nardone v. United States*, 308 U.S. 338, 341-42 (1939) (holding that judges must have discretion to control administration of justice before federal courts); *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) ("The Court of Appeals also has power to fashion remedies directly against an attorney persistently engaging in improper courtroom conduct."), cert. denied, 456 U.S. 989 (1982). In *United States v. Lopez*, the Ninth Circuit reiterated the three interests set out in *Hastings*, *United States v. Lopez*, 4 F.3d 1455, 1463 (9th Cir. 1993), and explicitly noted that the supervisory powers have been upheld as a means of policing prosecutorial misconduct. *Id.*

202. *Lopez*, 4 F.3d at 1463 ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.").

203. *United States v. Simpson*, 927 F.2d 1088, 1089 (9th Cir. 1991).

204. 461 U.S. 499 (1983).

205. *Hastings*, 461 U.S. at 505.

206. Communications with Represented Persons, *supra* note 21, at 39,981 (arguing that local rulemaking authority is limited to prescribing local practices as to "matters of detail").

d[o] not approve."²⁰⁷ The "chancellor's foot veto" condemned by the Supreme Court, however, is the unprincipled use of supervisory power. The Supreme Court in *United States v. Russell*²⁰⁸ noted that "[t]he execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to *judicially fashioned rules* to enforce those limitations."²⁰⁹ The Court has also noted, however, that "[t]he uniform first step for admission to any federal court is admission to a state court. The federal court is entitled to rely on the attorney's knowledge of the state code of professional conduct applicable in that state court."²¹⁰ The adoption of state ethics rules by local federal courts is simply a way for the federal court to ensure that the congressional limitations, which require that all Department of Justice attorneys are licensed by the bar of at least one State, are met.

Similarly, in *United States v. Simpson*²¹¹ the Ninth Circuit condemned the use of supervisory power as courts "mak[ing] up the rules as they go, imposing limits on the executive according to whim or will."²¹² Unprincipled enforcement of the will of the judiciary upon unapproving law enforcement personnel is not, however, a danger when the court merely has adopted, by local rule, a clear ethical principle supported by substantial case law.²¹³

The Department asserts that "[t]he regulation . . . accords substantial and appropriate deference to the court's supervisory authority over the parties and proceedings before it."²¹⁴ While the Department is correct that the regulation affords courts significant oversight,²¹⁵ the oversight authorized by the regulation is insufficient

207. *United States v. Russell*, 411 U.S. 423, 435 (1973).

208. 411 U.S. 423 (1973).

209. *Russell*, 411 U.S. at 435 (emphasis added).

210. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985).

211. 927 F.2d 1088 (9th Cir. 1991).

212. *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991).

213. See *In re Investigation of FMC Corp.*, 430 F. Supp. 1108, 1110 (S.D. W. Va. 1977). In *FMC*, the court observed:

In exercising its supervisory power, the canons enjoy great weight in the court's assessment of whether appropriate standards are being observed by lawyers in the course of their practice within the jurisdiction of the court. The canons are themselves the product of experience gained over the decades, even the centuries, and are designed to establish and assure standards of simple fairness and moral and ethical responsibility on the part of counsel in furtherance of the ends of justice.

Id.

214. Communications with Represented Persons Commentary, *supra* note 2, at 39,917.

215. See Communications with Represented Persons Commentary, *supra* note 2, at 39,917 (allowing no substantive communication to occur without consent of counsel unless: court finds knowing, intelligent, and voluntary waiver; communication is made pursuant to court-approved discovery procedures; or communication concerns criminal or civil offense different from

for two reasons. First, the regulation only authorizes courts to police constitutional violations of the parties' Fifth and Sixth Amendment rights.²¹⁶ Rules of professional ethics, however, extend protections and limitations that are broader than the constitutional limits.²¹⁷

The second reason that the regulation provides insufficient oversight by federal courts is that it authorizes a federal court to punish attorney misconduct only when the prosecutor comes into federal court.²¹⁸ The Supreme Court's recent opinion in *United States v. Williams*²¹⁹ would, at first glance, appear to support the Department's position on separation of powers, i.e., that courts cannot sanction attorney conduct that occurs outside of the court process. That case dealt with the scope of the lower courts' inherent supervisory authority in grand jury proceedings.²²⁰ The opinion limited the ability of the lower court to dismiss an indictment because a prosecutor failed to present exculpatory evidence to the grand jury.²²¹ In reaching that conclusion, the Court made broad statements about the limited authority of the courts to punish prosecutors for conduct that does not occur before the court.²²² A closer reading of *Williams*, however, indicates that the opinion does not foreclose enforcement of the anti-contact rule by federal courts.

The holding in *Williams* differs from the current situation in two important ways. First, the Court placed significant emphasis on the independence of the grand jury from both the court and the prosecutor.²²³ Enforcement of ethics rules, on the other hand, has always been an important function of the courts. As one court has recognized, the ethics violations do not need to occur in the presence

offense before court).

216. Communications with Represented Persons Commentary, *supra* note 2, at 39,917 (observing that "this regulation does not . . . disturb the authority of federal courts to fashion appropriate remedies when *ex parte* contact violates the Constitution") (emphasis added).

217. See *infra* note 338 (citing several cases holding that anti-contact rule extends beyond constitutional protections).

218. See Communications with Represented Persons Commentary, *supra* note 2, at 39,917 (recognizing that regulation governs attorney's conduct when he is "not before the court").

219. 112 S. Ct. 1735 (1992).

220. *United States v. Williams*, 112 S. Ct. 1735, 1742 (1992) (acknowledging that grand jury functions independently of judicial branch).

221. *Id.* at 1741-42.

222. *Id.* (recognizing that grand jury is separate institution and, as general matter, courts have no "supervisory" judicial authority over it).

223. *Id.* at 1742-46 ("The grand jury's functional independence from the judicial branch is evident both in the scope of its power to investigate criminal wrongdoing, and in the manner in which that power is exercised."); see also *Almond v. United States Court*, 852 F. Supp. 78, 85 (D.N.H. 1994) (noting that *Williams* prohibited judicial oversight from interfering with independence of grand jury system).

of the court in order for the court to enforce the ethical principles.²²⁴

The second important distinction between the holding in *Williams* and enforcement of DR 7-104 is that in *Williams* there was no explicit rule requiring prosecutors to present exculpatory evidence to the grand jury.²²⁵ It is this unbridled discretion of the district court to exercise a "chancellor's foot veto" over prosecutorial conduct that the Court in *Williams* condemned.²²⁶ The anti-contact rule provides a longstanding ethical principle by which federal prosecutors can guide themselves without fear of discipline from the federal court. It does not provide the danger of an unwritten rule that the federal court can impose on federal law enforcement officials by will or whim.

Furthermore, the separation of powers argument actually cuts against the Department of Justice.²²⁷ By promulgating a rule of ethics, the Department of Justice actually usurps the supervisory power of the judiciary to control the actions of court officers.²²⁸ Several courts have also noted that it remains within their inherent supervisory powers to refer violations of the Rules of Professional Responsibility to the appropriate state ethics commission for investigation and potential sanction.²²⁹ Because the Department of Justice may not strip a co-equal branch of government of its inherent and inseparable power by simple regulation,²³⁰ it must either abide by the current

224. *United States v. Klubock*, 832 F.2d 649, 653 (1st Cir.) (citing numerous cases for proposition that "the competence of the district courts to make local rules regarding the admission of attorneys to their respective bars, and the control of their conduct thereafter, cannot at this late date be seriously questioned"), *aff'd on reh'g by equally divided court*, 832 F.2d 664 (1st Cir. 1987) (en banc).

225. *See Williams*, 112 S. Ct. at 1741-42 n.6 (listing standards of behavior for prosecutors as set forth in United States Code).

226. *Id.* at 1741.

227. *See* ABA Report No. 301, *supra* note 67, at 3 (asserting that DOJ's position on MR 4.2 is "unilateral assumption of authority to render self-interested interpretations of ethical standards").

228. *See United States v. Hastings*, 461 U.S. 499, 505-06 (1983) (holding that "guided by considerations of justice," and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress" (quoting *McNabb v. United States*, 318 U.S. 332, 341 (1943))); *see also* ABA Report No. 301, *supra* note 67, at 7 (establishing ABA's position that Thornburgh Memorandum usurps judicial authority, violating separation of powers).

229. *See, e.g., United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993) (averring that referring federal officials to state bar for disciplinary proceedings is adequate action to discipline and punish government attorneys who attempt to circumvent "standards of their profession"); *United States v. Dennis*, 843 F.2d 652, 668 (2d Cir. 1988) (holding that appropriate remedy for violation of DR 7-104(A)(1) is disciplinary action); *Klubock*, 832 F.2d at 665 (upholding power of state disciplinary board to address ethics violation by federal officer).

230. *See Michaelson v. United States*, 266 U.S. 42, 66 (1924) (holding that contempt power of federal judiciary is central to its authority); ABA Report No. 301, *supra* note 67, at 7 (asserting that "no federal regulation should be allowed to usurp this traditional and fundamental role of the judiciary" to issue rules of court (citing *Chadha v. Immigration and Naturalization Serv.*, 634

version of the anti-contact rule or make efforts to change the rule in those jurisdictions in which it is unsatisfied with the interpretation of the rule.²³¹

III. PROPER INTERPRETATION OF ANTI-CONTACT RULE IN ITS APPLICATION TO FEDERAL LAW ENFORCEMENT OFFICIALS

The regulation promulgated by the Department of Justice regarding communications with persons represented by counsel is not a proper exercise of the Department's rulemaking authority.²³² Unresolved issues, however, still remain concerning the application of DR 7-104(A)(1) to federal prosecutors. Specifically, there are seven issues that remain the subject of debate and concern among federal prosecutors and the courts regarding the interpretation of the anti-contact rule:²³³ (1) are prosecutors "authorized by law" to contact represented persons without the consent of counsel by virtue of their duty to investigate and enforce the law; (2) is an indictment or other formal proceeding necessary for a person to become a "party" to the criminal process; (3) if unindicted crimes are subject to the anti-contact rule, when has a party retained counsel in the "matter"; (4) does the rule prohibit covert communications with represented persons; (5) if covert communications are prohibited by the rule, to what extent are prosecutors responsible for the actions of investigators and informers; (6) may a prosecutor have overt contact with a represented person if that person initiates the contact; and (7) assuming DR 7-104(A)(1) is applicable against federal prosecutors, what is the appropriate remedy for a violation?

A. *Scope of "Authorized by Law" Provision of Anti-Contact Rule*

A primary argument used by the Department of Justice to justify its

F.2d 408 (1980), *aff'd*, 462 U.S. 919 (1983)).

231. See ABA Report No. 301, *supra* note 67, at 9 (arguing that if it is necessary to get exemptions for federal attorneys DOJ must do so through individual jurisdictions); Taylor, *supra* note 125, at 17 (criticizing Department's policy on anti-contact rule for seeking exemption for federal lawyers to state ethics rules, and recommending several changes that Department could seek in state rules).

232. See 5 U.S.C. § 301 (1988) (limiting power of head of Executive department to writing regulations to govern his or her department, its employees, and its business). The Attorney General is authorized by Congress to create rules governing "the conduct of its employees." *Id.* This regulatory power does not extend to a right to infringe on courts' inherent power to control the conduct of attorneys before them, because this power is "inseparable." *Michaelson*, 266 U.S. at 66; see also *In re Snyder*, 472 U.S. 634, 645 n.6 (1985) ("Federal Courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law.").

233. See Green, *supra* note 13, at 289 (listing questions presented by application of DR 7-104(A)(1) to federal law enforcement officials).

regulation²³⁴ is that the ABA version of the anti-contact rule (and equivalent versions adopted in most states),²³⁵ as well as the ethics provisions of most local federal rules,²³⁶ contain a provision allowing contact without the knowledge or consent of the attorney when the opposing counsel is "authorized by law" to contact the party directly.²³⁷ Prior to the formal promulgation of the regulations, the Department relied on its statutory authority to orchestrate criminal investigations,²³⁸ collect evidence,²³⁹ and prosecute crime²⁴⁰ as justifications for contacting represented persons in violation of DR 7-104.²⁴¹ Most courts, with one notable exception, have rejected this

234. Communications with Represented Persons, *infra* app., § 77.12; see also *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) (reiterating Department's position that DOJ attorneys fall within "authorized by law" exception to California ethics rule); *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (acknowledging argument by Government that federal prosecutors are authorized by law to contact represented parties during criminal investigation), *cert. denied*, 498 U.S. 871 (1990); *In re Doe*, 801 F. Supp. 478, 486 (D.N.M. 1992) (setting forth Department's argument that it is vested with authority to interpret when and how code of ethics applies to Assistant U.S. Attorneys); Communications with Represented Persons, *supra* note 111, at 10,102 (detailing circumstances in which federal official may contact represented individual); Richard Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 JUDICATURE 290, 291 (1991) (responding to criticism that Thornburgh Memorandum relies heavily on Supremacy Clause); Thornburgh Memorandum, *supra* note 59, at 492 (establishing position that general statutory authority to investigate and prosecute crime authorizes federal prosecutors to contact represented parties).

235. See Communications with Represented Persons, *supra* note 111, at 10,096 ("Virtually all the states have adopted some version of DR 7-104 or Model Rule 4.2 that includes an 'authorized by law' exception."). But see FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-4.2 (1992) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer."). The Florida Supreme Court explicitly did not adopt the "authorized by law" provision in its ethics code. *Id.* The Florida State Bar Association Committee on Professional Ethics has also issued an opinion rejecting the Thornburgh Memorandum's position that the anti-contact rule should not apply to federal prosecutors. See Florida State Bar Ass'n Comm. on Professional Ethics, Op. No. 90-4 (July 15, 1990), available in Westlaw, 1990 WL 446959, at *1 (stating that "Florida Rule 4-4.2 (communications with person represented by counsel) contains no exception for activities of U.S. Department of Justice attorneys").

236. See *Rand v. Monsanto Co.*, 926 F.2d 596, 601-02 (7th Cir. 1991) (detailing local federal district court rules' adoption of attorney-disciplinary measures).

237. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1980).

238. 28 U.S.C. § 533 (1988 & Supp. V 1993) (authorizing Attorney General to appoint officials to conduct criminal investigations).

239. *Id.*

240. 28 U.S.C. §§ 515(a), 533, 547.

241. See Thornburgh Memorandum, *supra* note 59, at 493 (asserting that "authorized by law" provision of ethical rule is basis for exemption of federal prosecutors engaged in authorized law enforcement activity from ethical rule); see also *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) (rejecting Department's reliance on "authorized by law" provision); *In re Doe*, 801 F. Supp. 478, 487 (D.N.M. 1992) (refusing to accept Department's argument that "authorized by law" provision of ethical rule made contact with defendant permissible); Brief for Appellant, *supra* note 103, at 4 n.2 (noting that issue before court on appeal is not validity of DOJ regulation "because it did not govern the conduct at issue" in this appeal); Thornburgh, *supra* note 234, at 336 (rebutting claim that Supremacy Clause is main justification for Thornburgh

argument.²⁴²

The exception was the Second Circuit in *United States v. Hammad*,²⁴³ which found that the general enabling statutes did give prosecutors the authority to conduct or supervise legitimate investigative actions that resulted in the communication with represented persons in the absence of their counsel.²⁴⁴ But the court was also careful to note "that in some instances a government prosecutor may overstep the already broad powers of his office, and in so doing, violate the ethical precepts of DR 7-104(A)(1)."²⁴⁵ The court left the determination of when a prosecutor overstepped his authority for a "case-by-case adjudication."²⁴⁶ This case-by-case adjudication suggested by the *Hammad* court, however, is an unacceptable method of determining the limits on a prosecutor's ability to contact represented individuals. Case-by-case adjudication gives courts what the Supreme Court has condemned as a "'chancellor's foot' veto over law enforcement practices of which it did not approve."²⁴⁷

Now that the regulation has been adopted by the Department of Justice, the "authorized by law" argument has become more compelling.²⁴⁸ However, the authority of the Department to override the supervisory power of the federal courts and preempt state law, where Congress has explicitly required that all Department of Justice attorneys be licensed by one of the States or the District of Columbia is simply nonexistent.²⁴⁹ The Department's attempt to alter the near unanimous opinion of federal courts that DR 7-104 applies to federal prosecutors is bound to meet with resistance in the courts.²⁵⁰

Memorandum and asserting that "authorized by law" provision of ethical rule supports Department's position).

242. See, e.g., *Lopez*, 4 F.3d at 1461 (citing commentary to California anti-contact rule that requires "express statutory schemes" for exemption from ethics rule); *Doe*, 801 F. Supp. at 486-87 (relying on *Lopez* analysis to reject Department's argument).

243. 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990).

244. *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (reasoning that where prosecutor is conducting proper law enforcement activity, including authorizing undercover investigations, prosecutor is acting within his statutory authority, and therefore his conduct is "authorized by law"), cert. denied, 498 U.S. 871 (1990).

245. *Id.* at 839-40.

246. *Id.* at 840.

247. *United States v. Russell*, 411 U.S. 423, 435 (1973) (limiting federal court's power to prevent law enforcement techniques through entrapment).

248. See *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993) (rejecting earlier "authorized by law" argument based on Thornburgh Memorandum because Memorandum "was neither promulgated pursuant to notice and comment rule-making nor published in the Federal Register"), *appealed*, No. 93-5233 (D.C. Cir. argued Dec. 8, 1994).

249. See *supra* Part II (discussing weaknesses in DOJ's supremacy clause and separation of powers arguments).

250. Cf. Norton, *supra* note 39, at 207 (noting that ABA House of Delegates voted overwhelmingly to condemn Thornburgh Memorandum). Norton's article clearly lays out the dangers of the Department of Justice's position regarding the application of ethics rules to all

B. Application of Anti-Contact Rule to Preindictment Communications

The regulation put forth by the Department of Justice rejects a blanket prohibition against communications with represented persons prior to the attachment of the Fifth and Sixth Amendment rights to counsel.²⁵¹ The regulations permit most noncustodial, investigatory communications with a represented person before the attachment of the Fifth or Sixth Amendment rights to counsel.²⁵² This policy

government attorneys as well as state law enforcement officials. *Id.* at 206-07. Norton observes that if the Department is successful with this attempt to exempt law enforcement officials, the logic carries over to all ethics rules and to all attorneys working in all executive and legislative agencies in the federal government. *Id.* at 207. In fact, the Department essentially already takes the position that it has the power to exempt its attorneys from all ethics rules: "[E]ven though the Department has the authority to exempt its attorneys from the reach of [MR 4.2 and DR 7-104(A)(1)], the Department has decided not to implement a *wholesale* exemption." Communications with Represented Persons Commentary, *supra* note 2, at 39,911 (emphasis added). There is nothing in the Department's reasoning that indicates its power to create a "wholesale exemption" from other ethics rules is more restricted. *See* Taylor, *supra* note 125, at 17, 30 (questioning how Department's reasoning limits it to seeking exemption from anti-contact rule). Moreover, state prosecutors are beginning to pursue in state courts a separation of powers argument similar to that asserted by the Department of Justice. Norton, *supra* note 39, at 207 (citing *Triple A Machine Shop Inc. v. State*, 261 Cal. Rptr. 493 (1989); *In re Criminal Investigation No. 13*, 573 A.2d 51 (Md. App. 1990)).

On August 6, 1994, when the Department presented its new regulation to the ABA, ABA President R. William Ide, III, characterized the Department's regulation as "misguided." Ballard, *supra* note 39, at 7. He criticized the Department's efforts, observing that "[t]his approach would substitute the Attorney General's regulation of lawyers for the control and supervision that has historically been the province of the state and federal judiciary." *Id.*

Finally, it is significant to observe that the regulation has critics in the highest levels of the judiciary. The Conference of State Supreme Court Chief Justices attacked the regulation, "arguing that the Department lacks authority to preempt state ethics rules or to supersede local federal district court rules." Communications with Represented Persons Commentary, *supra* note 2, at 39,913. This august group also asserted "that it is the *exclusive* province of the state supreme courts to construe state disciplinary rules and to determine whether this regulation falls within the 'authorized by law' exception to these rules." *Id.* at 39,916 (emphasis added); *see also* Maria B. Rubin, *The Thornburgh Memo, Now the Reno Rule: A Case of Ethics*, N.Y. L.J., Sept. 23, 1994, at 1, 4 (noting that "the Conference of Chief Judges (of state courts) 'urged its members to enforce the no-contact rule with regard to "all members of the bar" as the Justice Department's assertion of power violates "principles of federalism" and is 'without appropriate authority.'" (quoting Daniel Weis, *Clinton Administration Embraces Thornburgh Memo*, N.Y. L.J., Aug. 8, 1994, at 1)).

251. Communications with Represented Persons, *infra* app., § 77.7; *see also* Communications with Represented Persons Commentary, *supra* note 2, at 39,922-23 (stating that individuals who are neither arrestees nor defendants may be communicated with, directly or indirectly, by government attorneys, but recognizing that overt communications raise different considerations than covert ones and should be circumspect).

252. Communications with Represented Persons, *infra* app., § 77.7; *see also* Communications with Represented Persons Commentary, *supra* note 2, at 39,922-23 (discussing in commentary need for preindictment noncustodial communications). *But see* Communications with Represented Persons, *infra* app., §§ 77.8 to .9 (limiting both communications with represented person concerning plea negotiations and interference with attorney-client relationships); Communications with Represented Persons, *supra* note 111, at 10,097 (proposing changes to U.S. ATTORNEYS' MANUAL § 9-13.231, which limits overt communications with represented persons).

accurately reflects the position of a majority of the case law and supporting authority.²⁵³ There are, however, notable exceptions. The Second Circuit in *United States v. Hammad* flatly refused to limit the application of DR 7-104 to the point after the Sixth Amendment right to counsel attached.²⁵⁴

In *Hammad*, the court upheld a lower court finding that the AUSA had violated DR 7-104(A)(1),²⁵⁵ but refused to suppress acquired evidence because of the previously unsettled nature of the law.²⁵⁶ The court refused to link the application of DR 7-104 to the attachment of the Sixth Amendment right to counsel because of the distinct, albeit related, goals that each protection is intended to afford.²⁵⁷ Furthermore, the court reasoned that the indictment process is under the control of the prosecutor and could be manipulated to gather information that could not be obtained after the attachment of the right to counsel.²⁵⁸ In order "to avoid handcuffing law enforcement officers in their efforts to develop evidence,"²⁵⁹ through, for example, directing undercover investigations prior to indictment, the court held that the use of legitimate law

253. See, e.g., *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (holding that anti-contact rule does not apply in preindictment situations); *United States v. Ryans*, 903 F.2d 731, 739 (10th Cir.) (rejecting defendant's suggestion that Tenth Circuit adopt *Hammad*'s application of anti-contact rule to preindictment phase of investigation), *cert. denied*, 498 U.S. 855 (1990); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.) (rejecting application of DR 7-104(A)(1) to undercover operations), *cert. denied*, 464 U.S. 852 (1983); *United States v. Lemonakis*, 485 F.2d 941, 955 (D.C. Cir. 1973) (holding that noncustodial, preindictment communication through informant did not violate "current ethical standards demanded of the legal profession"), *cert. denied*, 415 U.S. 989 (1974); *United States v. Marcus*, 849 F. Supp. 417, 421 (D. Md. 1994) (rejecting application of anti-contact rule in preindictment, noncustodial setting and citing circuits that support this proposition); *United States v. Guerrero*, 675 F. Supp. 1430, 1436 (S.D.N.Y. 1987) (citing numerous cases for proposition that "[e]ach federal circuit addressing this issue has indicated that DR 7-104(A)(1) would not apply in the investigatory phase of a criminal case"); *Cramton & Udell*, *supra* note 41, at 338 (concluding that goals of DR 7-104(A)(1) in protecting attorney-client relationship are not advanced by application of anti-contact rule to covert, preindictment investigations); *Green*, *supra* note 13, at 293-97 (determining that application of DR 7-104 in investigatory phase is "prosecutor's nightmare come true").

254. *United States v. Hammad*, 858 F.2d 834, 838-39 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990); see *supra* note 46 and accompanying text (laying out facts of *Hammad*).

255. *Hammad*, 858 F.2d at 840 (finding that informant acted as prosecutor's alter ego in violation of anti-contact rule).

256. *Id.* at 840-42 (following rationale used to suppress evidence in case of constitutional violation where anything short of exclusion would be ineffective in reaching rule's goals).

257. *Id.* at 839 (stating that Constitution establishes minimum level of protection required to satisfy defendant's rights, while Model Code of Professional Responsibility "encompasses the attorney's duty to 'maintain the highest standards of ethical conduct'" (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmb. (1981))).

258. *Id.*

259. *Id.* at 838.

enforcement techniques is "authorized by law."²⁶⁰ But the court found that the Government's use of the sham subpoena was not a legitimate law enforcement tactic and, therefore, the AUSA had violated the anti-contact rule.²⁶¹

The second notable case is *United States v. Jamil*.²⁶² Although this case was reversed on appeal²⁶³ on the issue of "alter egos,"²⁶⁴ the case is important because it provides one of the first exhaustive analyses of the application of DR 7-104(A)(1) to federal prosecutors. The opinion concludes that the anti-contact rule applies to preindictment, covert communications with represented persons.²⁶⁵ The facts of the case provide insight into the difficulties of limiting the applicability of DR 7-104(A)(1) to postindictment situations.

Jamil was the target of a grand jury investigation in which indictments were imminent.²⁶⁶ The defense counsel and the AUSA had several meetings to discuss the probable prosecution of Jamil.²⁶⁷ The defendant's counsel instructed customs agents working on the case not to talk with Jamil without their consent.²⁶⁸ The agents, counter to these instructions, found a willing informer who agreed to wear a wire and record his conversations with the suspect.²⁶⁹ The informer captured a conversation with the suspect and his counsel on tape.²⁷⁰ Although the AUSA did not know of the actions of the agents beforehand, he was later eager to use the recordings in the prosecution of Jamil.²⁷¹

The district court found that the attempted use of this information was a violation of DR 7-104(A)(1).²⁷² The court rendered an insightful analysis into the goals and application of DR 7-104(A)(1), rejecting the argument that the language of the ethics rule, which mentions a "represented party," provides a significant distinction between the pre- and postindictment applicability of the anti-contact

260. *Id.* at 839; see *supra* Part III.A (discussing "authorized by law" provision of DR 7-104(A)(1)).

261. *Hammad*, 858 F.2d at 840.

262. 546 F. Supp. 646 (E.D.N.Y. 1982), *rev'd*, 707 F.2d 638 (2d Cir. 1983).

263. *United States v. Jamil*, 707 F.2d 638 (2d Cir. 1983).

264. See *infra* Part III.C (discussing use of agents or other alter egos by attorney to communicate with represented person).

265. *United States v. Jamil*, 546 F. Supp. 646, 653 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983).

266. See *id.* at 649.

267. See *id.*

268. See *id.*

269. See *id.* at 649-50.

270. See *id.* at 650.

271. See *id.* at 651.

272. *Id.* at 655 ("An ethical violation [of DR 7-104(A)(1)] would occur at the moment the evidence is introduced . . .").

rule.²⁷³ The court reasoned that such a distinction would be too formalistic.²⁷⁴ The fact that a person was subject to an investigation, was aware of it, and retained counsel for that purpose was sufficient for DR 7-104 to apply.²⁷⁵ The court reasoned that ruling that DR 7-104(A)(1) attached only when formal criminal proceedings had commenced "is not in harmony with the spirit" of the Code of Professional Conduct.²⁷⁶ The object of the anti-contact rule, the court reasoned, is to "protect a client from squandering a possible claim or defense and to insure against disclosure of privileged information."²⁷⁷ These dangers exist as much prior to an indictment as after.²⁷⁸

Although a majority of courts reject application of DR 7-104(A)(1) to the preindictment setting, *Hammad* and *Jamil* represent clear instances in which a limitation on the application of the rule to after the commencement of formal proceedings would seriously undermine the goals of DR 7-104. It is possible, however, to reconcile the goals of DR 7-104(A)(1) with the need for prosecutors to conduct thorough

273. *Id.* at 653.

274. *Id.*; cf. *In re Simels*, No. M2-238 (LLS), 1993 U.S. Dist. LEXIS 17454, at *4-11 (S.D.N.Y. Dec. 10, 1993) (applying DR 7-104(A)(1) to attorney who interviewed witness connected to proceedings, but not formally charged). The court in *Simels* rejected a narrow reading of "party," reasoning that a strict interpretation of the term would raise form over substance. *Id.* at *6. The court reasoned that where a person's interests were so intertwined with the pending litigation, although not a formal party to the proceedings, that person must be considered a party to the matter. *Id.* at *5; see also HAZARD & HODES, *supra* note 109, § 4.2:110, at 744.1 n.2 (noting requiring formal charges to fall within definition of "party" under MR 4.2 would be too technical and narrow view of Rule).

275. *Jamil*, 546 F. Supp. at 653-54 (drawing analogy to situation where target of investigation is advised to seek advice of counsel when his testimony is sought by grand jury).

276. *Id.* at 654.

277. *Id.*

278. See *id.* ("[T]he most critical phase is often before indictment; it is then that the skilled attorney uses persuasion and negotiation to forestall or shape the potential prosecution."); see also Martin S. Murphy, *The "No-Contact" Rule and the Sixth Amendment: A Dilemma for the Ethical Prosecutor*, 38 BOSTON B.J. 8 (1994).

Although Murphy concludes that DR 7-104(A)(1) should not be applied to prosecutors before indictment, he makes strong arguments in favor of its pretrial application:

[C]onstitutional protections protect citizens only after criminal proceedings begin or police interrogate a suspect in custody. By then, it is often too late. In many cases, statements made by suspects before formal proceedings began to provide the most powerful evidence for the prosecution at trial, and even the best courtroom lawyering by defense counsel cannot undo the damage that a client has caused by speaking to investigators. The issue cuts across the entire criminal process: individual defendants charged with even minor offenses often find that their words, spoken without benefit of counsel, come back to haunt them, and Fortune 500 corporations being investigated for fraud against the government, their customers, or violations of environmental laws are not immune from the unpleasant discovery that statements made by their own employees to criminal investigators in the early stages of a governmental inquiry effectively require the company to work out a plea with the government rather than fight the charges brought against it.

Id. at 8.

investigations.²⁷⁹ The prosecutor should remain free to use undercover investigative tactics to elicit information from the suspect so long as the suspect is unaware he is under investigation and has not retained counsel to represent him in the investigation.²⁸⁰ Once the suspect is aware that he is the target of a federal investigation and retains counsel to represent him in the matter, the federal attorney should not direct further contact with the person.²⁸¹

C. Use of *Alter Egos*

The anti-contact rule also prohibits an attorney from circumventing the restrictions imposed by the rule by simply communicating with a represented person through an agent.²⁸² Such agents are common-

279. See WOLFRAM, *supra* note 8, §§ 11.6.1 to .2 (discussing goals of anti-contact rule). Wolfram notes that one goal of the anti-contact rule is to prevent the harm that would occur if "lawyers were free to exploit the presumed vulnerable position of a represented but unadvised party." *Id.* § 11.6.3.

280. This approach comports with the ethics rule. Contact with a represented person is only forbidden when a person is represented in the *subject matter* of the communications. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (stating that "a lawyer shall not communicate about the *subject* of the representation with a party the lawyer knows to be represented by another lawyer" (emphasis added)); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) ("[A] lawyer shall not [c]ommunicate . . . on the *subject* of a representation with a party he knows to be represented by a lawyer in that matter . . ." (emphasis added)). When a person is unaware of the pending investigation, he cannot be represented in the matter of the criminal investigation. See Florida State Bar Ass'n Op. No. 90-4 (July 15, 1990), available in Westlaw, 1990 WL 446959, at *2 (noting that in case of undercover investigation it is unlikely that suspect will realize he is under investigation so will not have retained counsel "in the matter").

281. See Communications with Represented Persons, *supra* note 111, at 10,098 (proposing changes to U.S. ATTORNEYS' MANUAL §§ 9-13.231 to .241 that would limit overt communications with represented targets).

Respect for the decision of a person who has chosen to entrust his representation to a trained attorney lies at the very core of the anti-contact rule. Green, *supra* note 13, at 285 n.7. Although the *U.S. Attorneys' Manual* restricts overt communications with represented persons and targets of investigations, the Department should not be allowed to surreptitiously circumvent a person's decision to channel communications through an attorney. *Id.* ("In most cases, a party retains a lawyer precisely because he considers himself incapable of handling his legal problems alone. When a party is called on to deal with opposing counsel directly, rather than through his own lawyer, he may effectively be denied the assistance of counsel."). No one would contend that a private civil attorney could use undercover investigators to ferret out information for his client from an opposing litigant. Attorneys for the federal government should be held to no lesser standard. See *State v. Morgan*, 646 P.2d 1064, 1070 (Kan. 1982) ("The prosecutor is a lawyer first; a law enforcement officer second. The provisions of the Code of Professional Responsibility are as applicable to him as they are to all lawyers.").

282. See DR 7-104(A)(1) (prohibiting attorney from "communicat[ing] or caus[ing] another to communicate" with represented person). MR 4.2 does not contain the language "cause another to communicate" but the Model Code Comparison indicates that the Model Rule "is substantially identical to DR 7-104(A)(1)." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (Model Code Comparison) (1992). The provision "cause another to communicate" has been moved to MR 8.4(a), which reads: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist another to do so, or do so through the acts of another . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1982).

The Philadelphia Bar Association issued an opinion in 1990 that describes the limitation on the use of private investigators by attorneys in civil litigation. Philadelphia Bar Ass'n Professional

ly referred to as alter egos of the attorney if the attorney directs their conduct.²⁸³ The Department of Justice, on the other hand, maintains that only limited restrictions should apply to the use of undercover agents when the prosecutor in charge of the case knows that the suspect has retained counsel for the purpose of the investigation.²⁸⁴ *Hammad* and *Jamil* both involve the troublesome use of "alter egos" to communicate with a person represented by counsel in the preindictment, noncustodial stages of criminal investigation.²⁸⁵

In *Hammad*, the prosecutor specifically secured the sham subpoena, was in regular contact with the informer, and directed the operation while the informer acted merely as an arm of the prosecutorial power.²⁸⁶ Those courts following *Hammad* have held that a prerequisite to finding a violation of DR 7-104(A)(1) is a determination that the nonattorney law enforcement officials who communicated with the represented suspect were acting as alter egos of the prosecutor.²⁸⁷

In *Jamil*, on the other hand, the prosecutor had no knowledge of

Guidance Comm., Op. No. 90-21 (Dec. 1990). The hypothetical posed to the Committee stated that the plaintiff claimed her injuries prevented her from continuing to earn income through the selling of a product, such as tupperware, through demonstrations. The attorney wanted to know if he violated MR 4.2 by authorizing his private investigator to stage a demonstration and film the plaintiff. He would also film the plaintiff delivering the goods to purchasers. The Committee emphatically stated that this action would not only violate MR 4.2 but also 8.4(a). The Committee stated: "Your proposed action is not simply one-sided surveillance of the plaintiff, but rather active direct communication and interaction with the plaintiff, in order to prejudice her cause of action." *Id.*

Except for the fact that this hypothetical was posed in the civil setting, it does not differ significantly from the conduct that the Department's regulation exempts from the scope of the anti-contact rule.

283. *E.g.*, *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983).

284. Communications with Represented Persons, *infra* app., §§ 77.7 to .9 (prohibiting communications with represented person that relate to plea negotiations or interfere with attorney-client relationships). In former versions of the regulation, the Department of Justice recognized no specific limitations on covert contact with represented persons prior to indictment. *See* Communications with Represented Persons, *supra* note 21, at 39,992-93 (limiting contact with represented persons *only* after attachment of Sixth Amendment right to counsel).

285. *See* Leubsdorf, *supra* note 8, at 701 (noting that most courts consider custodial questioning by police officers to be prohibited by rule because officers are considered agents of prosecutor and dangers of deceit are just as great as if prosecutor spoke with suspect directly).

286. *United States v. Hammad*, 858 F.2d 834, 836 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990).

287. *See, e.g.*, *United States v. Scozzafava*, 833 F. Supp. 203, 209 (W.D.N.Y. 1993) (noting that *Hammad* required threshold finding that agents were acting as alter egos of prosecutor); *United States v. Gray*, 825 F. Supp. 63, 64 (D. Vt. 1993) (holding agents were not acting as alter ego of prosecutor because attorney did not control their actions, and therefore application of DR 7-104(A)(1) was inappropriate); *United States v. Harloff*, 807 F. Supp. 270, 276-77 (W.D.N.Y. 1992) (finding prosecutor did not direct informant to deceive suspect); *see also* *United States v. Thompson*, 35 F.3d 100, 104-05 (2d Cir. 1994) (refusing to accept defendant's argument that anti-contact rule as applied in *Hammad* to noncustodial, preindictment stage should be extended to nonattorney law enforcement officers acting without any connection to prosecutor).

the actions of the customs agents.²⁸⁸ The district court in *Jamil* held that the prosecutor did not violate the ethics rule because the law enforcement agents contacted a represented person without the knowledge or consent of the prosecutor.²⁸⁹ Notwithstanding this, the district court went on to hold that the prosecutor became an accomplice to the agents actions when he attempted to benefit from the fruits of their conduct by using the information at trial, and at that point the ethical violation was committed.²⁹⁰ In *Jamil*, however, the Second Circuit rejected this broad definition of alter ego in terms of the anti-contact rule.²⁹¹ The Second Circuit reasoned that such a broad application of the anti-contact rule would unduly hamper legitimate investigative techniques.²⁹²

The district court in *Jamil* recognized at least two interests protected by the ethical rule that may be in jeopardy if undercover contact is allowed with represented persons.²⁹³ Concerns that lie at the core of the ethical rule, however, may not be implicated when a nonattorney communicates with a represented person.²⁹⁴ For instance, the artful negotiation and skillful persuasion of a trained attorney are not present when an "alter ego" is used in the contact with the represented party.²⁹⁵ On the other hand, where the attorney directs the actions of his agents, the attorney may manipulate an uncounseled client to the same extent as if the attorney had

288. *United States v. Jamil*, 546 F. Supp. 646, 654 (E.D.N.Y. 1982), *rev'd*, 707 F.2d 638 (2d Cir. 1983).

289. *Id.* at 655.

290. *Id.* But see Leubsdorf, *supra* note 8, at 697-98 (noting that in civil context, most courts do not prohibit lawyers from using fruits of communications between client and opposing party or between agents hired by client and opposing party so long as agents do not act as surrogate for client's lawyer).

291. *Jamil*, 707 F.2d at 646 (holding that no violation of ethics rules occurred when prosecutor introduced tape into evidence, because tape was lawfully made as part of preindictment investigation and attorney had nothing to do with its creation).

292. *Id.*

293. *Jamil*, 546 F. Supp. at 654 (noting that uncounseled client may squander valid defense and reveal privileged communications).

294. See Green, *supra* note 13, at 298-300 (observing that concern for effective assistance of counsel is only implicated if defense counsel's assistance would be useful, such as to negotiate terms under which client will cooperate, or to advise as to how to answer questions, and arguing that no such role is available to defense counsel in context of undercover investigations); Schwartz, *supra* note 121, at 951-52 (positing that skillful negotiation and persuasive bargaining are not present when nonattorney agent gathers information from suspect).

295. Schwartz, *supra* note 121, at 951-52 (arguing that "persuasion and negotiation" by defense counsel are only implicated "in the context of direct communication between a prosecutor and a suspect"); see also Leubsdorf, *supra* note 8, at 697 ("Whatever dangers flow from the confrontation of professional guile with lay innocence are absent when two nonlawyers communicate.").

spoken directly with the represented person.²⁹⁶

The court of appeals in *Jamil* correctly reversed the broad holding of the district court on the issue of alter egos. The text of the anti-contact rule prohibits communication with a represented person only when the attorney *knows* that the person is represented by counsel.²⁹⁷ If an attorney will not be disciplined for directly communicating with a person whom he subsequently discovers was represented by counsel at the time of the communication,²⁹⁸ it does not make sense to discipline the prosecutor for the actions of others of which he was unaware.²⁹⁹ The anti-contact rule is designed to control the conduct of lawyers in communicating with represented persons, and not the actions of persons over whom the attorney has little or no direct control.³⁰⁰ If the prosecutor were disciplined for using the fruits of an investigation in which there was contact with a represented party, it would put an end to nearly all legitimate undercover law enforcement without substantial, if any, gain to the represented suspect.³⁰¹

296. See *Jamil*, 707 F.2d at 646 (indicating that there may be danger that suspect would be "tricked" into giving his case away" through "artfully crafted questions" when nonattorney investigator acts as alter ego for prosecutor); see also *United States v. Massiah*, 307 F.2d 62, 66 (2d Cir. 1962) (refusing to find violation of anti-contact rule because court was not faced with "a case where defendant was in danger of being tricked by a lawyer's artfully contrived questions into giving his case away"), *rev'd on constitutional grounds*, 377 U.S. 201 (1964).

297. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983) ("[A] lawyer shall not communicate about the subject of the representation with a party the lawyer *knows* to be represented by another lawyer . . ." (emphasis added)).

298. See *United States v. Gray*, 825 F. Supp. 63, 64-65 (D. Vt. 1993) (finding that communication was not inappropriate because prosecutor did not know suspect was represented); WOLFRAM, *supra* note 8, § 11.6.2 (concluding that requirement of knowledge of representation represents goal of avoiding purposeful manipulation of represented client); Florida State Bar Ass'n Op. No. 90-4 (July 15, 1990), available in Westlaw, 1990 WL 446959, at *2 ("A Justice Department attorney's knowledge that a person is represented in connection with a particular matter is required before the rule is triggered.").

299. See, e.g., *Jamil*, 707 F.2d at 646 ("Such a holding would bar prosecutors from utilizing the fruits of government investigations which are found to be lawfully conducted.").

300. See *id.* (finding no ethical violation where prosecutor was unaware of contact with represented person); *United States v. Scozzafava*, 833 F. Supp. 203, 209 (W.D.N.Y. 1993) (observing that prosecutor did not have to supervise day-to-day operations of agent, but merely had to have supervisory authority over investigation in order for agents to be considered alter egos under *Hammad*); *Gray*, 825 F. Supp. at 64 (observing that prosecutor did not direct agents to contact suspect or instruct them on what information to elicit).

301. See *Jamil*, 707 F.2d at 646 (noting that rule holding prosecutor responsible for actions of police over which he had no control or knowledge would drastically hinder legitimate undercover investigations); see also Green, *supra* note 13, at 300-05 (citing and discussing numerous state law cases involving application of alter egos to DR 7-104(A)(1) in context of prosecutorial responsibility for conduct of police officers).

Green argues that because police and other nonattorney law enforcement officials have an independent authority to investigate crime, the anti-contact rule should not be applied to the fruits of their activity. *Id.* at 302-03. But see *United States v. McNaughton*, 848 F. Supp. 1195, 1202-03 (E.D. Pa. 1994) (concluding that anti-contact rule applied to investigator's actions despite lack of evidence in record that investigator was working at behest or direction of prosecutor). The court in *McNaughton* held that "[i]t is the government's burden to establish that a challenged confession is admissible, however, not the burden of the defendant to show

Courts, therefore, recognize that where the prosecutor is directing the investigation, there may be danger to the interests of the represented person.³⁰² On the other hand, the ABA should make explicit in the commentary to the anti-contact rule that prosecutors will not be disciplined simply for using the fruit of communication with a represented person when there is no indication that the prosecutor violated the ethical requirements.³⁰³

D. Representation in the "Matter"

If a prosecutor's obligation to refrain from contact with a suspect begins before formal criminal proceedings commence,³⁰⁴ it may frequently be difficult for the prosecutor to tell if the suspect's counsel is representing the suspect in the current investigation or in some other matter unrelated to the investigation that the prosecutor is directing. One concern of the Department of Justice with the application of the anti-contact rule to federal attorneys before the formal criminal process has begun is that it would allow career criminals to hire "house counsel" to represent them in all criminal matters.³⁰⁵ In *Hammad*, the Second Circuit also expressed particular concern about this problem.³⁰⁶ Two solutions have been suggested to avoid unduly hampering criminal investigations into the activity of such career criminals. First, attorneys are barred by the ethics rules from giving counsel for the commission of a crime.³⁰⁷ Therefore,

that it is not." *Id.* at 1202. The court concluded that because the Government offered no evidence that the investigator was not operating as the "alter ego" of the prosecutors "he is therefore subject to the restrictions of the anti-communication rule to the same extent that [the prosecutors] are." *Id.* at 1203.

302. See, e.g., *Jamil*, 707 F.2d at 645 (recognizing that violation occurs when investigators work as prosecutor's alter ego); *United States v. Massiah*, 307 F.2d 62, 66 (2d Cir. 1962) (stating that "[t]o be sure, [the anti-contact rule] would prohibit an investigator's acting as the prosecuting attorney's alter ego"), *rev'd on constitutional grounds*, 377 U.S. 201 (1964); *Scozzafava*, 833 F. Supp. at 209 (observing that prosecutor did not have to supervise day-to-day operations of agent, but merely have supervisory authority over investigation, in order for agents to be considered alter egos under *Hammad*).

303. See Taylor, *supra* note 125, at 17 (suggesting that Department seek change to ethical rule to recognize that prosecutors often must direct actions of law enforcement agents).

304. See *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988) (stating that government prosecutor's use of informants in preindictment, noncustodial situation may violate DR 7-104(A)(1)), *cert. denied*, 498 U.S. 871 (1990). But see *United States v. Marcus*, 849 F. Supp. 417, 421 (D. Md. 1994) (refusing to apply DR 7-104(A)(1) in preindictment, noncustodial setting, and citing circuits that have also rejected rule's extension).

305. See Thornburgh Memorandum, *supra* note 59, at 492-93 (discussing burdens that contact through "permanent counsel" would cause DOJ investigations).

306. *Hammad*, 858 F.2d at 839 (recognizing Government's fear of criminals immunizing themselves from infiltration by informants by hiring permanent "house counsel").

307. See Cramton & Udell, *supra* note 41, at 337 (noting that because ethics rules prohibit attorneys from advising clients with respect to commission of crime, suspect cannot be represented by attorney while engaged in continuous criminal activity); see also Green, *supra* note

the house attorney cannot be considered to represent a suspect engaged in ongoing criminal activity. Second, a person is considered represented in the matter under investigation only when the counsel has contacted the Department or the prosecutor in charge of the investigation, and declared his involvement in the case.³⁰⁸ The Department rejected this latter suggestion out of hand, however, because it would require ceasing all ongoing undercover operations once the attorney for the suspect began communications with the Government on the matter.³⁰⁹ In the end, neither suggestion truly addresses the primary concern of the Department of Justice that a person can effectively shield himself from both overt and undercover investigation into that person's activity by hiring a lawyer to represent him in all matters arising with law enforcement authorities. Just because a person is engaged in ongoing criminal activity and has retained a lawyer does not necessarily mean that the lawyer is advising the client to engage in that activity. Moreover, as the Department of Justice asserts, requiring the Department attorneys to sever contact as soon as the suspect's lawyer contacts the Department may unduly hamper legitimate criminal investigations. In particular, in the early stages of an investigation the prosecutor may need to be in contact with the investigators to determine whether there is sufficient information to seek an indictment.

There may also be a problem in determining the subject matter of a person's representation when an individual is charged with one crime for which he has retained counsel, but is simultaneously under investigation for a different, unrelated crime.³¹⁰ At least one State has endorsed an interpretation of the ethics rule that makes all contact with a person formally charged with a crime a violation of DR 7-104(A)(1), even if the law enforcement officer seeks to gain information about an unrelated and uncharged offense.³¹¹ The rationale is that "discussion of the pending case undoubtedly will take place."³¹² This position, however, would effectively prevent any further investigation into other criminal activity of a defendant once that person has been charged with one crime, thereby placing an unreasonable burden on law enforcement officials.

One possible solution to both the problem of "house counsel" and

13, at 308-09 (observing that Oregon State Bar ethics opinion allows communication with represented person for purpose of thwarting future criminal activity).

308. Communications with Represented Persons, *supra* note 21, at 39,985.

309. Communications with Represented Persons, *supra* note 21, at 39,985.

310. See Green, *supra* note 13, at 305-09.

311. Green, *supra* note 13, at 308 (citing opinion of Oregon State Bar ethics committee).

312. Green, *supra* note 13, at 308.

the problem of investigating unrelated and uncharged offenses would be for the ABA and respective state bar associations to amend MR 4.2 to limit the term "subject matter of representation" in the criminal context. The commentary to the ABA Model Rule could make it explicit that a person is only represented in the subject matter when an indictment has been handed up or the indictment is imminent.³¹³ To avoid the possibility that the prosecutor was using investigation of further crimes as a pretext for discovering information about the charged offense, it would be incumbent on the prosecutor to avoid any discussion of other charges that are pending against the person. Furthermore, the prosecutor would have to demonstrate a good faith effort to avoid any reference to the pending charges.

E. Waiver of Counsel by Represented Person

The Department of Justice concedes the dangers posed, even in the preindictment stages, by overt contact with a suspect absent the consent of the person's counsel.³¹⁴ The Department has prohibited four categories of overt communications in the preindictment stages.³¹⁵ Nonetheless, these restrictions are inadequate because the regulation authorizes direct, overt contact with a represented person

313. See Florida State Bar Ass'n Op. No. 90-4 (July 15, 1990), available in Westlaw, 1990 WL 446959, at *2 (suggesting that concept of general counsel be limited to civil context, and that ethics rule should apply only when suspect specifically refers matter of investigation to attorney); see also Communication With Represented Persons, *supra* note 111, at 10,098-99 (recognizing restrictions on overt communications with target of investigation (citing U.S. ATTORNEYS' MANUAL §§ 9-13.240 to .241)). Although previous versions of the Department's regulations did not contain any restrictions on contact with targets of an investigation, the current version still falls short of the dictates of the ethical rule. First, the restrictions on communications with targets appear in the U.S. Attorneys' Manual, not directly in the regulation. *Id.* Second, and more importantly, the restrictions only apply to overt communications. *Id.* Furthermore, even the restrictions on overt communications are insufficient because they allow contact when the target initiates the communications. See *infra* Part III.E.1 (discussing dangers of situation where suspect initiates communications with government attorney).

314. Communications with Represented Persons, *supra* note 111, at 10,088.

315. Communications with Represented Persons, *infra* app., §§ 77.8 to .9. The four categories are: (1) communications intended to discourage attorney consultation, *id.* § 77.9(a)(ii); (2) communications intended to elicit lawful defense strategy or legal arguments of counsel, *id.* § 77.9(a)(i); (3) communications for the purpose of negotiating or concluding a plea agreement or settlement, *id.* § 77.8; and (4) communications which improperly seek to disrupt the attorney-client relationship, *id.* § 77.9(a)(iii). The proposed regulation contains a further protection for the attorney-client negotiations in that it prohibits a prosecutor from directing an agent or informant to participate in attorney-client meetings or communications. *Id.* § 77.9(b). Furthermore, when an agent or informant is requested to participate in an attorney-client meeting, and the agent or informant must participate in order to protect his or her own safety or the confidentiality of the undercover investigation, the regulation requires the erection of "chinese walls." *Id.* In other words, the agent or witness cannot relay the content of the attorney-client meeting to any of the attorneys who are directly involved in the prosecution. *Id.* The content of the attorney-client meeting may also not be used to the detriment of the client. *Id.*

in two situations in which the ethical rule would most likely prohibit such communications.

1. *Initiation of communications by represented person*

One of the areas of overt communications with represented persons that the regulation would permit is when the represented person initiates the contact and knowingly, intelligently, and voluntarily waives the presence of counsel.³¹⁶ Although this position is in conformity with Fifth and Sixth Amendment precedent,³¹⁷ it misconceives the goal of DR 7-104(A)(1). Many courts recognize that ethical standards are applicable against the attorney and may not be waived by the client.³¹⁸

Among the goals advanced by DR 7-104(A)(1) is the ability of an attorney to assure that his client does not squander any viable defenses or make rash decisions without fully comprehending the legal implications.³¹⁹ The rule also prohibits contact with a represented person so that an attorney may not use his or her training to elicit concessions that are damaging to the represented person's case.³²⁰ Even if a party knowingly and voluntarily wishes to speak to

316. Communications with Represented Persons, *infra* app., § 77.6(c)(1); *see also* Communications with Represented Persons, *supra* note 111, at 10,098 (permitting contact with target when target initiates contact (citing U.S. ATTORNEYS' MANUAL § 9-13.241(c) (1994))).

317. Green, *supra* note 13, at 310 (explaining that contact with represented person in absence of counsel is in conformity with Fifth and Sixth Amendments).

318. *See, e.g.*, United States v. Lopez, 4 F.3d 1455, 1462 (9th Cir. 1993) (observing that ethical provisions deal with "duties of attorneys, not with the rights of parties," and therefore cannot be waived); United States v. Thomas, 474 F.2d 110, 112 (10th Cir.) (holding that defendant cannot waive his application of ethics rules), *cert. denied*, 412 U.S. 932 (1973); People v. Green, 274 N.W.2d 448, 453 (Mich. 1979) (stating that willingness of defendant to communicate with prosecutor may be considered as mitigating factor, but does not excuse ethical violation). *But see* Leubsdorf, *supra* note 8, at 688-90 (arguing that client is often better qualified to determine when it is appropriate to meet directly with opposing counsel).

319. United States v. Jamil, 546 F. Supp. 646, 654 (E.D.N.Y. 1982) (noting that rule is designed to protect clients from losing claims, defenses, or disclosing privileged information), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983); *see also* Leubsdorf, *supra* note 8, at 686 (listing purported goals and dangers sought to be addressed by DR 7-104(A)(1)).

320. *See* WOLFRAM, *supra* note 8, § 11.6.2 (discussing various goals of rule); *see also* HAZARD & HODES, *supra* note 109, § 4.2:101 ("In tandem with Rule 4.3, . . . [Rule 4.2] prevents a lawyer from taking advantage of a lay person to secure admissions against interest or to achieve unconscionable settlement of a dispute."); Leubsdorf, *supra* note 8, at 686 (stating that anti-contact rule is intended to address "danger that lawyers will bamboozle parties unprotected by their own counsel"). Even the Department of Justice recognizes that "the prosecutor's superior legal training and specialized knowledge could be used to the detriment of the untutored layperson." Communications with Represented Persons, *supra* note 111, at 10,088; *see also* Communications with Represented Persons Commentary, *supra* note 2, at 39,910-11 (noting that it is generally unfair for attorney to circumvent opposing counsel and employ superior skills and legal training to take advantage of opposing party).

Leubsdorf lists other frequently cited reasons justifying the rule as: avoiding the danger that the lawyer will have to become a witness because of a disagreement between the lawyer and opposing party over what was said at the meeting; helping clients avoid disclosing privileged

a prosecutor without his lawyer present, the prosecutor is under an obligation not to speak with the person because the prosecutor may consciously or unconsciously use his or her skills to the represented party's disadvantage.³²¹ When a person has an attorney present for advice, the suspect's attorney can ensure that the opposing counsel neither knowingly nor unwittingly uses his skills to the disadvantage of the suspect. Furthermore, although the client has the ultimate choice about the direction of his or her case,³²² the comments to the ethical rules recognize that the attorney has significant control over questions of strategy.³²³ If government attorneys are allowed to communicate with a represented person without the knowledge or consent of that person's attorney, the uncounseled client may "squander[] a possible claim or defense" or "disclos[e] privileged information."³²⁴

This does not mean that when a person waives his right to counsel altogether, the prosecutor is prohibited from communicating with the defendant. DR 7-104(A)(1) explicitly applies only to communications where the suspect is already *represented* by counsel.³²⁵

information; using lawyers as disinterested experts to aid in the settlement of disputes; and avoiding the conflict lawyers face between their duty to represent their client most effectively and their duty to avoid contact with the opposing party. Leubsdorf, *supra* note 8, at 686-87.

321. See, e.g., *United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) (finding that despite initiation of contact by defendant, prosecutors' refusal to abstain from communication weakened attorney-client relationship and "tilted the delicate balance of [the adversarial] process" (quoting *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 259 (2d Cir. 1985) (Feinberg, C.J., dissenting), *cert. denied*, 475 U.S. 1108 (1986))); *United States v. Guerrero*, 675 F. Supp. 1430, 1437 (S.D.N.Y. 1987) (stating that "the prohibition on direct contact with a represented party is required by the perceived imbalance of legal skill and acumen between an attorney and a layman. Without such a rule, an unscrupulous attorney might unfairly take advantage of an unsophisticated party." (citing *Massiah v. United States*, 377 U.S. 201, 211 (1964) (White, J., dissenting))); *Frey v. Department of Health and Human Servs.*, 106 F.R.D. 32, 34 (E.D.N.Y. 1985) (identifying goal of anti-contact rule as preventing counsel from taking advantage of adverse party); *United States v. Batchelor*, 484 F. Supp. 812, 813 (E.D. Pa. 1980) (discussing "societal interests" served by adherence to anti-contact rule even in criminal law enforcement context).

322. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983) (requiring an attorney to "abide by a client's decisions concerning the objectives of representation").

323. See *id.* Rule 1.2 cmt. 1 (noting that "the lawyer should assume responsibility for technical and legal tactical issues"); *id.* Rule 1.3 cmt. 1 (stating that "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.").

324. *United States v. Jamil*, 546 F. Supp. 646, 654 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983).

325. See DR 7-104(A)(1) (prohibiting lawyer from communicating with person, who he "knows to be represented by a lawyer") (emphasis added); MR 4.2 (same); see also Green, *supra* note 13, at 310 (noting that DR 7-104(A)(1)'s goal of effective assistance of counsel is not implicated when suspect has waived counsel); WOLFRAM, *supra* note 8, § 11.6.2 (noting that when opposing counsel does not know of representation, or person does not have representation, there can be no danger that attorney seeking direct contact with party is denying party effective assistance of counsel). The denial of effective assistance of counsel can occur in two ways. *Id.* First, the opposing counsel can knowingly circumvent the party's attorney in an effort to get concessions

There may be legitimate reasons for the represented party to meet with the prosecutor in the absence of counsel. Perhaps the most straight-forward reason occurs when a third party pays for the attorney, and the represented person does not feel that the counsel is pursuing his interests,³²⁶ as occurred in *United States v. Lopez*.³²⁷ The AUSA, under the belief that Lopez or his family was in danger, sought out judicial approval for a meeting with Lopez in the absence of, and without the consent or knowledge of, his lawyer.³²⁸ The Ninth Circuit held that the court has the authority to except the meeting from the requirements of the anti-contact rule.³²⁹

The Department's regulation requires that a government attorney seek judicial approval of overt communications when a represented party waives the presence of his counsel.³³⁰ Although the regulation

while the person lacks legal advice. *Id.* Second, if the party's attorney finds out about the contact, the attorney might be injured by what the attorney may perceive as his client's dissatisfaction with his services. *Id.* § 11.6.2 n.31. As a result, the client will not receive effective assistance of counsel. *Id.* These concerns are not present when a person has waived his right to counsel altogether. *But see* Leubsdorf, *supra* note 8, at 694 (criticizing anti-contact rule for not protecting unrepresented persons from contact with opposing counsel).

The Supreme Court has guaranteed a person's right to self-representation. *Farretta v. California*, 422 U.S. 806 (1975) (finding that denial of defendant's right to defend himself during prosecution for grand theft is violation of Sixth Amendment). The Ninth Circuit, in *United States v. Lopez*, did not find a conflict between enforcement of DR 7-104 and the constitutional right to self-representation where the party knowingly and voluntarily spoke with the prosecutor. *United States v. Lopez*, 4 F.3d 1455, 1463 (9th Cir. 1993). The court reasoned that so long as the party retained his counsel in the matter, the goals of DR 7-104(A)(1) would be undermined if the party was allowed to exonerate the prosecutor by "waiving" the application of the anti-contact rule. *Id.* Furthermore, Rule 4.3 provides limited protections to unrepresented persons from overreaching attorneys. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3; *see also* HAZARD & HODES, *supra* note 109, § 4.2:101 (stating that MR 4.3 works in connection with MR 4.2 to prevent lawyers from taking advantage of unrepresented laypersons).

326. *See* Thornburgh Memorandum, *supra* note 59, at 492 (outlining two scenarios in which it would be beneficial for represented person to meet with prosecutor in absence of his attorney). The first scenario is in the corporate setting where a corporate counsel allegedly represents all the employees, but one employee wishes to turn state's evidence. *Id.* The second situation involves organized crime, where the crime boss provides counsel for all organization members, but a member wishes to cooperate with the authorities and fears for his safety if he tells his lawyer that he plans to meet with the prosecutor to work out a deal. *Id.*

327. 4 F.3d 1455 (9th Cir. 1993); *see also supra* Part I.C.1 (setting out detailed discussion of facts and holdings in *Lopez*).

328. *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993).

329. *Id.* The AUSA, however, withheld from the magistrate the fact that Lopez' attorney told him that there was no danger to Lopez or Lopez' family. *Id.* at 1462. The Second Circuit, therefore, held that the magistrate had not ratified the meeting because she could not make an informed decision about authorizing the communications. *Id.*

330. Communications with Represented Persons, *infra* app., § 77.6(c)(2) (requiring judicial approval); *see also* Communications with Represented Persons Commentary, *supra* note 2, at 39,920-21 (discussing scope of judicial inquiry when court grants approval). Prior versions of the Department's regulation did not contain the requirement of judicial approval. *See* Communications with Represented Persons, *supra* note 21, at 39,987 (noting that judicial approval is not required, but that *U.S. Attorneys' Manual* suggests judicial approval as matter of good policy).

is a step in the right direction, it does not go far enough. The Department's regulation only requires that the judge determine whether the waiver of counsel was made knowingly, intelligently, and voluntarily.³³¹ The commentary to the regulation specifically rejects the requirement that the judge determine if there is "some overriding justification" for the client to communicate with the Government in the absence of his or her counsel.³³²

This procedure does not seem to comport with *United States v. Lopez*. In that case, the information withheld by the prosecutor did not go to the knowing, intelligent, or voluntary nature of Lopez' communications, but rather, the withheld information concerned the justification for the meeting.³³³ The Ninth Circuit remanded the case for consideration of whether the magistrate had "made an informed decision to authorize the communications."³³⁴ Therefore, *Lopez* stands for the proposition that there needs to be some justification for a meeting between the government attorney and the client in the absence of the client's attorney.

2. *Waiver of right to counsel upon arrest*

The most recent version of the Department's regulation authorizes government attorneys to speak with a suspect at the time of his arrest if he waives his right to counsel under the Fifth and Sixth Amendments.³³⁵ If the defendant waives his constitutional right to have his counsel present at the time of arrest the new regulation does not require judicial approval for the communication.³³⁶ The Department does not adequately justify the distinction between communications at the time of arrest and communications initiated by the represented person at another point, noting only that "the constitutional protections established in that decisional law adequately protect represented individuals following arrest."³³⁷ While this interpretation may be accurate, the anti-contact rule is intended to provide more protection to a suspect than the constitutional right to counsel.³³⁸

331. Communications with Represented Persons, *infra* app., § 77.6(c)(2).

332. See Communications with Represented Persons Commentary, *supra* note 2, at 39,921.

333. *Lopez*, 4 F.3d at 1462.

334. *Id.*

335. See Communications with Represented Persons, *infra* app., § 77.6(d); see also Communications with Represented Persons Commentary, *supra* note 2, at 39,921-22 (noting that these constitutional protections adequately protect represented individuals after arrest).

336. Communications with Represented Persons Commentary, *supra* note 2, at 39,921.

337. Communications with Represented Persons Commentary, *supra* note 2, at 39,921.

338. See *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990). The Second Circuit wrote:

[T]he Constitution prescribes a floor below which the protections may not fall, rather

F. Remedies for Violation of Anti-Contact Rule

Violations of the Department of Justice's regulation are to be dealt with primarily as a matter of internal discipline.³³⁹ The new regulation, however, contains a provision not included in earlier drafts. Apparently in a concession to the interests of States in attorney discipline, the regulation does allow for limited state involvement,³⁴⁰ permitting state disciplinary proceedings to take place only when the U.S. Attorney General has determined that a government attorney has willfully violated the Department's regulation.³⁴¹ But, because the Attorney General's determination concerning violations of the regulation is "final and conclusive," States are completely preempted from enforcing their version of the anti-contact rule without consent of the U.S. Attorney General.³⁴²

Furthermore, the regulation contains no provision regarding the ability of federal courts to discipline government attorneys for violating their local rules. As discussed above, this position is inconsistent with both the inherent supervisory powers of the federal courts and the concept of federalism.³⁴³ Because the enforcement

than a ceiling beyond which they may not rise. . . . The Code is designed to safeguard the integrity of the profession and preserve public confidence in our system of justice. It not only delineates an attorney's duties to the court, but defines his relationship with his client and adverse parties. Hence, the Code secures protections not contemplated by the Constitution.

Id. at 839; see also *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.) (finding that despite valid *Miranda*-type waiver, prosecutor violated rules of professional ethics by communicating with defendant without his counsel present because stricture of canons of ethics "is obviously not something which the defendant alone can waive"), *cert. denied*, 412 U.S. 932 (1973); *United States v. Four Star*, 428 F.2d 1406, 1407 (9th Cir.) ("emphatically reiterat[ing]" proposition that in-custody interrogation of represented suspect violates rules of ethics), *cert. denied*, 400 U.S. 947 (1970); *People v. Green*, 274 N.W.2d 448, 452-54 (Mich. 1979) (holding that prosecutor may violate anti-contact rule even though defendant properly waived his Fifth Amendment right to counsel). But see *State v. Decker*, 641 A.2d 226, 230 (N.H. 1994) ("We need not determine whether an ethical violation occurred, because we hold that suppression of a confession is not warranted absent a violation of the defendant's constitutional or statutory rights.").

339. Communications with Represented Persons, *infra* app., § 77.11 (establishing that "Attorney General shall have exclusive jurisdiction over this part and any violations of it"). The commentary observes that the Department's Office of Professional Responsibility has "sole original" jurisdiction to investigate violations of the regulation. Communications with Represented Persons Commentary, *supra* note 2, at 39,926. Furthermore, the commentary notes that the Attorney General's determination concerning a violation of the regulation "shall be final and conclusive." *Id.*

340. Communications with Represented Persons, *infra* app., § 77.12; see also Communications with Represented Persons Commentary, *supra* note 2, at 39,927 (noting that regulation completely preempts state law with only this exception).

341. Communications with Represented Persons, *infra* app., § 77.12.

342. Communications with Represented Persons, *infra* app., § 77.12; see also Communications with Represented Persons Commentary, *supra* note 2, at 39,927 (discussing preemptive effect of new regulation).

343. See *supra* Part II.

of the ethics provisions properly should remain with the federal courts and state ethics commissions, the question remains as to the appropriate remedies available to rectify violations of DR 7-104(A)(1).

Most federal courts have rejected suppression of evidence, dismissal of indictment, and reversal of conviction as inappropriate to address the concerns of anti-contact ethics violations.³⁴⁴ The Ninth Circuit in *Lopez*, for example, reversed the lower court's remedy of dismissing an indictment.³⁴⁵ The Ninth Circuit's analysis is particularly compelling:

We are sensitive to the district court's concerns that none of the alternative sanctions available to it are as certain to impress the government with our resoluteness in holding prosecutors to the ethical standards which regulate the legal profession as a whole. At the same time, we are confident that, when there is no showing of substantial prejudice to the defendant, lesser sanctions, such as holding the prosecutor in contempt or referral to the state bar for disciplinary proceedings, can be adequate to discipline and punish government attorneys who attempt to circumvent the standards of their profession.³⁴⁶

When there is substantial prejudice to the defendant, the contact may no longer be a simple ethics violation but may rise to the level of a violation of the defendant's due process rights.³⁴⁷ A district court in *United States v. Guerrerio*³⁴⁸ concluded that excluding the acquired evidence is particularly appropriate when constitutional rights are at stake because of the lack of an otherwise effective remedy.³⁴⁹ That court concluded, however, that the "discipline of

344. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993) (holding that dismissal of indictment was not justified); *United States v. Heinz*, 983 F.2d 609, 614 (5th Cir. 1993) (concluding that absent willful government misconduct, suppression is unwarranted); *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988) (stating that attorney disciplinary proceedings and not limitation of cross-examination would be appropriate remedy for violation of DR 7-104); *United States v. Partin*, 601 F.2d 1000, 1005 (9th Cir. 1979) (holding that violation by AUSA of DR 7-104 was not reversible error), *cert. denied*, 446 U.S. 964 (1980); *People v. Green*, 274 N.W.2d 448, 454 (Mich. 1979) (observing that reversal of conviction "constitute[s] reprehensible 'overkill'"). But see *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988) (observing that use of supervisory power to exclude evidence is warranted to deter further misconduct, maintain judicial integrity, and maintain popular trust in judicial process), *cert. denied*, 498 U.S. 871 (1990).

345. *Lopez*, 4 F.3d at 1464, *rev'g* 765 F. Supp. 1433 (N.D. Cal. 1991).

346. *Id.*

347. See, e.g., *Green*, 274 N.W.2d at 455 (analyzing prosecutor's conduct to determine whether it "was so fundamentally unfair and shocking to the sensibilities of reasonable persons that it rises to the level of a violation of due process of law"). The court in *Green* determined that despite the ethical violation, the prosecutor's conduct was "relatively innocuous." *Id.*

348. 675 F. Supp. 1430 (S.D.N.Y. 1987).

349. *United States v. Guerrerio*, 675 F. Supp. 1430, 1434-35 (S.D.N.Y. 1987) (stating that exclusionary rule is necessary to deter unconstitutional conduct because individual punishment is impractical).

attorneys has traditionally been a matter uniquely the province of local authorities,³⁵⁰ and that such a local forum provides an adequate remedy for the violation of ethics provisions.³⁵¹

Violations of ethics rules should never be used as a basis for the exclusion of evidence, dismissal of indictments, or reversal of convictions,³⁵² unless the violation rises to the level of a constitutional violation.³⁵³ The exclusionary rule is appropriate to remedy constitutional violations because personal rights are involved.³⁵⁴ Ethics rules, on the other hand, do not create personal rights in a defendant,³⁵⁵ but instead are intended to regulate the conduct of attorneys in the judicial process.³⁵⁶ The public would be penalized

350. *Id.* at 1435.

351. *Id.* The ABA Code of Judicial Conduct requires that when a judge becomes aware that an attorney has violated the Rules of Professional Conduct, she must refer the matter to the appropriate authority. See ABA CODE OF JUDICIAL CONDUCT Canon 3D(2) (1990). The Code defines "appropriate authority" as the body responsible "for initiation of disciplinary process with respect to the violation to be reported." *Id.* (Terminology). As of 1988, the ABA Code of Judicial Conduct had been adopted in 47 States, the District of Columbia, and by the Federal Judicial Conference. See Steven Lubet, *Regulation of Judges' Business and Financial Activities*, 37 EMORY L.J. 1, 1 n.1 (1988) (discussing acceptance of Code in United States).

352. See *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988) (finding that disciplinary action, and not limitation of cross-examination, would be proper method for sanctioning violation of MR 4.2); Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1100-01 (1994) (arguing that discipline and not dismissal or exclusion is appropriate remedy for violation of ethics rules by prosecutors); Schwartz, *supra* note 121, at 954-57 (providing persuasive arguments for prohibiting exclusion of evidence, dismissal, or reversal as remedies for violation of DR 7-104(A)(1)).

353. See *United States v. Adonis*, 744 F. Supp. 336, 347 (D.D.C. 1990) (refusing to depart from sentencing guidelines for violation of MR 4.2 where conduct neither affected fair trial nor was "entrenched or longstanding"); see also *supra* Part II.B (discussing scope of courts' inherent supervisory authority); cf. *United States v. Hastings*, 461 U.S. 499, 505-06 (1983) (holding that while courts have power not granted by Constitution or statute to reverse convictions because of wrongs committed during judicial process, power of reversal may not be exercised in absence of harmful error).

354. See *United States v. Payner*, 447 U.S. 727, 735-36 (1980) (barring use of supervisory powers to exclude evidence taken in violation of third party's Fourth Amendment right but not in violation of defendant's constitutional rights); Schwartz, *supra* note 121, at 955-56 (distinguishing violation of constitutional rights and violation of ethical rules).

355. See *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993) (recognizing that ethical rules are "fundamentally concerned with the duties of attorneys, not with the rights of parties"); *United States v. McNaughton*, 848 F. Supp. 1195, 1204 (E.D. Pa. 1994) (holding that suppression of evidence is not appropriate remedy for ethics violation).

The court in *McNaughton* further held that "[t]he Code of Professional Responsibility is not enforced under the constitutional exclusionary rule, but only under a federal court's general supervisory powers which are subject to the control of Congress." *Id.* The court concluded that the court's inherent supervisory power was limited by the Omnibus Crime Control and Safe Streets Act of 1968, which provides that "[i]f the trial judge determines that the confession was voluntarily made it shall be admitted in evidence." *Id.* (quoting 18 U.S.C. § 3501(a) (1988)); see also *People v. Green*, 274 N.W.2d 448, 454 (Mich. 1979) (observing that unlike constitutional and statutory rights, ethical rules do not provide guarantees to individual persons).

356. See *Green*, 274 N.W.2d at 454 (discussing purpose of ethical rules). The court in *Green* stated:

The provisions of the [ethics] code are not constitutional or statutory rights guaranteed

for the misconduct of an individual attorney by allowing an otherwise guilty person to go free.³⁵⁷ By taking action against the individual prosecutor, the proper deterrent value is achieved without the cost to the criminal justice system.³⁵⁸ In order to be effective, disciplinary proceedings must be conducted by independent tribunals, such as state disciplinary boards, and not through internal Department of Justice proceedings.³⁵⁹

to individual persons. They are instead self-imposed internal regulations prescribing the standards of conduct for members of the bar. Although it is true that the principle purpose of many provisions is the protection of the public, the remedy for a violation has traditionally been internal bar disciplinary action against the offending attorney. The sanctions available are by no means trivial. The attorney faces permanent disbarment. In these respects the provisions of the code are no different from the provisions found in the codes of conduct for other professions, such as medicine or architecture. They are all self-governing in-house regulations.

Id.; see also *State v. Morgan*, 646 P.2d 1064, 1070 (Kan. 1982) (holding that Rules of Professional Conduct govern behavior of lawyers and are unrelated to admission of evidence); *Stringer v. State*, 372 So. 2d 378, 383 (Ala. Crim. App.) (holding that admission of evidence is governed only by statutory and constitutional rules, not rules of professional conduct (citing *Green*, 274 N.W.2d 448 (Mich. 1979))), *cert. denied*, 372 So. 2d 384 (Ala. 1979)).

357. *Cf. Stone v. Powell*, 428 U.S. 465, 482 (1976) (holding that violation of Fourth Amendment is not cognizable claim in habeas corpus proceedings). The Court in *Stone* reasoned that the evidence obtained in violation of the Fourth Amendment was highly probative on the issue of the defendant's guilt. *Id.* at 485, 490. Furthermore, the Court reasoned that the cost of reversing the conviction outweighed the deterrent benefit of a reversal. *Id.* at 489-95. This reasoning is equally applicable in situations with ethical violations. Statements obtained in conformity with the constitutional protections, and even those that are obtained unconstitutionally, may be highly probative. *Id.* at 490. The costs of excluding such reliable evidence outweigh the benefits, especially where deterrence of unethical prosecutorial conduct can be accomplished in state disciplinary proceedings. See *Green*, 274 N.W.2d at 455 (noting that disciplinary proceeding would afford greater deterrent effect than exclusionary rule because exclusionary rule is only indirect sanction of attorney's conduct).

358. See *In re Atwell*, 115 S.W.2d 527, 528 (Mo. Ct. App. 1938) (reprimanding attorney for violating anti-contact rule; explaining, "It is hoped that this public reproof will have the effect of deterring you from further conduct of this sort, and that it will have the effect upon others who might be forgetful, as you have been, to deter them."); Morton, *supra* note 352, at 1115-16 (concluding that attorney discipline provides sufficient deterrent); Schwartz, *supra* note 121, at 956-57 (reasoning that attorney discipline provides more effective deterrent than suppression of evidence).

359. A recent student Note has concluded that internal policing of ethics violations by the Department of Justice Office of Professional Responsibility is ineffective. Morton, *supra* note 344, at 1109-10. The most significant problem with internal policing is the Department's extremely poor track record in taking any action against the prosecutor. *Id.* at 1109 (citing examples in which DOJ took no disciplinary action despite federal judges' reprimands of prosecutors); see also H.R. REP. NO. 986, *supra* note 155, at 35 (expressing concern about Department's efforts on self-policing because such efforts "are much like the fox guarding the chicken coop"); Taylor, *supra* note 125, at 30 (citing several examples where Department took no action against patently unethical conduct of prosecutor). Moreover, when the Department of Justice disagrees with the application of interpretation of an ethical rule, it can refuse to find an ethical violation by the prosecutor, thereby effectively preempting the traditional role of States and federal courts as bodies that define professional conduct of attorneys. Morton, *supra* note 352, at 1114 ("States which admit attorneys to practice under their laws must be able to maintain concurrent jurisdiction over federal prosecutors. Without this check on the Department of Justice, there are few realistic limits on federal prosecutorial misconduct when the Department of Justice finds itself in disagreement with state ethical rules.").

CONCLUSION

In some respects, the Department of Justice is correct in its assertion that there is a need to change the current anti-contact rule in its application to federal law enforcement.³⁶⁰ Indeed, perhaps the rule is even unsuitable with regard to state prosecutors as well.³⁶¹ The Department's heavy-handed approach is, however, an inappropriate response to a problem that must be solved with input from all members of the legal profession who are affected by the rule.³⁶² Not only does the new regulation disregard many of the important goals sought to be advanced by the anti-contact rule, it also elevates the objectives of efficient law enforcement and prosecutorial oversight of criminal investigations over the goal of effective, unhindered representation without first getting a consensus among all attorneys affected by the regulation.

Furthermore, the Department of Justice ignores the important interests of the States in regulating the attorneys licensed to practice in their jurisdiction, and of the courts to supervise the conduct of the officers of the court.³⁶³ On the other hand, the ABA and the respective state ethics tribunals need to recognize the need for legitimate law enforcement, especially what is perhaps the most effective investigative tool, undercover agents and informants.³⁶⁴

By amending the anti-contact rule to clarify when a person is represented in the subject matter of the communication, and by explicitly recognizing that prosecutors cannot be held responsible for the actions of others where the prosecutor had no knowledge of those

360. Cf. *United States v. Batchelor*, 484 F. Supp. 812, 813-14 (E.D. Pa. 1980) (positing that "[t]here may well be good reason for modifying Disciplinary Rule 7-104(A)(1)").

361. See Norton, *supra* note 39, at 207 (noting that state prosecutors are attempting to ride coattails of Department of Justice's effort to exempt federal prosecutors from anti-contact rule).

362. See *Solution for Prosecutorial Contacts*, *supra* note 109, at 302 (observing need for cooperation between ABA and DOJ because "[r]ule-making is 'symbolically the wrong place' for [Attorney General] Reno to begin addressing the issue. . . . The rule proposed in November 1992 was 'drafted without our input in a sort of last expression of hubris [by the Bush administration].'" (quoting Donald E. Santarelli, ABA Criminal Justice Section).

363. See *Solution for Prosecutorial Contacts*, *supra* note 109, at 304 (observing that DOJ's assumption of oversight of prosecutorial ethics upsets current, well-established scheme).

Perhaps the most serious [flaw] is the proposed rule's assumption that the Attorney General can definitively regulate the professional ethical conduct of Justice Department lawyers, without the various State supreme courts which admitted these lawyers to practice having continuing jurisdiction over them with regard to their conduct as federal Justice Department employees.

Id. (quoting Sam Dash, Professor of Law, Georgetown University Law Center).

364. See *United States v. Powe*, 9 F.3d 68, 70 (9th Cir. 1993) (holding that prosecutor did not intend to "forego one of its 'most effective law enforcement techniques for investigating complex crime'" by promising to direct all interviews with suspect through his attorney (quoting *United States v. Lopez*, 4 F.3d 1455, 1460 (9th Cir. 1993))).

actions, the ethical rule would not unduly hinder legitimate law enforcement techniques prior to and even after indictment.³⁶⁵ Furthermore, such amendments would not risk the interests of the person represented by counsel by preventing the prosecutor from manipulating a represented person either directly or through alter egos.

365. See *Solution for Prosecutorial Contacts*, *supra* note 109, at 303 (listing options for possible compromise without issuance of federal regulation, including ABA ethics opinion, revision of MR 4.2, and reworking commentary to anti-contact rule).

Other suggested options include congressional legislation, application to judicial officer for approval for contact, or appointment of a special prosecutor. *Id.*; see also Taylor, *supra* note 125, at 17 (suggesting several amendments to anti-contact rule that would protect prosecutors without preempting entire field).

APPENDIX

Part 77—COMMUNICATIONS WITH REPRESENTED PERSONS

§ 77.1 PURPOSE AND AUTHORITY.

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to provide a comprehensive, clear, and uniform set of rules governing the circumstances under which Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. This part ensures the Department's ability to enforce federal law effectively and ethically, consistent with the principles underlying Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, while eliminating the uncertainty and confusion arising from the variety of interpretations given to the rule and analogous rules by state and federal courts and by bar association organizations and committees. . . .

§ 77.3 REPRESENTED PARTY; REPRESENTED PERSON.

(a) A person shall be considered a "represented party" within the meaning of this part only if all three of the following circumstances exist:

(1) The person has retained counsel or accepted counsel by appointment or otherwise;

(2) The representation is ongoing and concerns the subject matter in question;

(3) The person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation.

(b) A person shall be considered a "represented person" within the meaning of this part if circumstances set forth in paragraphs (a)(1) and (2) of this section exist, but the circumstance set forth in paragraph (a)(3) of this section does not exist.

§ 77.4 CONSTITUTIONAL AND OTHER LIMITATIONS.

Notwithstanding any other provision of this part, any communication that is prohibited by the Sixth Amendment right to counsel, by any other provision of the United States Constitution, by any federal statute, by the Federal Rules of Criminal Procedure (18 U.S.C. App.) or by the Federal Rules of Civil Procedure (28 U.S.C. App.) shall be likewise prohibited under this part.

§ 77.5 GENERAL RULE FOR CIVIL AND CRIMINAL ENFORCEMENT;
REPRESENTED PARTIES.

Except as provided in this part or as otherwise authorized by law, an attorney for the government may not communicate, or cause another to communicate, with a represented party who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such party.

§ 77.6 EXCEPTIONS; REPRESENTED PARTIES.

An attorney for the government may communicate, or cause another to communicate, with a represented party without the consent of the lawyer representing such party concerning the subject matter of the representation if one or more of the following circumstances exist:

(a) *Determination if representation exists.* The communication is to determine if the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

...

(c) *Initiation of communication by represented party.* The represented party initiates the communication directly with the attorney for the government or through an intermediary and:

(1) Prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the client's right to speak through his or her attorney and/or to have the client's attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed and, if willing to do, signs a written statement to this effect; and

(2) A federal district judge, magistrate judge or other court of competent jurisdiction has concluded that the represented party has:

(i) Waived the presence of counsel and that such waiver is voluntary, knowing, and informed; or

(ii) Obtained substitute counsel or has received substitute counsel by court appointment, and substitute counsel has consented to the communication.

(d) *Waivers at the time of arrest.* The communication is made at the time of the arrest of the represented party and he or she is advised of his or her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and voluntarily and knowingly waives them.

(e) *Investigation of additional, different or ongoing crimes or civil violations.* The communication is made in the course of an investigation, whether undercover or overt, of additional, different or ongoing

criminal activity or other unlawful conduct. . . .

(f) *Threat to safety or life.* The attorney for the government in good faith believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or provide information to protect against the risk of injury or death; and the attorney for the government in good faith believes that the communication is necessary to protect against such risk.

§ 77.7 REPRESENTED PERSONS; INVESTIGATIONS.

Except as otherwise provided in this part, an attorney for the government may communicate, or cause another to communicate, with a represented person in the process of conducting an investigation, including, but not limited to, an undercover investigation.

§ 77.8 REPRESENTED PERSONS AND REPRESENTED PARTIES; PLEA NEGOTIATIONS AND OTHER LEGAL AGREEMENTS.

An attorney for the government may not initiate or engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the attorney representing such person or party; provided, however, that this restriction will not apply if the communication satisfies § 77.6(c).

§ 77.9 REPRESENTED PERSONS AND REPRESENTED PARTIES; RESPECT FOR ATTORNEY-CLIENT RELATIONSHIPS.

When an attorney for the government communicates, or causes a law enforcement agent or cooperating witness to communicate, with a represented person or represented party pursuant to any provision of these regulations without consent of counsel, the following restrictions must be observed:

(a) *Deference to attorney-client relationship.* (1) An attorney for the government, or anyone acting at his or her direction may not, when communicating with a represented person or represented party:

(i) Inquire about information regarding lawful defense strategy or legal arguments of counsel;

(ii) Disparage counsel for a represented person or represented party or otherwise seek to induce the person to forego representation or to disregard the advice of the person's attorney; or

(iii) Otherwise improperly seek to disrupt the relationship between the represented person or represented party and counsel.

(2) Notwithstanding paragraph (a)(1) of this section, if the Attorney General, the Deputy Attorney General, the Associate

Attorney General, an Assistant Attorney General or a United States Attorney finds that there is a substantial likelihood that there exists a significant conflict of interest between a represented person or party and his or her attorney; and that it is not feasible to obtain a judicial order challenging the representation, then an attorney for the government with prior written authorization from an official identified above may apprise the person of the nature of the perceived conflict of interest, unless the exigencies of the situation permit only prior oral authorization, in which case such oral authorization shall be memorialized in writing as soon thereafter as possible.

(b) *Attorney-client meetings.* An attorney for the government may not direct or cause an undercover law enforcement agent or cooperating witness to attend or participate in lawful attorney-client meetings or communications, except when the agent or witness is requested to do so by the represented person or party, defense counsel, or another person affiliated or associated with the defense, and when reasonably necessary to protect the safety of the agent or witness or the confidentiality of an undercover operation. If the agent or witness attends or participates in such meetings, any information regarding lawful defense strategy or trial preparation imparted to the agent or witness shall not be communicated to attorneys for the government or to law enforcement agents who are directly participating in the ongoing investigation or in the prosecution of pending criminal charges, or used in any other way to the substantial detriment of the client.

...

§ 77.11 ENFORCEMENT OF THIS PART.

(a) *Exclusive enforcement by Attorney General.* The Attorney General shall have exclusive authority over this part and any violations of it, except as provided in § 77.12. Allegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice, and shall be addressed when appropriate as matters of attorney discipline by the Department. . . . The findings of the Attorney General or her designees as to an attorney's compliance or non-compliance with this part shall be final and conclusive except insofar as the attorney for the government is afforded a right of review by other provisions of law.

(b) *No private remedies.* This part is not intended to and does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing

criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States.

§ 77.12 RELATIONSHIP TO STATE AND LOCAL REGULATION.

Communications with represented parties and represented persons pursuant to this part are intended to constitute communications that are “authorized by law” within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, DR 7-104(A)(1) of the ABA Code of Professional Responsibility, and analogous state and federal court rules. In addition, this part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government, and those acting at their direction or under their supervision, with represented parties or represented persons in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts. When the Attorney General finds a willful violation of any of the rules in this part, however, sanctions for the conduct that constituted a willful violation of this part may be applied, if warranted, by the appropriate state disciplinary authority.

