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# Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate

Alafair S.R. Burke
*Hofstra*

# NOTES

# Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate

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*The questions whether and when federal prosecutors may ethically contact parties who have retained attorneys about the subject of the representation recently have been the focus of considerable controversy. In this note, Alafair S.R. Burke traces the history of attempts by the Department of Justice to formulate a uniform rule governing such direct communications and analyzes the regulations the Department finalized in August 1994. Ms. Burke argues that federal government attorneys should be subject to a single national standard rather than numerous state no-contact rules, and that certain limited exceptions to the rule are justified in the criminal context. She contends, however, that the new regulations are overbroad because they go beyond the legitimate needs of law enforcement by allowing most direct contacts prior to an arrest. She offers an alternative approach that would create narrow exceptions to the no-contact rule based on the special needs of federal prosecutors. Finally, Ms. Burke argues that prosecutors who violate the rule should be disciplined by state bars but that, contrary to the Second Circuit's holding in* United States v. Hammad, *courts need not suppress evidence gathered in violation of the rule.*

## INTRODUCTION

The "no-contact" rule is a rule of legal ethics that forbids attorneys from communicating with persons represented by counsel regarding the subject of the representation.[1] It has recently become the focus of a bitter debate pitting federal law enforcement officials against the defense bar, the American Bar

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1. For a review of the history and purpose of the no-contact rule, see Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules,* 53 U. PITT. L. REV. 291, 324-28 (1992); Lewis Kurlantzik, *The Prohibition on Communication with an Adverse Party,* 51 CONN. B.J. 136, 138-39 (1977).

Association (ABA), and several national organizations. Moreover, criminal defendants have attempted to expand the parameters of the rule to prohibit communications long recognized as constitutionally permissible. Most notably, defendants have argued that the rule prohibits government attorneys from communicating with a represented party prior to the initiation of formal criminal proceedings, before the Sixth Amendment right to counsel attaches.

Courts have not responded uniformly to these arguments. A handful have held that the no-contact rule does not apply in the criminal context because the Constitution provides ample restrictions on communications by law enforcement officials. Other courts have held that the rule applies in the criminal context, but only after the initiation of formal, adversarial proceedings when the Sixth Amendment right to counsel attaches. The Second Circuit has gone further, holding in *United States v. Hammad*[2] that a court may suppress evidence obtained through direct communication with a represented party, even if the communication occurred prior to the existence of the Sixth Amendment right to counsel.

The implications of the no-contact rule for federal prosecutors are further complicated by the fact that, taken together, the Assistant United States Attorneys (AUSAs) are members of fifty different state bars, each with its own set of ethical guidelines and its own interpretation of the no-contact rule. The apparent inconsistency of these standards prompted then Attorney General Richard Thornburgh to issue a now infamous internal memorandum on June 8, 1989. In it, Thornburgh instructed AUSAs to ignore state ethical rules and instead to adhere exclusively to the policy of the Department of Justice (DOJ).[3] In doing so, Thornburgh hoped to shield the AUSAs from ethical dilemmas resulting from the existence of inconsistent rules.

Although the "Thornburgh Memo" merely repeated a position held by the DOJ since 1980,[4] it made public what had been a slowly emerging, behind-the-scenes conflict and instantly triggered a debate between the DOJ and nearly everyone else regarding the ethical duties of government attorneys. The defense bar strenuously objected to the memorandum. The president of the National Association of Criminal Defense Lawyers labeled it "a green light to ignore the Code of Professional Responsibility."[5] The ABA also sounded its disapproval by passing a formal resolution denouncing the Thornburgh Memo.[6] Even Gonzo journalists jumped into the fray: Hunter S. Thompson claimed

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

3. William Glaberson, *Thornburgh Policy Leads to a Sharp Ethics Battle,* N.Y. TIMES, Mar. 1, 1991, at B4; Tom Watson, *AG Decrees Prosecutors May Bypass Counsel: Move is Assault on Ethics Codes, Defense Bar Claims,* LEGAL TIMES, Sept. 25, 1989, at 1.

4. *See* Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4 Op. Off. Legal Counsel 576, 577 (1980) (maintaining that whether and to what extent ethics rules applied to federal prosecutors was a policy question).

5. Watson, *supra* note 3, at 29 (quoting Neal R. Sonnett, President of the National Association of Criminal Defense Lawyers); *see also* Glaberson, *supra* note 3, at B4 ("Many defense lawyers . . . have concluded that the department was using the memorandum to give prosecutors a wink of encouragement to ignore the rules of ethics . . . .").

6. AMERICAN BAR ASSOCIATION, MIDYEAR MEETING REPORT 301, at 1-9 (1990) [hereinafter ABA REPORT].

Thornburgh had "declared that his boys—4000 or so Justice Department prosecutors—were no longer subject to the rules of the Federal Court System."[7]

Despite Thornburgh's efforts, whether and how strictly the no-contact rule should apply to federal prosecutors remained an issue. In November 1992, Thornburgh's successor, William Barr, attempted to codify the Thornburgh Memo: He proposed DOJ regulations outlining circumstances in which prosecutors would be "authorized by law" to contact represented individuals directly without the presence or consent of counsel.[8] However, on January 22, 1993, the Clinton Administration withdrew the proposed rule.[9] Speculation followed that President Clinton's nominee for Attorney General, Janet Reno, would depart from the interpretation of the no-contact rule advocated by her predecessors.[10] But on July 26, 1993, the DOJ reissued Barr's proposed regulation for an additional thirty-day period of public comment "in light of the complex and important nature of the rule to the criminal and civil justice systems and the livelihoods of its attorneys."[11]

In a memorandum announcing the reissuance of the rule, Reno said she had "made no decisions on any aspect of the proposed rule" and that she published it "to obtain the broadest range of views in order to assist the Department's review."[12] She was not disappointed. The responses received by the DOJ illustrated the gulf dividing the two sides of the debate.[13] Federal prosecutors welcomed the proposal as desperately needed guidance regarding direct communications,[14] while the ABA and the defense bar saw the proposal as an effort to remove federal prosecutors from the ethical rules that govern every other member of a bar.[15] In an attempt to reconcile the two views, the DOJ turned for the first time to members of the private bar and requested their assistance in

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7. Hunter S. Thompson, *Fear and Loathing in Elko,* ROLLING STONE, Jan. 23, 1991, at 24, 56.

8. Communications with Represented Persons, 57 Fed. Reg. 54,737 (1992) (proposed Nov. 20, 1992; withdrawn Jan. 22, 1993).

9. Daniel Wise, *'Thornburgh Memo' Rules Killed: Clinton Staff Retracts Regulations on Agents' Contact with Suspects,* N.Y. L.J., Feb. 1, 1993, at 1.

10. *See, e.g.,* Cris Carmody, *U.S. Judge's Opinion: Justice Dept. Rules Trump State Ethics,* NAT'L L.J., Mar. 1, 1993, at 7 (noting that some observers believed Reno would adopt a less confrontational approach).

11. Communications with Represented Persons, 58 Fed. Reg. 39,976 (1993) (to be codified at 28 C.F.R. pt. 77) (proposed July 26, 1993) (Rulemaking History); *see also 'Thornburgh Memo' Resurfaces, Justice Seeks More Comments,* 62 U.S.L.W. 2077 (Aug. 10, 1993).

12. *Attorney-Client Privilege, Private Attorneys, Reno Meet to Discuss DOJ Proposal on Ex Parte Contacts,* 60 Fed. Cont. Rep. (BNA) No. 15, at D4 (Oct. 18, 1993) (quoting Reno's memo) [hereinafter *Private Attorneys, Reno Meet*].

13. The DOJ received 219 responses within the 30-day comment period. Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,912 (1994) (to be codified at 28 C.F.R. pt. 77).

14. *Compromise Sought with Defense Lawyers on Limits to Investigative Power,* DAILY REP. FOR EXECUTIVES, Oct. 15, 1993, at 198, *available in* LEXIS, Exec Library, Drexec File [hereinafter *Compromise Sought*] (quoting the concerns of Kenneth E. Melson, United States Attorney for the Eastern District of Virginia, regarding the chilling effect an expansive interpretation of the no-contact rule would have on prosecutors).

15. *See, e.g.,* 59 Fed. Reg. 39,913 (1994) (summarizing the concerns of defense lawyers); *Compromise Sought, supra* note 14, at *4 (reporting that members of the ABA's Litigation Section held a meeting with Attorney General Reno and her staff to express opposition to the reissuance of the proposed rule).

developing a rule for government attorneys that would not wholly exempt them from the ethical rules governing the rest of the bar.[16]

On March 3, 1994, after a lengthy series of meetings with members of the private bar, Reno submitted a revised version of the proposed regulations for an additional comment period.[17] The regulations were adopted on August 4, after the DOJ received only thirty-one comments on the proposed rule.[18]

This note assesses the adequacy of the new regulations. It outlines the most difficult dilemmas raised by the application of the no-contact rule to government attorneys. After analyzing various proposals, this note suggests a solution that balances the needs of effective federal law enforcement, on the one hand, and the protection of the attorney-client relationship, on the other. Part I summarizes the cases applying the no-contact rule to criminal attorneys, the original Thornburgh Memo, and the ABA's formal resolution denouncing the Memo. Part I concludes that government attorneys desperately need a clear rule to guide their communications with represented persons. Moreover, the needs of law enforcement sometimes require narrow exceptions to a literal application of the no-contact rule. On the other hand, these concerns alone do not justify a wholesale exemption from the rule for federal prosecutors.

Part II analyzes the no-contact regulations. It concludes that, although the DOJ has the constitutional authority to promulgate the regulations, the regulations provide government attorneys with protections not warranted by the need for effective law enforcement. Although the regulations purport to create only limited exceptions to the general rule prohibiting direct communications with represented persons, they permit almost all direct communications that conform to the minimal safeguards guaranteed by the Fifth and Sixth Amendments. Under the regulations, government attorneys generally are not subject to state disciplinary action so long as they do not engage in communications with represented persons after those persons have been arrested or indicted. The regulations provide that most prearrest, preindictment communications are "authorized by law." In short, government prosecutors are permitted to engage in communications that would subject other attorneys to state bar discipline.

Part III suggests an alternative approach that addresses the concrete concerns of government prosecutors without wholly exempting government attorneys from the no-contact rule. This approach does not distinguish between prearrest and postarrest communications. Instead, it creates narrow exceptions to the no-contact rule which meet the special needs of federal prosecutors. Part III also discusses the appropriate remedies for violations of the no-contact rule by a government attorney. It concludes that federal prosecutors who violate the rule should be subject to state bar disciplinary action. However, suppression of evidence obtained in violation of the rule is an inappropriate remedy because it

16. *See, e.g., Compromise Sought, supra* note 14, at *3 (reporting an agreement between Reno and members of the private bar to form a small working group to discuss the issue).

17. *See* 59 Fed. Reg. 10,086 (1994).

18. *Id.* at 39,913.

bestows unacceptable windfalls on criminal defendants and is not required by the no-contact rule.

## I. THE NO-CONTACT RULE IN THE CRIMINAL CONTEXT

The no-contact rule first appeared in 1908 as Canon 9 of the ABA Canons of Professional Ethics.[19] Both the Code of Professional Responsibility (the Code) and the Model Rules of Professional Conduct (the Model Rules) include versions of the rule. The rule prevents attorneys from communicating about the subject of representation with parties they know to be represented by counsel, unless the party's lawyer is present or consents to the communication, or the law authorizes direct communication.[20] The rule originally was designed to address imbalances in knowledge and skill between lawyers and adverse parties by preventing attorneys from using their superior legal skills to manipulate laypersons.[21] According to the Code, "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel."[22]

Few question the need for a no-contact rule in the civil context. There, the rule provides a represented party's *only* protection against an opposing counsel's attempts to interfere with the attorney-client relationship or harm the client's interests.[23] Furthermore, in the civil context, the rule governs the conduct of attorneys for all parties to a dispute and provides a "mutuality of obligation"[24] in which each attorney maintains complete control over her client's disclosures. But whether and how closely the no-contact rule should govern prosecutors' conduct remains contested.

### A. *Should the Rule Even Apply in the Criminal Context?*

Despite the no-contact rule's lengthy history and general acceptance in the civil arena, many argue that the rule should not apply to criminal prosecutors.[25] Several of the arguments advancing this view focus on the language of the rule

19. *See* Cramton & Udell, *supra* note 1, at 324.

20. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983).

21. *See* Massiah v. United States, 377 U.S. 201, 211 (1964) (White, J., dissenting) (asserting that the underlying concern of the rule is "the supposed imbalance of legal skill and acumen between the lawyer and the party litigant"); Kurlantzik, *supra* note 1, at 139 (noting that the layman's relative ignorance of the technical procedural and evidentiary framework of the law "necessitates limitation by some means of overreaching, and opportunity for overreaching, by the lawyer").

22. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1981).

23. Cramton & Udell, *supra* note 1, at 325.

24. 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, 1179 (1987) (noting that the mutual professional comity customary in civil matters is impossible in the criminal arena).

25. *See, e.g.*, Bruce A. Green, *A Prosecutor's Communications with Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 285 (1988) (stating that the no-contact rule "was drafted with civil practitioners in mind"); F. Dennis Saylor IV & 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, 463 (1992) (stating that "the [no-contact] rule . . . was intended by its drafters to apply principally, if not exclusively, to civil litigation"); Marc A. Schwartz, Note, *Prosecutorial Investigations and DR 7-104(A)(1)*, 89 COLUM. L. REV. 940, 946 (1989) (arguing that the no-contact rule "should not apply at all to the

as written in the Code and the Model Rules. As an initial matter, neither Disciplinary Rule (DR) 7-104(A)(1) nor Model Rule 4.2 expressly provides that the no-contact rule applies in the criminal context. Because some disciplinary rules are specifically aimed at government attorneys,[26] some commentators maintain that the absence of the word "prosecutor" means that the no-contact rule applies only in the civil arena.[27] Furthermore, both DR 7-104(A)(1) and Model Rule 4.2 forbid only those communications made in the course of the attorney's representation of a client.[28] Thus, several commentators argue that the no-contact rule exempts prosecutors, who are not partisan advocates and do not "represent" a "client" in the traditional sense.[29] It is doubtful, though, that the drafters of the no-contact rule intended to exempt prosecutors implicitly from the rule when they could easily have done so explicitly.

Recognizing that the language of the no-contact rule does not clearly indicate whether it governs the conduct of government attorneys, other commentators argue that the rule's underlying rationale applies only in the civil context.[30] The central purpose of the rule in the civil context is to prevent attorneys from using their superior knowledge to "trick" a party outside the presence of her counsel.[31] In the criminal context, however, prosecutors who contact represented persons in the absence of counsel may be acting to identify and apprehend criminal offenders or to prevent future offenses, rather than to take unfair advantage of a layperson.[32] Several commentators and courts argue that these interests outweigh those of the represented person in being protected from a prosecutor's unfair use of her legal skills.[33]

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criminal context"); Uviller, *supra* note 24, at 1179 (asserting that the no-contact rule is intended for "an entirely civil arena").

26. For example, the disciplinary rule immediately preceding the Model Code's version of the no-contact rule is entitled "Performing the Duty of Public Prosecutor or Other Government Lawyer" and deals in part with prosecutorial responsibilities concerning evidence. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) (1981); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983) ("Special Responsibilities of a Prosecutor").

27. *See* Saylor & Wilson, *supra* note 25, at 463 (arguing that "[i]n contrast to other disciplinary and model rules, neither DR 7-104(A)(1) nor Model Rule 4.2 provides that it applies to prosecutors") (footnotes omitted); Schwartz, *supra* note 25, at 948 ("The Rule's failure to explicitly mention the word 'prosecutor' lends additional support to the argument against application to prosecutors.").

28. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1981) (applying only "during the course of [the] representation"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983) (forbidding communications only if they are made by the attorney "[i]n representing a client").

29. *See, e.g.*, Uviller, *supra* note 24, at 1179-80 (noting that "[t]he prosecutor has no client" and that her "paramount professional obligation . . ., unlike her civil counterpart, is to promote a just outcome, not a partisan victory").

30. *See, e.g.*, United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986) (stating that the no-contact rule is intended to ensure that lawyers do not "prey" upon represented parties, not to prohibit legitimate undercover operations).

31. *See* notes 21-24 *supra* and accompanying text.

32. *See* Moran v. Burbine, 475 U.S. 412, 426 (1986) ("Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.") (citation omitted).

33. *See, e.g.*, United States v. Lemonakis, 485 F.2d 941, 956 (D.C. Cir. 1973) (declining to say that "the public interest does not—as opposed to the different interests involved in civil matters—permit advantage to be legally and ethically taken of 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it' " (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966))), *cert. denied*, 415 U.S. 989 (1974); Saylor & Wilson, *supra* note 25, at 464 (noting that the

However, the Supreme Court's use of the exclusionary rule to sanction violations of a criminal defendant's constitutional rights reveals a value system that allows limits to be placed on prosecutorial manipulation, even if those limits result in lost convictions.[34] Moreover, application of the no-contact rule only in the civil context can sometimes lead to absurd results. For example, few would argue that the chief executive officer of General Motors[35] facing the inconvenience of a minor civil suit needs the rules' protections more than does a scared and uneducated person facing the possibility of arrest, criminal charges, and imprisonment. The consequences of criminal prosecution may be far more severe than those resulting from civil litigation, and criminal clients tend to be less sophisticated.[36] Even the DOJ acknowledges that the rationale behind the no-contact rule, including the risk of damaging admissions, waiver of privileges, and misstatements, "clearly applies in criminal proceedings, perhaps with more force than in the civil context."[37]

A stronger argument against applying the no-contact rule in the criminal context relies on the Constitution. Some argue that the Constitution sufficiently addresses in the criminal context those concerns that the no-contact rule addresses in the civil context.[38] In the civil arena, the no-contact rule is the only limitation on an attorney's direct communication with a represented party.[39] In contrast, in the criminal context, the Fifth and Sixth Amendments place substantial restrictions on the ability of law enforcement officials to communicate with criminal defendants.[40] The Fifth Amendment forbids interrogating an arrested person who has asserted his desire to have an attorney present.[41] The Sixth Amendment prohibits law enforcement agents from "deliberately eliciting" statements from a defendant after formal criminal proceedings have begun, unless the defendant's counsel is present or the defendant expressly

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strong public "interest in the apprehension of criminal offenders, the prevention of future criminal offenses, and the accurate and expeditious resolution of criminal proceedings" can "outweigh the interest of the represented person in being protected from his own mistakes or the legal skill of the prosecutor"); Uviller, *supra* note 24, at 1179 ("In criminal investigations, unlike their civil counterparts, public policy favors full prosecutorial investigation while powerful constraints limit unfair or coercive police methods.").

34. *See* United States v. Wade, 388 U.S. 218, 239-41 (1967) (excluding evidence obtained in violation of the 6th Amendment); Miranda v. Arizona, 384 U.S. 436, 478-79, 492 (1966) (excluding statements by a defendant who had not been advised of his rights to remain silent and to an attorney).

35. The no-contact rule prohibits ex parte communications even with the most sophisticated parties. *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 71:302 (1994) (asserting that the no-contact rule does not include "exceptions for communicating with 'sophisticated' parties"); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.6.2, at 614 (1986) ("[C]onsent [of the opposing lawyers] may even be required when the opposing party is as legally sophisticated as that party's lawyer.").

36. Cramton & Udell, *supra* note 1, at 327.

37. 4 Op. Off. Legal Counsel 576, 584 (1980).

38. *See, e.g.*, Saylor & Wilson, *supra* note 25, at 465 ("In contrast to civil litigation, where the imbalance between lawyers and nonlawyers is normally addressed by ethical rules, the balance between prosecutors and suspects or defendants is struck by the Constitution.").

39. *See* notes 23-24 *supra* and accompanying text.

40. *See* U.S. CONST. amends. V, VI.

41. *See* Minnick v. Mississippi, 498 U.S. 146, 153 (1990); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); Miranda v. Arizona, 384 U.S. 436 (1966).

waives his right to counsel.[42] But despite the breadth of the Constitution's protections, few courts have reasoned that the no-contact rule is unnecessary and therefore inapplicable in the criminal context.

### B. *Application of the No-Contact Rule to Preindictment, Noncustodial Communications*

While some state courts refuse to apply the no-contact rule in the criminal context,[43] most have assumed or concluded that the rule does govern the conduct of prosecutors.[44] But even among these courts, there is no consensus concerning the scope of the rule in the criminal context. For example, courts have clashed over whether the rule governs direct communications with all represented individuals or only those who have been indicted. Still, most courts that have addressed this issue have concluded that a prosecutor does not violate the rule by using undercover techniques or communicating with a represented person prior to the initiation of formal criminal proceedings.[45]

#### 1. *The majority view: The rule does not prohibit preindictment communications.*

Most courts hold that the no-contact rule does not prohibit preindictment communications. Courts and commentators have invoked a variety of rationales for limiting the scope of the no-contact rule to postindictment communications. Some justify these decisions by looking to the rule's language itself. For example, some focus on the rule's prohibition only of those communications made to a "party." They contend that targets of criminal investigations are not "parties" until formal, adversarial proceedings are initiated and that the no-contact rule applies only once such proceedings begin.[46] Thus, the Tenth

42. Maine v. Moulton, 474 U.S. 159, 173 (1985); United States v. Henry, 447 U.S. 264, 270 (1980); *see also* Brewer v. Williams, 430 U.S. 387, 397-98 (1977); Massiah v. United States, 377 U.S. 201, 206 (1964).

43. *See, e.g.*, State v. Richmond, 114 Ariz. 186, 191, 560 P.2d 41, 46 (1976), *cert. denied*, 433 U.S. 915 (1977); State v. Nicholson, 77 Wash.2d 415, 418, 463 P.2d 633, 636-37 (1969).

44. *See, e.g.*, United States v. Ryans, 903 F.2d 731, 735 (10th Cir.) ("It is now well settled that [the no-contact rule] applies to criminal prosecutions as well as civil litigation."), *cert. denied*, 498 U.S. 855 (1990).

45. *See, e.g.*, United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) (stating that the no-contact rule was not intended to stymie undercover investigations once an individual retains counsel for the purpose of a grand jury inquiry), *cert. denied*, 464 U.S. 852 (1983); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982) (per curiam) (stating that the no-contact rule is not intended to enable a criminal suspect to hamper investigations, and finding that defendant was in any case not represented by counsel); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.) (holding that noncustodial communications between a criminal suspect and a government representative prior to arrest or indictment do not implicate the no-contact rule), *cert. denied*, 452 U.S. 920 (1981); United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973) (finding no ethical breach by a United States Attorney when a government informant communicated with a criminal suspect prior to indictment), *cert. denied*, 415 U.S. 989 (1974); *see also* Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 471-72 (1993); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 702-03 (1992); Schwartz, *supra* note 25, at 943-44.

46. *See, e.g.*, Cramton & Udell, *supra* note 1, at 333 (arguing that in criminal matters "the rule would apply at the same time the Sixth Amendment right to counsel attaches" because "until 'the Gov-

Circuit in *United States v. Ryans*[47] held that a "party" under the no-contact rule is a litigant participating in "an adversarial relationship."[48] Therefore, the court held that the no-contact rule does not prohibit direct communications made prior to the initiation of formal, adversarial proceedings.[49] However, the language of the comment to Model Rule 4.2 weighs against such a construction. It expressly extends the no-contact rule to all communications made to any person "who is represented by counsel concerning the subject matter of the communication."[50] Whether or not the person is a party to a formal proceeding is irrelevant to the applicability of the rule.[51]

Rather than focusing solely on the meaning of "party," some courts have also turned to the no-contact rule's requirement that the communication be on the "subject of representation." Several courts have held that, until formal proceedings have commenced, the subject matter of the representation is as yet undefined and, therefore, there is no clearly delineated "subject of representation" to which the no-contact rule can apply.[52]

Other courts rely on yet a third basis for concluding that the no-contact rule does not apply before the initiation of formal proceedings. The no-contact rule contains an exception for communications that are otherwise "authorized by law." Some commentators argue that communications made by government attorneys prior to formal proceedings are not prohibited by the rule because they are "authorized by law" under the Constitution.[53] The Supreme Court has held that the Sixth Amendment right to counsel does not attach until formal charges have been filed.[54] Thus, communications made prior to indictment, even if without the consent or presence of counsel, do not violate the Sixth

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ernment has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified,' there is no legal matter, controversy or proceeding to which a person may be a party" (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972))); Schwartz, *supra* note 25, at 948 (suggesting that "[p]rior to the initiation of proceedings, those with whom a prosecutor might communicate are not litigants and do not have an interest in a particular 'case,' so the language on its face seems inapposite to pre-indictment prosecutorial investigations").

47. 903 F.2d 731 (10th Cir.), *cert denied,* 498 U.S. 855 (1990).

48. *Id.* at 739. The court based its interpretation in part on the definition of a "party" as " 'a litigant, or a person directly interested in the subject matter of a case.' " *Id.* (quoting BLACK'S LAW DICTIONARY).

49. *Id.* at 739-40.

50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983). Moreover, the ABA's Standing Committee on Ethics and Professional Responsibility has recently proposed changing the word "party" in Model Rule 4.2 to "person," thereby extending the rule to preindictment communications. *Attorney-Client Privilege: ABA Committee Proposes to Expand Model Rule Prohibiting Ex Parte Contacts to Include Persons not yet Charged,* 61 Fed. Cont. Rep. (BNA) No. 22, at D6 (June 6, 1994) [hereinafter *Attorney-Client Privilege*].

51. *Attorney-Client Privilege, supra* note 50, at D6.

52. *Ryans,* 903 F.2d at 739 (stating that the "subject matter of the representation [is] uncertain during the investigative stage of [a] case"); United States v. Lemonakis, 485 F.2d 941, 956 (D.C. Cir. 1973) ("[I]n the investigatory stage of the case, the contours of the 'subject matter of the representation' by appellants' attorneys . . . [are] less certain and thus even less susceptible to the damage of 'artful' legal questions the [no-contact rule] appear[s] designed in part to avoid."), *cert. denied,* 415 U.S. 989 (1974).

53. Saylor & Wilson, *supra* note 25, at 474-76.

54. Brewer v. Williams, 430 U.S. 387, 398 (1977) (holding that the 6th Amendment right to counsel attaches at the time of arraignment). Even after the 6th Amendment right to counsel attaches, law enforcement officials may still receive volunteered information from a represented party, Kuhlmann

Amendment. But conduct is not automatically immune from censure simply because the Constitution does not forbid it.[55] State rules that regulate the professional conduct of attorneys may provide restrictions that go beyond the "minimal historic safeguards" of the Constitution.[56] To argue that the Constitution somehow authorizes all communications not expressly forbidden by it simply begs the question of whether state bar associations may promulgate any rules that regulate communications made in the criminal context.

Finally, some courts do not focus at all on the language of the no-contact rule. Instead, they adopt a practical approach that asks whether the rule makes sense as a matter of public policy in the criminal context. In particular, these courts are troubled by any application of the rule that would prohibit undercover investigations prior to the initiation of formal criminal proceedings.[57] They do not, however, carve out an exception to the no-contact rule for undercover communications. Instead, these courts hold more broadly that the no-contact rule's proscriptions do not attach at all during the period of investigation prior to the initiation of criminal proceedings.[58]

But applying the no-contact rule only to postindictment communications is the same in practice as simply declaring the rule inapplicable in the criminal context. The Sixth Amendment right to counsel already prohibits law enforcement agents from "deliberately eliciting" statements from a defendant *after* formal criminal proceedings have begun, unless the defendant's counsel is present or the defendant expressly waives his right to counsel.[59] Only two differences

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v. Wilson, 477 U.S. 436, 459 (1986), and the party may waive his 6th Amendment right to counsel at any time. *Brewer,* 430 U.S. at 405-06.

55. *See* McNabb v. United States, 318 U.S. 332, 340 (1943) (holding that exclusion of evidence is not governed solely by principles derived from the Constitution).

56. *Id.*

57. *See, e.g., Ryans,* 903 F.2d at 739-40 (holding that the no-contact rule is not intended to preclude undercover investigation simply because a suspect retains counsel); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) ("We do not believe that [the no-contact rule] was intended to stymie undercover investigations when the subject retains counsel."), *cert. denied,* 464 U.S. 852 (1983); United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983) (holding that no-contact rule does not require that law enforcement officials stop using informant prior to indictment to tape record a criminal suspect's conversations); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.) (holding that the Government's use of undercover investigative techniques prior to arrest or indictment does not implicate the ethical concerns addressed by the no-contact rule), *cert. denied,* 452 U.S. 920 (1981); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973) (holding that the rule "does not in our view embrace the initiation and recording of the conversations between" an informant and defendant), *cert. denied,* 415 U.S. 989 (1974).

58. *See, e.g., Ryans,* 903 F.2d at 740; *Fitterer,* 710 F.2d at 1333; *Kenny,* 645 F.2d at 1339; *Lemonakis,* 485 F.2d at 953-55.

59. *See* Maine v. Moulton, 474 U.S. 159 (1985) (holding that admission of incriminating statements made to codefendant after indictment and at a meeting to prepare for upcoming trial violated defendant's 6th Amendment right to counsel); United States v. Henry, 447 U.S. 264 (1980) (holding that statements made to paid government informant were inadmissible because the government intentionally created a situation likely to induce defendant to make incriminating statements in the absence of counsel, in violation of defendant's 6th Amendment right to counsel); Brewer v. Williams, 430 U.S. 387 (1977) (holding that statements that defendant made, after criminal proceedings had commenced, in response to police officer's speech asserting that victim's parents were entitled to give her a "Christian burial," were elicited in violation of 6th Amendment); Massiah v. United States, 377 U.S. 201 (1964) (holding that statements that federal agents obtained via radio transmitter installed in defendent's automobile after defendant had been indicted were obtained in violation of the 6th Amendment).

distinguish the scope of the Sixth Amendment right to counsel from the no-contact rule as applied to postindictment communications. First, the no-contact rule bars all communications between an attorney and a represented party outside the presence of counsel; the Sixth Amendment merely forbids government agents from "deliberately eliciting" information and permits agents to accept volunteered information.[60] Second, the protections of the no-contact rule can be waived only by the represented party's counsel, whereas the Sixth Amendment right to counsel may be waived by the party himself.[61] Although these differences may be critical in the relatively unusual case of a represented, indicted person who waives his Sixth Amendment right to counsel, they are irrelevant to the more common circumstances of a person who has chosen to retain counsel but is left with the protection of neither the Sixth Amendment nor the no-contact rule simply because he has been fortunate enough not to have been indicted. From this person's perspective, a no-contact rule that applies only after the initiation of formal criminal proceedings overlaps almost completely with the Sixth Amendment and provides no additional protection against direct communications with government attorneys.[62]

2. United States v. Hammad.

A few courts have recognized that preindictment communications might violate the no-contact rule but have refused to find a violation on other grounds.[63] Only one circuit court has held that communications made prior to the initiation of formal proceedings can violate the no-contact rule. In *United States v. Hammad*,[64] an AUSA arranged for an undercover informant to record a meeting with the defendant, who had not yet been indicted.[65] At the meeting, the informant showed the defendant a fake subpoena, supplied by the AUSA, purporting to require the informant to appear before a grand jury investigating the defendant.[66] Accepting the subpoena as genuine, the defendant encouraged

60. *See* Kuhlmann v. Wilson, 477 U.S. 436 (1986) (holding that statements made to informant who passively received information did not violate 6th Amendment right to counsel).

61. *See, e.g.*, Patterson v. Illinois, 487 U.S. 285, 292 & n.4 (1988) (holding that postindictment communications outside the presence of counsel were admissible because defendant knowingly, voluntarily, and intelligently waived his 6th Amendment right to counsel).

62. *See* Cramton & Udell, *supra* note 1, at 327-28, 359 (noting that, "[i]f the prosecutor's conduct meets Sixth Amendment standards, there is a strong tendency in the decisions to reject a claim that the ethics rule has been violated" and suggesting that the no-contact rule should apply to prosecutors, but only to custodial communications made after the commencement of formal proceedings, and only if the client is permitted to waive the protection of the rule); Schwartz, *supra* note 25, at 953 (recognizing the "redundancy" between constitutional restraints and the no-contact rule if applied only to postindictment communications).

63. *See, e.g.*, United States v. Weiss, 599 F.2d 730, 740 (5th Cir.) (warning that government attorneys "flirted with" a violation of the no-contact rule when, knowing that a criminal suspect was represented by counsel, they approached the suspect directly and discouraged him from consulting his attorney, but upholding their conduct because defense counsel was also a target of the investigation and had an actual conflict of interest in the subject of the representation), *reh'g denied*, 603 F.2d 860 (5th Cir. 1979).

64. 846 F.2d 854 (*Hammad I*), *as amended*, 858 F.2d 834 (2d Cir. 1988) (*Hammad II*), *cert. denied*, 498 U.S. 871 (1990).

65. 846 F.2d at 856.

66. *Id.*

the informant to avoid complying with it.[67] At the time the tape recording was made, the AUSA apparently was aware that the defendant was represented by counsel regarding the ongoing investigation.[68] The defendant sought to have the tape recording suppressed as a communication made in violation of the no-contact rule.

Although the Second Circuit, in its first *Hammad* decision, noted that the applicability of the no-contact rule to criminal prosecutions was "conclusively established,"[69] it also recognized that the application of the rule to preindictment communications presented a "closer question."[70] Nonetheless, in the court's view, there was "no principled basis" to constrain the scope of the rule to only those communications made after the initiation of formal criminal proceedings.[71] First, the court saw no constitutional argument for aligning the no-contact rule with the Sixth Amendment. It simply noted that the no-contact rule was designed to secure protections not contemplated by the Constitution.[72] Second, the court recognized the futility of tying the rule to the initiation of formal criminal proceedings: A prosecutor could easily manipulate the timing of an indictment to avoid the rule's encumbrances.[73]

The court therefore affirmed the district court's suppression of the tape recording and its interpretation of the no-contact rule, which applied the rule to all " 'instances in which a suspect has retained counsel specifically for representation in conjunction with the criminal matter in which he is held suspect, and the government has knowledge of that fact.' "[74] In approving this standard, the Second Circuit stated: "This sensible limitation substantially meets the government's objections. It would render ineffective a suspect's proclamation that counsel represented him regarding all criminal matters. Far more precise notice is required before a prosecutor will be ethically constrained."[75]

Notwithstanding this claim, the Second Circuit later issued an amended opinion in *Hammad*.[76] In *Hammad II*, the court explicitly rejected the standard approved by the panel in *Hammad I*, claiming it was "unduly restrictive in that small but persistent number of cases where a career criminal has retained 'house counsel' to represent him in connection with an ongoing fraud or criminal enterprise."[77] Yet the court failed to propose an alternative standard, stating instead that the prosecutor's use of a forged grand jury subpoena was an

67. *Id.*

68. *Id.* at 856-57.

69. *Id.* at 858.

70. *Id.*

71. *Id.* (noting that " '[t]hose courts that have found [the no-contact rule] inapplicable to the investigatory stage of a criminal prosecution have not clearly stated the bases for those decisions' " (quoting United States v. Guerrerio, 675 F. Supp. 1430, 1436 (S.D.N.Y. 1987))).

72. *Id.* at 859.

73. *Id.*

74. *Id.* (quoting the district court opinion, United States v. Hammad, 678 F. Supp. 397, 401 (E.D.N.Y. 1987)).

75. *Id.*

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

77. *Id.* at 839.

improper investigatory device that violated the no-contact rule.[78] *Hammad II* states that "the use of informants by government prosecutors in a preindictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to [the no-contact rule] and therefore will not be subject to sanctions."[79] Consequently, *Hammad II* essentially gutted the original *Hammad* decision.[80]

But *Hammad* still echoes. The Second Circuit retains its policy of case-by-case review, expressly refusing to issue a "bright-line rule" or "to list all possible situations that may violate [the no-contact rule]."[81] Some observers have criticized the Second Circuit's approach, saying that it leaves government lawyers without a clear standard of conduct, thereby hampering effective law enforcement by deterring government attorneys from engaging in what are most likely legitimate investigative techniques.[82] Other commentators have praised the *Hammad* decision for striking a balance that "is desirable because it prevents prosecutors from violating the rules of professional responsibility while allowing them to investigate."[83]

Regardless of the wisdom of the Second Circuit's approach, *Hammad I* derailed the consensus that had been emerging among courts that preindictment undercover investigations were not covered by the no-contact rule. Moreover, by suppressing evidence obtained in violation of its unique interpretation of the no-contact rule, the *Hammad* decision opened the door to the possibility that otherwise lawfully obtained evidence, admissible in every other federal court, would no longer be admitted in the Second Circuit. *Hammad* posed such potential for confusion that it prompted Attorney General Thornburgh to issue his havoc-creating memorandum. Despite the Second Circuit's attempt in *Hammad II* to unring the bell by stating that preindictment undercover investigations would "generally" be permitted, the *Hammad* decisions demonstrate the

78. *Id.* at 839-40.

79. *Id.* at 840.

80. Subsequent cases limiting the holding in *Hammad* to its facts reinforce this conclusion. *See, e.g,* United States v. DeVillio, 983 F.2d 1185, 1192 (2d Cir. 1993) (refusing to suppress tape recordings made by an informant after the defendant was represented by counsel and stating that, "in the instant case, there is no evidence of any violation rising to the level of the one we considered in *Hammad*"); United States v. Schwimmer, 882 F.2d 22, 29 (2d Cir. 1989) (distinguishing *Hammad* by noting that its holding was "limited . . . to the circumstances of that case"); *see also* United States v. Harloff, 807 F. Supp. 270, 276-78 (W.D.N.Y. 1992) (noting that most undercover investigations are unlike *Hammad*, where particularly deceptive tactics were used, and will fall within the "authorized by law" exception to the no-contact rule).

81. *Hammad II,* 858 F.2d at 840.

82. *See, e.g.,* Schwartz, *supra* note 25, at 950 (criticizing *Hammad II* as "an imprecise and uncertain approach . . . bound to hamper investigation"); *see also* Stephen Gillers, *Outside Counsel: Ethical Questions for Prosecutors in Corporate-Crime Investigations,* N.Y. L.J., Sept. 6, 1988, at 1, 6 (warning that "[t]he flipside of flexibility and discretion for the courts is caution (possibly overcaution) by the government" because prosecutors cannot know "how far the court will be willing to go in denying the fruits of an investigation" and "might elect less productive courses of action in order to reduce the risk of losing valuable evidence").

83. Lisa F. Salvatore, Note, United States v. Hammad: *Encouraging Ethical Conduct of Prosecutors During Pre-Indictment Investigations,* 56 BROOK. L. REV. 577, 588 (1990).

need for a clear regulation governing the conduct of government attorneys in this regard.[84]

### C. *The General Controversy: Thornburgh Faces Off with the ABA and the Defense Bar*

In response to the uncertainty created by the Second Circuit's decision in *Hammad*, on June 8, 1989, then Attorney General Thornburgh issued his now infamous memorandum. Apparently, Thornburgh was most concerned about strict application of the no-contact rule to government attorneys in two situations. First, he feared that suspects would use the rule to challenge otherwise lawful undercover communications. Second, he worried about the invocation of the rule by a single attorney representing several individuals, some of whom might wish to speak voluntarily with government attorneys.[85] But the memo addressed more than just the problems raised by the application of the no-contact rule in these particular circumstances. Indeed, the memo sought to wholly exempt Justice Department attorneys from the no-contact rule. The memorandum indicated that, regardless of the appropriate scope of the rule as applied to prosecutors, any attempt by state bar associations to regulate the conduct of Department attorneys would run afoul of the Supremacy Clause of the Constitution.[86] By depending on this argument, the memorandum avoided any meaningful discussion of the no-contact rule, its applicability in the criminal context, or the need for specially designed exceptions for government attorneys. Moreover, Thornburgh's approach was all but guaranteed to provoke the controversy that ensued.

Within months of the appearance of Thornburgh's memo, the American Bar Association passed a formal resolution denouncing it as an attempt to give DOJ lawyers a "blanket exemption"[87] from the no-contact rule and promised to "oppos[e] any attempt by the Department of Justice unilaterally to exempt its lawyers from the professional conduct rules that apply" to the rest of the profession.[88] The ABA's report recognized the "nearly universal acceptance"

84. *See, e.g.*, Communications with Represented Persons, 59 Fed. Reg. 10,086, 10,087 (1994) (to be codified at 28 C.F.R. pt. 77) (proposed Mar. 3, 1994, formalized Aug. 4, 1994) (citing *Hammad* and noting that "[u]ncertainty about the scope and applicability of [the no-contact rule] has directly affected the investigative activities of agents . . . who work with prosecutors"); U.S. DEPARTMENT OF JUSTICE, MONOGRAPH ON COMMUNICATIONS WITH REPRESENTED PERSONS: COMMENTARY TO 28 C.F.R. PART 77, at 3-4 (June 1993) (revoked and replaced by the new regulations) [hereinafter MONOGRAPH] ("Department of Justice attorneys in the Second Circuit must now attempt to forecast, without any real guidance, whether their contacts with represented persons will be judged in hindsight to be improper and potentially subject to disciplinary action.").

85. Memorandum from Richard Thornburgh, Attorney General, to All Justice Department Litigators 2 (June 8, 1989), *reprinted in* ABA Report, *supra* note 6, attached transcr. [hereinafter Thornburgh Memo]. For a discussion of the concerns surrounding these two types of communications, see notes 181-194 *infra* and accompanying text.

86. Thornburgh Memo, *supra* note 85, at 9 (advising that "the Supremacy Clause will continue to provide Department attorneys and agents with adequate assurances that the United States will support them if any disciplinary authority other than the United States attempts to interfere with the legitimate investigative prerogatives of the government").

87. ABA REPORT, *supra* note 6, at 6.

88. *Id.* app. (summary of recommendations).

of the no-contact rule and the policies underlying it, such as "situations in which a represented party may be taken advantage of by adverse counsel."[89] The ABA viewed the Thornburgh position as an unwelcome attempt "to modify or nullify a time-honored standard of professional conduct" through "an unwarranted and unfounded use of executive power to create unequal classes of both litigants and lawyers."[90]

The ABA had well-grounded reasons to attack the Thornburgh Memo's approach and analytical underpinnings. Thornburgh relied primarily on the Supremacy Clause. Absent a federal statute or lawfully promulgated regulation manifesting a federal intention to regulate the conduct of attorneys, state disciplinary action against a United States Government attorney does not implicate the Supremacy Clause.[91] Although a federal statute empowers the Attorney General to "detect and prosecute crimes against the United States" and to "conduct . . . other investigations regarding official matters under the control of the Department of Justice,"[92] it confers only general powers upon the Attorney General and the DOJ; it does not constitute a federal mandate inconsistent with state ethical guidelines.

Thornburgh's argument appears to presume mistakenly that the Supremacy Clause confers on federal officers general immunity from all state rules.[93] This interpretation of the Supremacy Clause would exempt government attorneys from *all* state ethical constraints, including uncontroversial rules aimed specifically at prosecutors.[94] Thornburgh's interpretation would also remove federal public defenders from the restraints of state ethical rules, a result Thornburgh surely did not intend. In short, Thornburgh's argument suggested a two-tiered ethical regime in which attorneys for the federal government have "ethical superiority"[95] and are "above both morality and law."[96]

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89. *Id.* at 2.

90. *Id.*

91. *Id.* at 3; *see also In re* Doe, 801 F. Supp. 478, 485-86 (D.N.M. 1992) (stating that a government attorney may be subjected to state bar disciplinary proceedings). *But see* Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 575 (4th Cir. 1989) ("Regulation of the legal profession admittedly implicates significant state interests, but the federal interest in protecting federal officials in the performance of their federal duties is paramount.").

92. 28 U.S.C. § 533(1), (3) (1988). More specifically, the Attorney General is granted statutory powers to conduct grand jury and other legal proceedings, *id.* § 515(a), conduct litigation and "secur[e] evidence therefor," *id.* § 516, "supervise all litigation to which the United States . . . is a party," *id.* § 519, and "direct all United States attorneys [and] assistant United States attorneys . . . in the discharge of their respective duties." *Id.* § 519.

93. *See, e.g.*, Mesa v. California, 489 U.S. 121, 138-39 (1989) (holding that state courts have jurisdiction to try United States Postal Service employees for state criminal violations arising out of their operation of mailtrucks); Johnson v. Maryland, 254 U.S. 51, 56 (1920) (stating that "an employee of the United States does not secure a general immunity from state law while acting in the course of his employment" and that "[i]t very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment"). *But see generally In re* Neagle, 135 U.S. 1 (1890) (holding that a federal employee, acting in his official capacity and pursuant to federal authority, is immune from prosecution for state law violations).

94. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103 (1981) ("Performing the Duty of Public Prosecutor or Other Government Lawyer"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983) ("Special Responsibilities of a Prosecutor").

95. William J. Martin, *Trashing Thornburgh's Noxious Memo*, CHI. LAW., June 1992, at 10.

Facing scathing criticism for his misplaced reliance on the Supremacy Clause,[97] Thornburgh maintained that "the Supremacy Clause [was] not the principal or the only arrow in our quiver."[98] He argued instead that otherwise lawful communications by DOJ attorneys fell within the "authorized by law" exception to the no-contact rule.[99] The ABA was equally critical of this argument, noting that the lack of a constitutional provision prohibiting communications with a represented party did not render the communications "authorized by law."[100] "The exception asserted by the government," the ABA concluded, "would swallow the rule."[101]

At least one federal court also found Thornburgh's reasoning less than persuasive. In *United States v. Lopez*,[102] an AUSA conducted plea negotiations with a defendant outside the presence of his counsel, without counsel's permission, after the defendant had been indicted.[103] The government attempted to shield itself from judicial censure by invoking the Thornburgh Memo. The judge condemned both the attorney's behavior and the entire Thornburgh Memo as a "frontal assault on the legitimate powers of the court."[104]

## II. THE DEPARTMENT OF JUSTICE REGULATIONS: FINALLY, A SOLUTION?

As it became increasingly clear that the Thornburgh Memo alone could not create a safe harbor from the no-contact rule for Department of Justice attorneys, the Department shifted strategies. The final regulations[105] outline the circumstances in which prosecutors are "authorized by law" to contact represented individuals directly without the presence or consent of counsel. In this manner, the regulations rest upon a premise quite distinct from that underlying the Thornburgh Memo. The Thornburgh Memo declared that state ethical guidelines could not be enforced against federal prosecutors. In contrast, the regulations apply the no-contact rule to government attorneys, but then define situations where communications made by prosecutors fall under the "authorized by law" exception to the rule. Thus, at least conceptually, the regulations concern themselves only with the few instances in which strict application of the no-contact rule would interfere with the function of government attorneys.

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96. Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1447 (1993).

97. *See, e.g.*, ABA REPORT, *supra* note 6, at 3; Jerry E. Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203 (1991). *But see, e.g.*, Saylor & Wilson, *supra* note 25, at 482-85.

98. Dick Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 JUDICATURE 290, 291 (1991).

99. *Id.*; Thornburgh Memo, *supra* note 85, at 7.

100. *See* ABA REPORT, *supra* note 6, at 6; *see generally* notes 53-56 *supra* and accompanying text.

101. ABA REPORT, *supra* note 6, at 7.

102. 765 F. Supp. 1433 (N.D. Cal. 1991), *vacated and remanded on other grounds*, 4 F.3d 1455 (9th Cir. 1993).

103. *Id.* at 1444.

104. *Id.* at 1461 (agreeing that a violation of the ethical rules had occurred, but reversing the lower court's dismissal of the indictment as an abuse of discretion).

105. *See* Communications with Represented Persons, 59 Fed. Reg. 39,910 (1994) (to be codified at 28 C.F.R. pt. 77); *see also* text accompanying notes 8-11 *supra*.

Unlike the Thornburgh Memo, the regulations do not exempt government attorneys from the rule entirely.[106]

Even staunch opponents of the Thornburgh Memo have been willing to accept a compromise in which government attorneys would be given some amount of freedom from the rule. For instance, Donald E. Santarelli, the vice-chair of the Governmental Affairs Committee of the ABA Criminal Justice Section, "urged [Attorney General] Reno to avoid playing the 'trump card' of a federal rule pre-empting state bar ethics rules without exploring the possibility of less drastic ways to address the concerns underlying the proposed rule."[107] In particular, he noted that "the ABA would reconsider the subject of contacts with represented persons in particular problem areas . . . [so] there would be no need for DOJ to proceed in such a heavy-handed way."[108]

### A. *Authority to Promulgate the Regulations*

Before examining the substance of the DOJ regulations, one should ask whether the DOJ possesses the authority to promulgate regulations defining what is "authorized by law" under the no-contact rule, thereby preempting state interpretations of the rule. It should be noted initially that the regulations are unlikely to conflict with most state ethical rules. The no-contact rule as adopted by almost all states invites preemption by containing an express exception for communications otherwise "authorized by law." The regulations simply employ that exception and define instances in which communications by government attorneys are authorized by federal law. However, the version of the no-contact rule in at least one state—Florida—contains no "authorized by law" exception.[109] At least in Florida, therefore, the door is open to a conflict between the state rule and the DOJ regulation.

In the event of a conflict between state ethical guidelines and the DOJ regulations, the federal regulations should prevail. Granted, states may regulate the ethical conduct of attorneys admitted to practice before their courts.[110] Arguably, states can regulate the conduct of attorneys for the federal government in the absence of a specific federal intention to preempt such regulation.[111] Nevertheless, the federal government may impose limitations on that authority by preempting state law.[112]

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106. 59 Fed. Reg. 10,086 (1994) (to be codified at 28 C.F.R. pt. 77) (noting that under the proposed regulation, "federal attorneys generally continue to be subject to state bar ethical rules where they are licensed to practice, except in the limited circumstances where state ethical rules clearly conflict with lawful federal procedures and practices").

107. *Compromise Sought, supra* note 14 (quoting Santarelli).

108. *Id.* (paraphrasing Santarelli).

109. *See* FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-4.2 (1993).

110. *See* Nix v. Whiteside, 475 U.S. 157, 165 (1986) (noting the "state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts").

111. *See* notes 91-96 *supra* and accompanying text.

112. *See, e.g.*, Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 384 (1963) (" '[T]he law of the State, though enacted in the exercise of powers not contraverted, must yield' when incompatible with federal legislation" (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824))).

Derived from the Supremacy Clause of the Constitution,[113] the doctrine of preemption permits the federal government in some circumstances to "trump" conflicting state law or wholly preclude states from regulating in a specific field.[114] Although the federal government can preempt state law in a "field which the states have traditionally occupied" only where it has a "clear and manifest purpose,"[115] the Attorney General should be permitted to promulgate regulations defining the authority of government attorneys to communicate directly with represented parties. The states may have "traditionally occupied" the field of regulation of professional conduct among attorneys practicing in their courts, but the currently proposed regulations do not purport to preempt the entire field of professional conduct. Instead, the regulations simply announce when DOJ attorneys can communicate directly with represented parties. The states have not dominated regulation of the conduct of federal law enforcement officials performing their duties on behalf of the federal government. In fact, Congress has stated explicitly its intent that the conduct of DOJ employees be regulated by the Attorney General.[116]

Even if preemption required a clear manifestation of a federal intention to displace state law, such manifestation need not be from Congress itself. The DOJ's intention to preempt state law[117] satisfies any requirement that the federal government display a "clear and manifest purpose" to preempt state law. The Supreme Court has held repeatedly that "[f]ederal regulations have no less preemptive effect than federal statutes."[118] Moreover, an administrative agency may preempt state law by regulation without explicit congressional authorization to displace state law.[119] When the federal government seeks to preempt state law with agency regulations, the relevant inquiry is whether the administrative agency promulgating the regulations intended to displace state law and whether it acted within the scope of its delegated authority.[120]

Regulations governing the communications of DOJ attorneys fall within the delegated authority of the Attorney General. Congress has enacted an exten-

113. U.S. CONST. art. VI, § 2 ("[T]he Laws of the United States . . . shall be the supreme Laws of the Land . . . .").

114. *See, e.g.*, Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986).

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

116. *See* 5 U.S.C. § 301 (1988) (authorizing heads of executive agencies to "prescribe regulations for the government of [their] department[s]" and "the conduct of [their] employees").

117. *See* 59 Fed. Reg. 10,102 (1994) (to be codified at 28 C.F.R. § 77.12) (specifying that the proposed regulation "is intended to preempt 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 . . . with represented parties or represented persons in criminal or civil law enforcement investigations or proceedings").

118. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982); *accord* City of New York v. FCC, 486 U.S. 57, 63-64 (1988).

119. *See, e.g., City of New York*, 486 U.S. at 64 (holding that "where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authoriziation to displace state law.' " (quoting *De La Cuesta*, 458 U.S. at 154) (alterations in original)).

120. *See, e.g., City of New York*, 486 U.S. at 63-64; Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699-700 (1984); *De La Cuesta*, 458 U.S. at 153-54; United States v. Shimer, 367 U.S. 374, 383 (1961).

sive scheme of federal statutes defining federal criminal offenses,[121] and the Attorney General is authorized to direct DOJ attorneys in securing evidence and conducting litigation pursuant to the enforcement of that scheme.[122] Moreover, Congress has authorized the Attorney General to promulgate regulations governing the Department of Justice and the "conduct of its employees."[123] Because the DOJ regulations do not authorize communications that are constitutionally impermissible, they should be viewed as valid regulations concerning the "conduct" of government attorneys. The regulations fall within the Attorney General's delegated authority and are clearly intended to displace conflicting state law; therefore, they are a lawful preemption of state ethical rules.

### B. *The DOJ Regulations*

Federal regulation is an effective and final settlement of the controversy surrounding the application of the no-contact rule to federal prosecutors. A regulation promises the persuasive, fair, bright-line, policy-based rules that the courts have been unable to provide. The lack of clear rules governing direct communications by federal prosecutors has created among government attorneys a lingering fear of disciplinary proceedings.[124] Federal Bureau of Investigation agents have expressed serious concerns to the Attorney General that, because of these apprehensions, federal prosecutors are refusing to authorize legitimate law enforcement techniques.[125] Although an amendment to the rules of professional responsibility could also define a prosecutor's responsibilities under the no-contact rule,[126] adoption of the amendment by all fifty states would be a lengthy process. Moreover, the states might not embrace such an amendment universally. Relying on state bar associations to amend their rules would likely leave government attorneys with their current dilemma of attempting to follow inconsistent ethical guidelines.

Furthermore, the new rule is particularly attractive in that—at least *conceptually*—it concedes that the no-contact rule generally governs communications made by the Department's attorneys and that government attorneys may not normally communicate with a party whom the attorney knows is represented concerning the subject matter of the communication.[127] The regulations do not

121. For example, Titles 8, 18, 21, 26, 29, 31, and 49 of the United States Code all contain statutes defining federal criminal offenses.

122. *See, e.g.*, 28 U.S.C. §§ 516, 519 (1988).

123. 5 U.S.C. § 301 (1988).

124. 59 Fed. Reg. 39,911 (1994) (to be codified at 28 C.F.R. pt. 77) (arguing that "application of different state disciplinary rules to [government attorneys] creates uncertainty, confusion and the possibility of unfairness" and noting the possibility that "one member of a two-member federal prosecution team could receive a commendation for effective law enforcement while the other member licensed in another state might be subject to state discipline for the same conduct").

125. *See* MONOGRAPH, *supra* note 84, at 4.

126. *See* ABA REPORT, *supra* note 6, at 7-8 (suggesting such an approach).

127. 59 Fed. Reg. 39,929 (1994) (to be codified at 28 C.F.R. § 77.5) (forbidding federal prosecutors from "communicat[ing], or caus[ing] 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" unless authorized by law or by the proposed regulation).

attempt to exempt federal attorneys from the no-contact rule altogether.[128] However, by distinguishing between a "represented party" and a "represented person," the regulations do exclude most communications by government attorneys from the scope of the no-contact rule. Under the regulations, a "represented party" would largely enjoy the protections of the no-contact rule,[129] whereas a "represented person" would not.[130]

The regulations define a person as a "represented party" only if (1) he is represented by an attorney, (2) the representation is ongoing and concerns the subject matter of the communication, and (3) he has already been arrested or charged in a formal criminal proceeding.[131] Subject to only a few exceptions, represented parties enjoy the broad protection of the no-contact rule under the regulations. However, not every individual who has retained an attorney enjoys these broad protections. A person who meets the first two prongs of the definition of a represented party, but who has not yet been arrested or indicted, is defined by the regulations as a "represented person."[132] The regulations permit government attorneys to contact represented persons in all but a few instances.[133] Forthcoming provisions of the *United States Attorneys' Manual*[134] will provide additional limitations on a government attorney's authority to communicate with represented persons prior to indictment or arrest. However, these restrictions contain broad exceptions and may be enforced only within the DOJ.

1. *Broad protection for represented parties.*

Once a represented person is indicted or arrested, he falls within the regulations' definition of "represented party."[135] The regulations expressly provide that "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."[136] Thus, under the regulations, government attorneys must abide by the restrictions of

128. *See id.* at 39,911 (asserting DOJ's authority to exempt its attorneys from the no-contact rule but explaining that the regulations do not do so).

129. *Id.* at 39,929 (to be codified at 28 C.F.R. § 77.5) (governing only contacts with "represented parties").

130. *Id.* at 39,930 (to be codified at 28 C.F.R. § 77.7) (providing that "[e]xcept 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").

131. *Id.* at 39,929 (to be codified at 28 C.F.R. § 77.3(a)).

132. *Id.* (to be codified at 28 C.F.R. § 77.3(b)).

133. *Id.* at 39,930 (to be codified at 28 C.F.R. §§ 77.7-77.9).

134. *Id.* at 10,096-99 (to be added to tit. 9, ch. 13 of EXECUTIVE OFFICE FOR U.S. ATTORNEYS, UNITED STATES ATTORNEYS' MANUAL (1994) [hereinafter U.S. ATTORNEYS' MANUAL]); *see id.* at 39,928 ("The Department anticipates that the manual provisions will be substantially similar to the draft published [in March]"). The *United States Attorneys' Manual* is an internal DOJ document that outlines the prosecution policies of the Department and provides guidance to government attorneys on exercising their prosecutorial discretion.

135. *Id.* at 39,929 (to be codified at 28 C.F.R. § 77.3(a)(3)).

136. *Id.* (to be codified at 28 C.F.R. § 77.5).

the no-contact rule when engaging in postarrest, postindictment communications. There are only six relatively narrow exceptions to this broad prohibition against direct communications with represented parties.

First, a government attorney may communicate with a represented party to verify that he is in fact represented by counsel concerning the subject matter of the investigation.[137] Second, the regulations authorize direct postindictment, postarrest communications if these communications are made pursuant to judicial or administrative process. This exception encompasses, for example, service of a trial subpoena or testimony before a grand jury.[138]

Third, a government attorney may communicate directly with a represented party if the party initiates the communication and knowingly and voluntarily waives the protections of the no-contact rule, and a federal judge or magistrate either verifies that the party's waiver of counsel was voluntary and knowing or determines that the party has obtained substitute counsel for purposes of the plea negotiations.[139] The regulations also authorize direct communications with a represented party at the time of his arrest if the party is informed of his constitutional rights and waives them voluntarily and knowingly.[140]

Under the fifth exception, a government attorney may communicate with a represented party during the course of an investigation into "additional, different or ongoing criminal activity or other unlawful conduct."[141] This exception encompasses, for example, communications relating to any criminal attempts to "impede or evade the administration of justice," such as jury tampering or intimidation of witnesses, in the proceeding to which the party is a defendant.[142] Finally, the regulations authorize postarrest, postindictment communications if a government attorney believes in good faith that the communication is necessary to help prevent an injury or death.[143]

2. *Limited restrictions on preindictment, prearrest communications.*

In contrast to the proposed regulations' broad application of the no-contact rule to postarrest, postindictment communications, the regulation broadly authorizes government attorneys to communicate directly with represented persons prior to arrest or indictment.[144] According to the DOJ, because "individuals and organizations who are neither defendants nor arrestees are not 'parties' within the meaning of [the regulations]," the general prohibition on

137. *Id.* at 39,930 (to be codified at 28 C.F.R. § 77.6(a)).
138. *Id.* (to be codified at 28 C.F.R. § 77.6(b)).
139. *Id.* (to be codified at 28 C.F.R. § 77.6(c)).
140. *Id.* (to be codified at 28 C.F.R. § 77.6(d)).
141. *Id.* (to be codified at 28 C.F.R. § 77.6(e)).
142. *Id.* (to be codified at 28 C.F.R. § 77.6(e)(2)).
143. *Id.* (to be codified at 28 C.F.R. § 77.6(f)); *cf.* New York v. Quarles, 467 U.S. 649, 657 (1984) (recognizing a "public safety" exception to the 5th Amendment because "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (permitting a warrantless search when it is necessary to protect the lives of officers and citizens).
144. 59 Fed. Reg. 39,930 (1994) (to be codified at 28 C.F.R. § 77.7).

ex parte contacts need not apply.[145] Therefore, the regulations "make[ ] clear that attorneys for the government are authorized to communicate, directly or indirectly, with a represented person unless the contact is prohibited by some other provision of federal law."[146]

Sections 77.8 and 77.9 of the new rule provide the regulations' only limitations on this broad grant of authority. Section 77.8 prohibits a federal prosecutor from negotiating directly with a represented person regarding plea agreements or other dispositions of criminal charges or sentences.[147] However, Section 77.8 permits such direct negotiations if the represented person initiates the communications and either knowingly and voluntarily waives the protections of the no-contact rule or obtains substitute counsel for purposes of the plea negotiations.[148]

Section 77.9 also includes restrictions on preindictment, postarrest communications with a represented person.[149] Section 77.9's limitations are intended to prevent those communications most likely to disrupt or improperly intrude upon the attorney-client relationship.[150] First, section 77.9 provides that, when communicating with a represented person without the consent or presence of the person's attorney, a government attorney must not ask questions regarding the attorney's lawful defense strategies or legal arguments,[151] must not "disparage" the person's attorney or otherwise attempt to urge the person to forego representation or ignore the advice of his attorney,[152] and must not "[o]therwise improperly seek to disrupt" the person's relationship with counsel.[153]

However, in some circumstances, a government attorney may alert a represented person to a perceived conflict of interest between the represented person and his counsel. If the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or a United States Attorney finds a substantial likelihood of a significant conflict of interest and determines "that it is not feasible to obtain a judicial order challenging the

145. *Id.* at 39,922.

146. *Id.*

147. *Id.* at 39,930 (to be codified at 28 C.F.R. § 77.8).

148. *Id.* (stating that an exception to the prohibition against direct plea negotiations exists if the represented person or party initiates the communication and it meets the procedural requirements of § 77.6(c)). For a further discussion of § 77.6(c), see note 139 *supra* and accompanying text.

149. 59 Fed. Reg. 39,930 (1994) (to be codified at 28 C.F.R. § 77.9) (captioned "Represented persons and represented parties; respect for attorney-client relationships").

150. *See id.* at 39,930 (explaining DOJ's goal not to "disrupt" the attorney-client relationship).

151. *Id.* at 39,930 (to be codified at 28 C.F.R. § 77.9(a)(1)(i)).

152. *Id.* (to be codified at 28 C.F.R. § 77.9(a)(1)(ii)); *cf.* United States v. Weiss, 599 F.2d 730, 740 (5th Cir. 1979) (stating that government attorneys "flirted with violation of [the no-contact rule] by approaching [the target] directly when they were about to seek an indictment against him and knew he had been represented by [an attorney], and by discouraging him from consulting [the attorney]"); *id.* at 740-41 (Godbold, J., specially concurring) (finding it "inappropriate for government counsel, in the process of investigating suspected crime, to advise any person represented by counsel—potential defendant, witness, or anybody else, that his chosen counsel is not acting in his best interests," calling a "citizen's choice of, and relation with, his attorney . . . none of the investigating government's business," and labeling such situations "Big Brotherism").

153. 59 Fed. Reg. 39,930 (1994) (to be codified at 28 C.F.R. § 77.9(a)(1)(iii)).

representation," then a government attorney may disclose the conflict of interest to the represented person.[154]

Section 77.9 also includes a general prohibition against directing informants or undercover law enforcement agents to attend or participate in a meeting or conversation between a represented person and his attorney.[155] However, recognizing that a conspicuous absence from a meeting or conversation might reveal the identity of an undercover agent or informant,[156] the Department has included several exceptions to this general prohibition. An attorney may direct an undercover agent or informant to attend a meeting between a represented person and his attorney if the represented person or another person associated with the defense requests the attendance and the agent's or informant's attendance at the meeting is reasonably necessary to protect either the confidentiality of the undercover operation or the safety of the agent or informant.[157] If an agent or informant attends a meeting between a represented person and his attorney, the proposed regulations provide that the agent or informant may not relate to a government attorney or law enforcement agent any information obtained relating to lawful defense strategy or trial preparation.[158] However, the regulations contain no other restrictions on a government attorney's use of information obtained during such an undercover intrusion into an attorney-client communication. In other words, an undercover agent may not attend an attorney-client meeting for the sole purpose of obtaining incriminating evidence. But once an undercover agent is permitted to attend a meeting, almost any information he obtains may be used by a government attorney.

As a practical matter, then, the no-contact regulations provide few restrictions on direct communications not already required by the Constitution. Although the regulations purport to apply the no-contact rule to government attorneys "to the maximum extent possible,"[159] only narrow provisions limit a government attorney's general authority to communicate directly with a represented person prior to his arrest or indictment. In effect, the regulations create a safe harbor for almost all overt prearrest, preindictment communications. The regulations forbid plea negotiations, inquiries into lawful defense strategies, and attempts to turn a represented person against his attorney. They explicitly authorize all other preindictment, prearrest communications and prevent

154. *Id.* (to be codified at 28 C.F.R. § 77.9(a)(2)) (adding that the government attorney must first obtain written authorization from the DOJ official who determines that disclosure of the conflict is appropriate and that if a government attorney notifies a represented person of a conflict of interest pursuant to this exception, he should do so in writing "unless the exigencies of the situation permit only prior oral authorization").

155. *Id.* (to be codified at 28 C.F.R. § 77.9(b)).

156. *See id.* at 39,924 (noting the recognition by federal courts that "such attendance occasionally will be required when the operative is invited to participate and his or her refusal to do so would effectively reveal his or her connection to the government").

157. *Id.* at 39,930 (to be codified at 28 C.F.R. § 77.9(b)).

158. *Id.*

159. *Id.* at 39,911.

any state disciplinary action against a government attorney engaging in such contacts.[160]

Despite the regulations' explicit creation of a safe harbor from state disciplinary actions for most prearrest, preindictment communications, accompanying proposed changes to the *United States Attorneys' Manual* provide further limitations on the appropriateness of such communications. These changes would allow government attorneys to engage in overt contacts with a represented person outside the presence of counsel "only after careful consideration of whether the communication would be handled more appropriately by others."[161] Moreover, "absent compelling law enforcement reasons," a government attorney would not be allowed to initiate a direct communication with a represented person once the government attorney had "provided explicit assurances to counsel for the represented person that no such communication w[ould] be attempted and no intervening change in circumstances justifying such communications ha[d] arisen."[162]

However, the primary restriction that the *Manual* would establish is that, as a matter of internal policy guidance, federal prosecutors would be cautioned not to make direct, overt contacts with represented "targets" of a criminal investigation.[163] In other words, the *Manual* would apparently eradicate the regulations' safe harbor and extend the protections of the no-contact rule to all targets, regardless of whether they happened to have been arrested or indicted at the time of the communication. However, three critical features of the *Manual*'s proposed prohibition against direct communications with targets of an investigation prevent it from having substantial bite. First, the definition of "target" is narrow, severely limiting the number of persons who would be protected by the no-contact rule as interpreted by the *Manual*. Second, this limited restriction against communications is subject to broad exceptions. Third, even if a government attorney violates the *Manual*'s limited prohibition, he is not subject to state bar disciplinary action.

The *Manual* would define a represented person as a "target" only if the government attorney anticipates seeking an indictment against the person *and* already has "substantial evidence" linking him to a crime.[164] For example, imagine two brothers, Bradley and Elmer. The government suspects that Elmer is an embezzler but lacks any real evidence linking him to a crime. Moreover,

160. *See id.* at 39,930 (to be codified at 28 C.F.R. § 77.7) (general authorization for prearrest, preindictment contacts); *id.* at 39,931 (to be codified at 28 C.F.R. § 77.12) (preempting "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 . . . with represented parties or represented persons in criminal and civil law enforcement investigations or proceedings").

161. *Id.* at 10,098 (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.230).

162. *Id.* (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.233); *accord* United States v. Powe, 9 F.3d 68, 69-70 (9th Cir. 1993) (holding that a promise to a defense attorney not to contact the defendant directly may bring communications within the scope of the no-contact rule, even prior to indictment, but will not forbid undercover communications where the promise does not explicitly provide for this).

163. 59 Fed. Reg. 10,098 (1994) (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.240).

164. *Id.*

unbeknownst to the government, Bradley is a co-conspirator in Elmer's scheme. The government knows that both Elmer and Bradley have retained counsel. Despite the *Manual*'s prohibition against direct communications with represented targets, government attorneys could still contact both Bradley and Elmer without the consent or presence of their attorneys. Bradley does not qualify as a "target" because the government attorneys do not yet anticipate seeking an indictment against him.[165] And although the government attorneys do anticipate seeking an indictment against Elmer, they may nevertheless communicate with him directly until they obtain substantial evidence against him.[166] Thus, the *Manual* would provide little protection to represented persons prior to their arrest or indictment.

Moreover, even if a government attorney has substantial evidence linking a represented person to a crime for which the government anticipates seeking an indictment, the government attorney nevertheless could communicate directly with the target if the communication fit within any one of several exceptions to the rule provided by the *Manual.* Most of these proposed exceptions are relatively narrow and are tailored specifically to meet the needs of law enforcement officials. For example, a government attorney could communicate directly with a represented target if the attorney believed the communication was necessary to protect a person's life or safety.[167] However, one of the exceptions provided by the *Manual* is particularly broad. It would allow a government attorney to communicate directly with a represented target if the Attorney General, the Associate Attorney General, an Assistant Attorney General, or a United States Attorney authorized the communication after determining that it was "necessary for effective law enforcement."[168] In other words, despite both its narrow definition of "target" and its inclusion of several, precisely tailored exceptions to an attorney's duty not to communicate directly with represented targets, the *Manual* would include a loosely defined, and therefore potentially vast, "catch-all" exception.

Finally, even if a government attorney were to violate the *Manual*'s narrow prohibition against direct communications with represented targets, he still would not be subject to state bar disciplinary action. Despite whatever prohibitions the DOJ includes in its own internal manual, the regulations do not encompass these prohibitions and expressly authorize most direct commu-

165. *See id.* (providing that a person is a target only if the government attorney "anticipates seeking an indictment" against the person).

166. *See id.* (providing that "[a] 'target' is a person as to whom the attorney for the government has substantial evidence linking that person to the commission of a crime or to other wrongful conduct").

167. *See id.* at 10,098-99 (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.241(f)). Other exceptions authorize direct communications for the purpose of determining whether representation exists, *id.* at 10,098 (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.241(a)); if pursuant to the judicial process, *id.* (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.241(b)); if initiated by the target, *id.* (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.241(c)); if the target waives his constitutional rights at the time of arrest, *id.* (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.241(d)); or if related to additional, different, or ongoing crimes. *Id.* (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.241(e)).

168. *Id.* at 10,099 (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.241(g)).

nications with represented persons prior to arrest or indictment.[169] Moreover, the regulations preempt state rules of professional responsibility to the extent they conflict with such authorization.[170] Although the *Manual* reflects an "internal policy"[171] discouraging such communications, the *Manual* provides that enforcement of this policy lies solely within the discretion of Department officials.[172] The *Manual* does not create judicially enforceable substantive rights for criminal defendants.[173]

### C. *A Critique of the Regulations*

Although the purpose of the regulations is to define the limited instances in which direct communications with represented parties fall within the "authorized by law" exception to the no-contact rule, in practice they would largely exempt government attorneys from the rule's prohibitions. By limiting the protections of the no-contact rule to arrested or indicted persons, the new rule authorizes almost all constitutionally permissible communications with represented persons. In other words, although the regulations adopt a theoretical framework in which government attorneys generally must abide by the no-contact rule, they effectively turn this framework on its head in the important context of prearrest, preindictment communications, where application of the no-contact rule has been most controversial.

The regulations do take a step in the appropriate direction by including within the definition of "represented party" those represented persons who have been arrested but not yet indicted. By doing so, the Department of Justice has broadened the temporal scope of the no-contact rule beyond that of the Sixth Amendment right to counsel, which does not attach prior to the initiation of formal legal proceedings.[174] However, the difference between the new regulations and regulations that would limit the application of the no-contact rule to postindictment communications is largely theoretical.[175] The Fifth Amend-

169. *See* notes 124-160 *supra* and accompanying text.

170. *See* 59 Fed. Reg. 39,931 (1994) (to be codified at 28 C.F.R. § 77.12).

171. *Id.* at 39,912.

172. *See id.* at 10,099 (to be added to U.S. ATTORNEYS' MANUAL, *supra* note 134, § 9-13.260) ("Appropriate administrative action may be initiated by Department officials against prosecutors who violate the policies regarding communication with represented persons.").

173. *E.g.*, United States v. Jones, 808 F.2d 561, 565 (7th Cir. 1986) (holding that the *Manual* "simply does not provide a criminal defendant any judicially-enforceable substantive rights"); United States v. Schwartz, 787 F.2d 257, 267 (7th Cir. 1986) (holding that the DOJ may choose its own punishments for government attorneys who violate the *Manual's* provisions and noting that "an effort by the Judicial Branch to foist on the Executive Branch a sanction it does not wish could lead the Executive Branch to abandon [its p]olicy rather than suffer unwarranted reversals"); United States v. Catino, 735 F.2d 718, 725 (2d Cir.) (holding that the *Manual* "affords defendants no substantive rights"), *cert. denied*, 469 U.S. 855 (1984); United States v. Ng, 699 F.2d 63, 71 (2d Cir. 1983) (stating that the *Manual* is "merely an internal guideline for [the] exercise of prosecutorial discretion, not subject to judicial review"); United States v. Kember, 648 F.2d 1354, 1370 (D.C. Cir. 1980) (per curiam) (holding that the *Manual's* "general guidelines" are not judicially enforceable); United States v. Wilson, 614 F.2d 1224, 1227 (9th Cir. 1980) (holding that the *Manual's* "provisions do not carry the force and effect of law").

174. *See* notes 53-62 *supra* and accompanying text.

175. Note that the prior set of proposed regulations would have applied the no-contact rule only to postindictment communications, even if a government attorney spoke to a represented person after he had been arrested. *See* MONOGRAPH, *supra* note 84, at 20 (stating that the previously proposed rule 28

ment precludes a prosecutor from interrogating an arrested person who has asserted his desire to have an attorney present.[176] Moreover, an individual who already has ongoing representation regarding the subject matter underlying his arrest will likely request the presence of his attorney upon arrest, thereby triggering the prosecutor's responsibility under the Fifth Amendment to cease questioning. Therefore, while the regulations purportedly prohibit both postarrest and postindictment communications, they actually provide little more protection than that mandated by the Fifth and Sixth Amendments.

The regulations essentially permit government attorneys to communicate directly with parties without the consent or presence of counsel in almost all circumstances, so long as the Constitution does not bar the communications. The regulations prohibit direct communications with represented persons prior to arrest or indictment in only two limited circumstances. Although accompanying provisions of the *Manual* purport to place an additional limitation on prearrest, preindictment communications with represented targets, the scope of the limitation is unjustifiably narrow, and it has been narrowed further by overly broad and potentially vast exceptions. Moreover, the *Manual* lacks the legitimacy and possibility for outside enforcement that the proposed regulations afford. While the prohibitions in the regulations carry the "force and effect of law"[177] and may be enforced by state disciplinary action if the Attorney General finds a willful violation of them,[178] the *Manual*'s provisions offer only "internal policy guidance"[179] and are wholly unenforceable outside the DOJ.[180] In short, the regulations intrude upon the attorney-client relationship in ways unwarranted by the needs of effective law enforcement.

## III. Restriking the Balance and Providing an Appropriate Remedy for Violations of the No-Contact Rule

As Part II demonstrates, the DOJ's regulations largely exempt government attorneys from the scope of the no-contact rule and, in doing so, provide an overly broad solution to the real but limited problems created by a strict application of the rule to prosecutors. Rather than permitting virtually all communi-

C.F.R. § 77.5 created an exception to the no-contact rule if the communication occurred prior to the attachment of the 6th Amendment right to counsel).

176. The 5th Amendment right to counsel is separate from the 6th Amendment's and is triggered upon a person's arrest. *See generally* Miranda v. Arizona, 384 U.S. 436, 467-69 (1966) (holding that Constitution requires that law officials warn arrestee of his right to remain silent and to have an attorney). Once an arrested individual asserts his desire to have an attorney present, law enforcement agents must cease all interrogation until counsel for the arrestee is present. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (recognizing that the 5th Amendment right to counsel requires that, once an arrestee requests an attorney, police interrogation must cease until counsel is made available); *see also* Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (holding that the *Edwards* rule requires that counsel be present during interrogation).

177. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) (noting that "properly promulgated, substantive agency regulations have the 'force and effect of law' " (citing Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Foti v. INS, 375 U.S. 217, 233 (1963); United States v. Mersky, 361 U.S. 431, 437-38 (1960); Atchison, T. & S.F.R. Co. v. Scarlett, 300 U.S. 471, 474 (1937))).

178. 59 Fed. Reg. 39,931 (1994) (to be codified at 28 C.F.R. § 77.12).

179. *Id.* at 39,912.

180. *See* note 173 *supra* and accompanying text.

cations that do not violate the Fifth and Sixth Amendments, the Department should create exceptions to the no-contact rule that are narrowly tailored to the specific concerns of government attorneys. It should also provide more remedies for violations of the no-contact rule by federal prosecutors. This Part analyzes both of these issues.

### A. *An Alternative Approach to the No-Contact Rule*

Three types of situations appear particularly to concern government attorneys and the courts: undercover investigations, representation by the so-called "mob lawyer," and representation of corporate employees. The Justice Department's no-contact regulations could accommodate these concerns without creating overly broad exemptions from the no-contact rule for government attorneys.

#### 1. *Communications by undercover agents or informants.*

The no-contact rule should not permit defendants to prevent otherwise lawful undercover investigations. Former Attorney General Thornburgh contends that this possibility was his primary concern when he first decided to issue his memorandum.[181] Moreover, almost all courts agree that the ethical concerns underlying the no-contact rule do not justify extension of the rule to legitimate undercover investigations.[182] The no-contact rule traditionally covers communications with a represented person by an individual whom the represented person knows is an attorney. The rule seeks to prevent attorneys from using their superior legal knowledge and authoritative position to manipulate the layperson. These concerns are simply inapplicable in the undercover context, where the target of a criminal investigation believes he is speaking with another private layperson.[183] Application of the no-contact rule to undercover investigations would stymie legitimate law enforcement techniques without serving the rule's underlying goals.

However, the concern that stringent enforcement of the no-contact rule would interfere with lawful investigations could be addressed without wholly exempting preindictment communications from the rule's restrictions. For example, the DOJ could provide that communications made by nonattorney law enforcement agents pursuing otherwise lawful undercover investigations[184] are exempt from the no-contact rule, even if a government attorney is overseeing the investigation. An exemption from the rule for undercover investigations

181. Thornburgh, *supra* note 98, at 290 ("[T]he Department's practice and policy coexisted peacefully with [the no-contact rule] for years until it became a defense tactic to threaten disciplinary action against a federal prosecutor for using confidential informants, seeking wiretap authorizations, or interviewing low-level functionaries to obtain evidence against principals.").

182. *See* note 57 *supra* and accompanying text.

183. *Cf.* Hoffa v. United States, 385 U.S. 293, 303-04 (1966) (holding that the 5th Amendment is not implicated by communications in the undercover context prior to the filing of formal criminal charges because of the absence of state compulsion).

184. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 299-300 (1990) (holding that the use of undercover agents or informants to obtain incriminating statements from potential defendants prior to the filing of charges is a permissible law enforcement technique).

would recognize the importance of undercover investigations to modern law enforcement.[185] Moreover, even with an exemption from the no-contact rule for covert communications, the government would not be free to initiate undercover investigations of all represented parties. Prosecutors and law enforcement agents would still be bound by the Sixth Amendment's restriction against deliberately eliciting information from a represented criminal defendant after the initiation of formal criminal proceedings.[186] Thus, an undercover exception to the no-contact rule would address the concerns of government prosecutors by permitting constitutionally permissible law enforcement efforts, but would do so without wholly excluding preindictment communications from the rule.

2. *The "mob lawyer."*

Government attorneys also worry that organized, wealthy criminals benefit from the protections of the no-contact rule simply by retaining "house counsel" to handle every matter that arises in their criminal organization. Several commentators and courts have expressed their concern that strict enforcement of the no-contact rule against prosecutors would allow professional criminals and the wealthy to evade investigatory techniques that could be used against all other defendants.[187] This concern could be alleviated by a regulation limiting the preindictment protections of the no-contact rule to those persons who retain an attorney for the specific criminal matter under investigation.[188] Such a DOJ regulation could incorporate the language in the current proposal limiting the definition of "represented person" to those individuals and organizations having "ongoing" representation that "concerns the subject matter in question."[189] Under such a regulation, government attorneys would not be precluded from

185. *See, e.g.*, United States v. Henry, 447 U.S. 264, 298 (1980) ("The Court acknowledges that the use of undercover policework is an important and constitutionally permissible method of law enforcement.").

186. *Id.* at 264 (holding that the government violated defendant's 6th Amendment right to counsel when it intentionally placed a paid government informant near defendant's cell, thereby creating a situation likely to involve incriminating statements in the absence of counsel after defendant had been charged).

187. *See e.g.*, Karlan, *supra* note 45, at 701-02 (warning that enforcing the no-contact rule by excluding evidence obtained in violation of it "would essentially circumvent the temporal limitation on the right to counsel contained in the Sixth Amendment. . . . for two classes of suspects—'rich people and professional criminals'—who are particularly unsympathetic candidates for expansive readings of the right to counsel") (citations omitted); Salvatore, *supra* note 83, at 579 ("If the disciplinary rule were strictly applied, suspects could insulate themselves from legitimate investigations merely by retaining counsel."); Uviller, *supra* note 24, at 1178 (citing United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982) (per curiam) (holding that representation of defendant by counsel during grand jury testimony did not entitle him to invoke the 6th Amendment to suppress a tape recording of a conversation he later had with a government informant)).

188. *Cf.* United States v. Hammad, 678 F. Supp. 397, 401 (E.D.N.Y. 1987) (applying the no-contact rule only when "a suspect has retained counsel specifically for representation in conjunction with the criminal matter in which he is held suspect, and the government has knowledge of that fact"), *aff'd*, 846 F.2d 854, 859 (2d. Cir. 1988) (approving this interpretation as a "sensible limitation"), *as amended*, 858 F.2d 834, 839 (2d Cir. 1988) (rejecting the lower court's interpretation as "unduly restrictive"), *cert. denied*, 498 U.S. 871 (1990). For a discussion of the *Hammad* case, see text accompanying notes 63-84 *supra*.

189. Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,929 (1994) (to be codified at 28 C.F.R. § 77.3(a)(2)).

communicating directly with a suspect simply because the suspect at one time had been represented by counsel in a separate criminal matter. Nor would government attorneys be forbidden from communicating with individuals who worked within a criminal organization known to be represented generally by counsel. Instead, the no-contact rule would apply only if government attorneys knew that an individual had retained counsel concerning the specific investigation. However, such a DOJ regulation would not need to include the current regulation's broad exemption from the no-contact rule for preindictment communications.

In addition to the problem of the criminal organization that retains general counsel for all potential legal matters, rigorous application of the no-contact rule in the criminal context can create a related problem concerning an individual suspect's ability to remove himself from the scope of the organization's representation. The issue of waiver of the rule's protections arises when an individual represented by "house counsel" wishes to cooperate with the government without advising his attorney. This situation may occur when the attorney actually participates in the criminal enterprise and, thus, the individual fears that his attorney will tell the "boss" of the cooperation. It will also occur whenever the retained attorney has a conflict of interest that would prevent the represented person from choosing voluntarily to cooperate with government attorneys.[190] The Supreme Court has noted that one of the "inherent dangers" of a lawyer for a criminal defendant being hired and paid for by the leader of an alleged criminal enterprise is that "the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest."[191] The no-contact rule creates a special ethical dilemma in this context because only the attorney, and not the client, can waive the rule's protection.[192]

The new regulations address the waiver dilemma by allowing a represented person to waive the presence of counsel if the waiver is "voluntary, knowing and informed," or to obtain substitute counsel who consents to the communication.[193] However, permitting *any* represented individual to waive the protections of the no-contact rule without consulting his attorney is an overbroad response to a relatively rare fact situation. It erases in every case the "attorney check," a critical aspect of the no-contact rule that is an appropriate protection in most situations. A less severe and equally effective approach would permit a

190. *See, e.g.*, United States v. Lopez, 989 F.2d 1032, 1034 (9th Cir. 1993) (stating that the attorney had a personal policy of not negotiating pleas with the government in return for clients' cooperation and client feared negotiating would cost him attorney's services in the event the case went to trial); United States v. Bernstein, 533 F.2d 775, 788 (2d Cir.) (finding a "readily apparent conflict" where an employer paid an employee's attorney), *cert. denied*, 429 U.S. 998 (1976).

191. Wood v. Georgia, 450 U.S. 261, 268-69 (1981).

192. *See* United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990) (holding that the no-contact rule forbids any ex parte communication by government agents as well as lawyers, even if the opposing party has initiated it). *See generally* Cramton & Udell, *supra* note 1, at 342 (observing that this aspect of the no-contact rule is "overly paternalistic" in its refusal to permit clients to voluntarily consent to direct communications and that "one objective of the rule [may be] to further the interests of lawyers without regard to the views or interests of the client").

193. 59 Fed. Reg. 39,930 (1994) (to be codified at 28 C.F.R. § 77.6(c)).

target in a criminal investigation to waive the protections of the rule by going voluntarily to a magistrate and obtaining judicial consent based on a showing of a conflict of interest between the represented person and his attorney.[194]

3. *Corporate employees.*

A third controversy arising when applying the no-contact rule to communications by government attorneys is whether such attorneys may contact employees of a corporation represented by counsel. Because organizations can communicate only through their individual agents, the critical inquiry in the corporate context is whether a communication with an employee is the functional equivalent of a communication with the organization. If contacting an employee would be the functional equivalent of communicating with the corporation, then the no-contact rule applies. This third controversial area is especially vexed because the standard for when corporate employees are deemed communicative agents of the corporation has not yet been settled even in the private civil arena.

A brief summary of the tests articulated by civil courts to determine when a corporate employee should be deemed a communicative agent of the corporation provides a helpful analytical framework.[195] The least inclusive of the standards is the "control group" test. In the context of the attorney-client privilege, the control group test confers the privilege only upon those employees responsible for making decisions regarding the corporation's representation by counsel.[196] However, for purposes of applying the no-contact rule, the scope of the control group standard is significantly broader and includes both top management employees with final decisionmaking authority and those employees who are indispensable advisors to the final decisionmakers.[197] Because the control group test includes only the most senior level employees of a corporation, the Supreme Court has expressly rejected it in the context of the attorney-client privilege,[198] and few courts have adopted it for purposes of applying the no-contact rule.[199]

194. *Cf. id.* (to be codified at 28 C.F.R. § 77.9(a)(2)) (advocating a similar procedure, except that senior federal government attorneys, rather than magistrates or judges, would make the conflict of interest determination when DOJ attorney wishes to discourage a represented party from consulting his attorney based on a conflict of interest between the party and his counsel).

195. A summary of the case law in this area would alone warrant an entire article. *See, e.g.*, Jerome N. Krulewitch, Comment, Ex Parte *Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest,* 82 NW. U. L. REV. 1274 (1988); Samuel R. Miller & Angelo J. Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is it Ethical?,* 42 BUS. LAW. 1053 (1987); Stephen M. Sinaiko, Note, *Ex Parte Communication and the Corporate Adversary: A New Approach,* 66 N.Y.U. L. REV. 1456 (1991).

196. *See* Upjohn Co. v. United States, 449 U.S. 383, 391-92 (1981) (rejecting the control group test in the context of the attorney-client privilege).

197. *See, e.g.*, Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc., 128 Ill. App. 3d 763, 471 N.E.2d 554 (1984).

198. *Upjohn,* 449 U.S. at 391-92.

199. Several courts have expressly considered and rejected the control group test. *See, e.g.*, Morrison v. Brandeis Univ., 125 F.R.D. 14, 16-18 (D. Mass. 1989) (adopting a case-by-case balancing test that weighs "plaintiff's need to gather information on an informal basis [against] the defendant's need for effective representation"); Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988) (adopt-

On the other end of the spectrum lies the most restrictive test, a blanket rule prohibiting all direct communications with current employees of a represented corporation.[200] Although this test's simplicity is appealing,[201] it severely limits the access of a corporation's adversary to information within the corporation's control, including access to witnesses and would-be "whistle blowers."[202] Accordingly, few jurisdictions have adopted this approach, and those that had once embraced it have recently adopted more moderate restrictions instead.[203]

Courts have also articulated several varieties of intermediate tests more protective of corporate interests than the control group test but less restrictive than the blanket prohibition on direct communications with corporate employees.[204] The most widely adopted intermediate test is the "alter ego" test, first enunciated by the New York Court of Appeal's modified opinion in *Niesig v. Team I (Niesig II)*.[205] This test confers the protections of the no-contact rule upon employees who have speaking authority for the corporation with regard to the subject matter of the representation, whose acts or omissions can be imputed to the corporation for purposes of liability, or who are in charge of implementing the advice of counsel.[206] Unlike the control group test, the alter ego test ex-

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ing the " 'managing-speaking' agent" test that disallows direct communications with anyone possessing the power to bind the corporation legally); Niesig v. Team I, 76 N.Y.2d 363, 374, 559 N.Y.S.2d 493, 498, 558 N.E.2d 1030, 1035 (1990) (*Niesig II*) (defining as parties "employees with 'speaking authority' for the corporation, and employees who are so closely identified with the interests of the corporate party as to be indistinguishable from it").

200. *See, e.g.*, Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs., 745 F. Supp. 1037, 1042 (D.N.J. 1990) (*P.S.E.&G.*) (holding that the no-contact rule prohibits direct communications between defendant insurer and plaintiff insurer's former employees); Cagguila v. Wyeth Lab., Inc., 127 F.R.D. 653, 654-55 (E.D. Pa. 1989) (denying a motion to disqualify plaintiff's attorney who spoke directly with defendant's employee without notifying defense counsel but excluding evidence obtained from the employee); Bobele v. Superior Court, 199 Cal. App. 3d 708, 713, 245 Cal. Rptr. 144, 147 (1988) (holding that no-contact rule permits direct communication between plaintiff's counsel and former employees of defendant who were not members of the corporation's "control group"); Niesig v. Team I, 149 A.D.2d 94, 545 N.Y.S.2d 153 (1989) (*Niesig I*), *modified*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990) (*Niesig II*); *see also* Miller & Calfo, *supra* note 195, at 1071-73 (proposing a blanket prohibition on direct communications with current employees of a represented corporation).

201. *P.S.E.&G.*, 745 F. Supp. at 1042-43; *Niesig II*, 558 N.E.2d at 1034 (rejecting the blanket rule but noting that its "single indisputable advantage" is its clarity).

202. *See* Robert J. Goldstein, *Contacting an Adversary's Employees: A Breach of Legal Ethics?*, N.Y. ST. B.J. 22, 23 (Mar./Apr. 1993) (noting that informal ex parte interviews with former employees are desirable due to the "likelihood of increased candor and . . . broader factfinding").

203. *See, e.g.*, Hewlett-Packard Co. v. Superior Court, 205 Cal. App. 3d 43, 252 Cal. Rptr. 14, 16 (1988) (opinion withdrawn by the California Supreme Court) (denying a petition asking that opposing counsel be disqualified because of direct communications with corporate employees), *rev. denied, opinion ordered not officially published* (Dec. 15, 1988); *Niesig II*, 558 N.E.2d at 1033-34 (rejecting the blanket prohibition adopted in *Niesig I*).

204. These approaches include the " 'managing speaking' agent" test, which generally includes employees with "speaking authority" for the corporation regarding the subject matter of the representation, *see, e.g.*, Wright v. Group Health Hosp., 103 Wash. 2d 192, 200, 691 P.2d 564, 569 (1984); the "scope of employment" test, which provides that an attorney may not communicate directly with employees regarding matters within the scope of their employment, *see, e.g.*, Comm. on Professional Ethics, Ass'n. of the Bar of the City of N.Y., Op. 80-46 (1980); and the "case-by-case" approach, which requires courts to weigh the discovering party's need to communicate directly with an employee against the corporation's need for effective representation, *see, e.g.*, Morrison v. Brandeis Univ., 125 F.R.D. 14, 18 (D. Mass. 1989).

205. 558 N.E.2d at 1035-36.

206. *Id.*

tends the protection of the no-contact rule to employees whose acts gave rise to the litigation, even if they work in nonmanagement positions. Unlike a blanket prohibition, the alter ego test permits attorneys to communicate directly with eyewitnesses to the events under investigation.[207] Because of its careful balancing of the corporation's attorney-client relationship and the adversary's need for information, an increasing number of courts consider *Niesig II*'s alter ego standard an equitable compromise.[208]

Rather than adopting any of these standards, the DOJ has crafted its own test for determining which employees are agents of the corporation for purposes of the no-contact rule. The DOJ test provides less protection for corporate employees than the restrictive control group test and gives prosecutors broad immunity from the no-contact rule. The regulations apply the no-contact rule only to "controlling individuals." To qualify as a controlling individual, the employee must participate "as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter."[209] In other words, the regulations adopt an extremely narrow version of the control group test, resembling the version advocated for purposes of interpreting the attorney-client privilege, but expressly rejected by the Supreme Court in *Upjohn Co. v. United States*.[210] The regulations permit government attorneys to communicate directly with almost all corporate employees unless they were represented individually by separate counsel.[211]

Moreover, aside from the problems that any adversary might experience as a result of the no-contact rule, it is unclear what interests particular to federal law enforcement require that government attorneys be permitted to speak directly with virtually all corporate employees. According to the DOJ, "the alternative approaches would impose unacceptable constraints on federal law enforcement."[212] This terse explanation sheds little light on the rationale underlying the DOJ standard. But the Department has stated in the past that the alter ego standard is inappropriate in the criminal context because "criminal liability may be imputed to a corporation for the acts or omissions of any employee, no matter how menial."[213] Therefore, "a federal standard that prohibited communications with employees whose statements could be attributed to the organization for purposes of imposing criminal . . . liability would simply have the effect of prohibiting all such communications."[214]

The Department's rationale contains several flaws. First, less restrictive alternatives can achieve effective law enforcement. The alter ego test clearly

207. *See* Branham v. Norfolk & W. Ry., 151 F.R.D. 67, 69-70 (S.D. W. Va. 1993) (adopting the alter ego test and noting that it clearly permits access to witnesses).

208. *See, e.g., id.* at 69-70; Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991); State v. Ciba-Geigy Corp., 247 N.J. Super. 314, 325, 589 A.2d 180, 185, *appeal granted,* 126 N.J. 338, 598 A.2d 895 (1991), *and appeal dismissed,* 130 N.J. 585, 617 A.2d 1213 (1992); Strawser v. Exxon Co., 843 P.2d 613, 614 (Wyo. 1992).

209. 59 Fed. Reg. 39,931 (1994) (to be codified at 28 C.F.R. § 77.10(a)).

210. 449 U.S. 383, 390-91 (1981).

211. *See* 59 Fed. Reg. 39,931 (1994) (to be codified at 28 C.F.R. § 77.10(d)).

212. *Id.* at 10,095.

213. MONOGRAPH, *supra* note 84, at 68.

214. *Id.*

allows government attorneys direct access to employees who are merely witnesses to the events under investigation.[215] Second, although a corporation may be held criminally liable for the actions of even "menial" employees, liability ensues only if traditional agency requirements are fulfilled. These traditional principles of agency form the foundation of the alter ego test.[216] Finally, the fact that criminal liability may be imposed on a corporation for the acts or omissions of lower-level employees actually argues in favor of a *more* protective standard in the criminal context. A narrow test that applies the no-contact rule only to the highest level of corporate employees permits government attorneys to communicate directly with precisely those employees whose actions form the basis of the criminal investigation of the corporation, opening the door to the type of manipulation that the no-contact rule seeks to prevent.

More importantly, the DOJ has failed to articulate how the interests of federal law enforcement are served by the requirement that only the highest level of employees be considered "represented parties" within the scope of the no-contact rule. Requiring federal prosecutors to interview employees in the presence of corporate counsel would not seem to unreasonably impede the efficiency of government investigations. And although the government is justifiably interested in permitting would-be whistleblowers to communicate directly and voluntarily with government agents without interference from corporate counsel, adopting a severe version of the control group standard is an overbroad means of ensuring this result. The DOJ control group standard simply limits the classes of employees who are considered corporate agents and therefore enjoy the protections of the no-contact rule in the first instance. Instead, the special interests articulated by the DOJ call for a regulation addressing whether an employee covered by the rule's protections can voluntarily waive them. The interests of effective law enforcement could be addressed adequately with a regulation permitting employees to opt out of representation by corporate counsel for purposes of the no-contact rule, either by retaining individual representation or by knowingly and voluntarily waiving the presence of in-house counsel.

Narrowly drawn exceptions to the no-contact rule, such as the three outlined above, address those instances where law enforcement communications must depart from the requirements of the rule. They serve the needs of government lawyers but, unlike the new regulations, do so without trampling upon the principles underlying the no-contact rule and without creating the impression that the DOJ is removing its attorneys from the scope of the rule. Moreover, critics of the regulations appear willing to accept this type of ethical regime. For example, William W. Taylor III, a specialist in white collar criminal defense and a prominent opponent of the DOJ proposal, has suggested a compromise in which the no-contact rule would be amended to meet the concerns of government attorneys. Under Taylor's proposal, the no-contact rule would per-

215. *See Niesig II*, 558 N.E.2d at 1035-36.

216. *See id.* at 1036 (explaining that the alter ego test is based upon concepts drawn from the "law of evidence and the law of agency").

mit government attorneys to oversee undercover investigations of represented persons and to contact defendants who would like to cooperate with the government but whose lawyers might interfere.[217] Taylor would also permit DOJ attorneys to communicate directly with corporate employees under investigation or indictment without the interference of corporate counsel.[218]

In sum, the DOJ's no-contact regulations are preferable to the Thornburgh Memo in that they subject government attorneys to the same ethical guidelines as govern the conduct of all attorneys, yet also recognizes situations unique to criminal attorneys where direct communications should be "authorized by law." However, the Department has defined its "authorized by law" exception too broadly. By including almost all preindictment, prearrest communications within this exception, the DOJ has gutted the no-contact rule and removed from it almost all practical meaning.

### B. *Remedying a Violation of the No-Contact Rule by a Government Attorney*

Even with narrowly drawn exceptions to the no-contact rule, the Justice Department must address how courts should remedy a federal prosecutor's violation of the rule. Most commentators agree that evidence obtained in violation of the rule should not be suppressed.[219] The no-contact rule itself does not sanction such an extreme remedy. There are several reasons why a violation of the no-contact rule should not be a basis for suppressing evidence.

First, although the Supreme Court has never ruled on this matter, the Court has sanctioned the suppression of improperly obtained evidence only in the context of a deprivation of constitutional rights. The exclusionary rule originated in *Weeks v. United States*,[220] in which the Court held that it would be "a denial of the constitutional rights of the accused" to introduce evidence obtained in violation of the Fourth Amendment.[221] The Court has since extended the exclusionary rule to violations of the Fifth and Sixth Amendments.[222]

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217. *See* William W. Taylor III, *Justice's Ethics: Bad Policy Redux*, N.J. L.J., Mar. 14, 1994, at 17 (suggesting an amendment to the no-contact rule to accommodate legitimate governmental interests, maintaining that the amendment should be adopted by the ABA and that the DOJ is without authority to promulgate an amendment on its own).

218. *Id.*

219. *See, e.g.*, Henning, *supra* note 45, at 474 ("It is anomalous that defendants can attempt to use a set of rules designed to govern the conduct of the legal profession to create rights that the Supreme Court has refused to accord them."); Saylor & Wilson, *supra* note 25, at 478 ("[N]either the rule governing communications with represented parties nor any other ethical rule is intended to confer enforceable rights on a party to litigation, including a criminal defendant."); Schwartz, *supra* note 25, at 954 ("To the extent that courts apply DR 7-104(A)(1) to prosecutors, violations should not be cured through evidentiary exclusion."). *But see* Salvatore, *supra* note 83, at 588 ("If the disciplinary rules are to be effective, the attached sanction must be appropriate to have a deterrent effect on future improper conduct.").

220. 232 U.S. 383 (1914).

221. *Id.* at 398.

222. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (5th Amendment); United States v. Wade, 388 U.S. 218 (1967) (6th Amendment).

The Court's rationale for the exclusionary rule has always been that suppression of evidence may be the only effective means of guaranteeing these constitutional rights.[223] On the other hand, the Court's holdings reflect an awareness that application of the exclusionary rule is a severe remedy that can hinder effective law enforcement. The Court has recognized as "well known" the adverse impact that the suppression doctrine has on the criminal justice system.[224] The doctrine diverts the focus from "the ultimate question of [the] guilt or innocence [of the defendant] that should be the central concern in a criminal proceeding."[225] While suppression of relevant, trustworthy evidence often leads to the release of a guilty defendant, it does little to punish the government actor who obtained the evidence in violation of procedural rules.[226]

For these reasons, the Supreme Court has noted that "[t]he disparity in particular cases between the error committed by the [government] and the windfall afforded a guilty defendant by application of the [exclusionary] rule is contrary to the idea of proportionality that is essential to the concept of justice."[227] Thus, the Court has recognized that the exclusionary rule is not a per se rule applying to every violation of a procedural rule by the government.[228] In particular, the Court has refused to extend the scope of the exclusionary rule to remedy violations of agency regulations not mandated by the Constitution or federal statute.[229] In the absence of a constitutional violation, suppressing evidence to punish a violation of the no-contact rule would be an unwarranted windfall to the guilty and would hinder effective law enforcement.

Second, both the Model Rules of Professional Conduct and the Code of Professional Responsibility indicate that the ethical rules they codify are intended to discipline attorneys who violate them, rather than create new rights for litigants to be enforced through the exclusionary rule. As the drafters of the Model Rules explicitly state:

> Violation of a Rule should not . . . create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. . . . Furthermore, the purpose of the Rules can be subverted when they are invoked

223. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 652 (1961) (noting that "other remedies have been worthless and futile").

224. *E.g.*, Stone v. Powell, 428 U.S. 465, 489 (1976).

225. *Id.* at 490.

226. Irvine v. California, 347 U.S. 128, 136 (1954); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411-24 (1971) (Burger, J., dissenting) (discussing the adverse consequences of the exclusionary rule on law enforcement), *cited with favor in Powell*, 428 U.S. at 489 n.27.

227. *Powell*, 428 U.S. at 490; *see also* Michigan v. Jackson, 475 U.S. 625, 637 (1986) (Burger, J., concurring) (stating the now familiar view that the exclusionary rule permits the criminal to " 'go free because the constable has blundered' " (quoting People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.))).

228. Even in the context of constitutional violations, the Court has not applied a per se rule of exclusion. Illinois v. Krull, 480 U.S. 340, 349-50 (1987) (holding that evidence can be admitted if obtained in reliance on a statute later declared unconstitutional); United States v. Leon, 468 U.S. 897, 922 (1984) (holding that evidence can be admitted if obtained in good faith reliance on a warrant).

229. *See, e.g.*, United States v. Caceres, 440 U.S. 741, 749-57 (1979) (refusing to suppress evidence gathered in violation of administrative regulations).

> by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding . . . has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.[230]

The drafters of the Code did not address the concern as thoroughly as did the drafters of the Model Rules. Still, they suggest that the Code serves "as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules."[231] Thus, the Code explicitly contemplates the use of disciplinary actions against an offending attorney, but makes no mention of any other type of punishment, including the suppression of evidence.

Moreover, given the complex nature of modern law enforcement practices, the suppression of evidence is an inappropriate remedy when a direct communication is constitutional and would be entirely permissible if initiated by a law enforcement officer rather than a government attorney. Although the no-contact rule applies to law enforcement agents acting as an attorney's "alter ego,"[232] it does not apply to agents operating independently.[233] If courts suppressed evidence based on a violation of the no-contact rule, then the likelihood of a conviction would often turn on whether a government attorney or his alter ego rather than an independent agent elicited the incriminating information, even though attorneys and agents both act on behalf of the government.

Such an outcome overemphasizes the distinction between agents and attorneys in federal law enforcement,[234] especially for the complex, organized crimes and white collar offenses commonly investigated at the federal level. Because traditional street crime investigations involve classic inquisitorial techniques, the use of informants to provide incriminating information, and the gathering of physical evidence, police generally investigate street crimes without the assistance of lawyers. Therefore, most investigations of street crimes are unlikely to implicate the professional rules of conduct. In contrast, investigations into white collar and organized crimes are complex, often calling for

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230. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1992).

231. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981).

232. *E.g.*, United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983); United States v. Lemonakis, 485 F.2d 941, 956 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); United States v. Thomas, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

233. *See* United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993) ("The canons of ethics—unlike constitutional principles—apply to and control only the attorney's conduct and not the investigator's or informant's independent conduct."); *see also* L. Eric Johnson, *The Impact of Disciplinary Rule 7-104 on Law Enforcement Contact with Represented Persons*, 40 U. KAN. L. REV. 63, 107 (Criminal Procedure Edition) (1992) (asserting that while courts vary in their application of the alter ego rule, prosecutors cannot be held responsible for conduct by officers made without the prosecutor's knowledge).

234. *See* United States v. Galanis, 685 F. Supp. 901, 903 (S.D.N.Y. 1988) (calling "useless [an] inquiry to find out whether an agent is acting as an '*alter ego* of government prosecutors' " and holding that "[o]n such useless and immaterial differentiations, the enforcement of the criminal law should not be allowed to depend").

document subpoenas and grand jury proceedings.[235] In these investigations, therefore, prosecutors cooperate early on with law enforcement agents. Suppression of otherwise lawfully obtained evidence simply because it was secured at the direction of a government attorney would provide an unfair windfall to those defendants who happened to have been investigated by a law enforcement team containing a member of the bar.

Despite these arguments, some courts have used their supervisory powers to exclude evidence obtained through communications made in violation of the no-contact rule.[236] The supervisory power allows a court to formulate procedural rules not specifically required by Congress or the Constitution.[237] There are three legitimate bases for exercising the supervisory power: to remedy a violation of a recognized statutory or constitutional right, to preserve judicial integrity by ensuring that a criminal conviction rests on considerations validly before a jury, and to deter future illegal conduct.[238] Relying on its supervisory powers, the Tenth Circuit held in *United States v. Thomas*:

> Once a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present. To hold otherwise, we think, would be to overlook conduct which violated both the letter and the spirit of the canons of ethics.[239]

Other courts, however, have refused to suppress evidence to remedy a violation of the no-contact rule[240] or have avoided reaching the issue.[241]

Regardless of whether suppression of evidence appropriately remedies a violation of the no-contact rule, clearly there are limits to how far a court will go in jeopardizing a prosecution because of a violation of the rule. In *United States v. Lopez*,[242] the Ninth Circuit held that a district court went too far when it invoked its supervisory powers to dismiss an indictment, where an AUSA

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235. *See* Henning, *supra* note 45, at 406-13; Karlan, *supra* note 45, at 700.

236. *See* United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988) (*Hammad II*) (holding that suppression of evidence may be ordered by the court for violation of the no-contact rule), *cert. denied,* 498 U.S. 871 (1990); United States v. Killian, 639 F.2d 206, 210 (5th Cir.) (observing that suppression is probably the appropriate remedy for violation of the no-contact rule), *cert. denied,* 451 U.S. 1021 (1981); United States v. Durham, 475 F.2d 208, 211 (7th Cir. 1973) (stating that statements obtained in absence of defense counsel should not have been admitted); United States v. Thomas, 474 F.2d 110, 112 (10th Cir.) (holding that statements obtained in violation of the no-contact rule may not be offered into evidence), *cert. denied,* 412 U.S. 932 (1973).

237. *See* Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988).

238. *See* United States v. Hasting, 461 U.S. 499, 505 (1983).

239. 474 F.2d at 112.

240. *See* United States v. Chavez, 902 F.2d 259, 266-67 (4th Cir. 1990) (admonishing a government attorney for ex parte contact, but refusing to suppress evidence in the absence of a showing of prejudice to the defendant); United States v. Dennis, 843 F.2d 652, 657 (2d Cir. 1988) (absent a showing of prejudice, disciplinary action and not suppression of evidence is the appropriate sanction for violation of the no-contact rule); Suarez v. State, 481 So. 2d 1201, 1206 (Fla. 1985), (holding that a violation of DR 7-104(A)(1) does not warrant suppression of evidence), *cert. denied,* 476 U.S. 1178 (1986).

241. United States v. Jamil, 707 F.2d 638, 646 (2d Cir. 1983) (finding it "unnecessary . . . to decide whether suppression would have been warranted *if* the disciplinary rule had been violated").

242. 4 F.3d 1455 (9th Cir. 1993).

had conducted postindictment plea negotiations with the defendant outside the presence of defense counsel.[243] The Ninth Circuit agreed that a district court may invoke its supervisory powers to police ethical misconduct by prosecutors but found that, in the circumstances presented in *Lopez*, less severe sanctions were sufficient:

> 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.[244]

Ethical guidelines designed to protect the professionalism of the bar and to foster an atmosphere of civility among attorneys should not be permitted to be invoked by criminal defendants in an attempt to create new substantive rights. In fact, such misuse of the ethical guidelines inspired the DOJ's current attempt to soften the impact of the ethical rules on government attorneys[245] and may explain the reluctance of courts to apply the no-contact rule to preindictment communications. Furthermore, if understood as a substantive right for criminal defendants, the no-contact rule would unjustifiably suppress reliable and otherwise lawfully obtained evidence against a criminal defendant simply because the communication was made by or at the direction of a government attorney rather than an independent nonattorney law enforcement official.

On the other hand, if the no-contact rule is viewed as an attempt to police the conduct of all members of the bar, then it is reasonable to apply it to government attorneys regardless of whether or not it is applied to other law enforcement officials. Government attorneys, unlike other law enforcement agents, are members of the bar and, except in those narrow instances where the interests of federal law enforcement require that government attorneys be exempt from the no-contact rule, should be subject to the same ethical rules and disciplinary proceedings as are applicable to the rest of the bar. Thus, unless a government attorney's ex parte communication is "authorized by law" as defined in the DOJ regulations, the state bar association to which she belongs should retain authority to discipline her just as it may discipline any other member of its group.

However, the new DOJ rule goes further than simply creating narrow exceptions to the no-contact rule as applied by state bar associations. Section 77.12 provides that state disciplinary action may be brought only if the Attorney General first determines that a government attorney willfully violated the

243. *Id.* at 1463-64.

244. *Id.* at 1464 (citation omitted); *see also* United States v. Larrazolo, 869 F.2d 1354, 1357 (9th Cir. 1989) (noting that dismissing an indictment is appropriate only when prosecutorial misconduct is a "flagrant error" that prejudices the defendant).

245. *See* MONOGRAPH, *supra* note 84, at 1 ("The efforts to expand the scope of the [no-contact rule], although largely unsuccessful, have created substantial problems for federal law enforcement.").

no-contact rule as defined by the proposed regulation.[246] In other words, not only does the regulation create broad exemptions from the no-contact rule for government attorneys; but it prohibits state bar associations from disciplining violations of the DOJ's narrowly defined no-contact rule unless the Department itself determines that such action is appropriate. The DOJ's approach only fosters the common perception among defense attorneys that the Department's regulation, like the Thornburgh Memo, is critically flawed by an attempt to wholly exclude government attorneys from ethical rules.[247]

A less drastic approach would be a federal regulation creating narrow exceptions to the no-contact rule that address the special circumstances faced by government attorneys, as suggested in Part III.A, leaving the remainder of the no-contact rule intact and enforceable by the state licensing bodies that have traditionally regulated the ethical conduct of attorneys. Such an approach would generally hold federal prosecutors to the same standards as apply to every member of the bar. Moreover, it would subject government attorneys to an identical range of potential consequences for violating the no-contact rule. Under such a regime, government attorneys would not be immune from state bar disciplinary proceedings, a possibility under the current regulation unless the DOJ itself first determines that an attorney wilfully violated the regulation. Moreover, violations of the no-contact rule would be subject *only* to traditional disciplinary remedies and not to the exclusionary rule, which bestows unjustifiable windfalls upon criminal defendants.

## CONCLUSION

The no-contact rule should be interpreted as a guideline for professionalism among attorneys, not as a vehicle for conferring substantive criminal rights not provided by the Constitution. Seen this way, the rule generally should control the behavior of federal prosecutors just as it controls the behavior of private practitioners. However, because government attorneys are in the unique position of overseeing the actions of law enforcement officials—whose conduct is restrained only by the Constitution—they desperately need a clear regulation to reconcile professional ethics with effective investigative communications. If the no-contact rule is applied too restrictively, prosecutors might attempt to avoid ethical sanctions or the exclusion of evidence by disassociating themselves completely from the investigative stage of a prosecution. This would leave investigation and interrogation in the hands of nonattorney law enforce-

246. 59 Fed. Reg. 39,931 (1994) (to be codified at 28 C.F.R. § 77.12) (stating that the DOJ's proposed rule preempts application of state and local rules regarding communications by government attorneys, but noting that "[w]hen the Attorney General finds a willful violation of any of the rules in [the DOJ regulation,] however, sanctions for the violation of this part may be applied, if warranted by the appropriate state disciplinary authority").

247. *See, e.g.*, Harvey Berkman, *Son of "Thornburgh,"* NAT'L L.J., Mar. 14, 1994, at A8 (" '[Reno's proposal is] better than the Thornburgh memo, but when the temperature goes from 50 below to 25 below, it's still pretty cold out.' " (quoting Neal R. Sonnett, former chair of the ABA's Criminal Justice Section)); Taylor, *supra* note 217, at 30 (arguing that "the Reno rules, like the Thornburgh memorandum, seek to address the [no-contact debate] by sweeping aside the historical role of state licensing bodies in regulating and policing the conduct of lawyers").

ment officers acting without attorney supervision. As a result, the risk of illegal or manipulative communications would likely increase.[248]

To avoid this scenario, certain ex parte communications unique to the criminal context should be permitted under the "authorized by law" exception to the rule. However, the interests of effective law enforcement do not require that all communications prior to the initiation of formal proceedings be exempt from the scope of the no-contact rule, nor do they require that the substance of the rule be gutted in the context of communications with corporate employees. Narrowly defined exceptions to the no-contact rule which generally hold government attorneys to the same ethical guidelines as direct the behavior of every other member of the bar can effectively serve the interests of law enforcement.

248. *See* Schwartz, *supra* note 25, at 952-53.