COMPROMISING PROFESSIONALISM: THE JUSTICE DEPARTMENT'S ANTI-CONTACT RULE

I. INTRODUCTION

The concept of professionalism is one of an organized group of people engaged in the pursuit of a specialized, learned art for the dual purpose of serving the public and making a living. In the legal profession, the organization contemplated is not a formally structured entity, but a custom of solidarity in carrying out the public service of promoting the administration of justice. One way to further this singleness of purpose among all members of the legal profession is to require them to follow a common code of ethical behavior which strives to balance the various conflicting interests inherent in pursuing legal justice. By holding lawyers accountable for their ethical conduct, the profession intends to instill in the public a confidence that all members of the legal profession will pursue their common goal with "fairness, integrity, and impartiality."

Among the rules designed to ensure lawyers adhere to high ethical standards is a rule which prevents one lawyer from communicating with a person she knows is represented by another lawyer without that lawyer's consent. This anti-contact rule exists to protect "the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."

3. Id.; see also United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (noting that the purpose of the ethics rules is to "safeguard the integrity of the profession and preserve public confidence in our system of justice").
4. For purposes of clarity, references to lawyers and prosecutors will be female and references to non-lawyers (parties and non-parties) will be male throughout the Article.
5. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 396 (1995); see also United States v. Jamil, 707 F.2d 638, 646 (2d Cir. 1983). The court was contemplating lawyers' deceptive strategies when it emphasized the importance of anti-contact rules to protect criminal defendants who are always "in danger
The aims of the no-contact rule are consistent with the legal profession's interest in serving justice, so it is surprising that the United States Department of Justice, a federal entity which by its very name exists to preserve justice, has exempted its attorneys from having to observe the anti-contact rule promulgated by the legal profession and imposed upon all lawyers. Instead, the Attorney General issued a separate set of guidelines, imposed on Department attorneys and enforced by the Attorney General's Office, which is more lenient in scope but intended to be consistent in spirit with the anti-contact rule. Supporters of the rule insist the rule is necessary for United States attorneys to effectively perform their roles as "shepherd[s] of justice" when defense attorneys are not acting in their clients' interests. Critics maintain that it allows Department lawyers to appear as innocent as sheep while exercising their authority to be as guileful as wolves.

The American Bar Association's Model Rules of Professional Conduct Rule 4.2 (Model Rule) is currently the paradigmatic anti-contact rule upon which state and federal district courts base their own anti-contact rules. However, by issuing a regulation setting forth its own rule governing attorneys' communications with represented persons, the Justice Department claims to have preempted jurisdictional no-contact rules and shielded its attorneys who allegedly violate those rules from the possibility of discipline by a state or local bar.

of being 'tricked' into giving [their] case[s] away by opposing counsel's artfully crafted questions." Id.


9. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1996). The rule states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so." Id.


11. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.12
In response to the Justice Department’s regulation, however, Congress amended provisions of the United States Code governing the conduct of United States attorneys in an attempt to nullify the Attorney General’s preemption of no-contact rules. Entitled Ethical Standards for Federal Prosecutors, the new law effectively abrogates the Department’s regulations by providing that government attorneys must adhere to the “State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.” The new statute ensures the compliance by requiring the Attorney General to make and amend the Department’s rules to comport with the statute. Implicit in the amendment is Congress’s intent to compel the Attorney General to amend the policies regarding prosecutors’ contacts with represented persons. The effect of the statute is to add to the already existing controversies and uncertainties about what aspects of the regulations are valid and enforceable.

To understand the debate which has culminated in congressional action, this Article looks at the Justice Department’s rule, referred to as the “Reno Rules,” from the sides of both its supporters and its oppo-

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14. Id.

15. See Congress Enacts Statute, supra note 12, at 70.


ments. Part II examines the background and purposes of both Model Rule 4.2 and the Department's version of a no-contact rule, highlighting the conflicts between the two. In the next three sections, the Article considers the Department's three primary justifications for its rule and presents the counter arguments to these defenses. Specifically, Part III contrasts the Department's explanation that the traditional anti-contact rule impedes prosecutors from performing their legitimate prosecutorial duties with the concern that prosecutors will "trick" suspects and defendants into making statements which damage their cases. Part IV looks at the reasons for having a rule which separates one group of lawyers from the rest, and it discusses the damages the profession could suffer from having two standards of accountability. In Part V, this Article considers whether the Department of Justice exceeded the scope of its authority in promulgating its guidelines for regulating federal prosecutors' contacts with anyone known to be represented by counsel.

Inherent in the Attorney General's rule are two pervasive concerns: (1) the rule threatens the ethical integrity of the practice of law by exposing people in vulnerable positions to the deceptive devices of lawyers; and (2) applying separate behavioral standards to members of the same profession undermines the legal profession's ultimate goal of preserving justice. Although the Justice Department and the rule's proponents advance valid justifications for the rule, the rule compromises some of the professional standards on which the legal profession is based.

II. CONFLICTS BETWEEN MODEL RULE 4.2
AND THE RENO RULES

A. Background of Model Rule 4.2

The legal profession ensures commitment to the goal of "advanc[ing] the rule of law and our system of justice" by having a single governing authority regulate and enforce uniform behavioral standards.\textsuperscript{18} Early on, lawyers prompted by the need for a way to regulate the delivery of legal services to ensure the profession would not be debased imposed regulations on themselves.\textsuperscript{19} As a result, the American Bar Association

\footnotesize{(2d ed. 1998).}\noindent\textsuperscript{18} Shestack, supra note 1, at 4.

\textsuperscript{19} ABA Report, supra note 2, at 112.
adopted a cannon of ethics the purpose of which was to demand ethical conduct from all members of the Bar through uniform state application and enforcement of the cannons.\textsuperscript{20} Self-regulation required strict adherence to the rules, and a lawyer's failure to conform to the standards required by the rules would result in the profession's forcing her to relinquish her privilege of practicing law.\textsuperscript{21} Similarly, the Preamble to the current version of the model ethics guidelines encourages adherence to the common rules of conduct to ensure the preservation of the "quality of justice."\textsuperscript{22}

Model Rule 4.2 embodies all of the ideas behind the notion of professionalism in practicing law. Perhaps this is why a version of the anti-contact rule has been part of the ethical guidelines imposed on lawyers since they were first set forth.\textsuperscript{23} The current version of the anti-contact rule forbids a lawyer who represents a client from communicating about a subject with anyone she knows is represented by an attorney in connection with that subject, unless she either gets permission from the other lawyer or finds legal precedent authorizing the communications.\textsuperscript{24} While earlier versions of the anti-contact rule forbade a lawyer's communicating with represented parties,\textsuperscript{25} the American Bar Association amended the rule in 1995 to protect not only parties but all represented persons.\textsuperscript{26} This change reflected the original drafters' true intention for the rule to extend to all circumstances in which a lawyer representing her client contacts anyone whom she knows is represented.\textsuperscript{27} Underscoring the

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} at 114.
\item \textsuperscript{21} \textit{Id.} at 113.
\item \textsuperscript{22} \textbf{MODEL RULES OF PROFESSIONAL CONDUCT} Preamble (1996).
\item \textsuperscript{23} ABA Comm. on Ethics and Professional Responsibility, Formal Op. 396 (1995). While the American Bar Association included an anti-contact rule in the first set of rules it issued in 1908 (The Cannons of Professional Ethics), the ABA insists the rule has been around since 1836. \textit{Id.} Interestingly, the ABA credits David Hoffman with the earliest adoption of the anti-contact rule in his book entitled, \textit{A Course of Legal Study Addressed to Students and the Profession Generally}. \textit{Id.} Hoffman's version reads: "I will never enter into any conversation with my opponent's client, relative to his claim or defence [sic], except with the consent, and in the presence of his counsel." \textit{Id.} (footnote omitted).
\item \textsuperscript{24} \textbf{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 4.2 (1996).
\item \textsuperscript{25} \textbf{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 4.2 (1983) (amended 1995); \textbf{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 7-104(A)(1) (1981); ABA CANNONS OF PROFESSIONAL ETHICS Cannon 9 (1908).
\item \textsuperscript{26} \textbf{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} § 158 reporter's note to cmt. b (Tentative Draft No. 8, 1997).
\item \textsuperscript{27} \textbf{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 4.2 cmt. 3 (1983) (explain-
broad scope intended by the use of the word "person," the comments to the current version of Rule 4.2 specify that the circumstances need not involve a party to litigation or a contract, but must merely involve any individual who has retained an attorney with regard to the subject matter of the communication.  

Despite the inclusive nature of the language "a person . . . represented by another lawyer" and the historically consistent view that unauthorized communications with both parties and non-parties alike are forbidden, Model Rule 4.2 recognizes exceptions whenever "applicable judicial precedent" recognizes exceptions to the rule. Therefore, once a court has issued an opinion validating an attorney's conduct in contacting a represented person without approval from the person's attorney, similar subsequent contacts in this jurisdiction will meet the "authorized by law" exception to the anti-contact rule.

The most significant aspect of Model Rule 4.2 is its facial acknowledgment that lawyers and non-lawyers are unequals in matters of law. To level the field on which communication between the two should take place, the rule requires lawyers to afford non-lawyers the opportunity, whether or not they are aware of it, to have their attorneys present during the communication. Underscoring the potential inequality between lawyers and non-lawyers in legal discussions, the rule is not satisfied with lawyers' seeking permission from non-lawyers to talk about the subject of representation in the absence of the other lawyer, but instead demands permission come from an equal. In short, the anti-contact rule seeks to protect people who have an interest in a matter from jeopardizing that interest by speaking too openly to a person who has been professionally trained in the use of potentially manipulative legal strategies.

\begin{footnotesize}
\begin{enumerate}
\item \textit{See id.}
\item \textit{Id.}
\item \textit{See id.}
\item \textit{Id.}
\item \textit{See id.}
\item \textit{See id.}
\end{enumerate}
\end{footnotesize}
Courts have stated that the anti-contact rule operates to ensure a client is not "tricked into giving his case away by opposing counsel's artfully crafted questions." Even the Department of Justice recognizes that "when two parties in a legal proceeding are represented, it is generally unfair for an attorney to circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party." More specifically, the rule guards against a person's disclosing privileged information, allows discussions to be filtered through people whose personal interests are not at stake, and protects clients from lawyers' overreaching.

Consistent with protecting non-lawyers from the inequities inherent in dealing with lawyers, the anti-contact rule also safeguards the rights and privileges afforded by the attorney-client relationship. The paramount duty of an attorney in this relationship is to be a competent and zealous advocate for her client. She is robbed of her ability to perform her professional duty if she is absent from her client's conversations with the opposition's attorney. In sum, the ABA correctly asserts that the legal system, because of its adversarial nature, functions best when "persons in need of legal advice or assistance are represented by their own counsel." Thus, the anti-contact rule, by ensuring fairness in legal settings,


35. Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,910-11 (1994). For this reason, the codified regulations contain a provision which insists that these rules intend to follow Model Rule 4.2 as closely as possible. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.1 (1994). It states:

This part ensures the Department's ability to enforce federal law effectively and ethically, consistent with the principles underlying Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, while eliminating the uncertainty and confusion arising from the variety of interpretations given to that rule and analogous rules by state and federal courts and by bar association organizations and committees.

Id.


promotes the goals of professionalism.

B. Background of the Reno Rules

While the Justice Department recognized the importance of the no-contact rule in preserving the integrity of the legal profession and safeguarding the attorney-client relationship, it also recognized that the rule’s blanket prohibition sometimes foreclosed prosecutors from performing their statutorily prescribed investigatory duties. Related to this general problem was the specific obstacle prosecutors faced when crime rings hired defense attorneys to represent an individual suspect or defendant in order to frustrate investigations by refusing to allow their ostensible client to negotiate with the government. Prosecutors were also unable to perform their law enforcement duties when career criminals took advantage of the blanket no-contact rule by hiring career attorneys who would provide them with a permanent shield from investigation. Finally, because the Model Rules have not been uniformly adopted in every state court and federal district court throughout the country, and because each jurisdiction slips different factual circumstances into the “authorized by law” exception, the Department of Justice felt the need to

40. Id. at 39,911 (“The expansive application of these rules in some jurisdictions may have the effect of blocking preindictment interviews or undercover operations that most courts have held permissible under federal constitutional and statutory law.”).
41. Saylor & Wilson, supra note 10, at 471-72. The authors, both attorneys with the United States Department of Justice, state that before the Reno Rules prosecutors faced a difficult dilemma when represented persons who initiated or wanted to initiate contact with a prosecutor had reason to believe their attorneys were not acting in their best interests. Id. Forbidden by the anti-contact rule to by-pass the attorneys, prosecutors could either ignore the ethics rule and risk penalty or not pursue valuable information the represented person wished to communicate to the government. Id. at 460.
42. Bruce A. Green, A Prosecutor’s Communications with Defendants: What Are the Limits?, 24 CRIM. L. BULL. 283, 287 (1988).
43. See Saylor & Wilson, supra note 10 (explaining that most states have adopted the Model Rules with some modifications and that federal district courts typically adopt the state’s rules into their own pursuant to Rule 57 of the Federal Rules of Criminal Procedure which gives them rulemaking power).
44. See, e.g., United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996) (reasoning that communications with represented persons during a “legitimate pre-indictment
promulgate its own regulations governing United States attorneys’ communications with represented persons. The Department’s rule recognizes six situations in which prosecutors may contact defendants without their attorneys’ permission, and it restricts contacts with non-parties by requiring prosecutors to respect the attorney-client relationship. The Justice Department ensured it would apply and enforce the anti-contact rule consistently and that prosecutors would uniformly adhere to its guidelines by providing that the rule preempts the no-contact rules of other jurisdictions and that only the Attorney General has the authority to review alleged violations and impose sanctions for infractions.

The timing of the Department’s promulgation of 28 C.F.R. § 77 supports these purposes and reveals the Department’s concerns that anti-contact rules both unreasonably hinder its attorneys’ law enforcement functions and effectively chill the intensity with which they carry out investigation were authorized by law in accordance with the anti-contact rule’s exception; United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) (stating that the “authorized by law” exception allows only the extent of contact between prosecutors and represented defendants that case law allows); United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (holding that a prosecutor is “authorized by law” to use “legitimate investigative techniques” to supervise and conduct criminal investigations, but finding that the prosecutor in this case had used improper strategies so had violated the anti-contact rule); In re Doe, 801 F. Supp. 478, 486-87 (D.N.M. 1992) (refusing to adopt the argument that the statute giving federal prosecutors investigatory powers was meant to be a law which authorized them to ignore ethical rules in a case where the prosecutor contacted a represented defendant).

DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77 (1994). The Department of Justice asserts that its purpose in promulgating the rule was to “provide a comprehensive, clear, and uniform set of rules governing the circumstances under which Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.” Id.; see Rory K. Little, Who Should Regulate the Ethics of Federal Prosecutors?, 65 FORDHAM L. REV. 355, 369-70 (1996).

28 C.F.R. § 77.6, .9. An in-depth discussion of the rule is provided in Part III. While the Justice Department’s rule includes a provision dealing specifically with corporations, id. § 77.10, consideration of this provision and the issues it raises are beyond the scope of this Article.

Id. § 77.12; see infra Part V (discussing the issue of the need for uniformity and examining whether preemption was an ultra vires act).

28 C.F.R. § 77.11; see infra Part IV (discussing the Attorney General’s power to be a separate regulator with respect to ethics rules).

See infra Part III.
their public duties. The predecessor to the codified regulations was a policy statement issued by Attorney General Richard Thornburgh in the form of a memorandum to the Department’s attorneys. According to Attorney General Thornburgh, the Department of Justice’s position had traditionally been that beyond federal statutory and constitutional provisions, only the Department’s policies could set limitations on government attorneys in their performance of their duties. The Memorandum explicitly stated that the Attorney General’s Office planned to codify its position that federal prosecutors were exempt from following state and federal district court anti-contact rules.

The Justice Department's need for a codified regulation became evident after the Ninth Circuit's ruling in United States v. Lopez that a prosecutor had violated the state's anti-contact rule by communicating with a represented defendant. The court held this way even though the prosecutor was told the defendant did not feel his attorney represented his best interests, he obtained the court's permission to conduct the discussions, and he received a signed waiver from the party. In Lopez, the defendant, Lopez, and a co-defendant, Escobedo, retained separate attorneys, and while Escobedo's attorney planned to negotiate with the government on his client's behalf, Lopez's attorney refused to plea bargain. Lopez decided that he was interested in negotiating, so he asked his co-defendant's attorney to relate this desire to the prosecutor, telling the attorney that he did not believe his own attorney represented his best interests. The prosecutor received permission from the court to communicate with Lopez without his attorney's knowledge, and Lopez signed

50. See infra Part IV.
52. Thornburgh Memorandum, supra note 51.
53. Id.
54. 4 F.3d 1455 (9th Cir. 1993).
55. Id. at 1463.
56. Id.
57. Id. at 1456.
58. Id.
a waiver before going through with the meeting. 59 A second meeting, employing the same safeguarding processes as the first, transpired, but the parties failed to strike a plea agreement. 60 Despite the defendant’s desire not to have his attorney know he wanted to negotiate a plea with the government and despite the safeguards the prosecutor took to ensure his conduct was judicially authorized, the Ninth Circuit, nevertheless, held that the prosecutor had impermissibly violated the state’s anti-contact rule. 61 Soon after the ruling, the Department of Justice issued the proposed regulation which was later codified at 28 C.F.R. § 77. 62

C. Conflicts Between Model Rule 4.2
   and the Reno Rules

Opponents of the Reno Rules argue that strict adherence to Model Rule 4.2 is the best way to ensure justice is served through just means. Allowing prosecutors to communicate with represented persons without their attorneys’ consent creates an unlevel playing field upon which it is possible for them to damage their cases in a way that their attorneys could have prevented had they known the communications would take place. 63 This possibility makes the rule an anathema to the professional goal that justice be sought in ways that are fair. 64 The drafters of the Reno Rules seem to have been aware of this possibility and included in it specific safeguards to apply under specific circumstances. 65 And, at all times, prosecutors must respect the attorney-client relationship. 66 But

59. Lopez, 4 F.3d at 1456.
60. Id.
61. Id. at 1462.
62. Lopez was argued on May 12, 1992, and Attorney General Barr issued a proposed regulation on November 20, 1992, which Attorney General Reno later withdrew. See Delker, supra note 51, at 857 n.1. The Lopez decision was handed down on March 17, 1993, and Attorney General Reno submitted her proposal on July 26, 1993. Id. On March 3, 1994, the Attorney General issued the proposal which, with minor changes, became the final rule on August 4, 1994. Id.
64. See supra text accompanying notes 32-38.
65. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6 (1994).
66. Id. § 77.9.
questions persist: Are these safeguards enough to be consistent with the goals of professionalism? Will the safeguards be followed so that justice may be achieved professionally, or will federal attorneys ignore them because they know they do not have to answer to the judicial body deciding the case if they violate them? Do the "shepherds of justice" intend to remain faithful to their role?

The Reno Rules purport to follow the principles of Model Rule 4.2 as closely as possible while affording all federal attorneys a clear and uniform code of conduct.67 Furthermore, the rule claims to provide limitations additional to, not in place of, all restrictions placed on prosecutors’ communications with represented persons by the Sixth Amendment, any other United States constitutional provision, federal statutes, the Federal Rules of Criminal Procedure, and the Federal Rules of Civil Procedure.68 The inclusion of these two provisions indicates the Justice Department’s intent for its attorneys to conform to the overall spirit of the anti-contact rule and to tailor their contacts to fit within the bounds of existing federal and constitutional laws as they perform their duties in the pursuit of justice.69 In other words, the legal protections afforded represented persons must guide prosecutors’ conduct even though they are permitted some leniency to serve the public interests of administering justice. In demanding high standards of professional responsibility, the Reno Rules profess to be consistent with the goals of the legal profession.70

Nevertheless, the Department’s no-contact rule raises many concerns, among them whether prosecutors will be tempted to manipulate the parameters of the rule in order to obtain the information they seek; whether the application of separate rules to members of the legal profession destroys the goals of professionalism; and whether the Justice Department has the constitutional authority to promulgate such a rule. While the Department resolutely defends its rule on several grounds, each justification presents a countervailing concern that an unintended and harmful result may issue from prosecutors’ adherence to the regulations. The Reno Rules try to reach a middle ground between prosecutors’ strict adherence to state and federal courts’ no-contact rules and permissive leniency which enables them to perform their public function. Notwith-

67. Id. § 77.1(a).
68. Id. § 77.4.
69. Id. § 77.1, .A.
70. See discussion supra note 35.
standing this goal, represented persons and their attorneys have genuine reasons to be wary of the effects of the Department’s rules. These concerns are discussed in greater detail in the next three sections.

III. COMMUNICATIONS AND PROSECUTORIAL DUTIES

A. Represented Parties

A primary argument the Department of Justice asserts in defense of its anti-contact rule is that requiring its attorneys to abide by state and local anti-contact rules hinders the Department’s ability to perform its congressionally mandated function of enforcing the law. More specifically, it insists that being barred from communicating with defendants without first obtaining permission from their attorneys sometimes compromises the Department’s cases, resulting in injustices such as endangering the defendant and his family, losing key pieces of evidence, or both. These results, supporters of the rule contend, are more severe than the ethical violation would have been. Therefore, Attorney General Reno’s rule contains a general prohibition against prosecutors communicating with represented defendants, but it recognizes exceptions to this


72. See, e.g., United States v. Lopez, 4 F.3d 1455, 1457 (9th Cir. 1993). The federal prosecutor in Lopez assumed (but did not know his assumption was erroneous) that Defendant Lopez’s wish not to have his lawyer involved in plea negotiations with the government arose out of some connection with a drug ring which was paying his attorney’s fees. Id. As a result of this connection, the prosecutor assumed, Lopez’s family would be endangered if his attorney learned he wanted to negotiate with the government. Id.

73. See, e.g., Saylor & Wilson, supra note 10, at 459-60. The authors, two Department of Justice attorneys, introduce their readers to the Department’s rule with a scenario which seems more like a Hollywood screenplay than a plausible ethical dilemma. Id. at 459. In it, a prosecutor discovers that a mob-boss defendant with information about several organized crime families wants to make a deal with the government but is certain his mob-paid attorney will arrange for his death were he to do so. Id. The prosecutor’s dilemma is whether to violate the federal district court’s anti-contact rule and strike a blow against crime or uphold his professional duty to obey court rules and forgo pursuing the information in a manner which could subject the defendant to legal negotiations in which he was an unequal participant because not represented by an attorney. Id. at 460.

74. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.5
blanket no-contact rule.\textsuperscript{75} Consequently, the Justice Department's no-contact rule recognizes six circumstances under which prosecutors may conduct communications with represented parties without their attorneys' permission.\textsuperscript{76}

According to the Reno Rules, criminal and civil federal prosecutors are prohibited from communicating with a represented party without his attorney's consent unless the situation meets one of the authorized exceptions.\textsuperscript{77} For purposes of these regulations, a "party" is a person who "has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding . . . ."\textsuperscript{78} First, prosecutors may communicate with a represented party to determine whether he is represented.\textsuperscript{79} Second, United States attorneys may discuss the subject matter of the representation with a defendant in the course of conducting discovery and performing judicial or administrative processes, provided they do so in accordance with the court's orders or rules.\textsuperscript{80} Third, without seeking prior approval from his attorney, federal prosecutors may communicate with a party who initiates the contact.\textsuperscript{81} However, before doing so, they must obtain two items: (1) a signed, written statement acknowledging the party's waiver of his right to have an attorney present; and (2) permission from the court which has either determined the waiver is valid or obtained substitute counsel who consented to the conversations.\textsuperscript{82} Fourth, if at the time of arrest the represented party knowingly waives his \textit{Miranda} rights, discussions conducted at that time are permissible.\textsuperscript{83} Fifth, the rule permits contacts involving "[i]nvestigation[s] of additional, different or ongoing crimes or civil violations."\textsuperscript{84} Finally, in situations in which prosecutors have a good faith belief that a person's life or safety is endangered and that communications with a represented party are necessary

\textsuperscript{75} Id. \textsuperscript{76} Id.\textsuperscript{77} Id. \textsuperscript{78} Id. \textsuperscript{79} DOJ Communications with Represented Persons Rule, 28 C.F.R. \textsuperscript{80} Id. \textsuperscript{81} Id. \textsuperscript{82} Id. \textsuperscript{83} Id. \textsuperscript{84} DOJ Communications with Represented Persons Rule, 28 C.F.R. \textsuperscript{85} Id.\textsuperscript{86} Id.\textsuperscript{87} Id.\textsuperscript{88} Id.
to eliminate the risk, contact with the party aimed at gaining information to provide protection is acceptable.\textsuperscript{85}

The exceptions contemplate a variety of situations. Most significantly, the exceptions eliminate the dilemma prosecutors face when an organized crime ring pays for the attorney of an individual defendant who wants to exchange evidence against the ring for a lighter sentence, but who fears the repercussions of his attorney's finding out.\textsuperscript{86} Without the Reno Rules, prosecutors in this situation could either ignore the jurisdiction's anti-contact rule, get the evidence, and face the possibility of sanctions or forego the evidence to avoid endangering the defendant's life. Under the Reno Rules, such contacts would fall into either the exception for discovery, the exception for investigation of other crimes, or the exception recognized when the defendant initiates contact.\textsuperscript{87} In addition, prosecutors may fear losing valuable information essential to developing their cases because they suspect the defendant's attorney will coach her client's responses to their questions. Pursuant to the Reno Rules, prosecutors facing this possibility may communicate with the defendant without seeking permission from the attorney as long as they do so in accordance with specific orders and rules of the court having jurisdiction over the case.\textsuperscript{88}

Furthermore, the rule anticipates that an unethical defense attorney may simply refuse to honor her client's wishes to cooperate with the government.\textsuperscript{89} To avoid this situation, the Department's rule allows contacts "pursuant to discovery procedures or judicial or administrative process[es]" in accordance with the court's rules or orders\textsuperscript{90} and contacts the defendant initiates.\textsuperscript{91} Other exceptions seek to avoid losing valuable information a party can contribute to a different crime or proceeding in exchange for less severe treatment.\textsuperscript{92} Finally, in order to be consistent with Justice Department's prevailing duty to preserve the public welfare,

\textsuperscript{85} Id. § 77.6(f).
\textsuperscript{86} See supra notes 72-73 and accompanying text.
\textsuperscript{87} DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6(b), (e), (c) (1994).
\textsuperscript{88} See id. § 77.6(b).
\textsuperscript{89} The facts of United States v. Lopez suggest this possibility. 4 F.3d 1455, 1456-67 (9th Cir. 1993); see supra text accompanying notes 54-61.
\textsuperscript{90} DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6(b) (1994).
\textsuperscript{91} Id. § 77.6(c).
\textsuperscript{92} See id. § 77.6(c), (e).
the rule authorizes prosecutors to solicit information from defendants when the information is necessary to eliminate the risk of harm to third parties. 93

Despite these valid intentions, it seems likely that in any of these situations, prosecutors’ questioning strategies could easily manipulate the defendant into offering an unintentional but harmful or even inculpatory response simply because the defendant did not have his attorney’s assistance. At the least, a defendant who is sitting alone in an interview with an adversary may inadvertently damage his own case because he is intimidated by the mere presence of the government attorney and his surroundings. At the extreme, federal prosecutors may be so driven to get a conviction that they interpret the limitations imposed by the Reno Rules very narrowly while interpreting the exceptions very broadly and engage in conduct which is arguably within the scope of the rule but is patently unfair and improper.

Therefore, the conflicting, but equally real, effects of any prosecutorial authority to contact defendants without first obtaining permission from their attorneys will possibly be to “intrude[] upon the function of defense counsel and impede[] his or her ability to negotiate a settlement and properly represent the client . . . .” 94 Indeed, the rules give prosecutors the ability, authority, and discretion to alter a defendant’s case significantly. 95 Thus, society, courts, defense attorneys, and individuals are justified in fearing the consequences of a federal prosecutorial system in which those in charge may approach those charged with violating the law without the knowledge of their attorneys. 96 It seems likely that constitutional provisions which limit a federal attorney’s contacts with defendants are insufficient, and ethical restraints including a blanket no-contact rule are imperative. 97

B. Represented Non-parties

Model Rule 4.2, if applicable to federal prosecutors, would prevent them from conducting pre-indictment, non-custodial interviews with any-

93. See id. § 77.6(f).
95. Id.
96. Green, supra note 42, at 286.
97. See id.
one they know has retained counsel in the matter because the rule covers persons not just parties.\textsuperscript{98} It does not, on its face, prohibit non-lawyers from conducting such interviews with represented persons.\textsuperscript{99} However, attorneys for the federal government deal with business crimes and organized crime rings for which the investigations and prosecutions require coordinating many lawyers and non-lawyer officers or agents, using informants, and gathering evidence through covert operations.\textsuperscript{100} To be effective and efficient, the Department of Justice argues, requires the prosecutors supervise and be involved in the activities along side the agents and officers.\textsuperscript{101} This situation differs from the domestic and violent street crimes prosecuted at the state level which law enforcement officers are better equipped to investigate and in which a lawyer would be ineffective.\textsuperscript{102} Because of the level of lawyer involvement in pre-custodial contacts, the government was concerned that career criminals would simply retain permanent lawyers whom prosecutors would be ethically bound to contact before contacting the suspect; in this way these criminals would effectively assure no one associated with the Attorney General’s office could investigate them with regard to any of their activities.\textsuperscript{103} Before the Reno Rules, the Justice Department felt that because prosecutors were bound by anti-contact rules, witnesses, suspects, and targets had the incentive to immunize themselves from any criminal investigation by simply retaining a lawyer.\textsuperscript{104}

The rule’s proponents also argue that prosecutors represent the public and are obligated to protect the public interest,\textsuperscript{105} and thus are “minister[s] of justice.”\textsuperscript{106} Therefore, conflicts arise in their considerations of

\textsuperscript{98} Model Rules of Professional Conduct Rule 4.2 (1996).
\textsuperscript{99} See id.
\textsuperscript{100} 2 Hazard & Hodes, supra note 17, \S 4.2:109-1.
\textsuperscript{102} 2 Hazard & Hodes, supra note 17, \S 4.2:109-1.
\textsuperscript{103} See United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988); Thornburgh Memorandum, supra note 51; Restatement (Third) of the Law Governing Lawyers \S 158 cmt. h (Tentative Draft No. 8 1997).
\textsuperscript{104} 2 Hazard & Hodes, supra note 17, \S 4.2:110.
\textsuperscript{105} Saylor & Wilson, supra note 10, at 463-64. The Authors argue that because the language of anti-contact rules states that they govern the conduct of an attorney “[i]n representing a client” and because federal prosecutors do not represent clients, the rule does not apply to prosecutors involved in criminal cases. Id.
\textsuperscript{106} Model Rules of Professional Conduct Rule 3.8 cmt. (1986); In re Doe, 801 F. Supp. 478, 480 (D.N.M. 1992) (stating that attorneys for the government are
what resolutions to prosecutions are just and what means of achieving those resolutions are most just. For example, because they are responsible not only for trying cases but also for investigating the crimes, prosecutors have strong incentives to solicit admissions from suspects during the investigatory stages. An admission, supporters argue, could lead to a quick and efficient trial and conviction, thereby preserving judicial and governmental resources and raising public confidence in the prosecutorial system, which is one form of justice.

Courts have likewise acknowledged that prosecutors have a duty to investigate possible criminal and civil law violations and that anti-contact rules could “significantly hamper legitimate law enforcement operations.” While the Department of Justice and commentators have tried to convince courts and the public that the anti-contact rule has no application to federal prosecutors because they engage in investigative activities, courts have consistently held that the rule does apply to criminal and civil federal prosecutions. However, courts have, with the same

to be “shepherd[s] of justice”).

107. See Saylor & Wilson, supra note 10, at 463-64.


109. Green, supra note 42, at 286.

110. See id.

111. United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982); United States v. Guerrero, 675 F. Supp. 1430, 1436-37 n.13 (S.D.N.Y. 1987); 2 HAZARD & HODES, supra note 17, § 4.2:110 (noting that courts recognize the Justice Department’s fear that “criminal enterprises having lawyers would be immune from normal police investigation, and criminals without lawyers would quickly retain them”).

112. United States v. Lopez, 4 F.3d 1455, 1459 (9th Cir. 1993) (“The government argues, however, that [the state’s anti-contact rule] was not intended to apply to prosecutors pursuing criminal investigations.”); Thornburgh Memorandum, supra note 51. In his statement explaining the Department’s position with respect to the application of the rule on its attorneys, former Attorney General Thornburgh, relying on prior Department of Justice opinions, asserted that only the Constitution and federal law have the power to place limitations of federal attorneys conduct. Id. He further stated that the states’ attempts to regulate them contrary to federal law violated the Supremacy Clause. Id. The Department of Justice now recognizes that the anti-contact rule does apply to prosecutors so promulgated its own rule which the Department asserts both preempts state and local district court rules and meets the “authorized by law” exception. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.12 (1994); see also Saylor & Wilson, supra note 10, at 463 (insisting that “the rule itself does not support the conclusion that it applies to prosecutors”).

113. Grievance Comm. S. Dist. N.Y. v. Simels, 48 F.3d 640, 647 (2d Cir. 1995);
degree of consistency, refused to interpret the rule as intending to "handcuff[] law enforcement officers in their efforts to develop evidence."114 As a result many federal circuit courts have held that any time prosecutors communicate either directly or through an informant with represented persons in a non-custodial, pre-indictment situation, they are not violating anti-contact rules.115

The Reno Rules go even further than judicial precedents by giving federal prosecutors what is close to a blanket license to contact represented non-parties.116 Unlike Model Rule 4.2, the Department's rule distinguishes a party from a non-party in both characterization and scope of contact allowed.117 For purposes of the Reno Rules, a "person" is anyone who is neither in criminal custody nor a civil defendant.118 The rule demands prosecutors who contact represented persons without their attorneys' consent adhere to the expected ethical norms of respect for the rights and privileges inherent in the attorney-client relationship.119 These limitations apply to both parties and non-parties, and they prohibit prosecutors from (1) questioning represented persons about "defense strateg[ies] or legal arguments;" (2) discrediting the person's attorney; or

United States v. Ryans, 903 F.2d 731, 735 (10th Cir. 1990); United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983).

114. United States v. Hammad, 858 F.2d 834, 838 (2d Cir. 1988); see also United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983) (anti-contact rule not intended to "stymie" investigations).

115. Balter, 91 F.3d at 436; United States v. Powe, 9 F.3d 68, 69 (9th Cir. 1993); Ryans, 903 F.2d at 740; United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986); United States v. Kenney, 645 F.2d 1323, 1339 (9th Cir. 1981). But see Hammad, 858 F.2d at 839 (stating that when prosecutors use legitimate techniques in communications with represented persons during pre-indictment, non-custodial investigations, their conduct falls within the "authorized by law" exception, but holding that under the facts of this case, the prosecutors' use of a sham subpoena constituted a type of misconduct which caused the contact not to be an "authorized by law" exception); United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1973) (specifying that the anti-contact rule does apply to pre-indictment communications after the suspect has been arrested and while he is in custody).

116. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.7 (1994).

117. Compare id. § 77.3(a) (defining "party"), with id. § 77.3(b) (defining person); compare id. § 77.5 (establishing the rule governing communications with "parties"), with id. § 77.7 (establishing the rule governing communications with "persons").

118. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.3(b) (1994).

119. Id. § 77.9.
(3) otherwise interfering with the defendant’s relationship with his attorney.\textsuperscript{120} Although the rule forbids prosecutors from disrupting the attorney-client relationship, it is lenient in situations in which an official in the Attorney General’s office determines an attorney’s interests conflict with her client’s interests.\textsuperscript{121} Under these circumstances, if “it is not feasible to obtain a judicial order challenging the representation,” government attorneys may, during their contact with the party or person, warn him of this conflict of interest.\textsuperscript{122}

In addition to the requirement that they conduct all communications authorized by the Reno Rules with deference to the attorney-client relationship, prosecutors may not themselves, nor may they so direct agents or witnesses, to attend attorney-client meetings, unless the represented person or his attorney requests their presence.\textsuperscript{123} This restriction imposes further safeguards by not only forbidding agents or witnesses who are allowed to be present at such meetings from relating to prosecutors or agents involved in the case information about “lawful defense strateg[ies] or trial preparation,” but also demanding they not use this information to the represented person’s “substantial detriment.”\textsuperscript{124} Finally, under no circumstances are prosecutors allowed to initiate plea negotiations with represented parties or non-parties.\textsuperscript{125} They may, however, engage in settlement communications which are initiated by represented parties as long as they follow the guidelines governing circumstances in which a represented defendant contacts the government (section 77.6(c)).\textsuperscript{126}

However protective of the attorney-client relationship these restrictions seem, they fall short of ensuring the rule conforms with the attorney-client rights and privileges that a blanket no-contact rule like Model Rule 4.2 provides. Because Model Rule 4.2 and its state and federal

\textsuperscript{120} \textit{Id.} \textsection 77.9(a)(1).

\textsuperscript{121} \textit{Id.} \textsection 77.9(a)(2). The circumstances contemplated by this provision are those in which crime families hire an attorney to represent individuals in the family who are subject to investigation by the Justice Department. The defense attorney does not necessarily represent her alleged client’s best interests; instead her function may be to keep the individual from incriminating the family. \textit{See supra} notes 86-87 and accompanying text.

\textsuperscript{122} DOJ Communications with Represented Persons Rule, 28 C.F.R. \textsection 77.9(a)(2) (1994).

\textsuperscript{123} \textit{Id.} \textsection 77.9(b).

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.} \textsection 77.8.

\textsuperscript{126} \textit{Id.}
district counterparts are fairly permissive in scope, in many instances it is unnecessary to allow federal prosecutors to enjoy the privileges of being regulated under more lenient rules. The no-contact rule forbids attorneys from communicating with persons known to be represented. The comments state that the rule only attaches to protect represented persons when lawyers have “actual knowledge of the fact of the representation.” Although the comment claims the circumstances may give attorneys “substantial reason” to infer actual knowledge and that attorneys must not close their eyes to obvious signs of representation, the comments do not impose an affirmative duty on lawyers to determine whether the person has retained counsel. Furthermore, while Model Rule 3.8 imposes additional requirements on prosecutors with respect to defendants’ rights to representation, it does not restrict them in their dealings with non-accused persons. Therefore, in pre-indictment, non-custodial stages of an investigation, prosecutors rarely need more permissive guidelines than the Model Rules give them to perform their duties.

No-contact rules intend to foreclose “the possibility of treachery that might result if lawyers were free to exploit the presumably vulnerable position of a represented but unadvised” person. The Reno Rules fail to offer the same guarantee. Certainly, the regulations aspire to provide adequate safeguards. For example, the Attorney General included specific provisions which demand federal attorneys afford deferential treatment to the attorney-client relationship whenever they engage in communications authorized by the regulations, and the rule asserts that it is “consistent

128. Id.
129. Id. cmt. 5.
130. Id.
131. Model Rules of Professional Conduct Rule 3.8(b), (c) (1996). Subsection (b) requires prosecutors to be certain that the accused has full knowledge of her right to representation, and subsection (e) forbids them from inducing unrepresented accuseds to waive this right. Id. The comments to Rule 3.8 state that the rule does not prohibit prosecutors from conducting “lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.” Id. cmt. 2. Although this comment seems to conflict with the language in comment 2 of Model Rule 4.2 stating that preindictment communications which accord with “applicable judicial precedent” constitute exceptions under the “authorized by law” provision of the rule, the two comments can be harmonized: Rule 3.8’s comment merely clarifies what contacts the rule does not prohibit while Rule 4.2’s comment expressly allows certain contacts. Compare Model Rule 4.2 cmt. 2, with Model Rule 3.8 cmt. 2.
133. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.9
with the principles underlying [Model] Rule 4.2 . . . ." 134 Nevertheless, it is still easy for those facing possible criminal punishment to jeopardize their cases in situations in which prosecutors employ strategies which adhere to the rules but which are unfair to non-lawyers in legally sensitive positions. Because prosecutors have such broad powers to affect people’s lives, 135 opponents of the Reno Rules argue they should be expected to and required to adhere to the same standards as all other attorneys. 136

Creating an entirely separate body of rules which allows them to engage in a wider range of conduct undermines principles of “fundamental fairness” and equality. 137 How can fairness and justice prevail when a similarly situated group is governed by totally different standards and a totally different regulatory body? One commentator has stated that the “notion that attorneys for the government are to be held to a different and lower standard of ethics than are other members of the bar” is “very disquieting.” 138 The obtainment of justice should never outweigh the need to be just in obtaining it by applying only legitimate, lawful investigative techniques narrowly tailored to be fair to the suspect in the situation.

(1994).

134. Id. § 77.1(a).

135. Hearings, supra note 63 (statement of Congressman Joseph M. McDade, proponent of the Citizens Protection Act of 1998). Congressman McDade quoted United States Supreme Court Justice Robert Jackson as saying:

[Police] can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizens to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial.

If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole.

. . . While the prosecutor at his best is one of the most benevolent forces in our society, when he acts from malice or other base motives, he is one of the worst.

Id.

136. Id.

137. Id. (statement of Frederick J. Krebs, President and Chief Operating Officer of the American Corporate Counsel Association).

IV. SEPARATE REGULATORS OF COMMUNICATIONS WITH REPRESENTED PERSONS

Another concern which prompted the Department of Justice to issue the Reno Rules was the “chilling effect” state and federal anti-contact rules had on its attorneys’ performance of their duties. The Department argued that fear of sanctions from state or federal district courts for improperly contacting parties or persons caused prosecutors to curtail their investigative activities. According to the Justice Department, its more permissive set of regulations governing communications eliminates federal attorneys’ preoccupation with whether they are acting within the bounds of the ethics rules so that they may concentrate on vigorously performing their duties. To effect this purpose, the rule provides that the Attorney General has sole power to regulate its attorneys’ conduct with respect to their contacts with represented parties and persons; no other judicial entity may regulate their behavior in this respect. In short, with the Reno Rules in place federal prosecutors need only follow the Department of Justice’s guidelines when contacting anyone and need only fear being investigated and sanctioned for violating them by the Department’s Office of Professional Responsibility.

The rule’s proponents say that the existence of a single standard of conduct for all lawyers regulated by a single entity is problematic for federal prosecutors because they seem to be a distinct subcategory of the legal profession as a whole. In other words, prosecutors comprise a separate group within the larger body of professionals whose function it is to serve the public by representing the federal government’s interests. In fact, one former state Attorney General has noted that prosecutors serve “dual roles as both lawyer[s] and government official[s],” and that their governmental role often requires that they perform activities outside the traditional scope of representing a client, such as conducting investi-

140. Id.; Jamie S. Gorelick & Geoffrey M. Klienberg, A Sensible Solution, 78 JUDICATURE 136, 142 (1994).
142. DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.11(a) (1994). Subsection 77.11(b) emphasizes that the rule does not create a substantive right for individuals to pursue private remedies.
143. See Moore, supra note 108, at 524.
gations. In short, the government’s position is that to be effective in carrying out its specialized duties, this distinct entity serving a distinct public interest may, on certain occasions, need to be subject to particularized rules which conform in spirit but perhaps not in detailed form to the rules the entire body of lawyers must obey.

The Reno Rules’ proponents argue that the ABA’s failure to provide adequate accommodations for prosecutors facing the unique professional dilemma of needing to communicate with represented persons in the course of performing their governmental duties prompted the Department to address the problem itself. Model Rule 4.2’s “authorized by law” exception provides the ABA with a possible solution to the problem because this language could be interpreted as allowing a loose application of the rule to federal attorneys who, in the course of their legitimate prosecutorial duties, find it impracticable to adhere to the consent requirement of the no-contact rule. However, while the comments to Rule 4.2 hint that the exception would excuse such conduct in circumstances which strictly conform to “applicable judicial precedent,” these comments ignore the fact that prosecutors sometimes have to choose between the interest in fully performing their statutory duties and adhering to a professionally imposed code of conduct in order to avoid censure.

Specific cases gave rise to the Department’s concern that its attorneys would forgo pursuing essential evidence to avoid the risk of sanctions or exclusion of the evidence as punishment for violating the jurisdiction’s anti-contact rule. In United States v. Lopez, the Eighth Circuit held that a federal prosecutor’s plea negotiations with a represented defendant absent his attorney’s consent but pursuant to a court’s permission and the defendant’s waiver violated the state’s no-contact rule. In deciding the appropriate sanctions to impose on the attorney, the court firmly established that “[w]e have recognized that [a court’s] exercise of [its] supervisory powers is an appropriate means of policing

144. Id.
146. See Moore, supra note 108, at 524.
149. Moore, supra note 108, at 525.
150. 4 F.3d 1455 (8th Cir. 1993).
151. Id. at 1463.
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ethical misconduct by prosecutors."152 Therefore, although the appellate court concluded that the lower court's dismissal of Lopez's indictment was too harsh a sanction given the prosecutor's conduct, it held that "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."153 The court's forceful language confirmed not only that prosecutors could be disciplined by the states in which they practiced, but also that courts could construe many of prosecutors' investigative activities and prosecutorial duties as "attempt[s] to circumvent the standards of their profession," rather than lawful exercises of their powers.154

The Eighth Circuit's statement that courts may, pursuant to their supervisory powers, impose discipline for attorneys' ethical violations has its foundations in the traditional structure of the legal profession. Historically, regulation of lawyers' conduct has been left "exclusively to the States and the District of Columbia within their respective jurisdictions."155 States possess the regulatory authority to grant and revoke licenses, to establish and enforce the standards of professional conduct, and to impose discipline for ethics violations.156 Because of this history, until the Department of Justice promulgated its own set of regulations regarding prosecutors' contacts with represented persons, it was presumed that state and federal courts could enforce their rules on the federal attorneys who appeared before them.157 Opponents of the rule find support in Congress's mandate that Justice Department attorneys be "duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia,"158 for their assertion that

152. Id. at 1463 (citations omitted).
153. Id. at 1464.
154. Id. The Reno Rules were promulgated swiftly on the heels of the Eighth Circuit's decision in Lopez. See supra text accompanying notes 54-61.
157. Little, supra note 45, at 369 (noting that the Reno Rules contain the first instance of the Attorney General's "issuing preemptive ethical regulations" in the history of the office); Moore, supra note 108, at 522 (stating that disciplinary rules and their application to prosecutors by the states is not a subject of controversy); Hearings, supra note 63 (statement of Tim Evans on behalf of the National Association of Criminal Defense Lawyers) (asserting that ethics rules have historically applied to all attorneys, private and governmental, equally).
the courts' duties to regulate attorneys includes the power to hold United States attorneys accountable for their ethics violations. Nevertheless, the Reno Rules assert that no court may control what communications federal prosecutors have with represented persons. Rather, prosecutors may zealously carry out the Justice Department's paramount function of prosecuting criminal and civil violations of the law without fearing sanctions from the source all other attorneys must fear.

A major concern expressed by opponents of the Reno Rules is that the tolerant nature of these rules and the general message it sends to United States attorneys that they are in a more "privileged" position than non-federal lawyers will contribute to the already existing problem of prosecutorial misconduct. Even more troubling to critics is the likelihood that because in the past many instances of misconduct have remained unaddressed and undisciplined these rules will simply add another level to the lack of supervision and regulation in the Justice Department. Controversy also arises out of the sense that it is presumptuous for the Department "to be telling the rest of us that it and it alone will set the rules for the conduct of its attorneys — suggesting an arrogance that has led many critics to the charge, 'above the law.'" This impassioned language can be translated into the valid and forceful argument that the Reno Rules destroyed the level playing field that all participants in an adversarial or investigative process were on before the regulations separated federal attorneys from private and state attorneys. In short, "[i]f Rule 4.2 is binding on [state prosecutors and lawyers in private practice], why should Justice Department lawyers practice under uniquely

161. Id.
162. Hearings, supra note 63 (statement of Tim Evans on behalf of the National Association of Criminal Defense Lawyers; statement of Roger Pilon, Senior Fellow and Director of the Cato Institute).
163. Id. (statement of Tim Evans on behalf of the National Association of Criminal Defense Lawyers (citing Judge Posner and Judge Kozinski for support)).
164. Id. (statement of Roger Pilon, Senior Fellow and Director of the Cato Institute); see also Moore, supra note 108, at 517 n.4.
165. Dash, supra note 159, at 138; Hearings, supra note 63 (statement of Frederick J. Krebs, President and Chief Operating Officer of the American Corporate Counsel Association).
different ethics rules?''

Indeed, prosecutors are individual lawyers and members of the profession of lawyers. As such, opponents of the Reno Rules argue, they must be required to adhere to the same rules their colleagues must follow. One court has recognized that "[t]he prosecutor is a lawyer first; a law enforcement officer second. The provisions of the Code of Professional Responsibility are as applicable to him as they are to all lawyers."167

As a result, opponents assert that the Attorney General's drastic measure of becoming a separate regulator with regard to permissible conduct between federal prosecutors and people they know to be represented by counsel is "very disquieting."168 This internal system of self-regulation suggests to some that the Attorney General is either incapable of or unwilling to work "within the system" to reach solutions to the problems she believes prosecutors face.169 The division among lawyers weakens the integrity of the legal profession in three ways. It eliminates some of the safeguards the no-contact rule imposes to ensure lawyers seek justice through fair and just means. In addition, it begins to deconstruct the notion of professionalism among lawyers by imposing on United States attorneys a different, more lenient standard of behavior. Finally, it implies that the nation's highest symbol of justice is free to practice under its own version of the law.

V. UNIFORMITY, PREEMPTION, AND THE CONSTITUTION

In addition to justifying its version of an anti-contact rule on the ground that it allows prosecutors to zealously perform their duties without fear of sanctions, the Department of Justice insists its rule lends much needed uniformity to this body of lawyers which is different and separate from other members of the legal profession.170 Because attorneys who represent the federal government are authorized to practice in any state and federal jurisdiction and each jurisdiction is free to adopt its own set

166. Dash, supra note 159, at 138.
169. Id.
of ethics rules, the inconsistent and uncertain application of these rules to federal prosecutors caused confusion, especially when attorneys licensed in different states collaborated in a federal investigation. To remedy the confusion which tended to have a restraining effect on the zealousness with which the attorneys investigated and prosecuted matters, the Department promulgated this uniform set of rules and declared that it "preempt[s] and supersede[s] 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 . . . ."  

While uniformity may be a valid goal, the vehicle through which the regulations purport to achieve it, preemption of all other rules regulating its attorneys’ communications with represented persons, is a troubling aspect of the Reno Rules. As justification, the Department explains that state and local federal courts need not look beyond their own versions of Model Rule 4.2 to validate its regulations and condone all conduct which falls within their scope. Most states include an “authorized by law” exception to the requirement that attorneys wishing to communicate with represented persons first seek their attorneys’ consent. According to the Department, the rule it promulgated is a “law” within the meaning of the language “authorized by law.” However, the Department of Justice’s interpretation of the “authorized by law” exception conflicts with the Model Rule’s intentions. The comments accompanying Rule 4.2 state that the “authorized by law” exception includes only those contacts which “applicable judicial precedent” has found permissible under the rule. Thus, in jurisdictions where a court has upheld certain conduct of a government attorney communicating with persons during investigations occurring before they initiate criminal or civil enforcement proceedings, federal prosecutors who adhere to the precedent will not be subject to sanctions for violating Rule 4.2. Comment 2 to the anti-contact rule

171. Id.
172. Id.
177. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 2 (1996).
urges government attorneys who are operating under the exception to uphold the rule’s “ethical restrictions” which are more stringent than constitutionally imposed restrictions.¹⁷⁹ This comment suggests that constitutional provisions merely sketch the outer bounds of federal prosecutors’ actions while the guidelines for professional conduct envision their adhering to a higher standard of ethics.¹⁸⁰

As for whether a governmental agency’s promulgation of a formal rule constitutes a law for purposes of Model Rule 4.2’s “authorized by law” exception, both the rule and the comments proceeding it are silent. As a result, the ABA Commission on Ethics and Professional Responsibility issued a formal opinion offering a cautiously worded discussion of the issue, but the opinion neither affirmatively nor negatively responds to the particular regulations instituted by the Department of Justice.¹⁸¹ The Committee asserts that a directive such as the one promulgated by the Department qualifies as a law for purposes of the “authorized by law” exception only if it is “embodied in formal regulations that have been properly promulgated pursuant to statutory authority that contemplates regulation of the character in question.”¹⁸² Clarifying the congressional grant of power which must exist for the ABA Ethics Commission to recognize an agency’s promulgated rule, the opinion states that a regulation which “permit[s] what other law forbids” is invalid if the agency asserts a general grant of regulatory authority gave it the power to preempt existing laws.¹⁸³ In other words, if an administrative agency promulgates a rule and cites an enabling statute as support for its exercise of that particular regulatory power, the rule will not fall into the “authorized by law” exception to existing state and federal rules of professional conduct. At no point in its opinion does the Committee apply its general discussion to the regulations at issue, which leaves unresolved the specific question of whether the Committee recognizes the Reno Rules as an “authorized by law” exception.

The ABA supports its position with the Supreme Court’s decision in *Chrysler Corporation v. Brown*,¹⁸⁴ a case involving the authority of a federal agency to issue disclosure regulations which conflicted with the

¹⁸¹. *Id.*
¹⁸². *Id.* (citing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)).
¹⁸³. *Id.*
exemptions outlined in the Freedom of Information Act.185 According to the Court, federal regulations may, under the Supremacy Clause of the United States Constitution,186 preempt state laws and qualify as laws for purposes of "authorized by law" exceptions to federal statutes.187 However, they do so only when they have the force of substantive law in that they affect rights and obligations,188 are the product of the agency's legislative authority granted by Congress,189 and are issued pursuant to "procedural requirements imposed by Congress."190 In particular, the Chrysler Court held that the "housekeeping statute" which the federal agency claimed gave it the power to promulgate its substantive regulations only authorized it to issue rules dealing with agency organization and procedure.191 Congress had not, as the agency argued, given it the power to create and enforce "substantive" rules, so the regulation at issue having the force of substantive law was invalid.192

Recently, the Eighth Circuit struck down the Reno Rules, holding that because the agency committed an ultra vires act in promulgating them, they did not satisfy the "authorized by law" exception to the anticounterparts rules.193 The court in McDonnell Douglas further held that the agency's "invalid promulgations" did not supersede or preempt the local federal district court's rules.194 First, the court reasoned that the United States Code sections the Justice Department argued gave it the authority to enact its substantive ethics rules were merely "general enabling statute[s]" defining the roles of the United States Attorneys and the Attorney General's authority over them.195 As such, the statutes failed to provide the Department with the ability to issue regulations which exempt its lawyers from adhering to rules all other lawyers are required to fol-

185. Id.
186. U.S. CONST., art. VI, cl. 2. The Supremacy Clause states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance there- of . . . shall be the supreme Law of the Land." Id.
188. Id. at 301-02.
189. Id. at 302.
190. Id. at 303.
191. Id. at 310.
192. Chrysler, 441 U.S. at 312.
194. Id. at 1257.
195. Id. at 1256.
low.\textsuperscript{196} Likewise, the "housekeeping statute"\textsuperscript{197} did not give the Attorney General the authority to promulgate substantive regulations, because it had never been held to grant federal agencies anything more than the power to adopt procedural and internal administrative rules.\textsuperscript{198} In reaching its conclusion, the court discussed several federal opinions which had rejected the same argument the government advanced in \textit{McDonnell Douglas} and relied primarily on \textit{Chrysler}.\textsuperscript{199}

Next, in rejecting the Department of Justice’s preemption argument, the Eighth Circuit reduced its argument to a footnote.\textsuperscript{200} Because the federal agency erroneously argued its federal regulation preempted a federal district court rule, the agency’s argument failed for lack of legal support.\textsuperscript{201} The court dismissed the preemption issue as a "non-issue" stating that "[a] federal regulation cannot preempt federal law."\textsuperscript{202} Furthermore, because federal law, not state law, was at issue, the Supremacy Clause was not implicated.\textsuperscript{203}

The Eighth Circuit’s determination that the Justice Department lacked the congressional authority to promulgate the Reno Rules renders the regulations invalid and unenforceable in its jurisdiction. Congress’s intent in its grant of power to the Attorney General lends dispositive authority for the court’s decision. The Department claimed 5 U.S.C. § 301 and 28 U.S.C. §§ 516, 515(a), 519, 509, 510, 533, and 547 permitted it to promulgate 28 C.F.R. § 77.\textsuperscript{204} In addition to the Attorney General’s flaw in relying on a department head’s power under § 301, the

\begin{itemize}
\item \textsuperscript{196} \textit{Id.} at 1257.
\item \textsuperscript{197} 5 U.S.C. § 301 (1994). Section 301 states in pertinent part: The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.
\item \textit{Id.}
\item \textsuperscript{198} \textit{McDonnell Douglas}, 132 F.3d at 1255-56.
\item \textsuperscript{199} \textit{Id.; see also supra} text accompanying notes 184-92 (discussing \textit{Chrysler}).
\item \textsuperscript{200} \textit{McDonnell Douglas}, 132 F.3d at 1257 n.4.
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{Id.} (citation omitted).
\item \textsuperscript{203} \textit{Id.} (citing United States v. Kluboek, 832 F.2d 649, 651 (1st Cir. 1987) (finding preemption doctrine inapplicable to federal court rule which incorporates state ethics rules), \textit{aff’d en banc}, 832 F.2d 664, 667 (1st Cir. 1987)).
\item \textsuperscript{204} DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.1(b) (1994).
\end{itemize}
“housekeeping statute,” to issue the rule,205 the remaining federal statutes, likewise fail to provide the Department with the express power needed to preempt state and local ethics rules.206 Sections 509 and 510 house the functions of the Department of Justice with the Attorney General and give her the power to delegate authority to the Department’s officers,207 while § 533 allows her to appoint officials to prosecute crimes and conduct investigations.208 In § 547, Congress broadly set out the duties of United States attorneys including the mandate that they must “prosecute for all offenses against the United States” and “prosecute or defend, for the Government, all civil actions, suits or proceedings . . . .”209 Section 515(a) permits federal prosecutors to conduct legal proceedings in states in which they are not residents.210 Finally, pursuant to §§ 516 and 519, the Attorney General must direct and supervise Department attorneys in the performance of their duties to conduct litigation in which the United States is a party.211 These two statutes do not provide the Attorney General with a blanket grant of power to control litigation. Rather, she may direct and supervise “[e]xcept as otherwise authorized by law.”212 This crucial limitation indicates Congress’s intent for the Attorney General’s Office not to preempt existing laws, such as jurisdictional anti-contact rules. In short, no provision of the United States Code speaks of the Justice Department’s power to preempt state and federal law.

Relying on the ultra vires argument, critics of the regulations raise legitimate concerns that the Justice Department may not limit its self-proclaimed preemption power to Model Rule 4.2, but may, in the future, argue the necessity of preempting other ethics rules.213 Opponents suggest that in promulgating the Reno Rules, the Justice Department implies it may “pick and choose which if any ethical rule would apply to [its] office, and to entirely deny to state agencies the power to enforce even those rules which [the Department] might choose to retain.”214 In this

205. See discussion supra text accompanying notes 197-99.
208. Id. § 533.
209. Id. § 547.
210. Id. § 515(a).
211. Id. §§ 516, 519.
“alarming assertion of power,”215 she has set a dangerous precedent by claiming to have the ability to remove all other power but her own over the regulation of federal prosecutors’ communications with represented persons. Such a division among lawyers threatens to seriously undermine the self-governing feature of the profession.216 If each member of the legal profession is not held to the same behavioral standards, society cannot be sure that the profession is truly “regulating itself in the public interest.”217 Immunizing Justice Department attorneys from the constraints which bind all other attorneys “does not promise glory either to these attorneys, or to the government that they serve.”218

VI. CONCLUSION

Although the Reno Rules seek to accomplish the legitimate goal of ensuring that prosecutors can perform their statutory duties, the permissive scope of conduct allowed by the regulations indicates that they are not tailored narrowly enough to meet the standards demanded by the legal profession. Rather, the Department of Justice has cast too wide a net and potentially subjected all represented people to the prejudicial situation of discussing criminal matters with an attorney who does not represent their interests without the presence of an attorney who does represent their interests. A broad rule which destroys the level playing field upon which criminal and civil investigations and prosecutions should take place causes the public to lose confidence in a system designed to administer justice through just means.

Furthermore, the separation between prosecutors and non-prosecutors created by the preemption of state and federal district no-contact rules sends society the disturbing message that the legal profession is not the unified, self-regulated entity it professes to be. Now that the professional requirement of uniform conduct has one chip in it, others could follow, resulting in little uniformity of ethical behavior and potential destruction of professionalism.

As the governmental entity specifically created to preserve justice whose agents serve as “shepherds of justice,”219 the Attorney General’s

215. Dash, supra note 159, at 137.
217. Id. at 518.
Office should demand that its attorneys conduct their activities in conformity with the ethical rules the legal profession deems are best tailored to serve justice. As high profile representatives of a profession which has a great interest in pursuing its goals with "fairness, integrity and impartiality," United States attorneys should aspire to the highest ethical standards. The Department of Justice created conflicts within the profession by allowing its attorneys to follow a lower standard when they communicate with represented persons. Professionalism demands all attorneys preserve justice in ways that are just, and compromising professionalism could mean compromising justice.

Fortunately, Congress has taken steps to preserve the tradition of professionalism underlying the legal system. By enacting a statute requiring federal prosecutors to adhere to the same ethical standards non-federal attorneys must follow, Congress has attempted to repair the chip the Justice Department made in the profession's commitment to fair and uniform conduct demanded of its professionals. Although questions over how the statute will be implemented will arise and its effectiveness is uncertain, Congress's promotion of high ethical conduct facilitates the pursuit of justice through just means.

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220. ABA Reports, supra note 2.
221. See Sumbermeyer & Cooper, supra note 16, at 1.

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