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Reassessing the Citizens Protection Act: A Good Thing It Passed, and a Good Thing It Failed

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INTRODUCTION

Critics have lambasted the Citizens Protection Act of 1998 (the CPA)[1] from all ideological perspectives.[2] The criticism began at the earliest stages of the legislative debate and continues through the present. With the advantage of fifteen years hindsight, this article demonstrates that the CPA succeeded where it should have and failed where it should have. The CPA has left us—even if inadvertently—with a remarkably coherent and consistent approach to regulating a federal prosecutor's ability to effectively

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1. The CPA is codified at 28 U.S.C. § 530B (2006). Although the bill entitled "The Citizens Protection Act" was an earlier version of the bill that was ultimately enacted, the law is still commonly referred to by that name. *See* Megan Browdie & Wei Xiang, Current Development, *Chevron Protects Citizens: Reviving the Citizens Protection Act*, 22 GEO. J. LEGAL ETHICS 695, 695-96 & n.8 (2009). The law is also sometimes referred to as the "McDade Amendment," after Rep. Joseph McDade, its chief Congressional sponsor. *See* James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 530 n.16 (2006).

2. *Compare, e.g.*, Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 399 (2001) (criticizing the CPA for failing to rein in prosecutorial misconduct), *and* Browdie & Xiang, *supra* note 1, at 696 (same), *with* Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 816-17 (2009) (criticizing the CPA for creating an unsettled legal landscape that chills federal prosecutors' willingness and ability to fully engage in criminal investigations), *and* Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 59-60 (1999) (same).

direct and participate in criminal investigations regardless of whether the suspect is represented by counsel early in the proceedings.

The legislative debate over the CPA focused on two questions. First, may a federal prosecutor communicate with, or direct others to communicate with, a suspect in a criminal investigation if the suspect is represented by a lawyer? And second, should the U.S. Department of Justice (DOJ) be able to decide this issue for its own lawyers?

To put the issue in context, consider the following typical scenario:

DOJ is investigating a person suspected of involvement in a string of burglaries. The suspect is aware of the investigation and has retained a lawyer. The federal prosecutor assigned to the matter directs a cooperating witness to initiate and record conversations with the suspect about the burglaries. The suspect's lawyer knows nothing about the conversations. The suspect makes incriminating statements to the cooperating witness. The suspect is subsequently charged, his recorded statements are introduced at trial, and he is convicted.[3]

No statute or constitutional provision prohibits the prosecutor's conduct in this situation. The only potentially relevant prohibition is the "no-contact" rule of professional conduct, adopted in every state, which generally prohibits a lawyer in a matter from communicating with, or directing others to communicate with, the client of another lawyer in the matter.[4]

The CPA required federal prosecutors to conform to state rules of professional conduct "to the same extent and in the same manner as other attorneys in that State."[5] Congress intended the CPA to nullify DOJ's claimed authority to exempt federal prosecutors from most constraints of the no-contact rule in criminal investigations.[6] The CPA accomplished this goal. Congress also, however, intended the CPA to lodge authority over the no-contact rule issue with state authorities which, it was assumed, would interpret the rule in a manner that would substantially constrain federal prosecutors' ability to participate in the scenario described above.[7] The CPA did not accomplish this goal.

This mixed record of success and failure has resulted in our current effective system of no-contact rule regulation for federal prosecutors. To

3. This factual scenario was adapted from *United States v. Lemonakis*, 485 F.2d 941, 945-47 (D.C. Cir. 1973), which was the first federal appellate decision to directly address this question. *See infra* Part I.B.1.

4. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009).

5. 28 U.S.C. § 530B(a).

6. *See, e.g.*, Browdie & Xiang, *supra* note 1, at 709.

7. *See, e.g.*, Hazard & Irwin, *supra* note 2, at 809-10.

demonstrate why and how this is so, this article analyzes each critical step up to, and including passage of, the CPA, beginning in Part I with the no-contact rule itself. Because the CPA was intended to bind federal prosecutors to the rule in the same way as private civil lawyers are bound, Part I demonstrates how the rule operates in the civil context and then examines the development in federal courts of what I have termed the "pre-charge investigatory exemption," which permits prosecutorial communications with persons who are represented by counsel but who have not yet been charged with a crime.[8] Finally, Part I examines *United States v. Hammad*, which, for the first time among federal courts, held that pre-charge investigatory communications could violate the rule.[9]

Part II examines the "Thornburgh Memo"[10] and the "Reno Regulation,"[11] which together comprised DOJ's reaction to *Hammad*. The Memo and the Regulation asserted that DOJ had exclusive authority to interpret and enforce the no-contact rule for its lawyers and that the no-contact rule had minimal application to the work of federal prosecutors. Part II demonstrates that the Memo and the Regulation were unnecessary as a practical matter and also unwise as a tactical matter—leading as they did to the CPA, which DOJ bitterly opposed.

Part III examines the legislative debate leading to the CPA and demonstrates that both sides of that debate assumed that the new law would substantially limit the broad pre-charge investigatory exemption for federal prosecutors. Through an examination of post-CPA court decisions, Part III then demonstrates how and why these shared expectations proved to be so incorrect.

Part IV examines how scholarship regarding the CPA has focused on fixing the problems that the CPA is alleged to have wrought or—depending on the scholar's perspective—is alleged to have failed to fix. Part IV concludes that it is a good thing the CPA passed because DOJ's claim of

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8. The reference to "pre-charge investigatory" communications is intended to be broadly inclusive of communications with represented persons prior to arrest, indictment, or other adversarial charging event. *See generally* Frank O. Bowman, *A Bludgeon By Any Other Name: The Misuse of 'Ethical Rules' Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 734-35 & n.339 (1996).

9. *See* United States v. Hammad, 858 F.2d 834, 838-40 (2d Cir. 1988).

10. *See* Memorandum from Dick Thornburgh, Attorney General, to All Justice Department Litigators (June 8, 1989), *reprinted in In re* Doe, 801 F. Supp. 478, 489-93 (D.N.M. 1992) [hereinafter Thornburgh Memo].

11. *See* Communications with Represented Persons, 59 Fed. Reg. 39,910 (Aug. 4, 1994) [hereinafter Reno Regulation]. The Reno Regulation was codified at 28 C.F.R. §§ 77.1-77.5 (1995), but was superseded in 1999 by new regulations consistent with the Citizens Protection Act, s*ee* Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19,273 (April 20, 1999), codified at 28 C.F.R. §§ 77.1-77.5 (2013).

authority over the no-contact rule would inevitably have undermined public confidence in federal prosecutors' commitment to fair and ethical investigatory processes. By the same token, it is a good thing that the CPA failed to narrow the parameters of the pre-charge investigatory exemption because depriving federal prosecutors of this essential tool—or disciplining them for using it—would have substantially hindered otherwise-legitimate criminal investigations for no good reason.

I. THE NO-CONTACT RULE

The debate over the Citizens Protection Act was framed primarily around the no-contact rule. Every American jurisdiction has adopted such a provision, most of which mirror the American Bar Association's Model Rule 4.2:

> 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 by law or a court order.[12]

The no-contact rule dates back more than a century, and its basic thrust—prohibiting a lawyer in a matter from communicating with persons represented by another lawyer in the matter—has changed little over time.[13]

A. The No-Contact Rule for "Other Attorneys in that State"

The CPA requires federal prosecutors to adhere to the no-contact rule "to the same extent and in the same manner as other attorneys in that State."[14] The phrase "other attorneys" was generally taken to mean private lawyers, probably because the history of the rule and the vast majority of court decisions prior to 1998 focused on private civil practice.[15] A brief review, then, of how the rule developed and was applied to private lawyers

12. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009). For links to the current rules of professional conduct in each state, *see* Links of Interest, AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html#States (last visited Aug. 18, 2013).

13. *See* Mark H. Aultman, *The Story of a Rule*, 2000 MICH. ST. U. L. REV. 713, 713-23 (2000); Bowman, *supra* note 8, at 721-23.

14. 28 U.S.C. § 530B(a) (2006).

15. The CPA might logically have been expected to hold federal prosecutors to the same standards as state prosecutors rather than "other attorneys" generally. As suggested by Zacharias and Green, however, the CPA debate did not linger on this distinction. *See* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88. GEO. L.J. 207, 224 (2000) ("An essential assumption of the CPA is that federal prosecutors should, for purposes of legal ethics, be treated more like private lawyers and state prosecutors.").

illustrates the constraints that federal prosecutors were expected to encounter under the CPA.

In a system that works best when all parties are represented, the ABA and the states adopted the no-contact rule to protect the lawyer-client relationship.[16] The rule is intended to prevent a lawyer from pressuring or tricking another lawyer's client into saying or doing something that might undermine the client's legal position.[17] Violations may be addressed in court with sanctions against the lawyer's case (e.g., suppression of the evidence) or against the lawyer personally (e.g., fines or disqualification).[18] Violations may also be referred to state bar authorities for investigation and action against the lawyer's bar license.[19]

In a typical private case—let's call it *X v. Y*—application of the rule is straightforward: X's lawyer may not communicate with Y if Y's lawyer does not consent.[20] The prohibition applies regardless of timing—whether, for example, the communication comes before or after a complaint is filed.[21] X's lawyer may not speak with Y even if Y initiates the

16. *See* Roger C. Cramton & Lisa K. Udel, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 324-25 (1992).

17. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 ("This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation."). Iterations of the rule's basic purpose have remained constant over time. *See, e.g.*, Am. Bar Ass'n Comm. on Prof'l Ethics and Grievances, Formal Op. 108 (1934) ("To preserve the proper functioning of the legal profession as well as to shield the adverse party from improper approaches the [rule] is wise and beneficent and should be obeyed.").

18. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. n (2011); ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROF'L CONDUCT 10-11, 420 (7th ed. 2011).

19. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. n.

20. X's lawyer may communicate with Y if Y is *unrepresented*, *see* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 9, but may not say anything that might confuse Y as to X's lawyer's role and loyalties in the matter, *see id.* R. 4.3 (Dealing With Unrepresented Person).

21. *See id.* R. 4.2 cmt. 2 ("This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates."). In 1995, the ABA changed the title of the Model Rule from "Communication With Party Represented By Counsel" to "Communication With Person Represented By Counsel" to signify that the rule prohibited communications with any represented person, not just persons who were formal adversaries in a court proceeding. BENNETT ET AL., *supra* note 18, at 409-10.

communication.[22] Nor may X's lawyer evade the prohibition by asking a non-lawyer to communicate with Y.[23]

The rule does not prohibit all communications between X's lawyer and Y. The prohibition does not apply unless X's lawyer actually "knows" that Y is represented.[24] Nor does the prohibition apply to communications that concern a subject other than "the subject of the representation."[25] And if Y is a business or other organization, X's lawyer is only prohibited from communicating with a relatively small group of current "constituents" (usually employees) who are deemed to stand in Y's shoes for purposes of the representation; X's lawyer may communicate with any other current employee of Y, including most eyewitnesses, and with all former employees.[26]

The rule also permits communications that are "authorized" either by a "court order" or by "law."[27] The first of these exceptions permits a lawyer to seek a court order when the lawyer is "uncertain" as to whether a communication is prohibited or when the communication may be justified by "exceptional circumstances," such as when an otherwise-prohibited communication is necessary to avoid serious injury.[28] The second exception—for communications authorized by "law"—applies to private lawyers when a provision of constitutional or statutory law or a regulation or court rule specifically requires or permits a lawyer to communicate with another lawyer's client.[29] Thus, for example, if a procedural rule required

22. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 3 (2009). Clients may, however, communicate directly with each other even if their lawyers were involved in crafting the substance of the communication. *Id.* R. 4.2 cmt. 4.

23. *See id.* R. 8.4(a) (a lawyer may not "violate the Rules . . . . through the acts of another"); *id.* R. 5.3(c) (a lawyer is responsible for the conduct of a non-lawyer "that would be a violation of the Rules . . . . if engaged in by a lawyer" if the lawyer orders or ratifies the conduct).

24. *See id.* R. 4.2 cmt. 8. However, "such actual knowledge may be inferred from the circumstances." *Id.*

25. *See id.* R. 4.2 cmt. 4.

26. *See id.* R. 4.2 cmt. 7. Prior to 2002, some state rules prohibited communications with most current and former employees who had first-hand knowledge of the matter in dispute. Subsequent revisions in many states clarified and substantially narrowed the rule's reach to those employees who are directly involved in Y's legal strategy or whose actions in connection with the matter may be imputed to Y. *See* AM. BAR ASS'N, REPORT OF THE COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT 325-26 (2000); Hazard & Irwin, *supra* note 2, at 834-35; Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 468 (2002).

27. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009).

28. *See id.* R. 4.2 cmt. 6.

29. *See* Am. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995); BENNETT ET AL., *supra* note 18, at 417-18.

that a document be served directly on named parties, X's lawyer would not violate the no-contact rule by mailing the document directly to Y.[30]

The no-contact rule, on its face and as it developed in the context of private practice, would therefore seem to preclude prosecutors—if they were treated like other lawyers—from engaging in or directing communications with represented individuals being investigated for possible criminal prosecution, unless the communication was authorized by a court order in the matter or unless a statute or regulation specifically authorized the communication. As demonstrated below, however, this scheme of prosecutorial constraint was never embraced by the courts.

B. The No-Contact Rule for Federal Prosecutors (Through 1988)

Although nothing in the text of the no-contact rule specifically exempts prosecutors from the prohibition, federal courts traditionally declined to apply the prohibition to prosecutors during the pre-charge stage of a criminal investigation. A 1988 Second Circuit decision, however, threatened to up-end this settled understanding.

1. Origins of the Pre-Charge Investigatory Exemption

As ultimately codified by the CPA, federal prosecutors are bound by state rules of professional conduct.[31] Federal prosecutors, like all DOJ lawyers, must hold membership in at least one state bar, and such membership carries with it the obligation to follow that jurisdiction's rules.[32] Federal prosecutors may also be subject to professional responsibility rules in states where they practice even if they are not members of that state's bar, particularly when appearing in a federal court that has adopted the professional responsibility rules of the state in which it sits.[33]

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30. *See, e.g.*, Hanson v. United States, 908 F.2d 257, 258 (8th Cir. 1990); *In re* Seizure of $143,265.78, 616 F. Supp. 2d 699, 706 (E.D. Mich. 2009); Wilkerson v. Brown, 995 P.2d 393, 397 (Kan. Ct. App. 1999).

31. Indeed, prosecutors are subject not only to the same rules of professional conduct as other lawyers, but they also have additional obligations arising from their responsibilities as "minister[s] of justice." *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 & cmt.1 (2009).

32. *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 390-92 (2002); Samuel Dash, *An Alarming Assertion of Power*, 78 JUDICATURE 137, 139 (1994); CONG. RESEARCH SERV., RL31221, MCDADE-MURTHA AMENDMENT: LEGIS. IN THE 107TH CONG. CONCERNING ETHICAL STANDARDS FOR JUSTICE DEPARTMENT LITIGATORS 2 & n.2 (2001).

33. *See* Green & Zacharias, *supra* note 32, at 390-92; 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, 466 (1992).

For much of the no-contact rule's history, however, courts had little opportunity to consider how the rule would apply to prosecutors.[34] The no-contact rule applies only to lawyer-driven communications, and until the 1970s federal agents and local police investigated crimes with little assistance from prosecutors.[35] Accordingly, the rule had no bearing on most communications during the pre-charge investigatory stage because they were planned and executed by non-lawyer agents.

Once a prosecutor did become involved in a criminal matter, the suspect usually had been charged or was in custody. The no-contact rule had little relevance at this point because the Fifth and Sixth Amendments generally prohibited communications with the suspect.[36] In *United States v. Durham*, a typical case from this period, the suspect had been arrested, he had had a preliminary hearing, and he was in jail when the government interviewed him without his lawyer's consent.[37] A prosecutor was clearly involved by this point, and the court noted that the interviews "would appear to raise ethical questions" under the no-contact rule.[38] However, because evidence of the communications was suppressed on Sixth Amendment grounds,[39] the *Durham* court did not need to elaborate on the apparent ethical violation or determine what consequences would flow from such a violation.[40]

Prosecutors became more involved in criminal investigations in the 1970s, when DOJ began to focus more heavily on white collar and

34. Application of the no-contact rule in the criminal context is primarily a question of how the rule applies to prosecutors; criminal defense lawyers are generally treated like private lawyers in the civil context. *See, e.g.*, *In re* Disciplinary Action Against McCormick, 819 N.W.2d 442, 444 (Minn. 2012); John D. Cline, *It Is Time to Fix the Federal Criminal System*, 35 CHAMPION, Sept. 2011, at 34, 35. *But cf.* Grievance Comm. v. Simels, 48 F.3d 640, 650-51 (2d Cir. 1995) (suggesting that the same no-contact rule standards should apply to defense lawyers and prosecutors).

35. *See, e.g.*, Jamie S. Gorelick & Geoffrey M. Klineberg, *A Sensible Solution*, 78 JUDICATURE 136, 141 (1994).

36. *See, e.g.*, Cramton & Udel, *supra* note 16, at 328-32.

37. United States v. Durham, 475 F.2d 208, 209-11 (7th Cir. 1973).

38. *Id.* at 210-11.

39. *Id.* at 211.

40. The Supreme Court has referenced the no-contact issue in much the same fashion. For example, in *United States v. Henry*, 447 U.S. 264, 270, 274-75 (1980), the Court found that a defendant's post-charge jailhouse statement should be suppressed on Sixth Amendment grounds. The Court cited the no-contact rule in support of its conclusion that the government impermissibly interfered with the defendant's right to counsel even though, as the Court noted, the rule "does not bear on the constitutional question." *Id.* at 275 n.14. *See also, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 790-91 (2009); Texas v. Cobb, 532 U.S. 162, 171 n.2 (2001); Patterson v. Illinois, 487 U.S. 285, 301 & 301 n.1 (1988) (Stevens, J., dissenting).

organized crime.[41] The suspects in these cases tended to be wealthy enough and savvy enough to hire defense counsel early in an investigation. And DOJ wanted prosecutors to be involved early in the process as well, to fend off legal challenges, to make grand jury presentations, and to file the necessary court papers for electronic surveillance and other sophisticated investigatory techniques.[42]

United States v. Lemonakis[43] was the first federal appellate decision to squarely address the no-contact rule in a pre-charge situation.[44] A federal prosecutor and local police were investigating an extensive burglary conspiracy in Washington, D.C.[45] A cooperating witness, working at the investigatory team's direction, instigated an undercover pre-charge conversation with Lemonakis in which Lemonakis made incriminating statements.[46] Lemonakis was represented at the time, and the government was aware of this fact.[47] Lemonakis argued that the statements were obtained in violation of the no-contact rule and should therefore be suppressed.[48]

The *Lemonakis* court found no violation of the no-contact rule. The court determined that applying the rule to pre-charge communications simply imposed too great a burden on the public's interest in effective law enforcement.[49] The court also found that the covert nature of the communication was significant, observing that the rule was not intended to protect a "wrongdoer" like Lemonakis from voluntarily confiding in

41. *See* Cramton & Udel, *supra* note 16, at 361-64 & n.297, 385 n.414.

42. *See* Cramton & Udel, *supra* note 16, at 318-19; Gorelick & Klineberg, *supra* note 35, at 141-42; *see also* Reno Regulation, *supra* note 11, at 39,911.

43. 485 F.2d 941 (D.C. Cir. 1973).

44. *See* United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983) (identifying *Lemonakis* as the earliest federal appellate decision to consider the rule's effect on pre-charge covert communications). Prior decisions touching on a prosecutor's no-contact rule obligations involved post-arrest and custodial scenarios and so were decided on constitutional grounds. *See Lemonakis*, 485 F.2d at 955 n.21 (distinguishing prior cases where facts presented Fifth and Sixth Amendment violations).

45. *Lemonakis*, 485 F. 2d at 945-46. Local crimes in the District of Columbia are prosecuted by DOJ. *See* D.C. CODE § 23-101 (2001).

46. Prosecutors, like other lawyers, may not personally engage in undercover communications. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (lawyers may not engage in conduct involving "dishonesty, fraud, deceit or misrepresentation"); *id.* R. 4.1(a) (lawyers may not make "false statement[s] of material fact or law"). It has long been recognized, however, that prosecutors may direct the work of undercover officers or cooperating witnesses. *See, e.g.*, Zacharias & Green, *supra* note 15, at 231 & nn.133, 134.

47. *Lemonakis*, 485 F.2d at 945-47, 956.

48. *Id.* at 954-55. Lemonakis also argued that the statements should be suppressed on constitutional grounds; the court rejected this argument because Lemonakis's right to the presence of counsel had not yet attached. *Id.* at 954.

49. *Id.*

someone whom he mistakenly believed would keep his confidences.[50] For the next fifteen years, all federal appellate courts addressing the issue similarly found that—although prosecutors were subject to the no-contact rule as a general matter[51]—pre-charge covert communications did not violate the rule.[52]

By emphasizing the covert nature of the communication, the *Lemonakis* court suggested that *overt* communications might be more problematic. An overt communication—where the suspect is aware that he or she is speaking with a government agent—inherently presents a greater potential for coercion than a covert communication.[53] A suspect might not appreciate the option of simply walking away from a government interview or might feel compelled to agree to a cooperation or plea deal. Several cases during the 1980s considered pre-charge overt communications and reflected this unease; even so, the courts in these cases declined to find any violation, relying on *Lemonakis* and other covert-contact cases for the general proposition that the rule does not prohibit pre-charge communications in criminal investigations.[54]

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50. *Id.* at 956.

51. Some commentators argued that the no-contact rule should not apply to prosecutors *at all* because prosecutors are sufficiently constrained by the Fifth and Sixth Amendments from interfering with lawyer-client relationships in criminal cases. *See* 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); Saylor & Wilson, *supra* note 33, at 459. Virtually all federal courts rejected this argument, finding instead that the rule did apply to prosecutors as a general matter. *See, e.g.*, United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983); United States v. Thomas, 474 F.2d 110, 111 (10th Cir. 1973); *see also* Cramton & Udell, *supra* note 16, at 327. This conclusion, however, simply gave courts discretion to interpret the rule; it did not require courts to prohibit all or even most communications engaged in or directed by prosecutors.

52. *See, e.g.*, United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986) (finding that the rule "was meant to ensure that lawyers not prey on [represented] persons," not to protect represented criminal suspects); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983) (finding that the rule was not intended to "stymie" undercover investigations simply because the suspect retained counsel); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982) (finding that applying the rule before charging "would simply enable criminal suspects, by retaining counsel, to hamper the government's conduct of legitimate investigations"); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981) (finding that pre-charge undercover communications "do[] not implicate the sorts of ethical problems addressed by" the rule).

53. *See, e.g.*, Alafair S.R. Burke, Note, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635, 1662 (1994) ("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.").

54. *See* United States v. Pinto, 850 F.2d 927, 933-35 (2d Cir. 1988) (finding no violation for a pre-charge interview in the prosecutor's office but still "question[ing] the ethical propriety of

Given the courts' broad acceptance of both covert and overt pre-charge communications, there was little occasion to address appropriate sanctions for a pre-charge violation.[55] In particular, courts did not need to decide whether suppression was an appropriate remedy—a remedy that, if available, would likely inspire a flood of no-contact rule challenges by criminal defendants.

2. *United States v. Hammad*

A seismic shock to the status quo arrived in 1988 with *United States v. Hammad*,[56] the first federal appellate decision to find that a pre-charge communication violated the no-contact rule.[57] Hammad was being investigated for Medicaid fraud; he knew about the investigation and had hired a lawyer. Another suspect in the matter agreed to cooperate and to record a conversation with Hammad.[58] The prosecutor supplied the cooperator with a sham grand jury subpoena to help him elicit information from Hammad.[59] The conversation took place six months before Hammad was charged.[60]

The *Hammad* court rejected the bright-line pre-charge investigatory exemption established by *Lemonakis* and other earlier decisions.[61] The court reasoned that the goal of the no-contact rule—"to safeguard the integrity of the profession and preserve public confidence in our system of

interviewing a potential criminal defendant . . . when the interview is likely to elicit [incriminating] information"); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983) ("Although in some [unspecified] circumstances," overt communications might violate the rule, this pre-charge "noncustodial interview" did not); United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1300-01 (E.D.N.Y. 1985) (finding no violation where agents conducting pre-charge interviews were not working at the prosecutor's direction, but also suggesting that pre-charge non-custodial interviews generally would not violate the rule, particularly if the suspect is free to leave or to speak with a lawyer).

55. *See, e.g.*, *Lemonakis*, 485 F.2d at 956 ("We find there was no ethical breach by the [prosecutors]; accordingly, we need not reach what legal consequences might flow had we concluded otherwise.").

56. 858 F.2d 834 (2d Cir. 1988).

57. *See generally* John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 428-32 (1997) (describing the significance of *Hammad*); Neil Salon, Note, *Prosecutors and Model Rule 4.2: An Examination of Appropriate Remedies*, 12 GEO. J. LEGAL ETHICS 393, 397-98 (1999) (same).

58. *Hammad*, 858 F.2d at 835.

59. *Id.* at 835-36. The subpoena was a "sham" because the prosecutor created the document "not to secure [the cooperator's] attendance before the grand jury, but to create a pretense that might help [him] elicit admissions from a represented suspect." *Id.* at 840. The cooperator showed the sham subpoena to Hammad who, believing that it was genuine, "devis[ed] strategies for [the cooperator] to avoid compliance." *Id.* at 836.

60. *Id.* at 835-36.

61. *See id.* at 838-39.

justice"—was not limited to the post-charge phase.[62] Moreover, limiting the rule's reach to the "moment" of formal charging would, according to the court, invite the prosecutor to "manipulate" the system by delaying charges in order to take advantage of the pre-charge investigatory exemption.[63]

Having concluded that pre-charge communications *could* violate the rule, the court went on to find that the communication with Hammad *did* violate the rule because the prosecutor's creation of a sham subpoena was not a "legitimate investigative technique[]."[64] The court did not explain why a sham subpoena was particularly problematic, and it expressly declined to identify other techniques that might violate the rule.[65] Instead, the court left the delineation between acceptable and unacceptable techniques to "case-by-case adjudication."[66]

The *Hammad* court acknowledged that the prosecutor could not have anticipated that this communication would violate the rule. Given the "uncertainty" in no-contact rule jurisprudence, the court determined that suppressing evidence of the conversation would be inappropriate in this case.[67] For future cases, however, suppression would be an available remedy for pre-charge violations. In the court's view, suppression for a no-contact rule violation would serve the same salutary purposes as suppression for a constitutional violation: deterring improper government conduct, excluding tainted evidence, and maintaining public trust in the system.[68]

Although *Hammad* seemed to threaten the ability of prosecutors to be involved in pre-charge communications with represented suspects, the court emphasized that many such communications would *not* violate the rule. Specifically, the court observed that "legitimate investigative techniques," generally including the use of informants, would "frequently" fall within

62. *Id.* at 839.

63. *Id.*

64. *Id.* at 840.

65. *Id.* Zacharias and Green point out that a sham subpoena particularly "implicate[s] the integrity of the judicial process." Zacharias & Green, *supra* note 15, at 241 n.173. *Hammad* itself, however, did not explicitly draw this connection. *See* Gleeson, *supra* note 57, at 434 n.49. Indeed, the court commented that the case did not present the opportunity "to consider the use of this technique in relation to unrepresented suspects," 858 F.2d at 840, thus leaving open the possibility that a sham subpoena might not always be problematic from a professional responsibility perspective.

66. *Id.*

67. *Id.* at 842.

68. *Id.* at 840-41. The *Hammad* court did, however, exhort lower courts to "exercise their discretion cautiously and with clear cognizance that suppression imposes a barrier between the finder of fact and the discovery of truth." *Id.* at 842.

the "authorized by law" exception.[69] Foreshadowing the trend of future criminal no-contact rule jurisprudence, the *Hammad* court also suggested that judicial precedent could be the "law" that would trigger the rule's "authorized by law" exception, at least in cases that did not involve a sham subpoena or other objectionable technique.[70]

II. THE THORNBURGH MEMO AND THE RENO REGULATION

From DOJ's perspective, *Hammad* and the prospect of similar future decisions posed an intolerable risk to federal prosecutors personally and to effective federal law enforcement generally. DOJ responded to *Hammad* with the Thornburgh Memo and the Reno Regulation, which declared that the no-contact rule permitted pre-charge communications without exception—a move that proved unnecessary as courts quickly cabined off *Hammad* as simply wrong or at least limited to the sham subpoena scenario.[71] The Memo and Regulation also asserted DOJ's exclusive authority over the no-contact rule for federal prosecutors—a move that created a direct conflict between DOJ and the courts and invited Congressional intervention that ultimately resulted in the CPA.[72]

A. DOJ Responds to Hammad

DOJ believed that *Hammad*, with its embrace of "case-by-case" adjudication, would usher in an era of uncertainty regarding the no-contact rule's application to federal prosecutors.[73] For DOJ, *Hammad* raised the

69. *Id.* at 839.

70. *See id.* (relying on federal precedent that recognized prosecutors' investigative responsibilities for the proposition that pre-charge communications will often fall within the "authorized by law" exception); s*ee also infra* Part II.B.

71. The no-contact rule policies announced in the Memo and Regulation applied to civil enforcement matters as well as to criminal prosecutions. *See* Thornburgh Memo, *supra* note 10, at 493; Reno Regulation, *supra* note 11, at 39,910. The criminal context, however, was the primary focus for DOJ and, ultimately, for Congress and the CPA. *See generally* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2083-86 (2000) (describing the provisions of the Memo and the Regulation); Todd S. Schulman, Note, *Wisdom Without Power: The Department of Justice's Attempt to Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. REV. 1067, 1067-76 (1996) (same).

72. *See generally* Michael L. Stern, *Ethical Obligations of Congressional Lawyers*, 63 N.Y.U. ANN. SURV. AM. L. 191, 209 n.61 (2007) (describing the conflict that led to the CPA); Bradley T. Tennis, Note, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144, 151 (2010) (same).

73. *See* Thornburgh Memo, *supra* note 10, at 490; Reno Regulation, *supra* note 11, at 39,911; *see also* Stern, *supra* note 72, at 209 n.61; Katherine R. Brody & Chris Tatrowicz, *A Change of Heart for the DOJ: Policy Run Amok or Greater Respect for Ethical Norms?*, 20 GEO. J. LEGAL ETHICS 427, 431 (2007).

specter of inconsistency from one case to another and certainly from one jurisdiction to another.[74] With many investigations spanning multiple district court jurisdictions, similar communications conducted in a single investigation might alternately violate and not violate the rule. And with different prosecutors on the same case sometimes members of different state bars, the prospect of multiple and conflicting no-contact rules applying in the same case was heightened even further.[75]

According to DOJ, prosecutors facing such uncertainty had an impossible choice: either risk a rule violation or decline to participate in the investigation.[76] The first option would subject the prosecutor to potential personal sanctions and might result in suppression of the evidence. Under the second option, either the entire investigative team would refrain from communications that potentially violated the rule, or agents would have to conduct this aspect of the investigation without the benefit of legal guidance.[77] Neither choice boded well for DOJ, and the Attorney General ultimately decided to "take action to protect the interests of both law enforcement and the public."[78]

DOJ's first post–*Hammad* salvo came in 1989 with the Thornburgh Memo. The Thornburgh Memo was an internal declaration of DOJ policy, with no evidence that DOJ formally solicited any outside input.[79] The Memo concluded that interpretation of the no-contact rule was "solely a question of [DOJ] policy" and that DOJ's interpretation therefore superseded any contrary federal court decisions.[80] Citing the Supremacy Clause, the Memo also concluded that DOJ's interpretation of the rule superseded state court decisions as well.[81] Indeed, DOJ hinted that the

74. *See* Thornburgh Memo, *supra* note 10, at 490; Reno Regulation, *supra* note 11, at 39,911.

75. *See* Thornburgh Memo, *supra* note 10, at 490; Reno Regulation, *supra* note 11, at 39,911.

76. *See* Thornburgh Memo, *supra* note 10, at 490-91; Reno Regulation, *supra* note 11, at 39,911.

77. *See* Reno Regulation, *supra* note 11, at 39,911.

78. Jamie S. Gorelick, *Contacts With Represented Persons*, 11 CRIM. JUST., Summer 1996, at 40, 40. Gorelick was Deputy Attorney General under Attorney General Janet Reno.

79. The Memo recounted the positions of various DOJ components, *see* Thornburgh Memo, *supra* note 10, at 491-92; DOJ did not solicit outside views until the regulatory process leading up to the Reno Regulation.

80. *Id.* at 491. The Memo relied on an earlier advisory opinion by DOJ's Office of Legal Counsel, which concluded that neither federal nor state courts had authority to impose sanctions for conduct "within the scope of [a government attorney's] federal responsibilities," leaving interpretation of the rule to DOJ's discretion. *See* Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. O.L.C. 576, 577 (1980).

81. *See* Thornburgh Memo, *supra* note 10, at 490.

authority claimed in the Memo might logically extend to *any* professional conduct rule being interpreted in a manner that "interfere[d] with the legitimate investigative prerogatives of the government."[82]

Having staked its claim of DOJ authority, the Memo then purported to exempt all prosecutorial pre-charge communications from the no-contact rule:

> It is the clear policy of the Department that in the course of a criminal investigation, [a federal prosecutor] is authorized to direct and supervise the use of undercover law enforcement agents, informants, and other cooperating individuals to gather evidence by communicating with any person [in the pre-charge phase]. It is further the policy and the experience of the Department that what it may do in an undercover setting, it may similarly do overtly.[83]

DOJ, undoubtedly recognizing the furor that would follow, ended the Memo with a promise to codify the policy through the regulatory process.[84]

DOJ fulfilled that promise with the 1994 Reno Regulation.[85] After multiple rounds of soliciting, reviewing, and responding to comments, DOJ could—and did—claim the legitimacy of an extensive public rulemaking process.[86] DOJ employed language designed to position the Regulation within accepted professional norms, promising to hold DOJ lawyers to "the highest ethical standards"[87] and to ensure respect for "the principles underlying" the no-contact rule.[88] The Regulation's overarching "General

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82. *Id.* at 493.

83. *Id.* at 492. Though short on specifics, the Memo suggested that even *post-charge* communications might be permitted if DOJ believed that defense counsel had conflicted loyalties, such as "where a single attorney represents several individuals (one of whom is the principal target and is paying for everyone's representation) or an organization and all its employees (when the organization is the target and is paying for the representation)." *Id.* at 489. The Reno Regulation clarified that communications in these circumstances should be pre-approved by a court. Reno Regulation, *supra* note 11, at 39,929-30 (Section 77.6).

84. *See* Thornburgh Memo, *supra* note 10, at 493.

85. *See* Reno Regulation, *supra* note 11.

86. *See id.* at 39,910 ("This final rule . . . culminates a lengthy rulemaking process in which a proposed rule on the same subject was issued three separate times for comment."); *see generally* Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, 2003 PROF. LAW. 15, 28 n.75 (2003) (describing the regulatory process leading to the Reno Regulation); Neals-Erik William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855, 856 n.1 (1995) (same); Ryan E. Mick, Note, *The Federal Prosecutors Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251, 1258-59 & nn.32, 34 (2001) (same).

87. *See* Reno Regulation, *supra* note 11, at 39,914 ("[T]he content of [the General Rule] derives largely from" the Model Rule).

88. *Id.* at 39,911. To promote "respect" for the defense lawyer-client relationship, the Reno Regulation prohibited disparagement of defense counsel and also prohibited solicitation of privileged information or attorney work product. *Id.* at 39,923.

Rule" largely echoed the ABA Model Rule,[89] prohibiting communications with a represented person regarding the subject of the representation unless the represented person's lawyer consented.[90] Also like the Model Rule, the General Rule contained an exception for communications that were "authorized by law."[91]

Notwithstanding the conciliatory tone, substantively the Regulation was essentially just a more detailed version of the Thornburgh Memo that preceded it.[92] The various specific provisions of the Regulation, read together, permitted—as did the Thornburgh Memo—virtually all pre-charge communications.[93] And unlike the Model Rule, the General Rule referenced *the Regulation itself* as "law" that would trigger the "authorized by law" exception.[94]

DOJ argued that this self-authorizing "authorized by law" exception was justified by the need for a definitive and uniform no-contact standard for federal prosecutors in the wake of the uncertainty promulgated by *Hammad*.[95] DOJ also argued that the policy was justified as an appropriate expression of the Attorney General's authority to regulate the conduct of DOJ lawyers under the Supremacy Clause and a multitude of federal statutes.[96] And, similarly to the Thornburgh Memo, DOJ suggested in the Regulation that federal prosecutors might not be bound by outside

89. *See* Reno Regulation, *supra* note 11, at 39,914 ("the content of [the General Rule] derives largely from" the Model Rule).

90. *See id*. at 39,929 (Section 77.5).

91. *See id*. at 39,927, 39,929.

92. *See* Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 651 *n.367 (2004); see also* Lance Cole, Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided), 48 VILL. L. REV. 469, 561 & n.410 (2003); *cf.* Hazard & Irwin, *supra* note 2, at 808 (noting that like the Thornburgh Memo, "[t]he Reno Regulation purported to preempt and supersede state ethical rules, but unlike the Thornburgh memorandum, it gave specific guidance about what types of investigatory contacts were permissible.").

93. *See* Reno Regulation, *supra* note 11, at 39,910 ("In essence, this regulation permits federal prosecutors . . . to make or direct undercover or overt contacts with individuals and organizations represented by counsel for the purpose of developing factual information up until the point at which they are arrested or charged with a crime."). The Regulation also permitted communications with most employees of a represented organization, *see id*. at 39,931 (Section 77.10), a change that was largely embraced for all lawyers as part of the 2002 revision to Model Rule 4.2. *See* BENNETT ET AL., *supra* note 18, at 414-15; *see also supra* note 26.

94. The exception in the General Rule was for communications "as provided in this [Regulation] *or as otherwise* authorized by law." Reno Regulation, *supra* note 11, at 39,929 (emphasis added); *see also id.* at 39,911 ("This final rule, a duly promulgated regulation, is intended to constitute 'law' within the meaning of the 'authorized by law' exception.").

95. *See* Reno Regulation, *supra* note 11, at 39,911.

96. *See id.* at 39,915-16.

interpretation of *any* rule of professional conduct that was "inconsistent" with DOJ's "law enforcement responsibilities."[97]

Finally, the Regulation established an entirely internal process for responding to allegations of no-contact rule misconduct and punishing any violations. "[T]o ensure consistency and uniformity," the Regulation replaced the traditional disciplinary authority of state and federal courts with review by DOJ's own Office of Professional Responsibility (OPR).[98] Under the Regulation, OPR would investigate allegations of prosecutorial misconduct and make disciplinary recommendations to the Attorney General, who had exclusive enforcement authority.[99] With this disciplinary provision, DOJ completed its self-authorizing loop of control—from promulgating its own rule to interpreting its own rule to enforcing its own rule.

B. Status Quo in the Courts (1989-1997)

DOJ defended the Thornburgh Memo and, especially, the Reno Regulation as the necessary antidote to an uncertain post-*Hammad* world. DOJ acknowledged that *Hammad*'s impact was "muted substantially" by subsequent decisions,[100] but insisted that without DOJ intervention future federal and state court decisions might prohibit a federal prosecutor from involvement in even well-accepted (covert, no sham subpoena) pre-charge communications.[101] In fact, however, federal and state court decisions from the decade leading up to the CPA simply continued on the well-charted path that began with *Lemonakis*.

97. *See id*. at 39,911.

98. *Id.* at 39,926.

99. *Id.* at 39,926 & 39,931 (Section 77.11). The Regulation did permit state bar discipline of DOJ lawyers who willfully violated the Regulation. This power, however, could be exercised only *after* the Attorney General determined that there was such a violation. *See id.* at 39,931 (Section 77.12).

100. *See* Reno Regulation, *supra* note 11, at 39,911; *see also* Thornburgh Memo, *supra* note 10, at 490 ("*Hammad* no longer poses the same threat to federal law enforcement objectives that it once did.").

101. *See* Gorelick, *supra* note 78, at 40 (Deputy Attorney General arguing that "some overly expansive interpretations" of the no-contact rule threw into doubt a federal prosecutor's ability to direct pre-charge undercover communications); *see also* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 473 (1996) ("[For DOJ,] the mere prospect that evidence might be suppressed or, even worse, that federal prosecutors might be sanctioned personally for violating the no-contact rule remained chilling.").

1. Federal Courts: *Hammad* has Little Impact

Federal courts outside the Second Circuit quickly rejected *Hammad*'s broad holding that the no-contact rule could prohibit pre-charge investigatory communications.[102] Typical was *United States v. Ryans*, involving a criminal antitrust investigation where the prosecutor instructed a cooperating witness to telephone the suspects and engage them in conversation regarding their rate-setting practices.[103] The *Ryans* court rejected *Hammad* in favor of *Lemonakis* and other pre-*Hammad* decisions, finding that applying the rule in the pre-charge phase would "unduly restrict[]" law enforcement efforts against those criminal suspects who, like Ryans, were able to retain counsel early in the proceedings.[104]

Ryans also demonstrated the limited reach of *Hammad*'s "sham subpoena" holding. Similarly to the prosecutor in *Hammad*, the prosecutor in *Ryans* issued a subpoena to the cooperating witness for the purpose of concealing his cooperation.[105] Ryans argued that, as in *Hammad*, the prosecutor's use of a subpoena in this way—to further the government's deception rather than to secure an appearance before the grand jury—violated the no-contact rule.[106] The court rejected the *Hammad* analogy out of hand as the prosecutor in *Ryans* had issued a *real* subpoena.[107] More importantly, the court questioned the soundness of *Hammad*'s legal conclusion that even fake subpoenas were necessarily improper, and the court broadly endorsed the government's use of "'appropriate artifice and deception to ferret out illegal activities.'"[108]

Hammad similarly had little impact on prosecutors' ability to engage in overt pre-charge communications. Few decisions during the decade between *Hammad* and the CPA addressed overt communications, but the tension continued between recognizing the importance to effective law enforcement investigations of a broad pre-charge exemption and unease

102. *See, e.g.*, United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996); United States v. Powe, 9 F.3d 68, 69 & n.4 (9th Cir 1993); United States v. Ryans, 903 F.2d 731, 739 (10th Cir 1990); United States v. Marcus, 849 F. Supp. 417, 421-22 (D. Md. 1994); United States v. Infelise, 773 F. Supp. 93, 94-95 (N.D. Ill. 1991).

103. *Ryans*, 903 F.2d at 733-34.

104. *Id.* at 739-40.

105. *See id.* at 733, 737-38.

106. *See id.* at 738.

107. *Id.* at 738 n.8 ("[T]he subpoena at issue in this case was not fictitious; it was simply unnecessary.").

108. *See id.* (citation omitted); *see also Infelise*, 773 F. Supp. at 95 (finding that issuing a subpoena to a cooperating witness so that the suspect's "suspicion would not be aroused" was "an appropriate investigative tool").

with the inherent coerciveness of an interview by government agents.[109] One court, for example, found that the prosecutor did not violate the no-contact rule for pre-charge investigatory interviews with arguably represented employees of a corporation being investigated by DOJ, rejecting *Hammad* in favor of *Ryans*.[110] Another court, however, found a violation where an overt interview strayed beyond factual investigation to negotiating disposition of potential charges against the suspect.[111] Ultimately, however, the *Ward* court, like the *Hammad* court, was unwilling to suppress the evidence or "punish" the prosecutor where the law remained "unsettled."[112]

Even the Second Circuit proceeded much as it had before *Hammad*—with broad deference to the concept of a pre-charge investigatory exemption for prosecutors.[113] Appellate and district court decisions from within the Circuit now acknowledged that, per *Hammad*, the no-contact rule *could* prohibit pre-charge investigatory communications. But none of them found that a pre-charge communication actually *did* violate the rule.[114] So long as the communication did not involve a sham subpoena—described by one court as the "critical element" from *Hammad*[115]—the prosecutor's actions were not found to violate the no-contact rule.[116] And this proposition carried over to the overt communications realm as well.[117]

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109. *See supra* Part I.B.1 discussion of pre-*Hammad* overt communications decisions.

110. *See In re* Doe, 876 F. Supp. 265, 268-69 (M.D. Fla. 1993).

111. *See* United States v. Ward, 895 F. Supp. 1000, 1006-07 (N.D. Ill. 1995).

112. *Id.* at 1007-08. Also significant to the decision was that the suspect voluntarily chose to speak with the government. *Id.* at 1007.

113. In one pre-*Hammad* decision, for example, the Second Circuit noted that disallowing prosecutorial pre-charge communications "would simply enable criminal suspects, by retaining counsel, to hamper the government's conduct of legitimate investigations." *See* United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982); *see also* Grievance Comm. v. Simels, 48 F.3d 640, 648-49 (2d Cir. 1995).

114. *See Simels*, 48 F.3d at 649 (noting that none of the nine post-*Hammad* appellate or district court decisions from the Second Circuit found a violation of the rule); *see also* Bowman, *supra* note 8, at 738 & n.362 ("[*Hammad*] had no notable effect on federal law, even within the Second Circuit."). Indeed, the *Hammad* court itself was concerned that the decision would be read to broadly prohibit undercover investigations, and twice revised its published decision in a not-entirely-successful effort to clarify that it did not intend such a result. *See id.* at 737-38 & n.362.

115. *See* United States v. Harloff, 807 F. Supp. 270, 276 (W.D.N.Y. 1992).

116. *Id.* at 276-78; *see also* United States v. DeVillio, 983 F.2d 1185, 1192-95 (2d Cir. 1993) (finding that having a cooperator tape conversations with other suspects did not violate the rule); United States v. Schwimmer, 882 F.2d 22, 29 (2d Cir. 1989) (noting that the holding from *Hammad* is "limited . . . to the circumstances of that case").

117. *See* United States v. Gray, 825 F. Supp. 63, 64-65 (D. Vt. 1993) (finding that an overt pre-charge interview was "a legitimate investigative technique" as contemplated by *Hammad*).

Hammad did have one lasting—though largely unacknowledged—impact on federal no-contact rule jurisprudence: its suggestion that judicial precedent could trigger the "authorized by law" exception.[118] Both within the Second Circuit and elsewhere, courts citing other federal decisions began to invoke the exception as the basis for finding that pre-charge investigatory communications did not violate the no-contact rule.[119] This shift occurred with little explanation. Prior to *Hammad*, federal courts simply declared that the rule should not be interpreted to constrain pre-charge communications.[120] After *Hammad*, the "authorized by law" exception grounded the pre-charge exemption more clearly in the structure of the no-contact rule itself.[121]

In 1995, the American Bar Association recognized this new use of the exception. So long as the "body of precedent" approving prosecutorial pre-charge investigatory communications "remain[ed] good law," the ABA would recognize such communications as falling within the "'authorized by law'" exception.[122] Thus, virtually all pre-charge communications, or at least those not involving a sham subpoena, could be "authorized" by the long line of federal court decisions allowing such communications by federal prosecutors.

2. State Courts: No Impediment

DOJ claimed that post-*Hammad* uncertainty emanated not only from federal courts, but from state courts as well. Federal courts adopted state rules of professional conduct, and state courts and bar authorities could discipline federal prosecutors. Therefore, according to DOJ, the disparity among the various states' no-contact rule restrictions required a unified federal response.[123] Again, DOJ's concerns were not substantiated by the actual state of the law.

DOJ provided few concrete examples of state-by-state disparities, and the examples that it did provide had little practical bearing on criminal investigations. Commentary accompanying the Reno Regulation suggested,

118. *See, e.g.*, *Simels*, 48 F.3d at 649 (collecting Second Circuit post-*Hammad* cases and noting the reliance of many on the "authorized by law" exception); *see also Balter*, 91 F.3d at 436; United States v. Marcus, 849 F. Supp. 417, 421 (D. Md. 1994).

119. *See, e.g.*, *Simels*, 48 F.3d at 649 (collecting Second Circuit post-*Hammad* cases and noting the reliance of many on the "authorized by law" exception); *see also Balter*, 91 F.3d at 436; United States v. Marcus, 849 F. Supp. 417, 421 (D. Md. 1994).

120. *See, e.g.*, United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973).

121. *See, e.g.*, *Balter*, 91 F.3d at 436.

122. Am. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).

123. *See* Reno Regulation, *supra* note 11, at 39,911-14.

for example, that some states found that the rule never applied during the pre-charge phase while others, following *Hammad*'s reasoning, found that it did.[124] What DOJ did not acknowledge, however, was that almost no state authorities found that a pre-charge communication actually *did* violate the rule, whatever the precise basis of the underlying reasoning.[125]

Moreover, federal courts simply did not consider themselves bound by state no-contact rule opinions that contravened federal priorities as interpreted by federal courts.[126] A 1990 Florida state bar ethics opinion, for example, had concluded that the Florida no-contact rule prohibited prosecutors' pre-charge investigatory communications with represented suspects or witnesses.[127] A Florida federal district court, however, rejected this interpretation.[128] Even though Florida's rule, unlike the rule in every other jurisdiction, contained no "authorized by law" exception, the court relied on *Lemonakis*, *Ryans*, and other federal decisions in concluding that the structure of the rule "contemplate[d] . . . an adversarial relationship between litigants, not a mere investigation."[129]

The basis for DOJ's concern regarding the risk of state-imposed discipline was—like its concern regarding varying state versions of the rule—more theoretical than real. Although state courts certainly claimed authority to discipline federal prosecutors who violated their professional

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124. *See id.*

125. *See, e.g.*, State v. Smart, 622 A.2d 1197, 1214 (N.H. 1993) ("While we do not suggest that a prosecutor . . . may never be in violation of the rule prior to indictment, on the facts presented here, where the defendant was not in custody and had not been criminally charged, we find no ethical violation."); State v. Mosher, 755 S.W.2d 464, 469 (Tenn. Crim. App. 1988) (quoting *Vasquez*, 675 F.2d at 17) (finding that applying the rule in the pre-charge phase "'would simply enable criminal suspects, by retaining counsel, to hamper the government's conduct of legitimate investigations'"); State v. Lang, 702 A.2d 135, 137 (Vt. 1997) (finding that a pre-charge conversation between a cooperator and a suspect was "authorized by law"); 75 Op. Cal. Att'y Gen. 223 (1992) (finding that pre-charge communications "are 'authorized by law' and may include ex parte custodial interrogations"); Colo. Bar Ass'n, Formal Op. 96 (1994) (agreeing with the "overwhelming preponderance" of federal and state decisions holding that the rule did not apply in the pre-charge phase).

126. *See, e.g.*, Grievance Comm. v. Simels, 48 F.3d 640, 645 (2d Cir. 1995) ("[R]equiring a federal court to follow the various and often conflicting state court and bar association interpretations of a disciplinary rule, interpretations that may also contravene important federal policy concerns, threatens to balkanize federal law."); United States v. Biersdorf-Jobst, Inc., 980 F. Supp. 257, 259 (N.D. Ohio 1997) ("[A]ttorneys practicing in this Court are bound by the ethical standards of the Ohio Code of Professional Responsibility . . . [only] insofar as those standards are consistent with federal law.").

127. Fla. Bar Ass'n Comm. on Prof'l Ethics, Op. 90-4, 1990 WL 446959 (July 15, 1990).

128. *In re* Doe, 876 F. Supp. 265, 269 n.5 (M.D. Fla. 1993) (finding that local bar or state court ethics opinions are "highly persuasive" but only to the extent that such opinions are consistent with federal priorities).

129. *Id.* at 268-69.

responsibility rules, the only case prior to the CPA where a federal prosecutor was disciplined by state authorities for violating the no-contact rule involved *post-charge* communications.[130] And even that decision suggested that discipline would have been inappropriate if the communications had occurred during the pre-charge phase.[131]

3. All Courts Reject the Thornburgh Memo and the Reno Regulation

DOJ might have expected that courts would react positively to the Thornburgh Memo and the Reno Regulation. The Memo and the Regulation, after all, largely stood for a proposition of law that the courts had embraced: that federal prosecutors should not be constrained by the no-contact rule during the pre-charge investigatory phase. DOJ emphasized this practical aspect in defending the Memo and the Regulation. Attorney General Thornburgh, for example, explained that the Memo should be understood as an effort to prevent the no-contact rule from impeding criminal investigations and not as "an all-out effort all of a sudden to . . . exempt all of our lawyers from state ethics rules."[132]

Most federal court decisions, however, made little or no reference to the Memo or the Regulation.[133] Certainly the courts did not rely on them as authority for the pre-charge investigatory exemption. Rather, the courts simply continued to rely on federal precedent such as *Lemonakis* and *Ryans* for this purpose.[134]

The few federal court decisions that did specifically address the Memo or the Regulation focused on, and rejected, DOJ's assertion of exclusive

130. *See In re* Howes, 940 P.2d 159, 168-70 (N.M. 1997) (finding that no provision of federal law prohibited state authorities from disciplining a federal prosecutor).

131. *See id.* at 166-67 (rejecting the defendant's reliance on *Ryans*, not because *Ryans* was wrongly-decided but because "[i]n the present case, at the time of [the prosecutor]'s communications with defendant, defendant had been arrested, a preliminary hearing had been held, probable cause had been found, and defendant was in custody being held without bond").

132. *See* T.R. Goldman, *For McDade: Life Fuels Legislation*, LEGAL TIMES (D.C.), May 18, 1998, at 1 (quoting Thornburgh); *see also* Gorelick & Klineberg, *supra* note 35, at 144 (exhorting DOJ's critics to focus on "what [the Regulation] actually does"—preserve the pre-charge investigatory exemption—rather than on their concerns regarding the Attorney General's authority to issue the Regulation).

133. *See, e.g.*, United States v. Balter, 91 F.3d 427, 435 n.6 (3d Cir. 1996) (referencing the Memo and Regulation in passing, as part of a description of the debate over how the rule would apply); United States v. Johnson, 68 F.3d 899 (5th Cir. 1995) (not referencing the Memo or Regulation at all).

134. *See, e.g.*, United States v. W. Elec. Co., No. 82-0192(HHG), 1990 WL 116811, at *1 n.6 (D.D.C. Aug. 03, 1990) ("The Court does not need to, and does not, rely on the [DOJ policy] which purports to exempt Department of Justice litigators from" the no-contact rule.).

authority.[135] From a policy perspective, courts excoriated DOJ for purporting to define the rule for its own lawyers. Not only would this "render[] the rule meaningless," as one district court put it, "but the notion of such an idea coming from the country's highest law enforcement official displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession."[136]

Federal courts also found that the Attorney General lacked sufficiently specific authority under the Supremacy Clause or federal statutes to preempt the courts' traditional regulation of DOJ attorneys. The Thornburgh Memo—characterized by one court as "no more than a unilateral statement of Justice Department policy"—was particularly vulnerable in this regard.[137] But even the Reno Regulation—the product of a lengthy rule-making process—was declared "invalid" because, as the Eighth Circuit explained, no federal law "contemplate[d] the issuance of anything resembling" the Regulation.[138]

State courts had few opportunities to directly assess the Regulation.[139] The association of state supreme court chief justices, however, forcefully rejected the Regulation as a direct attack on the states' rightful regulatory role.[140] The justices warned of a potential "constitutional confrontation" and urged state courts "to continue to enforce the ethics rules upon *all* members of [the state] bars."[141]

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135. *See* N.Y. State Bar Ass'n v. FTC, 276 F. Supp. 2d 110, 132-33 (D.D.C. 2003) (discussing courts' rejection of the Memo and the Regulation).

136. *In re* Doe, 801 F. Supp. 478, 486 (D.N.M. 1992); *see also* United States *ex rel.* O'Keefe v. McDonnell-Douglas Corp., 961 F. Supp. 1288, 1295 (E.D. Mo. 1997) (finding DOJ's "efforts to exempt its attorneys from complying with state ethical rules disappointing"), *aff'd*, 132 F.3d 1252 (8th Cir. 1998).

137. *See* United States v. Ferrara, 847 F. Supp. 964, 969 (D.D.C. 1993); *see also* United States v. Lopez, 4 F.3d 1455, 1458 (9th Cir. 1993) (agreeing with the lower court's characterization of the Memo as "an egregious and flagrant 'frontal assault on the legitimate powers of the court'").

138. *O'Keefe*, 132 F.3d at 1257.

139. Since federal prosecutors do not generally practice in state court, the Memo and Regulation would primarily come before state authorities in the disciplinary context. And given the general agreement between state and federal courts regarding the rule's application to prosecutors, such cases were rare. *See supra* Part II.B.2.

140. *See* Conference of Chief Justices, Resolution XII: Proposed Rule Relating to Communications with Represented Persons (August 4, 1994), *in* CONFERENCE OF CHIEF JUSTICES: RESOLUTIONS 1994-PRESENT 869, 871 (1996), http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/858.

141. *Id.* (emphasis added); *see also In re* Howes, 940 P.2d 159, 168 (N.M. 1997) (finding that DOJ had no authority to "issue policies or regulations that absolve its attorneys from the responsibility to comply with ethical regulations promulgated by the courts granting them their licenses and responsible for their conduct as officers of the court.").

III. THE CITIZENS PROTECTION ACT

Congress stepped into the fray in the mid-1990s. After a protracted legislative fight, the Citizens Protection Act was approved on October 21, 1998,[142] and went into effect on April 21, 1999.[143] The CPA survived several repeal efforts,[144] and the pertinent text remains the same today as it was on the day it was approved: "An attorney for the Government shall be subject to 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."[145]

Although the language is broad, the CPA's focus is clarified through further legislative and regulatory definition: DOJ lawyers, including federal prosecutors, are subject to state rules of professional conduct just like all other lawyers.[146]

The clear result of the CPA was that DOJ could no longer claim authority to exempt federal prosecutors from the no-contact rule or any other rule of professional conduct. Less clear was the CPA's practical impact. Both proponents and opponents of the legislation assumed that the CPA would leave federal prosecutors substantially more constrained by the no-contact rule than they were before. In fact, however, the CPA did no

142. After earlier bills failed to make it out of committee, proponents inserted the bill that would become the current CPA into a time-sensitive appropriations bill. *See* Citizens Protection Act, H.R. 4276, 105th Cong. (1998). This maneuver effectively immunized the measure from substantive debate and ensured passage as failure would have left a number of federal agencies (including DOJ) without funding. *See* T.R. Goldman, *McDade Gets in Final Dig Against DOJ*, LEGAL TIMES (D.C.), Oct. 26, 1998, at 18 (noting that the CPA might not have passed as stand-alone bill). The process was described by some as an underhanded maneuver: "One might expect that criminal justice legislation that is opposed by the president, the attorney general and the chairman and ranking member of the Senate Judiciary Committee would not be blithely slipped into the statute books. But prudence was long ago a casualty of this budget process." Editorial, *Hampering Law Enforcement*, WASH. POST, Oct. 18, 1998, at C6.

143. *See generally* Lerner, *supra* note 92, at 651-54 (describing the legislative process leading to passage of the CPA); Zacharias & Green, *supra* note 15, at 215 (same).

144. *See* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 app. at 469 (2009); Gregory B. LeDonne, Recent Development, *Revisiting the McDade Amendment: Finding the Appropriate Solution for the Federal Government Lawyer*, 44 HARV. J. ON LEGIS. 231, 237 (2007); Lerner, *supra* note 92, at 655-56.

145. 28 U.S.C. § 530B(a) (2012).

146. The phrase "attorney for the Government" is defined to mean lawyers employed by DOJ or independent counsel. *See* 28 U.S.C. § 530B(c); 28 C.F.R. § 77.2(a) (2013). The phrase "laws and rules" is defined to mean laws and rules "that prescribe ethical conduct for attorneys and that would subject an attorney, whether or not a [DOJ] attorney, to professional discipline." *See* 28 C.F.R. § 77.2(h).

more to affect prosecutorial conduct under the no-contact rule than did the *Hammad* decision, the Thornburgh Memo, or the Reno Regulation before it.

A. Shared Expectation: The End of the Pre-Charge Investigatory Exemption

The CPA largely owes its existence to the determination of Representative Joseph McDade (R-Pennsylvania).[147] McDade's crusade for the CPA—and truly it was a crusade—was motivated by personal experience. After a lengthy DOJ investigation, McDade was tried on public corruption charges in 1995. McDade was acquitted at trial, but he emerged from the experience convinced that federal prosecutors routinely disregarded applicable ethics rules.[148]

McDade intended the CPA to nullify the Reno Regulation, which he perceived as allowing DOJ to shield prosecutorial misconduct from public scrutiny and discipline. Although not specifically mentioned in the CPA, the no-contact rule—as the centerpiece of the Reno Regulation—became the focal point of the CPA debate.[149] Both CPA supporters and opponents expected that the new law would subject federal prosecutors to state interpretations of the no-contact rule—just like "other attorneys in that

147. *See generally* John G. Douglass, *Jimmy Hoffa's Revenge: White-Collar Rights Under the McDade Amendment*, 11 WM. & MARY BILL RTS. J. 123, 133-34 (2002) (describing McDade's lead role in passing the CPA); Lerner, *supra* note 92, at 650-56 (same); Zacharias & Green, *supra* note 15, at 211-16 (same).

148. *See Ethical Standards for Federal Prosecutors Act of 1996*: *Hearing on H.R. 3386 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. of the Judiciary*, 104th Cong. 7 (1996) (statement of Rep. McDade) ("My experience, my colleagues, is by no means an isolated case."); *id.* at 10 ("There have been more than enough examples of prosecutorial misconduct to warrant more ethics regulations, rather than less."); Goldman, *supra* note 142, at 25. Representative Jack Murtha (D-Pennsylvania) was McDade's primary legislative ally. Like McDade, Murtha had been the subject of a public corruption investigation. Although never prosecuted, Murtha was named as an unindicted coconspirator in the Abscam scandal of the early 1980s. Lerner, *supra* note 92, at 643. Lerner has explored the heightened willingness of members of Congress to support defendant-friendly legislation when they have personally experienced the sting of a federal investigation. *See id.* at 599 ("Over the centuries, legislators have been menaced by criminal prosecution, and this prospect has, on significant occasions, shaped the development of Anglo-American criminal procedure."); *see also* Charles Finnie, *DOJ Notebook* (McDade's Revenge), LEGAL TIMES (D.C.), May 27, 1996, at 18 (quoting a joking comment by a past president of the National Association of Defense Counsel: "'If we indict a few more congressmen, we might find more support for our view.'").

149. *See, e.g.*, Douglass, *supra* note 147, at 134 ("[The CPA] was aimed broadly at the supremacy arguments of the Reno Regulation, though the committee hearings focused almost exclusively on the rules governing contact with represented parties."); Robert Morvillo, *Implications of Prosecutors Observing State Ethical Standards*, N.Y. L.J., Aug. 7, 2001, at 3 ("Although by its terms [the CPA] extends to all state ethical rules, historically the primary source of controversy regarding prosecutors behavior has centered around the no-contact rules.").

State"—and that state law would narrow or eliminate the availability of the pre-charge investigatory exemption.[150] The two sides simply disagreed as to whether this was a good outcome or a bad outcome.

McDade and his allies framed their argument around a theme of basic fairness—that the CPA was the necessary antidote to prosecutorial power run amok.[151] As explained by the National Association of Criminal Defense Lawyers, the CPA—in requiring compliance with the no-contact rule—prevented prosecutors from "being tricky with citizens not trained in the law," which was especially important "in cases involving federal prosecutors, who have extraordinary powers to destroy people's lives."[152] The pro-CPA forces had something of a public relations problem in that the individuals who would most immediately benefit from the CPA were suspected criminals—not, generally, the most sympathetic group.[153] They found an appealing example, however, in Independent Counsel Kenneth Starr's 1998 interrogation of White House intern Monica Lewinsky regarding her personal relationship with President Bill Clinton. Although Lewinsky herself was not a popular figure, her only "crime" was, perhaps, a substantial lack of good judgment. Starr's team tricked Lewinsky into showing up at a hotel where she thought she would be meeting a friend.[154] Instead, Lewinsky was ambushed by government agents who interviewed her for hours, tried to convince her to sign a cooperation agreement, and dissuaded her from contacting her lawyer.[155] Although a judge reviewing the matter expressed "concern" about the interview,[156] Starr was never

150. *See, e.g.*, Finnie, *supra* note 148, at 18; Goldman, *supra* note 132, at 25; Goldman, *supra* note 142, at 18; Harvey Berkman, *It Is No Longer OK For Federal Prosecutors To Flout State Ethics Rules*, NAT'L L.J. (N.Y.), Nov. 2, 1998, at A8.

151. *See, e.g.*, 144 Cong. Rec. 2592, 2594 (1998) (introduction of the CPA by Rep. McDade) ("[The CPA] will safeguard the citizens of [the] [n]ation from unfair, abusive and unethical conduct by employees of the Department of Justice."); *Ethical Standards for Federal Prosecutors Act of 1996*: *Hearing on H.R. 3386 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. of the Judiciary*, 104th Cong. 10 (1996) ("A requirement in all 50 states . . . [is] that it is unethical to communicate directly with suspects in the absence of their lawyer. The Department of Justice, through the [Reno Regulation], is attempting to circumvent this essential . . . right.").

152. Goldman, *supra* note 132, at 25 (quoting an NACDL lobbyist).

153. The alleged prosecutorial misconduct in McDade's case involved a conflict of interest, not a no-contact rule violation. *See* Davis, *supra* note 2, at 459 n.363; Zacharias & Green, *supra* note 15, at 212. This may have been one of the reasons that McDade focused so heavily on the no-contact rule—from the beginning of the debate, there could be no suggestion that McDade himself would have personally benefitted from the CPA. *See* Finnie, *supra* note 148, at 2.

154. *See* Davis, *supra* note 2, at 419.

155. *See id.* at 419-20.

156. *See* Andy Puccinelli, President's Message, *State Ethics Rules Should Apply to Federal Prosecutors*, Nev. Law., April 1999, at 5.

disciplined.[157] CPA proponents trumpeted Lewinsky's experience as typical of what ordinary Americans could expect if the CPA failed and federal prosecutors continued to disregard the no-contact rule.[158]

Opponents of the CPA focused on specific examples of how the CPA would impede—or, arguing for repeal, had impeded—the investigation of serious federal crimes.[159] They pointed to allegedly thwarted investigations of wide-ranging drug and government fraud conspiracies,[160] and they claimed that the CPA's dismantling of the pre-charge investigatory exemption would slow down efforts to quickly apprehend the individuals or organizations behind the September 11 terrorist attacks.[161] They painted a stark picture of criminals running rampant while federal prosecutors stood by helplessly, hamstrung by the CPA from pre-charge investigatory communications.

A DOJ ethics advisor arguing for the CPA's repeal provided what she described as "real-life" examples of the CPA's "deleterious effect on criminal prosecutions."[162] Radack's lead example was a 1998 California

157. The court reviewing allegations of Starr's misconduct referred the matter to DOJ's Office of Professional Responsibility. *See* Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269, 334 (2000). There is no public record of DOJ discipline for Starr, nor any suggestion in the literature that he was in fact disciplined. *See, e.g.*, Press release, U.S. Dep't of Justice, Statement of the U.S. Department of Justice, (Nov. 16, 1998), http://www.justice.gov/opa/pr/1998/November/546crm.htm (announcing that DOJ had dismissed "many" of the ethics allegations against Starr's office); Editorial, *Mr. Starr's Departure*, Wash. Post, Oct. 20, 1999, at A28 ("The various ethical allegations against [Starr] have mostly melted away on close inspection.").

158. *See, e.g.*, Sapna K. Khatiwala, Note, *Toward Uniform Application of the "No-Contact" Rule: McDade Is the Solution*, 13 Geo. J. Legal Ethics 111, 111-12 & n.11 (1999) (arguing that "even more troubling" than Starr's interrogation of Lewinsky "is the idea that [Starr's] actions are emulated by experienced prosecutors who exercise similar tactics as standard procedure"); Goldman, *supra* note 132, at 25 ("The [no-contact rule issue] has taken on resonance since the Monica Lewinsky story broke."). Starr's conduct inspired Congress to extend the CPA's application to Independent Counsels. *See* Khatiwala, *supra*, at 113 n.19.

159. Senators Orrin Hatch (R-Utah) and Patrick Leahy (D-Vermont) led the legislative opposition to the CPA. Hatch and Leahy, both members of the Judiciary Committee, were closely aligned with DOJ's effort to maintain maximum investigative flexibility for federal prosecutors. *See* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra* note 71, at 2093-94; Tennis, *supra* note 72, at 155-56.

160. 145 CONG. REC. 630, 1027 (1999) (statement of Sen. Hatch) ("It is in [cases such as these] that [the CPA] will have its most pernicious effect. Federal attorneys investigating and prosecuting these cases, which frequently encompass three, four, or five states, will be subject to the differing [no-contact] rules of each.").

161. 147 CONG. REC. 19,431, 19,496 (2001) (statement of Sen. Leahy) ("At a time when we need federal law enforcement authorities to move quickly to catch those responsible for the September 11th attacks, and to prevent further attacks on our country, we can no longer tolerate the drag on federal investigations and prosecutions caused by [the CPA].").

162. Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707, 707 (2001).

environmental disaster that resulted from an oil spill at sea.[163] Federal agents boarded the tanker ship to interview the crew. The agents, however, were rebuffed by lawyers for the ship's owners who claimed to represent all employees on the ship and argued that the California no-contact rule therefore prohibited the interviews.[164] Apparently out of concern regarding the CPA, the prosecutors directed the agents to abandon the interviews, thus substantially slowing down and narrowing the scope of the investigation.[165]

Notwithstanding its opponents' list of seemingly compelling examples, the CPA—and the rhetoric of basic fairness—won the legislative debate. As demonstrated below, however, the CPA did not in fact make any difference in whether or not federal prosecutors could be involved in pre-charge communications. Passage of the CPA made it no more likely that Ken Starr would be found to have violated the no-contact rule, nor did it mean that prosecutors investigating the California oil spill had to order agents to cease their interviews.[166] Whatever federal prosecutors could (or could not) do before the CPA, they could (or could not) do after.

B. Status Quo in the Courts (1998-Present)

Uncertainty regarding the CPA's effect on federal prosecutors was understandable in the immediate wake of the new law. The CPA, after all, was intended to give individual state authorities control over federal prosecutors' compliance with the no-contact rule within their geographic borders.[167] *United States v. Plumley*[168] underscored this uncertainty.

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163. *Id.* at 710.

164. *Id.*

165. *Id.*

166. A more compelling example described by Radack concerned a different rule of professional conduct—the Oregon rule prohibiting deception by lawyers. *See id.* at 715-18. Although every state has a similar rule, the Oregon Supreme Court—alone among the states—determined that the rule prohibited government lawyers as well as private lawyers from directing undercover operations. *See id.* at 716-17 (describing *In re* Gatti, 8 P.3d 966 (Or. 2000)). Federal prosecutors withdrew from all such operations in the state. *Id.* at 717. While *Gatti* clearly conflicted with federal law, the deception rule—unlike the no-contact rule—had no "authorized by law" exception, and so DOJ concerns regarding potential state discipline against federal prosecutors were more than theoretical. The crisis was resolved in 2002 after a DOJ complaint filed in federal court prompted Oregon to change its rule to permit supervision of otherwise lawful covert activities. *See* Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123, 139-41 (2008).

167. *See, e.g.*, N.Y. Bar Ass'n v. FTC, 276 F. Supp. 2d 110, 133 (D.D.C. 2003) (noting that the CPA "was enacted in direct response to the DOJ's attempt to exempt its lawyers from state ethical rules . . . [and] reflects the respect Congress has for the right of the states to regulate the ethical conduct of lawyers who practice law in their jurisdictions.").

168. 207 F.3d 1086 (8th Cir. 2000).

Plumley sought to suppress evidence of a pre-charge interview orchestrated by DOJ, relying on the CPA and a state ethics decision that Plumley claimed prohibited the contact.[169] The court rejected Plumley's argument because the interview occurred prior to passage of the CPA and found that the interview fell squarely within pre-CPA precedent establishing the pre-charge exemption.[170] Ominously for DOJ, however, the court noted that the CPA "may inform our approach to future cases."[171]

As it turned out, most post-CPA decisions have not mentioned the CPA at all,[172] or they simply note the uncontroversial fact that, per the CPA, state rules of professional conduct "apply" to federal prosecutors.[173] Due largely (if sometimes implicitly) to the "authorized by law" exception—which was almost completely absent from the CPA debate—the pre-charge exemption carved out by federal courts has endured.

1. Federal Courts: The CPA has Little Impact

United States v. Brown is typical of post-CPA decisions reaffirming the broad exemption for covert pre-charge communications.[174] Unlike most of these decisions, however, *Brown* explicitly addressed the CPA's impact, and the decision illustrates why the widely-shared assumptions about the CPA's anticipated effects proved to be so mistaken.

Brown was charged in connection with a fraudulent accounting scheme carried out in Pennsylvania.[175] He moved to suppress surreptitiously recorded pre-charge conversations between himself and a cooperating witness.[176] Brown argued that the Pennsylvania no-contact rule prohibited the communication and that the CPA effectively nullified earlier Third Circuit precedent—*United States v. Balter*—that had embraced the pre-charge exemption.[177]

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169. *Id.* at 1094-95.

170. *Id.*

171. *Id.* at 1095.

172. *See, e.g.*, United States v. Mullins, 613 F.3d 1273, 1288-89 (10th Cir. 2010); United States v. Cope, 312 F.3d 757, 773-74 (6th Cir. 2002); United States v. Basciano, 763 F. Supp. 2d 303, 329-30 (E.D.N.Y. 2011); United States v. Binder Schweitzer Emblem Co., 167 F. Supp. 2d 862, 864-67 (E.D.N.C. 2001).

173. *See, e.g.*, United States v. Talao, 222 F.3d 1133, 1139-40 (9th Cir. 2000); *In re* Chan, 271 F. Supp. 2d 539, 542 n.3 (S.D.N.Y. 2003).

174. *See* United States v. Brown, 595 F.3d 498, 516 (3d Cir. 2010); *see also, e.g.*, United States v. Carona, 660 F.3d 360, 366 (9th Cir. 2011); *Mullins*, 613 F.3d at 1289; *Cope*, 312 F.3d at 773-74.

175. *Brown*, 595 F.3d at 503.

176. *Id.* at 514.

177. *Id.* at 514-16 (citing *Balter*, 91 F.3d 427 (3d Cir. 1996)).

Brown's argument might seem appealing in the post-CPA world. After all, if lawyers in Pennsylvania would generally be barred from investigatory communications under the no-contact rule, wouldn't the CPA demand the same ground rules for federal prosecutors? The Third Circuit answered this question with an emphatic "no" for reasons that boiled down to the simple conclusion that the CPA did not narrow the universe of communications permitted under the rule.[178] Rather, applying the rule to federal prosecutors meant applying the *whole* rule, including the "authorized by law" exception.[179] And federal precedent holding that pre-charge communications did not violate the rule, whether decided before or after the CPA, supplied sufficient "law" to trigger the exception.[180]

For the *Brown* court, this meant that the *Balter* decision authorized the government's communications with Brown. The fact that *Balter* involved the New Jersey rule rather than the Pennsylvania rule was irrelevant.[181] Moreover, for the *Brown* court, *Balter's* underlying rationale remained as valid after the CPA as it was before—that is, applying the rule in the investigatory pre-charge phase would unfairly protect suspects who were wealthy enough to hire counsel early in the process and would "'significantly hamper legitimate law enforcement operations.'"[182]

Brown also illustrated the federal courts' continuing refusal to expand *Hammad*'s list of "illegitimate" tactics beyond the sham subpoena at issue in that case. The *Brown* prosecutor supplied the cooperator with a "fictitious letter" relating to a meeting between the cooperator and the government.[183] There was no actual meeting planned, but the letter contained an agenda for the fictitious meeting to help guide the cooperator's conversation with Brown.[184] Although the letter gave the court "pause," it rejected Brown's comparison to the *Hammad* sham subpoena: the letter "did not invoke the [court's authority] or contain any forged signatures, the letter was not addressed to Brown, and the letter in no way purported to compel any action or inaction on Brown's behalf."[185] The Ninth Circuit recently went even further, finding that the creation of false subpoena attachments to be used as "props" by a cooperator was no more problematic

178. *Id.* at 516.
179. *Id.*
180. *See id.* at 515-16.
181. *Id.*
182. *Id.* at 515 (quoting *Balter*, 91 F.3d at 436).
183. *Brown*, 595 F.3d at 503.
184. *Id.* at 516.
185. *Id.*

than any other undercover tactic, expressly rejecting *Hammad* on this basis.[186]

Like covert communications, overt communications—interviews conducted by the prosecutor or by a non-undercover agent—remain generally acceptable under the rule. *United States v. Binder Schweitzer Emblem Co.* is typical of post-CPA decisions where the court found no reason to distinguish between covert and overt communications.[187] *Binder* involved a pre-charge interview with an employee of a represented company that was suspected of making false representations to the government.[188] Noting that most federal precedent involved covert communications, the court found this to be a distinction without a difference as such decisions generally approved of pre-charge communications "in categorical terms."[189] Concluding that the Fourth Circuit would adhere to the "majority view," *Binder* held that the interview did not violate the rule.[190]

As was true prior to the CPA, some federal courts expressed caution regarding overt communications' potential for coercion—but still stopped short of finding a violation.[191] In *Talao*, for example, the court found that direct pre-charge communications between the prosecutor and a represented person could violate the rule, even though in this case they did not.[192] In

186. *See Carona*, 660 F.3d at 365-66. Even the Second Circuit has continued to limit *Hammad* to its particular facts. *See* United States v. Binday, 908 F. Supp. 2d. 485, 496 (S.D.N.Y. 2012) ("The only case in this Circuit that found 'egregious misconduct' under these governing principles is *Hammad* itself.").

187. *See* 167 F. Supp. 2d 862, 866 (E.D.N.C. 2001); *see also* United States v. Hailey, No. WDQ-11-0540, 2012 WL 2339275, at *6 n.10 (D. Md. June 13, 2012); *In re* Amgen, No. 10-MC-0249 (SLT)(JO), 2011 WL 2442047, at *18 (E.D.N.Y. April 6, 2011); United States v. Guild, No. 1:07cr404 (JCC), 2008 WL 302316, at *4 (E.D. Va. Jan. 31, 2008); United States v. Tableman, No. Crim. 99-22-B, 1999 WL 1995192, at *2 (D. Me. Sept. 3, 1999).

188. *Binder*, 167 F. Supp. 2d at 864.

189. *Id.* at 866.

190. *Id.*

191. *See* United States v. Talao, 222 F.3d 222 F.3d 1133, 1140-41 (9th Cir. 2000); United States v. Bowen, No. 10-204, 2011 WL 1980281, at *1 (E.D. La. May 20, 2011) (suggesting that an interview would violate the rule where the represented person is "coerced or in any way intimidated into talking," although that was not the case here); *In re* Criminal Investigation of John Doe, Inc., 194 F.R.D. 375, 377-78 (D. Mass. 2000) (noting the greater "potential for abuse" with overt contacts, but still permitting DOJ to proceed with interviews, subject to certain conditions). One court found a violation for a pre-charge interview, but this poorly-reasoned opinion condemned communications with represented persons in such broad terms that even *covert* communications seemed problematic. *See* United States v. Tapp, No. 107-108, 2008 WL 2371422, at *16 (S.D. Ga. June 4, 2008) ("For the Government to go behind a lawyer's back is a practice that leads to mischief.").

192. *See Talao*, 222 F.3d at 1140-41. *Talao* adopted *Hammad*'s case-by-case approach, concluding that where—as here—the Department of Labor had already filed an administrative

Talao, a represented witness contacted the prosecutor because the witness's employers—who were represented by the same lawyer as the witness—had pressured her to lie to the grand jury and she did not feel that she could be truthful with the lawyer present.[193] The court found no violation under these circumstances because "[i]t would be an anomaly to allow the subornation of perjury to be cloaked by an ethical rule."[194]

Whether overt or covert, *post-charge* communications are not "authorized by law" and remain off-limits. Federal courts have, however, carved out an additional zone of acceptance for communications with a person who is represented on a charged crime and is being investigated for a factually related but legally distinct uncharged crime (such as witness tampering prior to trial on the original matter). Courts find that the rule does not apply in these circumstances because the communication is not "about the subject matter of the representation."[195] Since the rule does not apply, there is no need to explicitly invoke the "authorized by law" exception, but courts in these cases still rely on federal precedent and invoke the same underlying rationale as the "authorized by law" cases: that the rule "should not be construed to conflict with the public's vital interest in ensuring that law enforcement officers investigate uncharged criminal activity."[196]

2. State Courts: No Impediment

The few post-CPA state court decisions on point generally continue to embrace a broad pre-charge exemption for prosecutors.[197] Most states, moreover, have adopted a comment to their version of the no-contact rule that indicates general acceptance of the concept that judicial precedent can trigger the "authorized by law" exception for both covert and overt pre-

action and a *qui tam* complaint was pending, the parties' "fully defined adversarial roles" were sufficient to trigger the no-contact rule even before Talao was criminally charged. *Id.* at 1139. A subsequent Ninth Circuit decision, however, indicated that the court would continue to adhere to the broad pre-charge exemption at least in covert communications cases, where the prosecutor did not directly "interrogate" the represented person. *See Carona*, 660 F.3d at 365-66.

193. *Talao*, 222 F.3d at 1139-40.

194. *Id.* at 1140.

195. *See, e.g.*, United States v. Mullins, 613 F.3d 1273, 1288-89 (10th Cir. 2010); Crawford v. United States, 60 Fed. App'x 520, 535-36 (6th Cir. 2003); United States v. Ford, 176 F.3d 376, 381-82 (6th Cir. 1999); United States v. Petters, No.08-364(1) RHK/AJB, 2009 WL 1519888, at *8-*9 (D. Minn. April 28, 2009).

196. *Ford*, 176 F.3d at 382.

197. *See, e.g.*, State v. Reavley, 79 P.3d 270, 279-80 (Mont. 2003); State v. Bisaccia, 724 A.2d 836, 847 (N.J. App. Div. 1999); People v. Kabir 822 N.Y.S.2d 864, 867-70 (N.Y. Super. Ct. 2006).

charge communications.[198] And even where there are no state cases on point or state cases are to the contrary, federal courts still approve federal prosecutors' pre-charge communications on the basis of federal precedent.

The no-state-law situation was confronted in *United States v. Brown*.[199] The court in *Brown* relied on a prior Third Circuit decision that construed the New Jersey version of the rule, even though the communication in *Brown* occurred in Pennsylvania.[200] Brown argued that under the CPA, the "authorized by law" exception could not be triggered in the absence of a Pennsylvania law or decision expressly authorizing the communication.[201] The court disagreed, noting that both rules derived from the ABA Model Rule and holding that the absence of state authority could not invalidate an exception that was "well-established" through federal jurisprudence.[202]

A harder question arises when state law rejects (or arguably rejects) the broad pre-charge investigatory exemption, but federal courts still decline to find a violation or to suppress the evidence in this situation. Florida, for example, is the one state where the no-contact rule has no "authorized by law" exception, and a couple of older state opinions significantly circumscribed prosecutors' ability to participate in pre-charge communications.[203] Prior to the CPA, a Florida federal district court decision—*In re Doe*—concluded that federal courts were not bound by state law and adopted a pre-charge exemption on the basis of federal law.[204] Federal courts in Florida apparently have not again had occasion to address

198. These state comments are modeled on an ABA comment to Model Rule 4.2 acknowledging that judicial precedent is sufficient to trigger the exception for both overt ("direct") and covert ("through investigative agents") communications. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 5 (2009) ("Communications authorized by law may . . . include investigative activities of [government lawyers], directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings."). For links to the current rules of professional conduct in each state, *see supra* note 12.

199. *See* 595 F.3d 498, 516 (3d Cir. 2010); discussed *supra* at Part III.B.1.

200. *Id.* at 515-16.

201. *Id.*

202. *Id.* at 515-16 & nn.20-21.

203. *See* Florida v. Yatman, 320 So. 2d 401, 403 (Fla. Ct. App. 1975) (finding that a state prosecutor's pre-charge deposition of a witness who was charged and represented in a separate but related matter violated the rule); Fla. Bar Ass'n Comm. on Prof. Ethics Op. 90-4 (1990) (rejecting a prosecutorial pre-charge exemption for communications with represented suspects or witnesses). The combination of no "authorized by law" exception and these state law decisions led one commentator to cite Florida as a key example of how the CPA would preclude federal prosecutors' involvement in pre-charge communications. *See* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra* note 71, at 2090-91.

204. *See In re* Doe, 876 F. Supp. 265, 269 (M.D. Fla. 1993); discussed *supra* at Part II.B.2.

the investigatory pre-charge exemption.[205] However, post-CPA Florida decisions in other professional responsibility contexts expressly rely on *Doe* for this proposition, leaving the same argument readily available to federal prosecutors in the no-contact rule context.[206]

Minnesota is another state with law that is potentially problematic for federal prosecutors. In *State v. Miller*, the Minnesota Supreme Court expressly adopted *Hammad* and found that a state prosecutor violated the rule by refusing repeated demands to halt a pre-charge interview or to allow the suspect's lawyer to speak with his client.[207] Subsequent federal decisions from Minnesota, however, have distinguished the particular conduct at issue without deciding whether to adopt *Miller*'s rejection of a blanket pre-charge exemption. In one case, the court relied on both Minnesota and federal precedent to find no violation where a covert communication concerned the suspect's efforts to obstruct an upcoming trial on charged criminal behavior.[208] In another case, a federal prosecutor conducting a pre-charge interview made no effort to keep the interviewees from consulting a lawyer, and so, the court concluded, even Minnesota state courts would find no violation on these facts.[209] So far at least, Minnesota's

205. The one post-CPA federal case from Florida to address whether a federal prosecutor had violated the no-contact rule concluded that a pre-charge interview had nothing to do with the matter on which the interviewee was represented, so the rule simply did not apply. United States v. Moss, No. 10-60264-CR-COHN, 2011 WL 2669159, at *7-*8 (S.D. Fla. March 21, 2011). Interestingly, the court relied on an ABA ethics opinion as support for its interpretation of the rule, noting that the Florida rule and the Model rule were "virtually the same," other than Florida's lack of an authorized by law exception. *Id.* at *7 & n.9.

206. *In re Doe* is cited approvingly in cases applying the no-contact rule to private lawyers, *see* NAACP v. Florida Dept. of Corrections, 122 F. Supp. 2d 1335, 1339 n.3 (M.D. Fla. 2000), as well as in cases addressing other rules of professional conduct, *see, e.g.*, Voter Verified, Inc. v. Premier Election Solutions, Inc., No. 6:09-cv-1968-Orl-19KRS, 2010 WL 2243708, at *2 (M.D. Fla. June 4, 2010); *see also* Ward v. Nierlich, No. 99-14227-CIV, 2008 WL 511909, at *2 (S.D. Fla., Feb. 22, 2008) (stating that federal courts should only rely on state court or bar association decisions "to the extent that they are compatible with federal law and policy" (quoting Grievance Comm. v. Simels, 48 F.3d 640, 645 (2d Cir. 1995))). Post-CPA decisions from other federal jurisdictions have made the same point. *See, e.g.*, *In re* Congoleum Corp., 426 F.3d 675, 687 (3d Cir. 2005); *In re* WorldCom, Inc. Securities Litigation, 219 F.R.D. 267, 284 (S.D.N.Y. 2003); Cavender v. U.S. Xpress Enterprises, Inc., 191 F. Supp. 2d 962, 966 (E.D. Tenn. 2002).

207. State v. Miller, 600 N.W.2d 457, 466-68 (Minn. 1999) (finding that this "systematic isolation of the client from his attorney" warranted suppression); *see also In re* McCormick, 819 N.W.2d 442, 444 (Minn. 2012) (reiterating *Miller*'s holding that the rule generally permits "legitimate investigative processes" but prohibits "egregious" prosecutorial conduct); State v. Clark, 738 N.W.2d 316, 337-45 (Minn. 2007) (adopting and clarifying *Miller*'s case-by-case approach in the context of a post-charge interview).

208. United States v. Petters, No. 08-364(1) RHK/AJB, 2009 WL 1519888, at *8-*9 (D. Minn. April 28, 2009).

209. United States v. Beliveau, No. 09-304(JMR/JJK), 2010 WL 681257, at *4-*5 (D. Minn. Feb. 23, 2010).

Hammad approach has been no more of a constraint in federal court than *Hammad* itself proved to be.[210]

Of course, even if a federal court finds no violation of the no-contact rule, opposing counsel or a defendant could still refer a federal prosecutor to state bar authorities for discipline. It is hard to imagine, however, that a state bar would discipline a federal prosecutor for conduct that federal courts—the courts where the prosecutor practices—have deemed not to be a violation. And indeed, there appears to be no post-CPA state case disciplining or even considering discipline for a federal prosecutor's violation of the no-contact rule.[211]

IV. REASSESSMENT: A GOOD THING IT PASSED, AND A GOOD THING IT FAILED

From the beginning, the CPA has been the subject of extensive scholarly criticism. Some commentators have focused on what they perceive to be the CPA's failure to deliver on its promise to enforce the no-contact rule against federal prosecutors.[212] Others have focused on what they perceive to be the CPA's crippling effects on law enforcement as a result of continuing uncertainty regarding various state interpretations of the rule.[213] Both schools of thought, however, would benefit from a closer examination of how the no-contact rule has actually been applied to federal prosecutors in the wake of the CPA.

On the one hand, the CPA accomplished the important goal of nullifying the ill-conceived system of DOJ self-interpretation of the no-contact rule for federal prosecutors. On the other hand, the CPA did not accomplish its supporters' questionable goal of subjecting federal prosecutors to various state versions of the no-contact rule that might effectively have nullified the pre-charge investigatory exemption. The combined result of this mixed record has been a remarkably—if inadvertently—enduring and coherent framework of no-contact rule regulation by federal courts.

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210. *See supra* Parts II.B.1-2.

211. The pre-CPA *In re Howes* decision, discussed *supra* at Part II.B.2, appears to be the only reported state court decision disciplining a federal prosecutor for a no-contact rule violation.

212. *See, e.g.*, Browdie & Xiang, *supra* note 1.

213. *See, e.g.*, Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra* note 71, at 2092-94.

A. A Good Thing It Passed: DOJ Self-Authorization to Formulate and Interpret the No-Contact Rule is Nullified

The CPA was a major accomplishment in that it definitively nullified the Thornburgh Memo and the Reno Regulation and, with them, DOJ's claim of exclusive authority to formulate and interpret a no-contact rule for federal prosecutors. The few pre-CPA federal court decisions that explicitly considered the Memo and the Regulation rejected DOJ's claim of authority,[214] but whether that trend would have continued is, of course, unknown. At minimum, the CPA short-circuited what likely would have been years of litigation over the issue. And had DOJ ultimately prevailed, the resulting self-regulatory system would have undermined the legitimacy of the rule itself—even though DOJ's no-contact rule largely mirrored the pre-charge investigatory exemption that had been established by federal court decisions beginning with *Lemonakis*.

Self-regulation of any profession invites criticism regarding the purpose and efficacy of self-imposed rules.[215] Such rules may serve the purposes of the profession at the expense of protecting the public. The rules may be framed in broad generalities that are difficult to enforce to afford members maximum flexibility. Members may be loath to report colleagues' misdeeds due both to personal relationships and to concerns regarding the status and reputation of the profession as a whole.[216] And regardless of the extent to which these concerns are true in any particular case, the public may perceive them to be so.[217]

Many commentators have leveled such criticisms at the legal profession.[218] Rules of professional conduct for lawyers are largely established and interpreted by bar associations that are comprised of individuals who are themselves bound by the rules. As demonstrated by

214. *See supra* Part II.B.3.

215. *See, e.g.*, Anthony D'Amato, *Self-Regulation of Judicial Misconduct Could be Mis-Regulation*, 89 MICH. L. REV. 609 (1990) (questioning self-regulation of the judiciary); Jim Hawkins, *Financing Fertility*, 47 HARV. J. LEGIS. 115, 124-27 (2010) (fertility clinics); Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation*, 34 SEATTLE U. L. REV. 439, 457-59 (2011) (the internet); Yuwa Wei, *Speculation and Regulation: A Story of China's Capital Market*, 16 CURRENTS: INT'L TRADE L.J., Winter 2007, at 14, 18 (capital markets).

216. D'Amato refers to this as a "guild" mentality. *See* D'Amato, *supra* note 215, at 611.

217. *See, e.g.*, Wei, *supra* note 215, at 18 ("All of these disadvantages undermine public confidence in self-regulation.").

218. *See, e.g.*, Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L. J. 253 (2012); Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079 (2005); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

Zacharias, however, the bar association system is in fact subject to significant external controls.[219] State supreme courts, for example, have ultimate authority over the promulgation and interpretation of bar rules;[220] regulatory agencies such as the SEC may impose their own rules of conduct on the lawyers who appear before them; and state legislators authorize and can always modify the self-regulatory system.[221]

Unlike regulation of the broader legal profession, the self-regulatory system of the Thornburgh Memo and the Reno Regulation admitted no external controls—a position appropriately criticized as "an extraordinary and alarming assertion of power."[222] Reflecting, perhaps, prosecutors' "reflexive mistrust of professional regulatory institutions,"[223] DOJ accorded the Attorney General complete discretion over the no-contact rule for federal prosecutors.[224] Although outside input was solicited and considered at least for the Reno Regulation, DOJ was under no obligation to incorporate contrary views into its rulemaking.[225] And with the Regulation itself intended to provide sufficient "law" for the "authorized by law" exception, courts would have had no choice but to approve any communications that fell within the Regulation's broad investigatory exemption. [226]

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219. *See* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

220. Although judges are lawyers themselves, "judges overseeing lawyers take their independence from the bar and their regulatory functions seriously," and thus are appropriately characterized as an external control on the system. *Id.* at 1153-54.

221. *Id.* at 1166-71. Zacharias persuasively argues that this system of co-regulation would—if it were better understood—generate far greater public confidence in the rules of professional conduct and in the profession generally. *See id.* at 1184-86.

222. Dash, *supra* note 32, at 137; *see also* Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473, 494 (1995) (arguing that the Reno Regulation "takes the concept of attorney self-regulation to the most extreme manifestation imaginable").

223. Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 904 (2012).

224. *See id.* at 878.

225. *See, e.g.*, Reno Regulation, *supra* note 11, at 39,910 ("During the most recent comment period, the Department received many thoughtful comments from private attorneys, local bar organizations, state courts, federal prosecutors, and others. The Department closely scrutinized all of these comments. After considering those comments, the Department made several relatively minor amendments to the proposed rule.").

226. Zacharias and Green, in a piece written shortly after the CPA's passage, suggested that, ironically, a renewed version of the Reno Regulation or something similar could still provide the "law" that would trigger the "authorized by law" exception. *See* Zacharias & Green, *supra* note 13, at 219 & nn.78-79. DOJ, however, avoided fighting the same battle again and replaced the Reno Regulation with new regulations that provided guidance on implementation of the CPA (including, for example, choice of law guidelines) but claimed no specific exemptions from the no-contact rule or any other rule. *See* 28 C.F.R. §§ 77.1-77.5 (1994).

The conflict of interest inherent in this particular self-regulatory scheme is plain. DOJ is judged by many measures. No measure, however, is more significant than the number of serious crimes that are successfully discovered and prosecuted.[227] The temptation for DOJ, then, is to draft a no-contact rule that emphasizes law enforcement needs (latitude in investigations) over the rule's purpose (protection of the lawyer-client relationship). And the negative publicity for DOJ that ensues from prosecutorial misconduct[228] further suggests a temptation to craft a permissive standard that would rarely be violated, as the importance of public confidence in the nation's chief law enforcement agency cannot be overstated.[229]

DOJ defended the Memo and the Regulation as promoting the highest ethical standards.[230] And CPA proponents surely overstated the case in asserting that DOJ's no-contact rule was an affront to fairness, particularly in light of the fact that DOJ's rule was so similar to the pre-charge exemption crafted by federal courts. The fact of the rule coming entirely from DOJ, however, undermined the rule's credibility for all of the reasons that make self-regulation suspect in any arena.[231]

In one significant way, the CPA had no effect on DOJ's claim to self-regulation under the Thornburgh Memo and the Reno Regulation. One primary objective of the CPA was to dislodge the disciplinary system from DOJ's Office of Professional Responsibility (OPR) in favor of state disciplinary authorities.[232] As noted above, however, state discipline of

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227. *See, e.g.*, John Hasnas, *Between Scylla and Charybdis: Ethical Dilemmas of Corporate Counsel in the World of the Holder Memorandum*, 44 VAL. U. L. REV. 1199, 1215 (2010) ("the metric by which success is measured at the DOJ is one's conviction rate."). The DOJ website reflects this understanding with a prominently featured list of the Attorney General's "top accomplishments" that highlights DOJ's successful efforts to investigate and punish serious crimes, including terrorist threats, drug trafficking, gang violence, and financial fraud. *See* U. S. DEP'T OF JUSTICE, http://www.justice.gov/accomplishments/ (last visited June 5, 2013).

228. Federal prosecutors' failure to disclose potentially exculpatory evidence to Senator Ted Stevens's defense team is a recent example of the intense criticism that can follow from well-publicized professional responsibility failures. *See, e.g.*, Charlie Savage & Michael S. Schmidt, *Prosecutors Suspended in '08 Trial of a Senator*, N.Y. TIMES, May 25, 2012, at A22; Del Quentin Wilber & Sari Horwitz, *Report: Prosecutors Hid Evidence in Stevens Case*, WASH. POST, March 16, 2012, at A3.

229. *See, e.g.*, UNITED STATES ATTORNEY'S MANUAL § 3-2.140 (2009) ("The[] professional abilities [of United States Attorneys] and the need for their impartiality in administering justice directly affect the public's perception of federal law enforcement.").

230. *See, e.g.*, Reno Regulation, *supra* note 11, at 39,928 (amending 28 C.F.R. § 77.1(a)).

231. *See, e.g.*, Green, *supra* note 223, at 903 ("Prosecutors' exaggerated opposition to professional regulation . . . undermines professional and public confidence in prosecutors.").

232. *See generally* Jennifer Blair, Comment, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations: 28 U.S.C. § 530B and the Reality of Inaction*, 49 UCLA L. REV. 625, 638-39 (2001).

federal prosecutors for violations of the no-contact rule has been virtually non-existent.[233] Backed by substantial evidence, many commentators have criticized OPR for a lack of objectivity that contributes to inordinately lengthy investigations and little or no meaningful discipline.[234] And, indeed, although numerous allegations of no-contact rule violations have been filed with OPR, there is no public record of OPR ever finding a violation for a pre-charge communication.[235]

While the CPA certainly has not cracked this rightly-criticized system of self-discipline, the problem in this regard does not stem from the CPA itself. Rather, as discussed below, the no-contact rule—appropriately interpreted to include a broad pre-charge exemption for prosecutors—was always a poor vehicle to accomplish this goal. Simply stated, federal courts have continued to endorse a broad pre-charge investigatory exemption, which makes actual violations of the no-contact rule appropriately rare.

B. A Good Thing It Failed: The Pre-Charge Investigatory Exemption Endures

The CPA succeeded in wresting control over the wording and interpretation of the no-contact rule from DOJ. Contrary to expectations, however, the CPA did not lodge interpretive control with state authorities nor did it cut back on the pre-charge investigatory exemption for federal prosecutors. Instead, federal courts effectively remained the primary regulatory authority, continuing down the same jurisprudential path forged prior to the CPA, the Reno Regulation, and the Thornburgh Memo, and

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233. *See supra* Part III.B.2.

234. *See, e.g*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 159 (Oxford U. Press 2007) ("[T]he risk of actual and perceived bias in the decision-making process is high when [,as is true for OPR,] the ultimate decision-makers have a vested interest in demonstrating that most of its prosecutors do not engage in misconduct."); Brendan Sullivan, Opinion, *No Justice for Reckless Prosecutors*, WASH. POST, July 6, 2012, at A15 ("The underlying misconduct [in DOJ's prosecution of Sen. Ted Stevens] represents a shameful chapter in the Justice Department's history. But the department's failure to punish wrongdoers makes the scandal worse, and the failure makes a mockery of the attorney general's effort to establish a standard of propriety that the goal of prosecutors is to do justice, not to win at all costs.").

235. OPR annual reports are available online for the years 1994 through 2011. *See* U.S. DEP'T OF JUSTICE OFFICE OF PROFESSIONAL RESPONSIBILITY, http://www.justice.gov/opr/reports.htm. (last visited June 5, 2013). The reports are somewhat cryptic, providing summary examples of OPR investigations and disciplinary recommendations rather than a comprehensive reckoning of all OPR cases. These reports include only one instance, involving a *post-charge* communication, where OPR found that a federal prosecutor violated the no-contact rule. *See Fiscal Year 2005 Annual Report*, 2005 Ann. Rep., Examples of Matters Handled by OPR in Fiscal Year 2005, ex. 11.

notwithstanding the momentary panic generated by *Hammad*.[236] The CPA's "failure" to achieve its proponents' goals in this regard has resulted in a coherent and consistent pre-charge exemption that appropriately limits constraints on federal prosecutors.

Scholarship assessing the CPA during the first couple of years after passage tended to reiterate the central fallacy of the legislative debate—that federal prosecutors would have to follow different no-contact rules in different states and that the various states would impose significant constraints on federal prosecutors' involvement in pre-charge communications.[237] These assumptions permeated the literature regardless of the author's ultimate assessment of the law. Khatiwala, for example, praised the CPA as "the best solution" to ensure that federal prosecutors "comply" with the no-contact rule.[238] Radack, on the other hand, criticized the CPA as literally "costing lives" because of the chilling effect that enforcing the various state versions of the no-contact rule would have on federal prosecutors' investigation of serious crimes.[239]

Not surprisingly, critics of DOJ's investigatory tactics quickly became disillusioned with the CPA. Davis, for example, foresaw that, among other issues, the CPA's lack of clarity rendered it unlikely to "have any significant effect" on prosecutorial practice.[240] The CPA's requirement that federal prosecutors follow state rules did not prescribe the specific type of conduct that would be prohibited. From the perspective of the no-contact rule, the CPA compelled compliance with the *whole* rule, which included the "authorized by law" exception, and—with that—the federal courts' pre-charge investigatory exemption. This school of thought, then, criticized—and continues to criticize—the CPA as a missed opportunity to curb what is characterized as rampant prosecutorial misconduct.[241]

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236. *See supra* Parts II.B, III.B.

237. *See supra* Part III.A.

238. Khatiwala, *supra* note 158, at 112-13; *see also, e.g.*, Jennifer Marie Buettner, *Compromising Professionalism: The Justice Department's Anti-Contact Rule*, 23 J. LEGAL PROF. 121 (1999); David Halperin, *Ethics Breakthrough or Ethics Breakdown? Kenneth Starr's Dual Roles as Private Practitioner and Public Prosecutor*, 15 GEO. J. LEGAL ETHICS 231, 273 & n.182 (2002).

239. Radack, *supra* note 162, at 707; *see also, e.g.*, Douglass, *supra* note 147, at 142-43; Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra* note 71, at 2015-24.

240. Davis, *supra* note 2, at 460.

241. *See, e.g.*, *id.* at 399 (arguing that the CPA "will not control prosecutorial power adequately"); Alfredo Garcia, *"No Fetish" for Privacy, Fairness, or Justice: Why William Rehnquist, Not Ken Starr, Was Responsible for William Jefferson Clinton's Impeachment*, 10 CORNELL J.L. & PUB. POL'Y 511, 573 (2001) (disagreeing with scholars who viewed the CPA as a "promising start[] in efforts to curb or deter misconduct by federal prosecutors"); Browdie &

Somewhat more surprisingly, scholars favoring wide latitude for prosecutors under the no-contact rule also criticized—and continue to criticize—the CPA. Congress intended federal prosecutors to be subject to the various state interpretations of the no-contact rule, and thus, according to this school of thought, the concern remains that disparate state interpretations may negate the pre-charge exemption, at least in some jurisdictions. Moreover, even the mere *possibility* of federal prosecutors being subjected to conflicting state rules is enough—it is argued—to chill any prudent prosecutor's willingness to brave the uncertain landscape and forge ahead with investigatory communications that might violate some state's rule.[242]

The widespread criticism of the CPA has shaped the academic literature, with commentary tending to focus on identifying and solving the "problem" of how to apply the no-contact rule to federal prosecutors. Depending on the observer's perspective, the solution might be to promote maximum prosecutorial flexibility by broadening the pre-charge exemption.[243] Or the solution might be to better protect the criminal defense lawyer-client relationship by limiting the pre-charge exemption.[244]

Xiang, *supra* note 1, at 696 (arguing that the CPA did not prevent DOJ from "continu[ing] to circumvent ethics rules"); William H. Edmonson, Note, *A "New" No-Contact Rule: Proposing an Addition to the No-Contact Rule to Address Questioning of Suspects After Unreasonable Charging Delays*, 80 N.Y.U. L. REV. 1773, 1781-83 (2005) (arguing that contrary to Congressional intent, "courts have generally refused to enforce the no-contact rule against prosecutors" in the pre-charge phase); Jackie Lu, Note, *How Terror Changed Justice: A Call to Reform Safeguards that Protect Against Prosecutorial Misconduct*, 14 J.L. & POL'Y 377, 382 (2006) (arguing that the CPA is "insufficient to prevent misconduct in terrorism cases"); Cline, *supra* note 34, at 34 (arguing that the CPA did not end federal prosecutors' unfair exemption from the no-contact rule).

242. *See, e.g.*, Douglass, *supra* note 147, at 135 ("Under the CPA, a federal prosecutor might be subject simultaneously to the ethical rules of a host of states."); Hazard & Irwin, *supra* note 2, at 809-10 (arguing that although the various state versions of the no-contact rule are virtually identical, "differences in judicial interpretations may, in fact, pose problems of conflicting guidance"); Henning, *supra* note 2, at 59 ("Perhaps the greatest problem with the [CPA] is the lack of uniformity in ethical rules for the profession."); Judith A. McMorrow, *The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 16 (2005) (arguing that the CPA "leav[es] the prosecutor subject to potentially conflicting rules"); Frederick M. Morgan, Jr., *Of Third Rails and Rabbit Trails: The "No-Contact" Rule and the McDade Amendment in Qui Tam Lawsuits*, 37 FALSE CL. ACT AND QUI TAM Q. REV. 14, 26 (2005) (arguing that the uncertainty generated by the CPA continues to have an "in terrorem" chilling effect on federal prosecutors); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 821-22 (2003) (arguing that the CPA and its "unreflective application of [state] ethical rules governing investigations to prosecutors" is a "step[] in the wrong direction"); Tennis, *supra* note 72, at 153 (arguing that the CPA "hinders the ability of a federal prosecutor to determine which ethical regulations govern his conduct").

243. *See, e.g.*, Douglass, *supra* note 147.

244. *See* Hazard & Irwin, *supra* note 2, at 804.

Or the solution might simply be to codify *some* unified federal standard regardless of which side it favors, in order to remove the alleged uncertainties of state-by-state enforcement.[245] The one point of agreement among the pile of proposals is that reform is badly needed.[246]

With the advantage of fifteen years' hindsight since passage of the CPA, it is time to reconsider the urge to fix something that isn't broken. The rejoinder to both camps of criticism is by reference to how federal prosecutors have actually fared under the CPA. First, most pre-charge communications simply do not violate or circumvent the rule—they legitimately fall within the rule's "authorized by law" exception. Second, federal courts have shown no willingness to be bound by conflicting state interpretations of the no-contact rule nor is there any indication of a brewing shift in this regard. The most significant lesson from the CPA's failure to affect no-contact rule practice is that the federal courts have gotten it right.

The continued authority of federal courts—rather than various local bar associations and state courts—is appropriate for no-contact rule issues. Concerns by DOJ and other CPA opponents regarding state-by-state uncertainties were overblown, but not unfounded. State court interpretations have largely followed federal courts in adopting a broad pre-charge investigatory exemption. However, as seen, for example, in Florida and Minnesota,[247] federal prosecutors—if forced to follow local interpretations—could face a contradictory array of rules applying to otherwise identical aspects of the same investigation. Federal courts have rightly recognized their role as a bulwark against the "balkanization" of professional standards for federal criminal investigations.[248]

Second, federal courts have come to the right conclusion regarding the parameters of the no-contact rule. The broad and clear pre-charge investigatory exemption for covert communications is particularly well-suited for the "authorized by law" exception. Undercover operations have

245. *See, e.g.*, John H. Lim, Note, *The Side Effects of a Legal Ethics Panacea: Revealing a United States' Standing Committee's Proposal to "Standardize" Ethics Rules in the Courts as an Attempt to Undermine the No-Contact Rule*, 13 GEO. J. LEGAL ETHICS 547 (2000).

246. *See, e.g.*, Douglass, *supra* note 147, at 140-49; Hazard & Irwin, *supra* note 2, at 816-18; McMorrow, *supra* note 242, at 16; Henning, *supra* note 2, at 60; Christopher R. Smith, *I Fought the Law and the Law Lost: The Case for Congressional Oversight over Systemic Department of Justice Discovery Abuse in Criminal Cases*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 85, 99-100 (2010); Zacharias & Green, *supra* note 15, at 259-61; Browdie & Xiang, *supra* note 1, at 696; Edmonson, *supra* note 241, at 1787-89; Lim, *supra* note 245, at 572-74; Tennis, *supra* note 72, at 182.

247. *See supra* Part III.B.2.

248. *See, e.g.*, Grievance Comm. v. Simels, 48 F.3d 640, 645 (2d Cir. 1995).

long been recognized as appropriate and, indeed, are "frequently essential to the enforcement of the law."[249] Agents are expected to engage in such communications regardless of whether a suspect is represented by counsel. The most immediate and obvious effect of prohibiting or even partly prohibiting prosecutors' involvement is that agents would simply proceed without the benefit of legal advice—not just as to the propriety of the communication itself but potentially also as to the legality or advisability of related matters including, for example, search warrants and electronic surveillance techniques.[250]

Nor do covert communications contradict the underlying goal of the rule, which is to protect the lawyer-client relationship from undue interference by another lawyer. Covert communications certainly may result in the suspect saying or doing something that the suspect's lawyer would have advised against. But there is no reason that a covert communication necessarily or unduly undermines a suspect's relationship with his or her lawyer. And even if the prosecutor provides specific instructions for the undercover agent or cooperator, it is not as though anything worse—anything trickier or more nefarious—has happened beyond what the agent could simply do on his or her own.[251] If anything, the particular group most protected by the rule—relatively well-to-do criminal suspects who have been advised by counsel—may be the least susceptible to government trickery.[252]

The "authorized by law" exception should as a general matter include overt communications for the same reasons.[253] Agents are not bound by the no-contact rule, so all that carving out overt communications from the exemption would do is incentivize agents to not consult counsel. On the

249. Sorrells v. United States, 287 U.S. 435, 441-42 (1932) ("The appropriate object" of undercover investigation "is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law."); *see also, e.g.*, Jacobson v. United States, 503 U.S. 540, 548 (1992).

250. *See, e.g.*, In re Amgen, Inc., No. 10–MC–0249, 2011 WL 2442047, at *8 n.14 (E.D.N.Y. April 6, 2011) ("Because [the no-contact rule] regulates only attorneys and does nothing to constrain law enforcement agents acting as such, Amgen's broad interpretation of the no-contact rule would do nothing to reduce the government's ability to make contacts with investigative subjects—it would simply give the government a perverse incentive to have those contacts take place without an opportunity for prosecutors to ensure that they occur within the bounds of the law.") (citation omitted).

251. *See, e.g.*, United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973).

252. *See, e.g.*, United States v. Brown, 595 F.3d 498, 515 (3d Cir. 2010) (citing United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996)); United States v. Heinz, 983 F.2d 609, 614 (5th Cir. 1993).

253. *See, e.g.*, United States v. Binder Schweitzer Emblem Co., 167 F. Supp. 2d 862, 865-67 (E.D.N.C. 2001).

other hand, some degree of coercion is inherent—and inherently troublesome—in any interview with a government agent. The "interview" may quickly come to resemble an interrogation with no option of leaving or choosing not to answer the government's questions. Federal courts are right to tread carefully here, and to draw the line at least by the time that the communication turns to the possibility of forfeiting the suspect's legal rights, as with negotiations for immunity or a plea arrangement.[254]

Inherent in any common law scheme is some measure of uncertainty. Inevitably situations will arise—most likely in the overt context—where a prosecutor is not sure whether a communication violates the no-contact rule. The extent to which pre-charge overt communications by prosecutors—or, indeed, by non-lawyer government agents—should be allowed is a subject ripe for further investigation and analysis. In the meantime, however, the rule permits a prosecutor to seek a court order in such situations.[255] Though impractical on a regular basis, seeking a court order is a reasonable inconvenience for the occasional case where the parameters of the no-contact rule remain unclear.

CONCLUSION

Neither the *Hammad* decision, the Thornburgh Memo, the Reno Regulation, nor even the CPA itself ultimately upset the coherent, uniform, and remarkably durable pre-charge investigatory exemption for prosecutors established by federal courts beginning with the *Lemonakis* decision. The pre-charge exemption, which is now clearly recognized as falling within the rule's own "authorized by law" provision, has allowed federal prosecutors to supervise and provide legal counsel for criminal investigations, unimpeded by whether or not the suspect is able to retain a lawyer before charging. The exemption appropriately provides broad discretion in the context of covert communications and, also appropriately, more constrained discretion in the potentially coercive context of overt communications.

The CPA succeeded in nullifying DOJ's ill-conceived claim of exclusive interpretive authority over the no-contact rule for its own lawyers. The CPA failed to accomplish its proponents' ill-conceived goal of limiting federal involvement in pre-charge investigative communications with represented persons. The combined success and failure of the CPA have

254. *See, e.g.*, United States v. Carona, 660 F.3d 360, 365-66 (9th Cir. 2011); United States v. Ward, 895 F. Supp. 1000, 1006-07 (N.D. Ill. 1995).

255. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009) (excepting communications "authorized" by "a court order"); *see also* discussion *supra* Part I.A.

left us with a system of regulatory control that—for this particular issue—works.