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Whose Rules of Professional Conduct
Should Govern Lawyers in Federal
Court and How Should the Rules
Be Created?

Bruce A. Green*

At present, the rules of professional conduct applied in federal judicial proceedings vary from district to district. In reaction to this problem, the Judicial Conference of the United States is studying the question of whether a uniform set of rules of professional conduct should apply in federal judicial proceedings and, if so, what the nature of the rules should be and how they should be developed. The principal proposals under consideration are the adoption of a uniform set of federal rules based on the American Bar Association Model Rules of Professional Conduct or the adoption of a requirement that each federal district court apply the rules of the state in which it sits.

This Article demonstrates the shortcomings of these two alternatives and proposes a third: that the federal judiciary undertake rulemaking to develop a single set of highly detailed rules of professional conduct. It argues that the two alternative proposals will require the application of rules that are, in many respects, vague or ambiguous. The meaning of many of these rules would never be clarified, because federal courts rarely have occasion to interpret rules of professional conduct. As to the rules that federal courts would address, inconsistencies would abound, because the courts could be expected to adopt varying interpretations. Further, the standards of conduct adopted by interpreting open-textured disciplinary rules in the course of adjudication would likely be less appropriate than standards adopted by judicial rulemaking, because individuals and organizations with relevant perspectives would be denied an opportunity to present their views to the adjudicating court.

This Article sets its discussion of the relative merits of the various alternatives in the context of the hotly debated question of whether

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My perspective on the question addressed in this Article has been enriched by my experience on various bar association committees concerned with issues of legal ethics, including currently as Chair of the Ethics and Professionalism Committee of the American Bar Association Section of Litigation, as Vice Chair of the New York State Bar Association Committee on Professional Ethics, and as a member of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York. As will become evident to the reader, however, the views expressed in this Article are my own, and almost certainly would not be shared by the organizations in which I serve.
lawyers may contact represented persons in criminal cases. First, examining a recent Department of Justice regulation addressing this question, it argues that the administrative rulemaking process is inferior to judicial lawmaking because of the institutional bias of the executive branch, but that rulemaking is otherwise a preferable means of developing standards of professional conduct. Second, examining a recent United States Court of Appeals for the Second Circuit decision on criminal defense lawyers' communications with represented persons, it demonstrates the shortcomings of adopting ambiguous American Bar Association model rules that must be interpreted in the course of adjudication. Finally, it proposes and defends detailed rulemaking by the federal judiciary as the preferable alternative.

Introduction

Lawyers refer to their profession as "self-regulating," but this term is misleading as well as wishful. Although it is true that the American Bar Association ("ABA") has taken the initiative to draft model rules of professional conduct, and state bar associations have built on or revised the ABA

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2 See, e.g., Ippolito v. Florida, 824 F. Supp. 1562, 1571 & n.23 (M.D. Fla. 1993) (preferring the term "'judicial regulation' which means regulation by the court with the assistance of lawyers," to "self-regulation [which connotes] regulation by lawyers with the assistance of the court" (citing John F. Harkness, Judicial Independence Is at the Heart of Today's Lawyer Regulation, Fla. B.J., May 1993, at 12)).


3 See generally Susan P. Konia, The Law Between the Bar and the State, 70 N.C. L. Rev. 1389 (1992) (analyzing tension between organized bar and government agencies regarding the professional obligations of lawyers).

rules, the work product of bar associations does not have the independent force of law. Only a government body pursuant to its lawmaking authority can adopt legally enforceable rules to regulate lawyer conduct.

Traditionally, courts have been the principal lawmakers for lawyers. Over the past quarter century, pursuant to their supervisory authority over the legal profession, courts have filled this role by promulgating and enforce-


6 See, e.g., Culebras Enters. Corp. v. Rivera-Rios, 846 F.2d 94, 98 (1st Cir. 1988) ("Absent promulgation by means of a statute or a court rule, ethical provisions of the ABA or other groups are not legally binding upon practitioners."); Niesig v. Team I, 558 N.E.2d 1030, 1032 (N.Y. 1990) ("we are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines"); Bruce A. Green, Doe v. Grievance Committee: On the Interpretation of Ethical Rules, 55 BROOK. L. REV. 485, 532-33 (1989) ("Neither the adoption of the Code by the ABA nor its endorsement by the Connecticut Bar Association made it enforceable against an attorney . . . .").

7 In the colonial era, responsibility for regulating lawyers was largely shared by colonial courts and legislatures. See Bruce A. Green, "Lethal Fiction": The Meaning of "Counsel" in the Sixth Amendment, 78 IOWA L. REV. 433, 465-68 (1993) (describing colonial and post-revolutionary licensing statutes). Since this nation's founding, however, the oversight of lawyers has been predominantly a judicial function. Today, it is understood that federal courts and most state courts supervise and discipline lawyers pursuant to inherent judicial authority "to admit, suspend and disbar lawyers who practice within the jurisdiction of the court." Green, supra note 6, at 530-31 nn.161-62 (citing authority); see Charles W. Wolfram, Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine, 12 U. ARK. LITTLE ROCK L.J. 1, 3-6 (1989-90); see also Daniel J. Meador, Inherent Judicial Authority in the Conduct of Civil Litigation, 73 TEX. L. REV. 1805 (1995) (discussing "the broad, inherent authority in state and federal trial courts to exert a high degree of affirmative case management"); John Papachristos, Comment, Inherent Power Found, Rule 11 Lost: Taking a Shortcut to Impose Sanctions in Chambers v. NASCO, 59 BROOK. L. REV. 1225 (1993) (analyzing "the Supreme Court's arguments in favor of a broad inherent power"). Judicial regulation of lawyers' practice may also be premised on express grants of authority by legislative or state constitutional provisions. For example, federal district courts have authority to adopt local rules regulating lawyers pursuant to 28 U.S.C. § 2071 (1988), FED. R. CRIM. P. 57, and FED. R. CIV. P. 83. See Green, supra note 6, at 533 n.176.

Pursuant to this authority, courts may establish standards of conduct for lawyers either through rulemaking or on an ad hoc basis in the course of adjudication. See, e.g., Theard v. United States, 354 U.S. 278, 281 (1957) (holding that disbarment by state court does not automatically result in disbarment by federal court); In re Agent Orange Prod. Liab. Litig., 818 F.2d 226, 240 (2d Cir.) ("It is well established that a district court, pursuant to its rulemaking authority or on an ad hoc basis, may review a contingency fee agreement.")., cert. denied, 484 U.S. 926 (1987); Jenkins v. McCoy, 882 F. Supp. 549, 553 (S.D.W. Va. 1995) (citing authority for the proposition that "courts have an inherent authority to supervise the collection of attorney fees and monitor contingent fee agreements").

For most of the past quarter century, the scope of the courts' inherent authority to regulate lawyers was considered to be extremely expansive. To be sure, rules of conduct are subject to the limits of constitutional provisions such as the First Amendment, see, e.g., Bates v. State Bar, 433 U.S. 350 (1977), as well as express statutory limits, see, e.g., Baylson v. Disciplinary Bd., 975 F.2d 102 (3d Cir. 1992). Subject to that caveat, however, courts have assumed that they have authority to impose upon lawyers virtually any standard of conduct that might plausibly be justi-
ing sets of rules drafted by bar associations.\textsuperscript{8} Thus, in judicial proceedings within a particular state, lawyers' conduct is typically governed by a set of rules adopted by that state's judiciary based on a version of either the ABA Model Rules of Professional Conduct ("ABA Model Rules")\textsuperscript{9} or the predecessor ABA Model Code of Professional Responsibility ("ABA Model Code").\textsuperscript{10}

In federal judicial proceedings, however, the regulation of lawyers has been characterized by uncertainty and disharmony.\textsuperscript{11} The conduct of lawyers in federal proceedings is governed by the rules of the federal, not state, courts.\textsuperscript{12} The federal district courts, however, do not currently apply a uniform set of professional rules.\textsuperscript{13} Moreover, even rules that are substantially identical have been interpreted in vastly different ways by courts of different

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  \item \textsuperscript{8} See, e.g., 1 Laws. Man. on Prof. Conduct (ABA/BNA) 01:3 (Feb. 23, 1994) (listing states adopting rules based on ABA Model Rules of Professional Conduct).
  \item \textsuperscript{9} Model Rules of Professional Conduct (1983).
  \item \textsuperscript{10} Model Code of Professional Responsibility (1970). The one exception is California, where the California Rules of Professional Conduct depart from both ABA models. See Wolfram, supra note 4, at 64-65.
  \item \textsuperscript{11} See, e.g., Rand v. Monsanto Co., 926 F.2d 596, 600 (7th Cir. 1991) (criticizing inconsistent standards in federal district courts resulting from application of state court rules of professional conduct).
  \item \textsuperscript{12} See, e.g., In re Snyder, 472 U.S. 634, 645 n.6 (1985) ("The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts."); In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992) ("Federal courts may adopt state or ABA rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law.''), cert. denied, 507 U.S. 912 (1993).
  \item \textsuperscript{13} See Daniel R. Coquillette, Report on Local Rules Regulating Attorney Conduct 3-4 (July 5, 1995) (on file with author) [hereinafter Coquillette Report]. Some district courts apply the ABA Model Rules; some apply the earlier ABA Model Code; some apply the standards applicable in the state in which the district court sits; some apply some combination of these; and others have not explicitly adopted any set of rules. Id.; see also Linda S. Mullenix, Multiforum Federal Practice: Ethics and Erie, 9 GEO. J. LEGAL ETHICS 89, 99-101 (1995) (discussing the various model codes and rules of professional responsibility adopted by different federal district courts); Eli J. Richardson, Demystifying the Federal Law of Attorney Ethics, 29 GA. L. REV. 137, 152 (1994) (discussing the failure of some federal courts to distinguish the applicable ethics code); Malcolm R. Wilkey, Proposal for a "United States Bar", 58 A.B.A. J. 355, 356 (1972) (advocating the development of a "uniform nationwide criteria for the admission of attorneys to practice before all United States district and appellate courts"); Harvey G. Sherzer, Note, Certification of Out-of-State Attorneys Before the Federal District Courts: A Plea for National Stan-
federal districts.\textsuperscript{14} In response to a report prepared in July 1995 by Professor Daniel Coquillette,\textsuperscript{15} a Committee of the Judicial Conference of the United States ("Judicial Conference") convened a meeting in January 1996 with officials of the Department of Justice ("DOJ") and congressional staff members, as well as representatives of the organized bar, to consider this problem. That meeting took up questions of both institutional and procedural choice: First, who should decide which rules of professional conduct to apply to lawyers in federal court proceedings? And, second, by what process should the rules be developed?

One possibility is for federal courts to continue to promulgate professional standards that are heavily dependent on the work product of the organized bar.\textsuperscript{16} Professor Coquillette proposes that greater uniformity in the regulation of federal practitioners may nonetheless be achieved by either of two routes. First, the federal judiciary might adopt the ABA Model Rules, with or without modification, as the single set of rules applicable in federal proceedings.\textsuperscript{17} Second, each federal district court might instead apply the rules applicable to practitioners in its state—rules which are themselves variants of one of the ABA models in all states but California.\textsuperscript{19} Most commentators favor one of these options.\textsuperscript{20}

dards, 36 GEO. WASH. L. REV. 204, 209 (1967) (recommending the unification of the many district court rules).

\textsuperscript{14} See infra notes 327-328 and accompanying text.
\textsuperscript{15} Coquillette Report, supra note 13.
\textsuperscript{16} See id. at 38-41. Eli J. Richardson recently made a similar recommendation. See Richardson, supra note 13, at 184 ("Each federal court should identify in its local rules a single code that governs attorneys' conduct in the court to the exclusion of all other codes.").
\textsuperscript{17} See Coquillette Report, supra note 13, at 38-39.
\textsuperscript{18} Id. at 39-41.
\textsuperscript{19} See supra note 10.
\textsuperscript{20} A committee of the Association of the Bar of the City of New York recently divided almost equally between these two options. See Committee on Professional Responsibility, Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation, 50 Rec. Ass'n B. CRRY N.Y. 842, 842 (1995) [hereinafter Uniform Ethics Rules]. Nine members favored a federal rule adopting the ABA Model Rules, while the other eight favored a choice-of-law rule designating federal courts to apply specified state rules of ethics. Id.

In her recently published article, Linda S. Mullenix takes a similar approach to the question of what ethical rules should apply in federal court. She begins by describing the federal courts' application of inconsistent sets of ethical rules as well as, in some cases, their reliance on common law or procedural rules. See Mullinex, supra note 13, at 100-02. She perceives this hodgepodge of authority to create difficulties for litigators in ascertaining what standard of professional conduct to uphold in any given case. As an interim solution, she suggests a uniform federal choice-of-law provision to guide the determination of which federal district's ethical rules should apply when the potentially applicable rules are inconsistent. See id. at 127. For the long term, she urges the federal judiciary to promulgate a uniform code of professional responsibility for federal practitioners. See id. at 126. She does not, however, address the nature of such a code.

By contrast, this Article does not agree that the existence of differently worded rules is the root of the problem for litigators. Rather, this Article argues that federal litigators are potentially subject to inconsistent standards of conduct largely because courts render inconsistent interpretations of rules that are substantially similar, if not identical, in wording. See infra part II. The adoption of a single set of federal rules will not go far toward establishing uniformity unless those rules are more detailed and less ambiguous than the ABA-drafted rules on which courts presently rely. A uniform set of ambiguous and open-textured rules would invite courts of dif-
An alternative to judicial regulation of federal practitioners is for another branch of government,\textsuperscript{21} such as an executive agency through the administrative rulemaking process,\textsuperscript{22} to establish detailed rules to govern some
different districts, and even different courts of the same district, to render inconsistent interpretations, as they presently do. \textit{See infra} part II.B.2. Litigators would remain uncertain about what conduct is expected of them. Thus, while taking as its starting point the need for federal rules of ethics, this Article focuses on the nature of the rules that federal courts should adopt and the process by which uniform rules should be developed. \textit{See infra} part III.

\textsuperscript{21} Fred C. Zacharias has explored the possibilities of various federal legislative approaches to regulating lawyers' professional conduct. \textit{See} Fred C. Zacharias, \textit{Federalizing Legal Ethics}, 73 TEX. L. REV. 335, 379-66, 396-406 (1994). Although his proposals are principally directed at the adoption of uniform standards to govern aspects of the professional conduct of both state and federal practitioners, \textit{see id.} at 379-87, 396-99, he briefly explores the possibility of a uniform code applicable only in federal courts, \textit{see id.} at 399-400. He is unenthusiastic about this option because it does not address the principal concern of his article, namely, the disparity of professional standards among the states. \textit{Id.} at 399-400.


or all aspects of lawyers' conduct in federal proceedings. Prompted in part by the inconsistent application of professional rules in federal court, the DOJ did precisely that in August 1994, thereby becoming the first federal agency to promulgate a detailed regulation explicitly preempting judicial standards of conduct that would otherwise apply to a group of federal lawyers. Its regulation applies to lawyers in the DOJ in the course of criminal or civil law enforcement proceedings and addresses in particular their communications with persons represented by counsel. By promulgating the regulation, the lawyers in the DOJ asserted the authority to be "self-regulating" in the truest sense. Pending federal legislation, intended to resolve questions about whether the DOJ possessed the authority it asserted, may encourage the DOJ to adopt preemptive rules governing other aspects of federal prosecutors' professional conduct.

In many ways, the Kaye Scholer case seemed to reprise the controversy two decades earlier surrounding the SEC's attempts to police lawyers appearing before that agency. See, e.g., SEC v. Spectrum, Ltd., 489 F.2d 535, 536-37 (2d Cir. 1973) (sanctioning lawyer who had negligently prepared an erroneous opinion letter used to sell securities); SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978) (holding that a lawyer knowing of substantial misrepresentations in proxy statement is liable for aiding and abetting securities fraud by closing merger). See generally ABA Section of Corp., Banking and Business Law Ad Hoc Comm., SEC Standard of Conduct for Lawyers: Comments on the SEC Rule Proposal, 37 BUS. LAW. 913 (1982) (announcing the response by the ABA to the SEC's proposed standards of professional conduct for lawyers); David H. Barber, Lawyer Duties in Securities Transactions Under Rule 2(e): The Carter Opinions, 1982 B.Y.U. L. Rev. 513, 514 (assessing "the current status of administrative actions brought by the SEC against lawyers pursuant to Rule 2(e) ... in an attempt to identify the duties of securities lawyers under that section"); Robert A. Downing & Richard L. Miller, Jr. The Distortion and Misuse of Rule 2(e), 54 NOTRE DAME LAW. 774 (1979) (discussing the existence and scope of the SEC's statutory authority to regulate the professionals practicing before it); Junius Hoffman, On Learning of a Corporate Client's Crime or Fraud—the Lawyer's Dilemma, 33 BUS. LAW. 1389 (1978); Steven C. Krane, The Attorney Unshackled: SEC Rule 2(e) Violates Client's Sixth Amendment Right to Counsel, 57 NOTRE DAME LAW. 50 (1981) (discussing the SEC's regulation of the securities bar).


25 The DOJ has taken issue with two other provisions of the ABA Model Rules. The first, Model Rule 3.8(f) of the ABA Model Rules, limits the circumstances under which a prosecutor may issue a grand jury subpoena to a lawyer in order to obtain testimony about the lawyer's client. In 1986, the United States District Court for the District of Massachusetts adopted a similar restriction, which the government challenged unsuccessfully. See United States v. Klubock, 639 F. Supp. 117, 117 (D. Mass. 1986), aff'd by an equally divided court, 832 F.2d 664 (1st Cir. 1987) (en banc). Following the ABA's amendment of the Model Rules to include Model Rule 3.8(f), the government opposed the adoption of this provision by other federal district courts with relative success. Compare Petition of Almond, 603 A.2d 1087, 1087 (R.I. 1992) (rejecting United States Attorney's request to exempt federal prosecutors licensed in the state from the provision requiring prior judicial approval for attorney subpoenas) with Baylson v. Disciplinary Bd., 975 F.2d 102, 104 (3d Cir. 1992) (holding that the rule may not be enforced against federal prosecutors in Pennsylvania). See generally Roger C. Cramton & Lisa K. Udell, State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules, 53 U. PITT. L. REV. 291, 359-86 (1992) (discussing "the controversy arising out of
This Article argues that both alternatives have benefits but are ultimately unsatisfactory.\textsuperscript{26} The administrative rulemaking process has the advantage of allowing the most complete elicitation and consideration of factors that ought to go into the choice of a particular standard of conduct.\textsuperscript{27} Further, it allows the development of rules that are both more certain and better tailored to particular aspects of professional conduct than the bar association rules of general applicability.\textsuperscript{28} Despite these advantages, lawmaking by a branch of government other than the federal judiciary is the wrong institutional choice. Executive agencies lack objectivity because rules of professional conduct invariably implicate the government's interest as a party to federal litigation.\textsuperscript{29} Administrative regulations will therefore overvalue the interests of the government as a litigant. There is, thus, substantial wisdom to the tradition of disinterested judicial regulation of the bar.

Although judicial responsibility for the regulation of lawyers avoids the problem of subjective lawmaking, and is thus a more appropriate institutional choice, the federal judiciary's wholesale adoption of one or more sets of professional rules drafted by a bar association is deficient from a procedural perspective. Unlike the detailed rules promulgated by the DOJ to govern a discrete area of conduct for a particular set of federal lawyers, the bar association rules are extremely imprecise.\textsuperscript{30} Adopting a bar association model simply defers judicial lawmaking to adjudication, where concrete questions of lawyer conduct will finally be resolved in individual cases with guidance from vague or ambiguous rules. Such cases arise sporadically with the result that the appropriate standard of conduct may never be determined authorita-

\textsuperscript{26} See infra parts I.C, II.B.

\textsuperscript{27} See infra notes 126-131 and accompanying text.

\textsuperscript{28} See infra note 133 and accompanying text.

\textsuperscript{29} See infra part I.C.2.

\textsuperscript{30} See infra notes 145-146 and accompanying text.
tively. Moreover, because judicial decisionmaking in adjudication lacks the openness and deliberateness that is characteristic of rulemaking, rulings concerning lawyer conduct are unlikely to be fully considered and, consequently, unlikely to command respect within the legal profession.31

This Article explores the relative merits of these institutional and procedural choices in the context of the problem that has occasioned much of the recent debate about the regulation of federal practitioners: the question of whether lawyers or their investigators may directly contact represented persons in federal criminal cases. To illustrate the shortcomings of agency rulemaking, Part I examines the recent DOJ regulation governing federal prosecutors' communications with represented persons. To show what is wrong with the federal courts' adoption and interpretation of bar association rules, Part II examines a recent decision of the United States Court of Appeals for the Second Circuit ("Second Circuit") dealing with criminal defense lawyers' communications with represented persons.

Finally, Part III of this Article proposes a third alternative that was presented to the Judicial Conference just prior to its January 1996 meeting.32 The federal judiciary should independently develop and promulgate specific and detailed rules of professional conduct for lawyers in federal court pro-

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31 See infra part II.B.1.

32 On December 1, 1995, Professor Coquillette presented a second report to the Committee on Rules of Practice and Procedure. See Daniel R. Coquillette, Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct 1 (Dec. 1, 1995) (on file with author) [hereinafter Coquillette Study]. It reported the results of a study of published federal court decisions addressing the rules governing attorney conduct over a five-year period. See id. at 2-5. Professor Coquillette found that 46% of the disputes involving attorney conduct concerned conflict-of-interest rules, and that the remaining cases generally addressed only a handful of ethical rules, including principally the rules against communicating with represented parties, the advocate-witness disqualification rules, and rules dealing with attorneys' fees. See id. at 3-4. Sixteen categories of ethical rules were never once addressed in decisions published during the five-year period, and many other categories were rarely addressed. Id. at 4-5. Based on his study, Professor Coquillette presented an option that had not been included in his initial report: "adopting uniform national federal rules for attorney conduct only in certain key areas, and then stipulating that all other cases be governed by state standards." Id. at 5.

Additionally, Professor Coquillette's report appended an earlier draft of this Article, see id. app. IV, and briefly described and discussed its proposal. See id. at 5-6. The study notes that, consistent with the proposal made in this Article, the Judicial Conference might adopt an independent set of detailed rules "in limited, narrow areas—rather than 'across the board.'" Id. at 6. In response to this Article's advocacy of a more comprehensive set of rules, however, the Coquillette Study notes that "[w]hether this would be seen as a benefit to the hundreds of thousands of American lawyers and law students who have had to learn at least two other model systems, is open to debate." Id. at 6 n*. This implicit criticism is taken up later in this Article. See infra part III.F.

At the same time, Professor Coquillette notes, perhaps half-seriously, that "if this Committee recommends the entirely new federal 'rules of conduct for lawyers' proposed by Professor Green, this Reporter would eagerly seize his place in history by creating an entirely new draft code." Coquillette Study, supra, at 6 n*. The observation may overlook the process this Article proposes for developing federal rules of ethics—a process that certainly would make it difficult for any individual to claim credit for the final product. See infra part III.A. Coquillette's eagerness to carry the laboring oar also suggests, however, both that developing a new set of ethics rules would be far less laborious than some might fear and that at least one of the leading authorities on legal ethics would enthusiastically participate in the project.
ceedings. Although judicial rulemaking has proven successful in estab-
lishing federal rules of procedure and evidence, federal courts and others can
be expected to resist taking this route. This Article demonstrates, however,
that only by independently developing detailed rules can the federal judiciary
establish standards of conduct for federal practitioners that are appropriate,
clear, and uniform. Although the process would be burdensome in the short
run, in the long run it would preserve resources that would otherwise be de-
voted to interpreting unclear rules in adjudication. In sum, federal court
rulemaking would retain the virtues but avoid the shortcomings of both exec-
utive branch rulemaking and the judicial adoption of bar association

I. Executive Agency Rulemaking: The Problem of Subjectivity

Lawyers in the DOJ are in a sense an exception to the general rule that
lawyers cannot regulate themselves. DOJ has authority to promulgate regu-
lations governing the conduct of its employees, including those who are law-
yers. For the most part, however, DOJ exercises this authority interstitially.
Thus, it has directed its lawyers to “be guided in their conduct” by the ABA
Model Code, while adopting independent standards of conduct for govern-
ment lawyers, some promulgated as federal regulations and others included
as guidelines in the Department of Justice Manual to supplement both the
profession’s standards and, insofar as they differ, the standards adopted by
federal courts.

DOJ’s extraordinary decision in August 1994 to preempt judicial stan-
dards of conduct by promulgating a regulation governing its lawyers’ com-
communications with represented persons was the product of more than a decade
of frustration with the applicable rules of professional conduct and the man-
ner in which courts enforced them. This Part argues that the regulation ap-

33 As Professor Coquillette notes, uniform rules could be adopted pursuant to either a
special act of Congress or the existing Rules Enabling Act, 18 U.S.C. §§ 2071-2077 (1994). Co-
quillettes Report, supra note 13, at 38.
34 See, e.g., Geoffrey C. Hazard, Jr., Discovery Vices and Trans-Substantive Virtues in the
Federal Rules of Civil Procedure are “a major triumph of law reform”); Peter G. McCabe, Re-
35 See infra notes 285-288 and accompanying text.
37 28 C.F.R. § 45.735-1 (1989) (“[A]ttorneys employed by the Department of Justice
should be guided in their conduct by the Code of Professional Responsibility of the American
Bar Association.”). This provision was not updated following the ABA’s adoption of the Model
Rules in 1983.
38 See, e.g., 28 C.F.R. § 50.2 (1989) (restricting communications with news media in pend-
ing cases); 28 C.F.R. § 50.10 (1989) (restricting issuance of subpoenas to members of the news
media).
39 See, e.g., Department of Justice Manual § 9-2.161(a) (Supp. 1993) (regulating issu-
ance of grand jury subpoenas to lawyers); id. § 9-7.302 (regulating monitoring of oral and wire
communications); id. § 9-2.142 (regulating dual and successive prosecutions in state and federal
court); id. § 9-11.153 (requiring warnings to grand jury witnesses).
appropriately addresses DOJ's concerns except in one significant respect. The process that led to the final regulation provided an opportunity for relevant interests and considerations to be aired fully. Because the regulation is both detailed and applicable in all federal districts, the uncertainties previously faced by DOJ lawyers have been greatly reduced. But, because of the subjectivity of the ultimate decisionmaker—DOJ itself—one cannot have any degree of confidence that, in the end, the regulation sets forth an appropriate standard of conduct for government lawyers.

Part I.A briefly describes the events leading up to the decision to promulgate this regulation. Part I.B describes the rulemaking process and its final product. Part I.C examines the virtues, and the one profound shortcoming, of this process.

A. Background: Federal Prosecutors and the No-Contact Rule

1. The No-Contact Rule in Criminal Prosecutions

In 1970, the ABA adopted the Model Code, which served as the model for sets of professional rules adopted within virtually every state over the ensuing few years. Disciplinary Rule ("DR") 7-104(A)(1) of the Model Code provided that:

[d]uring the course of his representation of a client a lawyer shall not: [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such party or is authorized by law to do so.41

This "no-contact rule," which has been said to protect clients from overreaching on the part of opposing counsel as well as to ensure clients the effective assistance of counsel, later became the basis of Model Rule 4.2 of the ABA.

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41 Model Code of Professional Responsibility DR 7-104 (1970). This rule was based on Canon 9 of the 1908 ABA Canons of Professional Ethics which provided in pertinent part: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." Canons of Professional Ethics Canon 9 (1908). This provision in turn derived from a century-old principle. See generally John Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests, 127 U. Pa. L. Rev. 683, 684-85 (1979) (discussing the origins of DR 7-104).

42 See Massiah v. United States, 377 U.S. 201, 211 (1964) (White, J., dissenting) ("Lawyers are forbidden to interview the opposing party because of the supposed imbalance of legal skill and acumen between the lawyer and the party litigant . . . ."); In re Atwell, 115 S.W.2d 527, 528 (Mo. Ct. App. 1938) ("The rule is to prohibit lawyers from taking advantage of litigants who are represented by counsel.").

43 See Bruce A. Green, A Prosecutor's Communications with Represented Suspects and Defendants: What Are the Limits?, 24 CRIM. L. BULL. 283, 285 & n.7 (1988); see also United States v. Batchelor, 484 F. Supp. 812, 813 (E.D. Pa. 1980) (noting that the rule "insure[s] that laypersons not make decisions of major legal implication without the advice of counsel"); Model Code of Professional Responsibility EC 7-18 ("The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer . . . ."); Laws. Man. on Prof. Conduct (ABA/BNA) 71:302 (June 22, 1988) ("The purpose of the restriction on communications with parties represented by counsel is to preserve the integrity of
Model Rules, which superseded the Model Code in 1983. Every state currently has a rule based on or equivalent to DR 7-104(A)(1) and Model Rule 4.2. Consequently, federal district courts apply the no-contact rule to lawyers in federal court proceedings pursuant to their local rules of court that incorporate by reference state rules of professional conduct, bar association rules, or both.

The no-contact rule potentially forecloses prosecutors from gathering evidence through otherwise lawful means. Constitutional decisions dealing with criminal investigations allow prosecutors and their agents substantial leeway to question individuals to obtain confessions or leads for use against others. Generally speaking, these decisions impose no greater restrictions on the prosecution when dealing with represented suspects and defendants than when dealing with unrepresented ones. For example, under Supreme Court decisions, the prosecution may employ undercover investigators or informants to obtain statements from an individual who has not yet been formally charged, regardless of whether that individual has retained a lawyer in connection with the investigation. Moreover, prosecutors or their investigators may question both represented and unrepresented defendants concerning crimes other than those for which they have formally been charged. Indeed, they may question represented defendants concerning pending charges, as long as these defendants first waive their right to counsel.

By the mid-1970s, criminal defense lawyers began to perceive the no-contact rule to be a possible source of restrictions on prosecutors and their agents beyond those already imposed by constitutional decisions dealing with police interrogation. This raised two problems for prosecutors. The first was that courts might suppress incriminating statements made by defendants, although otherwise admissible, on the ground that they had been obtained in violation of the ethical rule. The second was that disciplinary authorities might sanction prosecutors personally for violating the rule.

Although the no-contact rule undoubtedly originated with civil cases in mind, most prosecutors initially accepted that the rule applied in criminal cases.
cases. In the very least, the rule foreclosed various measures that were, in any event, forbidden by constitutional decisions. For example, prosecutors could not communicate directly with indicted defendants for purposes of obtaining admissions about pending charges or negotiating a plea. By virtue of the no-contact rule, a prosecutor who did so would be subject to professional discipline.

It was uncertain, however, whether and to what extent the rule imposed independent restrictions. Did the no-contact rule apply at all to criminal prosecutors who acted within constitutional and statutory limits, or were their communications "authorized by law" because they were consistent with the prosecutors' legal mandate to investigate and prosecute crimes? Assuming the rule applied to prosecutors, did it apply to criminal investigators, who, even when acting under prosecutors' supervision, had an independent mandate to investigate criminal conduct? If the rule applied to investigators as well as government lawyers, did it apply before the filing of criminal charges when, at least as a formal matter, an individual was not a "party" to criminal proceedings? The no-contact rule was sufficiently ambiguous that prosecutors could not predict with certainty how courts would answer these questions.53

By 1980, although the no-contact rule had rarely been invoked in federal cases, the DOJ began to see it as a cause of concern.54 One problem presented by the rule was that federal courts might employ it to restrict otherwise lawful investigative measures. Another was that different federal courts might interpret the rule differently, so that a federal prosecutor licensed in one state but practicing in another would face uncertainty about which interpretation was controlling.

2. Litigating the Lines

When the no-contact rule was initially invoked, the DOJ responded by arguing that its prosecutors' conduct fell within the lines. Unlike some of their state court counterparts, federal prosecutors were enormously successful in making this argument. Federal courts almost invariably rejected defendants' claims that a federal prosecutor, acting either directly or through investigative agents, violated the no-contact rule by communicating with represented persons.55


55 See, e.g., United States v. Ryans, 903 F.2d 731, 739-40 (10th Cir.), cert. denied, 498 U.S.
A testament to the vigor of the federal government’s advocacy is United States v. Hammad.\textsuperscript{56} In that case, the Second Circuit initially invoked the ethical rule to restrict prosecutors and their agents from communicating with represented suspects during the course of an investigation.\textsuperscript{57} The court revised its opinion, however, in response to the government’s petition for rehearing, and provided that as long as legitimate investigative techniques were used, direct communications with represented suspects would generally be permissible.\textsuperscript{58} While finding that the investigative technique employed in that case—the use of a sham grand jury subpoena—was in fact illegitimate, the court nevertheless declined to suppress statements thereby obtained from the defendant.\textsuperscript{59}

Thus, federal courts rarely invoked DR 7-104, and only when other improper conduct was coupled with the prosecution’s ex parte contact.\textsuperscript{60} Moreover, while state prosecutors were occasionally disciplined for violating the ethical rule,\textsuperscript{61} federal prosecutors apparently were not.\textsuperscript{62} Nonetheless, 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.

3. Challenging the Rule

In 1989, the DOJ shifted from arguing with the judges about where the ethical lines were drawn to asserting that prosecutors had no obligation to play within the lines drawn by the courts. In June of that year, then-Attorney General Richard Thornburgh issued what came to be known as the “Thornburgh Memorandum.” The memorandum stated baldly “that contact with a represented individual in the course of authorized law enforcement activity does not violate” the no-contact rule.\textsuperscript{63} Further, it announced that the DOJ would rely on the Constitution’s Supremacy Clause to resist attempts to apply the no-contact rule to federal prosecutors.\textsuperscript{64} It reasoned:

\textsuperscript{56} See Hammad, 838 F.2d at 839.
\textsuperscript{57} See id. at 839; United States v. Lopez, 765 F. Supp. 1433, 1452 (N.D. Cal. 1991) (prosecutor misled federal magistrate in seeking authorization to speak with represented defendant), vacated, 989 F.2d 1032 (9th Cir.), amended, 4 F.3d 1455 (9th Cir. 1993).
\textsuperscript{58} See, e.g., In re Brey, 490 N.W.2d 15 (Wis. 1992).
\textsuperscript{59} Disciplinary proceedings were brought against federal prosecutors on rare occasion, however. See United States v. Ferrara, 54 F.3d 825 (D.C. Cir. 1995); Kolibash v. Committee on Legal Ethics, 872 F.2d 571 (4th Cir. 1989); In re John Doe, 801 F. Supp. 478 (D.N.M. 1992).
\textsuperscript{60} Memorandum from Dick Thornburgh, United States Attorney General, to United States Attorneys 9 (June 8, 1989) (on file with author) [hereinafter Thornburgh Memorandum].
[A]lthough the states have the authority to regulate the ethical conduct of attorneys admitted to practice before their courts, . . . that authority permits regulation of federal attorneys only if the regulation does not conflict with the federal law or with the attorneys' federal responsibilities.

Notwithstanding the state of the law, the defense bar has continued to press its position that DR 7-104 does in fact limit the universe of appropriate federal investigative techniques.65

Thus, as conceptualized by the Thornburgh Memorandum, DR 7-104(A)(1) constituted state law that could not be applied to federal prosecutors insofar as doing so would conflict with the DOJ's law enforcement objectives. The memorandum was immediately and forcefully criticized by members of the private bar and by academics,66 some of whom saw it as an expression of the position that prosecutors may generally adhere to lower standards of ethics than other practitioners.67

The Thornburgh Memorandum potentially affected federal prosecutors in various ways. To those cautious prosecutors who sought to stay within the sometimes ill-defined lines drawn by the courts interpreting the no-contact rule,68 the memorandum provided some comfort that if they inadvertently

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65 Id. at 3.

66 See, e.g., Jerry E. Norton, Ethics and the Attorney General, 74 JUDICATURE 203, 207 (1991); ABA Adds Two Model Rules on Subpoenas, Practice Sales, 6 LAWS. MAN. ON PROF. Conduct (ABA/BNA) 25, 27 (Feb. 28, 1990) (opposing "any attempt by the Department of Justice unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers under applicable rules of the jurisdictions in which they practice.").

67 See, e.g., Norton, supra note 66, at 207 (asserting that the Thornburgh Memorandum portends "that state codes of professional conduct will simply not apply to attorneys who have as their client the federal government"); William Glaberson, Thornburgh Policy Leads to a Sharp Ethics Battle, N.Y. TIMES, March 1, 1991, at B4 (reporting that defense lawyers perceived "that the department was using the memorandum to give prosecutors a wink of encouragement [sic] to ignore the rules of ethics when the rules got in the way of obtaining a conviction"); Tom Watson, AG Decrees Prosecutors May Bypass Counsel, LEGAL TIMES, Sept. 25, 1989, at 1, 29 (reporting that Neil Sonnett, President of the National Association of Criminal Defense Lawyers, described the memorandum as "a green light to ignore the Code of Professional Responsibility"); see also Crumton & Udell, supra note 25, at 321-22 (describing private bar's objections to Thornburgh Memorandum).

68 In the Second Circuit, for example, decisions stated that the rule applied both "to government attorneys . . . [and] to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors," United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983) (citations omitted); that the rule generally applied to criminal investigations, United States v. Hammad, 858 F.2d 834, 838-39 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990); that the rule escape communications that are "authorized by law," which includes "legitimate investigative techniques in conducting or supervising criminal investigations," id. at 839; and that "the use of informants to gather evidence against a suspect" prior to indictment "will frequently fall within the ambit of such authorization." Id.

These pronouncements left open a variety of questions. For example, when is a federal investigator an "alter ego" of the prosecutor? Are post-arrest and post-indictment investigative techniques also within the "authorized by law" exception? Which investigative techniques are illegitimate? When is the use of informants outside the "authorized by law" exception? See Establishing Ethical Standards, supra note 53, at 34 ("Lacking a 'bright-line' rule, defense lawyers and courts have focused on various aspects of the Hammad opinion in challenging and evaluating the propriety of the prosecutor's conduct.") (discussing United States v. Santopiero,
strayed, they would be fully supported by the DOJ at its highest level. It may also have emboldened more adventurous prosecutors to test the lines where they were uncertain or even to ignore the lines drawn by the courts with regard to ex parte contacts with represented individuals. 69

The Thornburgh Memorandum also added another legal weapon to federal prosecutors' arsenal in cases in which courts or disciplinary bodies were called on to consider whether prosecutors had overstepped the bounds of the no-contact rule. 70 It allowed prosecutors to argue that, by virtue of the authority of the Attorney General, federal prosecutors no longer were legally obligated to play within the lines, and that state disciplinary bodies and federal courts had no constitutional authority to make federal prosecutors do so. In this respect, however, the Thornburgh Memorandum may have backfired, hoisting the DOJ on its own petard. 71 This is true for several reasons.

To begin with, the Thornburgh Memorandum was deliberately confrontational. It posed a challenge to the constitutional authority of courts to regulate federal prosecutors. Courts did not take this challenge lightly. For example, a federal district court in New Mexico, in rejecting a prosecutor's challenge to a state disciplinary proceeding predicated on an alleged violation of DR 7-104, stated:

[T]he Government threatens the integrity of our tripartite structure by arguing [that] its lawyers, in the course of enforcing the laws regulating public conduct, may disregard the laws regulating their own conduct. . . . [T]he insolence with which the Government promotes this as official policy irresponsibly compromises the very trust which empowers it to act. 72

This district court judge's displeasure with the Thornburgh Memorandum was surely shared, if not necessarily expressed, by many other federal judges.

At the same time that the Thornburgh Memorandum waved a red flag in front of the courts, it did little to advance a constitutional challenge to judicial authority. The Thornburgh Memorandum was just that—a memorandum. It did not have the force of law. So, while the DOJ had constitutional arguments to make, it could not effectively make the best argument: that the no-contact rule was "trumped" by federal law that explicitly authorized prosecutors' communications with represented individuals. 73


71 The petard was a medieval weapon which, by the use of explosives, was designed to blast open the heavy doors of an enemy's fortress, but which had an unfortunate tendency to misfire, causing its engineer, in Shakespeare's phrase, to be "hoist with his own petar." WILLIAM SHAKESPEARE, HAMLET act 3, sc. 4, line 208 (T.J.B. Spencer ed., 1980).


Indeed, the legal position reflected in the memorandum seemed to betray a misunderstanding of the constitutional question raised by the DOJ's challenge to the no-contact rule. Because federal courts had adopted the no-contact rule, this was not primarily a Supremacy Clause question, but a separation-of-powers question. The question was not, in other words, whether states could regulate federal prosecutors through the application of ethical rules, but whether federal courts could do so. Until the Thornburgh Memorandum, the authority of federal courts to regulate federal prosecutors as lawyers had never seriously been questioned. If the challenge were to be raised, it would ultimately be resolved by the federal judges whose traditional authority to regulate the bar was called into question. As far as one could tell from its public pronouncements, the DOJ under Attorney General Thornburgh clearly had not considered the difficulty it would face if it sought to rely on the Thornburgh Memorandum as a source of authority for ignoring the no-contact rule as it was applied by federal courts.

While providing no support for the new constitutional argument, the Thornburgh Memorandum undercut the DOJ's ability to make the old argument in favor of a narrow interpretation of the no-contact rule. Before the memorandum was issued, when prosecutors or their agents communicated with represented individuals, courts interpreting this rule were inclined to credit the federal prosecutors' arguments that they had acted in accordance with important law enforcement needs and that the disciplinary rule should be interpreted to accommodate such needs. Moreover, courts would have state authority to regulate the legal profession by enforcing its rules of professional conduct extends to the regulation of federal prosecutors, except insofar as state rules actually conflict with federal law, aff'd, 832 F.2d 649 (1st Cir.), aff'd on reh'g, 832 F.2d 664 (1st Cir. 1987).

74 See Cramton & Udell, supra note 25, at 354 ("[B]ecause many federal courts adopt state ethics rules as local court rules, giving them the force of federal law, the Supremacy Clause is not greatly implicated in these conflicts.").

75 See Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1365 (1st Cir. 1995); Cramton & Udell, supra note 25, at 297, 384-86 (addressing separation-of-powers issue in context of federal court rule restricting prosecutors from issuing subpoenas to lawyers).

The DOJ continues to mischaracterize the issue of regulation of federal prosecutors principally as a question of the applicability of state rules of professional conduct. Thus, in defending proposed federal legislation that would explicitly authorize the DOJ to adopt preemptive rules governing its lawyers' conduct, the Deputy Attorney General recently argued: "The attorney general cannot permit an individual state court rule to override the ethical and law enforcement responsibilities of a prosecutor acting under the authority of the federal government to enforce federal law." Jamie S. Gorelick, Within the Law, Wash. Post, May 21, 1995, at C7.

76 An ancillary question was whether state disciplinary authorities had authority to sanction federal prosecutors licensed by the state for violating DR 7-104 as applied and interpreted by the federal district court in which the prosecutor practiced. Until now, courts have found that state authorities may discipline federal government lawyers for misconduct in federal court proceedings. See, e.g., Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 576 (4th Cir. 1989) (ruling that state bar disciplinary proceeding may be removed to federal court); Waters v. Barr, 747 F.2d 900, 902 (Nev. 1987) (holding that state supreme court had authority to discipline Assistant United States Attorneys).

77 See, e.g., United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983) (holding that use of informant to talk with defendant after he retained counsel but before he was formally charged did not violate his Fifth or Sixth Amendment rights to counsel or the ABA Model Rules); United States v. Guerrero, 675 F. Supp. 1430, 1436-37 (S.D.N.Y. 1987) (holding that prosecuting attorney's alleged violation of rule prohibiting direct communication by an attorney with party
been inclined to find that, even where federal prosecutors had overstepped, they had done so in a good-faith effort to comply with an ambiguous disciplinary rule. After the Thornburgh Memorandum, and particularly in cases in which the federal prosecutor cited the memorandum to justify his or her conduct, courts were unlikely to assume the best.78

B. Redrawing the Lines: The New DOJ Regulation

1. The Rulemaking Process

In the face of the disaster that was the Thornburgh Memorandum—a disaster both from a public relations and a legal perspective—the DOJ embarked on a new, more sophisticated, and more promising approach. Where previously it had argued that it was entitled to play outside the ethical lines drawn by the courts, the DOJ now sought to redraw the lines.

The DOJ began in November 1992 with the proposal of a federal regulation79 to be issued pursuant to the Attorney General’s statutory authority to prescribe regulations governing the conduct of the DOJ’s employees, the conduct of litigation, and the like.80 The proposed regulation was intended to supplant Model Rule 4.2, DR 7-104, and equivalent no-contact rules adopted and applied by state and federal courts.81 The regulation was not justified, however, as a device for circumventing these ethical restraints, but rather, as a means of resolving “uncertainty and confusion arising from the variety of interpretations of state and local Federal court rules” by “impos[ing] a com-

he knows to be represented by counsel did not mandate suppression of suspect’s recorded statement).

78 For example, in United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), vacated, 989 F.2d 1032 (9th Cir.), amended, 4 F.3d 1455 (9th Cir. 1993), the defendant initiated communications with the prosecution, whereupon the Assistant United States Attorney obtained a federal magistrate’s permission to speak with the defendant in defense counsel’s absence. Rather than simply defending his conduct on the ground that it comport ed with DR 7-104, the prosecutor invoked the Thornburgh Memorandum as a principal justification. The district court excoriated him for doing so, characterizing the memorandum as “nothing less than a frontal assault on the legitimate powers of the court.” Id. at 1461. Moreover, the court construed the prosecutor’s conduct in seeking the magistrate’s permission far more harshly than it need have done, finding, on the basis of a fairly ambiguous record, that the prosecutor had misled the magistrate about why the defendant was disinclined to include the defense attorney in discussions with the prosecutor. On appeal, the United States Court of Appeals for the Ninth Circuit initially determined that this finding of fact was not clearly erroneous, United States v. Lopez, 989 F.2d 1032, 1040 (9th Cir.), amended, 4 F.3d 1455 (9th Cir. 1993), although it reversed the district court’s order dismissing the indictment, concluding that the remedy was inappropriate. Id. at 1042. At the government’s urging, the court of appeals subsequently revised its opinion to observe that, although the magistrate judge apparently did not have a full understanding of the facts surrounding Lopez’s request, the district court’s “finding that [the prosecutor] materially misled the magistrate judge . . . is not sustainable without resolving certain conflicts in the testimony . . . as to what [the prosecutor] knew and when he knew it.” 4 F.3d at 1462.


80 See id. at 54,741.

81 See id. at 54,740-41.
prehensjve, clear, and uniform set of regulations on the conduct of government attorneys . . . ."82

In drafting the regulation, the DOJ purported to be "follow[ing], in substance, traditional interpretations of DR 7-104,"83 at least with respect to conduct that authorities had previously addressed. With respect to the gray areas, the DOJ purported "to strike an appropriate balance between the need to protect the attorney-client relationship from unnecessary intrusion and the need to preserve the ability of government attorneys to conduct legitimate law enforcement activities."84 The substance of the proposal seemed to belie this approach, however. The proposed regulation, which would have imposed virtually no restrictions on prosecutors other than those reflected in constitutional case law,85 essentially codified the Thornburgh Memorandum. Prior to the initiation of formal criminal proceedings, when a defendant's Sixth Amendment right to counsel attaches, prosecutors and their investigators would have been permitted to undertake any "communication . . . permitted by law."86 During the "prosecutive stage" of a criminal proceeding, after the defendant had formally been charged with a crime, prosecutors and their investigators would have been permitted to contact the defendant directly to gather evidence of crimes unrelated to the ones charged.87 They would also have been permitted to speak with a represented defendant about the pending charges if the defendant had "initiated" the communication and had "knowingly, intelligently, and voluntarily waived the presence of counsel."88

82 Id. at 54,737; see Jamie S. Gorelick & Geoffrey M. Klineberg, Justice Department Contacts with Represented Persons: A Sensible Solution, 78 JUDICATURE 136, 142-43 (1994).
83 Communications with Represented Persons (1992), supra note 79, at 54,740.
84 Id.
85 The regulation would have codified restrictions contained in the case law. For example, it would have provided that, once the defendant's Sixth Amendment right to counsel attached, prosecutors "may not deliberately elicit incriminating information from the represented person concerning the pending criminal charges." Id. at 54,743. This restriction is already imposed by decisions applying the right to counsel to police interrogation. See, e.g., Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that "petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel").

Similarly, at that stage of proceedings, the regulation would have imposed restrictions on undercover agents' and informants' presence at meetings between the defendant and the defense lawyer. See Communications with Represented Persons (1992), supra note 79, at 54,743. Similar limits have been recognized in Supreme Court and lower court decisions dealing with the so-called "spy in the enemy camp." See, e.g., Weatherford v. Bursey, 429 U.S. 545, 557-58 (1977) (holding that undercover agent's presence at a meeting between defendant and defendant's counsel was not a violation of the defendant's Sixth Amendment rights as long as agent did not communicate the substance of the conversation); United States v. Melvin, 650 F.2d 641, 644 (5th Cir. 1981) (finding dismissal of indictment inappropriate when defendant had failed to show any prejudice resulting from undercover agents' presence at a meeting between himself and his counsel); United States v. Levy, 577 F.2d 200, 208 (3d Cir. 1978) (reversing conviction because informant's revelation of defense strategy to prosecuting attorneys was violative of defendant's Sixth Amendment rights).
86 Communications with Represented Persons (1992), supra note 79, at 54,742.
87 See id.
88 Id.
Although the DOJ engaged in some informal consultations with members of the organized bar and consulted academic, judicial, and professional writings in the course of drafting the proposed regulation, it saw the thirty-day public notice-and-comment period as the principal occasion for receiving ideas from individuals outside the DOJ regarding the wisdom of the regulation. During that period, the DOJ received twenty sets of comments, half of which urged the DOJ to extend the period for public comment. The DOJ, now under the direction of Attorney General Janet Reno, did so in July 1993, while at the same time responding (in almost every case unsympathetically) to the comments already received.

In March 1994, the DOJ proposed another rule. The original version had been revised in response to the comments received in the interim, the overwhelming majority of which had come from federal prosecutors (only one of whom opposed the rule) and from others within the federal government. Among other things, the new version would preclude prosecutors from engaging in plea discussions and similar negotiations with represented individuals at any stage of a criminal case, unless the individual had initiated the discussion. Further, it would require prosecutors to seek judicial approval before talking about the substance of pending charges with a defendant who had initiated communications in the absence of the defense lawyer.

For the first time, the DOJ also issued planned additions to the Department of Justice Manual to govern prosecutors' communications with represented individuals. The planned additions to the Department of Justice Manual would impose restrictions that were not included in the regulation itself. These additional restrictions, like others contained in the Department of Justice Manual, would not have the force of law, however.

Finally, in August 1994, more than a year and a half after such a rule was first proposed, the DOJ promulgated its final rule governing contacts with

90 See id. at 39,976-77.
91 See id. at 39,976-91 (addressing comments).
93 See id. at 10,088-89.
94 See id. at 10,101.
95 See id. at 10,100.
96 See id. at 10,097-99. The planned provisions, as well as the proposed regulation, governed all DOJ attorneys engaged in criminal and civil law enforcement, not just prosecutors. See id. at 10,097. That is equally true of the regulation as ultimately promulgated. See Communications with Represented Persons (Final Rule), supra note 23. This Article focuses, however, on these provisions insofar as they affect federal prosecutors and, therefore, for convenience, refers to federal prosecutors in contexts where other DOJ lawyers might also have been included.
97 See, e.g., Chesnoff v. United States (in re Grand Jury Proceedings), 13 F.3d 1293, 1296 (9th Cir. 1994) (holding that grand jury witness lacked standing to assert a violation of an internal government guideline regulating subpoenas issued to attorneys because DOJ Guidelines do not establish rights in civil or criminal matters but merely assist the United States Attorney's Office in its internal operations).
represented persons without their lawyers' consent. This final version made only minor amendments to the penultimate one. Shortly thereafter, the DOJ incorporated provisions in the Department of Justice Manual imposing additional, albeit unenforceable, restrictions on federal prosecutors in communicating with represented persons.

2. The New Regulation

Entitled "Communications with Represented Persons," the new regulation applies both to federal prosecutors and to other DOJ lawyers engaged in civil law enforcement investigations or proceedings. It is intended to supersede rules of professional ethics that restrict lawyers in making direct contact with individuals who are represented by counsel. The regulation establishes a standard for federal government lawyers that is more permissive than the ethical rules, particularly as they have been interpreted by state courts and ethics committees. Furthermore, the regulation expressly forbids state disciplinary authorities and federal courts from enforcing the rules of ethics insofar as they are more restrictive. Indeed, it forbids state disciplinary authorities from sanctioning a federal government lawyer for violating one of the more permissive rules established by the regulation itself, unless and until the Attorney General finds that the lawyer willfully violated the rule. Thus, with respect to ethical limits on communications with represented parties, the DOJ has arrogated to itself the authority both to redraw the line more expansively and to decide for itself when federal government lawyers may be called for crossing the line.

In criminal cases, the regulation authorizes prosecutors and their agents to communicate with represented individuals before they are arrested or indicted for purposes of conducting an investigation. The principal limitation on such communications at the investigative stage is that the prosecutor may not engage in plea negotiations, negotiations over immunity, or similar negotiations in counsel's absence unless the individual initiates the communication and the court consents. Once the individual is arrested or charged,

98 See Communications with Represented Persons (Final Rule), supra note 23.
99 See id. at 39,910.
102 See id. § 77.2.
103 See id. § 77.12.
104 See infra notes 111-117 and accompanying text.
105 See 28 C.F.R. § 77.11(a) (1995).
106 See id.
107 See id. §§ 77.3, 77.7. The regulation is intended in part to supersede the Second Circuit's ruling in Hammad that covert communications with represented individuals are improper when illegitimate investigative techniques are employed. See supra note 59 and accompanying text. Whether the regulation must be read to do so, however, is unclear. The court would be free to hold that, whether or not an individual is represented, the use of a sham subpoena to obtain statements from that individual is improper. Cf. People v. Auld, 815 P.2d 956, 959 (Colo. Ct. App. 1991) (holding that dismissal of the case is an appropriate remedy when the district attorney perpetrates a fraud upon the court), cert. denied, 502 U.S. 1092 (1992). But see United States v. Martino, 825 F.2d 754, 762 (3d Cir. 1987) (upholding use of sham subpoena).
108 28 C.F.R. §§ 77.6(c), 77.8 (1995).
the individual goes from being a "represented person" to a "represented party," in the language of the regulation, and further restrictions on ex parte communications are imposed. In general, the prosecutor may not communicate or cause agents to communicate directly with the defendant "concerning the subject matter of the representation." This general rule is, however, subject to various exceptions that are potentially controversial, in that they authorize communications with represented defendants that many would view as inappropriate and that, indeed, might be improper under judicial interpretations of the prevailing ethical rules.

For example, the regulation authorizes prosecutors to interview represented defendants "in the course of an investigation . . . of additional, different or ongoing" crimes (i.e., crimes other than those for which the defendant has been arrested or indicted). This has been considered improper by some authorities even when the prosecutor makes an effort to avoid discussing the crime charged—an effort that the regulation seems to require of federal prosecutors. It might reasonably be argued that the interrogation of indicted defendants about past conduct jeopardizes all the interests that the no-contact rule is designed to protect. In the defense attorney's absence, a prosecutor or her agents may obtain incriminatory admissions by unfairly reinforcing and exploiting the defendant's misunderstanding that it is in his best interest to cooperate. The ex parte contact may also undermine the defendant's trust and confidence in the defense lawyer who represents him

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109 See id. § 77.3.
110 Id. § 77.5.
111 Id. § 77.6(e).
113 The regulation prohibits "any communication that is prohibited by the Sixth Amendment right to counsel." 28 C.F.R. § 77.4 (1995). The impact of this restriction, however, is far from clear. For example, the Supreme Court has not construed the Sixth Amendment right to counsel to prohibit the prosecutor from deliberately eliciting statements from an indicted defendant in defense counsel's absence. It has simply barred the admission of the statements in evidence on the then-pending charges. See Maine v. Moulton, 474 U.S. 159, 180 (1985). The final rule does not contain the explicit restriction included in the original proposal that would have required the prosecutor to avoid "deliberately elicit[ing] incriminating information from the represented person concerning the pending criminal charges." Communications with Represented Persons (1992), supra note 79, at 54,743. The supplementary information accompanying the final rule suggests that the omission was deliberate, and that prosecutors are now authorized to elicit from represented defendants incriminating statements about pending criminal charges as long as the prosecutor's subjective motivation is to investigate other, uncharged offenses. See Communications with Represented Persons (Final Rule), supra note 23, at 39,922.
114 See Green, supra note 43, at 320. Often an individual contacted by a prosecutor or her agents is led to believe that it is in his interest to cooperate with law enforcement authorities. Prosecutors and agents typically make comments to reinforce this belief. When prosecutors or their agents contact an indicted defendant in defense counsel's absence, they are likely to create the erroneous impression that it is in the defendant's interest to cooperate in order to receive a benefit with respect to the pending charges and, furthermore, that it would be against the defendant's interest to include defense counsel in the conversation. As a consequence, the defendant may make incriminating statements in the erroneous belief that the prosecutor will dismiss the pending charges or provide some other form of leniency in reward for his cooperation.
on the pending charges, thereby diminishing the defense lawyer's later effectiveness in conducting plea negotiations, in giving advice, or in advocating for the defendant in court. One might therefore question whether, in authorizing prosecutors to seek incriminating statements from defendants whenever there are uncharged offenses to investigate, the regulation gives adequate weight to the interests protected by the no-contact rule.\textsuperscript{115}

Indeed, as interpreted in a recent advisory opinion of the ABA Standing Committee on Ethics and Responsibility, the prosecutor should be forbidden by the no-contact rule from interviewing an individual represented by counsel in connection with a criminal investigation whether or not the individual is under indictment on unrelated charges.\textsuperscript{116} According to the ABA committee, once a suspect is known to have a lawyer representing him with respect to specific allegations, the rule should be read to forbid direct contacts by either the prosecutor or investigators acting under the prosecutor's direction.\textsuperscript{117}

\textbf{C. The Benefits and Shortcomings of Federal Executive Rulemaking}

In promulgating the new federal regulation, the DOJ asserted an authority it never previously has exercised and that no other body of lawyers (other than judges) ever has been thought to possess: the exclusive authority to make and interpret the ethical rules governing certain areas of their own professional conduct. Commentators have questioned whether the DOJ currently has the authority to exclude the judiciary from its traditional province of establishing ethical rules for lawyers,\textsuperscript{118} and, as noted previously, federal legislation has been proposed to provide the DOJ more explicit authority to do so.\textsuperscript{119} The DOJ will encourage federal courts to avoid having to resolve this question by interpreting the no-contact rule to accommodate the provisions of the regulation.\textsuperscript{120} If, however, a federal court concludes that a fed-

\textsuperscript{115} See id. at 318-20 & 320 n.120.


\textsuperscript{117} The opinion expresses the view that: (1) the no-contact rule applies in criminal as well as civil matters, see id. at 5-6; (2) the rule applies to communications with anyone known to be represented by counsel in connection with the matter to be discussed, not only with formal "parties," see id. at 6-9; (3) although some courts have held the rule inapplicable to criminal investigations prior to arrest or indictment, these readings of the rule are unsound, see id. at 9-12; and (4) a lawyer is responsible for the activities of an investigator acting under his or her direction. See id. at 19-21.


\textsuperscript{120} DR 7-104 and equivalent ethical rules, as adopted in most jurisdictions, permit otherwise improper communications that are "authorized by law." The government argues that conduct comporting with the regulation falls within the "authorized by law" exception. See Communications with Represented Persons (1993), supra note 89, at 39,978. One problem the government faces is that this exception is not included in the no-contact rule applied in some districts. See id.

Another problem is that a federal regulation is not necessarily the type of "law" to which
eral prosecutor acted in violation of the no-contact rule even though the communications were authorized by the regulation, several difficult questions will arise, including: whether federal courts have rulemaking authority or general supervisory authority to adopt the no-contact rule and to apply it to federal prosecutors, and, if so, whether the federal court has constitutional authority to apply the no-contact rule in the face of a contrary federal regulation.\(^{122}\)

the ethical rule is intended to defer. See Utah State Bar Ethics Advisory Opinion Comm., Op. 95-05 (1996) (noting that it is unclear whether the DOJ regulation constitutes “law” authorizing otherwise impermissible communications under Model Rule 4.2). A recent ABA opinion takes the view that the regulation would fall within this exception only if the regulation had “been properly promulgated pursuant to statutory authority that contemplates regulation of the character in question.” ABA Op. 95-396, supra note 116, at 22. Although the opinion retreats from deciding whether the regulation meets this test, id. at 23 n.65, Lawrence J. Fox’s separate concurrence flatly states the view that the DOJ’s “regulations are clearly not authorized by law” because “[t]here is no Congressional grant of authority to the Justice Department to issue regulations undermining the fundamental rights of clients to be represented by counsel.” Id. at 24 (concurring opinion).

In United States v. Florida Cities Water Co., 41 Env’t Rep. Cas. (BNA) 1541 (M.D. Fla. 1995), an environmental enforcement proceeding initiated by the DOJ, the defendant raised some of these questions, but the district court avoided resolving them. See id. at 1543. The court endorsed the magistrate judge’s order requiring that before the government attempted to interview potential witnesses, it must give the defendant reasonable advanced notice. See id. This would allow the defendant’s counsel, in the case of a represented witness, to alert the witness’s counsel and, in the case of an unrepresented witness, to discuss the matter with the witness and to advise the witness that he or she may be subject to criminal prosecution. Because the court’s order did not flatly prohibit the government from interviewing the defendant’s present or former employees, but merely required advanced notice before government lawyers attempted such interviews, the applicability of the DOJ regulation was not directly called into question.

Decisions such as Hammad and Lopez suggest that, until now, federal courts have taken it as a given that their authority to regulate the professional conduct of lawyers justifies applying the no-contact rule to federal prosecutors, at least in the absence of conflicting federal law. In response to suggestions that it lacks authority to supersede ethical rules adopted by the federal court, however, the DOJ has argued, among other things, that federal courts’ “supervisory power may not be used as a means of prescribing standards of prosecutorial conduct for out-of-court activities” such as criminal investigations that otherwise “do not violate clear constitutional or statutory norms.” Communications with Represented Persons (1993), supra note 89, at 39,981.

The DOJ’s distinction between in-court and out-of-court conduct is apparently premised on the assumption that courts’ inherent authority may be justified only by the interest in protecting the integrity of judicial proceedings. This cramped construction of judicial authority defies the contemporary practice and understanding. Courts routinely assume responsibility to set standards governing the setting of attorneys’ fees and other out-of-court relations between lawyers and their clients or third parties. See Jenkins v. McCoy, 882 F. Supp. 549, 553 (S.D.W. Va. 1995) (citing authorities).

There is little helpful precedent addressing the separation-of-powers question that would be raised by a conflict between an ethical rule properly adopted by the courts and a regulation properly promulgated by the executive.

A third constitutional question would be raised in a case in which a federal prosecutor violated the regulation itself. As noted earlier, the regulation not only redraws the lines, but also leaves it to the Attorney General to call the lines. See supra note 106 and accompanying text. Unless the Attorney General finds a violation of the regulation, and further finds that the violation was willful, the prosecutor may not be personally sanctioned by a state or federal disciplinary body. 28 C.F.R. § 77.12 (1995). This provision challenges the authority of courts to
These questions are important, but for purposes of this Article the more important question is different. DOJ’s exercise of executive agency rulemaking authority illustrates one available process for developing standards of professional conduct for some or all lawyers in federal court proceedings. The question is whether, assuming it is available, this process is an appropriate one. This Part begins by addressing the virtues of the process, then addresses the single, but fatal, shortcoming: the ultimate decisionmaker’s lack of objectivity.

I. Virtues of Agency Rulemaking

In commentary accompanying its regulation and the three earlier proposals, the DOJ reflected its understanding of its role and concomitant responsibilities in fashioning rules to govern its lawyers’ professional conduct. In the DOJ’s portrayal, it approached the task of rulemaking essentially as the judiciary would be expected to if it were to amend and expand DR 7-104 to clarify how the rule applies to prosecutors. Thus, the DOJ justified the regulation as a reasonable exercise of lawmaking, implicitly contrasting it with the predecessor Thornburgh Memorandum, which, at least in the eyes of judges and commentators, was a pure exercise of power designed to liberate federal prosecutors from what they viewed as an onerous ethical restriction imposed by the judiciary. Indeed, the regulation was depicted as an exercise in self-restraint more than self-liberation. The drafters’ goal was simply to establish a single, uniform standard governing communications with represented individuals. In the areas where there was a consensus among federal courts about the scope of how the ethical rule applied to prosecutors, the prevailing approach would be codified by the regulation, while in the gray areas, the DOJ would “strike an appropriate balance.” This approach to developing standards of professional conduct seems entirely appropriate.

discipline attorneys who are federal prosecutors for violating law that unquestionably applies to them, namely, the DOJ’s own regulation.

123 See, e.g., Communications with Represented Persons (Final Rule), supra note 23, at 39,913 (“[T]his rule is not designed to diminish the ethical responsibilities of government attorneys; it is intended to clarify those responsibilities.”).

124 Id. at 39,924-25; see also id. at 39,911 (“this regulation attempts to reconcile the purposes underlying DR 7-104 and Model Rule 4.2 with effective law enforcement”).

125 An earlier article suggested that the propriety of a prosecutor’s communications with represented parties should be determined in the light of a balancing of the “legitimate interests that weigh in favor of or against the application of the rule.” Green, supra note 43, at 315; see also Green, supra note 6, at 534-42 (arguing that ambiguous ethical rules should be interpreted to promote sound policy, not to promote their drafters’ apparent intent). When prosecutors or their agents communicate directly with a represented suspect or defendant, rather than communicating through defense counsel, several important interests protected by DR 7-104(A)(1) may be jeopardized, including, primarily, the interest in protecting the client from overreaching and the interest in assuring the client effective representation of counsel. On the other hand, direct communications with the client may promote legitimate law enforcement interests, including, among others, the interest in developing reliable evidence for use at trial and the interest in preventing future crimes. See Green, supra note 43, at 318-19. The point of the article was that courts should balance these countervailing interests when deciding how to apply DR 7-104(A)(1) to criminal investigations and prosecutions—a question not specifically contemplated by those who drafted the rule.
The process undertaken by the DOJ to craft rules of conduct that would strike the appropriate balance, although not beyond criticism, seemed reasonably designed to produce a full public discussion and consideration of factors relevant to the calculus. From November 1992, when it first proposed a rule, until August 1994, when it finally promulgated one, the DOJ received and reviewed comments from 260 different sources.\(^{126}\) Although the majority came from within the DOJ,\(^{127}\) others came from private attorneys, public defender offices, local bar organizations, state bar disciplinary counsel, state prosecutors, and state court judges.\(^{128}\) Many of the comments from outside the DOJ were directed principally at the question of whether it was necessary or appropriate for the DOJ to adopt exclusive rules governing its own lawyers’ conduct.\(^{129}\) Other comments, however, addressed the content of the proposed rule in its various incarnations,\(^{130}\) prompting the DOJ to acknowledge criticism, to defend the proposal where it considered the criticism unjust, and to amend the proposal to the extent it deemed appropriate.\(^{131}\)

Certainly, the process by which the DOJ promulgated the regulation was more open and more considered than the process by which the ABA adopted DR 7-104(A)(1) and Model Rule 4.2. Likewise, the DOJ gave far more attention to the question of when prosecutors should properly communicate with represented individuals than did any of the federal district courts at the

\(^{126}\) See Communications with Represented Persons (Final Rule), supra note 23, at 39,912-13 (receiving 20 comments in response to the initial proposal, 219 comments in response to the second publication of that proposal, and 31 comments in response to the third and substantially revised proposal).

\(^{127}\) Communications with Represented Persons (1994), supra note 92, at 10,088-89 (receiving 219 written comments in response to second publication of proposal of which 159 were from DOJ employees).

\(^{128}\) See, e.g., Communications with Represented Persons (Final Rule), supra note 23; Communications with Represented Persons (1994), supra note 92; Communications with Represented Persons (1993), supra note 89.

\(^{129}\) See, e.g., Communications with Represented Persons (Final Rule), supra note 23, at 39,913-17 (addressing criticisms of third proposal relating to the need for the rule and the DOJ’s authority to adopt it); Communications with Represented Persons (1993), supra note 89, at 39,976-82 (reviewing general comments received in response to first version).

\(^{130}\) See, e.g., Communications with Represented Persons (1994), supra note 92, at 10,089-96 (addressing comments relating to provisions of second proposal and describing revisions); Communications with Represented Persons (1993), supra note 89, at 39,982-91.

\(^{131}\) See, e.g., Communications with Represented Persons (Final Rule), supra note 23, at 39,918 (expanding definition of “attorney for the government” in final rule in response to criticism from DOJ components); id. at 39,919 (rejecting criticism of rule’s distinction between a represented “party” and a represented “person”); id. at 39,920 (clarifying, “[i]n response to one comment, . . . that representation is presumed to cease to be current for purposes of these rules when the matter in question has reached a final judgment . . . unless there is reason to believe that representation is continuing”); id. at 39,922 (responding to a comment from a United States Attorneys’ Office, final rule was changed to clarify that, for purpose of exception permitting communications with arrested defendants who waive their right to counsel, “the usual Miranda warnings and waiver suffice”); id. at 39,922-23 (agreeing with individuals’ comments that the range of contacts allowed during investigations was broader than necessary to meet the DOJ’s legitimate needs, but indicating that the DOJ would address this concern through changes to the Department of Justice Manual, rather than the rule itself).
time they decided to adopt professional rules on a wholesale basis by incorporation in a local rule of court.\textsuperscript{132}

Moreover, the detailed rules produced by the DOJ, some contained in the regulation itself and some added to the Department of Justice Manual, provided far more guidance than the no-contact rule, which is intended to apply to lawyers universally. The standards of conduct adopted by the DOJ focus on a single group of lawyers—federal government lawyers—engaged in a limited area of representation—criminal or civil law enforcement.\textsuperscript{133} Because they are specific and contextual, they leave notably less room for interpretation than the no-contact rule. Moreover, because they apply to federal government lawyers in all districts, they avoid the problem of "balkanization"—the danger that a federal prosecutor functioning in different districts will be subject to inconsistent rules.

2. The Lack of Objectivity

The one serious and, indeed, fatal flaw in the process by which the DOJ promulgated its regulation was that the drafting and ultimate decisionmaking were entirely controlled by lawyers within the DOJ. Oddly, in the many pages of commentary accompanying the regulation and the proposed rules that preceded it, the DOJ never squarely confronted this problem. Critics of the proposed rule had seemingly raised this question, asking, for example, whether "the Department of Justice is the proper arbiter of the ethical standards to be imposed upon its employees."\textsuperscript{134} But the DOJ took this and similar comments as a challenge to its legal authority, not to the wisdom of exercising its authority.

The prosecutor's customary role is in large part as advocate, and this was the role that dictated the DOJ's approach to DR 7-104 before it drafted the regulation. By contrast, in drafting and promulgating the regulation, the DOJ's lawyers did not serve as advocates. Nor did they serve as administrators of criminal justice, as they do when they exercise discretion about whom to investigate, whom to charge, what charges to bring before the grand jury, whether to plea bargain, and the like. In this context, they acted as lawmakers. This role brought with it a different, and ill-defined, set of responsibilities, which was in tension with the responsibilities flowing from their other roles.

Was the DOJ well equipped to assume the relatively unfamiliar role of lawmaker—a role which, as conceived by the DOJ itself, is close kin to that of judge?\textsuperscript{135} Or, to ask another way, was the DOJ qualified to develop ethi-

\textsuperscript{132} For the most part, federal district courts have adopted local rules that incorporate either the standard of the state in which the court sits, an ABA model, or both. See supra note 13. There is no indication that, in the course of doing so, district courts gave attention to the wording or substance of particular rules. See Green, supra note 6, at 533-34, 547 (noting when district court judges of Connecticut adopted the ABA Model Code they "did not discuss the particular provisions or even think about them").

\textsuperscript{133} See text accompanying note 102.

\textsuperscript{134} Communications with Represented Persons (1993), supra note 89, at 39,979.

\textsuperscript{135} A related question concerns the enforcement of the regulation. As noted earlier, the regulation precludes courts from sanctioning government lawyers for communicating with repre-
cal rules designed to balance the interest of the attorney-client relationship against the countervailing law enforcement interests?

Surely, the DOJ possesses the requisite insight and expertise, particularly when it comes to evaluating the relevant law enforcement needs. The DOJ may lack comparable expertise when it comes to evaluating the impact of prosecutors' communications on represented defendants and, in particular, on their relationship with counsel. But the DOJ is comprised of extremely bright lawyers with a variety of experiences. Moreover, written comments, as well as informal input in the drafting stage, allowed the DOJ to collect relevant information.

What was lacking, however, was objectivity. The DOJ is not only, or even primarily, a lawmaker, but a representative of a party before the federal courts. Any rules of conduct it developed would profoundly affect the interests of its client, the government. Prosecutors engaged in the competitive enterprise of gathering incriminating evidence cannot objectively determine how much weight to give the respective interests of the government and the individual and how the balance should be struck. Outside the context of rulemaking, many would argue, the DOJ and its prosecutors have routinely undervalued the attorney-client relationship in their quest for evidence. The practice of issuing subpoenas to criminal defense attorneys for information relating to their clients 136 is just one example to which defense lawyers might point. When prosecutors act as rulemakers, they cannot avoid being biased by their investigative interests or being influenced by the kinds of judgments they routinely make as advocates—including formerly as advocates for a narrow interpretation of the no-contact rule. 137

136 See supra note 25 (citing authorities addressing ABA Model Rule 3.8(f), which restricts this conduct).

137 See, e.g., ABA Op. 95-396, supra note 116, at 24 ("To ever permit a litigant (particularly one as powerful and capable of threatening represented parties as the Justice Department) to decide what rules will govern its own lawyers unbalances the judicial process in a fundamental, unfortunate and inequitable way.")

The DOJ might answer that its lawyers routinely exercise objective judgment outside the trial context. For example, individual prosecutors exercise objectivity in deciding whom to investigate and what charges to bring. While taking into consideration issues of fairness to the accused and proportionality, prosecutors also take into account the government's own interests in preserving resources, in gathering evidence to be used against others, in deterring future crimes by the particular defendant and other defendants, and the like. There is no reason to believe, however, that prosecutors weigh the respective considerations objectively, that is to say, in essentially the same way that a neutral and detached officer would. Nor is there any requirement that they do so.

The DOJ might also argue that as an entity it is practiced in exercising objectivity in the adoption of standards that restrain the conduct of its lawyers. But this answer confuses self-restraint with objectivity. Provisions of the Department of Justice Manual that guide or limit the discretion of federal prosecutors are often a product of self-interest. For example, the provision on the issuance of subpoenas to attorneys, Department of Justice Manual § 9-2.161(a)
Even if the DOJ were reasonably qualified, in theory, to engage in objective rulemaking, its assumption of this role invariably raises problems of appearance. When the DOJ's prosecutors draft regulations that preempt the judiciary's ethical rules—and particularly when they do so behind closed doors, as in this case—one might assume that the prosecutors in the DOJ were playing their accustomed role, advocating primarily for their own investigative interests. Similarly, when they subsequently seek to justify their handiwork, one might assume that they are continuing to serve as advocates, advancing the most palatable explanations for their drafting decisions, but not necessarily the true ones.138

Certainly, courts are better equipped, after receiving input from prosecutors, defense lawyers, and others, to fashion rules that strike an objective balance.139 Courts have both the requisite expertise, derived in part from their traditional experience in supervising the legal profession, as well as the requisite neutrality and detachment. Moreover, from the perspective of both the bar and the general public, ethical rules adopted by courts are far more likely to appear to strike an objective balance between competing prosecutorial and individual interests. Given the obvious superiority of the judiciary as an arbiter of ethics, one must invariably be skeptical of the DOJ's motives when it opts to abrogate existing judicial rules of ethics by unilaterally promulgating regulations governing the conduct of its lawyers.

Even if one had faith that, in other contexts, the DOJ could engage in the quasi-judicial function of drafting ethical rules for federal prosecutors, and could do so objectively, one might be skeptical in this context.140 Be-

(Supp. 1993), was largely designed to deflect criticism of this practice and to discourage courts from adopting more onerous restraints such as those urged by the ABA. See Green, supra note 135, at 76.

138 Cf. Floyd Abrams, Why Lawyers Lie, N.Y. TIMES MAG., Oct. 9, 1994, at 54 ("Public statements of prosecutors and defense counsel alike must be viewed with the greatest of skepticism.").

139 See Establishing Ethical Standards, supra note 53, at 44-45. In the absence of judicial involvement, another preferable alternative would be to seek consensus among those with various perspectives. A Conference recently hosted at Fordham Law School proceeded on this understanding:

The co-sponsors of this Conference shared the view that the best way to achieve satisfactory resolutions of ethical issues is through open discourse among individuals with varied perspectives, and that shared view explains the Conference's structure. The co-sponsors took as a given that no single group could claim to have all the right answers to the difficult questions of professional responsibility confronting lawyers for older clients. The fact that individual groups tend to be defined by a similarity of interest or experience among their members would make any one group particularly hesitant to make such a claim. In looking for answers to the hard questions facing lawyers [who represent older clients], it is critical to consider the widest variety of perspectives—to seek the views of lawyers who represent older clients, lawyers who practice in other areas, non-lawyer representatives of older persons, academics, health-care professionals, and others with valuable insights. That is why this Conference was co-sponsored by six groups representing varying perspectives, and why the co-sponsors sought to bring together thoughtful individuals with a variety of backgrounds and experiences.


140 Pronouncements by the DOJ in defense of the regulation would tend to reinforce this
cause the regulation imposes few restrictions on prosecutors beyond those already imposed by the Constitution and other laws,\textsuperscript{141} it is hard to avoid the conclusion that the regulation overvalues law enforcement interests at the expense of the interests ordinarily protected by the no-contact rule. Moreover, given that the regulation was drafted and promulgated hard on the heels of the Thornburgh Memorandum, and given the DOJ's concurrent challenges to other aspects of judicial regulation,\textsuperscript{142} it must almost invariably be perceived as an attempt to liberate prosecutors from judicial oversight, rather than simply an attempt to attain uniformity while deferring to past judicial judgments.\textsuperscript{143}

\textsuperscript{141} See, e.g., Communications with Represented Persons (Final Rule), supra note 23, at 39,911 ("[T]he Department has long maintained, and continues to maintain, that it has the authority to exempt its attorneys from the application of DR 7-104 and Model Rule 4.2 and their state counterparts.").

\textsuperscript{142} The DOJ has challenged both the authority of courts to apply ethical rules to federal prosecutors, see supra, note 25, and the authority of courts to provide various sanctions for concededly improper prosecutorial conduct. See, e.g., United States v. Horn, 29 F.3d 754, 767 (1st Cir. 1994) (assessment of monetary penalties against the government for prosecutorial misconduct violates sovereign immunity); United States v. Woodley, 9 F.3d 774, 781 (9th Cir. 1993) (holding that absent an express waiver of sovereign immunity a court may not impose monetary sanctions against the government); United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992) (refusing to dismiss indictment despite prosecutorial misconduct), cert. denied, 507 U.S. 985 (1993); United States v. Prince, No. CR 93-1073(RR), 1994 U.S. Dist. LEXIS 2962 (E.D.N.Y. Mar. 9, 1994) (rejecting government’s argument that sovereign immunity bars imposition of sanctions against it).

\textsuperscript{143} The DOJ's decision to preempt judicial rules of conduct raises two prudential concerns apart from whether, in doing so, it developed standard rules because of its exclusion of others from the drafting and decisionmaking processes. The first is the regulation's possibly negative impact on the DOJ's relations with bench and bar. The danger is that it will ratchet antagonism up a notch. Certainly, state judges have viewed the regulation as an act of advocacy from the perspective of both the DOJ's role in fashioning the rule and in enforcing it. The Conference of Chief Judges has responded by taking the position that the DOJ lacks constitutional authority to preempt state regulation of attorneys who are federal prosecutors. See Communications with Represented Persons (Final Rule), supra note 23, at 39,915-16. State Chief Judges have agreed to instruct state disciplinary authorities essentially to ignore the regulation. See Mark Curriden, \textit{State Court Chiefs Flex New Muscle}, \textit{Nat'l L.J.}, Oct. 17, 1994, at A1, A26; Coquillette Report, supra note 13, at 33-34.

The other concern is the regulation's potential impact on federal prosecutors themselves. At the same time that the DOJ has sought to promote compliance with ethical rules by training ethics experts in each of the United States Attorneys' Offices, it has promulgated a regulation that sends very different signals: a signal to individual prosecutors and their offices that they may appropriately test the limits of proper ethical conduct in order to promote investigative and prosecutorial interests, and a signal that prosecutors, and not the courts, are the arbiters of their own conduct. This may encourage federal prosecutors to take an aggressive approach even toward those ethical rules that are legally enforceable. And, if federal prosecutors are adamant about challenging judicially imposed ethical rules such as Model Rule 4.2, how can they be expected to exercise reasonable judgment and restraint in those areas where they are not, and never have been, subject to judicially enforceable limits of any meaningful sort—areas such as the choice of whom to investigate or the preparation of witnesses?
II. Federal Court Lawmaking: The Inadequacy of Adjudication

At present, most federal courts apply ABA rules of professional conduct or state variants that are incorporated by reference in local district court rules. For the most part, these rules of conduct are not context-specific. Rather, they cut across the varied contexts in which lawyers serve. Consequently, many are deliberately open-textured and others that initially appear to be worded more precisely prove, in important respects, unclear in meaning or application. Their meaning for federal practitioners cannot be

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144 See supra note 13. On occasion, federal courts establish legally enforceable standards of lawyer conduct in the course of adjudication by issuing pronouncements about how lawyers should behave on an ad hoc basis. One illustration is a series of judicial opinions in the Second Circuit requiring prosecutors to take steps to avert a conflict of interest on the part of the defendant's lawyers. See, e.g., United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986) (prosecutors should move for defense counsel's disqualification before trial when they are aware of a conflict of interest). See generally Bruce A. Green, Her Brother's Keeper: The Prosecutor's Responsibility when Defense Counsel Has a Potential Conflict of Interest, 16 Am. J. Crim. L. 323 (1989) (arguing that prosecutors should help to eliminate defense lawyers' conflicts of interest).

145 See, e.g., Model Rules of Professional Conduct Rule 8.4(e) (1993) (mandating that it is misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); id. Rule 8.4(d) (mandating that it is misconduct to "engage in conduct that is prejudicial to the administration of justice"). See generally Donald T. Weckstein, Maintaining the Integrity and Competence of the Legal Profession, 48 Tex. L. Rev. 267, 276 (1970) (noting that vague and broad language describing proscribed conduct is ineffective in providing standards for professional discipline); Martha E. Johnston, Comment, ABA Code of Professional Responsibility: Void for Vagueness?, 57 N.C. L. Rev. 671 (1979) (arguing that the broad language in the ABA Model Code does not provide sufficient guidance to practicing attorneys and may lead to selective enforcement by state bar committees).

146 The ABA drafters conceive of the professional rules as stating general obligations, and not containing "implementing regulations"—a conception which is at odds with their use as disciplinary standards. For example, several years ago, the ABA Standing Committee on Ethics and Professional Responsibility objected on this ground to a proposed amendment to the ABA Model Rules specifying that attorneys must perform at least 50 hours of pro bono work annually:

This Committee strongly believes that the Model Rules are not the appropriate place for what are in effect implementing regulations, even for a subject as important as pro bono publico service. We have objected on precisely this ground to a proposal to implement the requirements of Model Rule 1.15, for safekeeping property, by an amendment to that Rule that would prescribe recordkeeping and accounting procedures. We would similarly oppose a proposal, were one advanced, to implement Rule 1.1’s command of competence by spelling out continuing legal education requirements; or Rule 1.5’s requirement that fees be reasonable, by the insertion of numerical guidelines. It is this Committee’s firmly held view that the proper role of the Model Rules is best served by preserving their character as relatively general statements of principle rather than detailed prescriptions for implementation of those principles.


Many commentators have noted that this approach has produced rules that are extraordinarily uncertain in scope and application. See, e.g., Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 642 (1981) ("[T]he Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless."); Green, supra note 6, at 502-08 (noting that the disciplinary decision in Doe v. Federal Grievance Comm., 847 F.2d 57 (2d Cir. 1988), resolved only one of five interpretive questions under DR 7-102(B)(2) that were raised by the lawyer's conduct); Wilkins, supra note 1, at 810 (noting that "both the Model Code
determined conclusively until federal courts authoritatively interpret them, as they may do either in adjudicating whether a lawyer should be sanctioned personally for misconduct,\textsuperscript{147} or in rendering a decision in litigation that turns directly or indirectly on the propriety of a lawyer's conduct.\textsuperscript{148} In his report to the Judicial Conference, Professor Coquillette proposed that federal courts continue to rely on bar association rules.\textsuperscript{149}

This Part argues that the proposal reflects an appropriate institutional choice but an inappropriate procedural one. If federal courts continue to apply bar association rules, they will be compelled to resolve most disputed questions about the appropriate standard of lawyer conduct in the course of adjudication, rather than by rulemaking. In adjudication, courts tend to overlook relevant considerations and to provide unsatisfactory explanations for the choices they make, thereby undermining confidence that they have adopted the most appropriate standards of professional conduct. Moreover, courts tend to determine only the propriety of the conduct immediately before them, thus perpetuating uncertainties about the propriety of related lawyer conduct.

\textsuperscript{147} In some cases, courts review disciplinary decisions rendered by agencies or committees acting under judicial authority and subject to judicial oversight. See, \textit{e.g.}, \textit{In re Cooperman}, 633 N.E.2d 1069 (N.Y. 1994). In others, courts assume responsibility from the outset for deciding whether to sanction a lawyer. See, \textit{e.g.}, United States v. Gionvaneli, 897 F.2d 1227 (2d Cir.) (upholding summary contempt sanction), \textit{cert. denied}, 498 U.S. 822 (1990); People v. Simac, 641 N.E.2d 416 (Ill. 1994) (upholding contempt conviction).


Decisions interpreting rules of professional conduct may also respond to motions to suppress evidence allegedly obtained by a lawyer through improper means or motions for a protective order to prevent an opposing lawyer from engaging in allegedly wrongful conduct. See, \textit{e.g.}, Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc., 440 F.2d 1216 (7th Cir. 1971) (suppressing evidence obtained through improper ex parte communication with represented party). \textit{See generally} Erica M. Landsberg, Comment, \textit{Policing Attorneys: Exclusion of Unethically Obtained Evidence}, 53 U. Chi. L. Rev. 1399 (1986) (arguing for the adoption of an exclusionary rule for evidence obtained in violation of the rules of professional responsibility).

\textsuperscript{149} \textit{See supra} notes 16-18 and accompanying text.
These shortcomings are illustrated in the context of a recent decision of the Second Circuit, *Grievance Committee v. Simels*, which overturned an order sanctioning a criminal defense lawyer for violating the no-contact rule. The court's opinion, which is described in Part II.A, appropriately illustrates the shortcomings of judicial reliance on bar association rules, not because it is an unusually bad opinion, but because it is an unusually good one, in that it is far better and more extensively reasoned than the average opinion interpreting standards of professional conduct. Part II.B demonstrates that, while representing the best that can be achieved by promulgating and interpreting bar association standards, the decision ultimately stands as evidence of a flawed lawmaking process.

A. *The Simels Decision*

The *Simels* decision addressed the conduct of a criminal defense lawyer, Robert M. Simels, in connection with his representation of a defendant, Brooks Davis, in a narcotics conspiracy case in 1988. Shortly before the trial, a government witness in the narcotics case was shot. Agents arrested a suspect, Aaron Harper, who, under interrogation, admitted his role in the shooting and implicated Simels's client. Harper thus became a possible witness against Davis at the pending narcotics trial. He also became a potential codefendant on additional charges the government planned to bring based on the shooting and, at the same time, a potential witness against Davis on those same charges.

At his client's request, in an effort to develop evidence with which to impeach Harper or, better yet, to exonerate Davis, Simels visited Harper in prison. Although he indicated that he was represented by counsel, Harper submitted to an interview and ultimately signed an affidavit, which Simels later sought to use at Davis's trial. On learning of the affidavit, however,

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150 48 F.3d 640 (2d Cir. 1995).
151 See id. at 651.
152 Cf. *e.g.*, *In re Alcantara*, No. D-13 September Term 1995, 1995 N.J. LEXIS 1364 (N.J. Dec. 1, 1995). For a discussion of *In re Alcanta*, see infra note 198. The *Simels* case is unusual in other respects. First, the procedural setting is uncommon: Rarely do federal courts invoke their disciplinary processes to regulate the conduct of lawyers in criminal proceedings, and rarer still are disciplinary decisions addressing criminal law practices that are not manifestly improper. Moreover, the subject matter of the decision is noteworthy: Judicial decisions only infrequently address the propriety of criminal defense lawyers' conduct outside the courtroom. Finally, the issue addressed by the court—how DR 7-104(A)(1) applies to criminal defense lawyers—is itself significant. This question lurked, largely unnoticed, behind the past decade's debate about how this same rule applies to prosecutors. See *supra* part I.A. Not surprisingly, therefore, the court's opinion in *Simels* establishes new ground in the area of professional responsibility in criminal law practice and has important implications, not only with respect to defense lawyers' conduct, but also with respect to prosecutorial conduct.
153 See *Simels*, 48 F.3d at 642-43.
154 See *id*.
155 See *id* at 643.
156 See *id*.
157 See *id* at 650.
158 See *id* at 643.
159 See *id* at 643 & n.3.
the district judge ordered a mistrial and disqualified Simels from representing Davis.\textsuperscript{160} Thereafter, the prosecution referred Simels's conduct to the Committee on Grievances of the Southern District of New York.\textsuperscript{161}

From the point when the grievance committee received the referral until the Second Circuit issued its decision more than five years later, the proceedings involving Simels were closed to the public. After determining that Simels's conduct merited prosecution for, among other things, violating DR 7-104(A)(1),\textsuperscript{162} the grievance committee referred the case to a three-member panel headed by a retired state court judge and appointed a special counsel to prosecute the charges.\textsuperscript{163} The panel received evidence and issued findings of fact and conclusions of law.\textsuperscript{164}

The panel interpreted the disciplinary rule narrowly and thus concluded that it did not apply to Simels's conduct, but the grievance committee reversed the panel's conclusion of law and issued a sanction of censure.\textsuperscript{165} It reasoned that Simels had interviewed Harper about the "matter" in which Harper was represented, namely, the shooting of a government witness, and that, as a potential codefendant, Harper was a "party" represented in that matter.\textsuperscript{166} On appeal, the Second Circuit reversed, endorsing the panel's narrower interpretation.\textsuperscript{167} It concluded that neither witnesses nor potential codefendants are "parties" under DR 7-104(A)(1).\textsuperscript{168}

The Second Circuit's analysis in Simels began with three observations about the interpretation of disciplinary rules. First, the court would engage in de novo review of district court decisions interpreting a disciplinary rule. No deference would be accorded district court interpretations.\textsuperscript{169} Second, where "neither the plain meaning nor the intent of the drafters can be discerned from the face of the [disciplinary] rule, matters of policy are appropriately considered in determining its scope."\textsuperscript{170} Considerations of policy are

\textsuperscript{160} See id. at 643 n.3. The court of appeals later rejected a claim that the disqualification order was unwarranted and that a retrial should therefore be barred by the Double Jeopardy Clause. See United States v. Arrington, 867 F.2d 122, 129 (2d Cir.), cert. denied, 493 U.S. 817 (1989).

\textsuperscript{161} See Simels, 48 F.3d at 643. The disciplinary process in the Southern District of New York is governed by General Rule 4 of the United States District Courts for the Southern and Eastern Districts of New York. For a recent examination of the process, see In re Jacobs, 44 F.3d 84 (2d Cir. 1994), cert denied, 116 S. Ct. 73 (1995).

\textsuperscript{162} See Simels, 48 F.3d at 643. Other allegations of misconduct were either dismissed by the panel or not considered. See id. at 643-44. The court of appeals in Simels determined that there was no basis for remanding for further consideration of these other allegations. See id. at 644 n.5.

\textsuperscript{163} See id. at 643.

\textsuperscript{164} See id.

\textsuperscript{165} See id. at 644.

\textsuperscript{166} See id.

\textsuperscript{167} See id. at 645.

\textsuperscript{168} See id.

\textsuperscript{169} See id.

\textsuperscript{170} Id. Simels implicitly rejected a principle of interpretation adopted by the Second Circuit in an earlier disciplinary decision, Doe v. Federal Grievance Comm., 847 F.2d 57 (2d Cir. 1988). In Doe, the court equated the meaning of a disciplinary rule with "the drafters' intent." Id. at 62. Accordingly, faced with another ambiguous disciplinary rule, the Doe decision undertook a search for the intent of the ABA members who had drafted the ABA Model Code. See id. It
particularly important when applying disciplinary rules in the criminal context because rules regulating criminal defense lawyers and prosecutors will have an impact on "a defendant's right to the effective assistance of counsel and the public's interest in effective law enforcement."171 Finally, "well-established principles of federalism require that federal courts not be bound by either the interpretations of state courts or opinions of various bar association committees."172 Such interpretations might "contravene important federal policy concerns."173 Furthermore, "requiring a federal court to follow the various and often conflicting state court and bar association interpretations . . . threatens to balkanize federal law."174

The court then reviewed the history of DR 7-104(A)(1) and prior Second Circuit precedent interpreting the rule in criminal cases. It began by identifying interests that have been said to be protected by the rule restricting communications with represented parties, including the protection of clients from overreaching by opposing counsel,175 but derogated the disciplinary rule as "primarily a rule of professional courtesy."176 It noted that "it was not until more than a half century after its promulgation that defense attorneys began to urge that the Rule should apply in criminal proceedings,"177 thus implying that DR 7-104(A)(1) was not intended to have a

met with some academic criticism as a consequence. See, e.g., Green, supra note 6, at 558 (concluding that "[c]onsistent with their traditional authority to regulate the bar, courts can and should act as policy-makers when they interpret ambiguous provisions of the Code of Professional Responsibility").

171 Simels, 48 F.3d at 645.

172 Id. In this case, bar association opinions pointed in opposite directions. Compare New York State Bar Ass'n Comm. on Professional Ethics, Op. 245 (1972) ("A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of the opposing counsel or party, as a witness does not 'belong' to any party.") with New York County Lawyers Ass'n Comm. on Professional Ethics, Question No. 676 (1990) (holding criminal defense attorney may not directly contact a potential witness who has not been implicated in the charges against his client but is represented on unrelated criminal charges; the term "party" includes any represented "person" whose interests may be implicated by the communications) [hereinafter New York County 676].

173 Simels, 48 F.3d at 645.

174 Id.

175 See id. at 646-47.

176 Id. at 647.

177 Id. The court's reference is somewhat misleading. Apparently, the court was referring to the general principle that lawyers should not communicate with represented adversaries, as codified in the 1908 ABA Canons of Professional Ethics ("ABA Canons"). Canon 9 provided, in pertinent part: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." CANONS OF PROFESSIONAL ETHICS Canon 9 (1908). The ABA Canons, unlike the ABA Model Code, was not designed to serve as the basis of disciplinary standards (although state courts sometimes invoked them for that purpose). See WOLFRAM, supra note 4, at 54-55 ("The Canons . . . seem to have been a statement of professional solidarity—an assertion by elite lawyers in the ABA of the legitimacy of their claim to professional stature." (footnote omitted)). Even so, the relevance of the underlying principle to criminal proceedings was noted prior to the adoption of the ABA Model Code, which included DR 7-104(A)(1), in 1969. See, e.g., Massiah v. United States, 377 U.S. 201, 210-11 (1964) (White, J., dissenting) (rejecting analogy to ABA rule on ground that communication with represented defendant was undertaken by codefendant, not by government lawyer); United States v. Smith, 379 F.2d 628, 633 (7th Cir.) (declining to exercise supervisory authority to sup-
particularly important role in the criminal context.\textsuperscript{178} Then, the court reviewed prior Second Circuit decisions. None, it noted, had interpreted the specific language of DR 7-104(A)(1) that was placed in issue by Simels's conduct, and none had directly passed on how the rule applied to criminal defense lawyers.\textsuperscript{179}

Finally, the court analyzed how DR 7-104(A)(1) applied to Simels's conduct in communicating with Harper, a potential witness against his client, Davis, as well as a potential codefendant.\textsuperscript{180} It concluded, on balance, that "the purposes served by DR 7-104(A)(1)" were overridden by the "concern of a defendant's Sixth Amendment right to the effective assistance of counsel and a lawyer's ethical duty of zealous advocacy."\textsuperscript{181}

Although the opinion had earlier rejected the "plain meaning" and "intent of the drafters" interpretive standards,\textsuperscript{182} the court's starting point in analyzing how the rule applied to Simels's conduct was the language of the rule.\textsuperscript{183} The court seemed to assume that DR 7-104(A)(1) applies only when a lawyer representing a client in a particular matter communicates about the subject of the representation with an individual who is represented as a "party" in the same "matter."\textsuperscript{184} Proceeding on this assumption, the court first addressed the possibility that Harper had been interviewed in connection with the pending narcotics charges.\textsuperscript{185} In that event, even assuming Davis was represented by counsel in that "matter," the rule would not apply because Harper was simply a potential witness, not a "party" in that case.\textsuperscript{186}

\textsuperscript{178} The ABA itself would no doubt reject this position. \textit{See supra} notes 116-117 and accompanying text; \textit{see also} ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1373 (1976) (the rule bars a prosecutor from sending a represented client a copy of a letter containing a plea offer, even though no charges had yet been filed); ABA Comm. on Ethics and Professional Responsibility, Report No. 301 to the House of Delegates (Feb. 12, 1990) (on file with the ABA) (criticizing Thornburgh Memorandum, which asserted that prosecutors were not bound by DR 7-104(A)(1)).

\textsuperscript{179} \textit{See Simels}, 48 F.3d at 647.

\textsuperscript{180} \textit{See id.} at 650.

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} \textit{See id.} at 645.

\textsuperscript{183} \textit{See id.} at 650.

\textsuperscript{184} \textit{See id.} Other authorities have read the rule more broadly. \textit{See, e.g.,} WOLFRAM, \textit{supra} note 4, at \S 11.6.2 & n.33 (noting that DR 7-104(A)(1) probably prohibits contact with any person represented by a lawyer in a matter); Green, \textit{supra} note 43, at 305-09 (discussing authorities addressing whether "the subject of the representation" for a defendant includes uncharged offenses).

\textsuperscript{185} \textit{See Simels}, 48 F.3d at 650.

\textsuperscript{186} \textit{See id.} The court's conclusion seems somewhat inconsistent with decisions recognizing that government witnesses in criminal cases may have important interests implicated by the trial in which they are testifying that are adverse to the interests of the criminal defendant. \textit{See, e.g.,} United States \textit{ex rel.} Stewart v. Kelly, 870 F.2d 854, 857 (2d Cir. 1989) (holding that trial court's refusal to allow defendant to be represented by attorney he chose, where interests of defendant were potentially in conflict with interests of prosecution witness who was former client of that attorney, was not a violation of defendant's Sixth Amendment right to counsel); United States v.
Then the court addressed the possibility that the relevant “matter” was the attempted murder of a government witness.\textsuperscript{187} In that event, it found that Harper and Davis were not “parties” to the \textit{same} matter.\textsuperscript{188} There was no realistic possibility that Harper and Davis would be tried together, even if they were named as codefendants in the same indictment, because no witness other than Harper had implicated Davis.\textsuperscript{189} Moreover, the court of appeals rejected the grievance committee’s conclusion that, if actual codefendants are “parties” for purposes of DR 7-104(A)(1), then potential codefendants must be as well.\textsuperscript{190} It pointedly left open the question of whether the lawyer for one defendant in a multidefendant case may communicate directly with a codefendant, but noted that even if such contacts were improper once a criminal case commenced, the proscription would not necessarily apply to \textit{potential} codefendants.\textsuperscript{191}

The court supported its interpretation by reference to several considerations of policy. First, a broad interpretation of DR 7-104(A)(1) would discourage investigative steps that defense lawyers must take to prepare for trial: “We are not prepared to hold that a defense attorney engaging in critical pre-trial investigation, which might produce valuable sources of impeachment material or, better, direct evidence of his or her client’s innocence, is committing professional misconduct.”\textsuperscript{192} Additionally, “those potentially affected by the Rule are entitled to clear notice of its scope,” which the court’s narrow interpretation was said to provide.\textsuperscript{192} Finally, insofar as this interpretation might undermine the interests of represented witnesses such as Davis, this raised a policy issue implicating federal law enforcement concerns that was best left to Congress or the Supreme Court to resolve, rather than to district courts interpreting disciplinary rules.\textsuperscript{194} This last consideration echoed one raised at the very outset of the court’s legal discussion: that the grievance committee’s interpretation would “broad[ly] change[ ]... traditional ... defense practices,” and that “such substantial modifications [should] be made,” if at all, “only after careful consideration by the representative branches of the federal government.”\textsuperscript{195}

\textbf{B. The Lessons of Simels: The Benefits and Shortcomings of Interpreting Bar Association Rules in Adjudication}

\textit{Simels} exemplifies the two-stage process by which federal courts regulate lawyers. First, district courts adopt local rules incorporating bar association rules of professional conduct or state variants that are, in either case,

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\textsuperscript{187} See \textit{Simels}, 48 F.3d at 650.

\textsuperscript{188} \textit{See id.}

\textsuperscript{189} \textit{See id.}

\textsuperscript{190} \textit{See id.}

\textsuperscript{191} \textit{See id.}

\textsuperscript{192} \textit{Id. at 651.}

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} \textit{See id.}

\textsuperscript{195} \textit{Id. at 644.}
imprecise.196 Second, on a case-by-case basis, federal courts resolve issues concerning the reach of the incorporated rules as those issues arise in the course of adjudication.197 In this case, the no-contact rule, made applicable to federal practitioners by local rule of the Southern District of New York, set an unclear standard of conduct for criminal defense lawyers. Among the questions was whether a criminal defense lawyer may communicate directly with a represented person who is either a potential witness against, or a potential codefendant of, the lawyer's client. Almost a quarter century after the ABA incorporated the no-contact rule in its Model Code, this issue was finally resolved authoritatively for lawyers in the Second Circuit in the context of disciplinary proceedings that were closed to the public. The issue remains unresolved, however, in virtually all other federal circuits and state courts, since few judicial decisions other than Simels have confronted it. Moreover, when other courts outside the Second Circuit do address this issue, they will be free to interpret the no-contact rule differently, as the New Jersey Supreme Court did in a recent opinion that did not even acknowledge Simels.198

The advantage of this mode of judicial regulation over executive agency rulemaking is obvious: In both the rule-promulgation and adjudication stages, the lawmakers are neutral and detached judges, rather than lawyers who regularly represent parties before the federal courts. The disadvantages lie both in the process and in the limited nature of the rules it produces.

1. Procedural Limitations of Adjudication

Unconstrained by the intent of those who drafted DR 7-104(A)(1), the Simels court appropriately sought to apply the rule to defense lawyers in a way that made sense as a matter of policy. Resolution of this policy question required balancing countervailing considerations. On one side were those interests underlying the disciplinary rule that would be promoted by extending it to Simels's conduct. On the other were the interests of zealous advocacy, fair notice, and judicial deference to the policymaking branches of

196 One reflection of this is the proliferation of bar association committees that have been established to give advice to lawyers about the propriety of their proposed conduct. See infra note 306 and accompanying text. Opinions published by committees of the ABA and state and local bar associations are synopsized in the Lawyer's Manual on Professional Conduct (ABA/BNA).


198 In In re Alcantara, No. D-13 September Term 1995, 1995 N.J. LEXIS 1364 (N.J. Dec. 1, 1995), the New Jersey Supreme Court held that a criminal defense lawyer had violated the no-contact rule by communicating directly with represented codefendants who had entered guilty pleas with lenient sentence recommendations conditioned on their testifying against the lawyer's client. The court's reasoning, in its entirety, was that "[t]he word 'party' in [Model Rule 4.2] denotes 'adversaries,' " which would include the codefendants, because by agreeing to testify on the government's behalf, "their status [had become] much more significant than that of mere witnesses; they were adverse-party witnesses." Id. at *20.
government, that supported a narrower reading. Thus, the Simels court's conception of lawmaking in the area of lawyers' professional conduct was essentially the same as that of the DOJ when it adopted rules governing prosecutors' communications with represented persons.199

Unlike the DOJ, however, the court received limited input before announcing an authoritative rule. The Second Circuit had the benefit of the views of the special counsel, the panel, and the district court grievance committee, as well as the arguments of Simels.200 However, it never heard from the government, whose complaint had initiated the grievance proceedings, from the ABA or state or local bar associations, from representatives of the criminal defense bar (other than Simels himself),201 from academics, or from other interested parties. Because the proceedings were closed, other views could not be expressed through amicus briefs, as they have sometimes been in cases involving lawyers' professional conduct.202 Moreover, once the Second Circuit issued its decision, the rule it laid down as a practical matter was final.203 Because this was adjudication, not rulemaking, the court did not receive comments and would have been unlikely to reconsider its decision in response to comments that were put forth.

The theoretical limitations of this process can be illustrated concretely in the context of the Simels decision. The court in that case failed, at least explicitly, to consider perspectives that a variety of groups might have been expected to offer had the same issue been addressed through rulemaking rather than adjudication. From the organized bar's perspective, the opinion overlooked an important interest promoted by the no-contact rule. From the government's perspective, it overvalued the defendant's interest and undervalued the cooperating witness's interest in effective representation. The opinion did not consider, from the defense bar's perspective, how the possibility of defense lawyers' ex parte contacts with other defense lawyers' clients will affect cooperation among potential codefendants and their lawyers. Finally, the court lost the opportunity to benefit from an academic perspective on constitutional concerns that lay beneath the surface of the court's opinion.

With the benefit of these varied perspectives, the court might have reached a different conclusion about the appropriate standard of conduct for a criminal defense lawyer in Simels's situation. Or, the court might have been confirmed in its wisdom. Either way, having to acknowledge and address these perspectives and to explain its decision in the light of them would

199 See supra notes 123-125 and accompanying text.
201 Simels, of course, appeared in a personal, rather than representational capacity, and could not have been expected to represent the views of the defense bar insofar as they conflicted with his own interest in avoiding disciplinary sanctions.
203 On occasion, a party seeks rehearing or rehearing en banc. On rarer occasion still, a federal court of appeals revises its opinion in response to such a request. See, e.g., United States v. Hammad, 858 F.2d 834, 839 (2d Cir.), modifying 846 F.2d 854 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). In this case, however, special counsel did not petition for rehearing and, thus, there would have been no occasion for the court to reconsider its decision.
have resulted in a ruling worthy of greater respect and confidence for having been more fully considered.

a. The ABA Perspective: The Value of the No-Contact Rule

The Simels court characterized DR 7-104(A)(1) as "primarily a rule of professional courtesy," thereby implying that the purposes underlying DR 7-104(A)(1) are not particularly weighty. From the perspective of the ABA, the court was almost certainly too cavalier in its treatment of this rule for three reasons.

First, in alluding to the interests served by DR 7-104(A)(1), the court failed to acknowledge what, in the ABA's view, is "the central proposition" on which the no-contact rule rests, namely that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." How the disciplinary rule serves the interest in assuring clients the advice and assistance of independent counsel is most clear when a lawyer contacts a represented person directly in order to resolve a legal dispute, rather than simply to obtain information. For example, in a criminal case, a criminal defendant would ordinarily look to defense counsel for advice about whether to plead guilty or stand trial. If a prosecutor were to speak to the defendant about these options in defense counsel's absence, the defendant might feel pressured to make a decision without the benefit of independent legal advice. It is for this reason that the DOJ regulation generally forbids prosecutors to engage directly in plea negotiations with represented persons.

In Simels, this interest in effective representation was plainly implicated. The opinion does not explain how Simels convinced Harper to answer his questions and sign an affidavit. It is clear, however, that Harper faced a decision with significant legal consequences. While cooperating with Simels might have served whatever interest Harper had in assisting Simels's client, it would have jeopardized his relationship with the government. Harper would unquestionably have benefitted from his lawyer's advice with regard to this decision. Had Simels approached Harper through his lawyer, Harper would have received advice of counsel. Because Simels approached him directly, Harper did not.

204 Simels, 48 F.3d at 647.
205 ABA Op. 95-396, supra note 116, at 4-5 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1980)); see also supra note 43 (noting that the no-contact rule protects clients from opposing counsel and ensures that laypersons make major decisions with the advice of their own counsel).
206 Cases extending the Sixth Amendment right to counsel to police interrogation serve a similar function. See, e.g., Maine v. Moulton, 474 U.S. 159, 170 & n.7 (1985); see also Uviller, supra note 53, at 1176 (arguing that once the state's interests become adverse to the defendant's, police should not be able to use an inquisitorial method of gathering evidence).
Ex parte communications by a codefendant's lawyer might similarly deprive the defendant of counsel's advice as to an important decision with legal implications. See, e.g., United States v. Lopez, 989 F.2d 1032, 1043 (9th Cir.) (Fletcher, J., concurring) (identifying problems that may arise when a codefendant's lawyer has contact with another codefendant whose interests potentially conflict with the lawyer's client's interests), vacated, 4 F.3d 1455 (9th Cir. 1993).
Second, the ABA could have been expected to challenge the *Simels* court's reasoning that if DR 7-104(A)(1) were more than "a rule of professional courtesy," it "would have provided protection for unrepresented parties" as well as represented parties.208 Lawyers have no practical choice but to communicate directly with litigants who choose to represent themselves; the adversary process could not effectively function otherwise. The ABA Model Code makes this point in the Ethical Consideration relating to DR 7-104(A)(1).209 Moreover, to the extent the rule is designed to promote effective assistance of counsel, as well as to safeguard the lawyer-client relationship and protect against disclosures of attorney-client privileged information,210 there is no reason to extend its protection to those who are unrepresented.

Finally, the ABA, which includes far more civil than criminal litigators, might have been expected to note that the court's derogation of the interests protected by DR 7-104(A)(1) is inconsistent with the considerable importance ascribed to the rule by courts, as well as the organized bar, in the civil context. The rule has been read broadly to impose severe restrictions on civil litigants' access to potentially relevant evidence. For instance, the rule has been read to forbid communications with represented individuals who are not "parties" in a formal sense because civil proceedings have not yet been initiated,211 with witnesses and others who have interests with respect to litigation but who are not nominal parties in the proceeding,212 and with employees and, in some cases, former employees of a corporation that is itself a party or potential party to litigation.213 Broad effect has also been given both to the restriction on "communications"214 and to the requirement that the

208 *See Simels*, 48 F.3d at 647.

209 *See Model Code of Professional Responsibility* EC 7-18 (1980) ("If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person . . .").

210 *See ABA Op. 95-396, supra* note 116, at 5.

211 *See, e.g.,* Kearns v. Fred Lavey/Porsche Audi Co., 573 F. Supp. 91, 95-96 (E.D. Mich. 1983) (holding that attorney breached professional standards by negotiating with potential plaintiff after he knew that potential plaintiff was represented by other lawyers), *aff'd*, 745 F.2d 600 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1192 (1985); Triple A Mach. Shop, Inc. v. State, 261 Cal. Rptr. 493, 498 (Cal. Ct. App. 1989) (holding rule "attached once an attorney knew that an opposing party was represented by counsel even where no formal action had been filed"); Florida State Bar Ass'n Comm. on Professional Ethics, Op. 78-4 (1978) (holding rule applies "whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced"); Mississippi State Bar, Op. 141 (1988) ("[T]he actual filing of a lawsuit or intent to file a lawsuit is irrelevant to the question of whether the lawyer may communicate with the adverse party."); Oregon State Bar Ass'n Bd. of Governors, Op. 1991-42 (1991) (holding before instituting lawsuit, lawyer for prospective agent may not contact prospective defendant or have agent do so if the prospective defendant is known to be represented); Texas State Bar Professional Ethics Comm., Op. 492 (1994) (holding rule applies "despite the fact that litigation is neither in progress nor contemplated").


213 *See infra* note 328.

214 *See, e.g.,* In re Schwabe, 408 P.2d 922 (Or. 1965) (disciplining lawyer, in part, for telephoning adverse party to ask whether he had in fact retained counsel after the lawyer had
lawyer refrain from communications with represented persons through others, while the exception for communications that are "authorized by law" has been narrowly construed in civil cases. Further, in some civil cases, courts have considered the no-contact rule sufficiently important to justify, as a sanction for noncompliance, suppressing evidence or disqualifying counsel. It is hard to reconcile these broad readings with the notion that DR 7-104(A)(1) serves no important function.

b. The Government's Perspective: The Irrelevance of Ex Parte Communications to Effective Defense Representation

Among the countervailing considerations cited by the Simels court was the interest of criminal defendants in effective representation, of which one element is effective pretrial investigation by defense counsel. As the court understood, applying the no-contact rule to pretrial investigations would impede effective representation by foreclosing criminal defense lawyers from undertaking investigative steps that might produce impeachment evidence or exculpatory evidence. At first blush, it may appear hard to dispute the importance of this consideration, which alone might outweigh the interests of represented witnesses and potential defendants that the disciplinary rule protects. Although DR 7-104(A)(1) has been read more broadly in civil contexts, it seems fair, for defense lawyers as well as prosecutors, to allow greater latitude for ex parte communications in criminal cases, both because criminal defendants and the government have a more compelling interest in

received a letter from counsel indicating he was representing the adverse party); Board of Professional Responsibility of the Supreme Court of Tenn., Op. 85-F-89 (1985) (ruling that attorney may not eavesdrop on conversation between client and adverse party and that such conduct constitutes "communication," which is defined as "the sharing of knowledge by one with another . . . .") (quoting Black's Law Dictionary 253 (5th ed. 1979)).

Lawyers may not circumvent the rule by hiring private investigators to conduct the questioning. See, e.g., United States v. Aetna Casualty & Surety Co., 768 F. Supp. 1186, 1214 (W.D. Mich. 1990) (stating that lawyers who order nonlawyer assistants to engage in conduct that violates the ABA Model Rules are subject to discipline under the Model Rules). Indeed, some authorities have read the rule to forbid a lawyer from counseling the client personally to contact a represented adversary. See, e.g., In re Murray, 601 P.2d 780, 783 (Or. 1979).

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securing relevant evidence than do civil litigants and because they have fewer alternative means of obtaining the evidence.\(^{222}\)

Nevertheless, had the government been invited to participate in the disciplinary proceeding against Simels,\(^{223}\) it might have questioned the force of this interest. Its argument would be that, as a general rule, defense lawyers' ex parte communications with represented witnesses and potential defendants will not entail a legitimate search for probative evidence. Unlike prosecutors and their agents, who make such contacts in the interest of "seeking justice,"\(^{224}\) defense lawyers will do so in the interest of "zealous advocacy."\(^{225}\) They will therefore seek to influence witnesses to provide inaccurate accounts which can be used by the defense as evidence or to impeach truthful

\(^{222}\) It has been observed that:

DR 7-104(A)(1) reflects a reasonable and fair determination that, in civil cases, the interest in open access to information is not substantial enough to outweigh the interests promoted by the rule. This determination is reasonable because the ethical rule has only a slight impact on a civil litigant's access to information. In most cases, the rules of discovery provide an alternative way of obtaining information that is known to the opposing party. For example, a lawyer may question the opposing party in a deposition at which the truthfulness of the party's account can be put to the test of cross-examination. Because of this opportunity for cross-examination, the law fairly assumes that in most civil cases, information provided in a deposition, even if presented in a more favorable light, will not substantially differ from what would have been learned had the party been questioned in his attorney's absence. Moreover, even in civil proceedings that do not permit broad prehearing discovery, an opposing party generally may be called as a witness and questioned at the hearing itself.

Moreover, the balance struck in civil cases is fair. That is because the impact of the ethical rule falls equally on both sides of a civil dispute. The rule does not favor plaintiffs over civil defendants, or vice versa. It does not upset a balance otherwise created by the law. Neither civil litigant has a greater right or need than the other to communicate directly with the opposing party.


\(^{223}\) Had it been available, the government's participation might have been particularly helpful because it might have had access to additional evidence or to means of obtaining additional evidence.

\(^{224}\) See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980) ("[The prosecutor's] duty is to seek justice, not merely to convict."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1992) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). See generally Robert H. Jackson, The Federal Prosecutor, 31 J. CRIM. L. & CRIMINOLOGY 3, 4 (1940) ("Although the government technically loses its case, it has really won if justice has been done."); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 VAND. L. REV. 45 (1991) (discussing the prosecutor's paramount responsibility to seek justice within the adversarial system).

\(^{225}\) See, e.g., Bruce A. Green, Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law, 69 N.C. L. REV. 687, 709, 711 (1991) (many criminal defense lawyers believe that the duty of zealous advocacy, as reflected in ABA Model Code DR 7-101, requires them to engage in ethically questionable conduct to promote the client's interests); see also Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship, 85 YALE L.J. 1060, 1060 (1976) (defending traditional conception of lawyer's role "as a professional devoted to his client's interests and as authorized, if not in fact required, to do some things (though not anything) for that client which he would not do for himself"); John B. Mitchell, The Ethics of the Criminal Defense Attorney—New Answers to Old Questions, 32 STAN. L. REV. 293 (1980) (arguing for the necessity of zealous defense even of clients known by the attorney to be guilty).
testimony.\footnote{This is almost certainly how the government perceived Simels's conduct. It must have assumed that Davis, Simels's client, had used coercion or improper inducements to persuade Harper falsely to recant and that Simels approached Harper to record the false recantation.} Additionally, the government could have been expected to argue that the interest in effective representation cuts in favor of, as well as against, restricting communications with represented witnesses because Simels's client was not the only one whose interest in effective representation was at stake. As an arrested defendant who had agreed to cooperate with the government in exchange for leniency, Harper also had an interest in effective representation.\footnote{Allowing defense lawyers to seek uncounseled statements from defendants such as Harper denies one group of defendants the benefit of legal advice needed to protect them from making unwise decisions about whether to assist another group of defendants.} 

\section{The Defense Bar's Perspective: The Impact of Ex Parte Contacts on Cooperation Within the Defense Bar}

If the court had received the views of the defense bar, it would have had a source of knowledge as to current defense practices and how its ruling

\footnote{The court might well have rejected this argument, had it been made. Lawyers are presumed to act in accordance with their ethical responsibilities, and there is no justification for denying this presumption to criminal defense lawyers as a class. \textit{See generally}, Green, \textit{supra} note 148, at 1223-30 (discussing traditional judicial optimism about defense attorneys' adherence to ethical standards). To the extent that defense lawyers conduct investigations consistently with applicable ethical restrictions, it can be generalized that evidence they uncover through ex parte contacts will contribute to the discovery of the truth, just as this generalization is made with respect to prosecutors. \textit{See} Green, \textit{supra} note 43, at 317-20. This is not to say that the disclosures themselves will invariably be truthful. However, false information—if proven false—may be probative regarding the witness's credibility or state of mind. Insofar as such communications lead to the discovery of truthful, rather than false information, they promote not only the defendant's interest in effective representation but also the public interest in discovering the truth through the adversarial process.}

\footnote{Only the government could have been expected to argue for the interest of cooperating witnesses in being protected from ex parte contact. The same forces that discourage lawyers from counseling their clients to cooperate with the government would discourage representatives of the organized bar from publicly taking the side of cooperating witnesses. \textit{See generally} Daniel C. Richman, \textit{Cooperating Clients}, 56 \textit{Ohio St. L.J.} 69, 116-26 (1995) (describing ideological and economic disincentives against counseling clients to cooperate with the government).}

\footnote{The district court is not the proper body to choose whether one lawyer's "obligation to provide effective assistance to his client must yield to another defendant's interests." \textit{Grievance Comm. v. Simels}, 48 F.3d 640, 651 (2d Cir. 1995). Nevertheless, this explanation for not considering Harper's interest in effective representation seems bewildering, even if one accepts the court's apparent assumption that the represented person's interest in effective representation is not one of the interests generally protected by DR 7-104(A)(1). A tension between the interests of different parties underlies not only DR 7-104(A)(1), but also many of the disciplinary rules that place limits on zealous representation. Once courts determine to adopt such rules to regulate lawyers' professional conduct, they have no choice but to resolve such conflicts. In any case, the \textit{Simels} court determined to give weight to the interest of Simels's client in effective representation as a relevant consideration of policy. Having weighed this interest for one class of defendants—those awaiting trial—it should have weighed this interest for the other affected class of defendants, i.e., those who were cooperating with the prosecution.}
might alter them. This information would have been important in setting a standard of professional conduct for criminal defense lawyers. Among the court's explicit concerns was that a broad reading of DR 7-104(A)(1) would greatly alter traditional defense practices, a result it said was more appropriately left to Congress or the Supreme Court. The opinion provided no empirical basis, however, for the court's assumption that defense lawyers traditionally seek evidence from other defense lawyers' clients, and both the government and the district court grievance committee evidently viewed Simels's conduct as exceptional. Input from the defense bar would have enabled the court to learn whether Simels had engaged in a traditional defense practice, as the court assumed.

More important, input from the defense bar might have better enabled the court to determine, as a practical matter, whether allowing ex parte communications such as those undertaken by Simels will ultimately benefit or undermine criminal representation. Certainly, from the perspective of criminal defense lawyers' conduct, the Simels decision is a double-edged sword. On one hand, it expands opportunities for them to develop evidence that may be useful in defending their clients against potential or pending criminal charges. As the court noted, defense lawyers are duty bound to provide an effective defense and zealous representation, which often will entail interviewing prospective witnesses in search of impeachment material or exculpatory evidence. Until now, out of concern for DR 7-104(A)(1) (if not as a matter of courtesy as a matter of a personal conviction about what is appropriate professional practice), defense lawyers may have hesitated to con-

229 See Simels, 48 F.3d at 651.
230 In other contexts, such as lawyer malpractice cases, expert witnesses customarily testify about community norms relating to the practice of law. Such testimony might have established whether criminal defense lawyers have traditionally sought evidence from represented witnesses or defendants or whether Simels's conduct was aberrational, as the prosecution appears to have assumed when it referred Simels to the grievance committee. There is no indication, however, that testimony on this issue was provided at any stage of the Simels case.

231 Moreover, the court's suggestion that it is a traditional practice for criminal defense lawyers to have ex parte communications with represented witnesses and potential defendants seems somewhat inconsistent with its endorsement of the view that DR 7-104(A)(1) "'provid[es] parties with [a] rule that most would choose to follow anyway.'" Simels, 48 F.3d at 647 (quoting Leubsdorf, supra note 41, at 686-87).

232 Especially in white collar cases, lawyers representing subjects or targets of a criminal investigation customarily seek information from potential witnesses and, on occasion, attempt to influence those witnesses' accounts, either to develop evidence that may be used at trial or, more often, as part of an effort to stave off the filing of criminal charges. See generally Kenneth Mann, Defending White-Collar Crime 37-100 (1985) (surveying and analyzing how white collar criminal defense lawyers conduct investigations prior to indictment). Prior to Simels, these lawyers might have hesitated to communicate ex parte with potential witnesses who had retained counsel in connection with the investigation or who, as employees of a corporation that was a subject of the investigation, might be considered to be represented by corporate counsel. The Simels decision, however, gives defense lawyers in the Second Circuit carte blanche to interview potential witnesses, whether or not they are represented, prior to the filing of criminal charges.

The court's permissive reading of the no-contact rule will also benefit some defendants who have been charged with a crime and are awaiting a criminal trial, as Simels's client was when Simels contacted Harper.

233 See Simels, 48 F.3d at 651.
tact directly several classes of prospective witnesses. These classes include
(1) defendants in unrelated criminal cases,234 (2) alleged victims who have
retained lawyers to assist them in their role as witnesses or in connection with
the filing of civil charges, (3) prospective defendants who, as was true of
Harper, face the same possible criminal charges but have agreed to cooperate
with the government by testifying as government witnesses, and (4) code-
defendants who have already pleaded guilty235 or against whom the charges
have been dismissed.236 After Simels, these witnesses are fair game for de-
defense lawyers in the Second Circuit.

At the same time, Simels poses reciprocal problems for clients in crim-
nal cases. Prior to Simels, a defense lawyer retained in connection with a
criminal investigation might have cautioned his client not to speak about the
case with anyone else, including even the most trusted friends, because the
government might gain access to the statements and use them against the
client.237 The lawyer might have been particularly concerned about forays
from government agents and informants but would scarcely have anticipated
that the lawyers representing other subjects or targets of the investigation
might also seek damaging admissions from the client, either by questioning
the client personally or by employing private investigators.238 Nor would a
lawyer for a cooperating defendant in a multidefendant case have expected
that lawyers for other codefendants would seek evidence directly from the
client. After Simels, however, unsophisticated clients may be induced to
make inculpatory or otherwise harmful admissions under the artful question-
ing of other defense lawyers.239

That the opportunities and dangers of the Simels decision are reciprocal
for defense lawyers and their clients does not mean that they are equal. In

234 See, e.g., New York County 676, supra note 172.
235 See, e.g., In re Thompson, 492 A.2d 866, 867 (D.C. 1985).
236 See, e.g., United States v. Dennis, 843 F.2d 652 (2d Cir. 1988).
237 See, e.g., MANN, supra note 232, at 124-56 (discussing ways to control client disclosures
to third parties).
238 In United States v. Arrington, 867 F.2d 122 (2d Cir.), cert. denied, 493 U.S. 817 (1989),
the court determined that Simels had properly been disqualified when he sought to use the
affidavit obtained from Harper to defend his client, because Simels had thereby become a poten-
tial witness. The decision demonstrates the wisdom of ABA STANDARDS RELATING TO THE
ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard 4.3(d) (1974) [here-
inafter ABA STANDARDS], which provides:

Unless the lawyer for the accused is prepared to forego impeachment of a witness
by the lawyer's own testimony as to what the witness stated in an interview or to
seek leave to withdraw from the case in order to present his impeaching testimony,
the lawyer should avoid interviewing a prospective witness except in the presence
of a third person.

Id. Standard 4.3(f).
239 Grievance Comm. v. Simels, 48 F.3d 640, 651 (2d Cir. 1995). The court warned that:
[It] is incumbent upon defense attorneys to instruct clients in Harper's position not
to risk foregoing the benefits of a cooperation agreement by talking to, or by sign-
ing statements at the insistence of, another defense attorney. Many defendants are
not sophisticated; most, however, are sophisticated enough to understand the risks
of jeopardizing a cooperation agreement and potentially subjecting themselves to
perjury charges.

Id.
some respects, the decision would seem to be a net gain for the clients of
criminal defense lawyers because the disclosures that defense lawyers will
obtain through ex parte communications with prospective witnesses will ben-
efit their defendant clients more than they will hurt the witnesses who made
the disclosures. For the defendants, the stakes are extraordinarily high. Dis-
closures that may be used to exonerate a client or to impeach a witness may
help tip the balance toward acquittal. The stakes will ordinarily be lower for
the witnesses. On rare occasion, as the Simels opinion notes, a witness’s “un-
counselling statement . . . could jeopardize that person’s cooperation agree-
ment and be used against him or her at trial.”240 The greater likelihood,
however, is that the witness will simply make inconsistent statements that,
while useful to the defendant’s lawyer in cross-examining the witness, cause
only embarrassment to the witness.

On the other hand, by inviting one defense lawyer to contact other de-
fense lawyers’ clients, Simels poses a collateral risk to both defendants and
the truth-seeking process. For defense lawyers, the opportunity afforded by
Simels presents a difficult choice: Should they interview other represented
suspects, targets, or defendants? Indeed, are they ethically or constitution-
ally obligated or both to do so, in order to afford the zealous representation
and effective assistance of counsel to which, Simels notes in several places,
their clients are entitled?241 Or may they and should they refrain from doing
so either as a matter of courtesy or to preserve harmonious relations among
defense lawyers representing clients with similar interests? The decision will
create a level of uncertainty about the choices that fellow lawyers will
make.242 Whether or not defense lawyers opt to interview other lawyers’ cli-
ients, the very possibility that they will do so may foster distrust among law-
yers. This, in turn, may undermine cooperation among lawyers for potential
or actual codefendants,243 thereby facilitating government efforts to “divide

240 Id.
241 See infra note 247.
242 The possibility that other lawyers’ clients will choose to cooperate with the govern-
ment’s investigation creates a similar type of uncertainty. See generally Richman, supra note
227, at 89-90.
243 Defense lawyers recognize the importance of cooperation among lawyers for defend-
ants in multidefendant cases. For example, a lawyer who represented one of 22 defendants who
were acquitted after a 22 month trial recently observed:
You have absolutely no choice, if you want to win these cases, but to work closely
with your fellow defense counsel and their clients. If you don’t, you will surely lose.
You can not afford to have any additional enemies in the courtroom acting out of
malice or out of ignorance.

“Uncensored” CJA Seminar: Basic to Advanced Practice, 9 Crim. Prac. Man. (BNA) 99, 103

Judicial decisions recognize that defense lawyers share information, divide investigative
tasks, plan strategy together, and divide tasks at trial. See, e.g., United States v. Zackson, 6 F.3d
911, 919 (2d Cir. 1993) (sharing of discovery material). Moreover, the law generally favors co-
operation among counsel for parties aligned in interest on the theory that such cooperation pro-
motes effective representation and, in turn, truth-seeking. See, e.g., Raytheon Co. v. Superior
Court, 256 Cal. Rptr. 425, 428-29 (Cal. Ct. App. 1989) (indicating that attorney-client and work
product privileges are not necessarily waived upon disclosure of documents to codefendants with
whom the client has a commonality of interest). Thus, the attorney-client privilege has been
extended to protect disclosures of client confidences among counsel representing parties with a
and conquer.” Thus, while Simels makes defense lawyers more certain about one thing—how the federal court grievance committee will regard contacts with represented witnesses—it makes them less certain about another, i.e., whether other defense lawyers will now attempt to take advantage of their clients. In setting a standard governing criminal defense lawyers’ dealings with other lawyers’ clients, the court would have benefitted from the defense bar’s perspective on the importance of cooperation among criminal defense lawyers and the impact of a permissive rule on such cooperation.

d. The Academic Perspective: Constitutional Implications of the No-Contact Rule

At bottom, the court’s decision may have been driven less by considerations of policy than by considerations of power, or lack thereof. Although the court in Simels professed to be interpreting DR 7-104(A)(1), its doubts about whether a district court could have adopted a broader rule lie barely beneath the surface of the opinion. Its doubts reflected two concerns. The first was that lower federal courts would lack supervisory authority to circumscribe pretrial investigations by means of a broader disciplinary rule. To be sure, the court opined that the federal district courts’ supervisory authority over lawyers “should not be used as a means to substantially alter federal criminal law practice,” not that this authority may not be so used. But the latter possibility is certainly implicit.

Second, the court was concerned about constitutional limits on the district court’s supervisory authority. The Simels opinion makes several references to the defendant’s Sixth Amendment right to counsel, but does not

common interest. In order to receive the benefit of the privilege, criminal defense lawyers increasingly enter into formal agreements, termed “joint defense” agreements, which memorialize the terms of their cooperation. See generally Daniel J. Capra, The Attorney-Client Privilege in Common Representations, 20 TRIAL L.Q. 20 (1989) (describing the mechanics of a joint defense and the possible ethical problems that its use can create); Patricia G. Wells, A Survey of Attorney-Client Privilege in Joint Defense, 35 U. MIAMI L. REV. 321 (1981) (explaining the role of the attorney-client privilege in a joint defense); Susan K. Rushing, Note, Separating the Joint-Defense Doctrine from the Attorney-Client Privilege, 68 TEX. L. REV. 1273 (1990) (focusing on the need for a joint-defense privilege); Note, The Attorney-Client Privilege in Multiple Party Situations, 8 COLUM. J.L. & SOC. PROBS. 156 (1972) (reviewing the common law of attorney-client privilege in multiple party situations). Lawyers who undertake “joint defense” agreements may respond to Simels by including a provision barring participants from contacting each others’ clients without permission.

244 It may still be unclear how state court disciplinary committees will regard such contacts by defense lawyers in federal criminal proceedings. State authorities in New York may interpret DR 7-104(A)(1) more broadly, to proscribe the conduct that Simels deemed permissible, and prosecute criminal defense lawyers licensed by the state for violating the state disciplinary rule. The Simels opinion might discourage the enforcement of state disciplinary rules in this way but does not explicitly foreclose it.

245 The DOJ has made this argument in justifying its regulation. See supra note 121.

246 Grievance Comm. v. Simels, 48 F.3d 640, 644 (2d Cir. 1995) (emphasis added); see also id. (“If such substantial modifications are to be made, they should occur only after careful consideration by the representative branches of the federal government.”).

247 See, e.g., id. (“The Committee’s interpretation . . . raises important issues of policy affecting . . . the ability of defense counsel to provide the effective assistance and zealous representation that the Sixth Amendment and DR 7-101, respectively, guarantee to criminal
explicitly state that a disciplinary rule barring defense contacts with represented witnesses would contravene that right. Although Simels apparently did not defend his conduct on constitutional grounds, the court’s concerns were understandable. Numerous decisions have recognized that, to satisfy the right, criminal defense lawyers must undertake reasonable investigation.248 If read broadly, DR 7-104(A)(1) would bar defense lawyers from interviewing represented witnesses who are likely to have relevant evidence, thus impeding their ability adequately to investigate the case. The Supreme Court has previously held that a trial court, although motivated by legitimate ethical considerations, violates the right to effective assistance of counsel when it forbids a criminal defense lawyer from consulting with the defendant during an overnight recess between the defendant’s direct and cross-examination.249 It might similarly be argued that, as applied to criminal defense lawyers, DR 7-104(A)(1) violates the right to effective assistance of counsel, notwithstanding the possible legitimacy of the ethical concerns underlying the rule.

Interpreting DR 7-104(A)(1) narrowly enabled the Simels court to avoid questions about the scope of a court’s supervisory authority and the constitutional limits on that authority.250 Yet, the court might have been less restrained had it received the benefit of the views of legal scholars who had studied, or were willing to study, these questions. The court might have been convinced of its authority to apply the no-contact rule to restrict evidence gathering by criminal defense lawyers. Alternatively, academic commentary might have confirmed the court’s doubts about the scope of its power, lead-

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249 See Geders v. United States, 425 U.S. 80, 91 (1976); see also Herring v. New York, 422 U.S. 853, 857 (1975) (stating that the right to effective assistance of counsel “mean[s] that there [are] no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process”).

250 In Simels, the court of appeals had no need to concede that it was doing more, or doing something other, than simply interpreting a disciplinary provision that had been incorporated by reference in a district court’s local rule. It would have to do so, however, if a district court within the circuit were later to adopt a disciplinary rule that unambiguously reached a result opposite from the one reached in Simels—for example, a rule that explicitly bars defense lawyers from contacting witnesses or potential defendants who are represented by counsel. In that event, the court of appeals would have to determine whether to strike down the rule as a matter of its own supervisory authority over lawyer practice, on the ground that the district court exceeded its own authority in adopting the rule, or on the ground that the rule contravenes the Sixth Amendment right to counsel. It is virtually inconceivable, however, that a district court would put the court of appeals to this test.
ing it to cite constitutional concerns explicitly to justify a permissive reading of the no-contact rule. In the former case, the court might have set a standard of conduct that was more appropriate on policy grounds; in the latter case, it might have provided a more persuasive rationale for the standard it set.

2. The Limited Reach of Case-by-Case Adjudication

The Simels court gave weight to the need for drawing a "clear line" that provides defense lawyers "fair" and "clear notice" about the scope of DR 7-104(A)(1). The court could have provided as much clarity, however, while bringing Simels's conduct within the ambit of the rule. Quite simply, it could have read "party" in DR 7-104(A)(1) to mean "person." Under this reading, Simels could not properly have contacted Harper about the shooting because Harper clearly was represented in connection with the shooting.

In the context of Simels, in any event, the justification rooted in the need for clear line drawing seems unpersuasive because the court's interpretation does not in fact draw a clear line. While establishing that witnesses, targets of a criminal investigation, and arrested but unindicted defendants are not "parties," the court never resolved whether some or all indicted codefendants are "parties" for purposes of the rule.

On its face, DR 7-104(A) is ambiguous with respect to actual codefendants, just as it was with respect to witnesses and potential codefendants. On the one hand, indicted codefendants are certainly "parties" vis-a-vis the government. On the other hand, codefendants may not be "parties" vis-a-vis each other. As Simels notes, DR 7-104 is titled "Communicating with One of Adverse Interest," and the Second Circuit has never previously interpreted the term, "adverse interest." The meaning of the term may not be relevant, in that it did not find its way into the text of the disciplinary rule itself. Alternatively, in the light of the title, the term "party" may be read to imply some element of adversity.

Moreover, if adversity is required, another question is how much. Would there be sufficient adversity if the codefendants' lawyers were not for-

251 See 48 F.3d at 649-51.
252 Apparently, this is how the drafters of the rule meant it to be read. One commentator explains: "Although the matter is not entirely clear under the Code, probably DR 7-104(A)(1) and, clearly, MR 4.2 prohibit contact with any represented person, including those whose interests are apparently not adverse to the interests of an existing client of the lawyer." WOLFRAM, supra note 4, § 11.6.2 (footnotes omitted). This commentator further explains: "The lawyerism party sometimes refers only to parties in litigation but evidently is here intended to refer broadly to any 'person' represented by a lawyer in a matter. Vide 'party of the first part' in ancient contracts." Id. § 11.6.2 n.33; see also ABA Op. 95-396, supra note 116, at 6-9 (interpreting "party" in MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983) to mean "person"). In August 1995, the ABA amended Model Rule 4.2 to replace the term "party" with "person," in order to clarify that this is the appropriate reading. See GILLERS & SIMON, supra note 45, at 266-68 (excerpting ABA report).
253 See supra note 191 and accompanying text.
254 See Simels, 48 F.3d at 646-47. Courts have interpreted the requirement of adversity for the purpose of other rules. See, e.g., United States v. Harwood, 998 F.2d 91, 97 (2d Cir. 1993) (interpreting FED. R. EVID. 801(d)(2)(A)).
mally cooperating in the defense and the lawyer’s communication was for the purpose of discovering the codefendant’s position? Or would the codefendants’ interests merely be “potentially adverse” or “different” at that point? Is it even enough that the codefendant is a party with interests adverse to those of the defendant, as would be true at the point when the defendant’s attorney decided to interview the codefendant to obtain evidence to exculpate the client? Or must codefendants be “adversaries” in the sense of having already raised antagonistic defenses? Further, does the answer turn on whether the codefendants will be jointly tried? If it appears that the codefendants will not be litigants in the same courtroom proceeding, so that one is at most a potential witness vis-a-vis the other, does the codefendant cease to be a “party” (if otherwise he would have been one)?

Both the ABA’s ethics committee and a federal district court outside the Second Circuit have recently concluded that an indicted defendant’s lawyer may not contact a represented codefendant. The grievance committee that sanctioned Simels had assumed that actual codefendants are “parties” for purposes of DR 7-104(A)(1) and therefore are off limits to ex parte contacts by the lawyers for other defendants. This assumption was critical to its conclusion that potential codefendants are “parties.” Yet, perceiving the status of actual codefendants to be unclear, the Simels court rejected the grievance committee’s presupposition and declined to resolve the issue, explaining that it was “not presented for [the court’s] resolution.” Thus, in the end, the court did not draw a clear line, but shifted an unclear one.

At the same time, the court provided a framework for analyzing the issue that seems to point in the opposite direction from the conclusion reached by the ABA, the recent district court opinion, and the grievance committee. Given the ambiguity of DR 7-104(A)(1) as applied to codefendants, Simels indicates that the appropriate interpretive approach is to focus on policy considerations. The three principal policy considerations leading to a narrow interpretation in Simels would seem to be equally, if not more, applicable to communications with represented codefendants.

The first is the concern for promoting “investigation essential to a defense attorney’s preparation for trial.” If, as the court noted, “contacting represented co-targets during the investigative phase of a large conspiracy” is an element of “critical pre-trial investigation,” then contacting the same

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255 The Simels opinion strongly suggested this distinction in emphasizing that: Harper was a cooperating witness and in name only would have been a possible codefendant or “party” in [the] criminal proceeding [that might be brought against Davis for his involvement in the shooting of a government witness] ... [B]y merely naming a cooperating witness as a codefendant, the government could cut off a defendant’s ability to contact a represented “codefendant” even though that person would not likely be a “codefendant” at trial.

Simels, 48 F.3d at 650.

256 See ABA Op. 95-396, supra note 116, at 6 & n.11.


258 See supra note 190 and accompanying text.

259 Simels, 48 F.3d at 650.

260 Id.

261 Id. at 651.
individuals after the co-targets have become indicted codefendants would seem even more crucial. That is because, once the defendant is indicted, the need is more apparent to conduct pretrial investigation. This is especially true because individuals have no constitutional right to counsel until they have been arrested or charged.\(^{262}\) The overwhelming number of defendants being indigent, few secure counsel until that point. Consequently, this may be the first time that such investigative steps can be taken.

The second policy concern in *Simels* was the need for "clear notice" of the scope of the disciplinary rule.\(^{263}\) Interpreting the rule to provide that their clients' codefendants are never parties would provide defense lawyers the greatest possible notice. Virtually any alternative interpretation would present questions about what the rule meant or whether it applied in various contexts. For example, providing that codefendants are "parties" only when their interests are actually adverse to those of each other will raise both interpretive issues about the extent of the requisite adversity and factual questions about whether the codefendants' interests met the threshold of adversity in a given case. Likewise, distinguishing between codefendants who are likely to be tried together and those who will be tried separately, if at all, presents both an interpretive issue about how likely a joint trial must be and a factual question about whether it is sufficiently clear in a given case that codefendants will be tried together.\(^{264}\)

The last policy consideration was the need to avoid using disciplinary rules to resolve issues of federal law enforcement policy.\(^{265}\) The question of whether DR 7-104(A)(1) bars ex parte communications with codefendants certainly implicates such issues. The question pits one defendant's interest in obtaining possibly relevant evidence against another defendant's interest in access to a lawyer's advice. As the court noted in *Simels*: "If one defense attorney's obligation to provide effective assistance to his client must yield to another defendant's interests, that choice should be made either by Congress or the Supreme Court, and not by district courts' expansive interpretations of disciplinary rules."\(^{266}\) This observation should have at least as much force in the context of actual codefendants as it did in *Simels*, which implicated the competing interests of potential codefendants.\(^{267}\)

\(^{262}\) See Kirby v. Illinois, 406 U.S. 682, 688-89 (1972); In re Grand Jury Subpoenas, 906 F.2d 1485, 1493 (10th Cir. 1990).

\(^{263}\) See supra note 251 and accompanying text.

\(^{264}\) Even after a trial begins, a defendant in a multi-defendant trial may choose to plead guilty and testify for the government. Thus, from the perspective of a defendant's lawyer, there is never certainty that an individual will remain a codefendant and not become a witness.

\(^{265}\) See supra notes 245-250 and accompanying text.

\(^{266}\) *Simels*, 48 F.3d at 651.

\(^{267}\) At the same time, however, exempting codefendants from the reach of DR 7-104(A)(1) would appear contrary to a different policy consideration that clearly motivated the *Simels* decision, although it was not identified explicitly. Implicit in *Simels* was a concern for preserving symmetry between defense and prosecutorial practices. Although the issue before the court was the propriety of a defense lawyer's ex parte communications with a represented person, the court undertook an extensive review of prior decisions interpreting DR 7-104(A)(1) as applied to prosecutors. See id. at 647. In doing so, the court referred to prosecutorial conduct in a manner implying that its decision was driven by a concern for how the rule applies to prosecutors as well as defense lawyers. See id..
By leaving open whether these codefendants may be approached without their lawyers' permission, the court compounded the uncertainties that defense lawyers face after Simels. While extolling the virtues of "clear notice," the opinion failed to provide guidance to defense lawyers in multidefendant cases about whether they may invoke this investigative option to obtain evidence helpful to their clients. Likewise, it left lawyers uncertain whether their own clients will be viewed as a fertile source of information by lawyers for the codefendants. To this extent, it may undermine cooperation among lawyers seeking to wage a common defense on their clients' behalf.

The opinion thus reflects one of the most glaring shortcomings of adopting general rules to be interpreted in adjudication, as compared with adopting detailed, context-specific rules. The process of establishing precise standards of conduct for lawyers in adjudication is haphazard. Courts do not address the propriety of questionable conduct until required to do so, either because, as in Simels, disciplinary proceedings were initiated, or because the propriety of the lawyer's conduct is relevant in the context of litigation. Such cases arise infrequently in federal court, however. While waiting for a court to resolve questions of lawyer conduct, lawyers must either refrain from possibly permissible conduct that might serve their clients' interests or engage in such conduct at the risk of facing disciplinary proceedings, as did Simels.

By interpreting "party" in the disciplinary rule to authorize defense lawyers' communications with witnesses and potential defendants, the court afforded defense lawyers the same investigative opportunity it had previously afforded federal prosecutors, albeit by interpreting other terms of DR 7-104(A)(1). See United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988) (stating that prosecutors are "authorized by law" to seek to elicit statements from a represented defendant prior to indictment), cert. denied, 498 U.S. 871 (1990); see also United States v. Thompson, 35 F.3d 100 (2d Cir. 1994) (ruling that DR 7-104(A)(1) did not apply to law enforcement agent performing investigative function); United States v. De Villio, 983 F.2d 1185 (2d Cir. 1993) (finding no violation of DR 7-104(A)(1) where government arranged for codefendant to record incriminating conversations with defendants); United States v. Schwimmer, 882 F.2d 22 (2d Cir. 1989) (finding no violation of DR 7-104(A)(1) where prosecutor questioned before a grand jury a convicted defendant during pendency of that defendant's appeal), cert. denied, 493 U.S. 1071 (1990). It thereby preserved the legitimacy of its prior decisions narrowly interpreting the rule as applied to federal prosecutors. The federal prosecutors' interest in seeking evidence of guilt seems no more compelling than the defendant's interest in seeking evidence of innocence. Having previously found the prosecution's interest compelling enough to permit prosecutors to communicate directly with represented persons before they have been indicted, the court would have been hard put to justify striking the opposite balance in the context of investigations by criminal defense lawyers.

In the case of indicted codefendants, by contrast, the interest in preserving a "level playing field" would argue for applying the rule to indicted codefendants. Clearly, indicted defendants are "parties" vis-a-vis the government. Insofar as DR 7-104(A)(1) applies to prosecutors after the recent DOJ regulation, it almost certainly proscribes communications with indicted defendants about the subject of the pending charges. Allowing defense lawyers to contact indicted codefendants would thus afford them an investigative opportunity denied to prosecutors. If the court in Simels was implicitly concerned about interpreting DR 7-104(A)(1) to avoid providing one side a procedural advantage, this concern would cut in favor of defining codefendants as "parties," notwithstanding that the court's explicit concerns cut the other way.
III. Judicial Rulemaking

A. The Process for Developing Federal Rules of Professional Conduct

As the previous discussions reflect, several considerations bear on the questions about the choice of institution to draft and promulgate rules of professional conduct, the process by which the rules should be drafted, and the nature of the rules themselves. First, the law governing lawyers should set standards of conduct that are both appropriate and perceived to be appropriate. The DOJ regulation fails by this measure because of the partisanship of those who drafted and promulgated it. Second, the applicable standards of conduct should be clear. The bar association rules fail by this measure, as the Simels case reflects. Third, insofar as possible, the standards applicable in the different jurisdictions in which lawyers practice should be consistent. Finally, the process for developing standards of professional conduct should be reasonably efficient.

In the light of these considerations, the most appropriate process for developing professional standards for federal practice is the obvious one that has been resisted by federal courts thus far: federal judicial rulemaking. The federal rulemaking process has a long history. Since the adoption of the Rules Enabling Act of 1934, the Supreme Court has promulgated rules of practice for federal court, beginning with the Federal Rules of Civil Procedure in 1938 and the Federal Rules of Criminal Procedure in 1946. Since 1958, principal responsibility for drafting federal rules of practice has been vested in the Judicial Conference, which acts through a Standing Committee on Rules of Practice and Procedure and various advisory committees.

While doubts have been raised about the Supreme Court's authority to adopt procedural rules pursuant to express federal authority, there would be little question of its authority to adopt rules of professional conduct for lawyers in federal proceedings. As noted earlier, lower federal courts have

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268 See generally McCabe, supra note 34, at 1658-64 (recounting the history of promulgation of federal rules of practice and procedure).


273 See McCabe, supra note 34, at 1659.

274 See id. at 1658 & n.10 (citing authority).

275 Federal courts may adopt rules of professional conduct pursuant to their supervisory authority over the practice of law. See supra note 7; see also Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 724 (6th Cir.) ("Federal courts have the inherent authority to discipline attorneys practicing before them . . . ."), cert. denied, 508 U.S. 940 (1993); Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 439 (9th Cir.) ("In the absence of rules promulgated by higher authorities in the judicial system, the district courts are free to regulate the conduct of lawyers appearing before them."), cert. denied, 464 U.S. 851 (1983). Additionally, they have authority to do so pursuant to 28 U.S.C. § 2071(a) (1994), which provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."
done so even in the absence of explicit legislative authority.\textsuperscript{276} The problem, however, is that they have principally relied on imprecise bar association rules, rather than assuming responsibility for drafting detailed rules.

Rather than continuing to abdicate responsibility for the content of professional standards, the federal judiciary should develop independent standards through federal court rulemaking. Federal rules of professional conduct should apply in all federal judicial proceedings. These rules should comprehensively address lawyers' conduct as it relates to litigation. The obvious process for developing such rules would be a variant of the one by which federal courts promulgate rules of procedure, a process that has been refined over the course of more than sixty years\textsuperscript{277} and has proven successful.\textsuperscript{278}

Alternatively, the Judicial Conference could employ a more streamlined process that preserves three essential features of the current federal rulemaking process. First, responsibility for drafting rules should be placed in the hands of a broadly constituted group including federal judges, practitioners, academics, state judges, and representatives of the DOJ.\textsuperscript{279} Second, the process should allow for consideration of a broad range of perspectives, both by inviting public comment at public hearings during the drafting stage and by providing an opportunity for public comment on proposed rules.\textsuperscript{280} Third, the rules should be reviewed and promulgated by the Supreme Court, which may, if it chooses, defer entirely to the Judicial Conference.\textsuperscript{281}

The process should diverge in two respects from the customary practice with respect to procedural rules. First, it should be directed toward developing rules that are more specific and detailed than most federal rules of procedure and evidence. Many procedural and evidentiary rules are designed to vest considerable discretion in courts.\textsuperscript{282} There is no benefit, however, to rules of professional conduct that invite inconsistent interpretation and application. Lawyers should be afforded as much certainty as possible about whether their proposed conduct is proper. As discussed below, the adoption of specific rules is the only reliable means of affording such certainty, and is the means likely to produce the most appropriate standards.

Second, the process should be an ongoing one, characterized by the reconsideration and amendment of prior rules in the light of courts' experiences and by the adoption of new ones. In general, the federal judiciary has been unwilling to make frequent changes to the procedural rules\textsuperscript{283} and its changes have occasionally been criticized as unnecessary.\textsuperscript{284} In the case of

\textsuperscript{276} See supra note 13 and accompanying text.

\textsuperscript{277} See McCabe, supra note 34, at 1658-64.

\textsuperscript{278} See supra note 34.

\textsuperscript{279} See McCabe, supra note 34, at 1664-66.

\textsuperscript{280} See id. at 1669-73.

\textsuperscript{281} See id. at 1674-75 ("[T]he Court's enormous prestige clearly contributes to the legitimacy and credibility of the process.").

\textsuperscript{282} See, e.g., Fed. R. Evid. 201, 403, 608(b), 609(a) & (b), 611(a) & (b), 614(a), 705, 706(a), 1003; Fed. R. Civ. P. 6(b), 12(f), 13(f), 14(a), 15(a) & (b), 16(a), 19(b), 20(b), 24(b).

\textsuperscript{283} See McCabe, supra note 34, at 1678-81.

judicial rules of professional conduct, however, ongoing review will serve two purposes. First, it will provide a vehicle to craft rules governing conduct that has not been adequately addressed by existing rules. Among other things, ongoing review will enable the federal judiciary either to reject or to codify standards of conduct that are adopted interstitially by federal courts. Second, this process will serve as a vehicle to review federal court interpretations of existing rules and, more importantly, to resolve conflicting interpretations rendered by courts of different jurisdictions, thereby promoting uniform standards throughout federal courts.

No doubt, the prospect of federal judicial rulemaking would be strongly resisted by the ABA, which, seeking to preserve its influence over the content of the professional rules,285 would favor applying the ABA Model Rules in all federal proceedings. State judges, state disciplinary counsel, and state bar associations may urge federal courts to apply the rules of the states in which they sit.286 Academics who consult in the area of legal ethics can be expected to favor these options,287 and the DOJ may also, inasmuch as the

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285 Cf. Coquillette Report, *supra* note 13, at 36 ("The American Bar Association . . . would probably prefer to see a national standard for all federal courts, particularly if it followed the ABA Model Rules. This would . . . probably hasten the day when all states adopt the ABA Model Rules.").

286 See *supra* note 143 (discussing state judges' opposition to DOJ regulation).

287 Academic authorities on legal ethics have made a cottage industry of serving as "ethics experts," opining on the meaning of unclear ethical rules in opinion letters and in litigation. See Monroe Freedman, *Crusading for Legal Ethics*, LEGAL TIMES, July 10, 1995, at 25 ("Expert witnesses on lawyers' and judges' ethics charge as much as $500 an hour for their time, and some law professors double and triple their academic salaries by consulting and testifying about ethics."). Some have argued that obtaining advice from an individual expert, with whom the inquiring lawyer would have an attorney-client privilege, is preferable to obtaining advice from an ethics committee. Because statements to an ethics committee generally would not be privileged, an attorney would usually hesitate to provide it with the kind of detailed information necessary to an informed decision on matters of complexity. See Experts Examine Function of Legal Ethics Opinions, 7 Laws. Man. on Prof. Conduct (ABA/BNA) 2, 36-37 (Feb. 13, 1991) (citing comments of Professor Geoffrey C. Hazard, Jr., at a meeting of the National Organization of Bar Counsel in February 1991).

Increasingly, lawyers have also turned to ethics experts to give opinions to judicial or disciplinary bodies about the scope of ethical rules. See, e.g., Williams v. Warden, State Prison, 586 A.2d 582, 586 (Conn. 1991) (noting the testimony of experts on lawyers' professional responsibility); Monsanto Co. v. Aetna Casualty & Sur. Co., 593 A.2d 1013, 1016-17 (Del. Super. Ct. 1990) (stating that defendants submitted the affidavits of ethics experts); Committee of Professional Ethics v. Baudino, 452 N.W.2d 455, 459 (Iowa 1990) (noting testimony of ethics expert); *In re Gaulkin*, 351 A.2d 740, 746 (N.J. 1976) (citing the affidavit of a draftsman for the ABA Special Committee on Standards of Judicial Conduct); see also Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 244 & n.13 (1985) (noting the proliferation of ethics experts); Joseph J. Portuondo, *Abusive Tax Shelters, Legal Malpractice, and Revised Formal Ethics Opinion 346: Does Revised 346 Enable Third Party Investors to Recover from Tax Attorneys Who Violate Its Standards?*, 61 NOTRE DAME L. REV. 220, 239-39 (1986) (noting the increased use of ethics experts in the courtroom). On occasion, courts have reacted unfavorably to the submission of expert affidavits or testimony on matters of legal ethics. See, e.g., United States v. Eyerman, 660 F. Supp. 775, 781 (S.D.N.Y. 1987) ("Supplying such affidavits . . . seems rather presumptuous, considering that the affiants have not been asked by the Court for their views . . . ."). More often, however, the expert
federal courts' continued reliance on unclear bar association rules would perpetuate the conditions that justify the DOJ in employing a preemptive regulation.

Finally, many federal judges may prefer adopting ABA rules to the seemingly more burdensome alternative of drafting detailed rules through a process comparable to the one that has produced federal rules of procedure and evidence. Nonetheless, as the following Parts demonstrate, judicial rulemaking is superior to either federal agency rulemaking or judicial reliance on bar association rules when measured against the four benchmarks relevant to the processes for developing professional standards: appropriateness, clarity, consistency, and efficiency. Moreover, contrary to a suggestion in Professor Coquillotte's report, comprehensive federal rules of ethics will simplify, rather than complicate, the professional lives of lawyers and law students.

opinions have been considered helpful. See, e.g., Doe v. Federal Grievance Comm., 847 F.2d 57, 62 (2d Cir. 1988) (relying on an ethics expert's testimony in interpreting DR 7-102(B)); Fisons Corp. v. Atochem North America, Inc., No. 90 CIV. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284, at *20-*22 (S.D.N.Y. Nov. 14, 1990) (relying on the opinions of experts in order to determine whether lawyers met the requirements of DR 5-105(C)).

Why, as a theoretical matter, courts should rely on expert testimony on legal ethics—a subject governed by domestic law, and judge-made law at that—has never fully been explained. See Green, supra note 6, at 521. The value of law professors as ethics experts turns in large measure on the ambiguity of the prevailing rules of professional conduct. Academic experts can claim insight into the meaning of ethics rules that others do not share based, for example, on their familiarity with the drafting process and on other indicia of intent that are not easily accessible.

Judicial rulemaking on a more modest level has drawn support in recent years as an approach to developing rules of professional conduct. See, e.g., In re Opinion 668 of the Advisory Comm. on Professional Ethics, 633 A.2d 959, 960 (N.J. 1993) (reserving final determination of ethical restraints on ex parte interviews of employees of a corporate litigant until receipt of a report of a special committee that was appointed to assess the effects of any rule that the court might adopt); Establishing Ethical Standards, supra note 53, at 44-45 (endorsing "the federal district courts' adoption of ethical standards" for lawyers in federal criminal cases based on recommendations "from a committee established for this purpose which would be composed of members of various constituencies"); see also United States v. Ward, 895 F. Supp. 1000, 1005 & n.4 (N.D. Ill. 1995) ("A host of questions plagues any attempt to apply Rule 4.2 or its predecessor to prosecutors in the pre-indictment, non-custodial setting present in this case. . . . If there is to be national uniformity in this area, this Court believes it can only come through the Supreme Court's exercise of its rule-making power to craft a uniform rule for federal criminal prosecutions.").

One federal court, the District Court for the Eastern District of New York, appointed a group two years ago to "undertak[e] a detailed, rule-by-rule analysis of the rules of ethics that should apply in the Court." See Eastern District Studies Ethic Rules, Welcomes Comments, N.Y.L.J., Jan. 18, 1994, at 48. The group was authorized to consider not only recommending the adoption of existing rules or sets of rules, but also "recommend[ing] some entirely different rules." Id. Although the group's mandate allows the possibility of fashioning rules that are more detailed, and less ambiguous, than those now in effect, the group is unlikely to take on such a demanding task exclusively for the benefit of a single judicial district. This course might economically be undertaken by the Judicial Conference, however, since its work product would ultimately apply throughout the federal courts. Further, while individual districts might adopt rules that are more appropriate than existing rules and that provide greater guidance to lawyers who know that they are subject to the rules of that court, these sets of rules will not address the problem of interdistrict balkanization.
B. Appropriateness of Standards of Conduct

Perhaps the most important measure of a process for developing professional standards for federal litigators is the extent to which the standards the process produces are likely to be appropriate and perceived to be so by the courts that enforce them, the lawyers subject to them, and others whose interests are affected by them. This consideration has been given short shrift in discussions about the "balkanization" of professional rules. From the perspective of fashioning the most appropriate standards of conduct, the federal judicial development of detailed rules is superior to the alternatives addressed in Parts I and II—namely, agency rulemaking or judicial reliance on bar association models—for three reasons.

First, specific rules are superior to general rules in capturing appropriate contextual distinctions. For example, although several ABA provisions make distinctions based on the context in which lawyers serve, the overwhelming majority apply to lawyers serving in wide-ranging and vastly different roles: some apply to lawyers engaged in all forms of advocacy; many more apply to lawyers serving in all representational capacities; and a handful even apply to lawyers in their personal as well as professional capacity. Yet, context is important to determining what professional conduct is proper. The ABA rules often fail to take account of meaningful contextual distinctions, such as those based on the lawyer's role.

289 See, e.g., Coquillette Report, supra note 13, at 1-3.
290 See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d) (1994) (contingent fee may not be charged in domestic relations or criminal case).
291 See, e.g., id. Rule 3.1 (lawyer may not file frivolous claims or make frivolous contentions in a proceeding); id. Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation); id. Rule 3.3 (duty of candor to a tribunal); id. Rule 3.4 (fairness to opposing party and counsel); id. Rule 3.5 (relations to the tribunal); id. Rule 3.7 (lawyer as witness).
292 See, e.g., id. Rule 1.1 (competence); id. Rule 1.2 (scope of representation); id. Rule 1.3 (diligence); id. Rule 1.4 (communication with client); id. Rule 1.6 (confidentiality); id. Rule 1.7 (conflicts of interest).
293 See, e.g., id. Rules 8.1-8.4 (prohibiting lawyers from engaging in certain conduct in both personal and professional contexts); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-101 to -103 (1981) (identifying requirements applicable to lawyers in their personal and professional roles).
294 See, e.g., Burbank, supra note 21, at 975; Green & Coleman, supra note 139, at 967-68; Stanley Sporkin, The Need for Separate Codes of Professional Conduct for the Various Specialties, 7 GEO. J. LEGAL ETHICS 149, 149 (1993); Wilkins, supra note 22, at 1151.
295 Optimally, professional norms will take account of different lawyering roles both in a broad sense—distinguishing, for example, between civil litigation and criminal advocacy or between advocacy and counseling, see, e.g., Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 CAL. L. REV. 669, 669 (1978) (arguing that in a nonadversarial setting different principles of professional behavior should apply); Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 HUMAN RTS. 1, 12 (1975) (asserting "the amoral behavior of the criminal defense lawyers is justifiable" but not that of other lawyers)—and in a highly specific sense. See, e.g., Wilkins, supra note 22, at 1150-51. Commentators such as David Wilkins and Stanley Sporkin correctly perceive that the "universal" rules comprising the existing codes of professional conduct are antithetical to the ideal of context-specific professional norms. Their solution is the development of separate codes for lawyers serving in different roles. See, e.g., Sporkin, supra note 294; Wilkins, supra note 22, at 1216; Fred C. Zacharias, Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?, 6 GEO. J. LEGAL ETHICS 903, 930 (1993).
This is illustrated by the no-contact rule. Federal courts have determined that the appropriate standard of conduct governing contacts with represented persons should be more permissive for prosecutors than civil litigators. While courts have applied the restriction to investigations prior to the commencement of civil litigation, they have declined to apply it to criminal investigations before formal charges are filed. The no-contact rule did not reflect these distinctions, however. If read to apply equivalently in criminal and civil cases, as its language suggests, the no-contact rule would either be unduly restrictive for prosecutors or unduly permissive for civil litigators. This problem would have been avoided through the adoption of separate rules for criminal and civil cases. Federal judicial rulemaking will thus afford an opportunity to craft rules that are more precise and better tailored than bar association rules to particular courses of conduct in discrete contexts.

Second, because of the objectivity of the federal judiciary, rules drafted by the Judicial Conference and promulgated by the Supreme Court can be expected to strike a fairer balance between competing considerations than rules adopted by executive agencies or bar associations. Certainly, these rules will appear to be fairer, and therefore command greater respect from lawyers to whom they apply. Bar association rules are perceived to privilege the interests of lawyers over non-lawyers, of private lawyers and their cli-

Taking a different approach, bar organizations have sought to develop recommendations or guidelines for how lawyers in specific settings should represent clients within the confines of the generally applicable rules, as well as, in some instances, how those rules should be amended. See, e.g., ABA STANDARDS, supra note 238, Standard 3-1.1 to -6.2 (addressing the prosecution function); id., Standard 4-1.1 to -8.6 (addressing the defense function); ACTEC Commentaries on the Model Rules of Professional Conduct, 28 REAL PROP. PROB. & TR. J. 865, 866 (1994); Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, in 64 FORDHAM L. REV. 1281 (1996); Proceedings of the Conference on Ethical Issues in Representing Older Clients, Recommendations of the Conference, in 62 FORDHAM L. REV. 989 (1994); Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 FAM. L.Q. 375 (1995); see also GILLERS & SIMON, supra note 45.

296 See supra note 211.

297 See, e.g., United States v. Ryans, 903 F.2d 731, 740 (10th Cir.) (holding that "DR 7-104(A)(1)'s proscriptions do not attach during the investigative process before the initiation of criminal proceedings"), cert. denied, 498 U.S. 855 (1990); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983) (holding that DR 7-104(A)(1) "does not require government investigatory agencies to refrain from contact with a criminal suspect because he or she previously had retained counsel"); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) (concluding that DR 7-104(A)(1) was not intended to "stymie undercover investigations when the subject retained counsel"), cert. denied, 464 U.S. 852 (1983).

298 See JETHRO K. LIEBERMAN, CRISIS AT THE BAR: LAWYERS' UNETHICAL AND WHAT TO DO ABOUT IT 216-17 (1978) (recommending that a neutral body, such as the Judicial Conference, draft professional rules to avoid professional self-interest inherent in bar association rules).

299 See, e.g., RICHARD L. ABEL, AMERICAN LAWYERS 119 (1989) ("During the last sixty years [after the adoption of the ABA Canons in 1908], much of what passed for professional self-regulation actually was preoccupied with limitations on what lawyers could do to promote themselves."); Abel, supra note 146, at 686-87; Cramton & Udeil, supra note 25, at 317 ("There is strong evidence that lawyers when they regulate themselves are inclined to take positions that favor the use of lawyers and enhance their authority and prestige."); Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 702, 704 (1977) (arguing that
ents over the government, and of corporate law firms and their clients over small firms, solo practitioners, and individual clients. Conversely, administrative agency rules are perceived to privilege the interests of government lawyers and the government, as the DOJ regulation illustrates.

Finally, detailed rulemaking affords the courts the most complete information and most varied insights on which to base their determination of the appropriate standard. The alternative of relying on bar association rules or, for that matter, an independent set of general rules, would defer decision-making to adjudication. As the Simels case illustrates, adjudication allows inadequate opportunity to elicit and consider the insights of individuals and institutions with diverse perspectives.

C. Clarity of Applicable Standards

The ABA has traditionally preferred to adopt rules of professional conduct that embody general principles, rather than precise rules that lend themselves to enforcement through professional discipline and decisions in litigation. At first glance, this approach might seem antithetical to the organized bar’s interest in maximizing its influence over the content of professional standards, because ambiguous rules shift responsibility to courts to announce standards of conduct in adjudication. However, adjudication con-

“lawyers’ ethics are consistently self-serving”); Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689, 692 (1981) (asserting that professional codes “consistently resolved conflicts between professional and societal objectives in favor of those doing the resolving”).

300 See, e.g., Otis, supra note 119, at A13 (arguing that it is inappropriate to subject federal prosecutors to state disciplinary sanctions because “state bars are dominated by private lawyers—i.e., in criminal practice, by defense lawyers”).

301 See Ted Schneyer, Professional Discipline for Law Firms?, 77 Cornell L. Rev. 1, 6 (1991) (noting that “more than eighty percent of the lawyers disciplined in California, Illinois, and the District of Columbia were sole practitioners, and none practiced in a firm with over seven lawyers”).

302 See supra notes 66-67 and accompanying text (discussing reaction to Thornburgh Memorandum); supra part I.C.2 (discussing subjectivity of DOJ regulation).

303 See supra part II.B.1. Indeed, adjudication affords less opportunity to consider the different perspectives of federal judges themselves. In adjudication, only the views of the few federal judges involved in deciding the case are considered. Rulemaking, however, would allow for input from any federal judge with expertise in an issue.

Comment from federal judges is especially important because, as the Simels court noted, questions of professional conduct may implicate “important federal policy concerns.” Grievance Comm. v. Simels, 48 F.3d 640, 645 (2d Cir. 1995). For example, as in Simels, questions arising in criminal cases may implicate federal law enforcement interests. Similarly, questions arising in class actions—e.g., whether class counsel may solicit potential class members, whether class counsel may pay the expenses of litigation, or whether a former class counsel may represent class members in opposition to a proposed settlement—implicate policies underlying Federal Rule of Civil Procedure 23. And, questions arising in discrimination cases—e.g., whether “testers” may pose as prospective tenants and secretly tape-record conversations with the landlord—implicate interests underlying federal civil-rights law. Standards of professional conduct may also implicate federal constitutional concerns, as in the cases of those standards governing out-of-court speech, advertising and solicitation, and criticism of judges. Perhaps most importantly, professional standards—particularly those governing conduct during trial—may bear in the federal courts’ own interest in the fair administration of justice.

304 See supra note 146.
cerning unclear rules is sporadic at best.\textsuperscript{305} Thus, bar associations preserve their influence over the continuing development of professional norms by taking positions on issues of lawyer professional conduct through processes other than rule drafting. A principal means of doing so is through the appointment of advisory committees such as the ABA Standing Committee on Ethics and Professional Responsibility. Such committees issue nonauthoritative opinions interpreting the ethical rules upon the request of lawyers who seek guidance concerning their proposed conduct.\textsuperscript{306}

More certain standards of professional conduct, whether established by rule or judicial decision, are necessary for several reasons.\textsuperscript{307} From the perspective of effective regulation, precise standards of conduct are preferable to vague ones, if only because lawyers are more likely to comply with the appropriate standard if they know what it is. From the perspective of lawyers' professional obligation to clients, clear standards of professional conduct are as important as clear rules of procedure, since violations of professional standards may have procedural consequences in litigation.\textsuperscript{308} Finally, as the Simels court recognized, clarity is also preferable from the perspective of lawyers personally.\textsuperscript{309} When the standards are indeterminate, lawyers may inadvertently engage in misconduct or, like Simels, engage in proper conduct but nevertheless be put to the anxiety and expense of disciplinary proceedings.\textsuperscript{310}

As Simels illustrates, it is folly to expect federal courts to give clear meaning to imprecise rules by regularly interpreting them through adjudication.\textsuperscript{311} In this respect, rules of professional conduct have served very differ-

\textsuperscript{305} See infra notes 311-323 and accompanying text.


\textsuperscript{307} Some have argued, however, that the lack of specificity and clarity in the disciplinary codes serves positive functions. For example, in addition to serving as a basis for disciplinary enforcement, the codes encourage lawyers to engage in moral reflection. Rules that are too precise leave no room for reflection. See generally Fred C. Zacharias, Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, 69 NOTRE DAME L. REV. 223, 227-29, 240-43 (1993) (discussing the issues raised by substantive specificity in drafting professional rules).

\textsuperscript{308} See supra note 148.

\textsuperscript{309} See Grievance Comm. v. Simels, 48 F.3d 640, 651 (2d Cir. 1995).

\textsuperscript{310} See Green, supra note 225, at 689-90 (arguing for greater clarity, particularly when lawyer conduct approaches the lines of criminality); Coquillette Report, supra note 13, at 19 ("A lawyer's ability to practice law is more than a matter of honor, it is a livelihood, and a sanction that suspends that livelihood needs to be based on sufficient notice . . ."). In the past, the disciplinary authorities have generally refrained from bringing proceedings based on conduct that is not clearly improper. See infra note 314 and accompanying text; see also Green, supra note 6, at 553 (asserting that attorneys should not be punished for violating ambiguous disciplinary provisions). In this respect, Simels is an exceptional case.

ently from federal rules of procedure and evidence, which are routinely employed and interpreted by federal courts. Although federal courts may interpret rules of professional conduct in the disciplinary context or as they bear relevance in litigation, neither process is effective to develop authoritative judicial interpretations of unclear professional rules.

The disciplinary process is ineffective, in part, because federal courts are reluctant to invoke it.\textsuperscript{312} But even if federal courts were to fund and operate a disciplinary mechanism comparable to those now overseen by state courts,\textsuperscript{313} it is unlikely that the process would lead to the clarification of standards of professional conduct. Disciplinary proceedings have traditionally been brought only in cases of egregious misconduct, not where there is borderline conduct.\textsuperscript{314} And even then, disciplinary authorities have reserved

\begin{quote}
"lead[s] to a slowly developed, haphazardly organized, and frequently conflicting disciplinary code."
\end{quote}

\textsuperscript{312} With respect to federal prosecutors, it has been observed:

The public record suggests, however, that federal prosecutors are rarely, if ever, referred to federal grievance committees. Indeed, federal district judges who are concerned about possible wrongdoing by a federal prosecutor seem to be more inclined to refer the prosecutor to a state disciplinary committee than to a disciplinary committee of the district court. There are various possible explanations for this. First, federal courts have traditionally deferred to state licensing authorities to oversee the professional conduct of lawyers. Second, the district court disciplinary mechanisms tend to be ad hoc and unfunded, whereas the state court disciplinary mechanisms are professionally staffed and funded by the state. Additionally, district court discipline adds to the federal court's workload. For all these reasons, district courts would tend to invoke the federal disciplinary processes only in exceptional cases and would view the state processes as the ordinary mechanism for dealing with wrongdoing by federal litigators, including federal prosecutors.

Green, \textit{supra} note 135, at 83-84 (citations omitted). These observations are true of federal litigators in general.

\textsuperscript{313} Professor Mullinex urges the "creation of federal disciplinary committees within the federal districts or circuits" as a superior alternative to addressing allegations of attorney misconduct in the context of ongoing federal litigation. Mullinex, \textit{supra} note 13, at 131. Setting separate disciplinary mechanisms within each federal district or circuit would not remedy the problem of inconsistent federal court interpretations of identical ethical rules, however. Each federal court's disciplinary body would remain free to interpret the rules differently.

This problem of inconsistent judicial interpretations could be addressed by establishing a single federal agency with disciplinary authority over practice in all federal courts or by allowing the disciplinary decisions of separate agencies to be reviewed by a single federal court. This Article takes the view, however, that the preferable road to uniformity is through the adoption of far less ambiguous rules in the first place, because rulemaking is better than adjudication as a means of determining the appropriate standard of conduct in an area of controversy or uncertainty. \textit{See supra} part III.B.

\textsuperscript{314} \textit{See} Cramton \& Udell, \textit{supra} note 25, at 304 ("Disciplinary bodies have limited resources, which leads them to concentrate on egregious and intentional professional violations that harm the offender's client.... Disciplinary authorities are accustomed to leaving most issues of lawyer conduct to other remedial settings.").

Few publicly reported disciplinary decisions involve uncertain applications of ethical standards. Those few tend to fall into one of three categories. First, there are a number of cases involving lawyer advertising that raise interpretive or constitutional questions. \textit{See}, e.g., Shapero \textit{v.} Kentucky Bar Ass'n, 486 U.S. 466 (1988) (concluding that a state may not categorically prohibit lawyers from soliciting business by sending truthful and nondeceptive letters to potential clients known to possess particular legal problems). Disciplinary counsel's willingness to proceed in such cases, notwithstanding a general reluctance to test unclear standards, may have any
their resources for particular types of egregious wrongdoing, particularly those implicating the interests of individual clients.\textsuperscript{315} To some extent, forbearance by disciplinary authorities reflects an effort to allocate scarce resources where most needed.\textsuperscript{316} But, it also reflects legitimate concern about the unfairness of seeking sanctions when the applicable standard of conduct is unclear—a concern shared by the DOJ in promulgating its recent regulation\textsuperscript{317} and by the \textit{Simels} court in seeking to draw a clear line.\textsuperscript{318}

Federal litigation is ineffective as an alternative means of clarifying standards of professional conduct. Much of lawyers' out-of-court conduct never becomes known to adversaries or the court, and thus never becomes an issue in litigation. Broad areas of conduct subject to professional regulation, especially those that implicate exclusively the interests of the lawyer's client, will rarely be raised in litigation.\textsuperscript{319} Further, because federal courts seek to re-

of several explanations: the highly visible nature of the lawyer's questionable conduct may precipitate public concern to which authorities may feel they must respond; the lawyer personally may encourage disciplinary proceedings as a way of definitively resolving uncertainties about whether the advertisement is proper; and disciplinary counsel may react to lawyer advertising with a distaste carried over from the days when advertising and soliciting were the principal bugaboos of the organized bar.

Second, disciplinary authorities seem more willing to proceed based on uncertain standards in cases that involve other conduct that, like lawyer advertising, is highly visible, either because it occurred in a well publicized litigation or because it was undertaken by a political figure or other high profile personality. \textit{See, e.g., In re Westfall}, 808 S.W.2d 829, 829 (Mo.), \textit{cert denied}, 502 U.S. 1009 (1991); Kunstler v. Galligan, 571 N.Y.S.2d 930 (N.Y. App. Div.), \textit{aff'd}, 587 N.E.2d 286 (N.Y. 1991). This exception to the general policy of restraint is attributable not only to the authorities' perceived need to respond to public concern about visible wrongdoing, but also, at least in some cases, to the political biases of those authorities.

Finally, disciplinary counsel seem more willing to allege that a lawyer has violated uncertain standards in cases in which the lawyer has allegedly committed other, clear disciplinary infractions. \textit{See, e.g., In re Blatt}, 324 A.2d 15, 18 (N.J. 1974) (counseling potential witnesses to remain silent constitutes "'conduct prejudicial to the administration of justice' in violation of DR 1-102(5)"). The "piling on" of allegations that may be challenged on interpretive grounds may seem like "gilding the lily," but this approach makes sense for several reasons. First, the amount of resources expended to present additional charges in disciplinary proceedings that will be commenced in any event are negligible in comparison to the amount of resources that would be expended to present a case that proceeded exclusively on a questionable legal theory. Second, it might be expected that a favorable interpretation is more likely to be obtained in a case in which the lawyer's other, clearly wrongful conduct labels him a malefactor. Finally, if an unfavorable interpretation is received in such a case, the prosecution as a whole may nevertheless be regarded as a victory, because the lawyer will have received a sanction on other grounds anyway.

\textsuperscript{315} \textit{See} Cramton \& Udell, \textit{supra} note 25, at 305 n.41 ("Commentators report that even the most egregious prosecutorial misconduct, in violation of professional rules, generally does not result in disciplinary proceedings." (citing authority)); Green, \textit{supra} note 135.

\textsuperscript{316} \textit{Cf.} Eric H. Steele \& Raymond T. Nimmer, \textit{Lawyers, Clients, and Professional Regulation}, 1976 AM. B. FOUND. RES. J. 917, 998 ("Disciplinary agencies apparently adopt a pattern of resource allocation similar to that of prosecutors in the criminal justice system. Prior sanctions, disciplinary or criminal, and multiple or sequential complaints are interpreted as an index of the credibility of the complaint and of the seriousness of the alleged deviance.").

\textsuperscript{317} \textit{See} \textit{supra} note 82 and accompanying text.

\textsuperscript{318} \textit{See} \textit{supra} note 193 and accompanying text.

\textsuperscript{319} \textit{See} Wilkins, \textit{supra} note 146, at 815-16; Coquillette Study, \textit{supra} note 32, at 5 (stating that 16 categories of ethical rules were never addressed in published federal court decisions over a 5 year period).
solve litigation efficiently, they generally refuse to decide issues concerning lawyer conduct that do not directly affect the rights of the parties to the litigation. The no-contact rule is one of the few rules of professional conduct, other than the conflict-of-interest rules, that courts address with any degree of regularity. And, even so, as Simels illustrates, various questions concerning the scope of the no-contact rule remain unresolved. Consequently, as a practical matter, the only way to establish clear standards of conduct is through the adoption of clear, detailed rules of professional conduct.

D. Consistency

The major concern underlying Professor Coquillette's report to the Judicial Conference is the "balkanization" of rules of professional conduct. To the extent possible, lawyers practicing within different states and federal districts have an interest in consistency among rules of different jurisdictions. One might argue, however, that this concern has been overstated. If lawyers can adapt to different procedural and evidentiary rules in state and federal court, they should be equally able to adapt to different professional standards. Some might respond that when lawyers undertake to represent a potential litigant, they may not know where the case will be tried and therefore

320 See Wilkins, supra note 1, at 839 & n.168 (citing authority).
321 See, e.g., W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) ("The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the case before it." (citation omitted)); Williams v. Trans World Airlines, Inc., 588 F. Supp. 1037, 1046 n.4 (W.D. Mo. 1984) (asserting "alleged ethical violations should be left to federal or state disciplinary machinery unless the integrity of the judicial process is threatened"). See generally, Committee on Professional Responsibility, Suppressing Evidence Obtained in Violation of DR 7-104: If Hammad Is Right, Is the Civil Law Wrong?, 48 REC. ASS'N B. Cty. N.Y. 431, 433 (1992) (citing W.T. Grant Co. for the proposition that the courts should not "act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the case before it"); Green, supra note 6, at 540-41 n.195 (listing cases where courts have remarked on lawyers' conduct and others where courts have left the matter for disciplinary committees); Leonard E. Gross, Suppression of Evidence as a Remedy for Attorney Misconduct: Shall the Sins of the Attorney Be Visited on the Client?, 54 A.B.A. L. REV. 437 (1990) (examining whether the exclusionary rule might be applied to an attorney who engages in unethical misconduct during litigation); 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, 550-51 n.293 (1995) (listing cases supporting the belief that disciplinary proceedings are best left to the state bar).
322 See Coquillette Study, supra note 32, at 4. Even the frequent litigation over disqualification motions has not substantially clarified the conflict-of-interest rules. On the contrary, to a large extent, litigation has fostered uncertainty because courts often apply a standard different from the one embodied in the professional codes. See, e.g., In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992) (en banc) (disqualification motion is "governed by the ethical rules announced by the national profession in light of the public interest and the litigants' rights") (quoting In re Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992)), cert. denied, 113 S. Ct. 1262 (1993); Baird v. Hilton Hotel Corp., 771 F. Supp. 24, 26 (E.D.N.Y. 1991) (discussing the "Chinese Wall" exception to DRS-105(D)). See generally, Burbank, supra note 21, at 975 (commenting that standards of conduct vary depending upon an attorney's role); Richardson, supra note 13, at 167-73 (addressing the uncertain relationship between violations of ethics rules and motions to disqualify opposing counsel).
323 See supra part II.B.2.
324 See Coquillette Report, supra note 13, at 1-3.
may not know which jurisdiction's rules of conduct apply. Compliance with the wrong rules is not a significant problem from a disciplinary perspective, because disciplinary authorities would rarely, if ever, commence proceedings against a lawyer who complied with one of two arguably applicable sets of professional standards. The more realistic concern is that a court will disqualify the lawyer or suppress evidence based on a standard the lawyer could not reasonably anticipate would be applicable at the time of the relevant conduct.\footnote{For example, the no-contact rule has been interpreted in various ways in the context of a civil litigator's communications with employees of an adversary corporation. See supra note 328. Before a civil suit is filed, a lawyer might communicate ex parte with an employee who is outside the "control group," believing that the litigation will take place in a state in which such communications are permitted. If the litigation later occurs in a jurisdiction with a more restrictive interpretation of the no-contact rule, the lawyer might face disqualification or other sanctions. So far, however, reported decisions do not reflect that lawyers often face this problem. See supra notes 16-18 and accompanying text.}

Focusing specifically on inconsistencies in federal court practice, Professor Coquillette initially offered the Judicial Conference two alternatives: either apply the ABA Model Rules or some variant in all federal court proceedings or apply the particular rules of the state in which a given federal district court sits.\footnote{Most jurisdictions' rules of ethics are identical in substance, if not in precise wording. Occasionally, courts assume that an outcome turns on the choice of the applicable ethical rule, see, e.g., White Consol. Indus., Inc. v. Island Kitchens, Inc., 884 F. Supp. 176, 179-80 (E.D. Pa. 1995) (discussing whether New York or Pennsylvania rules of professional conduct apply to a motion to withdraw as counsel). It is unlikely, however, that the choice of rule would often be outcome-determinative but for the fact that the rules of different jurisdictions have been interpreted differently and in ways that were not necessarily preordained by the rules themselves. Nevertheless, commentators typically illustrate the problem of "balkanization" by identifying the few ethical rules of different jurisdictions that are explicitly at odds with each other, such as rules governing attorney-client confidentiality that in some states require the disclosure of a client's intent to commit a fraud and in others forbid it. See, e.g., Zacharias, supra note 21, at 347 n.52. The ABA has likewise regarded "balkanization" principally as a problem of inconsistent rules, rather than inconsistent interpretations. This is reflected, for example, in the language of Model Rule 8.5 and accompanying commentary. Model Rule 8.5 is a choice-of-law provision establishing which jurisdiction's rules will govern a lawyer's conduct. The commentary explains that the rule addresses the problem that "[a] lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 cmt. (1995).} Like much of the professional literature addressing the problem of "balkanization"—that lawyers in different jurisdictions may be subject to inconsistent ethical obligations—these recommendations exaggerate the extent to which the substance of ethical rules varies among jurisdictions\footnote{Opinions issued by bar association ethics committees demonstrate the vast potential for inconsistent interpretations. Ethics committees have taken differing approaches to questions such as: (1) whether a lawyer may use privileged material inadvertently provided by one's adversary, compare ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992) (lawyer who learns after reading privileged document that it was sent inadvertently must return it) with District of Columbia Bar Legal Ethics Comm., Op. 256 (1995) (once read, inadvertently sent material may be used); (2) whether a lawyer must disclose that the client has deliberately given a false answer in a deposition, compare ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987) (disclosure is necessary to avoid assisting a crim-} and overlook the greater extent to which "balkanization" results from inconsistent interpretations of similarly worded rules.\footnote{For example, the no-contact rule has been interpreted in various ways in the context of a civil litigator's communications with employees of an adversary corporation. See supra note 328. Before a civil suit is filed, a lawyer might communicate ex parte with an employee who is outside the "control group," believing that the litigation will take place in a state in which such communications are permitted. If the litigation later occurs in a jurisdiction with a more restrictive interpretation of the no-contact rule, the lawyer might face disqualification or other sanctions. So far, however, reported decisions do not reflect that lawyers often face this problem. See supra notes 16-18 and accompanying text.}
As the DOJ recognized in adopting its recent regulation, complete uniformity requires not only that a single set of rules be made applicable in all


This is best illustrated, however, by one of the normative problems for civil litigators that has occasioned the most discussion in recent years—the question of how the no-contact rule applies in a case in which the adversary is a corporation. Although the applicable rule adopted in different jurisdictions is often indistinguishable in substance and precise wording, courts of different jurisdictions have developed a range of inconsistent tests to determine which present and former officers and employees of a corporation may or may not be contacted under this rule.

Judicial interpretations have included: (1) the rule categorically restricts ex parte communications with all former and present officers and employees of a corporate party, see Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., 745 F. Supp. 1037, 1039 (D.N.J. 1990); Caggula v. Wyeth Lab. Inc., 127 F.R.D. 653, 654 (E.D. Pa. 1989); (2) the relevant "facts and circumstances" must be weighed judicially to determine whether corporate counsel's presence at an interview is necessary to ensure that the corporation receives effective representation, see Morrison v. Brandeis Univ., 125 F.R.D. 14, 18 (D. Mass. 1989); Mompoint v. Lotus Dev. Corp., 110 F.R.D. 414, 418 (D. Mass. 1986); (3) the rule restricts communications only with members of the corporation's "control group"—top managers who make final decisions and top employees on whose advice they rely, see Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 560-61 (Ill. App. Ct. 1984); (4) the rule applies only to communications with "managing speaking agents"—those with sufficient managerial authority to speak for and bind the corporation, see Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988); Frey v. Department of Health & Human Servs., 105 F.R.D. 32, 35-36 (E.D.N.Y. 1985); Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984); and (5) the rule applies only to the corporation's "alter egos," which include officers and employees who can bind the corporation, whose acts or omissions are imputed to the corporation, or who implement counsel's advice, see State v. Ciba-Geigy Corp., 589 A.2d 180, 185 (N.J. Super. 1991); Nieseg v. Team I, 558 N.E.2d 1030, 1035 (N.Y. 1990); Strawser v. Exxon Co., 843 P.2d 613, 621 (Wyo. 1992). See generally John E. Iole & John D. Goetz, Ethics of Procedure? A Discovery-Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary, 68 Notre Dame L. Rev. 81 (1992) (arguing that ex parte contacts with former employees are discovery problems, not ethics problems); Ernest F. Lidge III, The Ethics of Communicating with an Organization's Employees: An Analysis of the Unworkable "Hybrid" or "Multifactor" Managing-Speaking Agent, ABA, and Nieseg Tests and a Proposal for a "Supervisor" Standard, 45 Ark. L. Rev. 801 (1993) (proposing that "supervisors," as defined in the National Labor Relations Act, should be the focus of the ex parte contacts ban); Samuel R. Miller & Angelo J. Calfo, Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?, 42 Bus. Law. 1053 (1987) (recommending a complete ban on ex parte contacts for current employees and some former high level employees); Felicia R. Reid, Comment, Ethical Limitations on Investigating Employment Discrimination Claims: The Prohibition on Ex Parte Contact with a Defendant's Employees, 24 U.C. Davis L. Rev. 1243 (1991) (proposing a reconciliation between Model Rule 4.2's protective purposes and a plaintiff's discovery needs).

The ambiguity of the no-contact rule has prompted not only inconsistent interpretations among courts of different states and federal districts, but also inconsistent interpretations by judges of a single district. Compare Lang v. Reedy Creek Improvement Dist., 888 F. Supp. 1143 (M.D. Fla. 1995) (Fawsett, J.) (holding that ex parte communications with former employees of adversary corporation were permissible under the no-contact rule subject to various protective limitations) with Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992) (Kovachevich, J.) (forbidding ex parte contacts with former corporate employees), aff'd, 43 F.3d 1439 (11th Cir. 1995).
jurisdictions but also that these rules be interpreted authoritatively by a single institution. That is why the DOJ retained authority to determine whether a federal prosecutor had violated its regulation, rather than leaving enforcement to the various federal district courts. To achieve a comparable consistency of standards for lawyers in private practice would require Congress not only to adopt rules of conduct for lawyers in both state and federal practice but also to establish a national enforcement mechanism. Neither can be achieved by an executive agency or the federal judiciary alone, and neither is a realistic, or particularly desirable, prospect.

To promote consistency, a set of detailed rules of conduct for federal practitioners, revised on a regular basis to resolve conflicting judicial interpretations, is superior to adopting the ABA Model Rules. In either case, one set of rules will apply throughout the federal courts. The difference is that a uniformly applicable set of detailed rules will leave less room for interpretation and therefore engender less inconsistent interpretation. Although federal court rules would be inconsistent with the rules applied in state courts, the ABA Model Rules would be as well, although perhaps to a lesser extent.

The alternative that each federal court incorporate the rules of its state would promote consistency between federal and state practice at the expense of interdistrict practice. The benefit would be illusory, however. As previously demonstrated, the applicable standard of conduct is determined by judicial interpretation more than by the language of bar association rules. Federal courts would continue to apply different standards of conduct because they refuse to be bound by state court interpretations in light of their independent obligation to develop standards of conduct that reflect what at times are unique federal interests.

Moreover, it is far from certain that federal litigators have a greater need for consistency between state and federal practice than among the federal

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329 See supra notes 105-106 and accompanying text.
330 See generally Zacharias, supra note 21 (discussing the usefulness of a federal code of professional responsibility).
district courts. Even if one favors federal-state consistency, the development of detailed federal rules might prove preferable in the long run. The adoption of a single set of rules for federal court practice would likely influence state courts in the development and interpretation of their own rules, thus fostering consistency on the state as well as federal level. The incorporation of state court rules would only perpetuate inconsistencies in the intra-state standards of professional practice.

333 See Burbank, supra note 21, at 978 ("The federal courts can no longer afford to defer to the states regarding the norms of professional conduct applicable in federal practice.").

This is a question on which there is a need for empirical research. If litigators are likely to know that a case will be brought in federal court, but not which federal court, there is a stronger argument for uniform federal rules. If, however, litigators are likely to know that a case will be brought in a particular state, but not know whether it will be brought in state or federal court, there is a stronger argument for incorporating the rules of each state.

Regardless of what such research showed, however, uniform federal rules of ethics may better address the problem of balkanization. Consider two groups of federal litigators. The first is comprised of those who practice exclusively within the state and federal courts of a single state. The second is comprised of those—such as federal government lawyers and civil litigators concentrating in the areas of federal antitrust, bankruptcy, and securities law—who practice in federal court throughout the country. Uniform federal rules will slightly disadvantage the first group by subjecting it to two sets of ethical rules, whereas the state-centered approach will severely disadvantage the second, by subjecting it to fifty sets of ethical rules.

In any case, the two arguments that have been advanced most strenuously in favor of incorporating state rules of ethics have nothing to do with the need for consistent rules, much less for appropriate and clear ones. The first argument is that this would be a "low-cost solution," because federal courts would be spared the effort of having to decide what standards of conduct are most appropriate. See Uniform Ethics Rules, supra note 20, at 873. This argument overlooks the cost of interpreting ambiguous rules in litigation, see infra Part III.E, as well as the various interests that would be served by uniform federal rules of ethics.

The second argument is that uniform federal rules would be "inconsistent with the theory and tradition of state regulation of lawyers." Uniform Ethics Rules, supra note 20, at 874. One aspect of this argument is that if federal courts adopt uniform federal ethics rules, they may be required to create an independent federal disciplinary mechanism. This seems unlikely, however. As they do now, federal courts may rely largely on state disciplinary authorities to address improprieties occurring in federal court proceedings. It would be perfectly appropriate for state disciplinary authorities to enforce federal rules of ethics, as they enforce other states' rules. The ABA's model choice-of-law provision assumes that they will do so. See Model Rules of Professional Conduct Rule 8.5(b)(1) (1994) (stating that in cases involving misconduct in a judicial proceeding, disciplinary authority of state in which lawyer is licensed will apply the rules of the court before which the lawyer appeared).

The other aspect of this argument is that the states have an overriding interest in setting the standard of conduct for the lawyers whom they license, even when those lawyers appear before the courts of another jurisdiction. This might be true if the function of state ethical rules were solely to codify standards of fitness to practice law—e.g., that lawyers should be law-abiding, serve their clients competently, etc.—because licensing authorities clearly have an interest in determining whether lawyers whom they license have engaged in conduct that reflects adversely on a lawyer's fitness. For the most part, however, the ethical rules have nothing to do with fitness to practice per se, but reflect policy decisions about how lawyers should relate to clients, prospective clients, the court, and third parties. Many are indistinguishable from rules of procedure. Conduct which is permissible under the ethical rules of one jurisdiction but not of another will rarely, if ever, comprise conduct demonstrating one's lack of fitness to practice law.

334 Cf. McMorrow, supra note 21, at 976-77 (noting the potential leadership role of federal courts in developing a "vision of [lawyer] competence").
E. Efficiency

Until now, both state and federal courts have relied on bar association rules in order to avoid the time and expense of developing their own, more detailed rules. The experience over the past quarter century, since the adoption of the ABA Model Code, shows that courts have simply shifted the burden. Rather than adopting clear rules, courts interpret unclear rules in adjudication.

Consider, for example, the alternative approaches to resolving questions about whether lawyers may contact represented persons. This requires resolution of questions on which there is considerable room for disagreement, as illustrated by both the debate about prosecutorial conduct surrounding the Thornburgh Memorandum and the DOJ regulation, and the disagreement among district and appellate court judges about defense lawyers' conduct in Simels. For the Judicial Conference to adopt a rule specifically answering these questions with finality would require far more effort at the rulemaking stage than simply adopting the ABA's no-contact rule, which in one variant or another is presently in effect in every jurisdiction. Yet, the experience of the DOJ demonstrates that the task is manageable. On the other hand, leaving these questions open, as state and federal rules have done until now, requires the courts of different jurisdictions to resolve these questions in adjudication, if they are to be resolved at all. There is little reason to believe that federal courts and practitioners have spared themselves expense by deferring resolution of all the interpretative questions surrounding the no-contact rule until they can be raised in disciplinary proceedings or litigation.

F. The Simplicity of Comprehensive Federal Rules

Based on his study of reported federal court decisions, Coquillette concluded that "problems relating to attorney conduct have consumed a very substantial amount of attention in federal courts in the last five years." The comprehensive federal code of ethics proposed in this Article would address this problem by reducing the amount of federal litigation devoted to determining what standard of conduct is expected of federal litigators in a given jurisdiction. At the same time, the proposed federal rules would make the standards of professional conduct in federal litigation more appropriate, more certain, and more consistent. Nonetheless, Professor Coquillette questioned the utility of the proposal upon presenting it to the committee of the Judicial Conference. Perhaps tongue-in-cheek, he observed that it is debatable whether "lawyers and law students who have had to learn at least two other model systems" would benefit from having to learn a third set of rules. In other words, Coquillette implies, life is simpler for lawyers under the present regime. Coquillette's concern merits a response.

First, Coquillette's observation ignores the nature of the ABA models and the complexities they generate. Coquillette misleadingly implies that all a lawyer presently needs to "learn" are the ABA Model Rules and the ABA

335 See supra part III.C.
336 Coquillette Study, supra note 32, at 6.
337 Id. at 6 n.*.
Model Code, because their provisions answer lawyers' questions about what standards of conduct are appropriate in given situations. In reality, lawyers and law students typically must seek answers, not in the ambiguous and open-textured provisions of the ABA Model Rules and the ABA Model Code, but in the several treatises, hundreds of articles, and thousands of ethics opinions and judicial decisions that the ABA model provisions have spawned. Further, with respect to many questions, no amount of research will disclose an authoritative answer, because, as Coquillette's study demonstrated, judicial decisions address a comparatively narrow range of conduct.

Second, Coquillette's observation ignores the nature of the comprehensive federal rules that would be adopted as an alternative to the ABA models and the comparative simplicity of determining how to conduct oneself under such rules. Almost certainly, the drafters would take as their point of departure existing professional norms relevant to the conduct of federal litigation. They could be expected to codify standards of conduct as to which there is no professional disagreement and seek to choose the most appropriate standard where the professional literature reflects disagreement. Although the final product may reject some of the choices made by the ABA in areas of controversy, for the most part the federal rules would fill in the broad outlines drawn by the ABA's work product, rather than relegating that task to adjudication. Consequently, lawyers and law students would not have to learn new standards of conduct where the existing standards are clear. They would be afforded a set of rules whose meaning would, for the most part, be consistent with the ABA models, although not with all the opinions interpreting them. Further, the drafters would endeavor to make the required conduct apparent on the face of the rules, thereby reducing the need for lawyers to seek guidance elsewhere.

Whether or not this third set of rules would be beneficial might be considered in light of what appears to be the favored alternative—a uniform federal code of ethics incorporating the ABA Model Rules. While the uniform federal rules would be worded similarly, if not identically, to the rules of most states, the rules themselves would give no clear guidance about the propriety of a wide range of conduct. Courts would never have occasion to address the propriety of much of that conduct, thus leaving the scope of some rules perpetually uncertain. As to other conduct, the meaning of the rules, as construed by different federal and state courts, would ultimately vary.

For example, every federal court and most state courts would apply ABA Model Rule 4.2, the no-contact rule. From the face of this rule, a criminal defense lawyer could not determine whether it would be proper directly

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338 For example, the drafters might begin with rules relating to the following subjects: (1) advocacy in adjudication, see Model Rules of Professional Conduct Rules 3.1-3.8 (1994); (2) relations with nonclients, see id. Rules 4.1-4.4; (3) conflicts of interest, see id. Rules 1.7-1.12; (4) termination of the representation, see id. Rules 1.16; (5) accepting appointments by a tribunal to represent a person, see id. Rule 6.2; (6) duties of confidentiality and disclosure, see id. Rules 1.6 & 8.3; and (7) proper conduct generally. See id. Rule 8.4. On the other hand, there would be no need to address aspects of law practice that have essentially no relevance to federal litigation. See, e.g., id. Rule 1.15 (safekeeping property); id. Rule 1.17 (sale of law practice); id. Rule 6.1 (voluntary pro bono service).
to contact a represented government witness. To know the answer, the lawyer would have to "learn" not only Model Rule 4.2, but also the relevant case law of each jurisdiction, or, at the very least, of the jurisdictions in which he practiced. The lawyer's research might disclose that the witness could be contacted in a federal proceeding in the Second Circuit but not in a state court proceeding in New Jersey, and that, in virtually all other jurisdictions, the answer was in doubt, so that the lawyer would be proceeding at his peril.

By contrast, a comprehensive federal code of ethics would permit practitioners in all federal districts to know from the face of the no-contact rule whether they could contact represented witnesses in criminal cases. It is true that a lawyer who practiced in both state and federal court would have to "learn" not only this rule but also the possibly inconsistent or unresolved standards of conduct applied in the state courts before which he appeared. However, instead of being uncertain about what standard of conduct is required in federal and state courts alike, the lawyer would now be uncertain only about the standard required in state courts. On balance, it seems obvious that a single set of rules that, on their face, prescribe the standard of conduct for practitioners in all federal courts is far better for lawyers than the alternative: a set of rules that are, in effect, a statement of general principles whose meaning in any given jurisdiction must be sought in the case law, often will be indeterminable even after diligent research, and, where determinable, often will be inconsistent with the meaning ascribed in other jurisdictions.339

Conclusion

In the coming years, the Judicial Conference will face increasing pressure to remedy the federal courts' application of different standards of professional conduct. The Judicial Conference will be tempted to adopt rules incorporating bar association rules of professional conduct; however, it would be a mistake to do so, as becomes clear when rules of professional conduct are examined in the context of how federal courts will interpret and enforce them.

The bar association rules are vague and ambiguous. Until federal courts clarify them in adjudication, federal practitioners remain uncertain about whether particular conduct is appropriate. Federal courts, however, infrequently address issues of professional conduct in litigation, because they are unwilling to serve as disciplinarians. Nor do federal courts employ a regular disciplinary mechanism through which questions about borderline conduct

339 For some lawyers, the greater certainty to be afforded by a comprehensive federal code of ethics may be a vice, not a virtue. As Professor Coquillette's study illustrated, much of the conduct of federal litigators that implicates ethical rules rarely if ever comes to a court's attention. The ambiguities of the ABA rules are rarely resolved authoritatively. Consequently, lawyers may interpret those rules in a manner beneficial to themselves or their clients without concern that they will later be sanctioned for doing so. For these lawyers, the most recent option presented by Professor Coquillette—namely, "adopting uniform national federal rules for attorney conduct only in certain key areas" that are frequently addressed by federal courts, id. at 5-6—may provide the best of both worlds. Ambiguity would be preserved with respect to conduct that courts rarely address, while greater clarity would be provided with respect to conduct as to which there is a risk of discipline.
can be resolved. Even if such a mechanism were established, it would probably be reserved for cases of clear improprieties. Thus, bar association rules would rarely be clarified by federal courts. Nor would state court or bar association interpretations fill the void, since the meaning of any rules of conduct applied in federal courts will be a matter of federal law.

Moreover, when federal courts do address questions of professional conduct in adjudication, they are denied the opportunity to receive and consider comments from individuals and institutions representing diverse interests, as a rulemaker would. Consequently, courts in adjudication cannot be expected to resolve uncertainties by adopting the most appropriate standard of conduct. Nor can federal courts be expected to interpret the rules consistently with other federal or state courts. Thus, incorporating bar association rules is a certain formula for perpetuating the "balkanization" of the standards of conduct applicable to practitioners in different federal districts.

The only effective way to redress this problem is for a lawmaking institution to adopt a set of detailed rules to be applied in all federal proceedings. An executive agency is the wrong institution, because it is a frequent party to federal court proceedings and is therefore partisan. The federal judiciary is capable of weighing relevant considerations objectively and is therefore the appropriate institution. Through the judicial rulemaking process, the Judicial Conference should develop detailed rules that clearly resolve particular questions lawyers confront in federal court practice. The standards of conduct captured by such rules will be more appropriate than those developed in adjudication and command greater respect, because they will be the product of broader perspectives and fuller consideration. They will be clearer than the standards set by the bar association's rules as sporadically interpreted by federal courts. And, if regularly amended to resolve conflicting federal court interpretations, federal rules of professional conduct would achieve a reasonable degree of consistency among different federal courts. Finally, while employing the judicial rulemaking process would be burdensome in the short run, it would spare courts the task of interpreting ambiguous rules.

As the Judicial Conference moves ahead to address problems concerning the application of rules of professional conduct to federal court practitioners, it should therefore employ the obvious solution: the development of an independent set of detailed rules of conduct for lawyers practicing in federal court.