A Bludgeon by Any Other Name: The Misuse of Ethical Rules against Prosecutors to Control the Law of the State

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A Bludgeon by Any Other Name: The Misuse of “Ethical Rules” against Prosecutors to Control the Law of the State

FRANK O. BOWMAN, III*

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INTRODUCTION

Over the past few years, the American Bar Association and numerous state bar associations have amended or reinterpreted professional ethics rules in ways that purport to restrict or modify the methods prosecutors and police may use to investigate crime. Leaving aside the substantive merits or demerits of the rules, their most notable feature is that they make it unethical for federal prosecutors to engage in prosecution practices and investigative techniques that conform to current statutory law, and that the federal courts have held constitutional and proper.1 These ethical rules purport to render prosecutors subject to disciplinary sanction, even disbarment, for doing things that all three branches of the federal government — executive, legislative and judicial — have said they may, or must, do in the performance of their duties.

Three of these rules that will be discussed in this Article are:

(1) A rule that requires prosecutors to present exculpatory evidence to grand juries contemplating criminal indictments.2 Grand juries traditionally have been considered investigative or accusatory bodies, whose adjudicative functions are limited to determining whether the government has presented sufficient evidence to require an adversary trial. There is presently no requirement that a federal prosecutor present, or a grand jury entertain, exculpatory evidence before returning an indictment. The U.S. Supreme Court has expressly held that a U.S. Court of Appeals may not impose on federal prosecutors in its circuit a requirement that exculpatory evidence be presented to the grand jury. In effect, this ethical rule seeks to fundamentally alter the character of the federal grand jury.

(2) A rule that restricts the ability of prosecutors to subpoena attorneys to the grand jury to provide information about their clients, even in situations where the information sought is unprivileged and not protected by the Sixth Amendment.3 This rule creates a procedure of pre-issuance judicial review of attorney subpoe-

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1. While the rules addressed here also affect state prosecutors, this Article is limited to the effort by the organized bar to regulate federal prosecutors. The limitation to the federal system stems in part from the fact that these rules are at the center of active and heated controversies between elements of the private bar and the U.S. Department of Justice, and in part from the fact that the role of state courts in formulating these rules adds to an already complex topic an additional layer of complexity best left for another day.

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (1995) [hereinafter MODEL RULES], read in conjunction with Rule 3.8 cmt. 1.

3. MODEL RULES Rule 3.8(f) (as passed in 1990).
nas, sets up what amounts to a presumption of non-disclosure, and mandates standards of judicial review that are difficult to meet, and which require sweeping disclosure of grand jury proceedings now secret under federal law. In effect, this ethical rule also significantly broadens the scope of the attorney-client and work product privileges, as well as the Sixth Amendment right to counsel, in criminal cases.

(3) A rule that restricts the ability of prosecutors to contact, openly or undercover, persons who are represented by counsel, in situations where the Sixth Amendment right to counsel has not attached.\(^4\) If applied as urged by the organized bar, this ethical rule would significantly modify the Supreme Court’s Fifth and Sixth Amendment jurisprudence regarding government contacts with criminal suspects, and would also materially restrict the government’s ability to investigate criminal organizations and corporate crime.

My objective here is threefold: (1) to explain these ethical rules and demonstrate how each is in conflict with longstanding principles of federal criminal law; (2) to explain why these rules are illegitimate, both as rules of ethics and as rules of positive law; and (3) to offer some observations on how the dispute over these rules can sharpen our thinking about the nature and proper limits of ethical rules governing lawyers.

I am obliged to begin by noting that I have been both a state and federal prosecutor. In common with most of my colleagues, I think the rules under scrutiny here are, by and large, ill-advised, if sometimes understandable, responses to real concerns. Nonetheless, I hope that my analysis does not turn on whether the *substance* of the rules is good or bad. The question for consideration is not whether these are good rules of criminal procedure, but whether they are appropriate rules of ethics.

Before getting down to specifics, let me summarize the direction of my thinking: Standards of ethical conduct for the legal profession have moved over the last few decades from being primarily (if not exclusively) aspirational standards of conduct toward their present form as increasingly specific rules enforceable in professional disciplinary tribunals. As this formalism increases, the rules are emerging as an alternate source of positive law that co-exists uneasily with, and may, as in the present instances, conflict with the more traditional sources of law — statutory, administrative and judge-made law.

In itself, this is not an original observation.\(^5\) However, none of the distinguished scholars who have made it has, to my knowledge, ventured very far in defining the proper boundaries between bar-generated legal ethics rules and more

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5. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L.J. 1239, 1242 (1991) (arguing that the legalization of ethical norms "has resulted in the disintegration of the profession's sense of self"). Professor Susan P. Koniak has also written on the subject, expanding on the work of Robert Cover on "nomos and narrative." Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389 (1992).
MISUSE OF "ETHICAL RULES"

traditional sources of law. My thoughts on this subject flow from what I think is an unexplored observation — that formalization of ethical standards into enforceable disciplinary rules, administered by ethics regulators who exercise control over individual livelihoods, can transform what was a defensive response to calls for increased regulation of lawyer conduct into an offensive weapon employed by members of the private bar against elements of the national government staffed by lawyers. Put bluntly, ethics rules are being used to control, or at least modify, the law of the State. I think the trend embodied in the rules discussed here is an unfortunate one — contrary to traditional understandings of the proper function of ethical standards, frankly at odds with the norms of American constitutional order and ultimately subversive of the enterprise of professional self-regulation.

At a minimum, those who seek to establish bar ethical rules as positive law at odds with the law of the State are, it seems to me, obliged to submit their creations to tests of legitimacy that apply to law from any other source. This Article proposes a three-part test for assessing the legitimacy of ethical rules.

In my view, unless the bar changes the course marked out by the rules discussed here and learns to measure proposed ethical rules against standards of legitimacy similar to those proposed below, the federal judiciary will have little choice but to shoulder a burden it has long shunned — creating and enforcing a separate code of ethics for lawyers practicing in the national courts.

I. AN ANALYSIS OF THE AMERICAN BAR ASSOCIATION'S MODEL RULES OF PROFESSIONAL CONDUCT 3.3(d), 3.8(f) AND 4.2

Let us begin by discussing the genesis and substance of the ethical rules at issue here.

A. MODEL RULE 3.3(d): EXCUSPATORY EVIDENCE IN THE GRAND JURY

The first rule, Model Rule 3.3(d), read in conjunction with the comment to Model Rule 3.8, purports to place an ethical obligation on prosecutors to present exculpatory evidence to grand juries. Model Rule 3.3(d) states:

Rule 3.3 Candor Toward the Tribunal
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Model Rule 3.8, Special Responsibilities of the Prosecutor, is accompanied by the following Comment:

[1] . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. . . .
The clear import of this comment is to bring grand jury proceedings within the ambit of Model Rule 3.3(d). 6 

On the surface, this does not sound all that horrible — indeed, it sounds only fair. To understand the controversy, we need to examine the historical development of grand juries and their place in modern American criminal practice.

1. The Historical Development of the Anglo-American Grand Jury

   a. The Grand Jury in England

   Legal historians generally agree that the “presenting jury,” the lineal predecessor of both the modern grand and petit jury, became a formal part of English practice no later than 1166 at the Assize of Clarendon. 7 The presenting jury created by the Assize of Clarendon,8 in common with modern grand juries, had the dual function of gathering information about crimes within its jurisdiction and of rendering a “medial” adjudication on the truth of the accusations against one suspected of crime. 9 Those whom the presenting jury believed to be guilty were subjected to the final guilt-determining stage of the criminal process, trial by ordeal.10

   In 1215, the Fourth Lateran Council forbade clerical participation in trials by

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6. MODEL RULES Rule 3.3(d), Rule 3.8 cmt. See, e.g., United States v. Colorado Supreme Court, 871 F. Supp. 1328 (D. Colo. 1994), in which the Colorado Supreme Court and bar authorities asserted, in response to a Justice Department motion to enjoin enforcement of Model Rule 3.3 against federal prosecutors insofar as it applies to grand jury practice, that the rule applies to federal prosecutors.


8. The presenting jury consisted of twelve men drawn from every hundred, augmented by a further four from every vill (a smaller governmental subdivision). 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 140-43 (2d ed. 1923); ROGER D. GROOT, THE JURY OF PRESENTMENT BEFORE 1215, 26 AM. J. LEGAL HIST. 1, 3 (1982).

9. The presenting jury was required to report under oath to the court whether any local person was accused of, or reputed to have committed, any of a group of serious crimes listed in the Assize of Clarendon. EDWARDS, supra note 7, at 7; Groot, supra note 8, at 1, 3. The jury could base its actions either on personal knowledge or common rumor and reputation in the community. Id. at 5. The jurors had a duty to report every crime and every suspect. Id.

   Professor Groot has argued convincingly that the presenting jury also rendered an opinion on the accusations that they considered. Thus, the rolls would record that a defendant was “accused,” but not “suspected,” by the jury. Id. at 11-12. The finding that the defendant was “suspected” indicated the jury’s belief in his guilt. Id. at 23. The consequence of the finding was that the accused would be subjected to proof by ordeal. Those not “suspected” escaped the ordeal, though they could still be banished if their ill fame in the community was sufficiently notorious. Id. at 22.

10. 1 POLLOCK & MAITLAND, supra note 8, at 152.
ordeal.\textsuperscript{11} Without the sanction of the Church, the ordeal lost its power as a method of proof embodying the judgment of God; in England the ordeal was replaced by jury verdict as the method of determining the ultimate guilt of those “suspected” of crime by the presenting jury.\textsuperscript{12}

Though we know relatively little about the exact procedures employed by early English presenting juries, it is clear that they were not forums for adversarial presentations. Indeed, the source of most of the information on which they acted was the personal knowledge of their members combined with common report in the community.\textsuperscript{13}

By the end of the Fourteenth Century, the grand jury was in place in England much as we know it today.\textsuperscript{14} Its maintenance and development there over the ensuing four centuries up to the time of the American Revolution consistently reflected two features important to the present discussion: grand jury secrecy\textsuperscript{15} and presentation only of evidence for the prosecution.

Prominent English legal commentators in the Eighteenth Century insisted that the grand jury could not serve its function as guarantor of the rights of freeborn English subjects unless the jury could hear evidence and deliberate in private.\textsuperscript{16}

As for the source of evidence properly received by a grand jury, in 1769, Blackstone wrote that:

This grand jury are . . . only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to enquire upon their oaths, whether there be sufficient cause to call upon the party

\textsuperscript{11} See generally John W. Baldwin, The Intellectual Preparation for the Canon of 1215 Against Ordeals, 36 Speculum 613 (1961) (relating the demise of the ordeal first in canon law, and then in secular law).

\textsuperscript{12} Groot, supra note 8, at 1, 24. At first, the “trial jury” either was the presenting jury itself or might include members of the presenting jury. 2 Pollock & Maitland, supra note 8, at 647-50. Undoubtedly because of concern that presenting jurors would be predisposed to convict, a statute was passed in 1352 allowing the accused to challenge any member of the trial jury who had served on the presenting jury. Id. at 649; Leonard W. Levy, Origins of the Fifth Amendment 18 (1968).

\textsuperscript{13} 1 Beale & Bryson, supra note 7, § 1:02, at 4.

\textsuperscript{14} For a description of the institution, known by the end of the Fourteenth Century as the “grande inquest,” see id.§ 1.02, at 7. The grande inquest had jurisdiction over an entire county. Id. The jurors numbered 24, and were persons of substance summoned by the sheriff. Id. The grande inquest could issue presentments based on facts within its own knowledge, or could vote on charges drafted by third parties and transmitted by the judge to the jury. Id. If the grande inquest believed the charges, it endorsed them as a “true bill.” Id. The vote to prefer charges need not have been unanimous; a majority was sufficient. Id.

\textsuperscript{15} While the genesis of grand jury secrecy is difficult to date, between the Thirteenth and Seventeenth Centuries it became customary for the jurors to receive evidence in private, and for them to be sworn to secrecy about what they had heard. Id. at 12 n.44.

A good deal of scholarly verbiage has been expended over the years in contending either that the English grand jury was, by design and in practice, an instrument of state power, or alternatively, that it was a "bulwark of the rights and privileges of English citizens."18 This is not a debate to which there is a satisfactory resolution because the English grand jury from its inception always stood uneasily in the middle. It served both functions, arm of the state and protector of the individual, in varying degrees, depending on the times and the cases at issue. Critical for the present inquiry, however, are certain characteristics that remained constant: (1) English presenting and grand juries received only the prosecution's case; (2) their proceedings were secret; (3) from 1166 forward, English grand and presenting juries, in common with the modern American grand jury, were concerned only with "medial" adjudication, that is deciding whether a suspect should be obliged to endure the "ordeal," initially literal and then figurative, of the proof process.

b. The Grand Jury in America

When English colonists came to the New World, they brought many of their legal institutions with them. Among these was the grand jury.19 There is evidence that grand juries were employed in colonial Virginia as early as 1625,20 and their regular use in other colonies came soon thereafter.21 During the years leading up

17. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 300 (1769) (emphasis added).
18. RICHARD D. YOUNGER, THE PEOPLE'S PANEL 2 (1963). The case that is commonly credited with casting grand juries in the role of protectors of the rights of subjects against the oppression of the Crown was the refusal in 1681 of grand juries, despite intense government pressure, to indict Stephen Colledge and the Earl of Shaftesbury for treason. Id. at 2; 1 BEALE & BRYSON, supra note 7, § 1:02, at 8; MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 9 (1977). The jurors' steadfastness did Colledge and Shaftesbury little good. Shaftesbury was driven into exile, while Colledge was indicted by another grand jury and executed. Helene E. Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 AM. CRIM. L. REV. 701, 714-19 (1972). Nonetheless, the incident stimulated thinking about the grand jury's screening function. This school of thought began generating hymns of praise to the grand jury at an early point. John Somers, later Lord Chancellor of England, wrote in 1766: "[G]rand Juries are our only Security, in as much as our Lives cannot be drawn into jeopardy by all the malicious crafts of the Devil unless such a number of our honest Country Men shall be satisfied in the truth of the Accusations." SOMERS, supra note 16, at 23. See also Sir JOHN HAWLES, THE ENGLISHMAN'S RIGHT (London 1688) (expounding the virtues of the jury).
19. YOUNGER, supra note 18, at 2.
21. 1 BEALE & BRYSON, supra note 7, § 1:03, at 13. Colonial grand juries often assumed a number of executive or legislative functions, but their principal responsibility remained the consideration of criminal indictments and presentments. Id. § 1:03, at 14-15.
to the American Revolution, grand juries gained considerable popular attention by refusing to indict fellow colonists for violating unpopular laws. The Crown responded by initiating prosecutions by information.

When independence was won, several factors combined to ensure indictment by grand jury a place among the rights secured by the U.S. Constitution. First, of course, was the revolutionary era prominence of grand juries. Revolutionary propagandists had effectively labelled grand jury indictments the just and democratic method of initiating criminal cases. Informations filed by prosecutors were, by contrast, deemed instruments of oppression. Second, the Americans with legal training who drafted the national and early state constitutions were deeply influenced by British commentators including Lord Coke, Henry Care and William Blackstone, who pronounced grand jury indictments a fundamental protection of English citizens. Consequently, though the Constitution itself held no reference to grand juries, protests from various quarters led to the right to indictment for felonies being included among the package of protections embodied in the Bill of Rights. What is again key to our discussion is that the cherished institution that appears in the Fifth Amendment is the grand jury of medioj adjudication that evolved from the jury of presentment: the grand jury that hears evidence and deliberates in secret, the grand jury that Blackstone described in 1769 as receiving only the evidence of the prosecution, the grand

22. The American analogue to Lord Shaftesbury’s case was the refusal of three successive New York grand juries to indict John Peter Zenger, a newspaper publisher, for libel. See James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal 17-20 (Stanley N. Katz ed., 2d ed. 1972). Other grand juries refused to indict the leaders of the Boston Stamp Act riots, and refused to indict the Boston Gazette for libeling the royal governor of Massachusetts. Younger, supra note 18, at 28.

23. 1 Beale & Bryson, supra note 7, § 1:03, at 15. See also Younger, supra note 18, at 28-35 (detailing the role of the grand jury as a battleground for patriots and royal authority).

24. It is said that colonial lawyers were “nurtured” on Coke’s Institutes. Julius Goebel, Jr., Constitutional History and Constitutional Law, 38 Colum. L. Rev. 555, 563 (1938). Coke argued in his Second Institute that indictment by grand jury was one of the procedural safeguards guaranteed by the Magna Carta. Edward Coke, The Second Part of the Institutes of the Laws of England 46 (London, Brooke 1797). This view has since been discounted. See William S. McKeanie, Magna Carta, A Commentary on the Great Charter of King John 134 (2d ed. 1914) (describing it as “unfounded”). However, the view was current and influential in the 1780s. 1 Beale & Bryson, supra note 7, § 1:04, at 17-18.

25. See Care, supra note 16 (commenting contemporarily on early British law). Care placed grand jury indictment among the hereditary rights of free-born Englishmen, and stressed its role “to preserve the Innocent from the disgrace and Hazards which ill men may design to bring them to.” Id. at 252. The pamphlet was originally produced in England, but was reprinted in Boston in 1721 and Rhode Island in 1774. 1 Bernard Bailyn, Pamphlets of the American Revolution 742-43 n.9 (1965).

26. Blackstone wrote:

[F]or so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial.

Blackstone, supra note 17, at 301.

27. 1 Beale & Bryson, supra note 7, § 1:04, at 18-19.
jury that decides only whether the defendant must face the ordeal of petit jury trial.

To this day, by command of the Fifth Amendment, no felony charge can be brought in federal court without an indictment or presentment of a grand jury, which must find probable cause to believe the defendant committed the crime.\textsuperscript{28} Moreover, the modern federal grand jury is in all material respects the same institution known to the Framers.

In 1944, the traditional Anglo-American rule of grand jury secrecy was codified in \textit{Federal Rule of Criminal Procedure 6(e)(2)}.\textsuperscript{29} The rule requires that grand jurors, government attorneys, interpreters, stenographers and other persons with access to matters occurring before the grand jury keep such matters secret in the absence of a court order permitting disclosure.\textsuperscript{30} Even where disclosure is permitted, it can only occur after the party requesting disclosure has made a showing of "particularized need."\textsuperscript{31}

\begin{footnotes}
\item 28. U.S. CONST. amend. V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." \textit{Id.}
\item 29. "This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits disclosure . . . ." \textit{Fed. R. Crim. P. 6(e) note. See also United States v. Sells Eng'g, Inc., 463 U.S. 418, 425 (1983) ("Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule of grand jury secrecy."); United States v. Proctor & Gamble Co., 356 U.S 677, 681 (1958) (noting "a long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts").
\item 30. Prosecutors have a limited power to disseminate grand jury material to non-lawyers assisting them in their investigations. \textit{Fed. R. Crim. P. 6(e)(3)(A)(ii). Grand jury witnesses are not within the ambit of the rule. Fed. R. Crim. P. 6(e) note. The circumstances under which a court may permit disclosure are defined in \textit{Fed. R. Crim. P. 6(e)(3)(C)(i), (ii), (iv).}
\item 31. \textit{Sells}, 463 U.S. at 443-46. The \textit{Sells} Court applied to public entities seeking disclosure the same standard it had earlier imposed on private parties in \textit{Douglas Oil v. Petrol Stops Northwest}, 441 U.S. 211, 222 (1979).
\end{footnotes}
2. Exculpatory Evidence in the Federal Grand Jury: Response of the Judicial Branch

Federal courts have for 200 years consistently rejected attempts to make the grand jury's decision-making more adversarial by allowing defendants or compelling prosecutors to introduce exculpatory evidence.\textsuperscript{32} The most recent and resounding rejection of such efforts came in the Supreme Court's 1992 opinion in United States v. Williams.\textsuperscript{33}

The Williams case arose out of the Tenth Circuit, which in 1987 had adopted a rule that required federal prosecutors to present any "substantial exculpatory evidence" to the grand jury.\textsuperscript{34} The court of appeals had upheld the district court's

\begin{itemize}
\item \textsuperscript{32} In 1904, the Supreme Court decided Beavers v. Henkel and described the function of a federal grand jury by quoting Blackstone's declaration from 1769 that grand juries "are only to hear evidence on behalf of the prosecution." Beavers v. Henkel, 194 U.S. 73, 84 (1904). See also United States ex rel. McCann v. Thompson, 144 F.2d 604, 605-06 (2d Cir.) (holding that a grand jury is not required to permit a defendant to appear before it as a witness. "To this privilege he was not entitled; the practice was utterly unknown at common law, and, although grand juries have in recent times occasionally invited persons, whose conduct they are examining, to appear, they are never obliged to do so . . . ."), cert. denied, 323 U.S. 790 (1944).


The consistently expressed views of the federal courts have, of course, been no barrier to criticism by academic commentators of the relationship of prosecutors to grand juries. See, e.g., Peter Arenella, Reforming the State Grand Jury System: A Model Grand Jury Act, 13 RUTGERS L.J. 1, 9 (1981) (stating that "[t]he most obvious defect [of federal and state grand jury systems] is the grand jury's complete dependence on the prosecutor for all its information, advice, and direction.").

\item \textsuperscript{33} 504 U.S. 36 (1992).

\item \textsuperscript{34} The Tenth Circuit in United States v. Williams, 899 F.2d 898, 900 (10th Cir. 1990), rev'd, 504 U.S. 36 (1992), relied on the rule announced in United States v. Page, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987). The Page court suggested that the circuits that had previously addressed the issue entertained "two views concerning the duty of a prosecutor to present exculpatory evidence to a grand jury;" Page, 808 F.2d at 727, and that the Tenth Circuit was choosing the "better, and more balanced rule." Id. at 728. The court's suggestion that two circuits had previously adopted a "rule" requiring prosecutors to disclose exculpatory evidence to grand juries on pain of dismissal of the indictment rests on expansive, and in one instance unsupportable, readings of two previous cases.

In United States v. Flomenhaft, 714 F.2d 708 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984), the Seventh Circuit rejected a defendant's claim that the indictment should have been dismissed because the government failed to present allegedly exculpatory evidence. It adopted no rule requiring disclosure. The most it ventured on the subject was to say that "even assuming arguendo" the disputed evidence met the standard for clearly exculpatory evidence that had been adopted by a district court judge in another case, the defendant's claim would still have no merit because the evidence had been disclosed. Id. at 712. In its only decision on the issue after Flomenhaft (issued a year before the Page decision), the Seventh Circuit observed that a duty to present exculpatory evidence to the grand jury "is not clearly established." Kompare v. Stein, 801 F.2d 883, 890 n.8 (7th Cir. 1986).

In United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979), the Second Circuit denied the defendant's claim that his conviction should have been reversed and the indictment dismissed because the prosecutor misled the grand jury. The court wrote "[A] prosecutor is not presently obligated to search for and submit to a grand jury
dismissal of the indictment (without prejudice) due to the alleged failure of the Assistant U.S. Attorney to present such evidence. 35 The Supreme Court reversed.

Justice Scalia’s opinion in Williams expressly rejected the assertion that federal courts have the authority to impose on prosecutors the obligation to present exculpatory evidence to a grand jury. The opinion began by noting the grand jury’s roots “in long centuries of Anglo-American history,” 36 acknowledged the “grand jury’s functional independence from the judicial branch,” 37 and proceeded to a discussion of the unbroken line of authority holding that grand juries sit “not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.” 38 In rejecting the rule announced by the Tenth Circuit, the majority wrote:

The rule would neither preserve nor enhance the traditional functioning of the institution [the grand jury] that the Fifth Amendment demands. To the contrary, the court noted, “We would add that where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict.” 39

Later in the opinion the court remarked, “The government put forward enough evidence to establish probable cause that a crime was committed, and that the defendants were reasonably believed to have committed it. That is all it was required to do.” (citing Romano, 706 F.2d at 374), cert. denied, 469 U.S. 1193 (1985); United States v. Casamento, 887 F.2d 1141, 1183 (2d Cir. 1989) (indicating that prosecutor had no duty to present witness when prosecutor could not have expected that his testimony would “lead the jury not to indict.”), cert. denied, 493 U.S. 923, cert. denied, 495 U.S. 958 (1990); United States v. Leonard, 817 F. Supp. 286, 295 (E.D.N.Y. 1992) (dealing with evidence not qualifying as substantial exculpatory evidence).

35. Defendant Williams was indicted on charges that he made false statements to federally insured banks in connection with loan applications, in violation of 18 U.S.C. § 1014. United States v. Williams, 504 U.S. 36, 38 (1992). Immediately after arraignment he moved for disclosure of the grand jury minutes. Id. at 39. He then moved for dismissal of the indictment on the ground that the government had not introduced evidence that defendant claimed would support his defense. Id. The allegedly suppressed evidence was Williams’ general ledgers and tax returns, and Williams’ testimony in a contemporaneous Chapter 11 bankruptcy proceeding in which he claimed that his accounting methods “belied an intent to mislead the banks.” Id.

One is moved to wonder how evidence of this sort could properly be termed “substantial[ly] exculpatory.” One of the factors that clearly troubled the Supreme Court was the apparent elasticity of the Tenth Circuit’s test. The Court was disturbed by the observation of the Tenth Circuit that, “[T]he grand jury must receive any information that is relevant to any reasonable [exculpatory] theory it may adopt.” Id. at 52 n.7 (quoting Williams, 899 F.2d at 902).

36. Williams, 504 U.S. at 47 (quoting Hannah v. Larche, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result)).

37. Id. at 48. See also In re Kittle, 180 F. 946, 947 (C.C.N.Y. 1910) (Hand, J.) ("A court shows no punctilious respect for the Constitution in regulating [grand juries'] conduct. We took the institution as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance . . . .")

38. Williams, 504 U.S. at 51.
requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body. 39

The Court went on to say that there was no "common law" of Fifth Amendment grand jury practice that either required or permitted a rule mandating presentation of exculpatory evidence. 40 Likewise, the Court held that the federal courts could not impose such a rule as part of their supervisory power over grand juries and the prosecutors who appear before them. 41

3. Exculpatory Evidence in the Federal Grand Jury: The Bar's Efforts to Change the Grand Jury through Congress

It might be argued that, even if the courts lack the power to alter the federal grand jury's "historical role," perhaps the U.S. Congress possesses such power. If so, Congress has expressly refused to exercise its authority to impose an obligation on federal prosecutors to present exculpatory evidence. In August 1977, the ABA House of Delegates approved a package of twenty-five grand jury principles to be included in ABA-backed efforts at state and federal grand jury reform. 42 The third of these principles sought to impose a duty on prosecutors to disclose exculpatory evidence. 43 The twenty-five principles were conveyed to, and urged upon, Congress in hearings on federal grand jury reform conducted by the 95th Congress in 1977-78. 44 A provision requiring prosecutorial disclosure of

39. Id. (emphasis added). Justice Scalia's choice of words here implies a slight distortion of history. See supra notes 9-18 and in the accompanying text. The grand jury has from the beginning been an "adjudicatory body." However, its role has been and remains to provide "medial adjudication," that is, a determination of whether the government has presented sufficient evidence to merit a full-scale trial, as distinguished from the final adjudication yielded by such a trial.

40. Id. at 51-53. Justice Scalia observed that under present law, courts have no authority to review grand jury evidence for sufficiency, id. at 54 (emphasis added) (citing Costello v. United States, 350 U.S. 359, 363-64 (1956)), much less for whether any possibly exculpatory evidence was omitted.

41. Id. at 55. Justice Scalia emphasized the "grand jury's operational separateness from its constituting court." Id. at 49. Scalia went on to observe that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." Id. at 50.

42. CRIMINAL JUST. SEC., AMERICAN BAR ASS'N, ABA GRAND JURY POLICY AND MODEL ACT (1977-82) 1 (2d ed. 1982) [hereinafter ABA GRAND JURY POLICY AND MODEL ACT].

43. Principle 3 stated: "No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." Id. at 4. The ABA had previously announced the same principle as an ethical standard for prosecutors in the ABA Standards for Criminal Justice on the Prosecution Function, §§ 3 to 3.6(b). Id. at 7 cmt. 3. However, the ABA avowed that inclusion of a duty to disclose exculpatory evidence among the grand jury principles signified the Association's intent that the duty become "a legislative principle, and not simply a general standard for prosecutorial conduct." Id.

44. The ABA position regarding exculpatory evidence was first conveyed to Congress even before the ABA House of Delegates had acted on it. On May 2, 1977, the Grand Jury Committee of the ABA Criminal Justice Section Council recommended the addition of three new grand jury principles, among them a prosecutorial obligation to present exculpatory evidence, to the package of twenty-three principles that the Council had approved in November 1976. The Grand Jury Committee's recommendation was immediately forwarded to the

exculpatory evidence to the grand jury was included in both House and Senate grand jury reform bills introduced in the 95th Congress.\textsuperscript{45} The proposed requirement was expressly opposed by both the U.S. Department of Justice\textsuperscript{46} and the National District Attorneys Association.\textsuperscript{47} Neither the House nor the Senate bill was ever reported out of committee.\textsuperscript{48}

Undaunted, in January 1982, the ABA House of Delegates approved a \textit{Model Grand Jury Act}.\textsuperscript{49} Section 101 of the \textit{Model Act} would impose a duty on prosecutors to disclose exculpatory evidence\textsuperscript{50} to the grand jury.\textsuperscript{51} In 1985, the ABA's \textit{Model Act} was introduced, with only minor alterations, as a bill in the 99th Congress.\textsuperscript{52} Section 101 of the \textit{Model Act} became, with slight modifications, Section 3323 of H.R. 1407.\textsuperscript{53} The bill was referred to the House Judiciary Committee. \textit{Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess.} 157-58 (1977) [hereinafter \textit{House Hrgs.}]. In June 1977, the ABA Criminal Justice Section recommended to the ABA House of Delegates that it support grand jury reform principles, including presentation of exculpatory evidence. The section's recommendation was transmitted to the Judiciary Committee. \textit{Id.} at 160. Finally, in November 1977, the ABA forwarded to Congress the grand jury principles, still including presentation of exculpatory evidence, which had been approved by the House of Delegates that August. \textit{Id.} at 184, 185.


45. A provision requiring disclosure of exculpatory evidence was included in H.R. 94. \textit{House Hrgs., supra} note 44, at 198. A similar provision was in S. 3405. \textit{Senate Hrgs., supra} note 44, pt. 2 app. at 25.

46. \textit{See Testimony of Philip B. Heymann, Assistant Attorney General, Criminal Division, Department of Justice before Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, Aug. 22, 1978, in Senate Hrgs., supra note 44, pt. 1, at 51, 54, 106-07. The Justice Department's primary objection was that the proposed rule "would transform the grand jury into an adversary or adjudicatory proceeding." \textit{Id.} at 54. This is precisely the rationale adopted fourteen years later by the Supreme Court when it rejected judicial imposition of the exculpatory evidence disclosure requirement in United States v. Williams, 504 U.S. 36 (1992). \textit{See supra} notes 35, 39 and accompanying text (discussing the facts and the Court's decision in the Williams case).


49. ABA \textit{GRAND JURY POLICY AND MODEL ACT, supra} note 42, at 16.

50. In the Model Act, "exculpatory evidence" is defined as "evidence which, if believed, tends to negate one of the material elements of the crime . . . ." \textit{Id.}

51. \textit{Id.}


53. Compare Section 101 of the \textit{Model Act} with Section 3323 of H.R. 1407:

(1) Both Section 101(1) of the \textit{Model Act} and Section 3323(a) of H.R. 1407 would require a prosecutor to disclose and "if feasible present" evidence tending to negate a material element of the crime.

(2) Both Section 101(2) of the \textit{Model Act} and Section 3323(b) of H.R. 1407 would require a
Committee, hearings were held and the bill died in committee. Since the quiet demise of H.R. 1407, the ABA has apparently abandoned its effort to convince Congress to modify the federal prosecutor’s duties of disclosure before the grand jury.

4. Exculpatory Evidence in the Federal Grand Jury: The Response of the Executive Branch

The United States Department of Justice has long recognized that it is desirable for prosecutors to inform grand juries of evidence favorable to the defendant. After all, the mission of the Department of Justice as an institution and of federal prosecutors as individuals is to do justice, an objective that can hardly be accomplished if people are convicted of, or even indicted for, crimes they did not commit. In consequence, the United States Attorneys’ Manual advises that federal prosecutors should inform the grand jury if they are “personally aware of substantial evidence which directly negates the guilt” of a person against whom an indictment is being sought. The U.S. Attorneys’ Manual employs much narrower language than that in Model Rule 3.3(d), and it is explicit in creating no legal rights.

5. The Federal Prosecutor’s Dilemma

The upshot of all this is that a federal prosecutor licensed in a state that has adopted Model Rules 3.3 and 3.8 is faced with this situation:

(1) No federal statute requires presentation of exculpatory evidence to a grand jury. Indeed, Congress has twice expressly declined the invitation to pass such a statute.

(2) The U.S. Supreme Court says the Constitution does not require the

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54. Hearings were held intermittently between May 1985 and September 1986. House Subcomm. Hrgs. 1.
55. For history of H.R. 1407, see 2 Cong. Index, 99th Cong. (CCH) 35,016 (1986).
56. See Berger v. United States, 295 U.S. 78, 88 (1935) (Sutherland, J.) (defining a prosecutor’s interest in a criminal prosecution as ensuring justice will be done, not winning a case; thus, “guilt shall not escape or innocence suffer.”).
58. Id. at § 1-1.100.
59. At present, federal prosecutors are required to be licensed in at least one state in order to represent the Department of Justice in federal courts. Pub. L. No. 102-395, 106 Stat. 1828, 1838 Sec. 102(a) (1992). See discussion infra note 447 and accompanying text (describing the prohibitions and history of the statute). Local U.S. District Court rules often require federal prosecutors to be members of the bar of the state in which they work. See, e.g., U.S. Fed. Local Ct. Rules (E.D. Va.) Rule 7(A); U.S. Fed. Local Ct. Rules (D. Maine) Rule 5(a), (c).
presentation of exculpatory evidence to a grand jury, and that no federal court can order it.\textsuperscript{60} Moreover, the \textit{Williams} court said that the institution of the federal grand jury is incompatible with such a requirement.\textsuperscript{61}

\textbf{But the federal prosecutor’s state} bar association says he must abide by \textit{Model Rules} 3.3 and 3.8, which require disclosure of exculpatory evidence, or face disbarment.

\section*{6. The Unenforceability of \textit{Model Rule} 3.3(d)}

The absurdity of the prosecutor’s dilemma is compounded by the practical impediments to enforcement of the rule. In order for a bar disciplinary committee to determine whether a prosecutor had failed to disclose exculpatory evidence, it would need to have before it, at a minimum, the complete record of all grand jury proceedings in the case under scrutiny, including both the testimony and the colloquy between the grand jury and the prosecutor.\textsuperscript{62} Rule 6(e) of the \textit{Federal Rules of Criminal Procedure} prohibits disclosure of “matters occurring before the grand jury” except in narrowly limited circumstances.\textsuperscript{63} The only one of these

\begin{itemize}
\item \textsuperscript{60} United States v. Williams, 504 U.S. 36 (1992).
\item \textsuperscript{61} \textit{Id.} at 52.
\item \textsuperscript{62} The bar committee would need the colloquy, as well as the evidence, because it would need to determine whether the prosecutor advised the grand jury of the existence of potentially exculpatory evidence that was not thereafter formally presented. In general, a prosecutor cannot force grand jurors to receive evidence that they do not wish to hear. \textit{Id.} at 53 (recognizing that a grand jury can choose not to hear evidence offered by the government). \textit{But see} N.M. STAT. ANN. § 31-6-11(B) (Michie 1995) (prosecutor “shall present evidence that directly negates the guilt of the target where he is aware of such evidence”). On the other hand, grand jurors cannot call for potentially exculpatory evidence unless they are aware of it. \textit{See}, e.g., Johnson v. Superior Ct. of San Joaquin County, 539 P.2d 792, 796 (Cal. 1975) (“[U]nless so informed by the district attorney, the grand jury ordinarily has no ‘reason to believe that other evidence within its reach will explain away the charge.’”).
\item \textsuperscript{63} Federal Rule of Criminal Procedure 6(e) prohibits disclosure of “matters occurring before the grand jury” except:
\begin{itemize}
\item (a) to a government attorney “for use in the performance of such attorney’s duty,” \textit{FED. R. CRIM. P. 6(e)(3)(A)(i)};
\item (b) to government personnel deemed necessary by a government attorney for the performance of “such attorney’s duty to enforce federal criminal law,” \textit{FED. R. CRIM. P. 6(e)(3)(A)(ii)};
\item (c) “when so directed by a court preliminarily to or in connection with a judicial proceeding,” \textit{FED. R. CRIM. P. 6(e)(3)(C)(i)} (emphasis added);
\item (d) at the defendant’s request, “upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury,” \textit{FED. R. CRIM. P. 6(e)(3)(C)(ii)};
\item (e) by a government attorney to another federal grand jury, \textit{FED. R. CRIM. P. 6(e)(3)(C)(iii)};
\end{itemize}
\end{itemize}
circumstances which has ever been held to apply to state bar disciplinary proceedings is Rule 6(e)(3)(C)(i), which allows a court to release grand jury material "preliminarily to or in connection with a judicial proceeding." There is uncertainty, however, about when and whether state attorney disciplinary actions should be considered "judicial proceedings" within the meaning of the rule.64

The real obstacle to disclosure, however, is the requirement that one who seeks disclosure under Rule 6(e)(3)(C)(i) must make a showing of "particularized need."65 Even in circuits that consider release of grand jury materials to attorney

(f) at the request of an attorney for the government, "upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state . . . for the purpose of enforcing such law," FED. R. CRIM. P. 6(e)(3)(C)(iv) (emphasis added).

64. The difficulty arises because of the quasi-judicial character of attorney discipline proceedings and the diverse forms that these proceedings take. One of the seminal cases interpreting the term "judicial proceeding" in Rule 6(e)(3)(C)(i) is Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958). Judge Learned Hand approved disclosure of grand jury materials to the Grievance Committee of the New York City Bar Association, finding the New York disciplinary procedures to be "judicial" in nature because they were presented before the Appellate Division of the New York Supreme Court. For Judge Hand, the touchstone of the rule was to be whether the proceeding was ultimately "determinable by a court." Id. at 120.

Commentary has been critical of Judge Hand's formulation. See, e.g., Mark R. Kmetz, Note, Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e), 70 VA. L. REV. 1623, 1638-39 n.84 (1984). Nevertheless, Doe v. Rosenberry proved enduringly influential and moved several other circuits to agree that attorney disciplinary proceedings were "judicial proceedings." See, e.g., In re Barker v. Oregon State Bar, 741 F.2d 250, 253 (9th Cir. 1984) (relying on Doe v. Rosenberry and agreeing with characterization of a disciplinary investigation by the Oregon State Bar as "preliminary to . . . a judicial proceeding" and permitting release of grand jury materials to investigators); In re Disclosure of Testimony Before the Grand Jury, 580 F.2d 281, 285 (8th Cir. 1978) (citing Doe v. Rosenberry to support the proposition that lawyer disciplinary actions are judicial proceedings). See also United States v. Sobotka, 263 F.2d 764, 766 (2d Cir. 1980) (relying on Doe v. Rosenberry to characterize an investigation as preliminary to a judicial proceeding but requiring particularized need for grand jury testimony); In re Federal Grand Jury Proceedings (Doe), 760 F.2d 436, 438 (2d Cir. 1985) (relying on Doe v. Rosenberry to characterize an investigation as preliminary to a judicial proceeding but requiring the court to balance the goal of a just result in a judicial proceeding against the countervailing policy of grand jury secrecy); In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir.) (analyzing the disclosure to the Investigating Committee of the Judicial Council of the Eleventh Circuit of materials regarding the misconduct of a sitting federal judge), cert. denied, 469 U.S. 884 (1984); In re Sealed Motion, 880 F.2d 1367, 1368 (D.C. Cir. 1989) (discussing application of a witness who was to be named in a report issued under Independent Counsel Act). But see United States v. Bates, 627 F.2d 349, 351 (D.C. Cir. 1980) (finding that Federal Maritime Commission inquiry into antitrust violations is not a "judicial proceeding"); In re J. Ray McDermott & Co., Inc., 622 F.2d 166, 170-72 (5th Cir. 1980) (holding that Federal Energy Regulatory Commission investigation was not a "judicial proceeding").

The Sixth Circuit, however, reached a contrary result in In re Grand Jury 89-4-72, 932 F.2d 481 (6th Cir.), cert. denied, 502 U.S. 958 (1991). The court observed that United States v. Baggot, 463 U.S. 476 (1983), casts doubt on expansive readings of the term "judicial proceedings." In Baggot, the Supreme Court found that an IRS civil tax audit was not "preliminary to a judicial proceeding," and noted, "[t]he fact that judicial redress may be sought, without more, does not mean that the Government's action is 'preliminary to a judicial proceeding.' " In re Grand Jury 89-4-72, 932 F.2d at 485 (quoting Baggot, 463 U.S. at 480). The Sixth Circuit found that Michigan attorney discipline procedures are not judicial proceedings or preliminary thereto because they are conducted by a "privately funded agency" from whose findings there is only a limited right of appeal to the Michigan Supreme Court. Id. at 485. The most that can be said at present is that a state attorney disciplinary tribunal may, or may not, be eligible to receive grand jury materials pursuant to Rule 6(e)(3)(C)(i), depending on the local federal court's view of the tribunal's structure and relationship to the judicial process.

65. See supra note 31 and accompanying text (discussing this requirement).
disciplinary tribunals permissible in principle, an application for disclosure of
grand jury materials by a bar committee seeking to enforce the local version of
Model Rule 3.3(d) against a federal prosecutor would be a request to enforce a
rule of conduct that the U.S. Supreme Court said in Williams is inconsistent with
the character of federal grand juries.66 It is difficult to conceive of a federal court
finding that a state bar committee had a "particularized need" for grand jury
material to conduct an inquiry that the Supreme Court has said is forbidden to the
federal courts themselves. If the state attorney disciplinary authorities have no
way to investigate whether a violation of Model Rule 3.3(d) has occurred because
they have no access to records of federal grand juries, the rule is a nullity.

7. Exculpatory Evidence in the Federal Grand Jury: A Summary

At the end of the day, regardless of one's perception of grand juries, making
disclosure or presentation of exculpatory evidence to the grand jury an ethical
requirement of federal prosecutors is deeply problematic. One may disagree with
the Supreme Court's view of the historical role of grand juries in Anglo-
American practice as expressed in Williams.67 One might also feel that the
historical grand jury of "medial adjudication" embraced by the Court in Williams
is an anachronism which ought, in the name of fairness and good government, to
be changed into something more adversarial.68 But there is no escaping the
conclusion that the conceptual model of grand jury practice that informs Model
Rules 3.3(d) and 3.8 is at odds with eight centuries of Anglo-American legal
history and is in direct conflict with current, binding federal law as enunciated by
the highest court in the land. Moreover, because of the secrecy provisions of
Federal Rule of Criminal Procedure 6(e), a rule requiring disclosure of exculpa-
tory evidence is, as a purely practical matter, unenforceable against federal
prosecutors by state disciplinary authorities.

B. MODEL RULE 3.8(f): THE ATTORNEY SUBPOENA RULE

In February 1990, the ABA House of Delegates approved Model Rule 3.8(f),
which made it an ethical violation for a prosecutor even to issue a subpoena to an
attorney for information "about" a client unless the prosecutor obtained prior
judicial approval after an adversary hearing at which the court would inquire into

66. See supra notes 33-41 and accompanying text (discussing the Williams case).
67. See supra notes 36-39 and accompanying text (reviewing the Williams Court's historical analysis of
grand juries).
68. Similar views have shaped modifications of various state grand jury systems. See, e.g., DEBORAH DAY
contributing to states' decisions to revise their grand jury systems including awareness of abuse at the federal
level, the stand of the ABA and a desire to modify their entire criminal code).
This rule has been controversial since its inception. It has been adopted by only nine states, and as a local rule by some federal district courts within those states. The rule is so deeply flawed that on August 9, 1995, the ABA House of Delegates voted to remove one of its central features, the requirement of pre-issuance judicial approval. Nonetheless, as of this writing, variants of Model Rule 3.8(f) remain in effect in all those states and federal districts that previously adopted them. Whether these jurisdictions will follow the lead of the ABA in deleting the requirement of prior judicial approval remains to be seen. Even if they do, the amended rule retains many of the defects of the original.

1. The Perceived "Crisis" on Attorney Subpoenas

In the mid-1980s the perception arose that federal prosecutors were employing subpoenas directed to defense attorneys to collect evidence about clients to a far

69. MODEL RULES OF PROFESSIONAL CONDUCT ANNOTATED Rule 3.8(f) commentary at 408 (1992) [hereinafter MODEL RULES ANN.]. The rule reads as follows:

RULE 3.8 Special Responsibilities of a Prosecutor
The prosecutor in a criminal case shall:

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:
   (i) the information reasonably sought is not protected from disclosure by any applicable privilege;
   (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
   (iii) there is no other feasible alternative to obtain the information; and
(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

MODEL RULES ANN. Rule 3.8(f).

70. Those states that have adopted some form of Model Rule 3.8(f) are Alaska, Colorado, Louisiana, Oklahoma, Pennsylvania, Massachusetts, Rhode Island, Tennessee and Virginia. ALASKA CT. R. PROF. CONDUCT Rule 3.8(f) (1995); COLO. CT. R. PROF. CONDUCT Rule 3.8(f) (1995); LSA-R.S foll. 37:221, Rule 3.8(f) (1995); OKLA. ST. R. PROF. CONDUCT Rule 3.8(f) (1995); PA STAT. R. PROF. CONDUCT 3.10 (1996); MASS. ANN. LAWS ch. 3, R. 3:08 (Law Co-op. 1994); R.I. SUP. CT. ART V Rule 3.8(f) (1994); TENN. SUP. CT. R. 8, DR 7-103(c) (1994); VA. SUP. CT. R Pt. 6, Sec. II, DR 8-102(A)(5) (1994). For discussion of federal district courts that have adopted the rule, see infra notes 192-257 and accompanying text.


72. In the pages that follow, references to Model Rule 3.8(f) are, unless otherwise specified, references to the version of the rule passed in 1990, and not to the rule in its recently amended form. I take this approach in part because the version of Model Rule 3.8(f) actually in effect in those jurisdictions that adopted it is some variant of the 1990 rule, and it remains an open question whether those jurisdictions will follow the action of the ABA House of Delegates by deleting the requirement of prior judicial approval. In addition, when considering the broader questions of ethics regulation, the fact that the ABA originally enacted Model Rule 3.8(f) with a requirement of prior judicial review has significance independent of the reactions of the state bar organizations to the newly amended Model Rule.
greater degree than had previously been the case. This perception may have arisen in part from an actual increase in the absolute numbers of federal grand jury subpoenas issued to attorneys and in part from a spate of reported cases in the early 1980s in which defense counsel challenged such subpoenas.

2. The Response of the Federal Judiciary to Attorney Subpoenas before Model Rule 3.8(f)

Unease in the defense bar about attorney subpoenas grew as the 1980s

73. See, e.g., Seymour Glanzer & Paul R. Taskier, Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity, 75 J. CRIM. L. & CRIMINOLOGY 1070, 1070 nn.1-2 (1984) (listing numerous investigations as evidence that attorneys were more frequently summoned to testify before federal grand juries); Ellen R. Peirce & Leonard J. Colamarino, Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations, 36 HASTINGS L.J. 821, 824-25 (1985) (describing the disapproval of a number of federal courts toward subpoenaing defense attorneys to furnish evidence and appear before grand juries); Robert N. Weiner, Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform, 23 AM. CRIM. L. REV. 95, 95 (1985) ("Increasingly, federal prosecutors have subpoenaed attorneys before grand juries to testify and produce documents concerning their clients."); John R. Wing & Maranda F. Fritz, Subpoenas to Lawyers, 4 LEGAL NOTES & VIEWPOINTS 25, 26 (1984) ("the practice of hauling lawyers before grand juries to testify or produce records about their clients appears to be on the rise"); William J. Genego, The New Adversary, 54 BROOK. L. REV. 781, 804-14 (1988) (discussing a survey of the members of the National Association of Criminal Defense Lawyers purporting to show that a dramatic increase in the government's use of subpoenaing defense attorneys before grand juries occurred between 1983 and 1985); Max D. Stern & David Hoffman, Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform, 136 U. PA. L. REV. 1783, 1787-88 (1988) (referring to both the survey of the National Association of Criminal Defense Lawyers and a survey by the Department of Justice to show the increase in the number of attorney subpoenas in the mid-1980s); Koniak, supra note 5, at 1398 ("By 1985 the number of criminal defense lawyers being subpoenaed before grand juries had risen dramatically ....").

74. There are no figures available on the numbers of federal subpoenas issued to attorneys from 1980 to 1985. The claims of dramatic increase during this period made by academic commentators are based on inherently imprecise data such as a survey of defense attorneys. See, e.g., Stern & Hoffman, supra note 73, at 1788 n.19. Hard numbers on federal attorney subpoenas only became available after 1985, the year the Justice Department instituted an internal policy requiring preclearance of such subpoenas. See UNITED STATES ATTORNEYS' MANUAL § 9-2.161(a) (describing the procedure for obtaining approval of attorney subpoenas); see also infra note 96 and accompanying text (discussing adoption by Department of Justice of pre-issuance clearance procedures for attorney subpoenas). In 1986, the Justice Department approved roughly 400 attorney subpoena requests. Stern & Hoffman, supra note 73, at 1788 n.19. During fiscal years 1988-94, the numbers of attorney subpoenas approved were as follows: 1988 (523), 1989 (649), 1990 (695), 1991 (851), 1992 (1041), 1993 (975) and 1994 (1028). Telephone interview with Edgar Brown, Chief Witness Immunity Section, U.S. Department of Justice (Aug. 18, 1995).

The cause of the increased number of attorney subpoenas can be debated, but one fact of obvious significance is that the Justice Department has doubled in size over the last decade. In 1985, there were approximately 2,200 Assistant U.S. Attorneys (AUSAs). 1985 U.S. ATT'YS' OFFS. STAT REP. chart 14. By 1994, there were 4,064 AUSAs. 1994 U.S. ATT'YS' OFFS. STAT REP. at 1. Although the statistics are not available for a precise year-by-year comparison, it is plain that the ratio of AUSAs to attorney-subpoenas has remained roughly constant over the past decade. Moreover, the incidence of use hardly suggests the conversion of a once-rare device into a regular tool that is suggested by critics of the Justice Department. In FY 1994, for example, only one attorney subpoena was issued for every four AUSAs. Or, to look at it another way, between 1986 and 1994, on average each AUSA in the United States issued one attorney subpoena every four years.

75. See, e.g., Weiner, supra note 73, at 95 n.1 (cataloguing cases involving challenges to federal grand jury subpoenas on attorneys between 1982 and 1984).
progressed because the prosecution’s right to issue and enforce compliance with such subpoenas was consistently upheld. Attorneys who wished to resist a subpoena seeking information about a client raised a number of arguments.

a. Claims of Privilege

The reflexive response to an attorney subpoena is, of course, to assert that the material sought is protected by a privilege, most commonly the attorney-client or work product privileges. However, as will be discussed below, there have always existed broad categories of information that an attorney may possess about a client that are not covered by any privilege.

b. Constitutional Arguments

Where the information sought by a subpoena is not covered by an evidentiary privilege, defense counsel have commonly made the constitutional claim that subpoenaing the lawyer of a criminal suspect is violative of the suspect’s Sixth Amendment right to counsel in two ways. First, they argue that the Sixth Amendment is implicated even if the specific information sought is unprivileged because the subpoenaed lawyer becomes a witness who cannot ethically continue representing the defendant. Hence, the defendant may be deprived of the lawyer of his choice. Alternatively, it has been claimed that the mere issuance of a subpoena to a lawyer can have an unconstitutionally chilling effect on the attorney-client relationship. These arguments have met with little success. The courts have held that:

76. See infra notes 141-53 and accompanying text (discussing the work product privilege).
77. See, e.g., In re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039 (11th Cir. 1990) (discussing the client’s motion to intervene and to quash the grand jury subpoena alleging that the subpoena violated his Sixth Amendment right to assistance of counsel).
78. Testimony by an attorney about a client may create a conflict of interest which, under either federal substantive law or the rules of ethics, may require withdrawal of a testifying attorney. See Strickland v. Washington, 466 U.S. 668, 692 (1984) (holding that client has right to conflict-free representation); United States v. Cunningham, 672 F.2d 1064, 1072 (2d Cir. 1982) (finding that client may seek disqualification of former attorney from representing co-defendant), cert. denied, 466 U.S. 951 (1984). Both Model Rule 3.7 and DR 5-102(B) of the Model Code of Professional Responsibility mandate withdrawal of an attorney under certain circumstances if the attorney is or obviously will be called as a witness. MODEL RULES RULE 3.7; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1980) [hereinafter MODEL CODE].
79. See, e.g., In re Osterhoudt, 722 F.2d 591, 594 (9th Cir. 1983) (discussing situation where defendant argued compliance with the subpoena would create a conflict of interest denying defendant the counsel of his choice, but the court did not reach issue); In re Grand Jury Subpoena (Doe), 781 F.2d 238, 244-45 (2d Cir. 1985) (rejecting defendant’s claim that grand jury testimony of defense attorney would “set the stage for his attorney’s forced withdrawal”), cert. denied, 475 U.S. 1108 (1986).
80. See, e.g., Osterhoudt, 722 F.2d at 594 (noting defense argument that an attorney providing evidence against a client would be destructive of the “trust and confidence essential to the [attorney-client] relationship,” but not reaching the issue); In re Grand Jury Subpoena (Doe), 781 F.2d at 244-45 (rejecting defendant’s claim that grand jury testimony of defense attorney would “chill his potential Sixth Amendment rights,” and would cause the attorney-client relationship to be “undermined irreparably”); In re Sturgis, 412 F. Supp. 943, 946 (E.D. Pa. 1976) (discussing how an attorney’s presence in the grand jury room may plant “doubts in the client’s
(i) Indicted defendants have a right to counsel, but no absolute constitutional right to the particular lawyer of their choice. In the pre-indictment grand jury stage of a federal criminal investigation, the stage during which disputes over attorney subpoenas tend to occur, criminal suspects have no constitutional right to any lawyer at all. Consequently, if an attorney possesses relevant and unprivileged information, the client’s interest in a particular lawyer will generally be outweighed by society’s interest in the investigation and adjudication of criminal cases based on all available evidence.

(ii) In situations where there does exist a constitutional right to counsel, even information within the scope of the attorney-client privilege enjoys no particular constitutional protection because the privilege itself is not guaranteed by the U.S. Constitution, either under the Sixth Amendment right to counsel or under the Fifth Amendment privilege against compelled self-incrimination. The fact that courts have created a zone of privilege to protect the attorney-client relationship gives the privilege itself no independent constitutional status.

(iii) As for the claim that mere issuance of a subpoena to an attorney “chills” the relationship with his client, the courts have been even less receptive. Defendants have no right to a “meaningful attorney-client relationship,” even post-indictment. With a single notable exception, federal courts have consis-
tently held that there is no constitutional basis for the claim that solicitude for the attorney-client relationship requires prosecutors to make a special showing before issuing a subpoena to a lawyer for client information.\textsuperscript{89} Likewise, once a subpoena has been served, attorney witnesses may not make blanket assertions of privilege, but must appear and make a specific assertion of privilege as to each question, or at least subject matter, as to which they claim a privilege.\textsuperscript{90}

While courts exhibit instinctive concern over the sensitivity of subpoenas directed to lawyers for information about clients,\textsuperscript{91} and a marked dislike for motions to disqualify counsel based on such subpoenas,\textsuperscript{92} if the courts are satisfied that the subpoenas are not being used as a subterfuge to disqualify a nettlesome opponent, the justice system's interest in obtaining all relevant evidence not protected by privilege outweighs the defendant's interest in having one particular lawyer.\textsuperscript{93} Throughout the 1980s, the federal courts consistently rejected arguments that sought to exempt lawyers from the disclosure of

\textsuperscript{89} See infra note 184 and accompanying text (listing federal cases holding that government need make no prior showing to justify issuance of grand jury subpoenas); notes 204-257 and accompanying text (discussing opinions of First Circuit upholding requirements of prior showing).

\textsuperscript{90} Federal Rule of Evidence 1101(d)(2) provides that the law of privilege applies to the grand jury. Nonetheless, a witness claiming a testimonial privilege must appear and assert it as to each question, or at least subject matter, as to which he claims it applies. Fed. R. Evid. 1101(d)(2); see, e.g., In re Grand Jury Matters, 751 F.2d 13, 17 n.4 (1st Cir. 1984) (stating, in dictum, that attorney-client privilege must be asserted specifically as to each individual matter); In re Grand Jury Witness (Salas), 695 F.2d 359, 362 (9th Cir. 1982) (noting that blanket assertions of attorney-client privilege are "extremely disfavored"); United States v. El Paso Co., 682 F.2d 530, 539 (5th Cir. 1982) (rejecting blanket assertion of attorney-client privilege), cert. denied, 466 U.S. 944 (1984); In re Walsh, 623 F.2d 489, 493 (7th Cir.) (finding elements of attorney-client privilege must be established as to each record sought and each question asked), cert. denied, 449 U.S. 994 (1980). See also United States v. Rodriguez, 706 F.2d 31, 37 (2d Cir. 1983) (holding that courts should not accept blanket assertions of privilege); United States v. Arnott, 704 F.2d 322, 324-25 (6th Cir.) (finding that district judge should not rule on a claim of privilege until the witness has asserted privilege in response to particular questions), cert. denied, 464 U.S. 948 (1983).

\textsuperscript{91} See, e.g., In re Grand Jury Matters, 751 F.2d 13, 18 (1st Cir. 1984) (discussing requiring the government to show with some particularity why the grand jury’s investigation requires a subpoena of the attorney); United States v. Perry, 857 F.2d 1346, 1350 (9th Cir. 1988) (considering how the needs of the grand jury must be balanced with possible Sixth Amendment concerns of the attorney and client).

\textsuperscript{92} Professor Zacharias has remarked on this phenomenon, and has observed that the most common remedy for concerns about abuse is heightened judicial scrutiny for signs of a search for tactical advantage. Zacharias, supra note 80, at 942 n.97; Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice? 44 Vand. L. Rev. 45, 72 n.118 (1991).

\textsuperscript{93} See Wheat, 486 U.S. at 160 (holding that the interest of federal courts in "ensuring that criminal trials are conducted within the ethical standards of the profession" outweighs a defendant's interest in the services of an attorney with a conflict of interest). This is not to say that a government subpoena to a defense attorney could never implicate constitutional concerns. Certain types of "egregious" government interference with the attorney-client relation can impugn the Sixth Amendment right to counsel. Perry, 857 F.2d at 1349 (quoting United States v. Irwin, 612 F.2d 1182, 1189 n.18 (9th Cir. 1980)). The court in *Perry* intimates, but does not hold, that an intentional and successful effort by the government to manipulate the defendant’s choice of counsel through service of a subpoena on the attorney might be sufficiently egregious to constitute a per se violation of the constitution. *Id.* at 1349-52.
unprivileged client information\textsuperscript{94} or to expand significantly the scope of existing evidentiary privileges to increase the protection afforded client information.\textsuperscript{95}

In sum, just as had been the case with the exculpatory-evidence-in-the grand-jury rule, the defense bar tried and failed to convince the federal courts to impose significant new limits on subpoenas to attorneys. It is important to understand that the controversy over attorney subpoenas does not arise from attempts by the prosecution to obtain information protected by the attorney-client privilege, or any other recognized privilege. Nor does it spring from any recent judicial constriction of the traditional reach of privileges protecting the attorney-client relation. Critics of attorney subpoenas are not claiming that prosecutors are securing information to which the government would in the past have been unentitled. Examined carefully, the complaint is that the government is using a tool it always had, more often than had formerly been the case, to get information to which it always had a right.

3. Attorney Subpoenas: The Bar Appeals (Sort of) to the Executive and Legislative Branches

a. Response of the Justice Department

In addition to seeking redress in the courts, the bar expressed its concerns about attorney subpoenas to federal law enforcement officials. In response, in 1985, the Justice Department adopted internal procedures for approval of such subpoenas.\textsuperscript{96} While these guidelines require federal prosecutors to satisfy department superiors of the existence of six factors, including all those embodied in Model Rule 3.8(f), such guidelines create no legal rights and are not enforceable against the government in court.\textsuperscript{97} This effort at self-regulation did not satisfy the bar.

b. The Bar Skips the Congress

Interestingly, and quite unlike its approach in attempting to change grand jury practice concerning exculpatory evidence, the bar made no effort to seek congressional legislation on attorney subpoenas before turning to the path of ethical regulation. There was no reference to attorney subpoenas in the ABA Grand Jury Principles adopted by the House of Delegates in August 1977, and

\textsuperscript{94} See, e.g., In re Grand Jury Matters, 751 F.2d at 19 ("There can be no absolute rule that frees an attorney, merely because he is such, to refuse to give unprivileged evidence to a grand jury.").

\textsuperscript{95} See infra notes 117-40 and accompanying text (discussing the attorney-client privilege), infra notes 141-53 and accompanying text (discussing the work product doctrine).

\textsuperscript{96} United States Attorneys' Manual § 9-2.161(a). The need for such procedures was suggested by, among others, Robert Weiner. Weiner, supra note 73, at 125-33.

\textsuperscript{97} In re Klein, 776 F.2d 628, 635 (7th Cir. 1985).
forwarded to Congress later that year. Nor was the issue addressed in the 1982 ABA Model Grand Jury Act, which influenced the drafting of H.R. 1407 in 1985.

The first report by an ABA Committee to the ABA House of Delegates concerning the problem perceived to be created by attorney subpoenas was presented in 1986. Despite the fact that the problem identified, both in this report and by academic commentators, was an increase of federal grand jury subpoenas to lawyers, so far as can be determined, the ABA made no effort to secure legislation from Congress to address its concerns.

4. Model Rule 3.8(f): An Ethical Regulation in Conflict with Federal Law

As noted above, Model Rule 3.8(f) was promulgated in 1990. As originally enacted, the rule made it unethical for any prosecutor to subpoena a lawyer to present evidence “about a past or present client” without obtaining prior judicial approval “after an opportunity for an adversarial proceeding.” The rule also contained standards by which the court was to judge the application. It required

98. See supra notes 44-46 and accompanying text (discussing efforts by the ABA to make legislative changes in other areas).
100. See supra notes 51-55 and accompanying text (discussing the content and legislative history of HR 1407 and comparing it to the Model Act). The issue of attorney subpoenas was mentioned by witness George J. Moscarino, who appeared for the ABA in the 1987 House Judiciary Committee hearings on H.R. 1407, but the bill did not address the issue and Moscarino made no proposal to address his concern. House Subcomm. Hrgs., supra note 52, at 8.
101. See Model Rules Ann., supra note 69, commentary at 409 (stating that “the ABA House of Delegates adopted a resolution in February 1986 patterned after Massachusetts Supreme Court Rule 3:08, Prosecution Function 15, requiring prior judicial approval to subpoena a lawyer before a grand jury to testify about a client”).
102. Id. at 408; see also supra note 73 and accompanying text (discussing the increase in federal grand jury subpoenas of attorneys).
103. The only indications of congressional interest in the issue were the actions of one senator and one congressman. On Aug. 10, 1988, Sen. Paul Simon introduced a bill that would have required pre-issuance judicial approval of attorney subpoenas. See S. 2713, 100th Cong., 2d Sess. (1988); 134 Cong. Rec. 21,599-21,600 (1988) (statement of Sen. Simon). Sen. Simon was apparently acting at the behest of a group calling itself the “National Network for the Right to Counsel,” which included various academics, but which seemed to have no affiliation with any component of the organized bar. Id. No hearings were ever held on the bill during the 100th Congress. 134 Cong. Rec. Index 2396 (1988). There is no indication that Sen. Simon revived the idea.

In the House of Representatives, a single subcommittee chairman held a one-day hearing on May 10, 1990. This hearing came three months after the February 1990 adoption of Model Rule 3.8(f) by the ABA House of Delegates. Exercise of Federal Prosecutorial Authority in a Changing Legal Environment: Hearing before the Government Information, Justice, and Agriculture Subcomm. of the House Comm. on Government Operations, 101st Cong., 2nd Sess. (May 10, 1990). Representatives of both the ABA and the National Association of Criminal Defense Lawyers testified. Id. at 39, 204.


104. Model Rules Rule 3.8(f).
that the court be satisfied that the prosecutor have reasonable grounds to believe that "(i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; (iii) there is no other feasible alternative to obtain the information." 105

By contrast with Model Rule 3.3(d) which conflicts with only a single, albeit ancient, line of authority, application of Model Rule 3.8(f) to federal prosecutors would require the abandonment or modification of well-established principles in several different areas of federal criminal law. As will be demonstrated in detail below, the primary departures from current federal law embodied in Rule 3.8(f) are these:

(1) As written, the rule changes material aspects of federal privilege law concerning the attorney-client relation. Consequently, as a state ethics rule, Model Rule 3.8(f) violates the Supremacy Clause 106 by contravening Congress' express delegation of power to the federal courts to fashion privilege law in federal criminal cases. If adopted as a local rule of a federal district court, Model Rule 3.8(f) offends the same act of delegation because Congress made clear that federal courts were to fashion privilege law case-by-case as common law judges, and not in the exercise of any rule-making power, much less the interstitial power to make local rules on "matters of detail" pursuant to Federal Rule of Criminal Procedure 57.

(2) Model Rule 3.8(f) offends the Supreme Court's general prohibition, expressed in United States v. Williams, 107 against attempting to regulate grand jury procedure through the application of "ethical rules" to federal prosecutors. As a state rule, it violates the Supremacy Clause; as a local federal district court rule, it exceeds the court's rulemaking authority. Model Rule 3.8(f) would inappropriately limit the traditional scope of grand jury power in three ways:

(a) By reversing the burden of proof as to the availability of traditional privileges and by imposing hitherto-unheard-of conditions on the disclosure of information by attorneys about clients, the rule would expand the scope of protection historically afforded the attorney-client relation and restrict the grand jury's power to collect evidence.

(b) By requiring adversarial hearings at which prosecutors would be required to disclose substantial portions of their evidence to attorneys who would often be representing subjects or targets of the grand jury investigation, the rule would violate the tradition of grand jury secrecy and specific provisions of Federal Rule of Criminal Procedure 6(e).

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105. Id. (emphasis added).
106. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").
(c) Requiring the prosecutor to make a pre-compliance showing of relevance or need for subpoenaed information is in direct violation of Federal Rule of Criminal Procedure 17(c), as that rule has been interpreted by the Supreme Court in United States v. R. Enterprises Inc. 108

a. Model Rule 3.8(f) Would Impermissibly Redefine the Boundaries of Evidentiary Privileges Protecting the Attorney-Client Relationship

The 1990 passage of Model Rule 3.8(f) was an effort to engineer a significant *de facto* expansion of the sphere of evidentiary privilege surrounding the relationship between attorney and client. Historically, the confidentiality of various aspects of the attorney-client relationship has been protected by two sets of rules — the ethical rules of the bar and the law of evidentiary privilege created by courts and legislatures acting for the state. 109 In effect, the bar ethics rules and the law of evidentiary privilege created two layers of protection. The outer, more expansive, layer was the province of the bar; ethical rules defined a sphere of information connected with the attorney-client relationship that could not ethically be disclosed by the attorney, *unless a court ordered the disclosure*. 110 Sanctions for violating the bar’s rules about client confidentiality were levied by the bar on the attorney who held the confidence. A lawful court order compelling disclosure was an absolute defense to a claim of ethical breach. The inner layer of protection was the law of privileges (in modern times, principally the attorney-client and work product privileges), in which the state designated certain types of information, a smaller subset of the types of information protected by ethical

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110. Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct provide exceptions to their strict confidentiality rules when a court orders disclosure of information. MODEL RULES Rule 1.6 cmt. (“The lawyer must comply with the final orders of a court or other tribunal . . . requiring the lawyer to give information about the client [and] a lawyer may be obligated or permitted by other provisions of law to give information about a client.”); MODEL CODE DR 4-101(C)(2) (“A lawyer may reveal confidences or secrets when . . . required by law or court order.”); see also Epstein & Martin, supra note 109, at 6-7 (“Both ethical codes allow an attorney to reveal his client’s intent to commit certain wrongful acts and . . . to reveal confidences when necessary in collecting a fee or defending against an accusation of wrongful conduct.”).
111. There is debate over whether the protection afforded attorney work product should be labelled a “privilege,” a “doctrine” or an “immunity.” Those who object to the term “privilege” contend that the protection afforded material covered by a “privilege” is absolute, but that much work product material is given only conditional protection from disclosure under current law. Resolution of this debate is not necessary for present purposes. As a matter of convenience, I will refer to the protections afforded attorney-client communications and work product materials as “privileges.”
rules concerning client confidentiality, which even judges would not order attorneys to disclose.\footnote{112}

For at least four centuries, judges in England and America have viewed claims of evidentiary privilege as necessary, but nonetheless as subversive of the courts’ primary function of discovering the truth.\footnote{113} American judges have been even less disposed to accept restrictions on the truth-seeking powers of grand juries.\footnote{114} Consequently, evidentiary privileges have been created grudgingly and construed narrowly.\footnote{115} Moreover, and critical to the present discussion, the invariable rule in England and America has been that one who seeks to invoke a privilege, as the party attempting to deny the tribunal access to information, bears the burden of proof in establishing the availability of the privilege.\footnote{116}

\textsuperscript{112.} Recognized evidentiary privileges also generally apply when some other appropriate arm of the state such as a legislative committee is seeking information. See United States v. Bryan, 339 U.S. 323 (1950) (concerning power of congressional committee to require testimony).

\textsuperscript{113.} In 1904, Dean Henry Wigmore wrote, “For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.” \textit{Id.} at 331 (quoting 8 \textit{J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW \S SCE 2192 AT 70 (EMPHASIS ADDED)}). The power to compel testimony before courts was established in England by statute no later than 1562. \textit{Statute of Elizabeth}, 1562, 5 ELz., Ch. 9, \S 12 (ENG.). In 1612, Lord Bacon observed that all subjects owed the king their “knowledge and discovery.” \textit{COUNTESS OF SHREWSBURY’S CASE}, 2 How.St.Tr. 769, 778 (1612). The maxim, “The public has a right to every man’s evidence,” was coined by Lord Chancellor Hardwicke in 1742 during the parliamentary debate on the Bill to Indemnify Evidence. 12 \textit{COBBETT’S PARLIAMENTARY HISTORY} 675, 693 (1742), \textit{supra}, \textit{§ 2192, at 71. See also Draught for the Organization of Judicial Establishments, in 4 THE WORKS OF JEREMY BENTHAM} 320 (Bowring ed., 1843). In the United States, see \textit{Trammel v. United States}, 445 U.S. 40, 50 (1980) (“Testimonial exclusionary rules and privileges . . . must be strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.’ ” (quoting \textit{Elkins v. United States}, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)))

\textsuperscript{114.} “[T]he longstanding principle that ‘the public . . . has a right to every man’s evidence’ . . . is particularly applicable to grand jury proceedings.” \textit{United States v. Calandra}, 414 U.S. 338, 345 (1974) (quoting \textit{Branzburg v. Hayes}, 408 U.S. 665, 682, 688 (1972)).

\textsuperscript{115.} For a sampling of the extensive U.S. Supreme Court jurisprudence evincing a reluctance to create or broaden evidentiary privileges, see \textit{University of Pa. v. EEOC}, 493 U.S. 182, 188-89 (1990) (refusing to create a common law privilege for academic peer review materials); \textit{Trammel}, 445 U.S. at 50-53 (significantly narrowing the adverse spousal testimony privilege); \textit{Herbert v. Lando}, 441 U.S. 153, 175 (1979) (declining to create editorial privilege under First Amendment); \textit{United States v. Nixon}, 418 U.S. 683, 707 (1974) (rejecting President Nixon’s claims of executive privilege); \textit{United States v. Dionisio}, 410 U.S. 1 (1973) (holding grand jury witnesses had no Fourth or Fifth Amendment privilege to refuse to give voice exemplars); \textit{Branzburg v. Hayes}, 408 U.S. 665, 703-04 (1972) (declining to create First Amendment “newsman’s privilege” permitting reporters to refuse disclosure of sources to grand juries).

\textsuperscript{116.} \textit{See, e.g., In re Horowitz}, 482 F.2d 72, 82 (2d Cir.) (stating that with all privileges the person claiming the privilege has the burden of establishing all its essential elements), \textit{cert. denied}, 414 U.S. 867 (1973); \textit{Fletcher v. Aetx, Inc.}, 156 F.R.D. 45, 49 (S.D.N.Y. 1994) (holding that the burden is on party claiming protection of a privilege to establish the essential elements of the privilege); \textit{Bowne of New York City, Inc. v. AmBase Corp.}, 150 F.R.D. 465, 470 (S.D.N.Y. 1993) (finding that the burden is on the party claiming a privilege to establish all its elements); \textit{Wilson v. Martin County Hosp. Dist.}, 149 F.R.D. 553, 556 (W.D. Tex. 1993) (same);
Model Rule 3.8(f) is an attempt to alter settled law of evidentiary privilege, and thus to narrow, or even obliterate, the gap between the inner and outer spheres of protection afforded the attorney-client relationship.

i. The Attorney-Client Privilege

The attorney-client privilege, the oldest of the common law privileges,\(^\text{117}\) began its evolution in England in the Sixteenth Century.\(^\text{118}\) The development of

Buffington v. Gillette Co., 101 F.R.D. 400, 403 (W.D. Okla. 1980) (same); Earle v. Grout, 46 Vt. 113, 123 (1873) (expressing that the burden is on party who seeks to have evidence suppressed because of a privilege to prove the facts establishing the privilege). See also Stephen A. Saltzburg, American Criminal Procedure 674 (1980) (stating that although usual privileges can be raised before a grand jury, the burden is on the proponents of the privileges to prove them in order to preserve them). For authorities citing this principle in the attorney-client privilege context, see Christopher Mueller & Laird Kirkpatrick, Evidence § 5.27, at 434 (1995) ("The claimant must show that an attorney-client relationship existed between the communicants."); Rice, supra note 85, § 11:9, at 971, 975 (observing that, because attorney-client privilege is an exception to the rule that law is entitled to every man's evidence, courts place the burden of establishing each element of the privilege by a preponderance of the evidence on the proponent); United States v. White, 950 F.2d 426, 430 (7th Cir. 1991) ("The burden falls on the party seeking to invoke the privilege to establish all the essential elements."); United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir.) (noting that "the party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential"), cert. denied, 502 U.S. 1005 (1991); United States v. Abraham, 905 F.2d 1276, 1283 (9th Cir. 1990) (denying privilege where claimant's showing of elements was "meager, amorphous, and ultimately inadequate"); In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) (stating that claimant has burden to establish privilege with reasonable certainty); In re Grand Jury, 482 F.2d 72, 82 (2d Cir.) ("the person claiming the attorney-client privilege has the burden of establishing all essential elements" (citation omitted)), cert. denied, 414 U.S. 867 (1973).

The principle that the party invoking a privilege bears the burden of proving its existence is applied by courts to the other privileges as well. These include: the work-product privilege, e.g., Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, 120 F.R.D. 504, 510 (W.D. La. 1988); the marital communications privilege, e.g., United States v. Hamilton, 19 F.3d 350, 354 (7th Cir.), cert. denied, 115 S. Ct. 480 (1994); the spousal testimony privilege, e.g., United States v. Acker, 52 F.3d 509, 514-15 (4th Cir. 1995); the physician-patient privilege, e.g., Bryant v. Hilst, 136 F.R.D. 487, 490 (D. Kan. 1991); the psychotherapist-patient privilege, e.g., People v. Cabral, 15 Cal. Rptr. 2d 866, 869 (Cal. App. 1993); the clergy-penitent privilege, e.g., In re Grand Jury Investigation, 918 F.2d 374, 385 n.15 (3d Cir. 1990), and In re Possible Violations of 18 U.S.C. 371, 641, 1503, 564 F.2d 567, 571 (D.C. Cir. 1977); the journalist privilege, e.g., von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir.), cert. denied, 481 U.S. 1015 (1987); and the accountant-client privilege, e.g., State ex rel. Schott v. Foley, 741 S.W.2d 111, 113 (Mo. Ct. App. 1987).

117. See 8 WIGMORE, supra note 113, § 2290, at 542 (observing that attorney-client privilege is oldest of confidential communication privileges); MUELLER & KIRKPATRICK, supra note 116, § 5.8, at 357 (contending that attorney-client privilege was recognized in English cases as early as 1577); Berd v. Lovelace, 21 Eng. Rep. 33 (1577) (holding that solicitor served with process to testify is not compelled to be depose).

118. See 1 MCCORMICK ON EVIDENCE § 87, at 313 (4th ed. 1992) (noting that the first traces of English attorney-client privilege doctrine appeared during the reign of Elizabeth I). An attorney-client privilege did not arise, and probably was not required, in England until the Sixteenth Century, when English courts first began the practice of compelling witnesses to testify in court or by deposition. 8 WIGMORE, supra note 113, § 2290, at 542-43. See also, Rice, supra note 85, § 1:2 at 2 (tracing origin of the attorney-client privilege in English common law); Hazard, supra note 109, at 1070-73 (arguing that the attorney-client privilege originally protected the lawyer rather than the client). By the early 1700s, English judges based the privilege on the need for candor between the client and the attorney who was to represent him in pending litigation. The need for full disclosure by clients to their attorneys was particularly acute in early suits at law in which the parties were disqualified from being witnesses in their own cases. Since litigants could not by law speak for themselves, they
the attorney-client privilege in America before 1900 was heavily influenced by English doctrine.\textsuperscript{119} However, virtually immediately upon the 1904 publication of his exhaustive evidence treatise, Dean Henry Wigmore became the predominant influence in the development of American law on the attorney-client privilege.\textsuperscript{120}

Wigmore recognized that the attorney-client privilege, like all other evidentiary privileges, was an obstruction to the discovery of the truth.\textsuperscript{121} He laid down

had no choice but to retain counsel and speak candidly to him about their affairs. See Hazard, supra note 109, at 1082-83 (suggesting that the reason for the privilege was to prevent courts from obtaining a party's testimony indirectly when the testimony could not be adduced directly). The courts felt that the threat of disclosure of client communications would discourage communication, simultaneously damaging the client's interest in effective legal representation in the adversary system and society's interest in having clients receive competent representation in the courts. GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 185 (1990); see also Hazard, supra note 109, at 1079-81 (discussing the evolution of the attorney-client privilege). English courts gradually expanded the privilege beyond the litigation setting as they recognized that the need for guarantees of secrecy to encourage client candor existed in equal measure when lawyers performed as advisers and counselors. See, e.g., Lord Brougham's 1833 opinions in Bolton v. Corporation of Liverpool, 39 Eng. Rep. 614 (1833) (extending the privilege to a case involuntarily laid before counsel) and Greenough v. Gaskell, 39 Eng. Rep. 618 (1833) (discussing evolution of privileges at English common law). For discussion of Bolton and Greenough, see Hazard, supra note 109, at 1084-85.

119. HAZARD & KONIAK, supra note 118, at 186; Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464, 466 (1977) [hereinafter Note, Privilege]; Hazard, supra note 109, at 1087 n.120; 8 WIGMORE, supra note 113, § 2294, at 564; RICE, supra note 85, § 1:12 at 37; see, e.g., Dixon v. Parmelee, 2 Vt. 185, 188 (1829) (describing the English origins of the attorney-client privilege). See also In re Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961) ("In the eighteenth century, when the desire for truth overcame the wish to protect the honor of witnesses and several testimonial privileges disappeared, the attorney-client privilege was retained, on the new theory that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter to properly advise the clients. This is the basis of the privilege today."). aff'd, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

120. Wigmore's work was hailed immediately as "the best treatise on the common law of evidence." Joseph H. Beale, Book Review, 18 HARV. L. REV. 478, 480 (1905) (reviewing JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904-05)). By 1924, a reviewer of Wigmore's second edition wrote that since its first publication, the treatise had become more than a statement of the law: "During the intervening years, it has become something greater. It has created law." Zechariah Chafee, Jr., Book Review, 37 HARV. L. REV. 513, 521 (1924) (reviewing JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2d ed. 1923)). A modern scholar has remarked that, "[O]ne of the difficulties of debating with Wigmore was that, so great was his influence, once he had perpetrated a doctrine on the basis of little or no authority, precedents would soon follow to fill the gap." WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 111 (1985); see also WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 77-81 (1977) (describing the rapid and widespread acceptance of Wigmore's treatise among scholars and practitioners); David W. Louisek, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 TUL. L. REV. 101, 111 (1956) (noting Wigmore's "monumental contribution to the law of privileges").

Wigmore's influence has been particularly pervasive on the attorney-client privilege. He has been called "the great champion and architect of the privilege." 1 MCCORMICK, supra note 118, § 87, at 315. By 1913, the U.S. Supreme Court was citing Wigmore as the only necessary authority on the scope of the privilege. Grant & Burlingame v. United States, 227 U.S. 74, 79 (1913); see also Note, Privilege, supra note 119, at 466 ("The entrenchment of this utilitarian formulation of the [attorney-client] privilege may be traced, in large measure, to its remarkable codification by Professor Wigmore in his treatise on evidence."). Note, Developments in the Law — Privileged Communications: III. Attorney-Client Privilege, 98 HARV. L. REV. 1450, 1503 (1983) [hereinafter Note, Developments] (same).

121. Wigmore said of the privilege that "[i]ts benefits are all indirect and speculative; its obstruction is plain and concrete." 8 WIGMORE, supra note 113, § 2291, at 554.
the often-quoted limitation that the privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." Wigmore understood the "principle" of the privilege to be that clients would not communicate information about their legal difficulties honestly and completely to their lawyers unless "the apprehension of compelled disclosure" by the lawyers were removed. His understanding of this principle led to his classic formulation:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser (8) except the protection be waived.

While this formula has been rephrased and clarified from time to time, it remains in its essentials the defining statement of the privilege even today. The privilege as conceived by the old English judges, refined by Wigmore and embodied in modern federal evidence law is expressly utilitarian. It exists because lawyers cannot perform their useful social function without candid disclosure from clients; its limits are just so wide as to induce client candor, but no wider. Hence the requirement that protected communications be made in confidence. Consistent with the policy of narrow confinement of the privilege, courts have identified numerous types of information that an attorney may possess or collect about his client, or his representation of the client, that are not


123. 8 WIGMORE, supra note 113, § 2291, at 545.

124. Id. § 2292, at 554.


126. 1 MCCORMICK, supra note 118, § 87, at 314; Note, Developments, supra note 120, at 1503 ("Wigmore crystalized this utilitarian justification and separated it from prior rights-based theories.").

127. 8 WIGMORE, supra note 113, § 2285 at 527. As Professor Rice has pointed out, some early cases suggest that the privilege should extend to all communications made within the sphere of the attorney-client relationship, irrespective of whether the communications were confidential in the sense of being made privately out of the hearing of third parties. RICE, supra note 85, § 6:3 at 386. Wigmore came down firmly on the side of courts that extended protection only to confidential communications. 8 WIGMORE, supra note 113, § 2285, at 527. He reasoned that "unless confidentiality is essential to the relationship being fostered by the privilege, the suppression of relevant evidence is unjustified." See RICE, supra note 85, § 6:1, at 384. His influence insured that the requirement of confidentiality became, as it is today, a core element of the privilege. Id. § 6:3 at 397-401.
protected by the privilege. Examples of unprivileged information or material include:

(a) The name of the client and the existence of an attorney-client relationship; 128
(b) The amount and source of the fee received by an attorney from his client; 129

128. 8 Wigmore, supra note 113, § 2313, at 609-10. Although the name of the client is usually not considered privileged, all circuits recognize exceptions to this rule. The prevailing view has become that the exception exists in instances when disclosure of client identity would result in disclosure of other "confidential communications." See, e.g., Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963) (holding that client identity or fact that individual has become client are matters that attorney must disclose even though these facts may be used as evidence against the client); In re Grand Jury Matter, 926 F.2d 348 (4th Cir. 1991) (holding that, absent evidence that fee arrangements were themselves confidential information, the attorney-client privilege did not preclude attorneys from producing documents pertaining to such arrangements); In re Grand Jury Subpoena, 926 F.2d 1423 (5th Cir. 1991) (stating that if the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, the court will protect the confidential communication and the client's identity as privileged); In re Grand Jury Proceeding (Cherney), 898 F.2d 565, 568 (7th Cir. 1990) (holding that client's identity is privileged because revealing it would disclose the reason the client sought legal advice, which is a confidential communication); Rails v. United States, 52 F.3d 223 (9th Cir. 1995) (explaining that the privilege is invoked when disclosure of the client or fee-payer identity would infringe upon privileged communication); In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485 (10th Cir. 1990) (stating that information relating to representation of a client is not confidential); In re Grand Jury Proceedings (Newton), 899 F.2d 1039 (11th Cir. 1990) (stating attorney-client privilege did not exist to protect a client's name because the client did not hire the attorney with reasonable anticipation that such information would not be disclosed). The limits of the confidential communications exception were initially somewhat muddled, in part because several circuits interpreted the Ninth Circuit's decision in Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), as establishing a "legal advice" exception, protecting the client's identity when a strong probability existed that disclosure would implicating the client in the very matter for which he sought legal advice. See, e.g., United States v. Strahl, 590 F.2d 10, 11-12 (1st Cir. 1978) (distinguishing from Baird for lack of furthering the policies behind attorney-client relationship), cert. denied, 440 U.S. 918 (1979); In re Grand Jury Investigation, 631 F.2d 17, 19 (3d Cir. 1980) (suggesting that disclosure of third party paying legal fees would not violate attorney-client relationship), cert. denied, 449 U.S. 1083 (1981); In re Grand Jury Proceedings in Matter of Fine, 641 F.2d 199, 204 (5th Cir. 1981) (holding that disclosure of a client's name would violate privilege only if it would implicate the client in criminal activity for which legal counsel was sought); In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 452 (6th Cir. 1983) (adopting the "legal advice" exception from Baird), cert. denied, 467 U.S. 1246 (1984); United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977) (stating an exception from Baird where a client's identity and nature of client's fee arrangement may be privileged where person invoking the privilege can show that strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought). However, most of these courts later questioned or narrowed these holdings in favor of a confidential communications exception. See In re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983) (suggesting that a client's name may be considered confidential communication where incriminating substance has previously been revealed).

Another exception to the general rule that identity of the client is not privileged, the "last link" doctrine, which purported to protect client identity where discovery would constitute the "last link" in a chain of proof of the client's wrong-doing, has generally been abandoned in favor of a confidential communications analysis. See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Queena, 913 F.2d 1118, 1124-25 (5th Cir. 1990) (rejecting last link in favor of confidential communications exception), cert. denied sub nom. DeGuerin v. United States, 499 U.S. 959 (1991); In re Grand Jury Matter No. 91-01386, 969 F.2d 995, 998 (11th Cir. 1992) (accepting the last link doctrine, but concluding it only applies to confidential communications); In re Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447, 453-54 (6th Cir. 1983) (noting the fairness of last link doctrine, but rejecting it), cert. denied, 467 U.S. 1246 (1984).

129. United States v. Sims, 845 F.2d 1564, 1568 (11th Cir.) ("This circuit has consistently held that matters involving the receipt of fees from a client are not generally privileged."). cert. denied, 488 U.S. 957 (1988); see
(c) The general subject of the consultation or nature of the work performed by the attorney.\textsuperscript{130}

(d) Pre-existing documents given to the attorney by the client;\textsuperscript{131}

(e) Physical evidence;\textsuperscript{132}

(f) An attorney’s notification to his client concerning the date by which the client’s appearance in court is required;\textsuperscript{133}

(g) Information obtained from third parties;\textsuperscript{134}

(h) The independent personal observations of the attorney, including observations of the client's physical condition or appearance;\textsuperscript{135}

(i) Statements of the client made in the presence of third parties;\textsuperscript{136}

\textit{also In re Grand Jury Proceedings, Thurs. Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 354 (4th Cir. 1994)} (stating that the attorney-client privilege normally does not extend to the payment of attorneys’ fees and expenses); \textit{In re Grand Jury Proceedings (Goodman), 33 F.3d 1060, 1063 (9th Cir.)} (noting that information regarding the attorney-client fee arrangement is normally not privileged communication), \textit{cert. denied}, 115 S. Ct. 187 (1994); \textit{In re Grand Jury Subpoena for Attorney Representing Criminal Defendant, Reyes-Requena, 913 F.2d 1118, 1123 (5th Cir. 1990), cert. denied, 499 U.S. 959 (1991)} (“We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not generally privileged.”). The general rule that fee information is not privileged remains true even if disclosure of the information would tend to incriminate the client. United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 505 (2d Cir. 1991); \textit{In re Witnesses Before the Special March 1980 Grand Jury, 729 F.2d 489, 495 (7th Cir. 1984)}.

130. \textit{See, e.g., Behrens v. Hironimus, 170 F.2d 627, 628 (4th Cir. 1948)} (“[t]he client or the attorney may be permitted or compelled to testify as to the fact of his employment as attorney, or as to the fact of his having advised his client to a certain matter, or performed certain services for the client”); \textit{see generally RICE, supra note 85, § 6:21, at 464-66} (maintaining that the factual context of each consultation and communication may give rise to an attorney-client privilege).


132. “The privilege is not generally viewed as affording the attorney license to withhold evidence from the judicial system.” 1 MCCORMICK, supra note 118, § 89, at 328 n.12; \textit{see also, e.g., In re January 1976 Grand Jury, 534 F.2d 719, 722 (7th Cir. 1976)} (holding that the privilege was inapplicable to money turned over to an attorney by clients suspected of bank robbery).

133. United States v. Innella, 821 F.2d 1566, 1567 (11th Cir. 1987); United States v. Clemons, 676 F.2d 124, 125 (5th Cir. Unit B 1982); Walsh v. United States, 623 F.2d 489, 495 (7th Cir.), \textit{cert. denied}, 449 U.S. 994 (1980); United States v. Freeman, 519 F.2d 67, 68 (9th Cir. 1975).

134. 8 WIGMORE, supra note 113, § 2317, at 619; \textit{see also United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.), cert. denied, 377 U.S. 976 (1964)}.

135. \textit{See, e.g., 8 WIGMORE, supra note 113, § 2306, at 590} (explaining that information coming to an attorney’s attention by mere observation without any action on the client’s part is not “communications” of the client, and thus not privileged); MUELLER & KIRKPATRICK, supra note 116, § 5.12, at 375 (stating that the “privilege cannot be claimed to prevent the attorney from testifying to observations about the client’s appearance, dress, physical condition, demeanor, or conduct, at least where such matters are generally observable by others”): United States v. Pipkins, 528 F.2d 559, 563 (5th Cir.) (holding that physical characteristics observable by anyone are not privileged), \textit{cert. denied}, 426 U.S. 952 (1976); Darrow v. Gunn, 594 F.2d 767, 774 (9th Cir.) (same), \textit{cert. denied}, 444 U.S. 849 (1979); United States v. Kendrick, 331 F.2d 110, 114 (4th Cir. 1964) (same).

136. 8 WIGMORE, supra note 113, § 2311, at 599-603; \textit{see also United States v. Lopez, 777 F.2d 543, 553 (10th Cir. 1985)} (stating that a communication between defendant’s companion and his attorney in defendant’s presence was not confidential); United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981) (stating that disclosures made in multidefendant cases between defendants and their counsel must be made in circumstances that indicate they were made in confidence); United States v. Landof, 591 F.2d 36, 39 (9th Cir. 1978) (finding that an attorney who was present at a meeting between defendant and his counsel was not acting as an attorney or agent at that meeting, and therefore the communication did not come within the attorney-client privilege).
(j) Communications originally privileged as to which the privilege has been waived due to subsequent disclosure by either attorney or client to a third party;

(k) The "crime-fraud" exception, that is, communications that would otherwise be protected by the attorney-client privilege, but which lose their privileged status because they are made in furtherance of an ongoing or contemplated crime or fraud.

Modern American courts have measured claims for inclusion within the attorney-client privilege against its utilitarian justification. There is universal agreement that the policy underlying the privilege is one of promoting candid attorney-client communications so the attorney-client relationship can function in a socially beneficial way.

137. 1 MCCORMICK, supra note 118, § 93, at 347-48; see also Sheet Metal Workers Int’l Ass’n v. Sweeney, 29 F.3d 120, 125 (4th Cir. 1994) (finding that the attorney-client privilege was waived when the client transmitted allegedly privileged documents to parties outside of that relationship); Ward v. Succession of Freemen, 854 F.2d 780 (5th Cir. 1988) (stating that defendants did not automatically waive the attorney-client privilege by attempting to use privileged communications to demonstrate good-faith reliance on counsel’s advice concerning tender offer, where district court had compelled disclosure of privileged communications), cert. denied, 490 U.S. 1065 (1989); In re Von Bulow, 828 F.2d 94, 100-07 (2d Cir. 1987) (finding that publication of book by attorney waived privilege as to communications revealed).

138. 1 McCormick, supra note 118, § 95, at 351 n.3 (“The privileged communications may be a shield of defense as to crimes already committed, but it cannot be used as a guard or weapon of offense to enable persons to carry out contemplated crimes against society.”) (quoting Gebhardt v. United Ry. Co., 220 S.W. 677, 699 (Mo. 1920)); see also United States v. Davis, 1 F.3d 608, 610 (7th Cir. 1993) (stating that the attorney-client privilege is waived when the client uses the attorney-client relationship to engage in fraudulent or criminal activity rather than merely to defend against charges), cert. denied, 114 S. Ct. 1216 (1994); In re Federal Grand Jury Proceedings 89-10 (MIA.), 938 F.2d 1578, 1581 (11th Cir. 1991) (stating that post-crime repetition or discussion of such earlier communications, made in confidence to an attorney, may still be privileged even though those earlier communications were not privileged because of crime-fraud exception).

139. See, e.g., Fisher v. United States, 425 U.S. 391, 403 (1976) (“Since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures — necessary to obtain informed legal advice — which might not have been made absent the privilege.”); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (“privacy is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”) (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888)); Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348 (1985) (noting that since the attorney-client privilege promotes full and frank communications between attorneys and their clients, it encourages observance of the law and aids in the administration of justice).

Various commentators have suggested that the attorney-client privilege ought to be justified and applied (usually, in the view of such authors, more expansively) on other, non-utilitarian, grounds. The most common alternative justification is a privacy theory. See, Note, Developments, supra note 120, at 1503-04, summarizing the leading alternative theories. Such efforts have “achieved only very little recognition in the courts.” 1 MCCORMICK, supra note 118, § 87, at 315-16. One observer recently proclaimed the “death of the rights-based arguments for the attorney-client privilege,” saying, “[T]he former solicitude for personal rights no longer animates discussions of the attorney-client privilege. Instead, commentators now debate the merits of the utilitarian rationale.” Note, Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison, 108 HARV. L. REV. 1697, 1704-05 (1995) [hereinafter Note, Utilitarian].

140. See Note, The Attorney-Client Privilege in Class Actions: Fashioning An Exception to Promote
ii. The Work Product Privilege

The other legal doctrine that protects from disclosure information an attorney may have concerning a client is the work product privilege. This privilege is of recent origin. It springs from the Supreme Court's 1947 decision in *Hickman v. Taylor*.

Hickman established three basic propositions: (1) Material collected by counsel in the course of preparation for possible litigation is protected from disclosure in discovery. (2) That protection is qualified, in that the adversary may obtain discovery on showing sufficient need for the material. (3) The attorney's thinking — theories, analysis, mental impressions, beliefs, etc. — is at the heart of the adversary system, and privacy is essential for the attorney's thinking; thus, the protection is greatest, if not absolute, for materials that would reveal that part of the work product.

While the work product privilege is applied primarily in civil cases, its protection is available in criminal cases, at both the grand jury and trial stages. In both civil and criminal cases, the normal principle applicable to all assertions of privilege applies to the work product area. That is, one who claims the benefit of a privilege bears the burden of proving that the privilege applies.

Work product protection is in some respects broader, and in other respects...
narrower, than that afforded by the attorney-client privilege. It bears emphasis that there is a wide spectrum of material and information that an attorney may have concerning a client that is protected by neither the attorney-client nor the work product privilege.

Finally, the justification for work product protection, like that for the attorney-client privilege, is expressly utilitarian. Indeed, the Supreme Court appears to view the justifications for the two doctrines as nearly identical. In Upjohn Co. v. United States, the Court relied upon work product precedents, particularly Hickman v. Taylor, to justify its delineation of the proper scope of the attorney-client privilege. It is fair to say that the Supreme Court sees the two privileges as two tools employed in a common project of fashioning a zone of privacy within which the attorney-client relationship can flourish without simultaneously choking competing systemic imperatives such as the tribunal’s right to every man’s evidence and the increasing modern preference for open discovery in both civil and criminal cases.

iii. The Power to Create and Define Evidentiary Privileges in Federal Criminal Cases is Reserved to Congress and the Federal Courts

When performing the utilitarian calculus used to define the scope of evidentiary privileges in federal criminal cases, the Supreme Court is exercising a power expressly reserved by Congress to itself and to the federal courts acting as

would only be discoverable in rare cases); In re Sealed Case, 676 F.2d 793, 809-10 (D.C. Cir. 1982) (noting that “extraordinary justification” is required for production of attorney work product).

147. For example, the work product privilege is limited to materials created in anticipation of litigation, where the attorney-client privilege extends to confidential communications made during any of the various types and stages of attorney-client interaction: counselling, legal advice, etc. Conversely, within the litigation context, the term work product may encompass a number of things (memoranda, briefs, etc.) that neither are nor contain confidential attorney-client communications.

148. The work product doctrine “is an intensely practical one, grounded in the realities of litigation in our adversary system.” Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351, 358 (1989); see also Note, Utilitarian, supra note 139, at 1704 (arguing for a re-evaluation of the differences in scope between the attorney-client privilege and the work product immunity doctrine in light of the modern shift toward wholly utilitarian justifications for each protection); Anderson et al., supra note 143, at 785 (pointing out that the work-product doctrine is designed to preserve the benefits of the adversarial system without frustrating the goals of open discovery).

149. See Richard L. Marcus, The Perils of Privilege: Waiver and the Litigator, 84 MICH. L. REV. 1605, 1623-24 (1986) (indicating that the court in Upjohn blends attorney-client and work product ideas); Note, Utilitarian, supra note 139, at 1700 (noting that courts have grounded attorney-client and work product protections in the same rationale).


151. Id. at 391-97.

152. “[I]t is essential that a lawyer work with a certain degree of privacy….” Id. at 397-98 (quoting Hickman v. Taylor, 329 U.S. 495, 511 (1947)).

153. “Commentators and courts agree that the function of work product immunity is to preserve the benefits of adverse representation without frustrating the goals of open discovery.” Anderson et al., supra note 143, at 785.
common law judges. In 1972, the Supreme Court promulgated a proposed set of uniform *Federal Rules of Evidence*\(^\text{154}\) that contained provisions listing nine separate testimonial privileges,\(^\text{155}\) including the attorney-client privilege.\(^\text{156}\) The new rules of evidence were supposed to take effect in July 1973,\(^\text{157}\) but Congress, in large measure because of concerns about the sections on privileges, stepped in and prohibited the rules' adoption without congressional approval.\(^\text{158}\) After extensive debate and revision, Congress finally approved the *Federal Rules of Evidence* in January 1975.\(^\text{159}\)

The key aspect of the congressionally revised rules is that Congress deleted every one of the specific privilege rules that had been initially promulgated by the Supreme Court, leaving in their place a single rule, Rule 501.\(^\text{160}\) Rule 501 merely states, in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.\(^\text{161}\)

The legislative history of Rule 501 is crystal clear that the law governing the availability of testimonial privileges in *federal criminal cases* is to be federal common law — rules developed by federal courts in the adjudication of actual cases or controversies.\(^\text{162}\) Following the adoption by Congress of the revised

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155. PROPOSED FEDERAL RULES OF EVIDENCE at 234-55.

156. Id. at 235-37 (proposed rule 503).

157. Id. at 184.


160. Id.

161. FED. R. EVID. 501 (emphasis added).

162. The House Judiciary Committee wrote, "The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases." H.R. REP. No. 650, 93d Cong., 1st Sess. 8 (1973) (emphasis added).

The Senate Judiciary Committee wrote, "The committee agrees with the main thrust of the House amendment: that a *federally developed common law based on modern reason and experience shall apply except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case." S. REP. No. 1277, 93d Cong., 2d Sess. 11 (1974) (emphasis added).
Federal Rules of Evidence, the Supreme Court confirmed this understanding of congressional intent. In *Upjohn*, the Court rejected the idea that it should "undertake to draft a set of rules which should govern challenges to investigatory subpoenas," saying that "[a]ny such approach would violate the spirit of [F.R.E.] 501." In 1988, Congress made its intentions regarding the development of federal privilege law even more explicit. It enacted Title Twenty-eight, United States Code, Section 2074, concerning the procedure to be followed by the Supreme Court in enacting rules of procedure and evidence. Section 2074(b) reads as follows: "Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress." In sum, changes in the law of evidentiary privilege in federal criminal cases can occur in only three ways: (1) federal courts can make changes through evolution of federal common law; (2) Congress can make changes by statute; and (3) the Supreme Court, but not lower federal courts, can make changes by rule with the express permission of Congress.

iv. Summary: Model Rule 3.8(f) and Federal Privilege Law

Model Rule 3.8(f), as adopted in 1990, would radically alter the common law of evidentiary privilege developed over the past four centuries. Moreover, it is an attempt to substitute the judgment of state bar regulators for that of Congress and the federal courts in making privilege law in federal cases, a result Congress has expressly forbidden.

Consider the particulars of the rule. The most immediately striking feature of the rule is subsection 3.8(f)(1)(i), which provides that a prosecutor may not even issue a subpoena unless "the prosecutor reasonably believes ... the information sought is not protected from disclosure by any applicable privilege." When read in conjunction with the subsection 3.8(f)(2) requirement of "prior judicial approval" of the subpoena, this passage plainly means that the prosecutor must satisfy a judge of the non-existence of any privilege before the subpoena can issue. This provision alone turns 400 years of Anglo-American law on its head.

The conference committee was still more explicit: "Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases." H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 7 (1974) (emphasis added).

164. id.
166. See supra note 69 (citing the full text of Model Rule 3.8(f)).
167. MODEL RULES Rule 3.8(f) (emphasis added).
168. See id. The rule does not say this in plain terms, but the interpretation is inescapable. Subsection (f)(1) sets out three categories of reasonable belief that a prosecutor must have before issuing the subpoena. Subsection (f)(2) requires judicial approval of the subpoena after an adversary hearing. The rule clearly intends that the subject matter of the hearing, the issue on which the judge must pass before approving the subpoena,
privilege law on its head. As discussed above, the ancient and universal rule governing both the attorney-client and work product privileges is that the party seeking the protection of a privilege must bear the burden of establishing its applicability.¹⁶⁹

Moreover, Model Rule 3.8(f) does not limit its coverage to privileges designed to protect the attorney-client relationship. The prosecutor must disprove the existence of "any applicable privilege" so long as the witness is an attorney and the information sought is "about a past or present client."¹⁷⁰ Accordingly, this rule would reverse the burden of proof even if the subject of the subpoena was, for example, crimes committed by an attorney against his client and the privilege potentially at issue was the attorney's own Fifth Amendment privilege against self-incrimination.

In addition, Rule 3.8(f) protects material far beyond the limits of the attorney-client privilege in any of its forms. The rule covers, without limitation, all "evidence about a past or present client."¹⁷¹ There is no requirement that protected information have been imparted by the client "in confidence," or even that the information have any connection with a communication either from or to a client. Thus, to embrace Rule 3.8(f) is to abandon the utilitarian calculus that was at the core of Wigmore's thought, which the U.S. Supreme Court embraced in Upjohn, and which numberless lesser American courts have employed for nearly a century to determine the scope of the attorney-client privilege.

As for the work product privilege, Rule 3.8(f) contains no limitation either to material created in anticipation of litigation, or to material revealing lawyers' mental processes. Indeed, the rule is not limited to information acquired during, or even as a result of the existence of, an attorney-client relationship. The rule simply creates a blanket, albeit conditional, presumption against any lawyer giving any evidence against any client.¹⁷²

will be the reasonableness of the prosecutor's beliefs as to the existence of the factors enumerated in subsection (f)(1). Consequently, the prosecutor has no option but to prove to the judge, among other things, why no privilege applies.

¹⁶⁹ See supra note 116 and accompanying text (stating this rule and citing supporting authority); see also In re Certain Complaints Under Investigation, 783 F.2d 1488, 1518 (11th Cir.) (listing cases stating the principle that proponent of attorney-client privilege bears burden of establishing its applicability), cert. denied, 477 U.S. 904 (1986).

¹⁷⁰ Model Rules Rule 3.8(f) (emphasis added).

¹⁷¹ Model Rules Rule 3.8(f) (emphasis added).

¹⁷² It might be argued that Rule 3.8(f) does not really expand the attorney-client or work product privileges because it does not categorically prohibit a prosecutor from seeking or obtaining information outside the scope of those privileges as currently construed. This is true, but sophistical. All privileges are conditional. They say, in essence, that certain kinds of information will be exempt from the usual insistence that courts are entitled to every person's evidence if specified conditions are met. Any definition of a privilege is, rightly considered, merely a list of the conditions. In the past, the list of conditions under which a prosecutor could not obtain information from an attorney about a client was the list in Wigmore's, supra note 124 and accompanying text, or Judge Wyzanski's, supra note 125, definition of the attorney-client privilege, or the description of the reach of the work product privilege in Hickman, supra note 141 and accompanying text.
The rule would accomplish all these changes through mechanisms that are in themselves unprecedented. First, the rule incorporates in an ethical standard a form of evidentiary privilege. Next, the rule seeks to give the ethical rule the force of law: (a) by, in effect, requiring judicial participation in contemporaneous determinations of whether the standards of the ethical rule have been violated, and (b) by imposing sanctions, not on the attorney holder of the client confidence, but on the government attorney seeking disclosure.

b. Model Rule 3.8(f) Is Inconsistent with Established Federal Grand Jury Practice and Procedure

Not only would Model Rule 3.8(f) alter federal privilege law, it violates two fundamental principles of federal grand jury practice — the independence of the grand jury and the secrecy of its proceedings — and is, at a minimum, inconsistent with the Federal Rules of Criminal Procedure.

i. Independence of the Grand Jury / Rule 17(c) of the Federal Rules of Criminal Procedure

The first principle of federal grand practice violated by Model Rule 3.8(f) is the “grand jury’s functional independence from the judicial branch,” which is manifested in its broad investigative powers. Defense counsel have argued that grand jury subpoenas to various classes of witnesses, not only attorneys, should be subject to pre-compliance judicial review of their relevance and reasonableness. In response, the Supreme Court has repeatedly held that, because of the independent character of the grand jury, witnesses have no right under the Fourth

Model Rule 3.8(f) alters the list of pre-conditions for obtaining client information in two ways: First, as noted above, it reverses the normal presumption applicable to all claims of privilege by requiring that the prosecutor make a preliminary showing of the non-existence of each of the traditional conditions defining a testimonial privilege. See supra notes 166-69 (comparing the burdens in Rule 3.8(f) to traditional formulations of attorney-client and work product privileges’ burdens). Second, it adds to the accepted lists of conditions: prosecutorial showings of necessity (MODEL RULES Rule 3.8(f)(1)(ii)) and exhaustion of other sources of information (MODEL RULES Rule 3.8(f)(1)(iii)).

173. United States v. Williams, 504 U.S. 36, 48 (1992). A grand jury “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” United States v. Morton Salt, 338 U.S. 632, 642-43 (1950), quoted with approval in Williams, 504 U.S. at 48. It is not required to identify the person it suspects, or even “the precise nature of the offense” it is investigating. Blair v. United States, 250 U.S. 273, 282 (1919). Grand juries are empowered to receive and consider information from virtually any source and are not constrained by the rules of evidence. FED. R. EVID. 1101(d)(2) (exempting grand jury proceedings from rules of evidence other than those respecting privileges); United States v. Calandra, 414 U.S. 338, 343 (1974) (observing that grand juries are generally “unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials”); Costello v. United States, 350 U.S. 359, 363 (1956) (holding an indictment valid even if based purely on hearsay). Even though they may not compel evidence or testimony in violation of a recognized constitutional or common law privilege, Williams, 504 U.S. at 49, they may hear evidence previously obtained in violation of a target’s constitutional rights. Calandra, 414 U.S. at 349-52. Moreover, a witness will not be heard to complain that the evidence requested from him is merely cumulative. United States v. Dionisio, 410 U.S. 1, 13 (1973).
Amendment, to challenge the relevance or reasonableness of grand jury subpoenas.174 Witnesses do have the right under Federal Rule of Criminal Procedure 17(c), to move to quash or modify subpoenas duces tecum “if compliance would be unreasonable or oppressive.”175 However, the Court has recently construed even this rule-based avenue of attack very narrowly.

In United States v. R. Enterprises,176 the Supreme Court reviewed a decision by the Fourth Circuit concerning grand jury subpoenas to distributors of “adult entertainment.”177 The Court of Appeals imposed a requirement that the government make a preliminary showing that the targets of the subpoena were subject to prosecution in the district and that the materials sought would be relevant and admissible at trial against the subjects.178

The Supreme Court reversed.179 The Court disapproved of the Fourth Circuit’s reliance on United States v. Nixon,180 which held that when a trial subpoena duces tecum is challenged under Federal Rule of Criminal Procedure 17(c), the government is obliged to establish three things to avoid quashal: relevance, admissibility and specificity.181 The Court also specifically forbade the application of the Nixon test to grand jury subpoenas.182 The Court went on to say:

[A] grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance. Indeed, this result is indicated by the language of Rule 17(c), which permits a subpoena to be quashed only “on motion” and “if compliance would be unreasonable.” To the extent the Court of Appeals placed an initial burden on the Government, it committed error.183

175. FED. R. CRIM. P. 17(c). The apparent conflict between the Court’s Fourth Amendment cases and Rule 17(c) is resolved by recognition that the word “unreasonable” is being used in two different senses. In Dionisio and Mara, the Court holds that grand jury subpoenas are not searches or seizures covered by the Fourth Amendment, and are therefore not reviewable under Fourth Amendment “reasonableness” standards. Dionisio, 410 U.S. at 15; Mara, 410 U.S. at 22. Rule 17(c), by contrast, uses “unreasonable” in its ordinary sense of being burdensome, oppressive or intrusive. See United States v. R. Enterprises, Inc., 498 U.S. 292, 303 (1991) (Stevens, J., concurring).
178. 884 F.2d at 778-79. The decision was seemingly moved by the prospect that the subpoena might violate the distributor’s First Amendment rights. Id. at 777.
181. Id. at 699-700.
182. R. Enterprises, 498 U.S. at 300.
183. Id. at 301 (last emphasis added). The Court went on to consider the standard of proof that should be imposed on a witness once he has made a proper motion under Rule 17(c). It viewed a claim of lack of relevance as a type of Rule 17(c) unreasonableness argument, saying “where, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.” Id. The Court suggested, without expressly so holding, that “a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal
The Supreme Court's ruling in *R. Enterprises* was consistent with the virtually unanimous refusal of lower federal courts to require pre-compliance showings by the government of the relevance or reasonableness of grand jury subpoenas.\(^{184}\)

The principle of grand jury independence is also manifested in the deference given its determination of probable cause. A federal grand jury's determination that probable cause exists to believe that a person committed an offense is not reviewable, even after an indictment has been returned.\(^{185}\) Yet *Model Rule 3.8(f)(1)(ii)* purports to require a district court to review the progress of an ongoing investigation to determine not merely whether evidence is relevant to that investigation, but whether it is "essential" to an indictment the grand jury might decide to return in the future.\(^{186}\)

\(^{184}\) Before *R. Enterprises*, every circuit but the First and Third had rejected such requirements. See, e.g., *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 243-44, 246-47, (2d Cir.) (en banc), cert. denied, 475 U.S. 1108 (1986); *In re Grand Jury Matter*, 926 F.2d 348, 350 (4th Cir. 1991); *In re Grand Jury Subpoena for Attorney Representing Reyes-Requena*, 913 F.2d 1118, 1127, 1129 (5th Cir. 1990), cert. denied, 499 U.S. 959 (1991); *In re Grand Jury Proceedings*, Hellmann, 756 F.2d 428 (6th Cir. 1985); *In re Grand Jury Subpoena 84-1-24 No. 1*, Battle, 711 F.2d 327 (6th Cir. 1983); *In re Klein*, 776 F.2d 628, 634 (7th Cir. 1985); *In re Grand Jury Proceedings*, 791 F.2d 663 (8th Cir. 1986); *In re Osterhoudt*, 722 F.2d 591, 594 n.1 (9th Cir. 1983); *In re Grand Jury Proceeding*, Schofield, 721 F.2d 1221 (9th Cir. 1983); *In re Grand Jury Subpoenas* (Anderson), 906 F.2d 1485, 1495-96 (10th Cir. 1990); *In re Grand Jury Proceedings*, 88-89, 899 F.2d 1039 (11th Cir. 1990); United States v. Sims, 845 F.2d 1564, 1568-69 (11th Cir.), cert. denied, 488 U.S. 957 (1988); *In re Grand Jury Proceedings*, Bank of Nova Scotia, 740 F.2d 817, 825 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *In re Grand Jury Proceedings*, Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983); *In re Grand Jury Proceedings*, Bowe, 694 F.2d 1256, 1258 (11th Cir. 1982); *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982).

In *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 93 (3d Cir. 1973), the Third Circuit imposed a requirement that the government make a minimal showing of relevance after a witness had received a subpoena and made a motion to quash under *Federal Rule of Criminal Procedure 17(c)*, but it has since repeatedly rejected invitations to impose any requirement on government attorneys before the subpoena is issued and served. See United States v. Oliva, 611 F.2d 23, 25 (3d Cir. 1979) (finding that Schofield I did "not deal with procedural safeguards surrounding the issuance of grand jury subpoenas"); *In re Grand Jury Proceedings (McNab)*, 658 F.2d 211, 213 (3d Cir. 1981) (Schofield I did "not purport to encompass the appropriateness of an appearance before the grand jury.") (emphasis in original). In *Backiel*, the Third Circuit specifically refused to require the government to show that a subpoenaed attorney is the only practical source of the demanded information and that there is a heightened need for the evidence because such requirements "would obviously impair the efficiency of grand juries." *In re Grand Jury Matter* (Backiel), 906 F.2d 78, 88 (3rd Cir.), cert. denied, 498 U.S. 980 (1990). Finally, in the wake of *R. Enterprises*, the Third Circuit relied on the Supreme Court's holding in that case to rule that Pennsylvania could not apply a state ethics rule analogous to *Model Rule 3.8(f)* to federal prosecutors. *Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania*, 975 F.2d 102 (3d Cir. 1992), cert. denied, 113 S.Ct. 1578 (1993). For a discussion of *Baylson*, see infra notes 193-203 and accompanying text.

The work of the First Circuit, the only circuit court to approve of pre-issuance judicial review of grand jury subpoenas, is discussed infra notes 204-57 and accompanying text.


ii. Grand Jury Secrecy

*Model Rule* 3.8(f) would violate the traditional rule of grand jury secrecy.\(^{187}\) In order for there to be an “adversary proceeding” at which the recipient of the subpoena could litigate the questions of whether the requested evidence was “essential to the successful completion of [the] investigation”\(^{188}\) or whether there was any other “feasible alternative” to the subpoena,\(^{189}\) the prosecutor would be obliged to lay out his entire case in the hearing of an attorney who would often be counsel to one of the targets of the grand jury probe.\(^{190}\)


Because only nine states have adopted *Model Rule* 3.8(f) or some analogue,\(^{191}\) the occasions for federal court challenges to the rule have been few. The handful of cases that have considered the issue are worthy of some discussion.\(^{192}\)

i. The Third Circuit: *Baylson*

In *Baylson v. Disciplinary Board*,\(^{193}\) the United States Court of Appeals for the Third Circuit invalidated Rule 3.10 of the *Pennsylvania Rules of Professional Conduct*,\(^{194}\) a rule similar to *Model Rule* 3.8(f),\(^{195}\) as it applied to federal prosecutors.

187. *See supra* notes 15-18 and accompanying text (discussing the history of the rule of grand jury secrecy).
188. *MODEL RULES Rule 3.8(f)(1)(ii).*
189. *MODEL RULES Rule 3.8(f)(1)(iii).*
190. Proponents of the rule undoubtedly view this implicit requirement of disclosure as a good thing, either because it provides grand jury targets with a broad avenue for discovery or because the desire of prosecutors to avoid such discovery will deter the issuance of attorney subpoenas. But that, of course, misses the present point. Even if such unprecedented disclosure would be a good thing, it is still an unprecedented thing and contrary to existing federal law.
191. *See supra* note 70 for a list of states.
192. In addition to the cases discussed below, the Department of Justice sought declaratory judgment in Colorado federal district court that the *Colorado Rules of Professional Conduct* concerning attorney subpoenas (Rule 3.8(f)) and providing exculpatory evidence to the grand jury (Rule 3.3(d)) were unenforceable against federal prosecutors. The district judge declined to rule on the merits of the department’s application on the ground that it was not ripe because no actual state ethics complaint had been brought against a federal prosecutor under the rules at issue. United States v. Colorado Supreme Court, 871 F. Supp. 1328, 1329 (D. Colo. 1994).
195. Rule 3.10 is similar to *Model Rule* 3.8(f), but its operative language is broken into two parts — the text of the rule itself, which contains the simple injunction that a prosecutor shall not subpoena an attorney to provide evidence about a current or former client without "prior judicial approval," followed by a "Comment."

Id. The unique feature of Rule 3.10 appears in the comment, which begins as follows:

It is intended that the required "prior judicial approval" will normally be withheld unless . . . the court finds (1) the information sought is not protected from disclosure by Rule 1.6, the attorney-client privilege or the work product doctrine . . . . (Emphasis added.)

PENNSYLVANIA RULES Rule 3.10 cmt.

What makes this provision striking is the fact that Rule 1.6 defines an attorney’s ethical obligation of
Following the adoption of Rule 3.10 by the Pennsylvania Supreme Court, all three of the federal judicial districts in Pennsylvania revised their local rules to prevent its application in their courts. Federal prosecutors from all three Pennsylvania districts then joined in a single suit contending that they were exempt from the operation of the state rule. The U.S. District Court for the Eastern District of Pennsylvania agreed.

On appeal, the Third Circuit affirmed, finding that Rule 3.10 "falls outside the rule-making authority of the district courts, and its enforcement as state law violates the Supremacy Clause of the United States Constitution." It based its holding on two conclusions: First, Rule 3.10 "seeks to establish a broad mechanism for pre-service judicial review of attorney subpoenas, with attendant rules of procedure and rules of evidence," and it therefore exceeds the power of district courts under Federal Rule of Criminal Procedure 57 to make local rules concerning "matter[s] of detail." Second, Rule 3.10 is contrary to the principle derived from the Supreme Court's rulings, in R. Enterprises and Williams, that a "district court may not under the guise of its supervisory power or its local rule-making power, impose the sort of substantive restraint on the grand jury that is contemplated by Rule 3.10."

non-disclosure of client information. PENNSYLVANIA RULES Rule 1.6. In short, the Pennsylvania Supreme Court explicitly and unambiguously set out to convert an attorney's personal ethical obligation of non-disclosure into an evidentiary rule equal in stature to the attorney-client privilege and work product doctrine and enforceable against the government in the person of the prosecutor.


197. Id. at 332.

198. Id. The district court began its opinion by finding that the actions of the federal judges in expelling Rule 3.10 from their local rules had been ineffective because they had failed to give adequate public notice of the change under the provisions of 28 U.S.C. Section 2071(b). Id. at 333. Consequently, the court embarked on its analysis from the premise that Rule 3.10 remained a part of the local rules of all three federal districts. Id. at 336. The district court's general findings were that Rule 3.10 was "not compatible with the Federal Rules of Criminal Procedure or well-settled grand jury practice," id. at 336, that it was invalid as beyond the local rule-making powers of federal district courts, id. at 348, and that it constituted a violation of the Supremacy Clause as a state ethics rule applied to federal prosecutors, id. More particularly, the court ruled:

(1) That Rule 3.10 is a rule of criminal procedure in the guise of an ethical rule. Id. at 337;
(2) That "engrafting Rule 3.10 onto the ... local disciplinary rules would place them in conflict with Federal Rule of Criminal Procedure 6(e)" because the rule would violate principles of grand jury secrecy. Id. at 338;
(3) That "by interposing impermissible substantive restraints on the grand jury's ability to gather evidence, Rule 3.10 subverts the authority and autonomy of the grand jury system." Id. at 340;
(4) That Rule 3.10 impermissibly expands the scope of the attorney-client privilege. Id. at 344-45;

200. Id. at 108-09.
201. Id. at 110.
Beyond the result itself, the most notable aspect of Baylson is its recognition that the arguments of the proponents of Rule 3.10 are "argument[s] of public policy" whose merits must be addressed by Congress or the Supreme Court acting at the national level.

ii. The First Circuit Cases: Klubock and Whitehouse

The only U.S. Court of Appeals that has sustained an ethical rule requiring pre-issuance judicial screening of attorney subpoenas is the First Circuit. It has done so twice, first in United States v. Klubock, and again more recently in Whitehouse v. District Court. Because the work of the First Circuit in these cases has been, and will no doubt continue to be, relied upon heavily by proponents of attorney subpoena rules, a detailed exegesis is necessary.

(A) Klubock

In Klubock, the First Circuit addressed an ethical rule known as Prosecution Function 15 ("PF 15"), which had been adopted in 1986 by the Supreme Judicial Court of Massachusetts at the urging of the Massachusetts Bar Association. After the adoption of PF 15, the U.S. District Court for Massachusetts amended its local rules to include PF 15 as a rule of the district court. The Justice Department brought a declaratory judgment action to enjoin the enforcement of the rules against federal prosecutors, it was unsuccessful in the district court. The First Circuit panel that initially heard the case upheld the validity of

202. Id. at 106.
203. Id. at 110-11. The court also observed that, "[W]hatever balance which needs to be stricken [sic] between the grand jury and the attorney-client relationship, it cannot be achieved by means of the limited power of the federal district and circuit courts to prescribe local rules." Id. at 112.
204. 832 F.2d 649 (1st Cir. 1987) (amended panel), vacated and withdrawn on reh’g, 832 F.2d 664 (1st Cir. 1987) (en banc).
205. 53 F.3d 1349 (1st Cir. 1995).
206. See, e.g., MODEL RULES ANN. commentary at 409 (citing to only one federal case, Klubock, in the annotations to Model Rule 3.8(f)). See also 134 CONG. REC. 21,589-90 (1988) (comments of Sen. Simon on the occasion of introducing S. 2713, "a bill to provide procedural standards with respect to the issuance of lawyer-client subpoenas," and noting the decision of First Circuit in Klubock). For further discussion of Sen. Simon’s bill, see supra note 103.
207. Klubock, 832 F.2d at 650; MASS. SUP. JUDICIAL CT. R. 3:08. PF 15 is a lineal predecessor of ABA Model Rule 3.8(f). According to the annotated version of the Model Rules, published by the ABA itself, the first resolution concerning attorney subpoenas passed by the ABA House of Delegates was "patterned after Massachusetts Supreme Court Rule 3:08, Prosecution Function 15..." MODEL RULES ANN., supra note 69, at 409. Nonetheless, PF 15 is different from Rule 3.8(f) in material respects. It says, "It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness." Id. (quoting MASS. SUP. JUDICIAL CT. R. 3:08).
208. Klubock, 832 F.2d at 650.
209. Id.
210. Id. at 650-51.
the local rule. The matter was then reheard en banc. The en banc court split 3-3, with the result that the original district court opinion upholding PF 15’s validity was affirmed by an equally divided court.

(B) Klubock: The “Majority” Opinion

Because PF 15 had been adopted by the local federal district court and thus became a form of federal law, the First Circuit did not decide the question of whether application of state bar rules to a federal prosecutor would violate the Supremacy Clause. It focused instead on whether federal district courts had the power to adopt a rule of this character under its local rule-making authority.

As the Klubock majority itself noted, the power to make local rules is confined to “(1) procedural rather than substantive matters; (2) which are not inconsistent with the Federal Rules; or (3) with Federal statutes.” The decision to affirm the district court rested on two premises:

1. The first premise was that PF 15 does not conflict with federal law because it is not “inconsistent” with Federal Rule of Criminal Procedure 17. Judge Torruella (who wrote both the panel and prevailing en banc opinion) made two arguments in support of this premise:
   a. He claimed that PF 15 is not inconsistent with Rule 17 because Rule 17(a) grants authority to the district court clerk to “issue” grand jury subpoenas to prosecutors upon request, but does not address the right of a prosecutor to serve the subpoenas once issued. PF 15, said Judge Torruella, is acceptable because it imposes a requirement of judicial approval of service on attorneys of subpoenas already “issued” by the clerk. As Judge Campbell charitably remarks in his

211. Id. at 658.
212. Id. at 665. The opinion in Klubock is unusually confusing because an “Amended Panel Opinion” is published at 832 F.2d 649, just before the en banc decision at 832 F.2d 664. While the court says that the panel opinion has been vacated by the grant of rehearing en banc, id. at 665, both the author of the prevailing three-judge contingent of the en banc court and Judge Campbell in dissent incorporate their earlier remarks in the panel opinion by reference. Id. at 665, 668. Accordingly, this discussion will treat the amended panel opinion and dissent, and the en banc opinions and dissents, as it appears they were finally intended, as parts of an integrated whole.
214. 832 F.2d at 652 (citations omitted).
215. Id. at 655-56.
216. Id. at 655. Rule 17(a) states, in pertinent part:
   For attendance of witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. . . . The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served.
217. 832 F.2d at 655-56.
MISUSE OF "ETHICAL RULES"

panel dissent, "This is far too fine a distinction to provide a convincing rationale." 218

Indeed, the distinction will not survive even momentary scrutiny. Judge Torruella is saying Rule 17(a) means nothing more than that the clerk has the power to give a piece of paper to the prosecutor, but that judges retain virtually plenary authority over whether the prosecutor can convert the paper into a legally binding subpoena by serving it. This reading not only renders Rule 17(a) a nullity, but is in direct conflict with firmly entrenched federal case law. Every federal court to address the question, including the First Circuit, has concluded that Rule 17 means prosecutors have the power to "issue" grand jury subpoenas without the prior concurrence of the grand jury itself. 219 When these cases speak of the prosecutor's power to "issue" a subpoena under Rule 17, they refer to the power to identify the witnesses and evidence to be presented to the grand jury, and the necessary concomitant power to draft and serve subpoenas to compel the production of the evidence desired. 220

The Klubock court confuses matters further in a peculiar passage of the amended panel opinion:

PF 15 is not aimed at grand jury action. It deals solely with prosecutorial conduct in the prosecutor's capacity as a member of the bar. If, in fact, a grand jury acting independently of any prosecutorial influence issues a subpoena against an attorney/witness, the attorney/witness must honor it, or move to quash the subpoena in an appropriate manner. Such independent action by a grand jury has no relevance to PF 15 because none of the ethical concerns previously mentioned are implicated. 221

This distinction fails because it rests on the assertion that federal grand juries have some inherent authority through a mechanism other than that described in

218. Id. at 660 (Campbell, J., dissenting).
219. For examples of jurisdictions that permit issuance of grand jury subpoenas without prior authorization of the grand jury, see United States v. Anglian, 784 F.2d 765, 769 (6th Cir.), cert. denied, 479 U.S. 841 (1986); Doe v. DiGenova, 779 F.2d 74, 80 (D.C. Cir. 1985); United States v. Santucci, 674 F.2d 624, 627 (7th Cir. 1982), cert. denied, 459 U.S. 1109 (1983); United States v. Simmons, 591 F.2d 206, 210 (3d Cir. 1979); In re Melvin, 546 F.2d 1, 5 (1st Cir. 1976); In re Grand Jury Proceedings, 593 F. Supp. 92, 94-95 (S.D. Fla. 1984); United States v. Kleen Laundry & Cleaners, 381 F. Supp. 519, 522 (E.D.N.Y. 1974); United States v. Culver, 224 F. Supp. 419, 432 (D. Md. 1963); United States v. Morton Salt Co., 216 F. Supp. 250, 257 (D. Minn. 1962), aff'd d. 382 U.S. 44 (1965). For additional information, see generally First Nat'l Bank of Tulsa v. Department of Justice, 865 F.2d 217, 220 (10th Cir. 1989) (summarizing cases outlining the scope of federal prosecutors' subpoena powers); see also Beale and Bryson, supra note 7, § 6:10, at 60 ("[T]he federal courts have universally rejected the claim that the prosecutor must secure the prior authorization of the grand jury before he can issue the subpoena.")
220. Indeed, the First Circuit's reading of Rule 17(a) in Klubock is directly contrary to its own previous interpretation of the same rule in In re Melvin. There the court wrote, "The United States Attorney may obtain subpoenas issued in blank by the court, fill in the blanks, and have the witness served without consulting the grand jury." Melvin, 546 F.2d at 5 (citing FED. R. CRIM. P. Rule 17(a); 8 MOORE'S FEDERAL PRACTICE ¶ 17.06) (emphasis added).
221. 832 F.2d at 658 (second emphasis added).
Rule 17 to both "issue" and "serve" subpoenas without the cooperation or concurrence of either the U.S. Attorney or the clerk of the court. While there are commentators who suggest that such a power exists in theory, in fact such an event is unheard of, as the court was certainly aware.

The second pillar of the "majority" opinion in Klubock is its extended discussion of the rule-making powers of district courts and the policy reasons that are said to justify the exercise of the rule-making power to ameliorate the concerns aroused by attorney subpoenas. Here the majority becomes visibly schizophrenic. It cannot decide whether the source of the district court's power to adopt PF 15 is the "broad rule-making powers" district courts possess "by reason of the inherent nature of the judicial process, ex- statute," or the very specific and limited power granted by Federal Rule of Criminal Procedure 57 to

222. The traditional view of the grand jury is as a body with broad investigative powers to be exercised "independently of either the prosecuting attorney or judge." Strum v. United States, 361 U.S. 212, 218 (1960); Grand Jury Project, Inc. of the National Lawyers Guild, Representation of Witnesses Before Federal Grand Juries (3d ed. 1995) § 2.2(b), at 2-5; see also United States v. Calandra, 414 U.S. 338, 343 (1973) (discussing the wide latitude of grand jury investigations); Blair v. United States, 250 U.S. 273, 282 (1919) (same). It is generally recognized, however, that prosecutors direct most aspects of the grand jury process, including the issuance of grand jury subpoenas. See Andrew D. Leipold, Why Grand Juries Do Not (And Cannot) Protect the Accused, 80 CORNELL L. REV. 260, 315 (1995) (arguing that prosecutors direct grand jury investigations, including subpoena process); Grand Jury Project, supra, § 2.2(b), at 2-6 (stating that common practice permits U.S. Attorneys or investigators to control subpoena process); In re Melvin, 546 F.2d at 5 (stating that a U.S. Attorney's powers in connection with the grand jury include the power to select the witnesses to be subpoenaed). It has been suggested that the grand jury has some independent power to issue subpoenas without the concurrence of the prosecutor. See Yale Kamisar et al., Modern Criminal Procedure 702 (1986) (stating that even where a prosecutor has independent right to subpoena witnesses, the grand jury remains free to insist that additional witnesses be subpoenaed); Abraham S. Goldstein & Leonard Orland, Criminal Procedure 326 (1974) (stating that if a prosecutor should refuse to issue subpoenas, the grand jury can have the court order him to do so); Leipold, supra, at 305 (stating that although a prosecutor normally decides what evidence will be submitted to the grand jury, jurors have the authority to subpoena additional witnesses and documents); William J. Campbell, Eliminate the Grand Jury, 64 J. CRIM. L. & CRIMINOLOGY 174, 178 (1973) (contending that grand jurors possess independent power to subpoena witnesses, but this power is rarely, if ever, invoked). However, courts have acknowledged that this power is more theoretical than real, and that in practice it is prosecutors who control the issuance of subpoenas. See In re Grand Jury Proceedings (Schofield I), 486 F.2d 85, 90 (3d Cir. 1973) (stating that "although grand jury subpoenas are occasionally discussed as if they were the instrumentalties of the grand jury, they are in fact almost universally instrumentalties of [prosecutors]"); United States v. Martino, 825 F.2d 754, 761 (3d Cir. 1987) (same); Campbell, supra, at 177 (stating that in practice the prosecutor controls the grand jury, including deciding what witnesses the grand jury will subpoena); Grand Jury Project, supra, § 2.2(b), at 2-6 (stating that courts defer to realities of modern grand jury practice by finding no abuse of the subpoena power when the decision to issue subpoenas was neither made nor approved by the grand jury); Beale & Bryson, supra note 7, § 6:10, at 60 (contending that although in the federal system a prosecutor has no independent subpoena power, the prosecutor does control what evidence to subpoena, and need not secure the prior authorization of the grand jury before he can issue a subpoena); United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 522-23 (1974) (observing that "[t]hough the grand jury may request evidence, the function of issuing process to obtain it belongs to . . . the prosecutor," and that "Rule 17 of the Federal Rules of Criminal Procedure . . . lends statutory authority to the prosecutor's role."). Furthermore, federal case law provides no evidence of federal grand juries issuing subpoenas independently of the prosecutor.

223. 832 F.2d at 652-53.
224. Id. at 652-55, 667.
225. Id. at 652.
make local rules. The indecision is understandable because either choice is a poor one for the outcome the majority espouses.

On the one hand, the district court quite plainly incorporated PF 15 in its "Local Rules," and the source of the power to make such rules is Federal Rule of Criminal Procedure 57. On the other hand, if the problem the rule addresses is as complex and fundamental to the proper functioning of the adversary system as the court’s discussion of the justifications for the rule suggests, the rule can hardly be characterized as “procedural rather than substantive.” And as Judge Campbell notes in dissent, it plainly runs afoul of the injunction of the Advisory Committee on the Federal Rules of Criminal Procedure that Rule 57 is meant merely to leave leeway for local practices as to “matters of detail.”

At the end of the day, a careful reading of the Klubock opinions provides little solace for proponents of Model Rule 3.8(f). The majority opinion is markedly deficient, both in its attempt to explain away obvious conflicts between the concept of pre-issuance judicial screening of subpoenas and current federal law, and in its effort to shoehorn a sea-change in privilege law and grand jury practice into the cubby-hole of a local rule.

(C) Whitehouse v. District Court: Klubock Redux

Nonetheless, it is clear that the First Circuit has never entertained this disparaging view of its earlier work. In April 1995, a panel of the First Circuit decided Whitehouse v. District Court, holding that the District Court of Rhode

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226. In the panel opinion, the majority declines to specify whether the source of the district court’s authority “derives as a result of statutory delegation or inherent judicial authority.” Id. at 652-53. The en banc majority opinion decided that the district court’s action was an “exercise of both the inherent and statutory authority of the courts to control ethical and procedural matters in their forum.” Id. at 667 (emphasis added). In neither opinion did the prevailing judges specify which among several possible statutes they were actually relying on.

227. Id. at 658.

228. Id. at 652.

229. Id. at 659-60 (quoting Fed. R. Crim. P. 57, Notes of Advisory Committee on Rules (b)(2)). The dissents in Klubock repay attention. The dissent of then-Judge, now-Justice Breyer focuses on the question of whether PF 15 fell “outside the district court’s rulemaking power.” 832 F.2d at 671. It concludes that it did. 832 F.2d at 675.

Among other points, the dissent by Chief Judge Campbell decries one of the most striking features of PF 15, the fact that it requires a prosecutor to obtain judicial approval before subpoenaing a lawyer, but provides no suggestion of what standards the judge should apply in deciding whether approval should be granted. Id. at 668-69. Judge Campbell hints at one of the arguments made earlier in this paper — any rule that works a modification of federal privilege law is, as he says, “arguably beyond even the Supreme Court’s rule-making power.” Id. at 670 n.5; see also supra notes 154-65 and accompanying text (discussing Congress’ intervention in the Supreme Court’s formulation of the Federal Rules of Evidence). Finally, Judge Campbell observes that the majority’s reference (in its catalogue of possible sources of power for the adoption of PF 15) to the power of federal courts to regulate the behavior of attorneys appearing before them is no solution to the problem. Klubock, 832 F.2d at 669-70. Calling a rule an ethical rule does not make it so, says Judge Campbell, and he expresses his opinion that PF 15 “is not really about discipline,” but is instead about substantially modifying grand jury practice. Id.

230. 53 F.3d 1349 (1st Cir. 1995).
Island had the power to adopt a modified version of Model Rule 3.8(f) as a component of its local rules.\textsuperscript{231}

The Whitehouse opinion is a fascinating study. On first reading it appears to be a ringing affirmation of a federal district court’s power to regulate by ethical rules the conduct of prosecutors working with grand juries. On closer examination, the First Circuit has written a sheep in wolf’s clothing, and an unconvincing sheep at that. An understanding of Whitehouse begins with a careful examination of its procedural history.

The ethical rule at issue was first adopted in 1988 by the Rhode Island Supreme Court, and in 1989 by the U.S. District Court for Rhode Island.\textsuperscript{232} The text of the Rhode Island rule itself contains only the requirement that a prosecutor obtain “prior judicial approval” for a subpoena to a lawyer for evidence about a client.\textsuperscript{233} As with PF 15 in Massachusetts, there are no standards in the text of the rule by which the judge is to determine whether approval should be granted. Unlike PF 15, however, the Rhode Island version of Rule 3.8(f) (R.I. Rule 3.8(f)) was adopted with a comment. The comment says approval should be granted or denied “after an opportunity for an adversarial proceeding . . .”.\textsuperscript{234} The comment goes on to say that “prior judicial approval should be withheld” unless five conditions are met.\textsuperscript{235}

\begin{enumerate}
\item \textbf{Whitehouse: District Court Opinion}
\end{enumerate}

After unsuccessfully petitioning both the Rhode Island Supreme Court and the U.S. District Court for Rhode Island for an exemption from the rule, the Justice Department sought injunctive relief in federal court.\textsuperscript{236} The district court that heard the Justice Department’s challenge invalidated R.I. Rule 3.8(f) on the dual grounds that it exceeded a federal district court’s local rulemaking power if applied to grand jury subpoenas,\textsuperscript{237} and that enforcement of the state rule against federal prosecutors would violate the Supremacy Clause.\textsuperscript{238}

Supporters of the rule sought to rely on Klubock’s differentiation between rules aimed at grand jury action and those allegedly dealing “solely with prosecutorial

\begin{itemize}
\item \textsuperscript{231} \textit{Id.} at 1366.
\item \textsuperscript{232} Almond v. District Court, 852 F. Supp. 78, 81 (D.R.I. 1994), aff’d in part, rev’d in part, 53 F.3d 1349 (1st Cir. 1995). The Rhode Island rule is apparently based on recommendations from an ABA committee whose report ultimately led to the adoption by the ABA in 1990 of Model Rule 3.8(f). \textit{Id.} at 80.
\item \textsuperscript{233} R.I. SUP. CT. ART. V R. 3.8(f) (1994).
\item \textsuperscript{234} Almond, 852 F. Supp. at 81.
\item \textsuperscript{235} \textit{Id.} (emphasis added). The conditions are: (1) no privilege applies; (2) “the evidence sought is essential to successful completion of the investigation or prosecution”; (3) “the subpoena lists the information sought with particularity”; (4) the purpose of the subpoena is not to harass the attorney or the client; and (5) the prosecutor has exhausted other sources for the information. \textit{Id.}
\item \textsuperscript{236} \textit{Id.} at 81-82.
\item \textsuperscript{237} \textit{Id.} at 83. The Justice Department did not challenge the application of R.I. Rule 3.8(f) to trial subpoenas. \textit{Id.}
\item \textsuperscript{238} \textit{Id.} at 86.
\end{itemize}
conduct in the prosecutor’s capacity as a member of the bar.” 239 The district court’s response is worth quoting:

Two reasons compel me to reject this argument. First, while Rule 3.8(f) undoubtedly implicates “latent” ethical concerns, labelling it an ethical rule cannot obscure the fact it requires the creation of, and prosecutorial compliance with, a novel form of grand jury procedure. Second, and more importantly, Klubock’s rationale is no longer good law. Although it was a plausible interpretation of Supreme Court precedent at the time the case was decided, the Supreme Court has since conclusively rejected the notion that an otherwise impermissible rule of grand jury procedure becomes permissible if it is enforced against the prosecutor instead of the grand jury itself. 240

(2) Whitehouse: The First Circuit Opinion

The First Circuit’s rejoinder to the district court’s apparently irrefutable argument, and its effort to circumnavigate the seemingly insurmountable obstacle posed by the Williams decision, can only be termed unconvincing. The court revived, again without citation of authority, its assertion in Klubock that grand jurors have a power, “acting independently,” to subpoena witnesses to the grand jury through some unspecified procedure which involves neither Rule 17 nor the prosecutor. 241 Therefore, reasoned the court, since a grand jury could issue and serve a subpoena without action by the prosecutor, placing limitations on the prosecutor’s ability to issue subpoenas on behalf of the grand jury does not limit the grand jury. 242 While it might once have been possible to indulge the fiction that regulation of the prosecutor is not regulation of the grand jury for and with whom he acts, that option was foreclosed when the Supreme Court wrote in Williams: “We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor.” 243

The Whitehouse court next asserted that R.I. Rule 3.8(f) is not an alteration of grand jury procedure and does not affect the grand jury’s broad investigative powers because it “makes no change in substantive law.” 244 The court claimed that the rule “merely authorizes district courts to reject a prosecutor’s attorney-subpoena application for the traditional reasons justifying the quashing of a subpoena — that is, the subpoena request would be denied if the evidence sought is protected by a constitutional, common-law, or statutory privilege, or the court determines that compliance with the subpoena would be ‘unreasonable or

239. Id. at 87 (quoting United States v. Klubock, 832 F.2d 649, 658 (1st Cir. 1987)).

240. Id. at 87 (citing United States v. Williams, 504 U.S. 36, 52 (1992)).

241. Whitehouse v. District Court, 53 F.3d 1349, 1357 (1st Cir. 1995). The court quotes verbatim the passage from Klubock discussed supra at notes 298-303 and accompanying text. Id.

242. Id. at 1357-58.

243. Williams, 504 U.S. at 53.

244. Whitehouse, 53 F.3d at 1357.
oppressive.’”

It then reasoned that because the rule “does not keep any evidence from reaching the grand jury which would not potentially have been kept from it anyway,” the rule “merely changes the timing with respect to motions to quash. . . .”

This is the key passage in Whitehouse. The court’s claim that the rule does not expand the “traditional reasons” for quashing a subpoena can mean only one of two things: either the court believes that none of the conditions for approval listed in the comment to R.I. Rule 3.8(f) would constitute non-traditional reasons for denial, or the court is saying that the comment should be given no effect. Since each one of the five conditions in the comment would constitute a hitherto unrecognized restriction on grand jury subpoena power, the court can only be suggesting that the comment’s guidelines exceed the limits of federal law and are invalid and inoperative.

In fact, the court concedes, albeit obliquely, that this is indeed its view. In a footnote to its assertion that R.I. Rule 3.8(f) only authorizes traditional grounds for quashing a subpoena, the court writes:

To the extent that the Comment to Local Rule 3.8(f) . . . suggests a broader basis for rejecting a subpoena application, we point out that the Comment cannot substantively change the text of the Rule. . . . Moreover, federal district courts cannot effect substantive changes in the law through local rulemaking. We presume that district court judges will apply Local Rule 3.8(f) consistently with both its text and applicable law.

This concession has far-reaching implications. It means that Whitehouse is not authority for the proposition that the 1990 Model Rule 3.8(f) can co-exist with federal grand jury law. The heart of the 1990 ABA rule is its requirement that a judge make three of the findings required by the Rhode Island version of 3.8(f): absence of privilege, essentiality to the investigation and exhaustion of alternative sources for the information. All three are incontrovertibly new restrictions on grand jury power.

Footnote 12 alters understanding of the rest of the Whitehouse opinion. It means that the First Circuit is willing to defend a requirement of pre-issuance review of subpoenas on only two grounds: the existence of a privilege or determination that compliance with the subpoena would be “unreasonable or oppressive” under Rule 17. In sum, the court upheld the rule by eviscerating it. Moreover, the court’s effort to salvage even this much of R.I. Rule 3.8(f) was unavailing.

The court was also unable to provide a convincing rejoinder to the govern-

245. Id.
246. Id. at 1357-58.
247. Id. at 1358 n.12 (emphasis added).
248. Id. at 1357.
ment's argument that the adversarial hearing called for by the comment to R.I. Rule 3.8(f) has the potential to violate the traditional secrecy of grand jury investigations. In response, the court once again disavowed the comment and opined that "[n]othing in the text of the Rule prohibits the filing of attorney-subpoena applications to the court under seal or in camera. Nor does the Rule prohibit the court from holding an ex parte, in camera hearing."

R.I. Rule 3.8(f) may be read to permit ex parte applications by the prosecutor, thus avoiding a secrecy violation. However, if the issue under consideration at the ex parte hearing is the existence of a privilege, the prosecution as the only party present is inescapably, and as noted above, impermissibly, put in the position of proving the non-existence of a privilege. Moreover, while shifting the burden of proof of the existence of a privilege may well be within the power of federal courts acting in their capacity as common law judges, Congress and the Supreme Court have made it plain that federal privilege law is not within the rulemaking powers of federal courts.

The Whitehouse court is also unable to explain away R.I. Rule 3.8(f)'s conflict with Rule 17 of the Federal Rules of Criminal Procedure. The court reiterates the same arguments it made in Klubock without any reference to the Supreme Court's subsequent decision in United States v. R. Enterprises that Rule 17 review of a grand jury subpoena on grounds of oppression or burdensomeness can only occur "on motion" of the witness, which by definition can only occur after service of the subpoena. Moreover, the Court also held in R. Enterprises that at a hearing on the issue of oppression and burdensomeness, the court may not impose an initial burden on the government to prove the subpoena is not

249. Id. at 1358.
250. Id. at 1358 n.14.
251. Id. at 1358.
252. See supra note 116 and accompanying text (noting that the defendant bears the burden of proof and citing relevant authority).
253. See supra notes 159-65 and accompanying text (discussing Congress' exercise of its authority in this area).

Moreover, if a district court judge attempting to apply R.I. Rule 3.8(f) does hold an adversarial hearing, the supposed advantages flowing from pre-service review of attorney subpoenas evaporate. The Whitehouse court goes to great length to explain how mere service of the subpoena causes adverse consequences for the attorney-client relationship. Whitehouse, 53 F.3d at 1358. These include "driving a chilling wedge between the attorney/witness and his client" and opening "a second front" on which the defense attorney must expend time and resources. Id. But in order for the attorney/witness to know about the adversarial hearing, he would have to be "served" with something, call it a "Notice of Intention to Serve Subpoena," which, in order for the attorney to participate meaningfully in the hearing, would have to have as an attachment the subpoena itself. No principled distinction can be drawn between the consequences to the attorney-client relationship of an attorney's receipt of the notice of hearing and the subpoena itself.

254. Whitehouse, 53 F.3d at 1362-64.
255. 498 U.S. 292 (1991); see also discussion supra at notes 176-84 and accompanying text (discussing R. Enterprises).
256. 498 U.S. at 301.
Oppressive or burdensome; the burden rests on the witness to show that it is.\textsuperscript{257}

Pre-service judicial approval of subpoenas cannot be squared with this holding.

5. The Prospects for Model Rule 3.8(f) in the Federal Courts

The future of Model Rule 3.8(f) is murky. As the preceding discussion demonstrates, the rule in its 1990 form will not survive the scrutiny of federal courts. One suspects that a close reading of the Whitehouse case may have been a motivating factor in the August 9, 1995 vote by the ABA House of Delegates to delete the requirement of pre-issuance judicial review. If the nine states that currently have Model Rule 3.8(f) in their ethics codes, and the federal district courts in the First Circuit and elsewhere, follow suit, many of the most objectionable features of the rule should at the least be muted. Nonetheless, even in amended form, the rule harbors considerable potential for future conflict.

For example, elimination of pre-issuance judicial review would seem to eliminate the reversal of the burden of proof as to the existence of privileges inherent in the 1990 version of Model Rule 3.8(f). In fact, this result is not so clear. Under the 1990 version of the rule, a prosecutor was expressly obliged to go to the court pre-service and prove in an adversary hearing his reasonable belief in the absence of a privilege. Under the new rule, the very same issue may now be raised by creative defense counsel in the setting of a post-service, pre-compliance motion to quash. The argument will be that the subpoena should be quashed because the prosecutor will be alleged to have violated the ethical rule by issuing a subpoena without a reasonable belief regarding the absence of privilege. Because the rule speaks in terms of the prosecutor's subjective belief, the focus of the inquiry on the hearing on such a motion could become what the prosecutor had reason to believe, as opposed to what the attorney/witness could prove about his right to invoke a privilege.

Such a result would be most likely in federal district courts that have adopted as a local rule some form of Model Rule 3.8(f) along with the ethics rules of the state in which they sit. In such a district, the argument at the hearing on the motion to quash would be that the Assistant U.S. Attorney violated the court's own rule by unreasonably concluding that no privilege existed, that there was no alternative source for the information or that the evidence was essential to the case. Even if no federal court were disposed to make the new Model Rule 3.8(f) the basis for relief on a motion to quash, the "reasonableness" of the prosecutor's judgment on the existence of privilege, availability of alternate sources and necessity of the information would remain open to second-guessing by bar committees. Consequently, the bar is still claiming the right to discipline prosecutors for issuing subpoenas that are legal and appropriate under federal law.

\textsuperscript{257} Id.
Finally, the amended version of Model Rule 3.8(f) does not limit the scope of the information covered by the original rule. It still reaches any information "about a past or present client," regardless of source or subject matter or the existence of any privilege. By imposing requirements of "essentiality" and exhaustion of alternate sources on a prosecutor seeking information, the rule will forestall the issuance of some subpoenas and prevent disclosure of some information never previously protected. Accordingly, whether enforced by federal judges in pre-issuance hearings or by bar grievance committees and state supreme courts after service of the subpoena, the rule will remain an effort to expand the traditional sphere of protection afforded the attorney-client relationship and to limit the power of grand juries.

C. MODEL RULE 4.2: CONTACT WITH REPRESENTED PERSONS

The ethical rule at the center of the most heated current debate between the Justice Department and the organized bar concerns contacts with persons represented by counsel. Discussion of this rule has been reserved for last because the problems it raises are somewhat more subtle than those presented by the exculpatory evidence and attorney subpoena rules, and because many of the seeming conundrums and obscurities in the "no contact" rule debate are solved, or at least illuminated, by an understanding of the disputes over the other two rules.

1. History, Rationale and Scope of the “No Contact” Rule

The prohibition against communicating with represented parties without the consent of their counsel has roots in English common law. Although one court asserts it is a rule that has been followed "from time immemorial by the Anglo-American bar," the current no contact rule seems to have its origin in Hoffman's 1836 treatise, and there is considerable evidence that until this

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258. See Jerry E. Norton, Ethics and the Attorney General, 74 JUDICATURE 203, 207 (1991) ("Attorney General Thornburgh has quite deliberately drawn the battle line."); Nancy J. Moore, Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for An End to the Current Hostilities, 53 U. PITT. L. REV. 515, 515 (1992) (discussing "the ongoing 'war' between the U.S. Department of Justice and the ABA over the ethical conduct of prosecutors in their relationships with criminal defense attorneys").


260. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1846); see also Jamil, 546 F. Supp. at 651 (referring to Hoffman's Resolution XLIII); John Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests, 127 U. PA. L. REV. 683, 684 (1979) (indicating that no contact rule can be traced to Hoffman's treatise). Hoffman's Resolution XLIII provided that "I will never enter into any conversation with my opponent's client relative to his claim or defense except with the consent and in the presence of his counsel." HOFFMAN, supra, at 771.
century the "rule" was regarded more as a professional courtesy than a binding imperative.261

A critical and unique component of the modern no contact rule is that it reserves control over communications with a represented party to that party's lawyer, rather than the party himself. In the United States, the idea that an attorney has absolute control over communications with his client was not generally accepted until passage of the ABA's *Canons of Ethics* in 1908.262 The rule set forth in the 1908 *Canons* was continued without significant change or discussion in 1970, when the ABA adopted its *Model Code of Professional Responsibility.*263 Disciplinary Rule 7-104(A) contained the rule on contact with represented persons, and superseded the old Canon 9.264

*Model Rule 4.2*, adopted by the ABA in 1983, carried forward without substantial change the no contact rule embodied in DR 7-104(A).265 *Model Rule 4.2*, as adopted in 1983, stated:

In representing a client, a lawyer shall not communicate about the subject of the

261. One authority of the time wrote:

Let your love of harmony lead you to recommend your clients to make greater concessions, for the sake of tranquility, than rigid justice could require; and even dare to sacrifice punctilio to concord, when you believe an interview with the adverse party will be more conducive to the extinction of animosity, the settlement of a dispute, and the renewal of good-will, than any negotiation with his legal adviser.

Leubsdorf, *supra* note 260, at 684 (quoting A.C. & W.H. Buckland, *Letters to an Attorney's Clerk, Containing Directions for His Studies and General Conduct* 226 (1824)).

Many treatises after Hoffman's disregarded the "no contact" principle entirely. See Leubsdorf, *supra* note 260, at 685 (citing G. Sharswood, *An Essay on Professional Ethics* (2d ed. 1860); S. Warren, *The Moral, Social and Professional Duties of Attorneys and Solicitors* (1870)). State codes of ethics often limited the applicability of the rule to settlement negotiations. See *id.* at 685 (citing Committee on Code of Professional Ethics, *Report, 31 A.B.A. Rep. 676, 706 (1907)). Only one state code of ethics allowed the bypassed lawyer to veto the communication. *Id.* The remaining codes found it sufficient to require advance notice to the lawyer that opposing counsel proposed to communicate with his client. *Id.*

262. *Id.* Canon 9 provided: "A lawyer should not in any way communicate . . . 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) [hereinafter 1908 *Canons*].


264. *DR 7-104(A)* reads as follows:

*Communicating with One of Adverse Interest*

(A) During the course of his representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

*MODEL CODE DR 7-104(A)* (1970).

265. *Model Rules Ann.* commentary at 5, 423; *see also* Martin S. Murphy, *The "No-Contact" Rule and the Sixth Amendment: A Dilemma for the Ethical Prosecutor*, 38 BOSTON B. J. 8, 23 (1994) (discussing history of *Model Rule 4.2*). Some version of the no-contact rule is currently in effect in all fifty states. United States v. Lopez, 989 F.2d 1032, 1036 (9th Cir.), *opinion amended and superseded*, 4 F.3d 1435 (9th Cir. 1993).
representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.\footnote{266}

The ABA’s 1983 annotations to \textit{Model Rule} 4.2 explain that the rationale of the rule is to “prevent lawyers from taking advantage of un counselled lay persons and to preserve the integrity of the lawyer-client relationship,”\footnote{267} and to ensure that lay persons do not “make decisions of major legal importance without advice of counsel.”\footnote{268} Despite the relative antiquity of the no contact rule as a component of codes of legal ethics, prior to 1960 no court and only one unpublished ethics opinion had ever suggested that the rule governed prosecutors.\footnote{269} It was not until the 1960s that any court even raised the question of whether the anti-contact rule might apply in criminal cases.\footnote{270}

Nonetheless, and notwithstanding a spirited rearguard action by some legal scholars and courts who contend that the no contact rule was designed for civil litigation and was neither intended for, nor is it appropriate to, the investigatory activities of law enforcement officials,\footnote{271} the federal courts now routinely intone

\footnote{266. \textit{Model Rules} Rule 4.2 (1991).}
\footnote{267. \textit{Model Rules Ann.} commentary at 424.}
\footnote{268. \textit{Id.} For a list of other explanations for the rule, see Leubsdorf, \textit{supra} note 260, at 686-87.}
\footnote{269. In Jamil, Judge Weinstein says there were two ethics opinions before 1960 applying Canon 9 to prosecutors. \textit{United States v. Jamil}, 546 F. Supp. 646, 652 (E.D.N.Y. 1982), \textit{order rev’d}, 707 F.2d 638 (2d Cir. 1983) One of those he cites has nothing to do with Canon 9. 546 F. Supp. at 652; ABA Comm. on Professional Ethics and Grievances, Formal Op. 150 (1936). The other does. 546 F. Supp. at 652; ABA Comm. on Professional Ethics and Grievances, Decision 249, \textit{reported in} \textit{Henry S. Drinker, Legal Ethics} 296 app. A (1953) (“Where three persons are accused of related thefts, the prosecutor may not, in proceedings against one of them, interview another of them represented by counsel, except with the [consent of the] latter’s lawyer.”)

\textit{See generally} Moore, \textit{supra} note 258, at 520-21 (discussing dearth of authorities that suggest the “no contact” rule applies to prosecutors). \textit{See also} Grievance Comm. v. Simels, 48 F.3d 640, 647 (2d Cir. 1995) (reviewing the history of application of DR 7-104 to prosecutors).

270. Among the four cases from the 1960s of which I am aware that touch on the question, three allude to it only obliquely and reach no definitive conclusion. \textit{See Lee v. United States}, 322 F.2d 770, 777 (5th Cir. 1963) (presuming that legal ethics prohibit a government attorney’s attempt to communicate with a represented defendant without counsel’s consent); \textit{Ricks v. United States}, 334 F.2d 964 (D.C. Cir. 1964) (describing as “consistent with Canon 9” the government’s practice of not allowing any communication between police or prosecutors and a represented defendant except with counsel’s consent); \textit{Mathies v. United States}, 374 F.2d 312 (D.C. Cir. 1967) (noting that the U.S. Attorney has, in some cases, implemented a policy of notifying counsel for the criminal defendant of any interrogation sessions). In none of these three cases was the ethical rule either urged by the defendant or relied on by the court as a basis for decision. For discussion of the fourth case, \textit{United States v. Massiah}, 307 F.2d 62 (2d Cir. 1962), \textit{rev’d on other grounds}, 377 U.S. 201 (1964), see \textit{infra} notes 316-23 and accompanying text.

that the rule applies to prosecutors. 272

Given this apparent consensus, the no contact rule would seem a curious issue to provoke the current battle royal between federal prosecutors and the organized bar. To understand the level of hostility, one must begin by examining the substantial discontinuity between the no contact rule as it has been interpreted in civil settings and the array of investigative procedures that police and prosecutors have historically employed in criminal cases and which the courts have found legally appropriate.

2. The No Contact Rule and Criminal Investigation

   a. Government Contacts with Individual Suspects

The 1983 text of Model Rule 4.2 (and the text of DR 7-104(A)(1)), by referring to contact with a “party,” seemed to imply a litigation context and appeared to limit the rule’s application to situations arising after the initiation of formal adversary proceedings. The ABA and state ethics authorities have nonetheless interpreted the rule far more broadly. The 1983 comment to Model Rule 4.2 says that the “rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” 273 Professor Wolfram, in his ethics treatise observes, “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.” 274 On July 28, 1995, the American (asserting that DR 7-104(A)(1) on its face is aimed primarily at attorney conduct in the civil setting and should not apply to the criminal context).

272. See infra notes 324-69 and accompanying text (discussing the application of the no-contact rule in criminal cases).

273. MODEL RULES ANN. commentary at 423.

274. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.6.2, at 611 n.33 (1986). Examples of contacts the rule has been said to prohibit include:

(a) Contacts with parties whose interests are not apparently adverse to those of lawyer’s existing client. Id. § 11.6.2 at 611. See, e.g., Nebraska State Bar Ass’n v. Hollstein, 274 N.W.2d 508, 517 (Neb. 1979) (analyzing friendship and social contact); In re Sedor, 245 N.W.2d 895, 901 (Wisc. 1976) (concerning recent former client);

(b) An interview of a potential defendant by an attorney for a potential plaintiff, if the potential defendant has retained counsel. ABA Committee on Professional Ethics, Informal Op. 908 (1966); ABA Committee on Professional Ethics, Informal Op. 670 (1963);

(c) Letter by claimant’s counsel to represented insured prior to institution of suit advising insured that suit will be filed and extending offer to settle. ABA Committee on Professional Ethics, Informal Op. 1034 (1968); see also ABA Committee on Ethics and Professional Responsibility, Informal Op. 1373 (1976) (mailing of pre-indictment plea offer by prosecutor to defense lawyer and client improper);

(d) Once a claim against a municipality has been “put in the hands of an attorney for attention” it is improper for police officers, clients of the municipal attorney, to obtain written statements from the represented claimant. ABA Committee on Professional Ethics and Grievances, Formal Op. 95 (1933);

(e) Attorney for a personal injury defendant may not make a settlement offer directly to an injured party who has retained an attorney although no suit has been instituted. N.Y.C. Bar Assoc. Comm. on Professional Ethics, Op. 302 (1934);
Bar Association Committee on Legal Ethics issued Formal Opinion 95-396, in which the Committee declared that Rule 4.2 applies in both civil and criminal cases "to communications not only with formal 'parties' but also with any person known to be represented with respect to the matter to be discussed."\textsuperscript{275} Less than two weeks later, on Aug. 9, 1995, the ABA House of Delegates eliminated any doubt about the organization's intention to apply the "no contact" principle before the onset of formal litigation in civil and criminal cases when it voted to amend \textit{Model Rule} 4.2 by substituting the term "person" for "party."\textsuperscript{276}

If this broad view of the anti-contact prohibition were applied to criminal investigation, it would require dramatic revisions of current practice. Still more to the present point, it would significantly alter the constitutional balance between the rights of the individual and the needs of society which has been laboriously crafted by the Supreme Court over the past three decades in cases involving police contact with criminal suspects.

\textbf{i. The Work of the Supreme Court}

A detailed account of the Supreme Court's tortuous journey from \textit{Massiah}\textsuperscript{277} to \textit{Escobedo}\textsuperscript{278} to the landmark of \textit{Miranda},\textsuperscript{279} and through the host of adjustments,
reinterpretations and refinements that have followed is beyond the scope of this Article, but the contours of the result are plain enough. The Fifth Amendment prohibition against self-incrimination precludes judicial compulsion of testimony and any evidentiary use of a defendant's refusal to speak. Before the institution of formal charges, there are essentially no restraints on the government's choice of non-coercive methods designed to gather evidence through overt or covert contacts with a suspect, so long as the suspect is not subject to the potentially coercive influence of interrogation in government custody. Moreover, the Fifth Amendment also allows custodial interrogation, albeit only if preceded by an admonition of rights and a valid waiver of those rights.

Among the rights a defendant in custody enjoys, but can waive, is the right to consult with a lawyer before and during questioning. Still, the right to counsel in the custodial setting rests only partially, if at all, on the Sixth Amendment. Rather, it is a right ancillary to the Fifth Amendment conferred to ensure that the suspect's right against compelled self-incrimination is protected. The right to counsel under the Sixth Amendment by itself does not attach until the initiation of formal adversarial judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." Unlike the Miranda right to counsel ancillary to custodial interrogation, once the Sixth Amendment right to counsel has attached, law enforcement officials may not use

280. See generally Uviller, supra note 271, at 1155-76 (providing a detailed, and critical, account of the Supreme Court's work).

281. U.S. CONST. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself.").

282. The Fifth Amendment privilege is limited to "evidence of a testimonial or communicative nature." Schmerber v. California, 384 U.S. 757, 761 (1966).


284. Illinois v. Perkins, 496 U.S. 292, 297 (1990) (stating that the coercion against which Miranda protects occurs only though the interaction of the elements of custody and interrogation).


286. Miranda, 384 U.S. at 444, 478-79. Once a suspect has asserted his Miranda right to counsel, interrogation must cease until counsel is provided or the suspect subsequently waives the right. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).


288. Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion). The Court has once or twice suggested that the Sixth Amendment might be activated by events earlier in the investigative process. See, e.g., Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (suggesting that the right to counsel could be activated by a "focus" of suspicion during police questioning); United States v. Wade, 388 U.S. 218, 226-27 (1967) (holding that a preindictment lineup was a "critical stage" of the prosecution and that such a stage triggered the Sixth Amendment right to counsel). However, those suggestions have long since been disavowed. Escobedo's result was explained in Fifth Amendment terms in Miranda v. Arizona, 384 U.S. 436, 444 n.4 (1966). As for Wade, the Court in Kirby held that it was limited to its facts. Kirby v. Illinois, 406 U.S. 682, 689 (1972); see also Moran, 475 U.S. at 432 (holding that the Sixth Amendment right to counsel is not activated merely because an event "may have important consequences at trial").
MISUSE OF "ETHICAL RULES"

incriminating statements "deliberately elicited" from the accused without the presence or waiver of counsel,\(^{289}\) even if the statements are made in a non-custodial setting or to persons unknown by the defendant to be acting for the government.\(^{290}\)

The practical consequence of this legal structure is clear, and was clearly the objective of its judicial architects. Before a criminal case is hardened into a formal adversary proceeding by the occurrence of an event like an indictment or the filing of an information, the government can try to get evidence from the mouth and mind of the defendant surreptitiously without his consent or face-to-face with it. Because of the practical reality, which the Court clearly understands, that a suspect is unlikely to utter so much as a syllable once he is actually counselled by a competent attorney,\(^{291}\) the retention or appointment of counsel at the onset of formal proceedings serves to slam the door on any further potentially incriminating direct admissions to the police.

The establishment of this particular boundary between the periods during which the government, practically speaking, can and cannot obtain evidence from the mind of the defendant has been the subject of criticism,\(^{292}\) as has the employment of the right to counsel as the mechanism for achieving the demarcation,\(^{293}\) but there is no disputing that the Court has assigned this role of boundary marker to the Sixth Amendment.\(^{294}\)

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\(^{289}\) Whether police can interrogate at the time of arrest of a defendant who has previously been indicted seems to be a gray area. Since the indictment signals the onset of formal adversarial proceedings, one might think no statement could thereafter be "deliberately elicited," thus ruling out police questioning even with Miranda warnings and a valid waiver. In practice, during the window between the arrest and the first court appearance, both the police and the courts appear to have treated the situation like any precharging custodial interrogation. But see United States v. Foley, 735 F.2d 45, 48 (2d Cir. 1984) (criticizing the U.S. Attorney practice of interviewing unrepresented persons post-arrest, but pre-arraignment), cert. denied sub nom., Edler v. United States, 469 U.S. 1161 (1985).

\(^{290}\) Moran, 475 U.S. at 431; Brewer v. Williams, 430 U.S. 387, 399 (1977). See Massiah v. United States, 377 U.S. 201, 205-06 (1964) (holding that the Sixth Amendment was violated by government use of statements made to a co-defendant acting as informant after defendant's indictment and release on bail).

\(^{291}\) See Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part, dissenting in part) (observing that no lawyer "worth his salt" would do anything other than counsel his client to say nothing to police); I ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 87 (1984) (recommending that defense counsel advise clients at the initial interview to say nothing at all to police, prosecutors, cellmates, co-defendants, lawyers for co-defendants or reporters under any circumstances).

\(^{292}\) See Uviller, supra note 271, at 1167 (calling the boundary "awkward, indeed indefensible"); J. GRANO, POLICE INTERROGATIONS AND CONFESSIONS: A REBUTTAL TO MISCONCEIVED OBJECTIONS 13 (1987) (published by the Center for Research in Crime and Justice of the New York University School of Law) ("[W]e lack good reasons to reject either police interrogation as such or some of the tactics that help police interrogation to succeed.").

\(^{293}\) See Uviller, supra note 271, at 1138 ("Some attention is accorded the theory that ethics reinforce the Sixth Amendment proscription. None of the apologies survives close scrutiny, however, compelling the conclusion that the Sixth Amendment provision has been misapplied as an artificial device of cloture on government efforts to obtain cognitive evidence.").

\(^{294}\) See Maine v. Moulton, 474 U.S. 159 (1985) (Brennan, J.) (holding that the state violated the Sixth Amendment when it arranged to record conversations between a defendant and an undercover codefendant working for the state, after the defendant had already been charged with the crimes). Professor Uviller refers to
ii. Mismatch: The No Contact Rule Meets *Miranda*

The no contact rule, as interpreted in the civil arena, cannot be harmonized with the Supreme Court's constitutional jurisprudence on criminal investigations.

(1) The rule would prohibit U.S. Attorney knowledge of or participation in undercover operations involving direct verbal contact with any suspect known to be represented by counsel. In civil practice, such proceedings are unethical.295

(2) No custodial interrogation would be permitted of any suspect known by the prosecutor to be represented by counsel. Because *Model Rule* 4.2 and its predecessors give the power of consent to communications with a client exclusively to the lawyer,296 a criminal defendant known to be represented *could not be asked to give a valid Miranda waiver.*

Moreover, these boons to criminal suspects would be awarded for reasons that would be either irrelevant to or actually violative of principles of equal justice. In the first place, since the right to government-financed counsel under either the Fifth or Sixth Amendment cannot arise until one is either arrested or charged,297 no person of poor or even average means is at all likely to have a lawyer and to have conveyed that fact to a prosecutor before being made the subject of undercover recordings or being taken into custody. Consequently, only the rich will enjoy the new immunity.298 Moreover, even among the well-to-do, the protection of the no contact rule would extend randomly to cases in which, through fortuity or the foresight of defense counsel, the right prosecutor from the right jurisdiction became aware of the representation.299

b. Government Investigations of Organizations

The other aspect of the no contact rule of particular significance in attempts to

*Moulton* as a "ringing affirmation" of the principle that "the counsel clause of the sixth amendment functions as a restrictive device in the quest for reliable cognitive evidence of guilt." Uviller, *supra* note 271, at 1164.

295. See supra note 274 and accompanying text.

296. *Wolfram, supra* note 274, § 11.6.2, at 614; see also *Waller v. Kotzen*, 567 F. Supp. 424 (E.D. Pa. 1983), *appeal dismissed*, 734 F.2d 9 (3d Cir. 1983); ABA Committee on Ethics and Professional Responsibility, Formal Op. 362 (1992) (stating that a lawyer who makes an offer of settlement to the lawyer for the opposing party may not inquire of the opposing party whether the party has received the offer, even if the offeror lawyer has reason to believe the offeree lawyer has not conveyed the offer to his client); ABA Committee on Ethics and Professional Responsibility, Informal Op. 1348 (1975) (holding that a lawyer may not transmit a settlement offer to the opposing party, even if the lawyer has reason to believe that counsel for opposing party will not convey the offer).


298. Moreover, the subspecies of wealthy suspect most likely to have taken the precautions necessary to invoke the rule are high-level drug traffickers, organized crime figures, white collar criminals and crooked corporate executives.

299. For example, notifying the local district attorney of the fact of representation would have no effect on the ethical obligations of the district attorney in the next county, or those of the U.S. Attorney.
translate it to the criminal arena is the reach of the term "party" as applied to corporations and other group entities. Once again, the bar has taken an expansive view. The comment to Model Rule 4.2 says:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.\footnote{300}{MODEL RULES Rule 4.2 cmt. (emphasis added).}

The last clause of the comment is self-evidently open to a range of interpretations, from a narrow view, which would include only high corporate management,\footnote{301}{See, e.g., Fair Automotive Repair v. Car-X Serv. Sys., 471 N.E.2d 554, 560-61 (I11. App. Ct. 1984) (applying the "control group" test); N.Y.C. Bar Assoc. Comm. on Professional Ethics, Op. 613 (1942) ("only managing employees represent the corporation for the purpose of examination of the corporation before trial").} to the position that, since any statement by an employee might be construed as an "admission" by the corporation under Federal Rule of Evidence 801(d)(2),\footnote{302}{Federal Rule of Evidence 801(d)(2) states in pertinent part:

(d) Statements which are not hearsay. A statement is not hearsay if —

(2) Admission by a party-opponenit. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or . . . (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning the matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801(d)(2).} subjecting the corporation to civil or criminal liability, contact is prohibited with \emph{all} corporate employees.\footnote{303}{See, e.g., Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037, 1039-42 (D.N.J. 1990) (indicating that it is logical to prohibit ex parte communications with former employees "except for formal discovery because they 'may' make statements which can be imputed"). For an "intermediate" position that might in practice approach an absolute prohibition on interviews of any employee worth talking to, see Niesig v. Team 1, 559 N.Y.S.2d 493 (1990) (applying the rule to corporate employees whose acts or omissions in the matter at issue are binding on the corporation or imputed to the corporate criminal defendant is entitled to an order barring the state from interrogating any of its employees whose acts or omissions the state seeks to impute to the corporate defendant); State v. CIBA-GEIGY, 589 A.2d 180 (N.J. Super. Ct. App. Div. 1991) (adopting Niesig rationale; the corporate criminal defendant is entitled to an order barring the state from interrogating any of its employees whose acts or omissions the state seeks to impute to the corporate defendant).}

In fact, the reach of the rule in the organizational context is uncertain and unpredictable.\footnote{304}{See, e.g., MODEL RULES ANN. commentary at 426-27 (stringing together an array of conflicting tests cited by various authorities with no attempt whatever to distinguish between them or identify the correct, or even preferred, approach).} What does appear reasonably clear, however, is that the ABA's

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FED. R. EVID. 801(d)(2).}
\footnote{303}{See, e.g., Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037, 1039-42 (D.N.J. 1990) (indicating that it is logical to prohibit ex parte communications with former employees "except for formal discovery because they 'may' make statements which can be imputed"). For an "intermediate" position that might in practice approach an absolute prohibition on interviews of any employee worth talking to, see Niesig v. Team 1, 559 N.Y.S.2d 493 (1990) (applying the rule to corporate employees whose acts or omissions in the matter at issue are binding on the corporation or imputed to the corporate criminal defendant is entitled to an order barring the state from interrogating any of its employees whose acts or omissions the state seeks to impute to the corporate defendant); State v. CIBA-GEIGY, 589 A.2d 180 (N.J. Super. Ct. App. Div. 1991) (adopting Niesig rationale; the corporate criminal defendant is entitled to an order barring the state from interrogating any of its employees whose acts or omissions the state seeks to impute to the corporate defendant).}
\footnote{304}{See, e.g., MODEL RULES ANN. commentary at 426-27 (stringing together an array of conflicting tests cited by various authorities with no attempt whatever to distinguish between them or identify the correct, or even preferred, approach).}
interpretation of the rule has grown more expansive in the wake of the Supreme Court’s 1981 decision in *Upjohn Co. v. United States* concerning the scope of the attorney-client privilege in the corporate setting. In the *Upjohn* case, the Court rejected the so-called “control group” test for determining which corporate employees were clients, and extended the potential applicability of the privilege to “all employees who, by virtue of their employment, have knowledge of relevant facts.”

As Professor Stahl has described, before *Upjohn*, the traditional view taken by the bar was that the no contact prohibition generally extended only to persons who, by virtue of their position in, or relationship to, the corporation, could be considered its “alter ego.” After *Upjohn*, and in part in response to it, various state bars and the ABA itself reevaluated the traditional position. This reevaluation was reflected most starkly in the modification of the comment to Model Rule 4.2 between its draft version 1981 and the final version adopted in 1983. The draft version comment adopted an alter ego approach, but as can be readily seen from the excerpt quoted above, the final comment had shifted dramatically to a broader focus. The ABA’s expanded interpretation of the reach of Model Rule 4.2 was reconfirmed in the ABA Ethics Committee’s Formal Opinion 95-396, where the Committee opined that, “The Comment to Rule 4.2 makes plain that the term represented party refers not only to those with managerial responsibilities but to anyone who may legally bind the organization with respect to the matter in question.”

Two things can, therefore, be said about attempts to apply Model Rule 4.2 to criminal investigations of crime involving or related to organizations. First, Model Rule 4.2 would represent a significant practical impediment to such investigations. Because, unlike most individuals, virtually all corporations are continuously represented by counsel, if local ethics authorities take a broad view of the rule’s reach, the rule could forestall interviews with virtually any employee


306. Id. at 391-92.
308. Id. at 1183-91.
309. Id. at 1199-1218.
who knows anything of value to the investigation.\textsuperscript{312} Even in jurisdictions where the scope of the rule is narrower, it is inherently unpredictable, making any investigation of corporate wrongdoing at best an enterprise fraught with peril for the prosecutor's license and livelihood.

Second, while application of Model Rule 4.2 to criminal investigations of corporate misconduct does not directly upset the balance of constitutional interests created by the federal courts in the same way that its application to individual suspects so plainly does, such a use of the rule has a perverse result at odds with any reasonable interpretation of the Supreme Court's intentions. In Upjohn, those who opposed expansion of the attorney-client privilege in the case of corporations argued that such an expansion would "entail severe burdens on discovery and create a broad 'zone of silence' over corporate affairs."\textsuperscript{313} The Court rejected this contention, saying:

\begin{quote}
Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.\textsuperscript{314}
\end{quote}

The Court's reasoning was limited to the types of information protected by the attorney-client privilege, communications between attorney and client. By employing the Upjohn definition of "client" in the no contact rule setting, the bar seeks through Model Rule 4.2 to impose precisely the "zone of silence" the Court said it did not intend to create. Thus, by operation of Model Rule 4.2, corporate suspects join wealthy individuals in the special class that is largely exempt from normal pre-indictment criminal investigative procedures.

3. The No Contact Rule in Federal Criminal Cases: Response of the Federal Courts

In light of the obvious gap between the bar's interpretation of the no contact rule in civil settings and the constitutional and policy choices made by the Supreme Court in criminal cases, the perceptive reader may recall and wonder at the assertion made above that the federal courts routinely hold the rule applicable to prosecutors.\textsuperscript{315} The answer to this apparent conundrum is that, regardless of

\begin{itemize}
\item \textsuperscript{312} For a discussion of the sorts of difficulties that could arise, see In re Investigation of FMC Corp., 430 F. Supp. 1108 (S.D. W.Va. 1977) (discussing a situation where a corporation under grand jury investigation sought injunctive relief prohibiting government personnel from interviewing any of its employees without corporate counsel in attendance; the request was denied in light of guidelines for such interviews adopted by the government).
\item \textsuperscript{313} Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).
\item \textsuperscript{314} Id. (emphasis added).
\item \textsuperscript{315} See supra note 272 and accompanying text (asserting that federal courts routinely state that the rule applies to prosecutors).
\end{itemize}
what they say, the rule the courts are applying has only a distant relationship in scope and rationale to the no contact rule that obtains in civil matters. In fact, at the very outset of the criminal procedure revolution, the federal courts considered and discarded the ethical prohibition on contact with represented persons as a limitation on government investigative tactics before the lodging of formal charges.

a. Prologue: 1962 to 1987

The story begins in 1962, when the Second Circuit decided *United States v. Massiah*, apparently the first reported case in which the no contact rule was urged in federal court as a bar to the admissibility of a defendant's statement. There, in circumstances made famous by the Supreme Court's later decision in the matter, the defendant argued that his post-indictment statements to a co-defendant cooperating with the police should be suppressed because at the time of the statements he had retained an attorney and the government knew it. *Massiah* claimed that this conduct violated his constitutional rights and the 1908 Canons. The Second Circuit rejected both arguments and sustained Massiah's conviction.

The Supreme Court reversed. In doing so, however, it made no mention of the ethics issue, relying exclusively on the Sixth Amendment. Justice White's dissent picked up the no contact rule argument, but only to discount it. After *Massiah*, the anti-contact prohibition disappeared as a material factor in the Supreme Court's jurisprudence on defendant statements. With one exception,

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318. *Id.*
319. *Id.* at 66.
320. *Id.* at 66-67. The Second Circuit expressed doubt that the no contact rule applied to criminal cases, and opined that, even if it did, the facts of this case did not offend the rule. *Id.*
322. *Id.* at 205-06.
323. Justice White wrote:

> This case cannot be analogized to the American Bar Association's rule forbidding an attorney to talk to the opposing party litigant outside the presence of his counsel. Aside from the fact that the Association's canons are not of constitutional dimensions, the specific canon argued is inapposite because it deals with the conduct of lawyers and not with the conduct of investigators. 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; the reason for the rule does not apply to non-lawyers and certainly not to Colson, Massiah's codefendant.

*Id.* at 210-11.

324. The sole reference to the no contact rule in a majority opinion appears to be an enigmatic footnote by Justice Burger in *United States v. Henry*, 447 U.S. 264, 275 n.14 (1980). After holding that placement of a jailhouse informant in the same cellblock as the defendant with instructions to be alert for statements from federal prisoners offended the Sixth Amendment right to counsel, Burger added footnote 14: "Although it does not bear on the constitutional question in this case, we note that Disciplinary Rule 7-104(A)(1) of the Code of
the only significant references to the rule in the more than three decades since *Massiah* appear in a series of three dissents by Justice Stevens.\(^{325}\)

Stevens repeatedly expressed the view that the ethical standard in *Model Code DR 7-104(A)(1)* and *Model Rule 4.2* applies in criminal cases. His position, oft-repeated though it was, was neither very clear nor entirely consistent. At times he seemed to resurrect and endorse the inventive, if idiosyncratic, theory of one of his own dissents on the Seventh Circuit, in which he opined that an interview of the defendant in the absence of counsel would have violated DR 7-104(A)(1) in the civil context and violated the “procedural regularity” required by the Due Process Clause in the criminal context.\(^{326}\) Later, he seemed to have abandoned all restraint and asserted that “the same ethical rules apply” in criminal and civil cases.\(^{327}\)

Whatever the precise contours of Justice Stevens’ view, he never managed to attract a majority that shared it. Indeed, in *Moran v. Burbine* the Court rejected both Stevens’ position on the application of the no contact rule in particular and the more general notion that either the ABA or state legal ethics regulators could define federal constitutional law. In that case, the Court indicated an unwillingness to extend *Model Rule 4.2*-type notions to pre-charging investigation by refusing to suppress a confession despite the failure of Rhode Island police to tell the suspect under interrogation that his sister had hired a lawyer for him.\(^{328}\) Responding both to Justice Stevens’ dissent and to the amicus briefs filed by the ABA, the National Association of Defense Lawyers and the National Legal Aid and Defender Association,\(^{329}\) the Court wrote:

> We recognize . . . that our interpretation of the Federal Constitution, if given the dissent’s expansive gloss, is at odds with the policy recommendations embodied in the American Bar Association Standards of Criminal Justice. Notwithstanding the dissent’s protestations, however, our interpretive duties go well beyond deferring to the numerical preponderance of lower court decisions or to the subconstitutional recommendations of even so esteemed a body as the American Bar Association.\(^{330}\)

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Professional Responsibility provides [quoting the rule].” *Id.*. What this was intended to signify is anybody’s guess. The only subsequent reference to it in the Court’s cases appears in Justice Burger’s dissent in *Moulton*, where he contends that the *Henry* footnote was intended to limit the reach of Sixth Amendment protection in that case to situations where “the State deliberately circumvented counsel with regard to the subject of representation.” *Maine v. Moulton*, 474 U.S. 159, 187 (1985).


327. *Patterson*, 487 U.S. at 301 (Stevens, J., dissenting); *Harvey*, 494 U.S. at 365-66 n.12 (Stevens, J., dissenting).


329. *Id.* at 415.

330. *Id.* at 427-28 (citation omitted and emphasis added). The Court continued:
Despite the Supreme Court's hostility to the no contact rule as a limitation on criminal investigations before the filing of charges, criminal defendants have continued to invoke the rule in arguments to the lower federal courts. Roughly a decade after *Massiah*, the D.C. Circuit addressed such an argument in *United States v. Lemonakis.* During the government's investigation of a series of burglaries, but before any indictment, suspects Lemonakis and Enten retained counsel, who made their representation known to the authorities. The government nonetheless recorded incriminating conversations between the defendants and a cooperating accomplice. The defendants argued that these recordings violated their Sixth Amendment rights, a contention the court immediately discounted by noting that the right to counsel does not attach before the "initiation of adversary judicial criminal proceeding[s]."

The defendants also argued for suppression of the tapes on the ground that the Assistant U.S. Attorneys who authorized the undercover recordings violated ABA Canon 7 (formerly Canon 9) and DR 7-104. The court disagreed. It began by distinguishing two of its own earlier cases that might have been read to support the defendants' argument on the ground that in each case the alleged prosecutorial misconduct had a "constitutional dimension, in terms of Fifth and Sixth Amendment guarantees relating to the right to counsel, which does not, as we have concluded, inhere in the instant case."

The inescapable implication of this pronouncement is that the no contact ethical rule as applied to a prosecutor is to be read *in pari materia* with the constitutional right to counsel.

Since *Lemonakis*, every other circuit that has addressed the question (with the

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Nothing we say today disables the States from adopting different requirements for the conduct of its [sic] employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions.

*Id.*


333. *Id.*

334. *Id.*

335. *Id.* at 954-55.

336. *Id.* at 955 n.1. The cases were *Ricks v. United States,* 334 F.2d 964 (D.C. Cir. 1964), and *Mathies v. United States,* 374 F.2d 312 (D.C. Cir. 1967).

337. *Lemonakis,* 485 F.2d at 955 n.21.

338. The only D.C. Circuit case on this issue since *Lemonakis* is *United States v. Sutton,* 801 F.2d 1346 (D.C. Cir. 1986). In *Sutton,* the court rejected a motion to suppress tape recordings made of the defendant during the pre-indictment investigative phase of the case, holding that neither the Sixth Amendment nor DR 7-104 provided grounds for relief. 801 F.2d at 1366. The court cited *Lemonakis,* and then observed: "Rule 7-104 was never meant to apply to situations such as this one, but was meant to ensure that lawyers not prey on persons known to be represented by counsel." *Id.*

The court's remark is interesting for two reasons: first, there are certainly elements in the ABA eager to take issue with the court's view on original intent. See, e.g., ABA House of Delegates, Report No. 301, approved Feb. 12-13, 1990 (stressing that the requirements of DR 7-104(A)(1) are applicable to prosecutors). Second, the court is palpably incorrect insofar as the conduct under review would certainly be viewed as improper if engaged in
exception of the Second Circuit) has defined the no contact rule as an ethical obligation triggered only by the attachment of Sixth Amendment right to counsel.339

b. United States v. Hammad and the Thornburgh Memorandum

The continuing evolution of the Second Circuit’s views merits some analysis,

by disputants in a civil controversy. The comment is only coherent if it is taken to mean that DR 7-104 was “never meant to apply” to criminal cases, or at least to the investigative phase of criminal cases.

339. Fourth Circuit: United States v. Chavez, 902 F.2d 259, 265-67 (4th Cir. 1990) (expressing concern about an agent’s post-indictment conversations with a represented defendant, and stressing the effect of such communications on the “trust and confidence” essential to the attorney-client relationship guaranteed by the Sixth Amendment). 639

Fifth Circuit: United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993) (rejecting claim by dissent that anti-contact obligation applies pre-indictment and noting “the great weight of authority to the contrary”).


Eighth Circuit: United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852 (1983). The defendant was recorded speaking to an accomplice after he had retained counsel in connection with an upcoming grand jury appearance. The defendant claimed that the prosecutor had violated Minnesota Code of Professional Responsibility DR 7-104. The court found: (1) the defendant had no Sixth Amendment right to counsel because adversarial judicial proceedings had not begun; (2) the defendant had no Fifth Amendment right to counsel because he was not in custody; and (3) that “[w]e do not believe that DR 7-104(A)(1) of the Code of Professional Responsibility was intended to stymie undercover investigations when the subject retains counsel.” Id. at 1333; accord United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983) (holding that government investigatory agencies are not required to refrain from contact with a suspect because he or she had previously retained counsel).


The Ninth Circuit once suggested in a footnote that the no contact rule might apply pre-indictment to a situation of custodial interrogation, the circumstance that triggers the Miranda right to counsel ancillary to the Fifth Amendment, but the suggestion was dictum and the court has never revisited the idea. United States v. Lopez, 4 F.3d 1455, 1460 n.2 (9th Cir. 1993). In support of this suggestion, the court cited three cases in which it said other courts have held that “[w]e do not believe that DR 7-104(A)(1) of the Code of Professional Responsibility was intended to stymie undercover investigations when the subject retains counsel.” Id. at 1333; accord United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983) (holding that government investigatory agencies are not required to refrain from contact with a suspect because he or she had previously retained counsel).

In United States v. Thomas, the interrogation occurred after the defendant had been arrested, served with a criminal complaint, had counsel appointed and appeared at a preliminary hearing, in short, after adversarial judicial proceedings had begun. 474 F.2d 110, 112 (10th Cir.), cert. denied, 412 U.S. 932 (1973).

In United States v. Killian, the timing of the questioning is less clear, but the court says it occurred “[w]hile [the defendant was] in custody awaiting trial and after obtaining the services of an attorney . . . .” 639 F.2d 206, 208 (5th Cir.), cert. denied sub nom. Cox v. Wynck, 451 U.S. 1021 (1981). This, too, sounds as though the interrogation occurred after commencement of the adversarial process.

In United States v. Durham, an FBI agent interviewed the defendant on six occasions. 475 F.2d 208 (7th Cir. 1973). The first was arranged by defense counsel; four of the last five, though they occurred without the knowledge of defense counsel, occurred after defendant had been arrested and had appeared with counsel at a preliminary hearing. Id. at 209-10. Defendants have a right to counsel at a preliminary hearing. Coleman v. Alabama, 399 U.S. 1 (1970). Only one of the six interviews occurred prior to the preliminary hearing, but the court did not appear to recognize the distinction. Durham, 475 F.2d at 210-11.

Tenth Circuit: United States v. Ryans, 903 F.2d 731, 740 (10th Cir.), cert. denied, 498 U.S. 855 (1990) (“We hold that DR 7-104(A)(1)’s proscriptions do not attach during the investigative process before the initiation of criminal proceedings.”).
particularly because it was a case from that court, *United States v. Hammad*, that was the catalyst for the present feud between the bar and the Department of Justice.

In 1982, twenty years after its *Massiah* opinion, the Second Circuit decided *United States v. Vasquez*, in which it held that an undercover tape recording of an unindicted suspect, who had previously retained counsel in connection with a grand jury appearance, violated neither the Sixth Amendment nor DR 7-104(A)(1).

The following year, the Second Circuit was confronted in *United States v. Jamil* with a forceful exposition of the most expansive view of DR 7-104. The district judge’s position was that the ethical rule should prohibit the government from using the pre-indictment undercover tapes at issue, or any evidence obtained from direct or indirect communications with a person under suspicion of committing a crime, once the government became aware that the person had a lawyer. He rejected the position that there need be any congruence between the ethical rule and the Sixth Amendment, and explicitly urged the Second Circuit to reconsider *Vasquez*.

On appeal, the Second Circuit served up a remarkably anemic response. It reversed the suppression of the evidence on the narrow ground that, because the prosecutor had been unaware of the undercover taping, there could have been no

341. 675 F.2d 16 (2d Cir. 1982).
342. *Id.* at 17. The court held that acceptance of defendant’s argument on the ethics rule “would simply enable criminal suspects, by retaining counsel, to hamper the government’s conduct of legitimate investigations. Even assuming this provision of the Code to be applicable to a criminal investigation, which is doubtful, it was not intended to lead to such a result.” *Id.* (emphasis added).
343. 707 F.2d 638 (2d Cir. 1983).
Defendant was the represented target of a grand jury investigation into the unauthorized export of military equipment. *Jamil*, 546 F. Supp. at 649. Two-and-one-half years before the indictment was finally returned, but after the defendant had retained counsel, customs agents tape recorded conversations between the defendant and an informant. *Jamil*, 707 F.2d at 645. The Assistant U.S. Attorney was aware the defendant had counsel, but unaware of the taping. *Jamil*, 546 F. Supp. at 651. The defendant moved to suppress the tapes on Sixth Amendment grounds and on the basis that the taping had violated DR 7-104(A)(1). *Id.*

Judge Weinstein found no Sixth Amendment violation. *Id.* But then he held: (1) the no contact rule applies to prosecutors, *id.* at 652-53; (2) a criminal client is a “represented party” within the meaning of the rule as soon as “the client is being investigated as a possible defendant in a potential criminal proceeding,” *id.* at 653; (3) any direct or indirect communication between the prosecutor or any representative of the prosecutor “occurring after the government became aware that [the defendant] was represented by counsel would constitute a violation of DR 7-104(A)(1),” *id.* at 654; and (4) even though the Assistant U.S. Attorney had no advance knowledge of the taping in this case, his use of the tape at trial would constitute an ethical violation and should not be permitted, *id.* at 655.

345. Judge Weinstein did not actually base his suppression of the tapes on the alleged ethical violation, recognizing that he could not do so in light of *Vasquez*. *Id.* at 660. Instead he excluded them on what might best be termed an expansive application of Federal Rule of Evidence 403. *Id.* at 661.
346. *Id.* at 655-58.
347. *Id.* at 660.
violation of the disciplinary rule. It left open the possibility that "Jamil may have been entitled to the protection afforded by DR 7-104(A)(1) at the time the recording was made . . . ."

i. Stimulus: United States v. Hammad

The district court judge in United States v. Hammad saw the opening left by Jamil and plunged through it. Hammad involved three represented suspects being investigated by federal agents and the U.S. Attorney’s Office for Medicaid fraud. During the investigation, but before indictment, the government taped conversations between several suspects, including Taiseer Hammad and an informant, Wallace Goldstein.

The district court recognized that pre-indictment undercover meetings with a suspect implicated neither the Fifth nor Sixth Amendment. The court also admitted that it had been unable to find a case holding that a statement obtained in the "investigative, that is, pre-arrest, preindictment stage" of a prosecution had been garnered unethically. But apparently on the ground that the anti-contact rule "attempts to effectuate many of the same values embodied in the Sixth Amendment," the district court held that the Assistant U.S. Attorney had violated DR 7-104(A)(1) and that the undercover tapes should be suppressed on that basis.

The government appealed. In the original and revised opinions that followed, the Second Circuit succeeded principally in sowing confusion. On its first pass, the court rejected the government’s argument that the no contact rule was inapplicable prior to the attachment of the Sixth Amendment right to counsel. The court refused, however, to define the circumstances that would trigger the rule. It then accepted the district court’s determination that the rule should apply precisely as it would in a civil case, that is, "to instances in which a suspect has retained counsel specifically for representation in conjunction with the

348. Jamil, 707 F.2d at 646.
349. Id. (emphasis added)
351. United States v. Hammad, 678 F. Supp. 397, 398-99 (E.D.N.Y. 1987), reversed in part, 846 F.2d 854 (2d Cir.), revised, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). The Assistant U.S. Attorney disputed the claim that he was aware of Hammad’s representation by counsel, but the district court found that he either did know, or had been made aware of facts sufficient to give rise to a duty to inquire further. Hammad, 678 F. Supp. at 399.
352. Id. at 398-99.
353. Hammad, 858 F.2d at 836; Hammad, 678 F. Supp. at 405.
354. 678 F. Supp. at 405.
355. Id. at 401.
356. Id.
357. Hammad, 846 F.2d at 857.
358. Id. at 858-59.
359. Id. at 860.
criminal matter in which he is held suspect, and the government has knowledge of that fact." The circuit court upheld the district court’s ruling that the ethical rule had been violated, but reversed its imposition of the sanction of suppression of evidence.

Several months after its original opinion, the Second Circuit changed its mind. The panel left untouched its statements about the coverage of the no contact rule not being limited by the Sixth Amendment. However, the court withdrew its endorsement of the district court’s holding on the ambit of the ethical rule, avowedly out of solicitude for the government’s concern that applying DR 7-104(A)(1) would prohibit undercover operations. Instead, the court ruled that “the use of informants by government prosecutors in a preindictment, non-custodial situation . . . will generally fall within the ‘authorized by law’ exception to DR 7-104(A)(1) and therefore will not be subject to sanctions.” The court concluded by declining to create a “bright line rule,” or indeed to give any guidance whatever, for the application of the no contact rule to preindictment situations. It simply declared that “[t]his delineation is best accomplished by case-by-case adjudication,” and retired from the field.

As it later proved, the Hammad decision had no notable effect on federal law, even within the Second Circuit. As the Second Circuit itself recently observed in Grievance Committee v. Simels, “since Hammad, neither this Court nor any reported district court decision considering an alleged violation of DR 7-104(A)(1) has found that the Rule had been violated.” The court made this observation in the course of an opinion so vocally skeptical about the propriety of applying the rule broadly to either prosecutors or criminal defense counsel that it amounts to a de facto reversal of Hammad. The court wrote:

We believe that the [Grievance] Committee’s interpretation [of the rule] may well result in broad and unwarranted changes in traditional law enforcement and defense practices and procedures. If such substantial modifications are to be made, they should occur only after careful consideration by the representative branches of the federal government. The conceded power of federal district

360. Id. at 859 (quoting Hammad, 678 F. Supp. at 401). The Second Circuit viewed this formula as a “sensible limitation” on the reach of the rule. Id. This is an utterly baffling assertion since the quoted language is not a limitation but a restatement of the rule itself.

361. Id. at 859-60, 861-62.

362. The original opinion was issued on May 12, 1988. 846 F.2d at 854. The opinion was then revised on Sept. 23, 1988, and then amended on Nov. 29, 1988. Hammad, 858 F.2d 834, 834 (1988).

363. 858 F.2d at 839.

364. Id.

365. Id. at 840.

366. Id.

367. 48 F.3d 640, 649 (2d Cir. 1995). In Simels, the court rejected application of DR 7-104 to a defense attorney who interviewed a represented co-defendant with the knowledge that the co-defendant had counsel. Id. at 642-43, 651.

368. Id. at 649.
courts to supervise the conduct of attorneys should not by used as a means to substantially alter federal criminal law practice.\textsuperscript{369}

\textbf{ii. Response: The Thornburgh Memorandum}

Paradoxically, for a case whose resolution was as confused, illogical and, frankly, toothless as \textit{Hammad} became in its ultimate form, the opinion churned up a maelstrom that is still whirling. On June 8, 1989, roughly six months after the Second Circuit finished fiddling with \textit{Hammad}, then-Attorney General Richard Thornburgh issued a memorandum to all Department of Justice litigators.\textsuperscript{370} The memorandum was framed as a direct response to \textit{Hammad} and to continuing efforts by the defense bar “to press its position that DR 7-104 does in fact limit the universe of appropriate federal investigative techniques.”\textsuperscript{371} Viewed objectively, the vast majority of the Thornburgh Memorandum is unsurprising and unobjectionable. For example, its position on the no contact rule was nothing more than a restatement of the position the Justice Department had been asserting in court, with uninterrupted success until \textit{Hammad}, since \textit{Massiah} first went before the Second Circuit in 1962 — that it is legal and appropriate for government lawyers and agents “to gather evidence by communicating with any person who has not been made the subject of formal federal criminal adversarial proceedings . . . regardless of whether the person is known to be represented by counsel.”\textsuperscript{372}

Had the memorandum stopped there, it would probably have remained an obscure internal communique. What made the document famous was its overt proclamation of two assertions that, while the first is plainly true and the second is arguable, might best have remained unsaid. The first of these declarations was that “although 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 attorney’s federal responsibilities.”\textsuperscript{373} The memorandum went on to say that “the Supremacy Clause forbids the states from regulating [Justice Department] attorneys’ conduct in a manner inconsistent with their federal responsibilities, as determined by federal law and the Attorney General.”\textsuperscript{374} Despite the furor this claim has provoked, it stands, as will be seen, on a firm footing.

\begin{itemize}
\item \textsuperscript{369} Id. at 644 (emphasis added).
\item \textsuperscript{370} Richard Thornburgh, Memorandum to All Justice Department Litigators re Communications with Persons Represented by Counsel (unpublished office memorandum, June 8, 1989) [hereinafter Thornburgh Memorandum], reproduced in \textit{In re Doe}, 801 F. Supp. 478, 489-93 (D.N.M. 1992).
\item \textsuperscript{371} Id. at 490. The memorandum refers to \textit{Hammad} as “the high water mark of the bar’s litigative effort.” Id.
\item \textsuperscript{372} Id. at 492.
\item \textsuperscript{373} Id. at 490 (citation omitted).
\item \textsuperscript{374} Id. at 492.
\end{itemize}
The aspect of the Thornburgh Memorandum that has provoked the most violent denunciation is its implicit claim that any contact with a represented person by a Justice Department lawyer or his agent, regardless of circumstances, is ethical because "authorized by law." This assertion seems at least problematic, particularly in a case such as Hammad, where the U.S. District Court for the Eastern District of New York had adopted DR 7-104(A)(1) as a local rule, and the problem was thus not a conflict between a state ethics authority and federal law, but a disagreement between the federal executive and judicial branches over the proper interpretation of federal law. Much more easily defensible is the implication of the very same passage of the memorandum that the Attorney General has the power to set standards for Justice Department lawyers by regulation that will preempt state law.

Irrespective of the legal correctness of the Thornburgh Memorandum, one is disposed to wonder at the political acumen of declaring so boldly for federal supremacy and choosing Hammad and the no contact rule as casus beli. In the limited context of the no contact rule itself, the memorandum has forced the lower federal courts to confront a contradiction they have been discreetly avoiding for decades, to the advantage, on balance, of federal prosecutors. That contradiction, as we have seen, is that Model Rule 4.2 and its predecessors, as interpreted by the organized bar and many states, cannot be reconciled with the federal constitutional and procedural law of criminal investigations. The courts' solution has been to say that the no contact ethics rule applies to federal prosecutors, while in fact crafting a very different rule that is both triggered by attachment of the Sixth Amendment right to counsel and narrowly tailored to protect Sixth Amendment interests. The result has been preservation of the Supreme Court's careful balancing of public interest and suspects' rights without the uncomfortable necessity of declaring a venerable ethical rule void as to one class of lawyers.

Before the Thornburgh Memorandum, disputes over particular ethical rules — exculpatory evidence in the grand jury, attorney subpoenas and no contact — usually stayed focused on whether the rule in question violated federal law. The Thornburgh Memorandum shifted the center of gravity of the debate from the

375. The memorandum says:

In the near future, the Department will codify language in the Standards of Conduct, 28 C.F.R., Part 45, that will make the Department's position clear to the bench and bar. We intend to make clear that the "authorized by law" exemption in DR 7-104 applies to all communications with represented individuals by Department attorneys or by others acting at their direction.

Id. at 493 (emphasis added).


378. The choice to unfurl the battle flag seems particularly unnecessary in light of the post-Hammad jurisprudence of the Second Circuit. See supra notes 367-69 and accompanying text (discussing the Second Circuit's treatment of Hammad in subsequent case law).
distortion of criminal procedure through the misuse of ethical rules to the "arrogance" of federal lawyers seeming to declare themselves exempt from ethical control.³⁷⁹ By publishing a declaration that could be twisted by opponents into the sneer that "we're the feds and we don't need no stinking ethics," the Justice Department raised judicial eyebrows (and hackles), made litigation of no contact cases more difficult and gift-wrapped a rhetorical meat axe that the defense bar has been wielding with relish in and out of court ever since.

iii. Shock Waves: The Aftermath of the Thornburgh Memorandum

The reaction to the Thornburgh Memorandum among the organized bar was predictable. The popular and legal press was filled with howls of indignation.³⁸⁰ At its next mid-year meeting, in February 1990, the ABA House of Delegates passed a resolution condemning the memorandum as "a unilateral assumption of authority to render self-interested interpretations of ethical standards, [and] an unwarranted and unfounded use of executive power to create unequal classes of both litigants and lawyers."³⁸¹ It may be no coincidence that Model Rule 3.8(f) on attorney subpoenas was ratified by the House of Delegates at the same session.³⁸² The reaction among academic commentators to the memorandum has been generally negative.³⁸³

More significantly from a practical point of view, some members of the federal bench plainly took umbrage at what must have appeared as a challenge, not only to state authorities, but to the supervisory power of federal judges. The baneful

³⁷⁹. See In re Doe, 801 F. Supp. 478, 486 (D. N.M. 1992) (saying that the Thornburgh Memorandum "displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession"); ABA Adds Two Model Rules on Subpoenas, Practice Sales, [6 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 27 (1990) (noting an ABA delegate's view that Department of Justice position represents "sheer arrogance").
³⁸⁰. See, e.g., Tom Watson, AG Decrees Prosecutors May Bypass Counsel; Move Is Assault on Ethics Codes, Defense Bar Claims, LEGAL TIMES, Sept. 25, 1989, at 1 ("In a move likened by one lawyer to a 'declaration of war on the defense bar,' Attorney General Richard Thornburgh has decreed that federal prosecutors are not bound by a time-honored canon of legal ethics governing contact with counsel in criminal investigation."); William Glaberson, Thornburgh Policy Leads to a Sharp Ethics Battle, N.Y. TIMES, Mar. 1, 1991, at B4 ("That memorandum has reverberated through the world of criminal law like a shot across the bow."). See also Special Committee of the Conference of Chief Justices, Comment on Proposed Regulation Governing Contacts by Department of Justice Attorneys with Represented Persons, 28 C.F.R., Part 77, Mar. 31, 1994, at 13 (noting that "[t]he Supremacy Clause cannot be used to justify preempting a state ethics rule by means of a regulation adopted by the Department") (available from National Center for State Courts).
³⁸². MODEL RULES ANN. commentary at 408.
effect of the Thornburgh Memorandum can be seen in United States v. Lopez.\(^3\) While the Ninth Circuit ultimately confirmed its earlier restriction of the no contact rule to the period after the activation of the Sixth Amendment,\(^4\) the path to that result was perilous. The Lopez case arose out of a situation in which, after seeking and obtaining approval from a magistrate to do so, an Assistant U.S. Attorney met with an indicted defendant, Jose Lopez, in the absence of his retained counsel to discuss a plea bargain.\(^5\) The ensuing plea negotiations ultimately collapsed; the defendant's attorney found out about them and withdrew.\(^6\) Lopez' newly retained counsel immediately moved for dismissal of the indictment due to an alleged infringement on Lopez' Sixth Amendment right to counsel and violation of the no contact rule of the California Bar, which had been incorporated into the local rules of the federal district court.\(^7\)

In the district court proceedings on the motion to dismiss, the government's primary line of defense was that the Thornburgh Memorandum exempted Department of Justice attorneys from compliance with the no contact rule adopted by the district court, even in a post-indictment situation where the right to counsel had attached.\(^8\) This approach was not well received.

The district judge wrote a sizzling opinion,\(^9\) in which she found that neither the Thornburgh Memorandum nor general principles of separation of powers exempted federal government lawyers from the operation of the court's local ethical rule.\(^10\) She further found that the Assistant U.S. Attorney had violated the ethical rule, despite having cleared his meeting with Lopez with a magistrate, on the ground that the Assistant U.S. Attorney "effectively misled" the magistrate.

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\(^{384}\) 4 F.3d 1455 (9th Cir. 1993).
\(^{386}\) United States v. Lopez, 4 F.3d 1455, 1457 (9th Cir. 1993). The facts of the Lopez case were convoluted and remained in dispute even after the court of appeals decision, but the salient points were these: Two defendants were indicted for drug crimes in the Northern District of California. Id. at 1456. Sometime thereafter, one of the defendants, Jose Lopez, approached his co-defendant's attorney, Twitty, about the possibility of negotiating a plea agreement with the government without the presence or knowledge of his own lawyer, Tarlow. Id. at 1456-57. The reasons for Lopez' desire to cut out Tarlow were later the subject of much dispute, but Twitty contacted the Assistant U.S. Attorney and requested a meeting between the Assistant U.S. Attorney, Twitty, Twitty's client and Lopez, in order to discuss a plea in Tarlow's absence. Id. at 1457.

Recognizing the obvious difficulties of such a meeting, the Assistant U.S. Attorney contacted the district court, which referred the matter to a magistrate. Id. The magistrate conducted two in camera interviews of Lopez to determine whether Lopez wanted to meet with the government without his attorney and whether he understood his rights and the dangers of self-representation. Id. After both interviews, the magistrate concluded that Lopez should be allowed to meet with the government. Id.

\(^{387}\) Id.
\(^{388}\) Id.
\(^{389}\) Id. at 1458.
\(^{390}\) United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), order vacated, 989 F.2d 1032 (9th Cir.), opinion amended and superseded, 4 F.3d 1455 (9th Cir. 1993).
\(^{391}\) Id. at 1450-54.
about Lopez’ motives for seeking the meeting without his attorney. The court concluded by ordering the indictment against Lopez dismissed.

On appeal of the district court’s ruling to the Ninth Circuit, the government discarded its reliance on the Thornburgh Memorandum, arguing instead that the ethical rule “was not intended to apply to prosecutors pursuing criminal investigations,” either before or after indictment. The court made short work of this contention, referring to it as “puzzling,” and holding that rule does indeed apply “beginning at the latest upon the moment of indictment.”

The court’s reasoning, however, is most instructive. It wrote:

The prosecutor’s ethical duty to refrain from contacting represented defendants entitles upon indictment for the same reasons that the Sixth Amendment right to counsel attaches. In addition to focusing “the subject of the representation,” indictment gives rise to a defendant’s “right to rely upon counsel as a ‘medium’ between him and the State.” Maine v. Moulton, 474 U.S. 159, 176 (1985). Thus, the Sixth Amendment guarantee would be rendered fustian if one of its “critical components,” a lawyer-client “relationship characterized by trust and confidence,” could be circumvented by the prosecutor under the guise of pursuing the criminal investigation.

Just as it had in Kenny, the Ninth Circuit in Lopez justified and defined the limits of the anti-contact “ethical” rule by reference to Sixth Amendment principles.

iv. The DOJ Regulation on Contact with Represented Persons

In part because it became clear that federal courts were not disposed to accept a

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392. Id. at 1452.
393. Id. at 1464.
394. Lopez, 4 F.3d at 1458.
395. Id. at 1459.
396. Id. at 1459, 1460.
397. Id. at 1460.
398. Id. at 1461.
399. The word “entify” is defined as, “To make into an entity, attribute objective existence to.” 5 The Oxford English Dictionary 298 (2d ed. 1989). Assuming that the court employed the word advisedly, its use implies that the prosecutorial obligation of no contact with represented persons lacks “objective existence” pre-indictment.
402. The court nonetheless overruled the district court in two respects: First, while the appeals court initially refused to overturn the district court’s finding of ethical misconduct by the prosecutor, United States v. Lopez, 989 F.2d 1032, 1041 (9th Cir.), opinion amended and superseded, 4 F.3d 1455 (9th Cir. 1993), upon further consideration it issued an amended opinion concluding that the facts were unclear and remanding for further proceedings on the issue of whether there had been an ethical violation, 4 F.3d at 1462. Second, the court held that, even if an ethical violation had been committed, dismissal of the indictment was an inappropriate remedy. Id. at 1464.
prosecutorial exemption from an ethical rule purely on the basis of an internal memorandum from the Attorney General, particularly once the judges had acted to incorporate the rule in their own local rules, the Justice Department promulgated a regulation governing contacts between government lawyers and persons represented by counsel.

The regulation, which became effective on August 4, 1994, establishes a broad prohibition against contacts with a "represented party" after such a party has been arrested or charged in a federal criminal case, subject to six fairly narrow exceptions. The general prohibition on contact, taken together with its exceptions, does two basic things. First, it incorporates a fair approximation of existing federal case law concerning the point at which the anti-contact prohibition is activated. Second, it defines and legitimates a narrow post-activation

403. See, e.g., In re Gorence, 810 F. Supp. 1234, 1236 (D.N.M. 1992) (holding that because an assistant U.S. Attorney did not have colorable federal defense to New Mexico's no contact rule, disciplinary proceedings against him could not be removed to federal court); In re Doe, 801 F. Supp. 478, 485-86 (D.N.M. 1992) (holding that there was no evidence of any federal law showing a clear and manifest purpose to preempt the application of state ethical codes to an Assistant U.S. Attorney).


405. 28 C.F.R. § 77.3(a)(3) (1994).

406. The exceptions are:

(a) Communications to determine whether the person is in fact represented. Id. § 77.6(a);
(b) Communications in the course of discovery, grand jury testimony or the service of judicial process such as subpoenas. Id. § 77.6(b);
(c) Communications initiated by the represented party after a hearing before a federal judge or magistrate who has determined that the party has voluntarily waived counsel or obtained substitute counsel. Id. § 77.6(c);
(d) Communications at the time of arrest after an advisement of rights and a waiver. Id. § 77.6(d);
(e) Communications in the course of investigating additional, different or ongoing crimes separate from those for which the defendant has been arrested or charged. Id. § 77.6(e); and
(f) Communications believed in good faith to be necessary to protect against threats to life or personal safety. Id. § 77.6(f).

407. I say "fair approximation" because several peculiarities in the structure and wording of the regulation create anomalies that could have the effect of blurring the distinction that federal courts have so far maintained between contacts before and after attachment of the Sixth Amendment right to counsel. By defining a "represented party" as one who has counsel and has been "arrested or charged in a federal criminal case," id. § 77.3(a)(3), the regulation suggests that the anti-contact ethical prohibition is activated by the attachment of the Miranda right to counsel ancillary to the Fifth Amendment. Despite occasional hints that the rule might apply in precharging custodial situations, no federal court has ever actually made such a finding. See, e.g., discussion of...
exception to the rule for contacts initiated by the suspect with the knowledge and approval of a judge.

The regulation also defines the scope of the Justice Department's no contact prohibition as to employees of organizations that qualify as "represented parties." The regulation includes within the general ban on pre-charging contact only "controlling individuals:" this category is limited to current high-level employees known by the government to be participating as decision makers in the determination of the organization's legal position in the case or matter under investigation. In effect, the regulation returns the no contact rule on organizational employees to its traditional scope prior to the ABA's ill-conceived 1983 modifications in the wake of *Upjohn Co. v. United States*.

Beyond the particulars of the no contact ban, 28 C.F.R. § 77.11 is notable for its chosen enforcement mechanism. It states that responsibility for investigation and punishment of infractions rests exclusively with the Attorney General and the Justice Department itself. The adequacy of this approach will be considered below.

v. Counterstrike: The ABA Interprets and Amends *Model Rule 4.2*

The response of the ABA to the DOJ "no contact" regulation followed within a year. Formal Opinion 95-396 of the ABA Committee on Ethics and Professional Responsibility (issued on July 28, 1995), and the vote of the ABA House of Delegates two weeks later (on Aug. 9, 1995) to amend *Model Rule 4.2* by striking the word "party" and inserting the word "person," were undeniably direct reactions to the regulation. The more striking of the two ABA documents is the Ethics Committee opinion. The opinion acknowledged the weight of federal case law "suggesting" that "the Rule... does not come into play until Sixth Amend-

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*United States v. Lopez*, 4 F.3d 1455, 1460 n.2 (9th Cir. 1993), supra note 339. On the other hand, the exception in the regulation, 28 C.F.R. § 77.6(d), which allows interrogation of a "represented party" at the time of arrest after warnings and waiver, seems to restore the status quo and leave the Fifth Amendment/Sixth Amendment dichotomy undisturbed. 28 C.F.R. § 77.6(d).

On close examination, however, there are two situations in which the regulation appears to change existing law. First, assume an unindicted represented suspect who is arrested, refuses to speak, and advises his interrogators of the fact of representation, and is then released for lack of sufficient evidence. Under existing federal law, since formal adversary proceedings had not commenced, the suspect would be fair game for undercover or overt contacts in the period following his release but before any subsequent filing of formal charges. By defining "represented party" as one who has been arrested, the regulation appears to bar such contacts. Second, if the same arrestee had already been indicted and had obtained counsel prior to the arrest, the Sixth Amendment right to counsel would certainly have attached and, assuming the prosecutor were aware of the representation, even custodial interrogation without consent of counsel would appear to be forbidden. Yet the regulation appears to permit such an interrogation.

Whether these anomalies are oversights to be corrected with subsequent amendments or represent considered choices by the drafters remains to be seen.

408. 28 C.F.R. § 77.10.

409. 449 U.S. 383 (1981). The comment that originally accompanied *Model Rule 4.2* limited its coverage to "managing agents" of the corporation or organization. See supra note 310 and accompanying text.
ment rights attach,” but blithely concluded that such opinions “are not sound.” The Committee grudgingly acknowledged that the existing body of federal decisional law restricting the reach of Model Rule 4.2 must be adhered to, but offered an interpretation of that body of law which, to be candid, is distorted almost beyond recognition. The Committee wrote:

[T]he Committee recognizes that there is a body of decisional law that in effect concludes that the public interest in investigating crime may outweigh the interests served by the Rule in the criminal context, at least where the contacts are made with represented persons who have been neither arrested nor formally charged, and the contacts are made by undercover agents or informants and not by the government lawyers themselves (or by agents acting so closely under the lawyers' direction as to be their alter egos). Accordingly, the Committee believes that so long as this body of precedent remains good law, it is appropriate to treat contacts that are recognized as proper by such decisional authority as being “authorized by law” within the meaning of that exception stated in the Rule.

As has been discussed above, there is virtually no support in prevailing federal case law for the proposition that federal prosecutors may not direct pre-charging undercover activities involving agent or informant contact with a represented suspect. Indeed, the “altar ego” language in the Committee’s parenthetical would swallow the rule enunciated by the federal courts. The Committee’s interpretation would forbid a federal prosecutor to contact an uncharged, represented suspect himself, or to direct an agent to do so on his behalf. The only contacts that would remain unaffected by this “exception” would be agent-suspect contacts of which the prosecutor was unaware, and contacts of that type have always been beyond the ambit of a rule which is, after all, about attorney conduct. In short the

410. Opinion 95-396, supra note 275. The Committee’s arguments against the “unsoundness” of the federal court’s reading of Model Rule 4.2 are principally: (1) That prosecutors could “manipulate grand jury proceedings to avoid [the Rule’s] encumbrance,” and (2) that “applying the Rule to prohibit only post-indictment communications would render the rule of little use in the criminal context.” Id. The Committee simply declines to address the self-evident policy rationale behind the courts’ choice of attachment of the Sixth Amendment as a demarcation line for activation of the Rule -- that the intervention of lawyers early in the investigative stage of criminal cases would be effective in shutting off or reducing the flow of useful, reliable information about the commission of crimes, and the courts are unwilling to countenance that result. See supra notes 291-94 and accompanying text (discussing Supreme Court jurisprudence on this issue).

411. Opinion 95-396, supra note 275 (emphasis added). The highlighted language is plainly contrary to the law of every federal circuit to have considered the question, with the possible exception of the Second Circuit. See supra note 339 (discussing cases holding that the “no contact” rule does not apply before the initiation of formal adversary proceedings, and making no distinction regarding the identity of the person making or authorizing the contact); see also supra notes 340-69 and accompanying text (discussing the work of the Second Circuit). Particularly in light of the decision in Grievance Committee v. Simels, 48 F.3d 640 (2d Cir. 1995), discussed supra notes 367-69 and accompanying text, there would appear to be little support for the Ethics Committee’s position in any federal circuit.

412. In light of language in Section IX of the Opinion 95-396, even complete ignorance of the activities of one’s agents would not necessarily be enough to protect a federal prosecutor from a grievance under Model Rule
Ethics Committee opinion, despite its cautious draftsmanship, concedes authority over the regulation of federal prosecutors to neither the Justice Department nor the federal courts. Read carefully, it is neither a concession nor a compromise. It is instead a manifesto for further conflict.

4. The Debate over the No Contact Regulation: An Argument about History and Power

Though vastly different in both substance and tone from the Thornburgh Memorandum, the Justice Department’s no contact regulation has also inspired intense criticism from the bar. Reasonable observers can differ over whether the substance of the regulation is a fair compromise between prosecution and defense interests. Resolving the merits of that debate is not my objective here. However, certain components of the roaring feud over whether the Justice Department has the power to promulgate regulations that supersede state ethics rules do illuminate the present topic.

The basic argument of those who deny the Justice Department’s authority under the Supremacy Clause to promulgate the no contact regulation and preempt state law is that both Congress and the federal courts have, in effect, delegated to the states the power to control the membership in, and regulate the conduct of, the legal profession, including that portion of the profession that practices in the federal courts. Since, the argument continues, the Supreme Court persists in its reliance on state bars to regulate the conduct of federal lawyers, and since Congress has not expressly indicated an intention to permit the Justice Department to preempt this “traditional” state function, there can be no preemption by regulation. While this contention is in itself a marked distortion of federal

4.2. According to the Committee, a prosecutor (or other lawyer) who had supervisory authority over an investigator “would be ethically responsible for [contacts with represented persons] made by the investigator if she had not made reasonable efforts to prevent them. . . .” Opinion 95-396, supra note 275 (emphasis added).


414. See Burke, supra note 413, at 1665-67 (offering critical commentary). But see Developments in the Law—Lawyers’ Responsibilities and Lawyers’ Responses, 107 HARV. L. REV. 1547, 1595 (“Substantively, [the DOJ regulation] provides a balanced approach to ex parte communications, nicely accommodating competing interests . . .”).

415. This Article does not attempt to determine conclusively the question of whether Justice Department regulations can supersede ethical rules properly adopted by federal courts as local rules under Federal Rule of Criminal Procedure 57 or otherwise.

416. See Dash, supra note 413, at 138-39 (arguing that the attorney general has no power to preempt state and federal court ethics rules under the Supremacy Clause because the power is not expressly granted by Congress); Conference of Chief Justices, Comment on Proposed Regulation Governing Contacts by Department of Justice Attorneys with Represented Persons, 28 C.F.R. Part 77, Mar. 31, 1994, at 12-16 (available from National Center for State Courts) [hereinafter Chief Justices’ Comment].
preemption doctrine, because there is a well-established doctrine of administrative preemption, 417 the argument implicitly concedes, as it must, one critical point: if either Congress or the Supreme Court chooses to invalidate all or any portion of state ethics rules as applied to practice in the federal courts, it may do so under the Supremacy Clause.

Moreover, the fundamental assertion of the Justice Department's critics that the regulation of lawyers is "the exclusive province of the states," 418 with its implied corollary that Congress and the federal courts have not hitherto preempted state law in this area, is historical fiction. Federal courts have repeatedly...

417. The Supreme Court has held unequivocally that "[f]ederal regulations have no less preemptive effect than federal statutes." Fidelity Fed. Sav. & Loan Assoc. v. De La Cuesta, 458 U.S. 141, 153 (1982); accord City of New York v. FCC, 486 U.S. 57, 63-64 (1988) (stating "the statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations of an agency or frustrates the purposes thereof"). A number of critics have claimed that "[t]o preempt state law, Congress must do so expressly." Dash, supra note 413, at 138; Chief Justices' Comment, supra note 416, at 13. This statement is correct, but misleading because it applies only to acts of Congress itself, which have preemptive effect. An administrative agency does not require express congressional authorization to displace state law. City of New York, 486 U.S. at 64 (stating that "where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'") (quoting De La Cuesta, 458 U.S. at 154) (alterations in original).

When a federal agency seeks to preempt state law by regulation, the relevant inquiry is whether the agency that promulgated the regulations intended to displace state law and whether it acted within the scope of its delegated authority. See City of New York, 486 U.S. at 63-64 (holding that a federal agency may preempt state regulation); De La Cuesta, 458 U.S. at 153-54; Capital Cities Cable v. Crisp, 467 U.S. 691, 699-700 (1984) (discussing the limitations of the court's inquiry into regulations, promulgated by an administrator, that are intended to preempt state law); United States v. Shimer, 367 U.S. 374, 383 (1961) (discussing the importance of legislative history in preemption situations). In the present case, the Department of Justice no contact regulation expressly states its intention to preempt conflicting state law. 28 C.F.R. § 77.12. Congress has authorized the Attorney General to direct Department of Justice attorneys in the enforcement of federal criminal law. 28 U.S.C. §§ 516, 519 (1993). Congress also authorized the Attorney General to promulgate regulations governing the Department and the "conduct of its employees." 5 U.S.C. § 301 (1977). See generally Burke, supra note 413, at 1652-53 (discussing the attorney general's authority to promulgate regulations defining government attorneys' authority to communicate with represented parties directly).

The ABA's official position on the preemption issue as it relates to the DOJ "no-contact" regulation is painfully obscure. In Opinion 95-396, the Committee on Ethics and Professional Responsibility addresses the question of when conduct contrary to Model Rule 4.2 is "authorized by law." The Committee discusses the case of Chrysler v. Brown, 441 U.S. 281 (1979), at great length. In Brown, federal regulations were invalidated because they were in conflict with a federal statute, and because they failed to comply with the federal Administrative Procedure Act, 5 U.S.C. § 551 et seq (1976). Brown, 441 U.S. at 316. The Ethics Committee, without so much as a mention of the Supremacy Clause, then concludes that Brown should produce the "same result . . . if the other law involved were rules of professional conduct adopted by state courts — or, for that matter federal courts." Opinion 95-396, supra note 275. Having gone this far, however, the Committee adds a footnote stating that, "we express no view as to whether the Department of Justice regulations have sufficient statutory authorization to meet [the Brown] test." Id.

418. Chief Justices' Comment, supra note 416, at 12. See also Dash, supra note 413, at 138 (stating the presumption against the preemption of state law in areas regulated by the states); Opinion 95 - 396, supra note 275 ("Moreover, regulation of lawyers, including Justice Department lawyers, has traditionally and quite properly been left to the states. Indeed, in the authors' view, there could never be a delegation to the Justice Department or other law enforcement agency to set its own ethics rules unilaterally.") (emphasis added) (Lawrence J. Fox and Kim Taylor-Thompson dissenting).
intervened to nullify state bar regulations at odds with the federal constitution, statutes and regulations. To highlight but a few examples:

(1) The Supreme Court has ruled that state bars do not have unfettered control even over their own membership. State bar rules and practices regarding admission to practice will be struck down if violative of the federal Constitution. 419

(2) Federal power to override state determinations about membership in the legal profession is not limited to state actions that violate the federal Constitution. State decisions in derogation of federal statutes and regulations must also yield. 420

(3) Likewise, federal control over state bars’ regulation of their members is not restricted to the determination of who shall become an attorney in the first instance. The Supreme Court has repeatedly invalidated state ethical rules governing legal practice that conflicted with federal law.

   (a) In *NAACP v. Button*, 421 the Supreme Court struck down a transparent attempt by the Virginia Bar to employ legal ethics rules to prop up racial segregation. The Virginia Supreme Court of Appeals found that the activities of the NAACP in organizing African-American citizens to combat state-sponsored

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419. In *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), and *Konigsberg v. State Bar*, 353 U.S. 252 (1957), the Court found that the Due Process and Equal Protection Clauses of the Fourteenth Amendment place limits on the ability of states to exclude a person from the practice of law or any other occupation. *Schware*, 353 U.S. at 238-39. The Court went on to hold that New Mexico and California had impermissibly excluded the petitioners from the practice of law for their admitted or suspected political beliefs. *Id.* at 247; *Konigsberg*, 353 U.S. at 273. See also *Law Students Civil Rights Research Counsel v. Wadmond*, 401 U.S. 154, 162-63 (1971) (holding that there is no constitutional invalidity in Rule 9406 of the *New York Civil Practice and Law Rules*).

420. See, e.g., *Sperry v. Florida*, 373 U.S. 379, 404 (1963) (holding that, just as a state could not exclude persons from the bar for reasons that violated federal law, neither could it require a non-attorney authorized by federal regulation to practice before the U.S. Patent Office either to become an attorney and join the bar or discontinue his patent practice). At the behest of the Florida Bar, the Florida Supreme Court had enjoined Sperry from engaging in his patent practice because, in its view, his activities constituted the “unauthorized practice of law.” *Id.* at 382. The Court said:

A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give “the State’s licensing board a virtual power of review over the federal determination” that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.

*Id.* at 385 (quoting *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956)).

segregationist policies constituted “solicitation of legal business” in violation of state law and the 1908 Canons.422 The U.S. Supreme Court reversed, holding that the state’s interpretation of the 1908 Canons offended the First and Fourteenth Amendments.423

(b) The Supreme Court has twice rejected efforts by state bar associations to enjoin labor unions from facilitating their members’ access to competent and sympathetic counsel. In Brotherhood of Railroad Trainmen v. Virginia Bar424 and United Mine Workers v. Illinois Bar Association,425 the Court held that the efforts by the bar to halt the union plans on the ground that they constituted improper solicitation of legal business426 or the unauthorized practice of law427 violated the union members’ constitutional rights of speech and association.428

(c) In Bates v. State Bar of Arizona,429 the Court invalidated the ban on lawyer advertising contained in the Arizona Supreme Court’s ethics rules, holding that the ban violated the First and Fourteenth Amendments.430

(d) In Goldfarb v. Virginia State Bar,431 a minimum fee schedule maintained by a county bar association was held to be price-fixing in violation of the Sherman Act.432

All of the foregoing cases involve federal invalidation of state bar rules regulating the licensure and conduct of lawyers practicing in state courts. In such situations the Court starts from the premise that states have a “compelling interest” in the regulation of their bars, and intervenes only when it is clear that the bar rule offends supervening federal law.433 By contrast, the Court has repeatedly emphasized that federal courts exercise independent and sovereign control over the admission and conduct of lawyers practicing before them.434

423. Button, 371 U.S. at 428-29. See also In re Primus, 436 U.S. 412, 417-18, 439 (1978) (finding South Carolina’s attempt to discipline for improper “solicitation” of a client an ACLU attorney who offered the organization’s legal services to women who had been sterilized as a condition of receiving Medicare, a violation of First and Fourteenth Amendments).
427. Id.; Mine Workers, 389 U.S. at 218.
428. Trainmen, 377 U.S. at 5-6; Mine Workers, 389 U.S. at 225.
430. Id. at 810-82, 384.
432. Id. at 789-91.
434. See Selling v. Radford, 243 U.S. 46, 48 (1917) (stating that the power of removal is reserved to the federal court itself); Theard v. United States, 354 U.S. 278, 282 (1957) (holding that state disbarment did not, of itself, mandate removal from the Court’s rolls because “disbarment by federal courts does not automatically flow from disbarment by state court”). Each case concerns a petition to remove attorney the bar of the U.S. Supreme Court on the ground that he had been disbarred by the state in which he was licensed. Both cases held that a state disbarment has only evidentiary weight in a federal disbarment proceeding. Theard, 354 U.S. at 282; Selling, 243 U.S. at 50-51. Indeed, in Theard, the Supreme Court reversed the federal court’s order of removal.
Federal courts may choose to make state bar membership a precondition of federal practice, and they may elect to adopt state rules of lawyer conduct, in whole or in part, as their own, but the power to regulate the practice of federal law is inherent in the federal courts and not derivative from any state body. As the Supreme Court said in *In re Snyder*, in the course of reversing sanctions levied by the Eighth Circuit against an attorney for conduct alleged to be "unbecoming a member of the bar of the court" and violative of the *North Dakota Code of Professional Responsibility*:

The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. *Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law.*

The federal government’s undisputed power to set the rules of conduct that govern attorneys who practice in the federal courts is, if anything, enhanced when the particular lawyers at issue are employed by the federal government to investigate and enforce the criminal law of the United States. Indeed, as the discussion so far has demonstrated, federal courts have shown no reluctance to invalidate, modify or ignore ethical rules originating in state codes of conduct when such rules have restricted federal prosecutors in ways that violate federal law and procedure.

The Supreme Court in *United States v. Williams* forbade adoption by a federal court of a requirement that federal prosecutors present exculpatory evidence to grand juries. Although *Williams* voided a "local rule" adopted by the Tenth Circuit, there can be no doubt that the *Williams* decision forecloses the application of *Model Rule 3.3(d)*, or any analogue, to federal prosecutors by state ethics authorities.

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disbarment because it was premised exclusively on the state action. *Theard*, 354 U.S. at 282-83; *see also In re Isserman*, 345 U.S. 286, 288 (1953) (holding that the court will usually follow a state court’s disbarment, but that such a result is not automatic).

435. *See Theard*, 354 U.S. at 281 ("The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included.").


437. *Id.* at 645.

438. *Id.* at 645 n.6 (emphasis added). *See also Kitchen v. Aristech Chem.*, 769 F. Supp. 254, 258 (S.D. Ohio 1991) ("The ethical standards by which federal courts measure an attorney’s professional conduct are standards defined by federal law."); *Polycast Technology v. Uniroyal*, 129 F.R.D. 621, 624 (S.D.N.Y. 1990) ("Federal law governs the conduct of attorneys in the federal courts.").

439. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) ("[F]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government"); *United States v. District Court*, 407 U.S. 297, 312 (1972) ("It has been said that ‘[t]he most basic function of any government is to provide for the security of the individual and of his property.’" (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting))).


441. *See supra* notes 33-41, and accompanying text (discussing the *Williams* case).
As for Model Rule 3.8(f), every federal circuit but the First Circuit has rejected efforts to require pre-issuance judicial approval of attorney subpoenas. The First Circuit, in the Whitehouse case, considered a rule adopted by the federal district court, not a state ethical rule, and, as we have seen, was able to uphold even a federal rule only by labelling the bulk of its substantive provisions as non-binding commentary.

Finally, in the contact-with-represented-persons dispute, while federal courts say the ethical rule governs federal prosecutors, they do so only by quietly transmuting the bar's no contact rule into a truncated version compatible with federal law.

In sum, the claim that there is some policy of the federal judiciary that Justice Department lawyers must submit to the disciplinary rules of the states in which they are licensed irrespective of the content of those rules is wholly unsupportable.

The last arrow in the quiver of advocates of state bar hegemony over federal government lawyers is the undoubted fact that in the Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Congress provided that Justice Department lawyers must be licensed in at least one state. This simple proviso has been inflated into an unequivocal statement of congressional intent that government lawyers were henceforth to be bound by any and all ethical rules in effect in the state of their licensure. The statute will not bear so much weight; to the extent Congress' intent in inserting the highlighted language can be divined at all, its aims were certainly much more modest. As the Justice Department itself commented at the time of the statute's initial passage, the act "reflects a congressional decision to defer to the States, territories and the District of Columbia the threshold judgment regarding a person's qualifications and suitability to practice law." What the act quite plainly does not do is confer

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442. See supra note 184 and accompanying text (citing the controlling case in each circuit).
443. Whitehouse v. District Court, 53 F.3d 1349 (1st Cir. 1995).
444. See supra notes 241-57 and accompanying text (describing the circuit's opinion as unconvincing).
445. See supra note 339 and accompanying text.
446. For a particularly dogmatic exposition of this view, see Franklin D. Cleckley, Clearly Erroneous: The Fourth Circuit’s Decision to Uphold Removal of a State Bar Disciplinary Proceeding Under the Federal Officer Removal Statute, 92 W. VA. L. REV. 577 (1990). Professor Cleckley attacks the decision in Kolibash v. Committee on Legal Ethics, 872 F.2d 571 (4th Cir. 1989), which allowed removal to federal court of a West Virginia Bar Association disciplinary proceeding against a U.S. Attorney. He claims that the Supreme Court's deference to state interests in regulating the legal profession is so pronounced that a United States Attorney brought before a state ethics tribunal may not raise any federal defense to the charges of misconduct. Cleckley, supra, at 615-16, 624.
447. Pub. L. No. 96-132, 93 Stat. 1040, 104 (1979). The bill prohibits "‘the compensation of any person hereafter employed as an attorney (except foreign counsel employed in special cases) unless such person shall be duly licensed and authorized to practice as an attorney under the laws of a state, territory, or the District of Columbia.’" The requirement has been reenacted by Congress and remains in effect. Pub. L. No. 102-395, 106 Stat. 1828, 1838, Sec. 102(a) (1992).
448. See Dash, supra note 413, at 139; Chief Justices’ Comment, supra note 416, at 14-15.
449. Memorandum of the Department of Justice Re: Petition of the Board of Governors of the District of Columbia Bar for Amendment of Rules Implementing Canon 9, at 5 (Sept. 11, 1979) (emphasis added).

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upon the states a continuing power to impose restrictions upon the official conduct of government attorneys, even when such restrictions are contrary to other provisions of federal law. For example, by inserting in an appropriations bill one sentence about the professional qualifications required of federal prosecutors, Congress cannot reasonably be thought to have authorized state ethics committees to change the fundamental character of federal grand juries, as Model Rule 3.3(d) would do, or to limit the power of federal grand juries to compel the production of evidence, as would Model Rule 3.8(f). Congress certainly cannot have meant to delegate to state authorities a power it denied the Supreme Court — the power to make rules such as Model Rule 3.8(f), which modify evidentiary privileges in federal criminal cases. And Congress plainly did not intend to abandon thirty years of constitutional case law by allowing state authorities to place significant new restrictions, through a broad reading of Model Rule 4.2, on the power of federal law enforcement officers to interview criminal suspects.

It should be clearly understood that I am not offering a definitive opinion on whether the Justice Department may preempt state bar rules through the particular mechanism of a regulation. While I am disposed to think it can, the important point is that the federal government in the aggregate cannot be legally bound by the acts of state professional regulatory bodies. Nor has the federal government, either in the aggregate or through any one of its coordinate branches, decided to delegate to the states unfettered power over the conduct of federal lawyers.

All this having been said, the critics of the Department of Justice no contact regulation are correct in observing that the federal bench has placed heavy reliance on state bar mechanisms. The bench has ceded them great responsibility for determining, as an initial matter, who shall be admitted to federal practice and for disciplining lawyers who misbehave in federal court. Moreover, it is plain that the Supreme Court has not hitherto considered federal prosecutors exempt from regulation by the bar.\(^4\)\(^5\) Similarly, it is not unreasonable to think that Congress did anticipate that Justice Department lawyers would be regulated, at least in some degree, by the states from which they are now required to obtain licensure.

Neither the federal judiciary nor Congress has defined the boundaries of permissible and impermissible state regulation of federal government lawyers. The balance of this Article will be devoted to defining those boundaries and exploring their implications for the enterprise of ethical regulation of all lawyers.

II. CONSIDERING \textit{Model Rules} 3.3(d), 3.8(f) AND 4.2: TOWARD A DEFINITION OF LEGITIMATE RULES OF PROFESSIONAL ETHICS

While, as we have seen, the rules discussed above are contrary to existing

\(^4\) See Imbler v. Pachtman, 424 U.S. 409, 429 (1976) ("[A] prosecutor stands perhaps unique among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.").
federal law, my principal concern here is not with whether the rules would be sensible as substantive modifications of the legal system, but with the question of whether they are appropriate as ethical standards. I believe that these three rules represent a new, troubling and ultimately illegitimate use of the process of professional self-regulation for lawyers. In my view, these rules are an abuse of the ethics regulation process, even if viewed only from within the confines of the bar. An even more profound difficulty with these rules flows from the fact that their enforcement would markedly change the parameters of basic constitutional rights, principally the right to counsel, and would alter the character of a fundamental institution of the criminal justice system, the grand jury. Therefore, if enforced, these rules would be, both in effect and by design, rules of positive law.

I suggest that these rules are illegitimate as rules of ethics, and even more illegitimate as rules of positive law. Let me begin by considering them purely as rules of ethics.

A. THE ILLEGITIMACY OF MODEL RULES 3.3(d), 3.8(f) AND 4.2 AS RULES OF ETHICS

Before considering Model Rules 3.3(d), 3.8(f) and 4.2 in particular, it is necessary to explore the traditional understanding of what constitutes a legitimate rule of ethics for lawyers. Consequently, a brief foray into the history of ethical regulation of American lawyers is required.451

1. The Development of Ethical Regulation of Lawyers in America

a. Judicial Control over American Lawyers

From the founding of the Republic, American judges, like their English cousins,452 have held the power to control the admission to practice and
subsequent conduct of lawyers. State judges have commonly relied on an asserted inherent power to control the admission to and conduct of practice in the courts, but state legislatures in the post-Revolutionary period often made express grants of authority to the courts to regulate lawyers. Federal courts also assert an inherent power to regulate their own bars, but since their creation they have enjoyed statutory authorization to regulate the admission and discipline of lawyers appearing before them.

Historically, American judges exercising their regulatory authority over lawyers have been concerned primarily with the fitness of persons to become and remain members of the bar. From the earliest days, American courts assumed or were delegated authority to determine fitness for admission to practice in the first instance. As an entry qualification, “fitness” has customarily included both competence and moral character. Likewise, the focus of judicial inquiry

453. See, e.g., Ex Parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) (“The power [to strike attorneys from the rolls] is . . . incidental to all courts. . . .”); Ex Parte Wall, 107 U.S. 265, 273 (1883) (“[A] court has power to exercise a summary jurisdiction over its attorneys.”). See also WOLFRAM, supra note 274, § 2.2.1 at 22-23.

454. WOLFRAM, supra note 274, § 2.2.2, at 24-28.

455. See generally 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 224-80 (1965) (discussing the authority of late eighteenth century and early nineteenth century courts to regulate attorney conduct); see, e.g., An Act Regulating the Admission of Attorneys, Act of 1785, MASS. GEN. L. ch. 23, §§ 1, 2 (1823), quoted in CHROUST, supra, at 229; Act Regulating the Admission of Attorneys, 1821 Me. Laws 396-97, quoted in CHROUST, supra, at 234; An Act Adopting the Common Law of England, 1808 VT. Laws 60 (providing “[t]hat the supreme and county courts shall have power to admit attorneys in said courts”), quoted in CHROUST, supra, at 236; 1822 R.I. Pub. Laws 109 (authorizing the Supreme Judicial Court “to make and establish . . . rules for the admission of attorneys to practice in said court”), quoted in CHROUST, supra, at 240; An Act for the Appointment and Regulating Attorneys, 1784 Conn. Pub. Acts 10-11 (authorizing county courts to appoint “attorneys . . . to plead at the Bar”), quoted in CHROUST, supra, at 24); New York State Constitution of 1777, art. 27, § 2, 1802 N.Y. Laws 14 (stating that attorneys were to be appointed, licensed and regulated by the judges of the courts in which they practiced), quoted in CHROUST, supra, at 245.

456. See Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) (holding that the power to suspend an attorney is “necessary for the preservation of decorum, and for the respectability of the profession”); Ex parte Garland, 71 U.S. (4 Wall.) 333, 378-79 (1867) (stating that admission or exclusion of an attorney from a court is the “exercise of judicial power” not a “mere ministerial power”); In re Snyder, 472 U.S. 634, 643 (1985) (noting that “[c]ourts have long recognized inherent authority to suspend or disbar lawyers”).


458. This Article does not discuss the power of judges to impose sanctions less than disbarment through their contempt power for the behavior of lawyers actually appearing in court or acting for clients in matters under the jurisdiction of the court. See generally Louis S. Raveson, Advocacy and Contempt: Constitutional Limits on the Judicial Contempt Power, 65 WASH. L. REV. 477 (1990) (arguing that there should be a constitutionally based limit on the court’s contempt power so that it is only used to punish the actual obstruction of justice).

459. See supra notes 454-55 and accompanying text (noting that state judges often relied on an asserted inherent power, but state legislatures often expressly granted power to the courts to regulate attorneys).

460. Requirements of competence and character were imposed very early by the states. See, e.g., An Act Regulating the Admission of Attorneys, Act of 1785, MASS. GEN. L. ch. 23, § 1(1823) (requiring that a person admitted to be an attorney be professionally qualified and proficient and “a person of good moral character”), quoted in CHROUST, supra note 455, at 229; Act Regulating the Admission of Attorneys, 1821 Me. Laws 396-97 (requiring an attorney to be of good moral character and to have “devoted seven years at least to the acquisition of scientific and legal attainments”), quoted in CHROUST, supra note 455, at 234; An Act Adopting the Common Law of England, 1808 VT. Laws 60 (requiring as a prerequisite for admission examination by the judges and “attorneys of the bar” for knowledge of the law and good character); 1837 R.I. Pub. Laws 25 (requiring a
in the discipline of attorneys already admitted to practice has been on whether the conduct under scrutiny evidences a want of character or capability establishing unfitness for membership in the profession.\textsuperscript{461}

classical education and two years of legal study with a practitioner, or three years of such study, and a recommendation “by the bar as having a good moral character”), \textit{quoted in CHROUST, supra note 455}, at 240-41; 4 Day 119 (Conn. 1809) (citing a rule of Superior Court barring admission to practice before it until the applicant “shall have practiced two years in the Court of Common Pleas . . . and unless he sustain a good moral character, and shall be found qualified for practice, on a public examination of his knowledge of the law”). \textit{quoted in CHROUST, supra note 455}, at 242; \textit{Minutes of the Supreme Court of Judicature of the State of New-York, 1775-1781}, at 177, Court of Appeals Hall, Albany, New York (requiring that attorneys admitted to practice before the court have previously served as clerks to a member of the court’s bar for three years, be found on examination to be of “Sufficient Ability and competent to practice as an Attorney of this Court and produce a certificate of his Moral Character”), \textit{quoted in CHROUST, supra note 455}, at 245. \textit{See generally 2 CHROUST, supra note 455}, at 224-80 (discussing legislative and judicial attempts to control the legal profession).

In the modern era, the Supreme Court wrote of state bar admission requirements in \textit{Schware v. Board of Bar Examiners}, that:

A State can require high standards of qualification, such as \textit{good moral character or proficiency in its law}, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant’s \textit{fitness or capacity} to practice law. 353 U.S. 232, 239 (1957) (emphasis added); \textit{see also Dent v. West Virginia}, a case involving state regulation of doctors in which the Court said that the power of states to regulate professions includes the power to “prescribe all such regulations as in its judgment will secure . . . them against the consequences of ignorance and incapacity, as well as of deception and fraud.” 129 U.S. 114, 122 (1889).

Similarly, the requirements for membership in the bar of the U.S. Supreme Court are three years of membership in the bar of the highest court of any state and “good private and professional character.” Sup. Cr. R. 2. \textit{See In re Isserman}, 345 U.S. 286, 287-88 n.3 (1953), \textit{judgment set aside}, 348 U.S. 1 (1954). Each requirement is directed at both character and competence. Bar membership presumably carries at least minimal guarantees of professional knowledge, as well as the assurance that some investigation of character has been performed as a prerequisite for admission. The term “good private character” obviously implies some moral component, while “good professional character” suggests both moral integrity and at least minimal competence.

\textsuperscript{461} The classic statement is Lord Mansfield’s in \textit{Ex Parte Brounsall}:

\begin{quote}
[T]he question is, whether, after the conduct of this man, it is proper that he should continue a member of profession which should stand free from all suspicion. . . . It is not by way of punishment; but the Court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.
\end{quote}

98 Eng. Rep. 1385 (1778), \textit{quoted with approval in Ex Parte Wall}, 107 U.S. 265, 273 (1883); \textit{see also In re Snyder}, 472 U.S. 634, 645 (1985) (holding that “‘conduct unbecoming a member of the bar’ is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice” (emphasis added)).

State courts commonly hold that the purpose of attorney regulation and discipline is protection of the public through the determination of the fitness of lawyers to practice. \textit{See, e.g., Elledge v. Alabama State Bar}, 572 So. 2d 424, 425 (Ala. 1990) (holding that the purpose of inquiry is to determine whether attorney’s resumption of law practice will be detrimental to the integrity of the bar, the administration of justice or the public interest); \textit{In re Preston}, 616 P.2d 1, 5-6 (Alaska 1980) (stating that the purpose of discipline is not to punish, “but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected” (citation omitted)); \textit{In re Lutz}, 592 P.2d 1362, 1366 (Idaho 1979) (noting that discipline should exact justice, purge the legal profession of unworthy and unscrupulous lawyers and protect the public from those who are unfit to practice law); \textit{In re Smith}, 572 N.E.2d 1280, 1286 (Ind. 1991) (explaining that discipline is not meant to punish but to determine fitness of an officer of the court and to protect the public from unfit legal practitioners); Committee on Professional Ethics v. Behnke, 486 N.W.2d 275, 278 (Iowa 1992).
Pre-Civil War America contained no institution analogous to the English Inns of Court. There were many reasons for this void, but one powerful factor was the persistence of the Jacksonian idea that law was a public profession whose practitioners exercised unique influence over the institutions of government. Accordingly, thought Jacksonian democrats, access to this most public of professions should be as open as possible. Consequently, discipline of erring attorneys remained a monopoly of the judiciary that was neither supplemented nor supplanted by any formal peer review.

The bar association, the vehicle for legal self-regulation, and thus, from the radical democratic perspective, for the emergence of legal elitism, did not begin its rise until the early years of the twentieth century. In 1878, the ABA, the first national organization of lawyers, was founded in Saratoga Springs, N.Y.

Other stated purposes for the judicial discipline of attorneys include protecting public confidence in the legal system, upholding the reputation of the legal system and deterrence of future misconduct. Devlin, supra note 451, at 934-35 n.209, 935-36 n.210, 937-38 n.212.

Those legal organizations that existed in the young United States grew out of eating clubs or other social gatherings. WOLFRAM, supra note 274, § 2.3, at 34. “Bar associations fell into decline and ceased to exist during the early part of the nineteenth century.” Id. This devolution has been attributed to the leveling influence of Jacksonian democracy and its resistance to professional castes perceived as elitist. GRISWOLD, supra note 462, at 15-20 (discussing the “deprofessionalizing” of the American legal profession in the 1840s due to “overzealous democratization” in the Jacksonian era); RICHARD L. ABEL, AMERICAN LAWYERS 4-5 (1989); 2 CHROUST, supra note 455, at 156.

Some informal enforcement of group norms must certainly have occurred. See, e.g., JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 285-87 (1950) (noting that until 1925, most of the bar associations were informal social or political organizations); John A. Matzko, “The Best Men of the Bar”: The Founding of the American Bar Association, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 77 (Gerard W. Gawalt ed., 1984). Nonetheless, the nineteenth century American legal profession was far too geographically dispersed and professionally unorganized for meaningful self-regulation.
the ensuing decades, the ABA and the growing number of state and local bar associations undertook the task of "professionalizing" the business of law practice. This effort took a number of forms, including raising and standardizing the requirements for admission to the practice of law and efforts to assert control over the discipline of attorneys.

With respect to attorney discipline, two developments in the "professionalism" campaign of the organized bar are of special importance: the promulgation by the ABA of codes of ethical conduct, beginning in 1908 with the Canons of Legal Ethics, and the emergence of increasingly powerful bar organizations.

c. The Canons of Legal Ethics and the Rise of the Organized Bar

Examination of the original 1908 Canons reveals "thirty-two hortatory statements that insisted that a lawyer pursue the high road in every endeavor mentioned." Though amended from time to time until 1969, and eventually numbering forty-seven, the essentially aspirational character of the 1908 Canons was never altered.

It seems unlikely that the drafters of the 1908 Canons conceived of them as an enforceable code of conduct. Nonetheless, because of another development in the "professionalism" campaign of the bar, the Canons assumed that role.

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466. "By 1890 there were 20 state or territorial bar associations in the United States. By 1900 there were 40; by 1916 there were 48; by 1925 all the states and territories could claim some sort of association." Hurst, supra note 464 at 174.

467. See Pound, supra note 452, at 353 ("I have spoken of the rise of Bar Associations in the last three decades of the nineteenth century, and the growth of Bar organization in the present century as a progress in undoing the mischief wrought in the deprofessionalizing of the practice of law in America before and after the Civil War. This undoing is a real achievement. . . . We are restoring the practice of law as a profession.")


471. Wolfram, supra note 274, § 2.6.2, at 54. "The 1908 Canons were not designed to break new ground. They were largely copied from the 1887 Code of Ethics of the Alabama Bar Association." Wolfram, supra note 274, § 2.6.2, at 54. The Alabama Code, in its turn, drew heavily on still earlier sources, particularly George Sharswood, Essay on Professional Ethics (1854), published in ABA Rep. 1 (1907). Wolfram, supra note 274, § 2.6.2, at 54.


473. Wolfram, supra note 274, § 2.6.2, at 54.

474. Professor Wolfram asserts that "[t]he Canons were probably not intended to have any direct legal effect, but it is clear that the ABA leadership contemplated that they would be influential in lawyer discipline proceedings in courts." Id. § 2.6.2, at 55.
Roughly ten years after the promulgation of the *Canons*, the effort of bar associations to attain greater control of the legal profession took the form of a movement for an “integrated” bar in the states. An “integrated bar,” now more commonly called a “unified” bar, is one in which membership in the state bar association is mandatory and must be maintained in order to keep a license to practice law. In a unified bar, the bar association assumes primary control over the discipline of attorneys.

By the 1950s, twenty-five states had unified bars. By the 1980s, the number had risen to thirty-three. Even in those states where bars were not formally unified, by mid-century bar associations had assumed a role in the regulation of law practice largely indistinguishable from that of unified bars, a role they maintain to this day. Professor Wolfram puts it this way:

[C]ourts serve as the largely passive sounding boards and official approvers or disapprovers of [ethics] initiatives that are taken by lawyers operating through bar associations . . . . [Bar associations’] power can be much the same regardless of the particular form or official status of the bar association. Formal and,

475. In 1918, the American Judicature Society published a Model Act for the “integration” of state bars. Devlin, *supra* note 451, at 920. In 1921, North Dakota became the first such bar. *Id.*; *Wolfram, supra* note 274, § 2.3, at 36 n.7; *Griswold, supra* note 463, at 28-29.


477. *Id.* § 2.3, at 36 n.7; *Griswold, supra* note 463, at 28.

478. *Wolfram, supra* note 274, § 2.3, at 36-37; *Griswold, supra* note 463, at 28. State courts often view the state bar association as an administrative arm of the court. See, e.g., Sams v. Olah, 169 S.E.2d 790, 795-96 (Ga. 1969) (indicating that state law establishes the state bar as an “administrative arm of the Court” (citation omitted)), *cert. denied,* 397 U.S. 914 (1970). In states with unified bars, the state bar association is delegated by statute or rule of court the authority to adopt rules of attorney conduct, subject to the approval of the state supreme court. See, e.g., *ALA. CODE* § 34-3-43(a)(3) (1975) (granting the power “[s]ubject to the approval of the supreme court, to formulate rules governing the conduct of all persons admitted to practice . . . .”); *TEXAS CODE ANN.* §§ 81.024 et seq. (West 1996) (describing the process by which the state supreme court adopts rules governing attorney conduct). Unified bar associations also administer the rules by investigating complaints and imposing penalties through bar ethics committees. Severe sanctions such as suspension and disbarment require the imprimatur of the state supreme court.


481. In states without unified bars, the highest court customarily develops ethical rules either through its own work or that of a committee it creates whose results are reviewed and approved, modified or rejected by the court. While the bar association may not be included in this process by statute or rule, in practice it generally dominates the work of rulemaking. For example, in New York the *Code of Professional Responsibility* was written by the New York Bar Association and incorporated into the Judicial Codes of the several appellate divisions after review. Greene v. Grievance Comm. for Ninth Judicial Dist., 429 N.E.2d 390, 393 (N.Y. 1981), *cert. denied,* 455 U.S. 1035 (1982). The incorporation occurred pursuant to statute. *Id.* Moreover, in states with non-unified bars, the courts customarily delegate the enforcement of professional misconduct rules to the voluntary bar associations, reserving to themselves powers of review and control over the ultimate sanctions of suspension from practice and disbarment. See, e.g., *ORIE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS: A STUDY OF PROFESSIONAL ETHICS, DISCIPLINE AND DISBARMENT* 95 (1952) (reporting a study comparing results of the attorney discipline process in California, which integrated its bar in 1927, with that of Illinois, whose Supreme Court had vested disciplinary investigations in the voluntary Illinois State and Chicago Bar Associations).
to an extent, functional differences do exist between [unified and non-unified bars]. At the end of the day, however, bar associations exercise pervasive influence over bar admission and discipline, whatever the form of their organization.482

As bar associations gained increasing control over the lawyer disciplinary process from the 1920s forward, they were obliged to settle on some standards to apply in their new enterprise of self-regulation. The ABA’s 1908 Canons rapidly became the accepted expression of the profession’s ethical norms,483 and continued to occupy that position until 1969, when they were supplanted by the ABA Model Code of Professional Responsibility.484

Many commentators expressed dismay over the shortcomings of the 1908 Canons as a system of ethical regulations.485 Among critics of the 1908 Canons there was a sense of surprise that these “generalizations designed for an earlier era”486 should have been so rapidly and universally accepted as the ethical rules of the profession, and that their hegemony should have persisted for so long.

In fact, given the historical milieu in which the 1908 Canons arose and held sway, their content and tenacity is entirely unsurprising. Recall that as the renascent bar associations of the early twentieth century gained de facto control over the process of regulating lawyers, the role they were assuming was that historically claimed by judges—determining who was fit to become and remain a member of the profession. While administration of both the admission and exclusion processes was increasingly dominated by the bar, both unified and

482. WOLFRAM, supra note 274, § 2.3, at 33-34. One particularly germane recent manifestation of the now-engrained tendency of courts to defer to bar associations in matters of ethics is contained in the response of the Conference of Chief Justices to the Justice Department “no contact” regulation. After recounting the ABA’s opposition to the Thornburgh Memorandum and its position on the proper interpretation of DR 7-104(A)(1) and Model Rule 4.2, the Chief Justices wrote: “The ABA’s conclusions regarding DR 7-104(A)(1) and Rule 4.2 must be considered authoritative in light of the ABA’s role in formulating those rules.” Chief Justices’ Comment, supra note 416, at 5-6 (emphasis added).

483. By 1910, the Canons had been adopted in twenty-three states. Devlin, supra note 451, at 918. Professor Wolfram writes that, “As bar associations became more active in enforcing professional standards through disbarment and suspension procedures of courts, the Canons came to be widely regarded as ‘wholesome standards of professional action’ or as ‘guidelines’ which lawyers could ignore only at their peril.” WOLFRAM, supra note 274, § 2.6.2, at 55 (citations omitted).

484. Id. § 2.6.3, at 56.

485. Some observers complained that the Canons were too general, in that they consisted principally of high-toned moralisms that provided little specific guidance to practitioners contemplating future action. The Canons have been called “pontifical pap,” ARTHUR G. HAYS, CITY LAWYER 32 (1942); “glittering generalities,” James E. Starrs, Professional Responsibility: Three Basic Propositions, 5 AM. CRIM. L.Q. 17, 20 (1966-67); and “vaporous platitudes,” Professional Ethics: Lies & Lawyers, TIME, May 13, 1966, at 81 (quoting Anthony Amsterdam).

486. Harlan F. Stone, The Public Influence of the Bar, 48 HARV. L. REV. 1, 10 (1934). Critics often noted that the Canons were outdated because “[t]hey speak of a kind of law practice that was carried on almost entirely in the courtroom.” WOLFRAM, supra note 274, § 2.6.2, at 54. See also Powell, supra note 472. Commenting on the need for reevaluating the 1908 Canons, Justice Powell, then the incoming president of the ABA, observed: “In 1908 the typical lawyer was a general practitioner, usually alone, who divided his time between the courts and a family type of office practice.” Id. at 4.
voluntary bar associations ultimately held their warrant for performing the task of self-regulation from the courts. In the area of discipline, judges could deal with specific instances of misconduct before them through the contempt power. The portion of the bench’s regulatory authority that it largely delegated to the bar dealt with determination of overall fitness for admission to and continued membership in the profession. Under these circumstances the generality of the 1908 Canons was quite natural because they functioned not as a detailed guide to daily practice, but as an expression of the general norms to which a lawyer should conform on pain of exclusion from the profession.

d. “Reform”: The Model Code and the Emergence of Enforcement Bureaucracies

As the 1960s arrived, continuing complaints about the existing attorney regulatory system led to two complementary reform efforts: revision of the 1908 Canons and an overhaul of the bar’s disciplinary enforcement mechanisms. In 1964, ABA president, and later Justice of the Supreme Court, Lewis F. Powell, Jr. appointed an ABA committee to study the 1908 Canons and propose revisions to them. In his many public statements, Powell’s consistent theme was that the combination of a set of ethical rules, sound in principle but antiquated in form, with inadequate mechanisms for enforcement of attorney discipline was failing to purge the ranks of the unethical and incompetent.

487. See Hazard, supra note 5, at 1250-51 (discussing the effect of the interaction of the bench and bar in transforming professional norms into enforceable rules).

488. Likewise, even though in the decades following the adoption of the Canons the daily business of the legal profession became more centered on the counselling function, the types of misconduct of immediate concern to judges continued to be those surrounding litigation. Hence, the Canons, with their emphasis on trial work, persisted in part because they were a better fit to the needs of the courts than they were to the bar at large.


490. See, e.g., Powell, supra note 472. Powell declared:

It is not suggested that all or even a substantial number of the Canons are obsolete. There is, of course, no thought of starting out to rewrite de novo the ethical standards of the legal profession. The broad principles, as reflected eloquently in the Canons, are immutable. No doubt a major portion of the present Canons will be found adequate. The greater need may be for additional Canons rather than widespread revision of existing ones.

Closely related to the contents of the Canons is their enforcement. There is growing dissatisfaction [sic] among lawyers with the adequacy of the discipline maintained by our profession.

Id. at 6.

On several occasions Powell cited as an example of the failure of the attorney regulatory system the very low number of disbarments it produced. See, e.g., id. at 7 (citing E. Blythe Stason, Disbarments and Disciplinary Action, 49 A.B.A. J. 270 (March 1963)); Lewis F. Powell, Jr., Areas of Emphasis for 1964/65, at 5-6, Address Before the ABA House of Delegates (Aug. 14, 1964) (New York, N.Y.) (on file with Lewis F. Powell, Jr. Archives, Washington & Lee University) [hereinafter Areas of Emphasis]; see also Lewis F. Powell, Jr., The President’s Annual Address: The State of the Legal Profession, at 5-6, Address to the ABA House of Delegates (Aug. 9, 1965) (New York, N.Y.) (on file with Lewis F. Powell, Jr. Archives, Washington & Lee University)
In 1969, the ABA adopted the Model Code of Professional Responsibility.\textsuperscript{491} The Model Code contains three levels of norms: first, "Canons," which are short statements of general principle; second, "Ethical Considerations," which are commentaries "couched in the profession's traditional ethical rhetoric;"\textsuperscript{492} and third, "Disciplinary Rules," which function as statutes imposing reasonably specific minimum standards of conduct.\textsuperscript{493} The principal innovation of the Model Code was not its fundamental content, which remained strikingly similar to that of the 1908 Canons,\textsuperscript{494} but the inclusion of the "DRs," the standards of minimum conduct. The disciplinary rules are the component of the Model Code responsive to the call by Lewis Powell and others for specific rules enforceable by disciplinary bodies. By 1972, all but three states had taken steps to adopt the Model Code.\textsuperscript{495}

In the early 1970s, bar associations and courts across the country not only abandoned the 1908 Canons for the Model Code, but undertook sweeping modifications of the mechanisms for enforcing lawyer discipline.\textsuperscript{496} Informal handling of grievance complaints and utilization of volunteers from the bar as investigators and prosecutors were abandoned in favor of the professionalization of disciplinary enforcement through the creation of formal disciplinary agencies.\textsuperscript{497} The combination of the widespread adoption of the Model Code and the proliferation of disciplinary bureaucracies\textsuperscript{498} resulted in an increasing "legalization" of attorney discipline.

\textsuperscript{491} WOLFRAM, supra note 274, § 2.6.3, at 56.
\textsuperscript{492} Hazard, supra note 5, at 1251.
\textsuperscript{493} According to the preamble of the Code, the Disciplinary Rules state "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." MODEL CODE pmbl., preliminary statement.
\textsuperscript{494} "The preoccupations of the old Canons still lie heavy in the new Code, and they are the preoccupations of a profession composed overwhelmingly of individual practitioners serving individual clients." Charles Frankel, Book Review, 43 U. CHI. L. REV. 874, 886 (1976).
\textsuperscript{495} REPORT OF SPECIAL COMMITTEE TO SECURE ADOPTION OF THE CODE OF PROFESSIONAL RESPONSIBILITY, in 97 AM. BAR ASS'N, ANNUAL REPORT 268 (1972) (reporting adoption of the Model Code in forty states and substantial progress towards adoption in seven more).
\textsuperscript{496} One catalyst for these changes was the "Clark Report" of the ABA Special Committee on Evaluation of Disciplinary Enforcement, named after its chairman, former Supreme Court Justice Tom Clark. SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 5-6 (1970) [hereinafter PROBLEMS AND RECOMMENDATIONS]. The report found a "scandalous situation" in which "[d]isciplinary action [was] practically nonexistent in many jurisdictions; practices and procedures [were] antiquated; [and] many disciplinary agencies ha[d] little power to take effective steps against malefactors." Id. at 1. For a general account of the reform effort, see Devlin, supra note 451, at 921-30.
\textsuperscript{497} PROBLEMS AND RECOMMENDATIONS at 5, 9. "The major thrust of the Clark Report was its recognition of the need to professionalize lawyer disciplinary agencies." Devlin, supra note 451, at 926.
Still More “Reform”: The Model Rules

Despite its rapid and nearly universal acceptance by the states, the Model Code came under immediate attack. By 1977, leaders of the ABA were already calling for a complete overhaul. After laboring for six years, the Kutak Commission produced the Model Rules of Professional Conduct, which were adopted on August 2, 1983. The Model Rules are overtly statutory in form. They consist of fifty-four rules, accompanied by commentary. Not all of the rules are prohibitions; some describe conduct that lawyers may undertake in the exercise of discretion. Nonetheless, all the rules are plainly relevant to attorney disciplinary proceedings. It can be argued that the core principles embodied in the 1908 Canons are reflected, largely unchanged, in the Model Rules. Nonetheless, even if one accepts this premise, because of their form the Model Rules represent a significant acceleration of the process of legalizing ethics regulation begun in the Model Code.

All in all, the progression of the last twenty-five years has been to an increasing

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499. WOLFRAM, supra note 274, § 2.6.4, at 60.
501. WOLFRAM, supra note 274, § 2.6.4, at 61. The official title of the committee was the Commission on Evaluation of Professional Standards. MODEL RULES ANN. commentary at 4.
502. MODEL RULES ANN. commentary at 5. At this writing, the Model Rules have been adopted in some form in thirty-seven jurisdictions: Alaska, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming. Of these thirty-seven, only Alaska has adopted the Model Rules and accompanying commentary verbatim. See ALASKA RULES OF PROFESSIONAL CONDUCT (1993) (mirroring Model Rules). The remaining thirty-six jurisdictions use the Model Rules only with alterations. For example, six states, Illinois, Louisiana, Montana, Nebraska, New Jersey and Washington, adopted the Model Rules without the comments. This omission can have significant practical effects. As but one salient instance, exclusion of the comment to Model Rule 3.8 (which says that Model Rule 3.3 applies to grand juries, see supra note 6 and accompanying text) has the effect of eliminating the requirement of presentation of exculpatory evidence to the grand jury. Ten jurisdictions, Georgia, Iowa, Massachusetts, Nebraska, New York, Ohio, Oregon, Tennessee, Vermont and Virginia, still use the Model Code. Three jurisdictions, including most prominently California, have created their own codes of legal ethics. RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL.; ME. BAR RULES, CODE OF PROFESSIONAL RESPONSIBILITY; N.C. RULES OF PROFESSIONAL CONDUCT. Puerto Rico is the last holdout for the Canons: 4 L.P.R.A. App. IX (1993).
503. The commentary “explains and illustrates the meaning of and purpose of the Rule.” MODEL RULES ANN. scope.
504. See generally MODEL RULES ANN. pmbl., scope (defining the nature of lawyers' responsibilities generally and the role of the Model Rules in ensuring that responsibilities are met). See also WOLFRAM, supra note 274, § 2.6.4, at 63 (describing types of rules).
505. The reporter for the Kutak Commission, Professor Geoffrey Hazard, has made this case. Hazard, supra note 5, at 1249.
506. Id. at 1249, 1251. Professor Hazard writes:

In retrospect, it is clear that the crucial step in the “legalization” process occurred in the change from the 1908 Canons to the 1970 Code, rather than from the Code to the 1983 Rules. It was the Code that first embraced legally binding norms in the form of the Disciplinary Rules, albeit also retaining (in the
codification of black letter rules administered by disciplinary bureaucracies. Violation of the rules became less and less a falling away from the standards of a fraternal association, to be dealt with fairly informally by other members, and more and more like being accused of and tried for a violation of the law. Indeed, it is the transformation of ethics regulation of lawyers into a system so "law-like" that initially suggests the need for an inquiry about its legitimacy. If ethics regulation means rules of minimally acceptable conduct enforceable by punitive, coercive sanctions, a regime functionally indistinguishable from the positive law of the state, it behooves us to examine the source of the system's claim on lawyers' obedience.

It is no answer to say simply that ethics rules are legitimated by the approval of a state supreme court. In the first place, if, as I believe, Professor Wolfram is right in concluding that the ethics regulation process is dominated by the bars, with the state courts acting as "largely passive" partners, then the question even for purely state practitioners becomes not merely whether a court has blessed bar-created rules, but whether the rule-making and rule-enforcing processes of the bars are themselves legitimate. And when the issue is the reach of state ethics rules in federal practice, the imprimatur of a state court carries no necessary weight at all.

2. Regulation of Prosecutors and the Legitimacy of Ethics Rules
   a. The Legitimating Characteristics of Traditional Ethics Rules

   Traditional rules of legal ethics, including the vast majority of the Model Rules, have shared two characteristics.

   i. Subject matter

   The first characteristic shared by ethical rules as traditionally understood is a common subject matter. Such rules concern topics at the core of professional self-definition. These topics include:
   (1) Rules of moral conduct and right action in the ordinary sense;

   Ethical Considerations) the fraternal voice of the Canons. The Code's Disciplinary Rules formed the baseline of the 1983 Rules; indeed, many of the DR's were carried over intact into the Rules.

   Id.

   See, e.g., Murray L. Schwartz, The Death and Regeneration of Ethics, 1980 AM. B. FOUND. RES. J. 953, 953-54 (noting shift from "articulating professional standards, suffused with ideas of morality and ethics, and enforced if at all by informal sanctions and peer pressure, to enacting comprehensive and explicit legislation attended by formally imposed sanctions for breach") (citation omitted).

   See supra note 482 and accompanying text (quoting relevant language from Wolfram's Modern Legal Ethics and providing reference material supporting this proposition).

   Such rules include:
   (a) Do not steal from the client. Model Rule 1.15 "addresses the lawyer's ethical duty with regard to
(2) Rules expressing the importance of loyalty to clients, and defining the limits of such loyalty;510

(3) Rules that define the lawyer’s role in the adversary system. Among these are rules that address the dissonance between society’s ethics and the lawyer’s obligation to represent loyally people who may not themselves be honest or ethical.511 Also among the rules defining the lawyer’s role in the adversary
system are rules that prohibit subverting the system by doing things to which the opposing lawyer cannot respond;\textsuperscript{512}

(4) Rules of minimal professional competence;\textsuperscript{513}

(5) What I call the "guild rules" — rules that can either be described as promoting the identity and integrity of the legal profession or as protecting lawyers' monopoly on legal business.\textsuperscript{514}

One can readily take issue with the particulars of this taxonomy. Some might say that there should be more categories, others that there should be fewer.\textsuperscript{515} Others might point to particular rules that do not fit readily in any of these categories. The fundamental point remains, however, that rules of legal ethics traditionally have been \textit{about} defining what it means to be a lawyer and setting standards of fitness for membership in the profession. Viewed in the affirmative, as a description of desirable behavior, they describe the bar's vision of itself and its role in society. Viewed as a list of prohibitions, almost all of the standards subtle and contentious than implied by this summary of Model Rule 3.3. It has spawned endless debate. \textit{See, e.g.}, Charles W. Wolfram, \textit{Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System}, 1980 AM. BAR. FOUND. RESEARCH J. 964. \textit{See also} WOLFRAM, supra note 274, § 12.5.1, at 653 n.36 (listing numerous journal articles on the subject). The point here is not the particulars of the rule, but the fact that its subject is the central ethical dilemma of being a lawyer: Where do my obligations to my client stop and where do my obligations to society begin?

(d) Try to expedite litigation, unless delay helps your client. \textit{Model Rules Rule 3.2} ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); and

(e) Respect the rights of third parties, even though their interests must be subordinated to those of the client. \textit{Model Rules Rule 4.4} (respect for rights of third persons).

512. Rules in this category include:

(a) Do not make ex parte contact with judges or jurors. \textit{Model Rules Rule 3.5(b)} (prohibiting ex parte communications with judges, jurors and other officials);

(b) Do not try the case in the press. \textit{Model Rules Rule 3.6} (governing trial publicity); and

(c) As a prosecutor, ensure that the accused is advised of his right to counsel and is afforded a reasonable opportunity to obtain counsel. \textit{Model Rules Rule 3.8(b)}.

513. Rules in this category include:

(a) Be competent. \textit{Model Rules Rule 1.1};

(b) Be diligent. \textit{Model Rules Rule 1.3};

(c) Give proper supervision to your subordinates. \textit{Model Rules Rules 5.1} (supervision of lawyers); \textit{Model Rules Rule 5.3} (supervision of non-lawyers); and

(d) Do not file pleadings without a basis in law. \textit{Model Rules Rule 3.1} (regarding meritorious claims and contentions).

514. Rules in this category include:

(a) unauthorized practice of law rules. \textit{Model Rules Rule 5.5};

(b) the prohibition against partnerships with non-lawyers. \textit{Model Rules Rule 5.4};

(c) advertising and solicitation rules. \textit{Model Rules Rule 7.1—7.5}.

515. For example, Professor Hazard argues that the "basic ethical rules of representation that the narrative both presupposes and illustrates" have remained essentially unchanged for the past two centuries, and that they "enforce three core values: loyalty, confidentiality, and candor to the court." Hazard, \textit{supra} note 5, at 1246.
proscribe behavior that, if knowingly or persistently engaged in, would merit disqualifying the offender from the profession.

ii. Consensus

The second defining characteristic of traditional ethical standards is that, in addition to addressing the subject of fitness for membership in the profession, the rules have generally represented a consensus across the profession. By consensus I do not mean absolute unanimity. There certainly has been disagreement, often vigorous, about this or that rule, or part of a rule. It is nonetheless fair to say that, historically, the principles animating the rules have been shared by the overwhelming majority of attorneys. It was the existence of such a consensus that allowed Lewis Powell to refer to the 1908 Canons as “an articulate expression of the ‘conscience of the profession in the 19th and early 20th Centuries,’” and to call for the 1908 Canons’ reform in order to ensure that “they now conform to the conscience of the bar in the mid-20th Century.” Moreover, traditionally the consensus has run across all sectors of the profession: attorneys, judges, those in big firms, those in small firms, government lawyers and private practitioners, corporate counsel and tort litigators, prosecutors and defense attorneys. There is no doubt that the cause of consensus has in the past been aided by the generality of the rules. But even those few rules that addressed a particular practice area represented agreement between those practicing on both sides in that area.

b. Ethics Rules as a Narrative of the Bar

The combination of subject matter and consensus gave traditional ethical rules moral force. Moreover, the subject — principles defining what it is to be a lawyer — combined with the consensus about the principles, make it appropriate, as Professors Hazard and Koniak have previously argued, to think of traditional ethical standards as a “narrative” or “nomos” describing the normative universe of lawyers.

516. See, e.g., Koniak, supra note 5, at 1441-47 (discussing the conflict within the ABA over the Kutak Commission’s draft of Model Rule 1.6 regarding client confidentiality).
518. Id.
519. For example, Canon 5 concerns criminal practice. It says that defense attorneys may undertake the defense even of those they believe to be guilty, and may assert “every defense that the law of the land permits.” 1908 CANONS Canon 5. Of prosecutors it says that their “primary duty... is not to convict, but to see that justice is done,” and it condemns any effort to hide facts or witnesses favorable to the defense. Id. General though these statements may be, each side of the often-polarized criminal bar can agree that they fairly describe both its role and that of its adversary. Indeed, I might be disposed to go further and say that to a reflective attorney of upright character on either side of the criminal bar, Canon 5 says all that really needs to be said about professional ethics.
520. Hazard, supra note 5, at 1242-46.
521. Koniak, supra note 5, at 1391.
Because traditional ethical standards were a particularization of the shared narrative of the legal profession, the rules had aspirational power. For the same reason, those individuals found to have violated the shared vision were disposed to accept discipline meted out for those violations. In this respect the idea of ethical rules as a narrative of the profession is of more than descriptive consequence. The legitimacy of the ethics regulation process has always rested, and continues to rest, on the perception among lawyers that it is about adherence to shared moral norms that define suitability for membership in the profession.

This perception of the nature of the system of legal ethics has proven remarkably tenacious, even in the face of accelerating changes in the nature of the actual system. As we have seen, the 1908 Canons persisted, often maligned but unmolested, for six decades. In the ensuing fourteen years there were two wholesale rewrites of the profession’s standards. The second of these, the Model Rules, took six years to complete and has to this day not achieved anything approaching universal acceptance. Despite the actual state of flux in legal ethics rules, the perception that legal ethics rules are the embodiment of a shared moral vision which defines fitness for membership in the profession endures and is the source of much of the rhetorical ammunition being fired by bar associations (and sometimes judges) when prosecutors and others resist the rules at issue in this Article. The critics of prosecutorial resistance are shocked; shocked at the notion that prosecutors have the “arrogance” to claim that they are not bound by rules of ethics. And it would be a shocking claim, if these rules were legitimate ethical rules.

c. The Illegitimacy of Model Rules 3.3(d), 3.8(f) and 4.2

In fact, the rules discussed here depart from traditional ethics rules in a number of ways that render them illegitimate.

i. Subject matter

The rules on exculpatory evidence (Model Rule 3.3), attorney subpoenas (Model Rule 3.8(f)) and contact with represented persons (Model Rule 4.2) are not about fitness for membership in the profession. They are not about honesty.

522. See supra notes 501-08 (broadly describing the statutory nature of the Model Rules).
523. See, e.g., In re Doe, 801 F. Supp. 478, 480 (D.N.M. 1992) (“Today, in the context of a disciplinary proceeding, the government threatens the integrity of our tripartite structure by arguing its lawyers, in the course of enforcing the laws regulating public conduct, may disregard the laws regulating their own conduct.”).
524. See, e.g., SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES, ABA MID-YEAR MEETING 8 (1990) (opposing (1) exemption for Department of Justice lawyers from Model Rule 4.2 and (2) “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”); Norton, supra note 258, at 207 (“There is something very disquieting in what appears to be the emerging notion that attorneys for the government are to be held to a different and lower standard of ethics than are other members of the bar.”).
They are not about competence. They are not about maintaining the integrity of the profession. They are not about the classic conflict between duty to client and the dictates of ordinary morality. They are not even about seeking to protect the integrity of the traditional adversary system.

One might argue that all three rules at issue here fall into this last category, but close examination reveals that they do not. The exculpatory-evidence-to-grand-juries rule, far from protecting the traditional adversary system, tries by fiat to make adversarial a component of the Anglo-American criminal justice system which has for over 800 years not been so.

Extension of the no contact rule to non-custodial, pre-indictment settings does the same thing. The treatment of the rule by the federal courts demonstrates the point. The courts are willing to apply the rule to settings that tradition and the developments in constitutional law from *Massiah* onward have made adversarial. They are unwilling to allow a disciplinary rule to expand the adversary process into portions of the investigative phase of criminal cases that it has never heretofore reached.

The attorney subpoena rule is the most flagrant deviation of the three. Model Rule 3.8(f) does not even look like an ethical rule. It is unique and unprecedented in requiring a judicial order before an attorney takes a particular step, and in setting out a multi-part test for the court to apply in determining whether the order should be issued. Far from protecting the traditional adversary system, the rule radically alters one of the defining features of that system — the sphere of confidentiality surrounding the attorney-client relation — and, like the exculpatory evidence rule, injects adversary proceedings into the grand jury where they have not historically belonged.

These are not rules about legal ethics. They are about changing executive policy, legislative enactments, and judicial decisions regarding criminal procedure.

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525. One might argue that Model Rule 3.8(f) is about either loyalty or confidentiality, two of the "three core values" (the other being candor to the court) that Professor Hazard says ethical rules enforce. Hazard, supra note 5, at 1246. The difficulty is that, at least hitherto, ethics rules have generally confined themselves to defining the duties of confidentiality and loyalty by considering the limits on one's relationship with one's own client. A rule restricting prosecutors from issuing grand jury subpoenas to attorneys has no relationship to the prosecutor's duty of loyalty or confidentiality to his client: the people of the state or nation by whom he is employed.

526. See supra notes 166-72 and accompanying text (discussing alterations of attorney-client and work product privileges implicit in Model Rule 3.8(f)).

527. See supra notes 173-90 and accompanying text (discussing modifications of grand jury practice that would be mandated by Model Rule 3.8(f)).

Moreover, other rules concerned with protection of the adversary system tend to be directed at situations where one lawyer does something that undermines the system because the other lawyer does not know about it (destroying or failing to disclose evidence), or because there is no adequate response within the system if the lawyer finds out (pre-trial publicity). An attorney subpoena guarantees open, violently contested adversarial dispute.
ii. Consensus

These rules do not represent consensus. Exactly the reverse. They are opposed virtually unanimously by the sector of the bar on whom their penalties would fall — prosecutors. Moreover, the structure of the ABA and the process by which the organization adopts rules of professional conduct makes a mockery of any claim that these rules represent a consensus among the regulated population.

As an example, in 1990, the membership of the ABA Standing Committee on Ethics and Professional Responsibility, which studies and recommends amendments to the Model Rules, contained not a single prosecutor.\(^5\)\(^2\)\(^8\) At its August 1990 meeting, of the 463 members of the ABA House of Delegates, only two can be identified as prosecutors: Attorney General Richard Thornburgh and one state attorney general.\(^5\)\(^2\)\(^9\) Prosecutors are not outvoted in the ABA; they are, for all intents and purposes, unrepresented.

The absence of consent, or even meaningful participation in the adoption process by the very lawyers subject to these rules, is the fact that most clearly delegitimates them as rules of professional self-regulation. As far as I am aware, these rules are the only instance where one side of a practice area has captured the rule-making process, made rules and in effect declared to the other side: “We don’t care what you think. We’ve got the votes. Do it our way or get disbarred.” The implications of this behavior for other practice areas, like labor law, personal injury litigation or environmental law, where people have a tendency to choose sides and stay there over a career, are obvious.

Still, one might argue that prosecutors are just sore losers. Majority rules, and government lawyers should become more involved in the profession and send more delegates to ABA conventions. But it is the fact that these are criminal rules, whose sanctions would fall on agents of the government, that gives rise to the strongest arguments for their illegitimacy.

B. ETHICS RULES IN CONFLICT WITH THE LAW OF THE STATE

At the outset of this part of the discussion, it is useful to expand on the notion of legal ethics rules as a self-defined narrative of the bar in order to contrast that narrative with the law of the state governing lawyers.

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528. The membership was: Helaine Barnett (Legal Aid Society of New York); Michael Franck (Executive Director, State Bar of Michigan; formerly private practitioner, insurance defense); William F. Womble, Jr. (private practitioner, commercial litigation); Ralph G. Elliot (private practitioner); Daniel T. Goyette (public defender, Kentucky); Daniel Robert Coquillette (Professor of Law, Boston College; formerly private practitioner); David Isbell (private practitioner); William C. McLearn (private practitioner, commercial litigation); and Philip S. Anderson (private practitioner). AMERICAN BAR ASSOCIATION 1990/91 DIRECTORY 36.

529. These figures are derived from a comparison of the roster of the ABA House of Delegates, \textit{id.} at 13, with biographical data from \textit{Martindale-Hubbell} and other standard legal biographical sources. It is possible that more than two prosecutors were present. I am unable to identify the affiliations of 21 of the 463 delegates. What is clear is that no meaningful number of prosecutors were delegates.
1. Symbiosis: The Bar and the State

There has always been tension between the normative universe of the legal profession and that of the legal system lawyers serve. After all, one of the most romantic images in the bar’s narrative is the lone lawyer standing between his client and the power of the State.\textsuperscript{530} Yet there is constant creative interplay between the law of the State and the law or narrative of bar. In thinking about that interaction, one needs to remember several things.

First, there is more overlap than conflict. After all, lawyers who are members of the bar administer the mechanisms of the State. Lawyers are judges, prosecutors, members of congress, Attorneys General and presidents. These people received the same legal education, took the same “professional responsibility” courses and were socialized in the same professional values as private practitioners. Consequently, the lawyer agents of the state have inevitably internalized much of the bar’s normative vision.

Second, even considered as a monolithic entity, the State recognizes that its objectives — here administering a system of criminal justice consistent with constitutional guarantees of due process — cannot be achieved without allowing a sphere of autonomy for lawyers.

Third, the organized bar, at least until now, has always recognized the primacy of the democratic constitutional order in making positive law governing conduct of lawyers. Where obligations imposed by a bar rule conflicted with the law of the State, the bar recognized the lawyer had to obey the State.\textsuperscript{531} Until now, the bar has never claimed the right to punish members who were obeying law of the state.

2. Consent of the Governed: Government Lawyers Cannot Be Subject to Ethical Sanctions If They Are Defined Out of “The Bar”

Professor Susan Koniak has discussed the attorney-subpoena rule as an example of an ethics rule that is integral to the narrative of the bar, but which is in conflict with the law of State.\textsuperscript{532} Though she does not speak in precisely these terms, implicit in her presentation is the claim that because the attorney subpoena

\textsuperscript{530}. See, e.g., Professor Koniak’s discussion of the 1735 trial of John Peter Zenger for seditious libel against the colonial governor of New York. Koniak, \textit{supra} note 5, at 1448-50 (“The central and recurring theme in the profession’s narratives portrays the lawyer as champion, defending the client’s life and liberty against the government . . . .”).

\textsuperscript{531}. \textit{See MODEL RULES} Rule 1.6 cmt. (discussing the lawyer’s duty to withdraw and the lawyer’s professional discretion to reveal information in order to prevent prospective conduct that is criminal, as defined by state law, and likely to result in imminent death or substantial bodily harm); \textit{MODEL CODE} DR 4-101(C)(2) (concerning the ability of a lawyer to reveal confidential client information when required by state law or court order); \textit{see also supra} note 110 and accompanying text (noting that the attorney-client could historically be disrupted when a court ordered the attorney to disclose information).

\textsuperscript{532}. Koniak, \textit{supra} note 5, at 1398-1401.
rule is a manifestation of the narrative of the bar, it is a legitimate feature of the
ethics law of the bar. Although the conception of ethics rules as a narrative of the
legal profession is a useful and powerful tool, a careful examination of the notion
of law as narrative demonstrates why the rules examined here are illegitimate
when they conflict with the law of the State.

In order for a narrative or “nomos” to arise and gain the status of “law,” there
must exist a community whose members recognize themselves as such and who
accept the story as their own. The limits of the narrative are defined by the limits
of consensus within the group about its content. By definition, if a significant
segment of the community does not accept a part of the narrative, only two
conclusions are possible: either the portion of the narrative that cannot command
consensus is not part of the “nomos,” or the faction that does not accept the
disputed portion of the narrative is not really a part of the community that claims
the “nomos” as its law. Moreover, if the particular narrative under examination is
conceived of as embodying norms enforceable within the community, either
formally or informally, those norms that cannot command consensus cannot
legitimately be enforced against dissenters. Within the community, disputed
norms do not bear the legitimating imprimatur of the “nomos.” Outside the
community, attempts may be made to impose the community’s norms on others,
but the community can hardly argue that its own internal narrative creates “law”
in any form to which outsiders are bound to submit.

Seen in this light, the difficulties with a claim that the rules examined here are
legitimate expressions of the law of the bar become obvious. Prosecutors are
“members of the bar,” as are federal judges and legislators. Yet these groups,
most prominently prosecutors (as the segment of the bar upon whom the rules’
sanctions fall), do not agree that the rules represent manifestations of the shared
vision of the profession. One can conceive of the attorney subpoena rule, the
exculpatory evidence rule and the no contact rule as threads of the bar’s narrative
only by redefining the “bar” to exclude lawyers employed by the State as
legislators, judges and prosecutors. But if prosecutors are defined out of the
“bar,” how can it be legitimate to impose career-ending consequences on them
for violating the internal vision and self-regulating rules of a group to which they
do not belong?

Either the rules at issue here are not part of the bar’s narrative properly
understood, or their enforcement against prosecutors is illegitimate. As devel-
oped thus far, this argument would be equally applicable to ethics rules governing
any practice area. In short, the theory of law as narrative teaches the same lesson
as does the history of bar regulation — ethics rules are legitimate when they
express a consensus about issues that define membership in the profession.

3. The Bar Cannot Control the Law of the Nation through Ethical Rules

The rules I have been discussing present, however, an additional complication.
These rules are an attempt to capture the legal disciplinary process for the express purpose of controlling government policy through the imposition of sanctions against those who work in government. This effort is contrary to the constitutional order that lawyers are sworn to uphold.

The rules discussed in this Article illustrate the problem starkly. Remember that all of these rules are designed to expand the protections afforded criminal suspects by altering fundamental aspects of the criminal justice system. The rules seek to redefine how the grand jury works, when a criminal suspect is entitled to a lawyer and what information that lawyer may hold as confidential and what he must disclose. These are issues concerning the balance between society’s interest in the investigation and prosecution of crime, and the right of the individual to defend himself against charges of criminal wrongdoing.

Of course, the mere fact that a bar rule affects the fate of criminal suspects by regulating the way lawyers behave is no necessary barrier to ethical regulation. If it were, the ethics rules could not prohibit defense lawyers from active cooperation in client perjury or prosecutors from concealing evidence. What distinguishes the three rules at issue here is that they presume to supersede the conscious choices of Congress and the federal courts about the proper balance between the interests of society and those of the suspect.

Consider, for example, Model Rule 3.8(f), concerning attorney subpoenas. The result of the application of Model Rule 3.8(f) is that the zone of protection for the attorney-client relationship, whose boundaries the Supreme Court and other lesser tribunals have painstakingly defined by balancing competing public interests, is to be expanded. Carefully scrutinized, the justifications advanced for this expansion reflect nothing more than a difference of opinion about how to perform the utilitarian calculus that courts (and legislatures) have used to set the boundaries. The rule’s proponents are not claiming a new rights-based theory of privileges. They do not advance any novel claim of constitutional protection. They really say nothing more than this: we think the attorney-client

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533. See Model Rules Ann. Rule 1.16 cmt. (discussing a lawyer’s mandatory withdrawal from representation where the client demands that the lawyer actively cooperate in client perjury).

534. Model Rules Rule 3.8(d) (concerning obligations of prosecutor to disclose exculpatory and mitigating evidence).

535. See supra notes 126, 148 and accompanying text (discussing utilitarian justifications for the existence and scope of privileges protecting the attorney-client relationship).

536. Some commentators certainly argue that subpoenas directed to attorneys can implicate Sixth Amendment concerns such as the right to choose one’s counsel by creating a conflict between a subpoenaed attorney’s dual roles as advocate and witness, or the adequacy of the attorney’s representation. See, e.g., Genego, supra note 73, at 820-34; Stern & Hoffman, supra note 73, at 1804-07. Commentators have suggested that attorney subpoenas raise Fifth and Fourteenth Amendment due process concerns. Genego, supra note 73, at 834-40. But when such commentators call for an ethical rule on attorney subpoenas, they do so not because the Constitution commands such a rule, but because the Constitution as currently interpreted by the courts provides, in the commentators’ view, insufficient protection for the attorney-client relationship. See Genego, supra note 73, at 833-34, 839-40, 856-57 (arguing that although the practice of directing subpoenas at attorneys is not unconstitutional under current law, the practice is undesirable because of the significant additional costs to the
relationship should receive more protection from prosecutorial intrusion than the law now affords. We think so because we believe that relationship is more important and more at risk than the courts are willing to acknowledge, and we believe competing values such as the discovery of truth are either less implicated by restrictions on attorney subpoenas or relatively less important than the courts have thought.\(^{537}\)

That the organized bar would weigh the attorney-client relationship differently in the calculus of social values than do the organs of government is hardly a surprise. After all, the historical difference in perspective on the issue is the cause of the gap between the scope of the law of privilege and the bar’s rules about client confidentiality. What delegitimizes *Model Rule* 3.8(f) is its implicit assertion that the bar can ignore 400 years of Anglo-American law and substitute its social calculus for that of the national government.

Likewise, both *Model Rule* 3.8(f) and 3.3(d) attempt to alter characteristics of the federal grand jury that have remained constant for eight centuries, and which received in this decade the blessing of the Supreme Court. Finally, the no contact rule in the form espoused by the ABA is, in effect and by design, an end run around thirty years of federal constitutional case law on the interrogation of suspects.

The standard being advanced here, that ethical rules cannot impose greater restrictions on federal government lawyers than do federal statutes and case law, will seem to many unduly cramped. It runs contrary to the confident pronouncement of various participants in this debate, including the ABA itself, that the constitution and federal statutory and decisional law merely set minimum standards of conduct, but that ethics rules governing federal prosecutors as members of a learned profession are free to set “higher” standards.\(^{538}\) This

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537. The academic commentator who has most explicitly categorized *Model Rule* 3.8(f) as an expression of the bar’s ordering of values over the values of the government is Professor Koniak. *See* Koniak, *supra* note 5 (explicitly categorizing *Model Rule* 3.8(f) as an expression of the bar’s ordering of values over the values of government).

*See also* Genego, *supra* note 73, at 842-56 (analyzing the practice of subpoenaing attorneys using competing normative “models” of criminal procedure). Professor Genego concludes that the practice, “as presently constituted and utilized, [is] undesirable,” and should be regulated through, among other measures, ethical rules. *Id.* at 857, 863.

538. In its 1995 opinion on the scope of the “no-contact” rule, the ABA Ethics Committee stakes out this position unambiguously. It wrote:

> While the Fifth and Sixth Amendments provide protections to individuals in the context of a criminal case, the Constitution establishes only the “minimal historic safeguards” that the defendants must receive rather than the outer limits of those they may be afforded. Ethics rules, on the other hand, seek to regulate the conduct of lawyers according to the standards of the profession quite apart from other laws or rules that may also govern a lawyer’s actions. *Consequently, by delineating a lawyer’s duties*
assertion rests on seductive, but demonstrably erroneous, images of the nature of federal lawmaking and of legal ethics regulation.

The idea that ethical rules can set "higher" standards than the legally prescribed minimum rests on the sub rosa assumption that there is a hierarchy of values in the criminal justice system, a hierarchy in which fewer procedural protections for criminal suspects is "bad," and therefore low on the scale, while more procedural protections is "good," and therefore high on the scale. From this perspective, the perspective of a criminal suspect and the lawyer whose duty it is to defend him, it is easy to view the law as setting a minimum standard on a vertical scale. Seen from this perspective, any rule that moves the standard "up" the scale is self-evidently good.

Of course, this image is a simplistic distortion of what Congress and the Supreme Court do. Constitutional, procedural and evidentiary lawmaking is not a matter of choosing the minimally acceptable point on a vertical scale running upwards from bad to good. The more accurate image is that of selecting, on a horizontal scale, the point of balance that best accommodates inevitably conflicting interests of society and individual criminal suspects.

For example, the Supreme Court's Miranda decision and its progeny are all efforts to balance the need of society to solve crimes with the right of individuals to autonomy free of government coercion. Both solving crimes and individual autonomy are "good." Neither value can be accommodated absolutely. Consequently, it is perfectly possible for people of intelligence and good will to disagree heatedly about where the balance between these goods should be struck. The point here, however, is that in our system of government, the Constitution confers upon the Supreme Court of the United States the power to set the balance point. When the bar creates a rule like Model Rule 4.2, which requires federal prosecutors and their agents\textsuperscript{539} to behave differently in an area where the Court

\begin{quote}
to maintain standards of ethical conduct, ethical rules like Rule 4.2 may offer protections beyond those provided by the Constitution.
\end{quote}

Opinion 95-396, supra note 275 (emphasis added).

539. One foreseeable objection to the argument advanced here is that different standards do or should apply to lawyers, as opposed to police officers or government agents. An echo of this line of thinking appears in the original panel opinion in United States v. Hammad. 846 F.2d 834 (2d Cir. 1988). The panel held that Model Rule 4.2 had been violated because the prosecutor was involved in the planning of the activities of the informant, thus making the informant the prosecutor's "alter ego." The odd, but unmistakable, implication of the panel opinion was that, while undercover agents and informants can use deception to catch criminals, prosecutors must be virginally unaware of the deception to be practiced on their behalf. In Hammad, the panel suggested, in effect, that the more the prosecutor knows about what an informant is going to do, the closer he comes to an ethical violation. Id. at 859. In its final opinion, the court abandoned this approach. United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988).

While agents and prosecutors perform different roles in the criminal justice system, the idea that different standards of ethics should apply to each is a doubly dangerous one. As evidenced by the rules under examination in this Article, the notion that lawyers should behave "better" than agents can be employed to impose illegitimate controls on the entire criminal justice system. Just as dangerous, however, is the idea that police officers should be allowed to get away with violations of the rights of suspects because we cannot expect them to
has decided on a particular balance of social values, the effect is not to "improve" ethics, but to alter the constitutional balance. Neither the ABA nor state ethics regulators may make this adjustment.

The restriction of legal ethics rules to congruence with the law of the State is a consequence of the "legalization" of the professional regulation process. As long as ethics codes were composed partly of aspirational declarations and partly of enforceable minimum standards, there was room for declarations that conduct different than that required by law was considered by the bar to be ethically superior. In such a case, an individual lawyer could decide to pursue the divergent vision endorsed by the bar, even at the risk of being punished by the State for doing so. But the bar never presumed to require either government lawyers or private practitioners to obey its law rather than the law of the nation.

The *Model Rules* differ, however, because virtually all the rules are minimum standards enforceable by disciplinary sanctions. Thus, when the bar creates ethics rules for government lawyers at variance with the law of the nation, the bar inescapably places itself in the position of commanding the government itself, through its agents, to change its practices, thus altering the balance of competing values established and legitimated by constitutional processes.

Looked at in historical perspective, rules like the three examined here represent (to borrow from Tom Clancy) the "sum of all fears" of 19th century democratic theorists. They distrusted elitist bar associations as gatekeepers to the public profession of lawyering. Their concerns were largely social, in the sense that they wanted to prevent class-based monopoly on access to the profession and therefore on control of the courts and other organs of government. Nonetheless, they would have been even more horrified at the idea that an organization of lawyers would claim its own internal rules superseded the law of the constitutional government. I confess to thinking the concerns of Jacksonian democrats of more than antiquarian interest here. In truth, rules like these could only have been passed by a bar becoming estranged from the democratic process, a bar that has forgotten its own history and the delicate balance upon which the courts' grant of the power of self-regulation rests.

C. A TEST OF LEGITIMACY

So long as the bar adheres to the concept of ethical rules as enforceable...
minimum standards of conduct, in order for a rule to be considered legitimate both inside the profession and by the legal system of the nation, it must satisfy three requirements:

(1) its subject should be issues integrally related to fitness for membership in the legal profession;

(2) it should reflect a consensus of the legal profession, and must, most particularly, command the assent of the segment of the bar upon whom penalties for violating it would fall; and

(3) it cannot invade the constitutional prerogatives of the national government.

III. ETHICS AND THE FEDERAL COURTS

As noted above at the close of the discussion of the no contact rule, neither Congress nor the Supreme Court has ventured to define the proper boundaries of permissible and impermissible state regulation of federal government lawyers. The fact that the federal judiciary has not yet intervened decisively in the ethics debate is, in my view, another artifact of the enduring perception that ethics regulation continues to be about fitness for membership in the profession. I believe the Court's abstention flows from the fact that both the Court and the Congress continue to think about attorney regulation in terms of the paradigm that was created during the rise of the bar associations in the first half of this century. In that period, as we have seen, the state courts, in effect, made a bargain: they would yield to the bar practical control over the formulation and administration of ethics rules, reserving only what amounted to veto power over notably objectionable rules or unpalatable individual results. In return, the state courts received relief from the administrative burden of running the attorney licensure and discipline systems. The federal courts have piggybacked themselves onto this division of labor. By making state bar membership the *sine qua non* of admission to federal practice, and by dealing with most ethical infractions by referral to state bar agencies, the federal courts have avoided the creation of duplicative federal systems of licensure and discipline. But this act of delegation has always rested on the assumption implicit in the original transfer of power from the state courts to the bar associations — that in regulating the licensure and conduct of lawyers, the bar was concerned with the traditional question of fitness for membership in the profession. So long as the regulatory activities of the bar have concerned themselves with that topic, there has rarely been need for extensive independent activity by federal judges. The judges have neither time, facilities, funding nor inclination to do the administrative job of testing and admitting applicants. As for the regulation of conduct, so long as the rules concerned fitness for membership

543. See supra note 450 and accompanying text (noting that while it is reasonable to think the Supreme Court and Congress anticipated that federal prosecutors are regulated by states, the extent of state regulation has not been defined).
in the profession, conflict between bar rules and federal law was rare because the two regimes regulated different spheres.

Ethical rules that violate the paradigm by extending beyond questions of fitness to subjects federal judges consider their proper domain (such as the power of grand juries, the scope of evidentiary privileges and the reach of the right to counsel) may force federal judges into a reluctant re-examination of the delegation from which they have so long benefitted. 544

Several factors will be important in determining whether the final resolution of the controversy discussed here will be a uniform code of professional conduct for lawyers admitted to practice before the federal courts.

(1) The first factor will be the approach taken by the organized bar in the states. If the bar continues to insist that it can change federal law through state ethics rules, the impetus for intervention by the Supreme Court will grow. The actions of the ABA House of Delegates at its August 1995 meeting send conflicting signals. On the one hand, the deletion of the prior judicial approval provision of Model Rule 3.8(f) suggests a recognition of limits on the ability of the bar to regulate federal practice. On the other hand, the amendment to the comment of Model Rule 4.2 to bring prosecutors within the broadest interpretation of the no contact rule suggests either that the delegates were unaware of the degree to which the amendment places the rule in conflict with federal law, or that the organization is bent on confrontation.

(2) The second, and equally important, factor will be the approach of the Justice Department. The department is certainly correct that state ethics regulators cannot use rules of professional conduct to modify federal criminal law. Likewise, as a matter of law, the department is almost certainly correct that a properly promulgated federal regulation preempts state ethics rules. Nonetheless, the assertion implicit in the no contact regulation that the Justice Department could preempt even local federal court rules and act as sole arbiter of the conduct of its own lawyers is one that, if pressed, is likely to stimulate a judicial response. Moreover, it is simply not healthy for any government institution, particularly one as powerful as the U.S. Department of Justice, to be the only check on its own probity.

The final question is whether uniform federal ethics rules, enforced by federal courts, would be a good thing. They would certainly have several advantages over the present system. There is a need for a neutral forum with neutral rules to adjudicate allegations of federal prosecutorial misconduct. The criminal defense

544. Creation of a uniform federal code of ethics might require congressional authorization. There is a serious question whether any federal court, including the Supreme Court, currently has the authority to promulgate such rules, particularly if they had any impact on either grand jury practice or the law of evidentiary privilege. See, for example, the comment of Judge Campbell in his Klubock dissent that any rule which modifies federal privilege law is "arguably beyond even the Supreme Court's rule-making power." United States v. Klubock, 832 F.2d 649, reh'g granted, 832 F.2d 664, 670 (1st Cir. 1987) (en banc).
MISUSE OF "ETHICAL RULES"

bar complains, with some justice, that in the current judicial climate even established instances of government misconduct that offend constitutional norms often are labeled harmless error, and thus give rise to no penalty in the case in which they occur. Federal prosecutors, on the other hand, are rightly concerned that their licenses not be placed in the hands of state bar authorities operating under rules contrary to federal law. Uniform federal rules created and administered by federal judges would ensure: (1) that the rules applicable in federal court were nationally uniform; (2) that the rules were formulated by persons aware of and sensitive to federal law who understand the unique role of federal prosecutors; and (3) that the rules were enforced by a credible, neutral authority.

CONCLUSION

Unless the bar as a body, including elements inside and outside the federal government, can suppress the naturally adversarial instincts of its individual members and cooperate to confine standards of professional ethics to rules that (a) concern fitness for membership in the profession; (b) command a consensus all across all sectors of the profession; and (c) do not invade the constitutional prerogatives of the national government, the result in the federal courts at least seems inevitable. The Supreme Court and Congress will be obliged, reluctantly, to intervene by creating a national code of professional responsibility for the federal courts.

Such a result would have undoubted practical advantages, but at a more profound level federal preemption of ethical rulemaking would represent a distressing failure of the legal profession's generally laudable enterprise of self-regulation. Avoiding this unhappy result will require not only adherence to tests of legitimacy for particular rules, but commitment to a more balanced vision of the profession.

In a sense, the rules discussed here fail as ethical standards because they proceed from a distorted view of the common story of "the bar." Those who suggest that "the central theme" of the profession's role in the criminal justice system is the story of the lone lawyer matched against the power of the state are simply wrong. The story I know, the story I have shared with colleagues and adversaries during sixteen years as both prosecutor and defense attorney, is the story of two honorable advocates — a prosecutor powerfully committed to

545. See, e.g., United States v. Mechanik, 475 U.S. 66 (1986) (reversing dismissal and reinstating the conspiracy portion of the grand jury indictment, where the petit jury's verdict removed any taint from the grand jury indictment based in part upon the simultaneous testimony of two law enforcement officers in violation of Federal Rule of Criminal Procedure 6(d)).

546. See supra note 537 and accompanying text (describing the belief that Model Rule 3.8(f) is an explicit expression of the bar's ordering of values over those of government).
seeking justice, and a defense lawyer equally committed to representing his client vigorously, creatively, passionately, within the bounds of the law.

Unless ethics rules proceed from a vision of the bar that gives equal place to both of these figures, such rules cannot achieve legitimacy or command respect. The bar, all of us, should think well.