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Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties

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Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties

ERNEST F. LIDGE III*

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INTRODUCTION

Both the American Bar Association (ABA) Model Code¹ and the ABA Model Rules² bar a lawyer, in representing a client, from communicating with another party on the subject matter of the representation if the lawyer knows that the other party is represented by counsel.³ Recent attention has focused on this Rule's impact on criminal investigations.⁴ The ban on communicating with a represented party, however, may have an even greater impact on government civil investigations.

The proscription gained notoriety when former Attorney General Richard Thornburgh issued a memorandum⁵ purporting to exempt Department of

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⁵. Memorandum from Attorney General Thornburgh to all Justice Department Litigators (Jan. 8, 1989) [hereinafter DOJ Memo]. For discussions of the DOJ Memo, see [5 Current Reports] ABA/BNA Manual, supra note 2, at 427-31 (Jan. 3, 1990); N.Y. City Bar Ass'n
Justice attorneys and investigators from complying with the ban in both criminal and civil enforcement matters. At its February 1990 midyear meeting, however, the ABA House of Delegates adopted a Recommendation and Report rejecting the Attorney General’s memorandum and opposing any attempt by the Department of Justice to exempt its lawyers from the Rule. The ABA Report stated that “set against this nation’s historic commitment to an individual’s right to counsel,” the DOJ Memo presented a “substantial threat to the administration of justice.” The ABA Report also contended that the DOJ Memo eroded the legal profession’s commitment to responsible self-regulation.

This Article will focus on several aspects of the ban on communicating with represented parties and on its relationship to government civil investigations. Since the provisions in the Model Code and the Model Rules are essentially the same, this Article will refer to the ban on communicating with a represented party as “the Rule,” except when differences between the two versions of the Rule are significant. The Article discusses the scope and purposes of the Rule in Part I. In Part II, the Article addresses the Rule’s application to government civil investigations. A key issue is whether a government agency’s communications with a targeted party are “authorized by law,” thus falling outside the scope of the Rule. In Part II, Section C, the Article demonstrates that authorities have usually applied the “authorized by law” exception narrowly, especially when the communication could frustrate the basic purposes of the Rule. The Article concludes that such a narrow interpretation is desirable.

Specific, express constitutional and statutory provisions can provide authorization for communications with parties. A government agency (such as the Department of Justice), however, may purport to exempt its lawyers from the Rule by promulgating a regulation, contending that the regulation is “law” authorizing direct communications with parties. The Article concludes that when an agency’s communications with a party are merely


7. ABA Report, supra note 6, at 3.

8. Id.

9. The ban is codified in Disciplinary Rule (DR) 7-104(A)(1), MODEL CODE, supra note 1, and Model Rule (MR) 4.2, MODEL RULES, supra note 2.
ministerial and present no danger of frustrating the purposes of the Rule, an agency may unilaterally promulgate regulations authorizing the communications. If, however, the communications present a danger of overreaching, the regulations unilaterally promulgated by an agency are not "law" and cannot authorize the communication unless the agency submits the regulations to notice and comment procedures (or analogous procedures), when available, and establishes a nexus between the regulation and the legislative delegation of authority.

This Article proposes a test for determining whether a given communication is authorized by law. Courts and disciplinary authorities should look at four factors: the specificity of the authorizing language; the inherent dangers in the communication involved; the type of "law" providing the authorization—for example, constitution, statute, court order, substantive regulation, or procedural regulation; and the policies favoring the communication.

Another important issue is whether the actions of nonlawyer investigators should be attributable to government agency lawyers. In Part II, Section D, the Article concludes that the Rule is (and should be) fully applicable to government agency lawyers and investigators conducting civil investigations.

The Rule's application to government civil investigations raises some problems. Corporate whistleblowers may fear talking with government agencies in the presence of their employers' lawyers. In Part II, Section E, the Article therefore proposes a specific, albeit narrow, exception for such communications with whistleblowers. In addition, some government agencies have adopted operating procedures that do not fully comply with the Rule. In Part II, Section F, the Article evaluates the internal rules of five government agencies.

Finally, the Article examines the issues of federalism raised by the Attorney General's memo. The Article concludes in Part II, Section G, that the DOJ Memo does not immunize the conduct of Department of Justice attorneys from regulation by state disciplinary authorities and thus does not exempt these attorneys from the Rule in civil matters.

I. THE RULE AND THE POLICIES BEHIND THE RULE

A. General Principles

The Rule has been codified in MR 4.2 and DR 7-104(A)(1), which contain very similar language. Model Rule 4.2 states, "A lawyer shall not com-

10. For example, an agency may desire to routinely send copies of an amended charge to both the respondent and her lawyer.

11. Most direct interviews with a party would present dangers of attorney overreaching. See infra notes 50-51 and accompanying text and text accompanying notes 140-45.
municate about the subject of the 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."12

Disciplinary Rule 7-104(A)(1) states:

During the course of his representation of a client a lawyer shall not . . . [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such party or is authorized by law to do so.13

The two provisions, therefore, are essentially the same, except that the Model Code provision includes the language "cause another to communicate."14

Courts and disciplinary authorities have interpreted the Rule literally.15 The Model Code's footnote to DR 7-104(A)(1) states that Canon 9 (DR 7-104(A)(1)'s predecessor) "is to be construed literally and does not allow a communication with an opposing party, without the consent of his counsel, though the purpose merely be to investigate the facts."16 Thus, the Rule applies to investigations, not merely lawsuits.17

Interpreting the Rule literally also means that it only applies to communications on the "subject" of "representation" with a party known to be represented by counsel "in that matter." Thus, a lawyer may talk with a represented party about subjects unrelated to the representation. Furthermore, if a party has not sought advice from an attorney on the specific matter, the lawyer may talk freely with the party,18 although the

12. MODEL RULES, supra note 2, MR 4.2.
13. MODEL CODE, supra note 1, DR 7-104(A)(1).
14. Model Rule 4.2's lack of this language does not substantially change the meaning of the provision. See infra note 202.
15. The Model Code's footnote to the Rule states that the Rule should be "construed literally." MODEL CODE, supra note 1, DR 7-104(A)(1) n.76 (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 187 (1938)); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 517 (1962) (the Rule "has been strictly construed throughout its history").
16. MODEL CODE, supra note 1, DR 7-104(A)(1) n.75 (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 187 (1938)); see also United States v. Guerrerio, 675 F. Supp. 1430, 1438 n.16 (S.D.N.Y. 1987) ("In civil contexts . . . it has been found that DR 7-104(A)(1) does apply before the formal initiation of a law suit.").
17. While the Rule's use of the word "party" could be interpreted narrowly to apply only to parties involved in lawsuits after they have been filed, the term is a "lawyerism," referring to any person represented by counsel (that is, "party of the first part"). C. WOLFRAM, supra note 1, § 11.6.2, at 611 n.33. In addition, MR 4.2 prohibits, and DR 7-104(A)(1) probably prohibits, communications with any represented party, even a party whose interests are not adverse to the lawyer's client. Id. at 611.
18. See United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (approving lower court's limitation of Rule's applicability to situations where target retained lawyer specifically for matter at hand), cert. denied, 111 S. Ct. 192 (1990); United States v. Masullo, 489 F.2d 217, 223 (2d Cir. 1973) (defendant's retention of counsel for certain drug transactions no
lawyer must still obey the ethical rules dealing with unrepresented parties.\textsuperscript{19}

The represented party cannot waive the Rule.\textsuperscript{20} An attorney must obtain permission from the lawyer to communicate with the lawyer's client. If the lawyer refuses to grant permission for the communication, none may take place, even if the lawyer's client desires it.\textsuperscript{21} In essence, the lawyer has a veto over any communications between her client and opposing counsel.\textsuperscript{22} If such a meeting is important to the adverse party, the adverse party may of course instruct her lawyer to grant permission for the meeting and, if the lawyer refuses, terminate her services.\textsuperscript{23}

Authorities have vigorously enforced the Rule.\textsuperscript{24} Courts have disciplined attorneys in spite of claims that the violation of the Rule was not motivated by ill will or malice\textsuperscript{25} and have found violations even when

\textsuperscript{19} Model Rules, supra note 2, MR 4.3 (lawyer may not state or imply she is disinterested; reasonable efforts to correct misunderstandings about lawyer's role required); Model Code, supra note 1, DR 7-104(A)(2) (lawyer may not give advice to unrepresented person, except for advice to secure counsel, if person's interests may possibly be in conflict with lawyer's client).

\textsuperscript{20} See ABA/BNA Manual, supra note 2, at 71:302 (To communicate with represented party, opposing lawyer needs consent of party's lawyer, not of the party himself; the rule does not allow any "exceptions for communicating with 'sophisticated' parties."); C. Wolfram, supra note 1, § 11.6.2, at 614 ("Consent of the opposing lawyer . . . may even be required when the opposing party is as legally sophisticated as that party's lawyer.").

\textsuperscript{21} See H. Drinker, Legal Ethics 201 (1953) ("Canon 9 [DR 7-104(A)(1)'s predecessor] precludes the interviewing of the other party despite the fact that he will be a witness, and despite his willingness to be interviewed."); ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934).

\textsuperscript{22} For criticism of the lawyer's veto over communications and the resulting erosion of client sovereignty, see Leubsdorf, supra note 3.

\textsuperscript{23} An attorney, however, risks discipline if the opposing party tells the attorney that he has fired his lawyer, and the attorney takes the opposing party's word for it. See In re Schwabe, 242 Or. 169, 408 P.2d 922 (1965). In Schwabe, an attorney wrote to Schwabe informing him that he represented an adverse party. Based on the adverse party's past statements, Schwabe did not believe that the adverse party had retained an attorney. He attempted to call the attorney but could not reach him. Schwabe then asked the adverse party about the letter and the party said that he had not retained the attorney. Schwabe saw the adverse party on two other occasions. He received a public reprimand for the unethical communications. Cf. Florida Bar v. James, 478 So. 2d 27, 29-30 (Fla. 1985) (Attorney disciplined, in part, because when client told him that opposing party had fired her lawyer the attorney drafted a settlement agreement for her to sign rather than calling opposing counsel to determine if he no longer represented her.).

\textsuperscript{24} For examples of disciplinary sanctions imposed for violations of the Rule, see Annotation, Communication with Party Represented by Counsel as Ground for Disciplining Attorney, 26 A.L.R.4th 102 (1983 & Supp. 1990).

\textsuperscript{25} Carter v. Kamaras, 430 A.2d 1058 (R.I. 1981), a disciplinary proceeding, provides an interesting illustration of this principle. In that case, the attorney-respondent had represented the wife in a divorce proceeding. The attorney, who knew the husband was represented by
the opposing party initiated the contact.26 Even in private social conversations with a friend who happens to be an adverse party, an attorney must "refrain from touching, however slightly, on the pending lawsuit."27 In at least one instance, a court disciplined an attorney for an unsuccessful attempt to communicate with a represented party.28 Authorities have furthermore recognized that a lawyer who sends a letter to an opposing attorney and mails a copy to the attorney's client violates the Rule because he has not obtained the attorney's "consent" to communicate with his client.29 Thus, the Rule places strong limits on a lawyer's ability to communicate with an opposing party.

counsel, called the husband to ascertain whether he had sent a check to the wife. The respondent attempted to justify his violation of the Rule in the following manner:

Now . . . when a woman is in desperation and needs money, and she's been awarded the money, and the lawyer and the client get together to try to give opposing counsel a hard time and the woman a hard time, I think the lawyer representing the woman is entitled to some self-help, something's got to be done somehow, and if I called him and said, "Get that money to your wife," and if the Good Book says, "You shan't call another party, if they are represented by counsel," I'm sorry, gentlemen I can't buy it . . . .

Id. at 1058.

The Rhode Island Supreme Court was unsympathetic, noting that it was "immaterial" for disciplinary purposes whether the prohibited communication was an intentional or negligent violation of the Rule. The court publicly censured the respondent. Id. at 1059; see also Abeles v. State Bar, 9 Cal. 3d 603, 609, 510 P.2d 719, 722, 108 Cal. Rptr. 359, 362 (1973) (Rule shields opposing party from well-intended but misguided approaches); Mitton v. State Bar, 71 Cal. 2d 525, 534, 455 P.2d 753, 758, 78 Cal. Rptr. 649, 654 (1969); In re McCaffrey, 275 Or. 23, 28, 549 P.2d 666, 668 (1976) (immaterial whether "the direct communication is an intentional or a negligent violation of the rule").

Courts, however, have found lack of scienter relevant when deciding on a motion to disqualify counsel for violating the Rule. See Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975) (affirming district court's denial of disqualification because, inter alia, there was no suggestion that lawyer sought unfair advantage by communications); Skloff v. Bickley, Civ. A. No. 85-5555 (E.D. Pa. Feb. 27, 1987) (LEXIS, Genfed Library, Dist file) (disqualifying attorney but refusing to disqualify entire law firm; no one in firm knew of attorney's conduct); In re Korea Shipping Corp., 621 F. Supp. 164, 170 (D. Alaska 1985) (alleged prohibited communication does not require disqualification absent plan to take advantage of or dupe opposing party).


27. State ex rel. Taylor Assoc. v. Nuzum, 330 S.E.2d 677, 681 (W. Va. 1985); see also C. WOFREM, supra note 1, § 11.6.2, at 611 ("The breadth of the anticontact rule requires alertness on the part of a lawyer whose social friend or former client is now represented by a different lawyer.").

28. See State ex rel. Nebraska State Bar Ass'n v. Jensen, 171 Neb. 1, 20, 105 N.W.2d 459, 472 (1960) (mere fact that lawyer was prevented from keeping his plan to communicate with opposing party does not excuse violation), cert. denied, 365 U.S. 870 (1961).

29. See Kentucky Bar Ass'n v. Shane, 553 S.W.2d 467 (Ky. 1977) (reprimand); ABA/BNA Manual, supra note 2, at 71:303 (Sending adverse party copies of letters directed to party's lawyer "virtually always falls within the ban on direct communications.").
One problem that arises in delineating the Rule's scope is defining the corporate "party." If the opposing party is a represented corporation or other entity, which, if any, corporate or entity employees are included in the ban on communications?\textsuperscript{30}

Widely divergent positions are possible. If "party" is defined very narrowly, an opposing lawyer is only forbidden to speak with the corporation itself. Under such an interpretation, the lawyer could speak with any corporate employee (or director for that matter) unless that individual is an actually named "party" in the dispute. A corporation, however, can only act through its agents\textsuperscript{31} and for the Rule to have any meaning in the corporate context, some corporate employees must be considered parties. On the other hand, one could interpret the Rule to impose a blanket ban on communicating with any employee or former employee of a corporation. Such a restrictive approach, however, would frustrate the policy of liberal discovery, a major goal of our adversarial system.\textsuperscript{32}

Courts and disciplinary authorities have generally fallen somewhere between these two poles,\textsuperscript{33} although there is a great deal of disagreement. One court simply barred plaintiff's counsel from communicating with "managerial level" employees of a defendant corporation. Another used the "control group" test, preventing communications only with those top managers who had responsibility for making final decisions and those employees on whom top management relied for advice to make such decisions.\textsuperscript{34} Some authorities have adopted a "managing-speaking


\textsuperscript{32} See infra notes 52-54 and accompanying text.

\textsuperscript{33} But see Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037 (D.N.J. 1990) (barring ex parte communications with all present and former employees of a corporate party); Miller & Calfo, \textit{supra} note 30, at 1071 (arguing for a complete ban on communications with employees of a represented corporate party).


\textsuperscript{35} Fair Automotive Repair, Inc. v. Car-X Serv. Sys., 128 Ill. App. 3d 763, 471 N.E.2d 554 (1984). For a list of other authorities adopting the "control group" test, see Krulewitch, \textit{supra} note 30, at 1286 n.65. The United States Supreme Court has found the control group test inadequate for purposes of the attorney-client privilege. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).
agent” test, which prohibits communication with those employees who can “bind” the entity. The existence of different tests mandates that a lawyer educate herself about the rules in her particular jurisdiction before she communicates with a represented entity’s employees.

The tests vary because of the difficulty of resolving the competing interests involved. As stated by one court, the Rule creates a policy conflict between the opposing attorney’s need to obtain information in the corporation’s presence and “the corporation’s need to protect itself for the traditional reasons justifying the rule.”

While a lawyer who wants to communicate with entity employees has other possibilities—obtaining opposing counsel’s consent, proceeding through the normal discovery process, and, in appropriate circumstances, obtaining court permission—the Rule does restrict the lawyer’s access to

36. See, e.g., Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988); cf. Niesig v. Team I, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990) (“Party” includes corporate employees whose acts or omissions are binding on the corporation or can be imputed to the corporation and employees implementing the advice of counsel.). Two commentators have approved of the managing-speaking agent test. Krulewitch, supra note 30, at 1297-1304; Survey of Professional Responsibility, supra note 30, at 242-44. In applying the test, most courts and other authorities cite one (or more) of three sources: Wright by Wright v. Group Health Hosp., 103 Wash. 2d 192, 691 P.2d 564 (1984); Model Rules, supra note 2, MR 4.2 comment; and ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978). These authorities, however, are not consistent, and courts applying the managing-speaking agent test have not always been clear about what exactly the test is. The problem is determining what exactly is meant by “binding” the entity. See Stahl, supra note 30, at 1186 n.18.

37. A lawyer must also be aware of an employee’s status within the corporate hierarchy before communicating with the employee. If a lawyer does not know whether a particular corporate employee falls within the Rule’s protection, the lawyer should err on the side of caution and consult with corporate counsel before communicating with the employee. See Caguilla v. Wyeth Laboratories, Inc., 127 F.R.D. 653, 654 (E.D. Pa. 1989) (Prudent attorney should give notice to opposing counsel of intent to take statement from corporate party’s employee.); 2 G. Hazard & W. Hodes, supra note 3, at 737 (In close cases, lawyer desiring to talk with opposing party’s employees should consult with opposing counsel.); cf. Morrison v. Brandeis Univ., 125 F.R.D. 14 (D. Mass. 1989). In Morrison, the magistrate used a balancing test, see infra note 38, but did not think it appropriate for an attorney to perform the balancing analysis herself. He clearly implied that an attorney desiring to talk with an opponent’s employees should err on the side of caution and, when in doubt, seek court permission for the contacts. Morrison, 125 F.R.D. at 18 n.1; see also University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990) (in applying case-by-case balancing test, courts, not counsel, perform balancing).

38. Commentators have also identified another test, a case-by-case balancing approach, in which a court balances the interests of the entity and the opposing party in order to determine which entity employees the opposing party’s lawyer may contact. See Lizotte v. New York City Health & Hosps. Corp., No. 85 Civ. 7548 n.s (S.D.N.Y. March 13, 1990) (LEXIS, Genfed library, Dist file); Morrison, 125 F.R.D. 14; Mompoint v. Lotus Dev. Corp., 110 F.R.D. 414 (D. Mass. 1986); Krulewitch, supra note 30, at 1294; Survey of Professional Responsibility, supra note 30, at 241. This balancing test does not really define what constitutes a “party” for purposes of the Rule. Rather, it is a test for courts to use when deciding whether to authorize communications under the “authorized by law” exception. See Morrison, 125 F.R.D. at 18 n.1.

39. Wright by Wright, 103 Wash. 2d at 197, 691 P.2d at 568.
information. The restrictions are justified, however, by the interests the Rule protects.

B. Purposes of the Rule

The ban on communicating with a represented party is a long-established principle. Courts have said that no ethical provision is "more sacred" or "better established," that the Rule is "a matter of fundamental legal ethics," and that a knowing violation of the Rule "constitutes the grossest sort of unethical conduct" and is "unthinkable" and "unseemly." As with many well-established rules, however, the purposes of the Rule are rarely articulated fully.

40. The predecessor to DR 7-104(A)(1), Canon 9 of the ABA Canons of Professional Ethics (1908), provided, in relevant part, that "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." In 1846, David Hoffman, a member of the Baltimore bar, published fifty resolutions for the guidance of young lawyers. D. Hoffman, II, A Course of Legal Study 752-75 (2d ed. 1846). These resolutions are reprinted in H. Drinker, supra note 21, at 338-51 app. Resolution XLIII states, "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." Id. at 349 app.

In In re Oliver, 2 Adm. & Eccl. 620, 111 Eng. Rep. 239 (1835), Lord Denman held that the fact that an attorney obtained an elderly woman's signature to a document by direct communication with her while she was represented by counsel was sufficient grounds for ordering the attorney to surrender the document, even though the offending attorney claimed that the woman was competent, that she had not requested her counsel's presence, and that she had examined the document before signing it. Lord Denman stated, "This rule must be made absolute. When it appeared that Mrs. Oliver had an attorney, to whom she referred, it was improper to obtain her signature, with no attorney present on her part. If this was permitted, a very impure, and often a fraudulent, practice would prevail." Id. at 622, 111 Eng. Rep. at 240.

A ban on agreements with opposing parties can be traced back even farther. In 1231, the Emperor Frederick II promulgated the Liber Augustalis, which established ethical rules for advocates in the Kingdom of Sicily's royal courts. Advocates were required to take an oath to observe these principles. The Liber Augustalis forbade advocates from entering into agreements with an opposing party. See Brundage, The Medieval Advocate's Profession, 6 Law & Hist. Rev. 439, 449 (1988).


44. Yatman, 320 So. 2d at 403.


46. Lumbermens Mutual Casualty Co. v. Chapman, 269 F.2d 478, 481 (4th Cir. 1959) (A violation of the Rule is an "unseemly insensitiveness to the ethics of [an attorney's] calling.").
The ethical codes do not offer much guidance about what "sacred" functions the Rule serves. The Model Rules do not state the purpose of MR 4.2, and the Model Code speaks only in general terms:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer . . . .

The lack of specificity in identifying why the legal system "functions best" is typical of the justifications often advanced in support of the Rule. Indeed, courts also frequently speak in general terms about the Rule's purposes.

One can obtain a fuller understanding of the Rule's purposes by looking at the acts that the Rule was designed to prevent. The Rule prevents an attorney from: (1) undermining the opposing party's confidence in his lawyer; (2) negotiating directly with the opposing party and/or obtaining an advantageous settlement agreement; (3) obtaining privileged information from the opposing party; and (4) obtaining damaging admissions or any helpful information from the opposing party outside of the normal discovery process.

47. The Rule "is intended to insulate the client from improper conduct of opposing counsel and to preserve the integrity of the client-lawyer relationship." ABA Commission on Evaluation of Professional Standards, May 30, 1981 Proposed Final Draft, Model Rules of Professional Conduct 165-66. This statement begs the question. It does not delineate what conduct is "improper" or what it is about an ex parte communication that harms the "integrity" of the attorney-client relationship.

48. MODEL CODE, supra note 1, Ethical Consideration (EC) 7-18. The Model Code contains a Preamble, a Preliminary Statement, Canons, Ethical Considerations, and Disciplinary Rules. The Ethical Considerations are aspirational, not mandatory. Attorneys, however, can rely on them for guidance. Id. Preliminary Statement.

49. Courts have said that the Rule's purpose is to shield the represented party from "improper approaches" and to prevent situations in which opposing counsel can take advantage of the party. Frey v. Department of Health & Human Servs., 106 F.R.D. 32, 34 (E.D.N.Y. 1985); Wright by Wright, 103 Wash. 2d at 196, 691 P.2d at 567; see also University Patents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990) (The Rule was designed to prevent a lawyer from taking advantage of an opposing party.); In re Atwell, 232 Mo. App. 186, 188, 115 S.W.2d 527, 528 (1938) (same). Another has said that the Rule prevents opposing counsel from impeding the attorney's proper performance of his role and preserves the attorney-client privilege. Bobele v. Superior Court, 199 Cal. App. 3d 708, 712, 245 Cal. Rptr. 144, 146 (1988); see also Mitton v. State Bar, 71 Cal. 2d 525, 534, 455 P.2d 753, 758, 78 Cal. Rptr. 649, 654 (Rule allows lawyer to perform adequately in his proper role and prevents opposing lawyer from impeding his performance in that role.); Mills Land & Water Co. v. Golden West Ref. Co., 186 Cal. App. 3d 116, 130, 230 Cal. Rptr. 461, 468 (1986). Yet another has said that the Rule's purpose is to prevent overreaching. Shealy v. Laidlaw Bros., 34 Fair Empl. Pract. Cas. (BNA) 1223, 1225 (D.S.C. 1984).

The first two concerns are related. Without the protection of the Rule, a lawyer can drive a wedge between the opposing party and his attorney. Parties to negotiations, lawsuits, or other disputes are often in an emotionally vulnerable state. Attorneys usually have the experience and insight to exploit that vulnerability. The lawyer can "explain" to a party the weakness of his case, the incompetence of his lawyer, and, in a lawsuit, the dire consequences of his certain, impending loss. Because of the lawyer's superior knowledge and the nonlawyer's relative lack of experience, the lawyer can easily sow seeds of distrust. By implying that she has the true interests of the other party in mind, the lawyer can cause the opposing party to lose confidence in his attorney or even terminate the relationship. She could possibly obtain an advantageous settlement. If lawyers were free to obtain these kinds of advantages, our adversary system would be seriously undermined and courts would have to take a more active role in policing settlements.51

The Rule also protects the attorney-client privilege. A person does not have the knowledge, and often does not have the emotional strength, to assert the privilege vigorously. An experienced attorney, like an experienced police officer, can make an inexperienced party feel he must talk in order to prove his innocence. The attorney-client privilege can be protected only if lawyers are prevented from making ex parte contact with represented clients.

Very few will criticize the Rule's restrictive effect on the aforementioned activities. Perhaps, however, the reason why authorities use general terms in describing the Rule's purposes lies in the Rule's primary effect, and one of its central purposes: to limit an attorney's access to unprivileged information.

Our adversarial system is governed by liberal discovery rules. These rules are based on the notion that each side in a civil lawsuit should, within certain limits, be able to obtain information freely.52 In order to

unprincipled attorneys from using their greater knowledge and skills to obtain "unwise statements" from the opposing party. Second, it preserves the integrity of the lawyer-client relationship by preventing counsel from driving a wedge between the opposing attorney and client. Third, it protects privileged information. Fourth, it aids the settlement process by channeling discussions through lawyers skilled at negotiating. Id. at 625 (citing, among others, Kurlantzik, supra note 3, at 138-39, 145-46, 148-51; Leubsdorf, supra note 3, at 686).

51. A client's unwise statements to opposing counsel can also interfere with her lawyer's tactics, harming the client's case and the lawyer's reputation. 2 G. HAZARD & W. HODGES, supra note 3, at 730. While the goal of protecting the client's case is more laudable, the lawyer has a legitimate interest in the Rule's protections. Imagine a lawyer's (justified) chagrin if her client tells her that she has just spent a nice evening with opposing counsel talking about the case and her client assures her that there is no need to worry because she simply told opposing counsel the "true" facts. A lawyer should not have to represent a client in circumstances where opposing counsel has the opportunity to talk freely with the client.

perform effectively, attorneys must have access to witnesses and have
the opportunity to prepare favorable ones for trial.\textsuperscript{53} Indeed, it is a
“time-honored” principle that a party’s attorney has the “right to
interview an adverse party’s witnesses (the witness willing) in private,
without the presence or consent of opposing counsel . . . .”\textsuperscript{54}

The Rule frustrates this policy. It prevents a party from divulging not
only privileged information, but also any helpful information, unless the
information is released through the normal discovery process or with the
consent of the party’s attorney.

Although the Rule frustrates the policy favoring free access to infor-
mation, the adversary system “functions best” when attorneys can limit
the flow of information from their clients in order to prevent the other
side from obtaining information “unfairly” (that is, without the party’s
counsel being present).\textsuperscript{55} It is part of the litigation game\textsuperscript{56} and is fair to
all concerned to restrict the search for truth when the object of the
search is a represented party.\textsuperscript{57} The Rule reflects a judgment, based on
many years of experience, that the ability of the adversary system to
develop the truth is best served by limiting an attorney’s access to parties
in exchange for other benefits.

The restriction furthermore does not unduly hamper the flow of
information. An opposing lawyer may talk with nonparty witnesses

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“to obtain the fullest possible knowledge of the issues and facts before trial.”\textsuperscript{1}); \textsc{Fed. R. Civ. P. 26(b)(1)} (Parties may obtain discovery regarding “any” nonprivileged relevant matter.); 4 J. \textsc{MoeR}, J. \textsc{Lucas} \& G. \textsc{GroTher}, \textsc{Jr.}, \textsc{MoRe’s Federal Practice} \textsection 26.56[1] (2d ed. 1991) (“Relevance for discovery purposes, is broadly and liberally construed.”). 53. Siguel v. Trustees of Tufts College, 52 Fair Empl. Prac. Cas. (BNA) 697, 699 (D. Mass. 1990).

54. \textit{IBM v. Edelstein}, 526 F.2d 37, 42 (2d Cir. 1975).

55. \textit{Cf. Hickman}, 329 U.S. at 511 (Attorneys must be able to prepare their cases “without undue and needless interference”; this “is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.”).

56. As stated by one commentator, “\textsc{D}R 7-104 reflects an apparent conviction that, in the interests of legal sportsmanship, a party should not be allowed to further his case by taking advantage of his opponent’s naïveté to elicit devastating statements or to conclude an ill-advised settlement.” Note, supra note 3, at 1012.

57. As Professor \textsc{Kurlantzik} has pointed out:

Though truth is one of the prime objectives of this system, our society is not,
of course, willing to pay an unlimited price for it in other moral values. Testimony
obtained by torture is inadmissible. And . . . there are confidences and decencies
society does not ask men to violate, though by doing so they would materially
assist in ascertaining the truth.

\textsc{Kurlantzik, supra note 3}, at 146; \textit{see also Krulewitch, supra note 30}, at 1279 (“Although \textit{ex parte} interviews may promote the unfettered search for truth, truth alone is not necessarily a
sufficient end.”). On the other hand, as indicated in the text, the Rule’s restrictions on access
to information may actually \textit{promote} the search for truth. \textit{Cf.} Gulf Oil Co. v. Bernard, 452
U.S. 89, 104 n.21 (1981) (The Rule’s limit on an adversary lawyer’s “expression” does not
violate the first amendment.).
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(assuming they are not independently represented), and he has access to parties through the normal discovery mechanisms. Indeed, the Rule's restrictions on the search for truth can actually serve the search for truth. Under questioning by opposing counsel, clients can become confused and make inaccurate statements. Through skillful interrogation, an attorney can obtain damaging admissions that do not really reflect the truth. The presence of a party's lawyer prevents this. As stated by one commentator:

[During questioning of his client, the attorney] can stress the need for strict accuracy and encourage his client to refresh his memory by checking past records if a key fact or date is at issue. When damaging or prejudicial statements are made during the course of an interview, the attorney can minimize the harm done to his client's case by ensuring that such statements are, to the extent possible, explained or clarified, either during the interview itself or at trial.58

In addition, the attorney may prevent his client from becoming defensive and making misleading statements in reaction to the actions of opposing counsel—something people often do in a defensive posture. Thus viewed, the Rule can prevent distortion and serve truth.

Restricting the flow of information also prevents the attorney from being blindsided. The Rule decreases the likelihood that the attorney will be surprised by opposing counsel's use of information obtained from the attorney's client. Because the attorney has an opportunity to attend all meetings between his client and opposing counsel, the attorney is aware of the information that his client has passed on to opposing counsel. He is, therefore, able to prepare and to address the point fully at trial. An attorney who is in the dark about such information cannot effectively represent his client.

Thus, the Model Code's statement that the legal system "functions best" when persons are "represented by their own counsel," while very general, gets at the truth. The lawyer's ability to limit the flow of information from his client allows the lawyer to present his client's case in the most favorable light, and this latter task goes to the heart of representation—indeed, it is "representation" itself.59

58. Note, supra note 3, at 1013.

The Rule effects an appropriate balance. A lawyer may talk freely with a nonparty. With a party, however, he may communicate only through the normal discovery procedures or with the permission of a court or the party’s attorney.

II. APPLICATION OF THE RULE TO GOVERNMENT ATTORNEYS

A. General Principles

The ethical rules clearly apply to government lawyers, and courts and disciplinary authorities therefore have not hesitated to discipline...
government lawyers who violate the rules. The existence of special conflict of interest rules for former government attorneys and specific rules for prosecutors demonstrates that the drafters treated government attorneys differently when they so desired. In fact, courts recognize that government lawyers have an even greater responsibility to diligently observe the ethical rules. A government lawyer's conduct has to be more circumspect than a private lawyer's because government lawyers are more visible and are "invested with the public trust." There is less tolerance for their improper conduct because it has greater potential for widespread harm and damage to the public interest; a government lawyer's ethical lapses can undermine trust in the government itself.

The ABA and the courts have explicitly recognized that the Rule applies to government attorneys. The commentary to MR 4.2 states, "[T]he existence of a controversy between a government agency and a private party . . . does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter." This comment implies that communications between a government lawyer regarding the subject matter of the representation and a represented private party are forbidden. Furthermore, the Model Code cites ABA Formal Opinion 95, in which the ABA Committee on Professional Ethics and Grievances (Committee) held a municipal lawyer responsible for violations of the Rule.


62. MODEL RULES, supra note 2, MR 1.11; MODEL CODE, supra note 1, DR 9-101(B).

63. MODEL RULES, supra note 2, MR 3.8; MODEL CODE, supra note 1, DR 7-103.

64. Douglas, 227 Neb. at 62, 416 N.W.2d at 550; see also In re Petition for Review of Opinion No. 569, 103 N.J. 325, 330, 511 A.2d 119, 122 (1986) (Because they are invested with the public trust, government attorneys must be more circumspect.); Committee on Legal Ethics v. Rosk, 382 S.E.2d 313, 318 (W. Va. 1989) (same); C. WOLFRAM, supra note 1, § 13.9.2, at 757 (Many decisions criticizing a government lawyer's behavior exist, although the behavior would have been acceptable for a private lawyer, because the former owes "a higher standard of discretionary fairness."); cf. MODEL CODE, supra note 1, EC 7-14 ("A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice.").


66. MODEL RULES, supra note 2, MR 4.2 comment (emphasis added).

67. ABA Comm. on Professional Ethics and Grievances, Formal Op. 95 (1933) cited in MODEL CODE, supra note 1, DR 7-104(A)(1) n.76. For a discussion of Formal Op. 95, see infra text accompanying notes 189-94.

68. The American Bar Association Committee on Ethics and Professional Responsibility issues and publishes both formal and informal opinions, as do many state and local bar
In *In re Mettler*, state disciplinary authorities had accused a lawyer of violating the Rule while working for a state agency as an investigator. The Oregon Supreme Court found that he had not violated the Rule because the action had not occurred during the course of his representation of a client. The court, however, made clear that the Rule applied to government lawyers. The accused was a "lawyer" for purposes of DR 7-104, even though he was working for the government, "because government lawyers are as subject to the rules as their counterparts in private and corporate practice and activities."

Government agencies themselves have recognized that the Rule applies to their lawyers. The National Labor Relations Board, for example, has acknowledged that the Rule generally applies to its regional offices. In *In re Investigation of FMC Corp.*, the government acknowledged that the Rule applied to its attorneys. In that case, the United States Attorney, counsel for the Environmental Protection Agency (EPA), and

association ethics committees. The ABA's formal opinions deal with important topics and overrule prior conflicting formal and informal opinions; informal opinions concern less-important topics and only overrule prior inconsistent informal opinions. C. Wolfram, *supra* note 1, § 2.6.6, at 65-66 & n.11. The ABA's Committee on Ethics and Professional Responsibility, which has existed since 1971, and its predecessors, the Committee on Professional Ethics (1958-1971) and the Committee on Professional Ethics and Grievances (1919-1958), will collectively be referred to as "the Committee," although citations to these opinions will include the specific issuing committee.

69. The ABA continues to insist that the Rule applies to government attorneys. *See ABA Report, supra* note 6.

70. 305 Or. 12, 748 P.2d 1010 (1988).

71. *Id.* at 16, 748 P.2d at 1012.

72. Feld & Sons, Inc., 263 N.L.R.B. 332, 339 (1982). In *Feld*, the Board stated:

It is a well-established principle of legal ethics that, so long as an attorney-client relationship exists, attorneys dealing with the matter are prohibited from communicating directly with the client. This policy has been accepted and is followed by the National Labor Relations Board in its dealings with respondent. This being the case, unless extraordinary circumstances present themselves to justify direct contact with a client, the Region is obliged to deal exclusively with the party's attorney.

*Id.* (footnote omitted). The NLRB's internal guidelines, however, do not fully comply with the Rule. *See infra* notes 253-74 and accompanying text. Cf. Hoffman v. United Telecommunications, Inc., 111 F.R.D. 332 (D. Kan. 1986). In *Hoffman*, the plaintiff and the EEOC, the plaintiff-intervenor in the sex discrimination class action suit, sought court permission to send a letter and questionnaire to current and former employees of the defendants in order to uncover examples of sex discrimination, expedite the litigation, and avoid burdens and undue expense. The plaintiff and the EEOC also expressed concerns that they might be accused of violating the Rule. *Id.* at 333.

In their motion, the EEOC and plaintiff admitted that the Rule usually applied to an opposing counsel's communications to a party's managers. They argued, however, that the Rule should not apply to the questionnaire. Plaintiff's and Plaintiff-Intervenor's Memorandum in Support of Their Motion for Leave to Communicate with Potential Claimants, *Hoffman* (No. 76-223-C2). The court denied the motion and ordered all counsel to continue obeying the Rule. *Hoffman*, 111 F.R.D. at 337. In any event, the EEOC in its motion impliedly conceded that the Rule applied to it, and the court agreed.

investigators acting under their direction and control were investigating FMC Corporation for violations of certain federal criminal statutes. The court noted that the government had conceded that the Rule was "binding upon the United States Attorney and, presumably, the EPA attorneys and their investigators" but that the government declined to state the degree to which it was bound by the Rule in that instance.74

The Rule equally applies to prosecutors,75 although courts sometimes relax the Rule's application in criminal matters because prosecutors traditionally rely on undercover techniques and because there seems to be a greater public interest in criminal investigations. Courts, for example, have found that communications during criminal investigations are "authorized by law"76 or that the Rule is not designed to hamper such investigations77 or that a violation of the Rule does not mandate suppression of unethically obtained evidence.78 Almost all authorities, however, acknowledge that the Rule itself applies to prosecutors.79

74. Id. at 1110. The government contended that the Rule should be interpreted narrowly when a corporation was the opposing party. Id.

75. The Rule's application to criminal matters is beyond the scope of this Article. For a list of authorities discussing this issue, see supra note 4.

76. See, e.g., State v. Wolf, 7 Kan. App. 2d 398, 401, 643 P.2d 1101, 1105 (1982) (In most instances the district attorney is authorized by law to confer with persons concerning criminal investigations.); cf. United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (A prosecutor's use of informants to gather evidence against a suspect will usually fall within the "authorized-by-law" exception.).

77. See, e.g., United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983) (The Rule is not "intended to stymie undercover investigations when the subject retains counsel."); cert. denied, 464 U.S. 852 (1983).

78. See, e.g., Suarez v. State, 481 So. 2d 1201, 1206 (Fla. 1985) (Violation of the Rule does not mandate suppression because the Model Code was not designed to protect the rights of individuals but to prescribe standards for attorneys.) (citing People v. Green, 405 Mich. 273, 274 N.W.2d 448 (1979)), cert. denied, 476 U.S. 1178 (1986).

79. Thus in United States v. Guerrerio, 675 F. Supp. 1430, 1435 (S.D.N.Y. 1987), the court unequivocally stated that the Rule applied to government prosecutors. The court, however, held that the Rule did not apply to the investigatory stage of a criminal matter and also held that evidence should not be excluded for a prosecutor's violation of the Rule. Id. at 1434-38. The court did note that in civil contexts the Rule "does apply before the formal initiation of a lawsuit." Id. at 1438 n.16; see also Hammad, 858 F.2d at 837-38 and cases cited therein (Rule applies to criminal prosecutions; "[e]ven those courts restricting the rule's ambit have suggested that, in appropriate circumstances, DR 7-104(A)(1) would apply to criminal prosecutions."); United States v. Cross, 638 F.2d 1375, 1379 (Legal ethics forbid United States attorney or government agent to bypass defendant's lawyer.), modified, 655 F.2d 50 (5th Cir. 1981); United States v. Masullo, 489 F.2d 217, 223 n.3 (2d Cir. 1973) (listing cases); Suarez, 481 So. 2d at 1205 (Rule applies to criminal matters.); State v. Yatman, 320 So. 2d 401, 403 (Fla. Dist. Ct. App. 1975) (Rule equally applicable to prosecution of criminal cases and civil cases.); State v. Morgan, 231 Kan. 472, 478-79, 646 P.2d 1064, 1070 (1982) (Prosecutor violated DR 7-104(A)(1) even though prosecutor had not violated defendant's constitutional rights.); 2 G. HAZARD & W. HODGES, supra note 3, at 741-42 (Illustrative case applying Rule to prosecutor); ABA/BNA Manual, supra note 2, at 71:301 ("Prosecutors and their agents must refrain from contacts with represented criminal defendants."); id. at 71:305-06 (General discussion of the Rule's application to prosecutors). For a list of decisions involving application of the Rule to prosecutors, see Annotation, supra note 24, § 10, at 134-38.
The authorities cited above demonstrate that whether or not the Rule applies to government attorneys is not at issue. The open issues are: whether the "authorized by law" exception exempts government investigations; whether communications by government investigators can be attributed to government attorneys; and whether the looser application of the Rule to government criminal investigations, accepted by some courts and commentators, should also apply to government civil investigations.

B. Distinctions Between Civil and Criminal Investigations

The drafters of the Rule apparently had civil litigation in mind. While some authorities have said that the Rule should not be applied as strictly against prosecutors in criminal cases, there is no support for a weaker application of the Rule in the civil context.

Professor Bruce Green suggests that the different interests at stake in civil and criminal contexts justify a more relaxed application of the Rule against government investigators in criminal matters. Professor Green points out that the Rule protects a represented party against overreaching by opposing attorneys and protects the party's interest in effective assistance by counsel but sacrifices the adversary system's interest in the disclosure of relevant information. In the civil context, this sacrifice is reasonable because the Rule does not greatly hinder a litigant's access to information. The discovery rules provide other mechanisms for obtaining information from the other party. In criminal cases, on the

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80. Guerrero, 675 F. Supp. at 1435 n.10 (Rule applies to prosecutors, even though it "may have been drafted with civil litigation as its primary object."); N.Y. Committee, supra note 5, at 837 (Rule's origin relates to civil, rather than criminal, matters); Green, supra note 4, at 285 & nn.8-9 (Rule "drafted with civil practitioners in mind"); Schwartz, supra note 4, at 947 (The Rule "is directed towards lawyers operating in the civil setting."); cf. Suarez, 481 So. 2d at 1205 (Rule applies to prosecutors even though it "seems to speak in terms of civil matters.").

81. United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973) (Public interest in criminal matters justifies a more relaxed application of Rule in criminal investigations.), cert. denied, 415 U.S. 989 (1974); Guerrero, 675 F. Supp. at 1438 & n.16 (In criminal matters, Rule should only apply when right to counsel attaches (after initiation of adversarial judicial criminal proceedings; in civil litigation, Rule applies before "formal initiation of a law suit."); Wolf, 7 Kan. App. 2d at 400-01, 643 P.2d at 1104-05 (1982) (citing Lemonakis with approval); Green, supra note 4, at 317-20 (the interests that justify application of the Rule in the civil context not as strong in the criminal context); cf. Yatman, 320 So. 2d at 402-03 (Although some prosecutors doubt that Rule applies to them, this "sacred" rule "applies equally to lawyers involved in the prosecution of criminal cases as in civil cases."); People v. Robles, 27 N.Y.2d 155, 162, 263 N.E.2d 304, 307, 314 N.Y.S.2d 793, 798 (1970) (Fuld, C.J., dissenting) (Police should not question a represented person in custody because such conduct in a civil case, "no matter how trivial," would be "unthinkable."); cert. denied, 401 U.S. 945 (1971).

82. Green, supra note 4, at 317-20.

83. Id.
other hand, the prosecutor has a greater interest in obtaining information from the suspect's own lips because the prosecutor does not have a chance to conduct a full pretrial discovery. The prosecutor cannot depose the defendant or question the defendant at trial because the defendant can claim the privilege against self-incrimination. In addition, the important societal interest in the enforcement of criminal laws is much greater than the interest in the vindication of or defense against civil claims.84

Professor Green further suggests that a harsh application of the Rule would greatly hamper undercover investigations. Such investigations often include communications with suspects and involve trickery that is precisely the type of overreaching the Rule was designed to prevent. This kind of trickery may be regarded as "a socially acceptable means of furthering compelling law enforcement interests."85 Civil litigants, on the other hand, do not usually rely on undercover investigations involving communications with parties.86

In any event, it is clear that if authorities are to fully apply the Rule in any context it must be fully applied in civil matters. In a civil investigation, the government is not substantially limited in its ability to obtain information. If the government agency cannot obtain information voluntarily, it often has the power to issue subpoenas, and if it files a lawsuit, it can use the usual discovery mechanisms available to all civil litigants. Indeed, the government is in a much stronger position to obtain information than the normal civil litigant. In addition to the power to issue subpoenas, the government usually has greater financial resources than the normal civil litigant. Government agencies often employ trained investigators and attorney specialists and have tested procedures for investigations. In addition, investigatees will often feel obliged to comply voluntarily with a government agency's requests for information because of the customary deference to the government and the agency's power to bring further litigation.87

While the public obviously has a strong interest in the enforcement of tax, securities, fair employment, antitrust, labor, and other laws, it has an equally strong interest in the fair treatment of targets of government

84. Id.
85. Id. at 299 n.61.
86. It is almost always unethical for a private attorney in a civil case to engage in an undercover investigation of a represented party if the investigation involves "communicating" with the party. See infra note 237.
87. Indeed, if a party fails to cooperate some agencies may draw an unfavorable inference from that failure to cooperate. See, e.g., M. FORKOSCH, A TREATISE ON LABOR LAW § 378, at 633 (2d ed. 1965) ("[W]ithholding of requested evidence permits an inference to be drawn unfavorable to that party, whether for or against the ultimate issuance of a complaint.").
investigations and lawsuits. As stated by the United States Supreme Court in the Title VII context:

[W]hile it was certainly the policy of Congress that Title VII plaintiffs should vindicate "a policy that Congress considered of the highest priority"... it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary judicial process... A fair adversary process presupposes both a vigorous prosecution and a vigorous defense.88

The public has an interest in a "fair" adversary process and therefore an interest in allowing the defendant to maintain a vigorous defense. It would greatly hinder a defendant's ability to maintain a vigorous defense if government attorneys were permitted to ignore the Rule.

Government agencies have the same opportunities to investigate and discover information enjoyed by other civil litigants and, in addition, significant advantages that civil litigants do not have. It is highly unlikely that, in giving government agencies the power to investigate, Congress intended to immunize agency attorneys and investigators from the ethical rules.

C. Communications "Authorized by Law"

Both DR 7-104(A)(1) and MR 4.2 allow communications "authorized by law." An argument could be made that communications made during lawful government investigations are "authorized by law" because statutes or regulations authorize the agency to conduct investigations. Attorney General Thornburgh, in purporting to exempt Justice Department attorneys from the Rule in criminal and civil enforcement matters, appeared to argue in the DOJ Memo that communications made by these attorneys are "authorized by law."89 He also stated his intention to amend the Justice Department's Standards of Conduct90 to "authorize" the communications.91 In the civil context, however, authorities have generally interpreted a communication to be "authorized by law" only if the communication was merely for ministerial purposes (and thus did not frustrate the purposes of the Rule), if the authorization was very specific, or if there were very strong policy reasons for doing so.

This section examines the Rule's authorized-by-law exception, first exploring the ABA's traditional narrow treatment of the exception in several ethical opinions. The section then shows that a narrow treatment of the exception is

89. DOJ Memo, supra note 5, at 4, 9.
91. DOJ Memo, supra note 5, at 9. Some courts have suggested that prosecutors and government investigators may be "authorized by law" to engage in some ex parte communications in criminal matters. See supra note 77.
consistent with principles of statutory construction and with a similar authorized-by-law exception in the Code of Judicial Conduct. The section next demonstrates that policy considerations mandate a narrow treatment of the exception. It then examines what constitutes "law" for purposes of the exception. Finally, the section proposes a test for authorities to use when faced with a question of whether a communication is authorized by law.

1. ABA Ethical Opinions

With the possible exception of one relatively recent opinion,92 the ABA has interpreted the authorized-by-law provision "narrowly."93 In Informal Opinion 985,94 a state statute provided that the defendant in an action for the recovery of money could serve "upon the plaintiff, or his attorney" an offer of judgment.95 Lawyers in the area usually served offers of judgment directly upon the plaintiff and served a copy on the plaintiff's attorney. The state bar association's committee on legal ethics said that the practice was unethical. The ABA Committee, in accordance with its usual practice of declining to express opinions as to matters of law, declined to interpret the state statute. The Committee said, however, that:

A majority of the committee is of the opinion that if applicable statutes or procedural rules or rules of law . . . expressly permit an offer of judgment to be served directly upon an adverse party, a lawyer may ethically cause such direct service to be made, provided that a copy is also served concurrently upon the attorney for the adverse party, and provided further that the attorney making such direct service does not do so with any improper motive or purpose.96

The Committee's caution is noteworthy. Although there is little danger of attorney overreaching from direct service97 of an offer of judgment, the

92. See infra text accompanying notes 101-07.
93. AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 339 (1979); see also ABA Comm. on Professional Ethics and Grievances, Formal Op. 187 (1938) (refusing to create exception to Rule based on Canon 39's endorsement of a lawyer's right to contact witnesses because Rule is to be "construed literally").
95. Cf. FED. R. CIV. P. 68 (defendant may serve offer of judgment on adverse party at any time more than ten days before trial).
96. ABA Comm. on Ethics and Professional Responsibility, supra note 94 (emphasis in the original).
97. Any attempt to engage the served party in conversation about the lawsuit would certainly fall outside of the statute's authorization. Merely serving a party with an offer of judgment, on the other hand, would present little danger of the opposing attorney undermining
Committee was apparently concerned that a party might settle a case against its own interests. Thus, the communication would be authorized by law only if the statute expressly authorized the communication and the attorney provided the safeguard of mailing a copy to opposing counsel.98

In ABA Informal Opinion 1348,99 the Committee had to decide whether a lawyer who believed that the opposing party's attorney was not relaying settlement offers to his client could send copies of letters containing such settlement offers that were already in the hands of the opposing party's attorney to the opposing party in a pending suit. The Committee said that such a communication was not permissible and that the lawyer should instead bring the facts before the court.100

ABA Informal Opinion 1496101 contains the Committee's latest pronouncement on the authorized-by-law exception. In that opinion, a federal agency was authorized by law to inspect certain businesses. Some inspectors were lawyers, although the agency did not require inspectors to be lawyers and the duties of lawyer and nonlawyer inspectors were identical.102

Agency inspectors sought permission to inspect from a company manager, in spite of the fact that some of the larger companies employed in-house counsel. If the company asked the inspector to direct inquiries through the company lawyer, the inspector would comply. If an inspector discovered a violation of federal law, he would conduct a follow-up investigation. The inspector would obtain relevant documents and talk with managers and employees. After completing the investigation, the inspector summarized the results and submitted a report and recommendation to the agency supervisor,

the served party's confidence in her lawyer or obtaining advantageous information from the served party. There is a very slight danger that the attorney may be able to obtain an advantageous settlement from the served party by serving an offer of judgment. The Committee's requirement that the attorney serve a copy on the party's lawyer reduces this danger to almost nothing.

98. The narrowness of the authorized-by-law exception is further emphasized by the fact that the state committee had found the communication unethical (even with service on the attorney) and a minority of the ABA Committee believed that the communication would only be authorized by law if the statute required personal service on the party. ABA Comm. on Ethics and Professional Responsibility, supra note 94.


100. The Committee, reaffirming Informal Opinion 985, said that if statutes or procedural rules expressly permitted a settlement offer to be served directly on an opposing party the lawyer could do so provided that he served a copy on the party's attorney and that the attorney did not have an improper motive for the communication. Id. In ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1373 (1976), the Committee applied Informal Opinion 1348's rationale to criminal cases. The Committee found that it was improper for a prosecutor's office to forward a copy of a letter containing an offer of a plea bargain sent to defense counsel to the defendant. The Committee did not discuss the authorized-by-law issue. The Committee also noted that defense counsel had an ethical duty to transmit the prosecutor's offer and that the prosecutor could seek appropriate remedies through the courts or disciplinary authorities if defense counsel was not fulfilling his obligation.


102. Id.
who determined whether the matter should be referred to the Department of Justice for litigation.103

The Committee held that when the inspector was “acting within the scope of statutory legal authority in contacting a regulated business for purposes of inspection or investigation,” the authorized-by-law exception permitted such contacts without the permission of the company’s lawyer. The Committee said that the exception permitted a government inspector-lawyer to have “authorized inspection and investigation contacts.”104

This opinion can be read in two ways. Interpreted one way, it simply begs the question. Because the Committee does not decide questions of law, the Committee did not reproduce the relevant statutory authority and did not expressly find that the statute did authorize the contacts. The Committee's statement that contacts are permitted when an inspector is “acting within the scope of statutory legal authority” may simply mean, “when a contact is authorized by law, it is ‘authorized by law.’” So read, the statement reveals nothing about whether the contacts would be deemed “authorized by law,” and it provides no aid in deciding whether to interpret such statutory authorization narrowly or broadly. Given the Committee's prior opinions holding that statutory authorization must be express, the mere mention of an agency's authority to conduct an inspection and an investigation would not authorize discussions with a party.

In fact, it is possible that the inspectors' statutory authorization was similar to that provided for Occupational Safety & Health Administration (OSHA) inspectors. The relevant statute authorizes the Secretary of Labor to enter workplaces and “to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . . and to question privately any such employer, owner, operator, agent or employee.”105 The language is very specific, clearly authorizing ex parte contacts. If the Committee was faced with interpreting similar language in Informal Opinion 1496, the opinion is consistent with a narrow reading of the authorized-by-law exception.

The opinion, however, might also be read to suggest that the general statutory authority to investigate authorizes discussions with parties without counsel’s consent. Under this latter reading, the authorized-by-law exception is very broad indeed. If this is its intent, the Committee, without addressing the point directly, has reversed itself on Informal Opinion 985's106 requirement that the authorization be express. Because of the important policy

103. Id.
104. Id.
106. ABA Comm. on Ethics and Professional Responsibility, supra note 94; see supra notes 94-98 and accompanying text.
considerations involved,\textsuperscript{107} Informal Opinion 1496 should not be read this broadly.

The ABA House of Delegates recently reiterated that the authorized-by-law exception is narrow. In the ABA Report, the House of Delegates rejected the idea that the Justice Department's general statutory authority extends to investigate "authorized" ex parte communications with parties. It noted that the Comment to MR 4.2 suggested a narrow and specific reading of the exception and also stated that exceptions should be strictly construed.\textsuperscript{108} The ABA Report, issued after Informal Opinion 1496, clarifies any ambiguity created by that opinion. The authorized-by-law exception must be narrowly construed, and an agency's general authority to investigate does not authorize ex parte contacts with parties.

This principle was confirmed in the first judicial test of the DOJ Memo. In United States v. Lopez,\textsuperscript{109} a criminal case, the prosecutor had engaged in extensive negotiations with an indicted defendant in the absence of the defendant's lawyer. The prosecutor relied on the DOJ Memo and contended that the ex parte contacts were "authorized by law" by virtue of policy directives authorizing the Attorney General to investigate and prosecute crimes.\textsuperscript{110}

The court noted that the ABA Committee had only applied the authorized-by-law exception in "limited circumstances," and it stated that the implications of the DOJ's argument were "alarming." If authorities accepted the DOJ argument, there might not be any conduct forbidden to a prosecutor so long as the conduct "was pursuant to his or her responsibility to investigate and prosecute crimes." The court found that the Attorney General's authorized-by-law theory had "no foundation" and took the extreme step of dismissing the indictment.\textsuperscript{111}

\textsuperscript{107} See supra Part I.B.
\textsuperscript{108} ABA Report, supra note 6, at 6.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 1456. Other case law is also consistent with a narrow treatment of the authorized-by-law exception. Courts have usually applied the exception to ministerial communications, where the communications presented no danger of frustrating the basic purposes of the Rule. In Weinstein v. Rosenbloom, 59 Ill. 2d 475, 322 N.E.2d 20 (1974), for example, an attorney challenged a rule of the Illinois Industrial Commission (IIC). The IIC rule required an attorney requesting a continuance to fill out a "form" postcard notifying other parties of the date and place of the continued hearing. The lawyer gave the form to the arbitrator who mailed it to the other parties. The IIC prepared the form, which merely contained the case caption and the time and location information. The plaintiff challenged the IIC rule as violative of the ban on communicating with represented parties. The court held that the IIC rule fell within the authorized-by-law exception. Id. at 482-83, 322 N.E.2d at 24-25.

In Weinstein, the authorization was highly specific. More important, there was no danger whatsoever that an attorney would obtain valuable information or would discuss settlement or interfere in her opponent's attorney-client relationship. The postcard merely contained time and date information and the arbitrator, not the attorney, mailed it. It was for this type of
2. Principles of Statutory Construction

Principles of statutory construction also support a narrow interpretation of the "authorized by law" exception. A party claiming that her conduct situation that the authorized-by-law exception was designed.

Similarly, in Fusco v. City of Albany, 134 Misc. 2d 98, 509 N.Y.S.2d 763 (N.Y. Sup. Ct. 1986), the plaintiff had sued a city for personal injuries allegedly sustained while walking on the city's sidewalks. The plaintiff, relying on a state freedom of information law, moved for an order compelling the city to allow her attorney to inspect city records. The city opposed the motion on the grounds, inter alia, that the Rule prohibited the plaintiff's attorney from communicating with the city's employees for the purposes of examining public records. The court held that the state freedom of information law authorized the communication. *Id.* at 101-02, 509 N.Y.S.2d at 766.

Here again, contacting a city clerk in order to obtain the records is a purely ministerial, administrative act. There is no danger of an attorney obtaining useful admissions or helpful information from the attorney's routine communication with the clerk. While the attorney would certainly obtain potentially valuable information from the files, this was expressly authorized by the freedom of information statute.

The Fusco case highlights a related point: a party's right to communicate with a government agency is a special case. There are very strong policy considerations favoring the public's right to access to government as enunciated in the first amendment's guarantee of the right to petition the government and in the Freedom of Information Act. 5 U.S.C. § 552 (1988). In addition, public employees also have first amendment rights that militate against limits on whom they can talk to.

It is these constitutional and statutory mandates, apparently, that caused the drafters of the Model Rules to comment that a party to a controversy with a government agency will be authorized by law to speak with that agency, even if the government agency is represented by counsel in the matter. *Model Rules*, supra note 2, MR 4.2 comment 1. While this exception will cover a party's attempts to communicate with a government agency (the Model Rules have apparently abolished an attorney's duty to prevent a client from talking with an opposing represented party, see infra notes 194-207 and accompanying text), it is unclear under what circumstances a party's attorney is authorized by law to communicate with employees of a represented government entity. (It is interesting to note that, while the drafters commented that a party is authorized by law to communicate with a represented government agency, they did not state that the government agency is authorized to communicate with a represented party.) For a discussion of the Rule's impact on an attorney's ability to communicate with a represented government entity, see Note, supra note 3.

Because it could be misused to support a broad interpretation of the authorized-by-law exception, one other case is worthy of note. In Nai Cheng Chen v. Immigration and Naturalization Service, 537 F.2d 566 (1st Cir. 1976), two married Chinese citizens, the Chens, failed to depart at the required time, and the Immigration and Naturalization Service (INS) initiated deportation proceedings. During the investigation, an INS inspector visited the Chens' home and talked with Ms. Chen. After finding out that the Chens were represented in the matter, the inspector asked for their passports. Ms. Chen gave them to him. *Id.* at 567-68.

At the hearing, the immigration judge admitted the passports over the Chens' objections and found the Chens to be deportable. The Board of Immigration Appeals affirmed the judge's determination, and the Chens sought judicial review.

The Chens argued that the documents should have been excluded from the hearing because the questioning of Ms. Chen violated the Rule. The First Circuit rejected the Chens' argument. The court said that it did not need to decide whether an ethical violation required suppression because the INS investigators were authorized by law "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." *Id.* at 569 (quoting 8 U.S.C. § 1357(a)(1) (1970)). The court stated:

While we consider it better practice for the INS to provide an alien's counsel of
falls within an exception has the burden of proof on the issue.113 Doubts should be resolved in favor of the general requirement rather than the exception.114

The Committee has followed these principles in construing other ethical rules. For example, in Formal Opinion 145, the Committee interpreted an exception to the advertising rules in the old Canon 46. The Committee stated that, "Being an exception, it should be strictly construed . . . ."115 In another opinion concerning advertising, the Committee quoted Professor Drinker with approval, stating that "[a]s an exception to the general rule . . . the law list provision is to be strictly construed."116 Consistency requires that authorities strictly construe the authorized-by-law exception to the Rule.117

There are other good reasons for construing exceptions narrowly. A legislative body usually enacts a statute to advance certain policies. An overly generous construction of an exception could frustrate those policies.

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record with notice of impending contacts and investigations . . . nevertheless we do not think that . . . the failure to provide notice to counsel of an investigative interview requires the exclusion of evidence obtained from this contact at the deportation hearing. Id. at 569. The court also noted with approval that a member of the Board of Immigration had said that the INS ought not to engage in the "general practice of interviewing aliens, without advising known counsel of record." Id. at 569 n.8.

This opinion cannot support a broad reading of the authorized-by-law exception for two reasons. First, the statutory authority was very specific. The statute authorized the immigration inspector to interrogate "suspected" individuals. Second, this was not a disciplinary hearing but a ruling on whether the immigration judge should have suppressed the evidence based on an alleged violation of the Rule. The court said that it did not have to decide whether a violation of the disciplinary rules required suppression because it found no violation.

112. The ethical rules are not statutes, and courts and disciplinary authorities are not bound by principles of statutory construction. Such principles, however, are instructive, especially in light of the ABA's use of them in interpreting other ethical provisions. See infra notes 115-17 and accompanying text.


115. ABA Comm. on Professional Ethics and Grievances, Formal Op. 145 (1935). Although the Supreme Court has struck down the bar's advertising rules on numerous occasions, see e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); In re RMJ, 455 U.S. 191 (1982), and Bates v. State Bar of Arizona, 433 U.S. 350 (1977), thereby rendering most of the Committee's opinions on advertising obsolete, the Committee's willingness to use principles of statutory construction in interpreting the ethical rules is evident.


117. Indeed, the ABA Report states that a broad interpretation of the authorized-by-law exception would contradict the "well-established" rule that exceptions should be strictly construed. ABA Report, supra note 6, at 6.
Similarly, a broad construction of the "authorized by law" exception could significantly hinder the policies advanced by the Rule.

3. The Committee’s Treatment of "Authorized by Law" in the Code of Judicial Conduct

The phrase "authorized by law" is also used in the Code of Judicial Conduct. The Committee’s treatment of that provision is instructive. Canon 3(A)(4) states:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

This authorized-by-law exception applies to a judge’s communications with other judges and with court personnel whose role is to assist the judge in performing his adjudicative duties. This is precisely the type of ministerial function for which such an exception is designed.

In Informal Opinion 1346, a law school operated a federally funded Legal Information Center (Center). The federal grant charged the Center with providing legal research and information to judges, public defenders, or appointed defense counsel in the area of criminal law. Law students, with faculty supervision, performed the research. The Committee held that it would not be proper for a judge to communicate with the Center about a pending proceeding unless all parties were given notice of the identity of the persons consulted, the substance of the advice received, and an opportunity to respond.

The Committee could have construed the authorized-by-law exception broadly, finding that the federal grant’s charge to the Center to advise judges provided the requisite authorization or that the Center was a "long-distance law clerk" authorized to communicate with a judge. This would


120. E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT, ABA 53 (1973).


122. Id.
have allowed a judge to take full advantage of the Center. The Committee, however, refused to read the authorized-by-law exception broadly, noting that the ban on ex parte communications was broad and explicit and that the Canon’s “exacting limitations” on ex parte communications were backed by important policy considerations.123

The Committee’s narrow treatment of this exception is consistent with the Committee’s approach to the analogous exception in the Rule. In both cases, a broad reading of the authorized-by-law exception could harm the interests the ethical provision was designed to protect. The Committee therefore construes the exception narrowly.

Thus the Committee’s treatment of the Rule’s authorized-by-law exception, its treatment of the comparable provision in the Code of Judicial Conduct, and principles of statutory construction mandate a narrow interpretation of the exception. There are also compelling policy reasons for such a narrow interpretation.

4. Policy Considerations

The authorized-by-law exception leaves little room for fine-tuning. If an agency’s general investigative authority provides legal authorization for the agency to talk directly with targets of civil investigations, it not only provides authorization to talk with the president of a corporate party, it also authorizes the lawyer to talk directly with a named individual party. The authorized-by-law exception provides no basis for distinguishing the two situations. There would be nothing to prevent a government lawyer124 from meeting privately with a represented individual, bullying valuable information out of her, and obtaining damaging admissions.125

A broad treatment of the authorized-by-law provision could also sanction overreaching in settlement negotiations. Statutes often grant agencies the authority to settle cases. Therefore, if the general authority to investigate authorizes ex parte contacts in the course of an investigation, then an agency’s legal authority to settle cases would also authorize an agency lawyer to negotiate a settlement directly with a represented party. This can be demonstrated by examining the Equal Employment Opportunity

123. Id.
124. Although most of an agency's investigative work is performed by nonlawyer investigators, if an agency's authority to investigate constitutes authorization to communicate directly with represented parties, there is nothing to prevent anyone at the agency, including lawyers, from doing so.
125. Of course, an agency's own guidelines may prevent this, and some agencies have guidelines, see infra text accompanying notes 252-301, but there would be nothing to require an agency to promulgate such guidelines.
Commission's (EEOC) and the National Labor Relations Board's (NLRB) legal authority to investigate, on the one hand, and their authority to settle cases, on the other.

An agency's statutory authority to investigate is often very general. The statutory authorization given to the NLRB and the EEOC are typical. Section 706 of Title VII, for example, gives the EEOC the authority to "make an investigation" of charges of employment discrimination and to make a reasonable cause or no reasonable cause determination.\footnote{126} Section 710 provides that the statute that governs NLRB hearings and investigations, Section 11 of the National Labor Relations Act (NLRA), applies to EEOC hearings and investigations.\footnote{127} Section 11 of the NLRA gives the NLRB the right, in the course of investigations and hearings, to issue subpoenas to compel testimony or the production of evidence; it also provides mechanisms for the NLRB to enforce the subpoena.\footnote{128} These provisions are the extent of the EEOC's and NLRB's statutory authority to investigate.

The regulations are not very elaborate either, although the regulations governing the NLRB\footnote{129} are more specific than those governing the EEOC.\footnote{130} The section dealing with the Board's investigation of unfair labor practices states, "The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charge, as is deemed necessary."\footnote{131}

In reference to the EEOC, the Code of Federal Regulations states, "The investigation of a charge shall be made by the Commission, its investigators, or any other representative designated by the Commission."\footnote{132} The EEOC is authorized to avail itself of the investigative services of state and local agencies, to obtain statements of position, to require definite statements

\begin{footnotes}
\item[127] Equal Employment Opportunity Act of 1972, § 710, 42 U.S.C. § 2000e-9 (1988), states, "For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply."
\item[129] The NLRB did not subject these regulations to notice and comment procedures. See 24 Fed. Reg. 9095-9121 (1959) (revision of chapter). As discussed infra notes 151-73 and accompanying text, such regulations should not be considered "law" for purposes of the authorized-by-law provision if the communications at issue are more than ministerial and could frustrate the purposes of the Rule.
\item[130] The EEOC subjected these regulations to notice and comment procedures. See 42 Fed. Reg. 55,388-96 (1977) (final rule); id. at 47,828-40 (final rule); id. at 42,022-41 (proposed rulemaking). The EEOC stated that because these were procedural regulations it did not have to subject them to notice and comment procedures. The EEOC, however, used these procedures because it believed the process would be useful. Id.
\item[132] 29 C.F.R. § 1601.15(a) (1990).
\end{footnotes}
from the aggrieved party, and to require a fact-finding conference; but the
EEOC's authority to investigate a charge "is not limited" to the aforemen-
tioned procedures.\textsuperscript{133}

The authority for the agencies' power to settle cases is more specific.
Title VII provides that, if the EEOC finds reasonable cause to believe that
a charged party has engaged in unlawful discrimination, it shall attempt to
eliminate the practice by "informal methods of conference, conciliation,
and persuasion."\textsuperscript{134} Regulations provide that the EEOC may "encourage"
the parties to settle\textsuperscript{135} or may "facilitate" a settlement.\textsuperscript{136} Similarly, regu-
lations authorize the NLRB to hold prehearing conferences to discuss
settlement and to provide Board-prepared forms for settlement agreements.\textsuperscript{137}
The regulations provide that even after the issuance of a complaint the
"attorney in charge of the case" should afford everyone an opportunity
for settlement.\textsuperscript{138}

If the general statutory power to investigate authorizes NLRB or EEOC
attorneys to question represented parties and bypass their attorneys, the
more specific authority to conciliate and settle cases would authorize agency
attorneys to "encourage" or "facilitate" settlements directly with parties.\textsuperscript{139}
As the court recognized in \textit{NLRB v. Autotronics, Inc.},\textsuperscript{140} however, the
dangers of allowing agency attorneys to negotiate settlements directly with
parties are great.

In \textit{Autotronics}, four days before a scheduled hearing on unfair labor
practices allegedly committed by Autotronics, a Board attorney, Jeffrey
Lerer, telephoned Autotronics' president, Charles Womack, to discuss the
case. Autotronics was represented by counsel in the matter. During the
conversation, Lerer allegedly told Womack that the union was thinking of
settling. Womack stated that he might have to close the plant in order to
attend the hearing, and Lerer said that might result in additional unfair
labor practice charges. Lerer suggested that he and the union representative
come to Womack's office and try to "work something out." The three met
for lunch.\textsuperscript{141} Lerer drafted a settlement agreement containing a "waiver"
stateing that the company had bypassed its attorney and contacted the NLRB

\textsuperscript{133} \textit{Id.} § 1601.15(d).
\textsuperscript{135} 29 C.F.R. § 1601.20(a) (1990).
\textsuperscript{136} \textit{Id.} § 1601.20(b).
\textsuperscript{137} NLRB Statements of Procedure, 29 C.F.R. § 101.7 (1990).
\textsuperscript{138} \textit{Id.} § 101.9(a).
\textsuperscript{139} The fact that requiring an agency to go through a party's attorney may "hinder" an
investigation does not justify a different treatment for the authorized-by-law exception in
investigations on the one hand and settlement talks on the other. Just as an attorney's vigorous
representation of a client can make it a bit more difficult for government agencies to investigate,
opposing attorneys can hinder an agency's legally authorized attempt to settle a case.
\textsuperscript{140} 596 F.2d 322 (8th Cir. 1979).
\textsuperscript{141} \textit{Id.} at 324-25.
in order to reach agreement. Lerer allegedly told Womack that he needed this statement for professional ethics reasons and explained further that Autotronics' lawyers had never won a case before the NLRB, so Womack would be wasting his money if he did not settle. The next day, Womack signed a formal stipulation upon which the NLRB based its subsequent decision and order. The order required the company to stop committing certain unfair labor practices, post a notice, and to compensate some of its employees.\footnote{142}

When the Board had to petition for enforcement of its order, the company challenged the stipulation. The Eighth Circuit found that the allegations charged "grave unethical conduct" on the Board attorney's part.\footnote{143} The court found that the waiver did not immunize the Board attorney from having violated the Rule:

[The ethical rule against communicating with represented parties] was formulated to obviate the possibility of taking advantage of an uncounseled party. The coercive tactics allegedly engaged in by the Board attorney illustrate the potential abuse in this situation. These tactics included lulling Womack into believing that the Board attorney could represent his interests, threatening further unfair labor practice charges, playing upon the known financial insecurity of the company, and derogating the abilities of Autotronics' counsel of record.\footnote{144}

The court concluded that the stipulation had been so tainted by the NLRB attorney's unethical conduct that it could not enforce the NLRB's order.\footnote{145}

If the authorized-by-law exception is interpreted very broadly, however, much of this conduct would be authorized by the NLRB's authority to settle disputes. The potential for abuse of power is manifest.

Furthermore, a broad interpretation of the authorized-by-law exception could have unintended consequences. Specifically, authorities could apply the exception in other contexts, to the detriment of the public interest. Parties under investigation, civil litigants, and their attorneys have the legal right to conduct a defense, to investigate, and to settle disputes. Arguably, their attorneys are authorized to communicate freely with opposing parties so long as the communications are made in pursuit of those functions. In the criminal context, the sixth amendment imposes on defense attorneys "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."\footnote{146}

\begin{itemize}
\item \footnote{142} Id. at 323-25 & n.2.
\item \footnote{143} Id. at 325.
\item \footnote{144} Id. at 326.
\item \footnote{145} Id. In an order denying a petition for rehearing, the court softened its language a bit. It stated that the company's actions may have been partially responsible for the Board counsel's actions in bypassing the company attorney. The court said, however, that it was incumbent upon the Board's attorney to contact the company's counsel or to obtain a written statement withdrawing or denying the attorney's appearance. Id.
\end{itemize}
this requires counsel to "interview potential witnesses and to make an independent investigation of the facts and circumstances."147 A broad interpretation of the authorized-by-law exception would allow a defense attorney to talk with a separately represented co-defendant of the lawyer's client without the permission of the co-defendant's attorney since the Constitution sometimes requires talking with witnesses. The Rule, however, bars a lawyer from talking with a represented co-defendant of the lawyer's client unless the lawyer has the consent of the co-defendant's attorney.148

In this vein, the United States Supreme Court has stated that Congress has cast private civil rights plaintiffs in the role of "private attorney[general]" in order to vindicate "a policy that Congress considered of the highest priority."149 Prevailing civil rights plaintiffs, therefore, are normally entitled to attorneys' fees. If a government agency such as the Justice Department is "authorized by law" to engage in ex parte communications pursuant to a civil investigation—as claimed by the Attorney General in his memorandum—it is arguable that the attorney for a private "attorney general" vindicating a policy of the "highest priority" should also be authorized to make such communications. Similarly, Title VII defendants are entitled to a "vigorous defense."150 Presumably, this Supreme Court pronouncement might "authorize" defense attorneys to make ex parte contacts with opposing parties. Such a result, of course, would completely eviscerate the Rule.

5. What Is "Law"?

The word "law" in the phrase "authorized by law" is ambiguous. The word certainly includes constitutional provisions and statutes. According to EC 7-18, the exception includes "law or rule of court."151 It is unclear, however, under what circumstances agency regulations constitute "law" for purposes of the Rule. A lax interpretation of the word "law" would allow an agency to issue a regulation that would completely exempt it from the Rule.

An agency regulation can, in certain circumstances and for some purposes, be considered "law." For example, an agency possessing the requisite

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147. United States v. Debango, 780 F.2d 81, 85 n.3 (D.C. Cir. 1986) (quoting Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985)); see also United States v. Gray, 878 F.2d 702, 711-12 (3d Cir. 1989) (Failure to interview witnesses constituted ineffective assistance of counsel.).

148. In re Mahoney, 437 N.E.2d 49, 50 (Ind. 1982); see also In re Thompson, 492 A.2d 866, 867 (D.C. 1985).


150. Id. at 419.

151. MODEL CODE, supra note 1, EC 7-18.
statutory authority can, by following proper procedures, promulgate a
regulation that preempts conflicting state law. Such a regulation can be
considered federal "law" for purposes of preemption analysis.\(^{152}\)

In \textit{Weinstein v. Rosenbloom},\(^{153}\) the Illinois Supreme Court found that,
for purposes of the Rule's authorized-by-law exception, "law" included the
properly promulgated rules of an administrative agency. In that case,
however, the agency rule authorized a communication that was purely
ministerial. The agency required attorneys requesting a continuance to fill
out an agency "form" postcard notifying other parties of the date and
place of the continued hearing. The agency arbitrator then mailed the form
to the other parties. Filling out the postcard presented no attorney over-
reaching.

Other communications, however, such as most face-to-face meetings, are
more than ministerial and are potentially dangerous. Such communications
could frustrate the Rule's purposes because of the opportunities for attorney
overreaching. An agency's unilaterally promulgated investigatory procedures
should not usually be considered "law" authorizing such communications.
If such procedures were considered "law," any government agency could
simply promulgate a policy authorizing its lawyers and investigators to talk
with any party at any time (as the DOJ Memo purports to do for criminal
and civil enforcement matters). Similarly, any agency could "authorize" its
lawyers to communicate ex parte with state and federal judges at any time
and such communications would be "authorized by law" under the Code
of Judicial Conduct,\(^{154}\) the Model Rules,\(^{155}\) and the Model Code.\(^{156}\) Such a
result would be highly undesirable.

An agency should not be able unilaterally to exempt its lawyers from
ethical restraints unless it properly promulgates specific regulations. If the
agency rule authorizes conduct that could frustrate the purposes of the
Rule, the agency should subject its rule to notice and comment procedures
(or analogous procedures), when available, and should establish a nexus
between the regulation and the legislative delegation of authority. This point
is illustrated by a case in which the United States Supreme Court construed
a statute's use of the phrase "authorized by law."

\(^{153}\) 59 Ill. 2d 475, 322 N.E.2d 20. For a discussion of \textit{Weinstein}, see supra note 111.
\(^{154}\) \textit{CODE OF JUDICIAL CONDUCT}, supra note 119 (A judge cannot engage in ex parte
communications concerning a pending or impending proceeding "except as authorized by
law."); see supra text accompanying notes 118-23.
\(^{155}\) \textit{MODEL RULES}, supra note 2, MR 3.5(b) (A lawyer cannot communicate with a judge
or juror "except as permitted by law.").
\(^{156}\) \textit{MODEL CODE}, supra note 1, DR 7-110(B)(4) (In an adversary proceeding, a lawyer
cannot engage in ex parte communications with a judge about the merits of the case unless
"authorized by law" or by Code of Judicial Conduct Canon 3(A)(4).).
In *Chrysler Corp. v. Brown*, the Office of Federal Contract Compliance Programs (OFCCP) had issued regulations requiring government contractors to furnish information about their affirmative action programs. Chrysler, a government contractor, had provided the information. Other OFCCP regulations provided for public disclosure of information from the records of OFCCP and other compliance agencies. Third parties requested Chrysler’s records. Chrysler sought to enjoin agency disclosure, arguing that the Trade Secrets Act barred release of the information. The Act made it a crime for a federal employee to release certain types of confidential information belonging to individuals, corporations, or other entities, unless the release of the information was “authorized by law.”

The Court of Appeals held that the release of the information was “authorized by law,” namely by the OFCCP regulations that provided for public disclosure of the information. The United States Supreme Court disagreed.

The Supreme Court noted that the Administrative Procedure Act (APA) distinguished between substantive rules on the one hand and interpretative rules, general policy statements, or agency practice, procedural, and practice rules on the other hand. Substantive rules were “legislative-type . . . affecting individual rights and obligations.”

The Court stated, however, that for a substantive regulation to have the “force and effect of law” the regulation had to be rooted in a congressional grant of authority and had to conform to the procedural requirements imposed by Congress. While the OFCCP regulations were clearly substantive, the statutes relied on by the government—such as Titles VI and VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972—did not provide the legislative authority for the OFCCP disclosure regulations.

The Court acknowledged that Congress, in enacting these statutes, had granted government agencies the authority to collect information in order to end discrimination. Congress, however, had not been concerned with the public disclosure of such information. The fact that the agency had designed its disclosure policy to encourage cooperation with other parties desiring to end discrimination and that the policy was therefore consistent with the statutes’ purpose was insufficient to give the regulations the “binding effect of law.”

158. Id. at 286-87.
160. Id. at 295.
162. *Chrysler Corp.*, 441 U.S. at 302.
163. Id. at 302-06.
164. Id. at 306-08.
The Court also found that there was a procedural defect that precluded courts from affording the OFCCP disclosure regulations the force and effect of law. The APA required that agencies afford interested parties notice of proposed rulemaking and an opportunity to comment before promulgating a substantive rule. The APA exempted interpretive rules, policy statements, or agency organizational, procedural, or practice rules from this requirement. When the Secretary of Labor issued the OFCCP disclosure regulations, he characterized them as relating solely to interpretive rules, policy statements, or organizational, procedural, or practice rules. He therefore did not give interested parties notice of proposed rulemaking.

The Supreme Court therefore found that interpretive rules and other regulations not properly promulgated as substantive rules did not have the binding effect of law. The Court concluded that an interpretive regulation or general agency policy statement could not provide the authorization by law required for release pursuant to the Trade Secrets Act.

Thus, in interpreting the authorized-by-law language in the Trade Secrets Act, the Supreme Court held that "law" could include a regulation. To have the force and effect of law: (1) the regulation must be "substantive"; (2) the congressional grant of rulemaking authority must reasonably contemplate the regulation (otherwise, as pointed out by Justice Marshall's concurrence, "agencies Congress intended to control could create their own exceptions to [the Trade Secrets Act] by promulgating valid disclosure regulations"); and (3) the agency must have satisfied applicable procedural requirements.

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166. Administrative Procedure Act, § 4, 5 U.S.C. § 553(c) (1988). Informal rulemaking under the APA has three steps:

First, the agency must publish a general notice to the public in the Federal Register indicating its intention to issue a rule. The public notice must specify the time, place and nature of the proceeding, the legal authority under which the agency proposes to act, and either the substance of the proposed rule or a description of the subject and issues involved in the rulemaking. The purpose of the public notice is to permit members of the public to participate effectively in the rulemaking proceeding through the second step in the sequence—submission of written data, views or arguments concerning the proposed rule. Finally, the agency must publish the final rule in the Federal Register and must incorporate in that rule a concise general statement of its basis and purpose. The final rule is then subject to judicial review.


168. Id. at 314-15.

169. Id. at 315-16. The Court, however, held that the Trade Secrets Act did not afford a private right of action to enjoin disclosures violating the statute, although such violations might "have a dispositive effect on the outcome of judicial review of agency action." Id. at 316-17.

170. Id. at 320 (Marshall, J., concurring). In cases not involving the interpretation of an
While the ethical codes are not statutes and authorities need not slavishly follow Chrysler, its general principles are applicable to the Rule’s authorized-by-law exception. “Law” can include an agency’s procedural regulations that authorize acts that would not hinder the Rule’s purposes, such as the mailing of a notice of continuance to a party, as in Weinstein v. Rosenbloom. However, when the regulation purports to authorize acts that may frustrate the purposes of the Rule (such as interviewing parties or engaging in settlement discussions), the Chrysler principles should be followed. The agency should establish a nexus between the statutory authorization and the proposed regulation and should subject the regulation to notice and comment procedures (or analogous procedures), when available. Only then can the regulation provide legal authorization for potentially dangerous communications. Otherwise, agencies could unilaterally promulgate guidelines completely exempting their attorneys from the Rule.

6. Proposals for the Authorized-by-Law Exception

Authorities should continue to interpret the authorized-by-law exception narrowly. When faced with a question of whether a communication is authorized by law, courts and disciplinary authorities should look at four factors: (1) the specificity of the authorizing language; (2) the inherent dangers in the type of communication involved; (3) the type of “law” providing the authorization—for example, constitution, statute, court order, substantive regulation, or procedural regulation; and (4) the policies that would be in favor of allowing the communication.

For an agency to exempt a communication from the Rule, authorities should require that authorizations for the communication be specific and that the communication serve a legitimate purpose. The authorization should

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171. See K. Davis, ADMINISTRATIVE LAW TREATISE § 7.8, at 243-45 (1989 Supp.). In addition, an agency’s interpretive or procedural regulation might constitute “law” for some purposes. Chrysler Corp., however, is still valid for determining the power of an agency to create “law” for purposes of exempting itself from a statutory requirement that contains an authorized-by-law exception.

172. See also Honeywell, Inc. v. Consumer Product Safety Comm’n, 582 F. Supp. 1072, 1077 n.3 (D.D.C. 1984) (“Promulgation pursuant to the APA is a prerequisite to giving a regulation the binding effect of law.”); cf. Einhorn v. DeWitt, 618 F.2d 347, 350 (5th Cir. 1980) (The purpose of IRS procedural rules is to govern the IRS’ internal affairs, and they thus “do not have the force and effect of law”).

173. Agencies could also unilaterally exempt their attorneys from the Code of Judicial Conduct’s ban on ex parte communications with judges. CODE OF JUDICIAL CONDUCT, supra note 119; see supra text accompanying notes 118-23.

174. As discussed supra notes 92-111 and accompanying text, authorities have interpreted the authorized-by-law provision narrowly.
be tailored to the agency's legitimate need for the communication and should not authorize communications beyond the purpose served. Otherwise, agencies could simply create broad exemptions for their attorneys by using general language in the regulation. Courts and disciplinary authorities should require even greater specificity and more important policy justifications when the communication is more than ministerial and presents the potential for allowing opposing counsel to obtain helpful information or damaging admissions, or for driving a wedge between the attorney and her client.

If the communication is merely ministerial, a procedural regulation may provide authorization. If, however, the communication presents the possibility of frustrating the purposes of the Rule, an agency should establish a nexus between the statutory authorization and the regulation and should subject the regulation to notice and comment procedures (or analogous procedures), when available. Notice and comment procedures force agencies to justify proposed regulations to the public. Such procedures also ensure that agencies have a broad base of information when enacting regulations and that agencies remain flexible and open-minded.

D. Agency Lawyers' Responsibility for the Conduct of the Agency's Investigators

Much of the work of government agencies is performed by nonlawyers who are not subject to discipline. A government agency engaged in civil investigations, therefore, might seek to circumvent the Rule by having its investigators communicate with represented parties. Such a practice, however,

175. The communication at issue in Weinstein, supra note 111, provides an example of a ministerial communication.

176. See Chrysler Corp., 441 U.S. at 312-13 ("It is within an agency's discretion to afford parties more procedure."). State agencies should also subject such regulations to notice and comment procedures.

State rulemaking is very diverse. Some states have rather "primitive" administrative procedure acts; others have very sophisticated ones. W. Fox, Jr., UNDERSTANDING ADMINISTRATIVE LAW § 46, at 159-61 (1986). The National Conference of Commissioners on Uniform State Laws adopted a Model State Administrative Procedure Act (MSAPA) in 1946 and revised it in 1961 and 1981. More than half the states have enacted an administrative procedure act that is based, at least partly, on some version of the MSAPA. A. Bonfield, STATE ADMINISTRATIVE RULE MAKING § 1.1.3, at 12-13 (1986). The MSAPA generally imposes more rigorous procedural requirements on rulemaking than the federal Administrative Procedure Act, including stricter treatment of nonsubstantive rules. B. Schwartz, ADMINISTRATIVE LAW § 4.13, at 184-85 (2d ed. 1984).

177. B. Schwartz, supra note 176, § 4.10, at 171.

178. Attorney General Thornburgh, in his June 1989 Memorandum, argued that "any rule that would permit non-attorney investigators . . . to contact represented parties, but not at the direction of an attorney supervisor . . . [is] an invitation to those non-attorneys to avoid seeking direction from the responsible prosecutors and civil lawyers." DOJ Memo, supra note 5, at 7.

Similarly, some authorities have suggested that, in criminal matters, the police could avoid
ever, would not comport with the mandates of the ethical rules or with policy considerations.

This section addresses a lawyer's responsibility for the conduct of nonlawyers. The section first discusses a lawyer's duty to avoid acting unethically through a nonlawyer and then discusses the duty to supervise. The duty to supervise may differ under the two codes. The section therefore discusses, in turn, the Model Code and the Model Rules. The section then uses three hypotheticals to examine a law firm's ethical duties to avoid violations of the Rule when investigators are conducting investigations for the law firm. The hypotheticals illustrate the law firm's duty to avoid accessorial liability and its duty to supervise the investigators. Finally, the section examines the responsibility of government lawyers for the unethical ex parte communications of government investigators.

1. General Principles Regarding a Lawyer's Responsibility for the Conduct of Nonlawyers

In appropriate circumstances, the ethical rules hold lawyers responsible for the actions or omissions of nonlawyers. As the Preliminary Statement to the Model Code states, "A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client." The reason is that nonlawyers are not subject to discipline. In order to protect the public, the legal system, and other attorneys, lawyers must be responsible for the actions of nonlawyers associated with them when those actions could undermine the safeguards of the ethical rules.
Generally, the ethical rules do not impose strict vicarious liability. Thus, a lawyer usually need not absolutely guarantee that her nonlawyer associates act ethically.\textsuperscript{181} The rules, however, provide standards that impose on the lawyer responsibility for the actions of nonlawyers. The rules: (1) bar a lawyer from acting unethically through a nonlawyer by directing or ratifying the nonlawyer's unethical conduct (labelled "accessorial" liability by two commentators);\textsuperscript{182} and (2) require that the lawyer exercise reasonable supervision over nonlawyer associates.\textsuperscript{183}

2. Accessorial Liability

a. General Principles

The first mandate—to refrain from directing or ratifying a nonlawyer's misconduct—is codified in both the Model Code and the Model Rules. Disciplinary Rule 1-102(A)(2) states that, "A lawyer shall not . . . [c]ircumvent a Disciplinary Rule through actions of another."\textsuperscript{184} The Model Rules contain a similar provision, MR 8.4(a), which states, "It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . . or do so through the acts of another . . . ."\textsuperscript{185}

\textsuperscript{181} 2 G. HAZARD & W. HODES, supra note 3, at 784 (MR 5.3 "establishes an independent duty of supervision rather than a regime of imputed liability."). There is a possible exception, however, for cases decided under the 1969 Model Code dealing with a lawyer's responsibility for the mishandling of client funds. See C. WOLFRAM, supra note 1, § 16.3.1, at 893 ("Courts applying the 1969 Code provisions on client funds have stated that the requirement of adequate supervision is one of strict liability and is not excused by a reasonable belief in the competence of the employee.").

\textsuperscript{182} 1 G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 466 (2d ed. 1990).

\textsuperscript{183} 2 G. HAZARD & W. HODES, supra note 3, at 785 (MR 5.3 establishes a duty of reasonable supervision.).

\textsuperscript{184} MODEL CODE, supra note 1, DR 1-102(A)(2). The Model Code also contains specific provisions requiring lawyers to ensure that employees and associates protect confidential information, id. DR 4-101(D), and refrain from making improper extrajudicial statements, id. DR 7-107(J).

\textsuperscript{185} MODEL RULES, supra note 2, Rule 8.4(a). In addition, Rule 5.3(c)(1) states:

With respect to a nonlawyer employed or retained by or associated with a lawyer

\begin{itemize}
  \item [c)] a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
    \begin{itemize}
      \item [(1)] the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved . . . .
    \end{itemize}
\end{itemize}

\textit{Id.} Rule 5.3(c)(1).

\textit{See also} ABA/BNA Manual, supra note 2, at 21:8602 (A "lawyer may not use lay personnel to take any action that the lawyer himself is prohibited to take by professional ethics."); 1 G. HAZARD & W. HODES, supra note 3, at 466 ("[A]ny lawyer may be held liable . . . for a breach of professional ethics if he or she directs . . . the misconduct."); cf. C. WOLFRAM, supra note 1, § 16.3.1, at 892-93 ("A lawyer's responsibilities are not simply to avoid participating in the wrongdoing of nonlawyer employees and to correct known deficiencies, although they certainly include those and similar duties.").
Any lawyer, therefore, who authorizes a nonlawyer to engage in conduct that would be unethical for the lawyer is, under either code, guilty of professional misconduct and is, in effect, responsible for the actions of the nonlawyer. Accordingly, a lawyer may not communicate with a represented party through a nonlawyer. As one treatise states:

A lawyer may not circumvent the prohibition by delegating the task to a nonlawyer . . . or by advising another to communicate in a manner that would be impermissible if engaged in by the lawyer. . . .

A lawyer prohibited from speaking directly to an adverse party is likewise barred from causing an investigator, for example, to do the deed. . . . Moreover, lawyers should advise their clients against using investigators in this unethical manner.186

In accordance with this principle, the Committee has forbidden lawyers to use nonlawyers to make such communications for the lawyers' benefit. According to Informal Opinion 909, if a law firm employs an investigator, the investigator may not do anything that "a member of the law firm could not do ethically," and the law firm is responsible for all of the investigator's actions. If the investigator communicates with a represented adverse party, the firm has violated the Rule.187

Thus any lawyer, including a government lawyer, who authorizes an investigator to contact a represented party has violated the Rule.188 A government lawyer who authorizes an investigator to call a party or assents to the investigator's suggestion that the investigator make such a call or grants a blanket authorization for such calls has violated the Rule.

In addition, a lawyer who allows a client to send investigators to talk with represented parties and takes advantage of the fruits of the communications is unethically "circumventing" the Rule. The footnote to DR 1-102(A)(2)—the provision that bans "circumventing" a disciplinary rule through the actions of another—cites as its sole authority ABA Formal Opinion 95 (1933)189 in which the Committee held that a municipal attorney could not allow police officers to interview represented persons who had claims against the municipality. In that opinion, the Committee stated that an attorney-client relationship existed between the municipal attorney and the municipality and that the attorney would "of course" be responsible for the conduct of a nonlawyer under the attorney's supervision and control. Furthermore, an attorney cannot "adopt a general course of approving the

188. This is assuming, of course, that the communication is not authorized by law.
189. ABA Comm. on Professional Ethics and Grievances, Formal Op. 95 (1933), cited in MODEL CODE, supra note 1, DR 1-102(A)(2) n.12, DR 7-104(A)(1) n.75. The footnotes, written by the Model Code's reporter, were not an attempt at a complete annotation but have sometimes played an important part in the Code's interpretation. C. WOLFRAM, supra note 1, § 2.6.3, at 58 n.55.
unethical conduct of his client, even though he did not actively participate therein.'"\(^{190}\) The Committee also stated:

It would be unavailing to contend that the police officers or detectives are not under the supervision and control of the law officer, but rather are under the supervision and control of the municipality. "The attorney should not advise or sanction acts by his client which he himself should not do." \(^{191}\) Canon 16 also sets forth that if a client persists in improprieties contrary to the advice of his attorney, the lawyer should terminate the relationship. \(^{192}\) Opinion 44.

Furthermore, the duty of an attorney is not confined solely to his client. He has some obligations respecting the court and his brethren at the Bar. \(^{193}\) Canon 22, among other things, deals with candor and fairness to other lawyers. Such conduct on the part of the law officer of the municipality is not, we think, dealing with a brother lawyer with candor and fairness.

Thus, according to Formal Opinion 95, lawyers are responsible for nonlawyers under their supervision; lawyers cannot adopt a general course of approving the unethical conduct of another even if the lawyer did not participate;\(^ {194}\) and lawyers cannot sanction unethical actions of client's employees.

Formal Opinion 95 requires neither that the attorney participate in the nonlawyer's acts nor that he have supervisory authority over the nonlawyer. Routinely accepting the benefits of the client's "course of conduct" would constitute approval of that course of conduct and would, therefore, be unethical. Indeed, approving of the general course of conduct of another or routinely reaping the benefits of that conduct constitutes ratification of such conduct. Such knowing ratification of another's unethical conduct is, and should be, cause for discipline.\(^ {195}\)

\(^{190}\) Formal Op. 95, supra note 189.

\(^{191}\) Id. (citation omitted); see also Massa v. Eaton Corp., 109 F.R.D. 312 (W.D. Mich. 1985) (applying the Rule when an attorney was the "beneficiary" of his clients' continuing investigative efforts).

\(^{192}\) Cf. C. Wolfram, supra note 1, § 13.3.5, at 698 (A lawyer's continuing agreement to represent members of an illegal organization contributes to the organization's success and is therefore unethical.).

\(^{193}\) Cf. ABA Comm. on Professional Ethics and Grievances, Formal Op. 150 (1936). In Formal Opinion 150, police officers had recorded conversations between a criminal defendant and his attorney. At that time, such recordings were admissible as evidence. Although the prosecutor did not participate in the procurement of the evidence, the Committee held that the prosecutor could not ethically offer the confidential communication as evidence. Id.

Analyses to agency law also support the conclusion that an attorney's routinely reaping the benefits of a client's course of conduct constitutes ratification or affirmation of that conduct. A purported principal's affirmation of a person's unauthorized act normally has the same effect as if the person had been originally authorized (assuming the other conditions for ratification are met). \(^{194}\) Restatement (Second) of Agency § 100 comment a (1958). The receipt or retention of the benefits of an act can constitute an affirmation of that act if the purported
b. Party-to-Party Communications

The comment to MR 4.2 expressly allows parties to communicate with each other.¹⁹⁴ It could be argued that this comment allows a government "party" to have its investigators talk with represented parties. Such an interpretation would, however, completely eviscerate Formal Opinion 95 and would be unwarranted in light of the apparent reasons for the comment's inclusion. In fact, the comment to MR 4.2 and Formal Opinion 95 should be read consistently with each other.

The apparent reason for the inclusion of the comment can be demonstrated by examining two ethical opinions decided under the 1908 Canons.¹⁹⁵ In these opinions, the Committee had imposed on a lawyer a duty to prevent a client from discussing the case with the opposing party.¹⁹⁶ In Formal Opinion 75,¹⁹⁷ the Committee stated that a lawyer had to restrain a client from discussing settlement with the other party. In Informal Decision 524, the Committee said that a lawyer had to "use his best efforts to restrain and prevent his client from communicating with the other party without the consent of the party's attorney."¹⁹⁸ This duty existed even when the two parties were wife and husband!

These opinions clearly went too far. Lawyers should not have to prevent a client's informal discussions with the other side. This greatly erodes client sovereignty and places an onerous burden on lawyers.

The ABA remedied this in 1983 when it adopted the Model Rules. The comment to MR 4.2 expressly allows parties to communicate with each other. In addition, the Committee withdrew Formal Opinion 75 and Informal Decision 524.¹⁹⁹ These actions mean, in effect, that an attorney does not have a positive duty to prevent party-to-party communications.

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¹⁹⁴. MODEL RULES, supra note 2, MR 4.2 comment, states, in part, "parties to a matter may communicate directly with each other."
¹⁹⁵. ABA CANONS OF PROFESSIONAL ETHICS (1908).
¹⁹⁶. See also AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 334 (1979) (A lawyer "has a duty to dissuade the client from trying to gain advantages by communicating directly with the opposing party.").
¹⁹⁹. In ABA Comm. on Ethics and Professional Responsibility, Formal Op. 350 (1984), the Committee withdrew five opinions relating to communications with adverse parties, including Formal Op. 75 and Informal Decision 524. Two of the withdrawn opinions—ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 1255 (1972) and 1140 (1970)—dealt with communications with unrepresented parties and are not relevant to this discussion. Another withdrawn opinion—ABA Comm. on Professional Ethics, Informal Op. C-426 (1961)—was simply incorrect in that it purported to allow an attorney to send a legal notice to a represented adverse party and state the general contents of the notice to the adverse party without the opposing attorney's consent.
The Committee, however, did not withdraw Formal Opinion 95. Formal Opinion 95, as discussed previously, makes a lawyer responsible for approving a client's unethical practice of sending investigators to talk with opposing parties.

Furthermore, the "Model Code Comparison" to MR 4.2 states, "This Rule is substantially identical to DR 7-104(A)(1)." It is highly unlikely that the House of Delegates intended substantial changes in the Rule when it passed the Model Rules.

The rules governing accessorial liability can and should be interpreted consistently with both Formal Opinion 95 and with the comment to MR 200. Supra text accompanying notes 189-93.

200. Supra text accompanying notes 189-93.

201. The House of Delegates did not take action on the Code Comparison or the Legal Background notes and thus these are only products of the Kutak Commission, the special commission the ABA appointed to study the revision of the Model Code. (The last paragraph of the "Scope" section of the Model Rules states that the "[r]eview notes . . . have not been adopted, do not constitute part of the Model Rules, and are not intended to affect the application or interpretation of the Rules and Comments." Model Rules, supra note 2, Scope.) As Professor Wolfram notes, however, the quoted section from the Scope suppressing the notes apparently applied "only to the Legal Background notes because the Code Comparison notes were, with only slight editorial changes, republished along with the official ABA version of the finally adopted Model Rules." C. WOLFRAM, supra note 1, § 2.6.4, at 62 n.78. The Code Comparison notes are therefore entitled to some weight.

202. A similar analysis can be applied to a change in the Rule's language. Disciplinary Rule 7-104(A)(1) contains the phrase "or cause another to communicate." Model Rule 4.2 does not contain this language. The phrase is really duplicative because MR 8.4(a) forbids violating the rules through the acts of another. Nevertheless, the New York State Bar Association suggested retaining the language. The following discussion of the proposed Model Rule took place at the ABA February 1983 midyear meeting:

"An amendment proposed by the New York State Bar Association, which would have added the phrase "or cause another to communicate," was defeated. The opponents objected to a possible interpretation of the amendment that would prevent lawyers from advising principals to speak directly with their counterparts. The Rule was not intended to prohibit such advice. To the extent the amendment would have precluded a lawyer from using an intermediary to carry a message from the lawyer to the opposing party, such conduct was prohibited by Rule 8.4(a) which prohibited a lawyer from violating a Rule "through the Acts of another."


When the House of Delegates, however, adopted the final draft of the Model Rules at the August 1983 Annual Meeting, the delegates did not pass on nor, apparently, did they have the benefit of, this discussion. The Revised Final Draft considered by the delegates at that meeting contained only a Preamble, Terminology, Rules, Comments, a Code Comparison section, and Legal Background notes. 1 G. HAZARD & W. HODES, supra note 3, at xix. Since it is highly unlikely that the House of Delegates intended substantial changes in the Rule when it passed the Model Rules, the change dropped superfluous language and ensured that a lawyer did not have a duty to prevent party-to-party communications. The lawyer, however, may not approve of or knowingly reap the benefits of such communications.

The ABA also dropped the same phrase—"cause another to communicate"—from the ban on ex parte contacts with judges. Disciplinary Rule 7-110(B) contains the phrase; the analogous MR 3.5(b) does not. The change certainly did not authorize a lawyer to use another person to make ex parte contacts with a judge.
4.2. Thus parties are free to communicate with each other, and a lawyer does not have a positive duty to prevent client-to-client communications. This will sometimes have the salutary effect of allowing parties to settle disputes informally and to prevent ridiculous situations from arising—such as requiring the lawyer to prevent husband-wife communications. In addition, allowing parties to communicate with each other is consistent with the general policy favoring free expression. While the Rule's limits on an attorney's speech are justified by important policy considerations, the same considerations do not apply to communications between parties.

The lawyer, however, must have nothing to do with the communications. The lawyer cannot encourage, aid, abet, or ratify a client's communications with another party and must not approve of a client's general practice of sending investigators to talk with opposing parties.\(^{203}\) Thus, a lawyer may not ask his client to gain specific information or obtain certain admissions from the other party and cannot give the client detailed advice on how to conduct the discussions with the other party. To do this without the opposing lawyer's consent would be to use the client to gain an unfair advantage over the other party. As stated by one treatise:

The Model Rules' prohibition against a lawyer's speaking to the opposing party does not include a prohibition against the two parties speaking to each other . . . .

Lawyers, however, should not actively use their clients to communicate with opposing parties. Moreover, both the Model Rules and the Model Code prohibit lawyers from violating an ethics rule through another person's acts and from inducing another to violate a rule.\(^{204}\)

The fact that a lawyer cannot use her client to violate the Rule means that the analysis of Formal Opinion 95 is still applicable. An attorney cannot adopt a general course of conduct by which he approves of a client sending investigators to opposing parties. An attorney also cannot routinely accept the benefits of the communications, even if she did not actively participate in those activities.

The court in \textit{Massa v. Eaton Corp.}\(^{205}\) recognized this. In \textit{Massa}, eleven plaintiffs had filed an action for breach of an implied employment contract and age discrimination. One of the plaintiffs had interviewed several managerial-level employees of the defendant without the consent of

\(^{203}\) See ABA/BNA Manual, \textit{supra} note 2, at 71:301 ("[O]pposing parties themselves may communicate with each other without the consent of their lawyers, although lawyers should not encourage their clients to do so."); \textit{id.} at 71:302 ("[L]awyers should advise their clients against using investigators" to communicate with represented parties.); C. \textit{Wolfram}, \textit{supra} note 1, § 11.6.2, at 612 & n.40 (While "a lawyer is not required to advise a client who intends to contact an opposing party directly not to do so without the opposing lawyer's consent," the Rule clearly extends "to a lawyer's conduct in causing another, such as an investigator or the lawyer's own client, to make the contact.").

\(^{204}\) ABA/BNA Manual, \textit{supra} note 2, at 71:303 (citation omitted).

defendant’s counsel. It was unclear whether the plaintiffs’ attorney had requested or approved the plaintiffs’ communications. The plaintiffs’ attorney conceded, however, that he had been the “beneficiary of these investigative efforts” and that he did not “intend to direct his clients to cease” the communications unless the court ordered him to do so. The court ordered that the plaintiffs and their counsel cease communicating with the defendant’s managers. The court also ordered that the plaintiffs give the defendant a list of the employees to whom they had talked and that any evidence obtained through communications with managers would be inadmissible at trial.

The court’s logic is persuasive. The plaintiffs’ lawyer had violated the Rule by accepting the benefits of his clients’ communications, even if he had not requested that the plaintiffs talk with the managers. Allowing an attorney to benefit from his clients’ course of ex parte communications would eviscerate the Rule.

3. The Duty to Supervise

The rules regarding accessorial liability are essentially the same under the Model Code and the Model Rules. The rules regarding the duty to supervise, however, may differ between the two codes. It is unclear, however, whether such differences exist at all and, if so, to what extent.

The Model Code’s Preliminary Statement says that a lawyer “should ultimately be responsible” for the conduct of his employees and associates. Under the Code, courts have held that lawyers have “full supervisory responsibility” to ensure that the work of employees is compatible with the ethical rules. A lawyer has a duty to correct known deficiencies, to exercise a high degree of care in hiring and training employees, and to supervise employees. This includes a duty to make himself aware of “at least . . . the major areas of responsibility and the actual work habits of employees.”

206. Id. at 313.
207. Id. at 315.
208. Compare C. Wolfram, supra note 1, § 16.3.1, at 892 (“The theory of supervisory responsibility may . . . differ significantly under the 1969 Code and under the 1983 Model Rules.”) with id. at 894 (“While the provisions of MR 5.3 are susceptible of a reading that would make the responsibilities of lawyers considerably less than under the 1969 Code, that is not their apparent intended thrust.”).
209. MODEL CODE, supra note 1, Preliminary Statement.
210. C. Wolfram, supra note 1, § 16.3.1, at 892; cf. Crane v. State Bar, 30 Cal. 3d 117, 122-23, 635 P.2d 163, 165, 177 Cal. Rptr. 670, 672 (1981) (even if violation of Rule inadvertent and precipitated by members of attorney’s staff, attorney subject to discipline for “negligence in failing properly to prevent direct contact with represented parties”); In re Kiley, 22 A.D.2d 527, 528, 256 N.Y.S.2d 848, 849 (1965) (partner who worked on matter subject to discipline for firm’s false billing because of his negligence “in failing to uncover the irregularities”).
211. C. Wolfram, supra note 1, § 16.3.1, at 893. In addition, lawyers may be strictly liable under the Code if their assistants mishandle client funds. Id.
Model Rule 5.3, however, adopts "the arguably less stringent standard of a reasonably efficient bureaucracy."²¹² Model Rule 5.3 states, in part:

With respect to a nonlawyer employed or retained by or associated with a lawyer:
(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.²¹³

Subsection (a) requires that a partner in a law firm make reasonable efforts to ensure that the actions of nonlawyers are compatible with the ethical rules. This subsection requires, at a minimum, that partners ensure that nonlawyers receive relevant training in the requirements of the ethical rules. Partners should ensure that investigator employees or associates refrain from communicating with represented parties.

One could argue that by its language this Rule does not apply to government lawyers because they are not "partners." A closer examination of the Model Rules make clear, however, that the term "partner" includes lawyers exercising supervisory authority in government offices.²¹⁴

²¹². Id.
²¹³. Model Rules, supra note 2, MR 5.3. Model Rule 5.3 is very similar to MR 5.1, which deals with the responsibility of partners and supervisory lawyers for the actions of other lawyers in the firm. While MR 5.3 primarily deals with a lawyer's responsibility for her employees, the Rule is not limited to that context. As Professors Hazard and Hodes have stated:

In addition to nonlawyer legal workers who are physically located in a lawyer's office . . . Rule 5.3 applies to the relationship between lawyers and such outside operatives as investigators, claims adjusters, appraisers, and independent researchers. The Rule also requires a prosecutor to supervise police practices, to the extent that they impinge upon his responsibilities to the court and to persons accused of crime.

2 G. Hazard & W. Hodes, supra note 3, at 785.

In addition, the Rule on its face applies to nonlawyers "employed or retained by or associated with a lawyer." The use of the term "associated" is not a term of art referring to associated lawyers because the rule deals with "nonlawyer assistants" and Model Rule 5.1 deals with a law firm partner's supervisory responsibilities over lawyer associates. "Associated" cannot mean fee-splitting.

²¹⁴. The Model Rules' "Terminology" section defines "partner," as a "member of a
The language and structure of Model Rule 5.3, dealing with a lawyer's responsibilities regarding nonlawyer assistants, is very similar to the language and structure of Model Rule 5.1, dealing with the responsibilities of partners and supervisory lawyers. In fact, the legal background states that a lawyer's duty to supervise nonlawyer assistants "generally parallels the duty under . . . Model Rule 5.1 regarding partners and subordinate lawyers." The comment to Model Rule 5.1 states that "[p]aragraphs (a) and (b) [analogous to paragraphs (a) and (b) in Model Rule 5.3] refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency." The same must be true for Model Rule 5.3—all lawyers in government offices (or any other entity) who exercise supervisory responsibilities analogous to partners should have the duties of "partners."
Under subsection (b), a lawyer having direct supervisory authority over a nonlawyer must make "reasonable efforts" to ensure that the nonlawyer acts compatibly with the ethical rules. While what constitutes reasonable efforts will depend on the circumstances, a supervising lawyer certainly has the duty to instruct and train new employees in the basic ethical rules. Subsection (b) applies to any supervising lawyer, including those who have supervisory authority in government offices. In addition, as one treatise notes, it is the "clear, if unstated, assumption of MR 5.3 that some lawyer in the firm will have such 'direct supervisory authority' over nonlawyer employees as a product of the 'measures giving reasonable assurance' in MR 5.3(a)."

Under subsection (c)(2), a partner in a law firm or any lawyer who supervises a nonlawyer must take reasonable remedial action when the lawyer learns of the nonlawyer's unethical conduct. Thus a lawyer must try to stop the conduct; if it is too late for that, the lawyer must attempt to ameliorate the conduct.

There may be a loophole in this subsection. According to its strict language, if a nonpartner lawyer knows a secretary or investigator working under the supervision of another lawyer is engaging in unethical conduct, the lawyer is under no obligation to rectify the situation. Generally, a lawyer's violation of an ethical rule does not, by itself, subject the lawyer to civil liability, although some courts may use the Code for guidance in a civil case. C. Wolfram, supra note 1, § 2.6.1, at 51.

In regard to the duty to supervise, there is no reason whatsoever to distinguish between partners in traditional law firms, on the one hand, and managing lawyers in large sole proprietorships, corporate legal departments, legal aid offices, and government agencies, on the other hand. The Model Code makes no such distinction. Indeed, when the drafters of both codes desired to create specific rules for government attorneys, they did so. See supra text accompanying notes 62-63. It is reasonable to distinguish between partners and supervisory lawyers in other entities for purposes of tort liability because partners are the "owners" of the law firm and should therefore be financially responsible to wronged individuals in appropriate circumstances. For disciplinary purposes, however, the fact that partners have a financial stake in the firm, while supervisory lawyers in other entities do not, should not be determinative. The key issue is which lawyers have supervisory authority within the entity.

The codes thus treat lawyers alike, regardless of what type of entity employs them. The mandates of MR 5.3(a) apply to "entity" lawyers exercising supervisory authority.

220. 2 G. Hazard & W. Hodes, supra note 3, at 785.
221. 2 G. Hazard & W. Hodes, supra note 3, at 788.
222. C. Wolfram, supra note 1, § 16.3.1, at 894 n.6.
223. See 2 G. Hazard & W. Hodes, supra note 3, at 790 (Under MR 5.3(c)(2), lawyers are subject to liability for "failing to interdict ... misconduct known to them.").
224. C. Wolfram, supra note 1, § 16.3.1, at 894 n.7. A strong argument could be made, however, that the associate would have a duty to report the other lawyer's failure to adequately supervise the secretary. See Model Rules, supra note 2, MR 8.3(a) (A lawyer having knowledge of another lawyer's violation of the ethical rules "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."); cf. Model Code, supra note 1, DR 1-103(A) (A "lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.").
Such an interpretation would, however, be highly undesirable. A lawyer who knows that a nonlawyer associated with the firm is behaving unethically should not be allowed to ignore the behavior. This probably would not be the result under the Code, and courts and disciplinary authorities might, and should, impose discipline in this situation even under the Model Rules.

Thus any time a government lawyer exercises direct supervisory authority over an investigator, the lawyer is potentially responsible for the investigator’s conduct. If an investigator tells the lawyer he plans to talk ex parte with a represented party, the lawyer must instruct the investigator not to do so. In addition, under the Model Code, and possibly under the Model Rules, any lawyer in an office who learns of a nonlawyer’s unethical acts must make efforts to stop or ameliorate the conduct.

4. Hypotheticals

Since neither code distinguishes between private and government lawyers in determining lawyer responsibility for the conduct of nonlawyers, examining various hypotheticals involving the Rule’s applicability to a private firm’s investigators will aid in an analysis of the Rule’s applicability to investigators in a government agency. The following hypotheticals analyze the duties of a law firm to avoid accessorial liability and the law firm’s duty to supervise when the law firm or the firm’s client conducts civil investigations.

**Hypothetical 1**

A large private law firm, Smith & Jones, handles many personal injury cases for various parties and employs its own investigators. When a client comes to the firm, a lawyer discusses the matter with the client and, if appropriate, refers the case to the investigation department. The investigators

225. See Model Code, supra note 1, Preliminary Statement (“[T]he public has a right to expect” ethical conduct from a lawyer’s “non-professional employees and associates;” a lawyer should “ultimately be responsible” for their conduct.) Nonlawyer “associates” certainly form a broader group than those under a lawyer’s direct supervision and must include the situation in which a lawyer knows of a nonlawyer’s unethical conduct. See also C. Wolfram, supra note 1, § 16.3.1, at 892 (Nonlawyer employees “function as the alter ego of every lawyer in the firm and every lawyer in the firm remains responsible for their supervision.”).

226. See C. Wolfram, supra note 1, § 16.3.1, at 894 (“[W]hile the provisions of MR 5.3 are susceptible of a reading that would make responsibilities of lawyers considerably less than under the 1969 Code, that is not their apparent intended thrust.”).

Another problem with MR 5.3 is that it is geared toward law firms and not other entities that have no “partners”—government agencies, legal service organizations, and offices where several associates work for one attorney. Authorities will probably interpret “partner” to mean anyone in a law office who has supervisory authority equivalent to a partner. The Article discusses this problem in its analysis of subsection (a) of MR 5.3. See supra notes 214-19 and accompanying text.
then talk to potential parties, including represented parties. The investigators obtain admissions, useful information, and sometimes even tentative settlements. Once the investigation department completes its investigation, it turns over the file, including the information, admissions, and proposed settlements, to Smith & Jones’ lawyers. The lawyers then routinely use the information and admissions for purposes of negotiation and, if necessary, at trial. Lawyers also review the proposed settlements. The investigation department is headed by a lawyer, and lawyers supervise the investigators’ work.

**Hypothetical 2**

This hypothetical has the same facts as Hypothetical 1, except the investigation department is headed by a nonlawyer. The investigation department is completely independent and kept completely free of the involvement of lawyers. No lawyer directly supervises an investigator.

**Analysis of Hypotheticals 1 and 2**

Lawyers for Smith & Jones are clearly subject to discipline under both hypotheticals. In Hypothetical 1, the lawyers could be disciplined for any “accessorial” conduct—authorizing or ratifying an investigator’s communications with represented parties. While in Hypothetical 2 no lawyer authorizes the unethical communications, lawyers may be ratifying the acts.

In both hypotheticals, firm lawyers, depending on their degree of culpability, could be disciplined under the Model Code for negligent supervision of the investigators or a negligent failure to supervise. Under the Model Rules, lawyers directly supervising investigators would be responsible for failing to exercise reasonable supervision under MR 5.3(b) in Hypothetical 1, but not Hypothetical 2, because in Hypothetical 2 there are no lawyers supervising nonlawyers. Under MR 5.3(c)(2), lawyers in Hypothetical 1 directly supervising the investigators would be responsible for failing to stop or mitigate the effects of the investigators’ contacts. Under both hypotheticals, partners (or possibly all lawyers\(^\text{227}\)) aware of the communications would also be disciplined for failing to stop or mitigate the communications. Partners, but not associates, would be subject to discipline for a failure to ensure “measures giving reasonable assurance” under MR 5.3(a) in both hypotheticals.

**Hypothetical 3**

A law firm, Johnson & Brown, has a large corporate client, Acme, which does not employ staff attorneys. The firm defends several hundred personal injury suits a year for Acme. Acme employs a department of trained

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\(^{227}\) See *supra* notes 223-26 and accompanying text.
investigators. As a matter of course, before turning over the lawsuit to Johnson & Brown, Acme's investigators talk to plaintiffs (and potential plaintiffs), even those who are represented. No attempt is made to obtain permission from a plaintiff's attorney for the communications, and the investigators regularly obtain valuable information and damaging admissions as a result of the contacts. Sometimes the investigators are even able to obtain settlements.

Once Acme completes its investigation, it turns over the file, including the information, admissions, and proposed settlements to Johnson & Brown. The law firm never told Acme to establish such a system, never told the investigators to contact the parties, and never exercised supervisory authority over them. It routinely uses the information and admissions for purposes of negotiation and at trial, if a trial ensues. It also reviews the proposed settlements. The firm follows this procedure for all matters, year after year.

Analysis of Hypothetical 3

Johnson & Brown may be disciplined under one of several theories: (1) lawyers in the law firm have violated the Rule by ratifying the investigators' conduct; (2) partners have violated the Rule by failing to ensure that the investigators' conduct was compatible with the professional obligations of a lawyer, pursuant to MR 5.3(a) or the general supervisory duties under the Model Code; (3) the law firm has approved of a "general course" of Acme's unethical conduct, proscribed by Formal Opinion 95; and (4) Johnson & Brown has circumvented or violated the Rule through the acts of another, in violation of DR 1-102(A)(2) or MR 8.4(a).

5. Government Attorneys' Responsibility for Investigators

The relationships between government investigators and government attorneys working for an agency will almost always fall within one of the three hypotheticals discussed above. For example, NLRB and EEOC attorneys at the regional or district office are involved, to a greater or lesser extent, in the office's investigation of some charges. These lawyers would, of course, be responsible if they authorize or ratify an investigator's communications with unrepresented parties.

Surely, if a law firm representing a business concern became aware that the concern's investigators were interviewing adversary parties who were represented by counsel without first obtaining counsel's consent, it would not, if it failed to insist that its client's investigators desist from such activity, be heard to claim its benign neglect as a defense.
Lawyers at the local level would also be responsible for a negligent failure to supervise under the Model Code, and under MR 5.3(b) and (c)(2), lawyers directly supervising investigators would also be responsible for a failure to supervise and a failure to interdict or mitigate unethical conduct. A supervisory relationship might be found between an attorney at the local agency office and an investigator. In addition, a supervisory relationship could even be found between a high-level attorney at a "headquarters" office and the local office investigators. For example, the NLRB's General Counsel in Washington, D.C., has supervisory authority over all regional offices, although it is unclear whether this would satisfy MR 5.3's requirement of "direct supervisory authority."

Furthermore, under the duties imposed by the Model Code and under MR 5.3(a), government attorneys exercising supervisory authority should make reasonable efforts to ensure that the agency has "in effect measures giving reasonable assurance" that the conduct of agency investigators is compatible with the ethical rules, including this Rule. Such attorneys would often include the top attorneys in a local office and the top attorneys in a headquarters office. Any attorney who promulgates guidelines for investigators should be responsible for ensuring that the guidelines comport with the ethical rules.

Even when a federal, state, or local government agency merely investigates and then routinely refers the case to another agency—the Department of Justice, a state attorney general, or a municipal attorney—for litigation, attorneys for the litigating agencies should be responsible for reasonable supervision of the investigators' conduct and, of course, should not authorize or ratify any unethical conduct. Lawyers for the government litigating agency should be subject to discipline under the same circumstances as the law firm lawyers in Hypothetical 3.

Whenever the fruits of investigations conducted by a government civil investigator are likely to end up in the hands of a government lawyer, the government lawyer should take steps to ensure that the investigator's conduct does not violate the Rule. If the lawyer fails to do so, the lawyer should be disciplined.

229. As I have argued, all agency attorneys, or at least those attorneys exercising supervisory authority, should also have a duty to interdict an investigator's unethical conduct. See supra notes 223-26 and accompanying text.
231. Thus, for example, the NLRB General Counsel, who is responsible for promulgating the agency's Casehandling Manual, should amend the manual to comport with the Rule. I do not intend to single out the General Counsel or the NLRB. The General Counsel should be commended for promulgating written guidelines that show some concern for the Rule. There are some government agencies that do not have written guidelines. See infra note 252 and text accompanying notes 304-05.
232. These principles can be used to analyze the decision in a recent disciplinary case.
E. Possible Exceptions for Government Agencies

In the criminal context, commentators have expressed three concerns about the Rule’s effects on investigations. First, a broad interpretation of the Rule could effectively ban traditional undercover techniques by prohibiting covert contacts made by informants and undercover police officers.233

The second concern is related. A lawyer may attempt to immunize her client from all communications in futuro, with the net effect of blocking practically all criminal investigations of the attorney’s client. Theoretically, the attorney could notify all government agencies and police departments that she represents John Smith (or Acme Corporation) in all matters and request that all communications about any matter, present and future, be channelled through her. Again, an extremely broad reading of the Rule

In re Mettler, 305 Or. 12, 748 P.2d 1010 (1988), the Securities Section of the Corporation Division of the Oregon Department of Commerce employed attorney Mettler as an examiner (investigator). Examiners did not have to be attorneys. As a result of Mettler’s investigation, the Corporation Division issued a cease and desist order against, levied a fine on, and revoked the license of securities salesman Anderson. Furukawa sued Anderson in a civil suit as the result of the same matter, and Anderson retained an attorney to represent him in the suit. With knowledge of the pending civil suit and Anderson’s representation by counsel in that suit, Mettler procured Anderson’s signature to a stipulation containing damaging admissions. Furukawa’s attorney sought to use these admissions in the civil suit, but Anderson’s attorney persuaded the Corporation Division to withdraw the stipulation. Id. at 14-15, 748 P.2d at 1010-11.

In the disciplinary action against Mettler, the Oregon Supreme Court held that Mettler was subject to the disciplinary rules since he was admitted to practice before the court and was an active member of the bar, “even though he was serving in government.” Id. at 16, 748 P.2d at 1012. The court also held, however, that the Corporation Division was not a client since a client is one who asks a lawyer for legal advice and therefore Mettler had not violated the Rule. The court criticized Mettler’s conduct, observing that he had violated the Corporation Division’s own rules in communicating with Anderson, but it held that “bad practice does not necessarily equate to an ethical violation.” Id. at 20, 748 P.2d at 1014.

The state disciplinary authorities did not charge any of the government agency’s lawyers under any theory making a lawyer responsible for the acts of nonlawyers. A supervisor-lawyer who failed adequately to supervise Mettler, a lawyer who participated in or ratified Mettler’s actions, or a lawyer who benefitted from an investigator’s course of unethical conduct would be subject to discipline. Mettler, in turn, may have had a duty to report his supervisor’s violation. See Model Rules, supra note 2, MR 8.3 (lawyers obligated to report rule violations raising substantial question about lawyer’s “honesty, trustworthiness, or fitness as a lawyer in other respects”); Model Code, supra note 1, DR 1-103(A) (lawyers obligated to report violations of disciplinary rules, conduct prejudicial to administration of justice, and conduct adversely reflecting on lawyer’s fitness to practice law).

Even if such a violation had not occurred, Mettler should have been subject to discipline. He should have known that when the fruits of an investigator’s activities were likely to end up in the hands of a lawyer the investigator should not communicate with a represented party. He also should have known that he had violated the Corporation Division’s rules. His conduct, even if not a violation of the Rule itself, was prejudicial to the administration of justice. See Model Rules, supra note 2, MR 8.4(d); Model Code, supra note 1, DR 1-102(A)(3). It also adversely reflected on his fitness to practice law. See Model Code, supra note 1, DR 1-102(A)(6).

233. DOJ Memo, supra note 5, at 2.
could immunize a corporate client from all undercover criminal investigations.234

Third, an attorney representing multiple clients (one of whom is the principal target of a criminal investigation) or an attorney representing an organization and its employees may direct that all communications be made through her. If one of the co-clients or an organization employee believes that the attorney's interests are opposed to his interests and initiates a communication, he might fear that telling the lawyer may result in retaliation by the codefendant or organization.235

The first two concerns are not particularly relevant to civil investigations. Most government agencies do not rely on undercover techniques in conducting civil investigations. Even in cases involving such investigations, most communications would take place before the target had sought advice "in that matter" and the Rule, therefore, would not apply.236 If, however, a government agency traditionally and legitimately relied on undercover techniques directed against targets already under investigation, the agency could promulgate narrowly tailored regulations to allow the use of such techniques.237

In addition, there is little danger that defense counsel can block all future investigations by notifying government agencies of the representation. Authorities reject the argument that the retention of counsel for all matters

234. See S. Gillers & N. Dorsen, supra note 4, at 342; cf. Cohen, supra note 4, at 4 (Some criminal practitioners are sending letters to prosecutors "generally advising the prosecutor that they represent an individual, [and] not limiting the letter to a particular investigation.").

235. DOJ Memo, supra note 5, at 2-3. According to the DOJ Memo, notifying the attorney of the snitch or whistleblower's communications may have "dire consequences." Id. at 3. The DOJ is concerned that the codefendant may even physically retaliate against the snitch. See also Green, supra note 4, at 312 (A criminal defendant employed by a criminal organization may be afraid to have the organization's attorney learn of his willingness to cooperate with the government.).

236. See supra note 18 and accompanying text.

237. It is almost always unethical for a private attorney in a civil case to engage in an undercover investigation of an opposing represented party if the investigator communicates with the party. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 663 (1963); see also Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc., 440 F.2d 1216, 1218-19 (7th Cir. 1971) (criticizing defendant's investigator for deceptively questioning plaintiff's employee without notice to plaintiff's counsel and allowing employee to believe that investigator was hired by his employer).

238. For example, state agencies engaged in the enforcement of consumer protection laws sometimes use undercover techniques in civil investigations.

239. The agency should subject these regulations to notice and comment procedures, or analogous procedures, when available. See supra notes 151-77 and accompanying text. Ideally, any regulation exempting an agency from the Rule should expressly state that the agency can bypass the attorney and contact the party directly and should also specifically delineate under what circumstances such communications are authorized and describe the precise nature of the authorized communications. Cf. 26 U.S.C.A. § 7521(c) (West Supp. 1990) (expressly stating that IRS may bypass taxpayer's representative to notify taxpayer that representative is unreasonably delaying or hindering investigation).
immunizes the target from all future government questioning. Furthermore, this problem would usually be avoided by recognizing that, for the Rule to apply, the opposing party must have sought legal advice in the specific matter. In most circumstances, corporations would hesitate to notify the government about possible misconduct.

The concern that a whistleblower would fear reprisal is more troubling. Even in the civil context, while it is unlikely that a whistleblower will fear physical retaliation, she may fear that she will lose her job. While many statutes ban reprisals, an employee may nevertheless be afraid to tell her story in the presence of any company representative.

Often, the Rule will not be implicated when a whistleblower employed by an entity comes to a government agency. If an individual files a charge, it will often be required by statute that the agency receive the charge. Such specific statutory mandates are covered by the Rule's authorized-by-law exception. In addition, the entity will often have not yet sought legal advice "in that matter."

If, however, the Rule applies to a communication and the employee of a party requests that the party's lawyer not be present, the communication should be allowed. The ABA could add a section to MR 4.2 stating:

A communication between a government agency lawyer or agent and an employee of a party does not violate this Rule, if:
1. the communication is made pursuant to a lawful civil investigation;
2. the employee is not independently represented by counsel;

240. Green, supra note 4, at 307 n.86 (Such an argument would receive an "unsympathetic response."); see also United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982) (Too broad a reading of the Rule would allow criminal suspects, by retaining a lawyer, to frustrate legitimate investigations.); United States v. Masullo, 489 F.2d 217, 223 (2d Cir. 1973) (Defendant's retention of "counsel in other past and current drug transactions is not necessarily indicative of his retention of them" for the drug transaction at issue.); United States v. Guerrerio, 675 F. Supp. 1430, 1436-37 n.13 (S.D.N.Y. 1987) (citing Vasquez; criticizing an expansive reading of the Rule, because a sophisticated racketeer would be able to stymie any efforts to use undercover agents to record inculpatory conversations by having his lawyer advise law enforcement agencies that all communications be made through counsel).

241. See supra note 18 and accompanying text. The Hammad court apparently agreed with the lower court's reasoning that this limitation meant that, in criminal matters, the Rule "exempts the vast majority of cases where suspects are unaware they are being investigated." United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988).

242. As pointed out by one commentator, a corporation hoping to use the Rule prophylactically would have to "specify in advance the particular matter in which it might become suspect." Freedman, Dirty Pool in the Prosecutor's Department, 9 Tex. Law., Oct. 1, 1990, at 26, col. 1.


244. Title VII, for example, provides for the filing of charges of employment discrimination with the EEOC and mandates that the charge "be in writing under oath or affirmation" and "contain such information and be in such form as the Commission requires." Id. § 706(b), 42 U.S.C. § 2000e-5(b).
the employee initiates the initial communication and requests that
the party's lawyer not be informed of the communication;
4. the employee's request is put in writing; and
5. the communication is made solely to obtain the employee's testi-
mony and does not touch on privileged matters, settlement, or any other
improper subject.245

If the employee is independently represented by counsel in the matter or
is herself a party, the exception would not apply. The communication should
not take place unless the employee's lawyer has given her consent. There is
no danger that the presence of the employer's lawyer could lead to retaliation
because the employer's lawyer does not have to be notified when the
employee is independently represented.246

The exception to the Rule is only designed to ease the genuine fears of
whistleblowers. Government agencies should not use this exception to avoid
the Rule. Therefore, government agencies should not initiate the request for
ex parte communications unless the employee has initiated the communi-
cation and is reluctant to have the employer's counsel informed of the
communication.247 Requiring that the request be in writing will help ensure
that there is a genuine concern on the employee's part.248

Prohibiting the government agency from initiating communication may
present problems of proof.249 Nevertheless, most government attorneys would
comply with the requirement of the exception. Government agencies could
add to the written request a statement that the employee, without prompting

245. Cf. Leubsdorf, supra note 3, at 704 (proposing a broad change in the Rule, including
a more relaxed rule when an employee of a party "is interviewed solely to obtain his
testimonial")

246. See Model Rules, supra note 2, MR 4.2 comment (If organization's employee is
independently represented by counsel, consent by that counsel to communication "will be
sufficient for purposes of this Rule.")

247. The comment to the proposed amendment should explain that once an unrepresented
employee initiates contact about a matter with a government agency and requests that the
employer's counsel not be present the agency is free to contact the employee about the matter.
In addition, the fact that an agency has ethically communicated with an employee prior to
the employee's request to "blow the whistle" would not prevent the agency from taking
advantage of the whistleblower exception. For example, an agency may have talked with a
target's employee with the permission of the target's attorney or may have deposed the
employee. If the employee subsequently asks to speak with the agency without his employer's
knowledge, this would qualify as the employee initiating the "initial communication," and the
agency could take advantage of the whistleblower exception. The agency, however, could not
solicit such communications.

248. Cf. Model Rules, supra note 2, MR 1.5 comment (Written fee statements reduce "the
possibility of misunderstanding.")

249. Other code provisions raise similar problems of proof. See, e.g., Model Rules, supra
note 2, MR 7.3(a) ("A lawyer shall not by in-person or telephone contact solicit professional
employment from a prospective client with whom the lawyer has no family or prior professional
relationship, when a significant motive for the lawyer's doing so is the lawyer's pecuniary
gain."); Model Code, supra note 1, DR 2-104(A) ("[A] lawyer who has given in-person
unsolicited advice to a layperson . . . shall not accept employment resulting from that advice
. . . .")
from the government, has expressed a desire to meet with the agency without the party's counsel being informed.\textsuperscript{250}

The requirement that the communication not touch on privileged matters, settlement, or other improper subjects will also involve problems of proof. Most government agencies will obey the proscription.\textsuperscript{251} If an agency unethically uses confidential information and the opposing lawyer becomes aware of it, it might not be too difficult to find out how the government obtained the information.

In any event, government agencies can use the proposed exception to the Rule to alleviate the fears of whistleblowers. The exception, however, is a narrow one and preserves the Rule's protections for targets of government investigations.

\section*{F. Government Agency Guidelines}

Some government agencies recognize the dangers of bypassing a party's attorneys and have established internal procedures to limit such contacts. Such procedures rarely comply fully with the Rule, although they provide some safeguards.

This section discusses two agencies—the National Labor Relations Board (NLRB or Board) and the Equal Employment Opportunity Commission (EEOC or Commission)—in detail\textsuperscript{252} and also briefly discusses three other

\textsuperscript{250} Government agencies can simply promulgate a short standardized form for such communications.

\textsuperscript{251} Cf. \textit{Bates}, 433 U.S. at 379 ("[W]ith advertising, most lawyers will behave as they always have: they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system [and] for every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward."). An experience that I had in practice is relevant. I learned that the EEOC planned to interview a former high-level employee of my corporate client. My client had been charged with sexual harassment based on the acts of the former manager toward a female secretary. The former employee did not want a company representative present at the interview. I wrote a letter, demanding that the EEOC allow me to be present. I explained that I had engaged in privileged conversations with the former manager (while he had worked for my client) and I needed to be at the interview to protect my client's privilege. While the EEOC turned down my request, it hired a court reporter to record the entire testimony, apparently so that it would be clear that the agency had only sought testimony, not privileged material.

\textsuperscript{252} I have chosen to discuss the NLRB and EEOC in detail because I am familiar with them (I practiced in the labor law area) and the two agencies have different procedures regarding ex parte communications with represented parties. Other federal, state, and local agencies may have similar guidelines and the same analysis will be applicable.

I telephoned a few state fair employment agencies and asked about their policies regarding communications with represented respondents. The California Department of Fair Employment and Housing has a training manual that instructs investigators to allow respondents to have an attorney present when interviewing supervisors or managers. The agency also verbally instructs investigators to deal with respondents through their representatives.

The Illinois Department of Human Rights verbally instructs its investigators to only contact a respondent through its attorney. The protection extends to respondent's managers and the
agencies—the Internal Revenue Service (IRS), the Federal Trade Commission (FTC), and the Securities and Exchange Commission (SEC). The FTC procedures go a long way toward complying with the Rule, although the procedures protect fewer entity employees than most authorities require. The EEOC's procedures are inconsistent; some procedures substantially comply with the Rule's requirements while others do not. The NLRB and IRS procedures are deficient; a party can lose the Rule's protection if the party's attorney fails to cooperate with the agency's investigation. The SEC does not have written guidelines and refuses to recognize the Rule's application to entity employees, unless the employee is individually represented.

1. National Labor Relations Board

The NLRB's regional offices investigate charges of unfair labor practices. If the regional director finds that a charge has merit and a settlement cannot be reached, she issues a complaint. An administrative law judge then conducts a hearing. At the hearing, the trial attorney, representing the General Counsel, prosecutes the case. The trial attorney is often the same attorney who prepared the complaint. In fact, as two commentators

agency defines managers loosely to include supervisors. Investigators respect an attorney's wishes regarding contacts with the respondent. If an attorney fails to cooperate, the agency may subpoena individuals or may take a negative inference from the lack of cooperation.

The Massachusetts Commission Against Discrimination verbally instructs investigators to contact a respondent and a respondent's managers only through its representative. If the lawyer fails to cooperate, however, the agency may contact the respondent directly.

The New York State Division of Human Rights verbally instructs investigators to contact a respondent and all of the respondent's employees through the respondent's attorney. If an attorney is uncooperative, the agency may take an adverse inference or may subpoena individuals.

The Tennessee Human Development Commission, as a courtesy, contacts a respondent and its employees only through its attorney. If the attorney fails to cooperate and refuses to make witnesses available, however, the agency will contact them (including managers) directly.

The California, Illinois, and New York agencies comply with the Rule, although some authorities would find that the California Department of Fair Employment and Housing and the Illinois Department of Human Rights should extend the protection of the Rule to a respondent's rank-and-file employees, at least in some circumstances. The New York State Division of Human Rights actually goes farther than most authorities would require, in that it extends the Rule's protections to all of a respondent's employees. The Massachusetts and Tennessee agencies, however, do not comply with the Rule, because they allow communications with a party when the party's attorney is not cooperating.


254. NLRB Statements of Procedure, 29 C.F.R. § 102.35.

255. Id. § 102.35.

have noted, "The same attorney who may have participated in the initial investigation of the matter and who, prior to the issuance of the complaint, may have discussed the case with the respondent as an objective investigator, now becomes an advocate." 257

The internal guidelines governing NLRB investigators provide for partial compliance with the Rule. 258 The Board's Case Handling Manual 259 has specific policies that deal with interviewing charged parties and their agents. The manual is worth quoting at length. 260 In the section entitled "Investigations," the Case Handling Manual states that:

*Interviews of Respondent and its Agents: Every attempt shall be made to interview main representatives . . . of the charged party. Supervisors at all levels in a [case involving an unfair labor practice charge against an employer] and union agents in a [case involving an unfair labor practice charge against a labor organization] should also be interviewed if they possess relevant knowledge. If possible, such statements should be reduced to signed affidavits or at least written form.

Where the respondent is represented by counsel or other representative and cooperation is being extended to the Region . . . the charged party's counsel or representative is to be contacted and afforded an opportunity to be present during the interview of any supervisor or agent whose statements or actions would bind a respondent. This policy will normally

257. T. KAMMHOlz & S. STRAUSS, supra note 253, at 85-86.
258. See Feld & Sons, Inc., 263 NLRB 332, 339 & n.10 (1982) (policy enunciated in DR 7-104(A)(I) accepted by NLRB). But cf. Host International, Inc., 290 NLRB No. 442 (1988) (Board may consider evidence obtained from supervisor when supervisor volunteers to talk with Board attorney and requests that respondent company's attorney not be present).
259. The Board's General Counsel prepares the Case Handling Manual to provide "procedural and operational guidance" to the agency's staff. NLRB Case Handling Manual, supra note 256, para. 76.
260. The manual is a little confusing. In the chapter entitled, "Initial Procedures," section 10026 requires that certain official documents be served on parties and on a party's attorney. The provision also states:

*All other communications, both oral and written, should be with or through only the attorney or representative of record. However, whenever an attorney, representative, or party requests that copies of all written communications be sent to the party, or has authorized that a party or person be contacted directly, such request and authorization should be honored.

NLRB Case Handling Manual, supra note 256, Initial Procedures § 10026 (emphasis in original).

It is hard to reconcile the strict requirements of this provision with the looser requirements of § 10056.6. See infra text accompanying note 261. Arguably § 10026 does not apply to investigations because it is contained in the chapter entitled "Initial Procedures," while § 10056.6 is applicable to investigations because it is contained in the chapter, "Investigations." It is unlikely that § 10026 was intended to apply only to preinvestigatory matters because its other provisions dealing with the service of documents clearly apply to all phases of a Board's interactions with parties. The list of documents required to be served on a party's lawyers include dismissal letters and closing compliance letters. *Id.*

In any event, neither provision fully complies with the Rule. Although § 10026 is closer to the Rule's requirements than §10056.6, it allows an attorney or a party to waive the provision's requirements; the Rule only allows the attorney to waive its mandates.
apply in circumstances where: (a) the charged party or the latter's counsel or representative is cooperating in the Region's investigation; (b) counsel or representative makes the individual to be interviewed available with reasonable promptness so as not to delay the investigation; and (c) during the interview counsel or representative does not interfere with, hamper, or impede the Board agent's investigation. In cases involving individuals whose supervisory status is unknown, this policy would not be applicable.

This policy does not preclude the Board agent from receiving information from a supervisor or agent of the charged party where the individual comes forward voluntarily, and where it is specifically indicated that the individual does not wish to have the charged party's counsel or representative present. In those cases in which the witness does not object to the presence of counsel, the appointment for an interview should be made and counsel advised of the date, time, and place of the interview.261

Assuming that the person being interviewed is a “party” for purposes of the Rule,262 the Board’s procedure violates the Rule in a number of ways. First, the Board’s compliance with its procedure is based on the party’s and attorney’s “cooperation.” Courts and disciplinary authorities would not be very sympathetic to a private attorney’s explanation that he had bypassed the other party’s lawyer because the lawyer was not “cooperating” in his investigation.

Second, the NLRB internal guideline requires only that the NLRB notify the represented party’s attorney and allow her an opportunity to be present. It does not require the NLRB to obtain the attorney’s permission. Thus, even if an attorney objects to a meeting between a Board agent and her client, the meeting will take place, so long as the attorney is given notice and an opportunity to be present.263

Third, the statement that the provision does not apply if a person’s supervisory status is unknown is disconcerting. Once an attorney or

261. NLRB Case Handling Manual, supra note 256, Investigations § 10056.6. The manual also states that since former supervisors are not agents of the respondent and cannot make binding admissions for the employer under Rule 801(d)(2)(D) of the Federal Rules of Evidence the respondent’s counsel does not have the right to be present when a Board agent interviews a former supervisor. Id.

262. See supra notes 30-39 and accompanying text.

263. The same policy apparently applies even if the represented party is an individual, rather than an entity such as a union or a company. The NLRA provides that the Board may issue a complaint against “any person.” NLRA, § 10(b), 29 U.S.C. § 160(b) (1988); see also T. KAMMHOFLZ & S. STRAUSS, supra note 253, at 58 (“[I]t is important, when drafting a charge, to include all organizations and individuals alleged to have committed the unfair labor practices.”). While the NLRB does not usually hold individuals personally liable for unfair labor practices, it may do so if it finds that an individual “is so identified with the operations” of the respondent employer that he is an “alter ego” of that employer. Carpet City Mechanical, Inc., 244 N.L.R.B. 1031, 1034 (1979); see also O’Neill, 288 N.L.R.B. 1394, 1394 n.3 (1988) (individual liable for unfair labor practices); Las Villas Produce, Inc., 279 N.L.R.B. 883, 883-84 n.3 (1986) (same).
An investigator knows an individual is employed by a represented party, the attorney or investigator should inquire about the individual's status. 264

The provision that allows taking information from a supervisor if the supervisor requests that his employer's attorney not be present does not comply with the Rule's mandate that only the lawyer, not the party, can waive the Rule's requirements. 265 It substantially complies, however, with this Article's proposal for a whistleblower exception to MR 4.2, although the proposal requires that the supervisor's request be put in writing. 266

The dangers of overreaching that the Rule is designed to prevent are prevalent. Although a Board agent is supposedly a neutral investigator, 267 an agent may be tempted to obtain information unfairly when the agent has one eye cocked toward the possible issuance of a complaint, that complaint's sufficiency, and whether his regional office will be able to prove the allegations of the complaint.

In addition, the Board's emphasis on settlement could lead to overreaching. The Board, in its Case Handling Manual, encourages its agents, when discussing settlement, to know the facts and law because an astute point made "will go a long way toward breaking down the opposition's willingness to test the issues." 268 The manual notes that settlements are achieved most readily when the public is convinced that the Regional Office honestly believes that prosecution of the cases will "result in the finding of unfair labor practices." 269 The manual also states that the agent must conduct himself so as to "insure the best chances of obtaining a favorable reaction from the charged party to the proposal of a settlement." 270 The goal of settlement discussions is that the charged party be "convinced of the benefits to be achieved" by settlement. 271 The agent "must reveal enough to demonstrate that the case can be won but must not disclose enough to endanger the case should settlement negotiations prove fruitless." 272 The "Region should be prepared to openly discuss the legal theory and the cases on which it relies." 273

264. When in doubt, the attorney should err on the side of caution and consult with respondent's counsel before communicating with the employee. See supra note 37.
265. See supra notes 20-23 and accompanying text.
266. See supra notes 247-50 and accompanying text.
267. NLRB Case Handling Manual, supra note 256, Investigations § 10056 (During the investigation, "Board agents must remain completely neutral" and must not "convey a prosecutorial image, particularly when interviewing witnesses of the charging party.").
268. Id. § 10128.1 (emphasis added).
269. Id. § 10124.2.
270. Id. § 10128.2.
271. Id.
272. Id. The manual also states that "settlement discussions, to be most effective, should be conducted with the respondent alone, or with its representative or counsel." Id. § 10128.6 (emphasis added).
273. Id. § 10128.5.
Obviously, the Board is taking an advocate's position in regard to settlement. It is trying to convince respondents to settle and, in doing so, is explaining cases and legal theories, revealing selected facts, persuading respondents that the case is a winner for the Board, and "breaking down" opposition to settlement. The dangers are obvious, and respondents need the full protections of the Rule.

2. Equal Employment Opportunity Commission

When a party files a charge of unlawful employment discrimination under Title VII, the local district office of the EEOC investigates. The EEOC Compliance Manual contains specific provisions on communications with represented parties during the investigation. This section of the manual requires that EEOC employees mail to the complainant's attorney copies of all correspondence mailed to the complainant. If the complainant's attorney requests in writing that the Commission communicate with the complainant only through her, the EEOC will honor the request "except where EEOC procedures or regulations require that EEOC send the material directly to the . . . complainant."

The manual requires that the EEOC communicate with a respondent "entirely through the attorney unless requested in writing to do otherwise." In the latter situation, the manual states that the EEOC should not send copies of communications to the respondent unless the manual or regulations require it. This policy applies across the board—to charges before they are docketed and to charges after a right to sue letter has been issued.

The EEOC policy accepts that the Rule applies to EEOC attorneys and employees under their direction. While the manual does not specifically

274. See NLRB v. Autotronics, Inc., 596 F.2d 322 (8th Cir. 1979) (discussed supra text accompanying notes 140-45).
277. 1 EEOC Compliance Manual § 82.4, reprinted in EEOC Compliance Manual (CCH) ¶ 1754.
278. Id.
279. 1 EEOC Compliance Manual § 82.5, reprinted in EEOC Compliance Manual (CCH) ¶ 1755.
280. Id.
281. 1 EEOC Compliance Manual § 82.3, reprinted in EEOC Compliance Manual (CCH) ¶ 1753.
state who these employees are, it wisely applies the policy across the board to all EEOC employees involved in an investigation.\textsuperscript{282}

The policy in this section dealing with the representation of parties by attorneys does not contain a "cooperation" requirement. Unlike NLRB investigators, Commission employees are not exempt from the policy if the party's attorney is not cooperating. The policy also complies with the Rule in that it apparently requires the attorney's permission (not merely notification) before the EEOC communicates with the party.

The policy requires the EEOC to send documents directly to parties (and their attorneys) if EEOC procedures or regulations require it. These are precisely the ministerial functions that fall under the authorized-by-law exception. There is virtually no possibility that these acts will enable the EEOC to obtain information, admissions, or a favorable settlement.

Nevertheless, another section of the manual eviscerates this policy. In the section dealing with investigative interviews, the manual states that a respondent employer only has the right to have its attorney present when the EEOC interviews a management employee.\textsuperscript{283}

This policy does not comply with the Rule. The policy is too narrow in its protection for "entity" employees. Most authorities agree that the Rule's coverage is broader than managerial employees,\textsuperscript{284} but the manual's procedures apparently allow the EEOC to purposely bypass respondent's counsel when it communicates with nonmanagerial employees.\textsuperscript{285} In addition, the

\begin{itemize}
  \item \textsuperscript{282} Id. ("These procedures apply . . . to all communications between Commission staff and charging parties/complainants, respondents and the attorneys who represent them.")
  \item \textsuperscript{283} 1 EEOC Compliance Manual § 23.6(c), \textit{reprinted in} EEOC Compliance Manual (CCH) ¶ 826 (1991). In addition, if the manager requests confidentiality or if the EEOC is investigating the manager's employment circumstances (for example, the manager is a complainant), the EEOC will not permit the respondent employer's attorney to be present. \textit{Id}. If the manager is a complainant, the EEOC's communications with the manager would fall within the authorized-by-law exception. \textit{See supra} note 244 and accompanying text.
  \item The provision that allows an employee to request confidentiality is apparently designed to allay the employee's fears of retaliation. The policies behind allowing a relaxation of the Rule for whistleblowers is discussed \textit{supra} notes 245-53 and accompanying text. Although the employee's decision to elect to keep the interview confidential is put in writing, 1 EEOC Compliance Manual exhibit 23-A, \textit{reprinted in} EEOC Compliance Manual (CCH) ¶ 835 (1991), the EEOC policy does not fully comply with the requirements of my proposed whistleblower exception. \textit{See supra} text accompanying note 245. The manual apparently authorizes the EEOC to solicit the employee's request for confidentiality. \textit{See 1 EEOC Compliance Manual} § 23.9, \textit{reprinted in} EEOC Compliance Manual (CCH) ¶ 829 (1991). In addition, my proposed whistleblower exception mandates that the agency only obtain the employee's testimony and not discuss privileged matters or other improper subjects. \textit{See supra} text accompanying note 245. The EEOC Compliance Manual policy on the confidentiality option does not contain this safeguard.
  \item \textsuperscript{284} \textit{See supra} notes 30-39 and accompanying text.
  \item \textsuperscript{285} 1 EEOC Compliance Manual § 23.6(a)(1), \textit{reprinted in} EEOC Compliance Manual (CCH) ¶ 826 (1991) (If the respondent refuses to permit on-site interviews, "attempt to interview the witnesses at a suitable off site location outside of each witness's normal working hours.").
\end{itemize}
procedures do not require that the EEOC obtain the attorney's consent for a manager's interview; the procedures only allow the attorney the right to be present. This does not comply with the Rule's requirement that the represented party's attorney consent to her client's communications with opposing counsel.

The EEOC Compliance Manual is confusing. The section dealing with the representation of respondents by attorneys requires that the EEOC communicate with a respondent only through its attorney. Yet the manual's section on interviews offers significantly less protection to a respondent.

3. Internal Rules of Other Agencies

a. Internal Revenue Service

During an audit, the Internal Revenue Service engages in an investigation of the taxpayer. The investigation includes interviews and document requests. Representation by counsel during the investigation may be crucial. The IRS has designed the interviews to obtain information that could subject the taxpayer to tax liability. The IRS manual (IRM or manual) instructs examiners that the initial interview is "one of the most important phases of any examination." The manual urges the examiner to obtain all business information and "as much information as possible about the taxpayer's personal living habits, expenses, and financial history" and to "[d]etermine the extent of the taxpayer's... cash hoards." The IRS presumably has the same zeal when it requests documents or settles cases.

286. For a description of IRS audit procedures, see 1 L. CASEY, FEDERAL TAX PRACTICE § 3 (G. Donohue & J. Doheny rev. 1982); M. ROSE & J. CHOMME, FEDERAL INCOME TAXATION §§ 13.09-13.10 (3d ed. 1988); M. SALZMAN, IRS PRACTICE AND PROCEDURE ¶¶ 8-9, 13 (2d ed. 1981). An IRS agent who discovers firm indications of fraud must suspend the investigation and refer the case to the Service's Criminal Investigation Division. Id. ¶ 8.06[7]. Different policy considerations apply to criminal and civil investigations. See supra notes 80-88 and accompanying text. This discussion only deals with IRS civil investigations.

287. The IRS has promulgated a very detailed manual for its employees. Commerce Clearing House (CCH) has reprinted this manual. Part IV of the IRM deals with audits; CCH has reprinted Part IV in three volumes.


289. Id. § 4231(820)(2), reprinted in 1 IRM-Audit (CCH) § 7245-27 (1981).

290. The IRS has a procedure for settling tax controversies, see 1 L. CASEY, supra note 286, §§ 3.14, 4.10-13 and M. ROSE & J. CHOMME, supra note 286, § 13.10, and the IRS encourages such settlements. See Rev. Rul. 53-266, 1953-2 C.B. 450, reprinted in 1 L. CASEY, supra note 286, § 3.14, at 170 n.2 (IRS should "increase the number of agreements" in order to relieve case congestion.).

Representation can be crucial in making the decision to settle because it requires a careful weighing of costs and benefits, especially at the earlier stages of the investigation. See 1 L. CASEY, supra note 286, § 3.14, at 169-70. Casey states that the IRS has a policy against the reopening of agreed issues and the raising of new issues unless there are "substantial" grounds
The manual provides some protection to taxpayers. It states that a party's representative has the right to be present when the party is interviewed or interrogated and that "in most instances" arrangements for the examination or investigation of the taxpayer are conducted through that representative. The manual also provides that it is only the representative who may waive these rights.

However, what the manual gives, it takes away. The manual provides that when a representative unreasonably delays or hinders an examination by failing to provide nonprivileged information the examiner may request permission from his or her superiors to contact the party directly for the information.

The procedure for bypassing the Rule when the lawyer is hindering the investigation is similar to the mandate of the NLRB's casehandling manual that NLRB agents comply with the Rule so long as the lawyer is "cooperating" with the investigation. Again, it is simply not fair to allow unethical conduct because the opposing lawyer is resisting document requests. The lawyer may be resisting on entirely legitimate grounds. The IRS has other means at its disposal to obtain the information. It can issue a summons and that a "material" potential effect on tax liability encourages settlements because [t]he degree to which the taxpayer should make concessions in order to reach . . . agreement will be governed by the immediate tax cost thereof and his evaluation of the risks (a) that the agreed issues may still be reopened and his concessions used as a floor to exact further concessions, or (b) that . . . [refusing to settle] will result in further adjustments not yet injected into the case.

Id. This emphasis on settlement presents obvious dangers of overreaching.

291. A representative may be a certified public accountant or, in some circumstances, other nonlawyers. IRS Conference and Practice Requirements, 26 C.F.R. § 601.502(b) (1991); IRS Practice Rules, 31 C.F.R. § 10.3 (1990). When the IRS conducts an audit, it gives the taxpayer a publication, which describes the rights of a taxpayer, including the right to retain a representative. Treasury Dept. IRS Publication 1 (1989).

292. IRM, supra note 288, § 4055.21(6), reprinted in 1 IRM-Audit (CCH) § 4055.21(6).

293. Id. § 4055.22(1), reprinted in 1 IRM-Audit (CCH) § 4055.22(1). The Internal Revenue Code (IRC) authorizes some limited contacts directly with the taxpayer. The IRC states that a taxpayer's representative can appear at the initial interview and that, under most circumstances, the IRS cannot require a taxpayer to appear unless it issues a summons to that taxpayer. 26 U.S.C.A. § 7521(c) (West Supp. 1990). An IRS agent, with the consent of her immediate supervisor, "may notify the taxpayer directly" that she believes the taxpayer's representative "is responsible for unreasonable delay or hindrance" of the IRS investigation. Id. This allows the IRS to warn the taxpayer that the IRS may issue a summons requiring him to appear. 1 L. CASEY, supra note 286, § 3.12(a) (Cum. Supp. 1990). The provision does not, however, authorize the IRS to obtain information directly from the taxpayer.

294. If a taxpayer resists an administrative summons issued under I.R.C. § 7602 (1986), the Secretary of the Treasury may seek enforcement of that summons in federal district court. I.R.C. § 7604(b) (1986). I.R.C. § 7605(b) (1986) bans "unnecessary examination or investigations under § 7602." United States v. Rosinsky, 547 F.2d 249, 253 (4th Cir. 1977). Thus, to obtain judicial enforcement of an administrative summons, the IRS must show ""that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed."" Id. (quoting Donaldson v. United States, 400 U.S. 517, 526-27 (1971)).
requiring the taxpayer to testify and/or produce documents.\textsuperscript{295} In addition, if the taxpayer's lawyer is unethically delaying the investigation, the IRS may seek disciplinary sanctions against that lawyer.\textsuperscript{296}

\textit{b. Federal Trade Commission}

The Federal Trade Commission investigates possible antitrust violations and unfair or deceptive trade practices.\textsuperscript{297} The FTC has the authority to subpoena witnesses to testify and produce documents.\textsuperscript{298} The FTC's Operating Manual contains a provision entitled "Policy Re: Dealing with Counsel When Parties Are Represented." It states:

\begin{quote}
When proposed respondent or any third party has provided any form of notice that it is represented by counsel, any requests for information, documents, access or interviews to be obtained from proposed respondent or the third party or their officers, if a corporation, should be made through counsel. Counsel for a proposed respondent or third party is not by that fact alone to be recognized as counsel for employees of proposed respondent or the third party unless the employee is also an officer. However, it is customary to contact counsel prior to dealing with employees.\textsuperscript{299}
\end{quote}

Assuming that the FTC complies with this policy and obeys counsel's wishes if counsel does not authorize a communication\textsuperscript{300} and seeks

\begin{footnotes}
\textsuperscript{296} IRM, supra note 288, § 4055.22(3), reprinted in 1IRM-Audit (CCH) § 4055.22(3). The manual states that if a lawyer is failing to provide nonconfidential material, the matter may be referred to the appropriate personnel for possible disciplinary actions against the representative, which may affect the representative's right to practice before the IRS. \textit{Id.} In addition, the IRS could seek disciplinary sanctions against the lawyer with the disciplinary authorities of the state where the lawyer is licensed. The Model Rules require a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of the client." \textit{Model Rules, supra} note 2, MR 3.2. Model Rule 3.1 forbids a lawyer from asserting an issue "unless there is a basis for doing so that is nonfrivolous." \textit{Id.} MR 3.1. The Model Code provides that a lawyer cannot "assert a position, conduct a defense . . . or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." \textit{Model Code, supra} note 1, DR 7-102(A)(1).

\textsuperscript{297} For a description of FTC procedures, see 1 & 2 S. Kanwit, \textit{Federal Trade Commission} §§ 8-9, 23 (1987); E. Kintner & W. Kratzke, \textit{Federal Antitrust Law} 202-437 (1986); E. Rockefeller, \textit{Desk Book of FTC Practice and Procedure} 69-138 (3d ed. 1979); P. Ward, \textit{Federal Trade Commission: Law, Practice and Procedure} §§ 11-12 (1986). The FTC has procedures for settlement both before and after the issuance of a civil complaint. \textit{Id.} §§ 11.05, 12.07. The FTC engages in both civil and criminal investigations. 1 S. Kanwit, \textit{supra}, § 13.01, at 13-3. Different considerations apply to criminal investigations, on the one hand, and civil investigations, on the other. See \textit{supra} notes 80-88 and accompanying text. This discussion deals with civil investigations.


\textsuperscript{299} Federal Trade Commission Operating Manual, ch. 3, § 3.6.3.

\textsuperscript{300} One commentator has noted that some FTC investigators do not go out of their way to find out if an investigated party is represented by counsel. "Cases are known in which a friendly [FTC] investigator has coaxed from unsuspecting personnel sufficient evidence to make a case against the company before the attorney was notified." E. Rockefeller, \textit{supra} note 297, at 72.
\end{footnotes}
information through proper means, this simple provision substantially com-
plies with the Rule's requirements, except for the fact that it limits the 
Rule's protection to an entity's "officers."301

c. Securities and Exchange Commission

The Division of Enforcement (Division) of the Securities and Exchange 
Commission enforces the federal securities laws. The Division's staff con-
ducts private and public investigations and brings administrative proceedings 
and civil actions for injunctions on behalf of the SEC against alleged 
violators of the federal securities laws.302

A witness (including a party) has a right to counsel during any formal 
investigative proceeding.303 When the SEC requests a person to supply 
information voluntarily or serves the person with a subpoena, the agency 
 informs individuals of their right to be represented by an attorney.304

The SEC has not promulgated any published guidelines for its investi-
gators. It is the Division's policy,305 however, to communicate only through 
counsel when dealing with a represented individual respondent. When dealing 
with a represented corporation, the Division freely communicates with all 
employees (including high-level managers) unless an employee is individually 
represented or an employee asks the Division to communicate only through 
the corporation's attorney. The Division, therefore, fully complies with the 
Rule when dealing with individuals but not when dealing with corporate 
parties.

The five members of the SEC are subject to Canons of Ethics, which are 
codified in the Code of Federal Regulations. These Canons provide that 
the members "should not condone unprofessional conduct by attorneys in 
their representation of parties" and also mandate that the Commission 
"continuously assure that its staff follows the same principles in their

301. Most authorities would extend the Rule's protections to a broader group than the 
entity's officers. See supra notes 30-39 and accompanying text.

302. R. SHIELDS & R. STROUSE, SECURITIES PRACTICE HANDBOOK § 2.02, at 6-7 (5th ed. 
1987). The Division also refers cases to the Department of Justice for criminal prosecutions. 
Id. § 2.02, at 7. Different considerations apply to criminal, as opposed to civil, investigations. 
See supra notes 80-89 and accompanying text. This discussion deals with civil investigations. 
For descriptions of SEC procedures, see T. Hazen, THE LAW OF SECURITIES REGULATION § 95 
(1985); R. ShIELDS & R. STROUSE, supra, § 14; 1 M. STEINBERG & R. FERRARA, SECURITIES 
PRACTICE: FEDERAL AND STATE ENFORCEMENT chs. 3-4 (1989); McLUCAS, Hamill, Shea & 
Dubow, An Overview of Various Procedural Considerations Associated with the Securities and 

303. Rules Relating to Investigations, 17 C.F.R. § 203.7(b) (1991); see also McLUCAS, Hamill, 
Shea & Dubow, supra note 302, at 642.

304. The SEC gives the individual a four-page, single-spaced form, SEC Form 1662 (1989),
which informs the individual of her rights, including the right to be represented by an attorney.

305. I discussed the policy in a February 13, 1991, telephone interview with an employee 
of the SEC's Division of Enforcement.
relationships with parties and counsel." A strong argument can be made that the SEC is obligated by these regulations to ensure that its investigators comply with the rules of professional ethics and therefore, the Rule, even when dealing with corporate parties.

G. Policy Considerations Mandate that the Rule Apply to Government Agency Investigators

All attorneys must represent their clients zealously, but they must do so within the constraints of the law and of the ethical codes. The constraints imposed by the ethical codes prevent a lawyer from proceeding as if the representation of his client were the only good. Other values—the administration of justice, fairness towards opponents, and the public interest—restrain a lawyer. Designed to aid the adversary system and to ensure fairness to opponents, the Rule restricts all lawyers in their representation of clients.

The government lawyer represents more than just a single client; she represents a government agency and, through that agency, the public. It is arguable, therefore, that her greater responsibilities mandate a relaxation of the ethical rules in order to assist her in carrying out her responsibilities. Other values, however, exist beyond the lawyer's representation of the public. The public has a stake in the fair treatment of targets of government investigations; applying a looser ethical standard against government attorneys will erode public confidence in government. Indeed, government attorneys have a greater duty than private lawyers to treat their opponents fairly. If the work of a government agency is important, the public should grant it greater resources—not exempt agency lawyers from the ethical rules.

306. Canons of Ethics, 17 C.F.R. § 200.69 (1991). The duty to assure that the SEC's "staff" follows the same principles should apply to the entire staff of the SEC, not merely the members' personal staff. See id. § 200.10 (five-member Commission "is assisted by a staff, which includes lawyers, accountants, engineers, financial security analysts, investigators and examiners, as well as administrative and clerical employees"); id. § 200.52 (Canons distributed to SEC employees; executive and professional employees given copies when they begin service).

The SEC's ethics counsel is charged with overseeing compliance with the Canons of Ethics, investigating complaints of violations, preparing recommendations for disposition of such complaints, and referring findings of professional misconduct to appropriate state disciplinary authorities. SEC Organization and Program Management, 17 C.F.R. § 200.21a (1989). Presumably, one could file a complaint with the ethics counsel if an SEC attorney violated the Rule.

307. MODEL CODE, supra note 1, Canon 7; see also MODEL RULES, supra note 2, Preamble ("[A] lawyer zealously asserts the client's position under the rules of the adversary system.").

308. MODEL CODE, supra note 1, EC 7-1.

309. C. WOLFRAM, supra note 1, § 13.9.2, at 757.

310. See supra notes 64-65 and accompanying text.
The fact that the Rule limits a government agency’s access to information is inapposite. It is a central purpose of the Rule to do precisely that. While the Rule puts some constraints on a government investigation, the restraints are not onerous. All lawyers attempting to build a case are similarly restricted.

In addition, the government lawyer has advantages over private lawyers. The government lawyer has the financial resources of the government and often has a trained staff. Her agency often has the power to issue subpoenas. Parties frequently cooperate with government agencies because the agencies will sometimes presume that withheld evidence is unfavorable, and agencies often have the power to bring further litigation when the investigation is completed. While the threat of future litigation is always present with any opponent, the threat of a government suit will usually be more persuasive.

Furthermore, if the agency is authorized to bring a lawsuit and does so, it, like any plaintiff, can obtain a court order allowing ex parte communications with entity employees if it can show a need for such communications. A court order specifically allowing such communications would render the communications “authorized by law.” An agency bringing a civil suit also can use the normal discovery mechanisms and depose individuals.

Furthermore, many ethical rules can “hamper” the work of government attorneys. One could argue that a government lawyer might be able to do her job more effectively if she did not have to make a reasonably diligent effort to comply with discovery requests, avoid ex parte communications with judges, avoid prejudicial pretrial publicity, avoid lying, concern herself with the ethics of lawyers or nonlawyers she supervises, or report other lawyers’ misconduct. Nevertheless, the codes impose these duties on all lawyers. The fact that the Rule makes investigations a little more difficult for all lawyers does not justify exempting government lawyers from its mandates.

Although there will be some impact on investigations, the government should not attempt to exempt itself from this “sacred” and

311. See supra notes 50-59 and accompanying text.
313. See id. at 18 n.1.
314. Model Rules, supra note 2, MR 3.4(d).
315. Id. MR 3.5(b); Model Code, supra note 1, DR 7-110(B).
316. Model Rules, supra note 2, MR 3.6(a); Model Code, supra note 1, DR 7-107.
317. Model Rules, supra note 2, MR 4.1(a); Model Code, supra note 1, DR 7-102(A)(5).
318. Model Rules, supra note 2, MR 5.1(b).
319. Id. MR 5.3.
320. Id. MR 8.3(a); Model Code, supra note 1, DR 1-103(A).
“fundamental” provision. The Rule is essential to our adversary system. Although it is important that government agencies enforce the law, it is vital that the government treat targets fairly and allow the targets’ lawyers to effectively represent their clients.

H. Federal Attorneys and the Rule

In the June 8, 1989 DOJ Memo, Attorney General Thornburgh purported to exempt Department of Justice litigators from compliance with the Rule in criminal and civil enforcement matters. The DOJ Memo based the exemption on two grounds: that the supremacy clause of the United States Constitution prevented the state courts from interfering with the duties


323. See supra notes 40-59 and accompanying text. Indeed, government entities have not hesitated to attempt to use the Rule in civil litigation to insulate government employees from the inquiries of another party’s attorneys. See e.g., Lizotte v. New York City Health & Hosps. Corp., No. 83 Civ. 7548 (S.D.N.Y. 1989) (LEXIS, Genfed Library, Dist file) (city hospital); Frey v. Department of Health & Human Servs., 106 F.R.D. 32 (E.D.N.Y. 1985) (Social Security Administration); Smith v. Lubbers, 28 Fair. Empl. Prac. Cas. (BNA) 324, 328 (D.D.C. 1982), aff’d without opinion, 713 F.2d 865 (D.C. Cir.) (NLRB), cert. denied, 464 U.S. 996 (1983); Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977) (state welfare agencies). Courts usually do not read “party” as broadly in that circumstance because of the interest in the public’s access to government and/or the rights of government employees to communicate freely. See Lizotte, supra (The restrictions imposed by a government entity on the ability of its employees to communicate “are looked upon with particular disfavor.”); Frey, 106 F.R.D. at 37 (A stronger reason exists to construe term “party” narrowly when the defendant is a government entity because the government has a “duty to advance the public’s interest in achieving justice, an ultimate obligation that outweighs its narrower interest in prevailing in a law suit.”); Vega, 427 F. Supp. at 595 (The interests of government defendants in the Rule’s protections are outweighed by employees’ first amendment interests.). For a discussion of the problem of the Rule’s application when the government is the represented “party,” see Note, supra note 3.

324. It is irrelevant that the government lawyer’s motives—enforcing the law—are beyond reproach. Most lawyers who violate the Rule probably have good motives (zealously representing their clients). Well-intentioned and nonmalicious ex parte communications with a represented party clearly violate the Rule. See supra notes 25-28 and accompanying text.

325. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978) (In the Title VII context, “[a] fair adversary process presupposes both a vigorous prosecution and a vigorous defense.”).

326. Civil enforcement matters deal with the majority of cases when the Department of Justice enforces a statute (such as the False Claims Act, 31 U.S.C. § 3730 (1988)), as opposed to situations when it represents the government as simply another plaintiff (such as a normal contract action).

327. The supremacy clause, U.S. Const. art. VI, cl. 2 states, in part, “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.”

The discussion in this section of federal attorneys and the Rule is not intended as an exhaustive treatment of the supremacy clause issues. Such a treatment could easily be the subject of an entire article. The discussion in this section is intended to outline the relevant issues.
of federal attorneys and that communications made pursuant to a legitimate investigation were "authorized by law."

At its February, 1990 midyear meeting, however, the ABA House of Delegates adopted a Recommendation and Report rejecting the DOJ Memo's rationale and opposing any attempt by the Department of Justice unilaterally to exempt its lawyers from the Rule. The ABA Report said that the DOJ Memo had "significant, serious ... and intolerable ramifications ... [and] present[ed] a substantive and substantial threat to the administration of justice."

The supremacy clause argument strikes at the heart of a state's ability to regulate the conduct of lawyers licensed by the state and lawyers practicing within the state. It has always been assumed that states had the authority to discipline federal attorneys. One commentator has stated:

Federal government lawyers are all subject to the Code of Professional Responsibility ... made applicable to their professional conduct in one or more ways. First, their agency or department may make their professional conduct subject to the code by administrative direction or regulation. The code may also be made to govern each federal government lawyer's professional conduct by the bar of the state in which he is admitted.

Another has said, "A federal government lawyer may be disciplined by an agency of a state in which he or she was admitted." The Model Code states that "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."

States have not hesitated to discipline federal lawyers, and federal courts have acknowledged the states' authority to do so. When the Eleventh Circuit
was concerned about alleged improprieties committed by a federal prosecutor, for example, it suggested that the district court inform the state authorities of the prosecutor’s conduct. Other federal courts have also suggested that states have authority to discipline federal attorneys.

Nevertheless, within the limits of the Constitution, Congress can expressly preempt state authority. In deciding whether there is preemption, the key question is whether there is a conflict between the Rule and federal laws that authorize Department of Justice lawyers to conduct civil investigations. The United States Supreme Court, however, has been very reluctant in recent years to find such conflicts.

The courts have established a few tests to determine if federal law preempts state law. Absent language explicitly preempting state law (and Congress has not expressly preempted state regulation of attorneys or, more specifically, the Rule), a court may find the intent of Congress to preempt

agreed to sell confidential information about criminal cases “to persons whom he believed to be members of organized crime”), cert. denied, 449 U.S. 830 (1980).

In Waters v. Barr, 103 Nev. 694, 747 P.2d 900 (1987), the state bar counsel had refused to investigate a complaint against two Assistant United States Attorneys (AUSA), claiming that neither the Nevada Supreme Court nor the state bar had jurisdiction over AUSAs. The Nevada Supreme Court stated that the fact that Nevada attorneys had been AUSAs did not insulate them from the court’s discipline. Even if the behavior occurred in the federal courts, it affected other Nevada attorneys and the integrity of the Nevada state bar. The court said that there was “no question” that an attorney could be disciplined by any bar association to which the lawyer was a member. Id. at 697, 747 P.2d at 902.

The court also held that it had jurisdiction to discipline attorneys appearing on behalf of the federal government in the federal courts in Nevada who were not members of the state bar. The court said that the state had a “compelling interest” in regulating attorneys who practiced in the state and therefore such regulation was a proper exercise of state power. Id. The court, of course, could not suspend or disbar an attorney who was not licensed in Nevada. The court noted, however, that it might censure the offending lawyer or preclude the lawyer from practicing law before Nevada state courts in the future. Id. at 698, 747 P.2d at 902.

334. United States v. Ofshe, 817 F.2d 1508, 1516 n.6 (11th Cir.), cert. denied, 484 U.S. 963 (1987). In fact, the Eleventh Circuit actually published the address of the state disciplinary authorities in the opinion (apparently to make the job easier for the district court). Id.


336. As Professor Rotunda has stated, “[T]he trend of the law is increasingly moving away from preemption . . . . [B]efore a plaintiff is able to convince a federal court to rule in favor of preemption, that plaintiff must overcome new, higher barriers, jump over more hurdles.” Rotunda, Sheathing the Sword of Federal Preemption, 5 CONST. COMMENTARY 311, 312 (1988). For a general discussion of preemption, see 1 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 12.1-12.4 (1986 & Supp. 1991) [hereinafter R. ROTUNDA].
state authority by a federal regulatory scheme so pervasive that it is reasonable to infer that Congress left no leeway for the states to supplement it. Even when Congress has not completely displaced state authority in a specific area, federal authority preempts state regulation to the extent that the latter actually conflicts with federal legislation. Such a conflict occurs when it is impossible to obey both state and federal law or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" \(^\text{337}\)

In *CTS Corp. v. Dynamics Corp. of America*, \(^\text{338}\) the district court and the Seventh Circuit had found that the Williams Act, \(^\text{339}\) a federal law regulating hostile tender offers, preempted an Indiana statute\(^\text{340}\) that severely limited such takeovers. The Seventh Circuit had noted that very few tender offers could meet the requirements of the Indiana law and that Indiana's fifty-day minimum was too long in light of the fact that Congress in the Williams Act had determined that a requirement to keep a tender offer open for a month was sufficient. \(^\text{341}\)

The United States Supreme Court reiterated the principle that, unless Congress expressly indicated that it intended to preempt state law, the Court would find preemption only if it was "a physical impossibility" to comply with both laws or if the state statute stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." \(^\text{342}\) The Court dealt cursorily with the first prong of this test. It simply held that it was "entirely possible" to comply with both laws. Therefore, the Williams Act would preempt the Indiana law only if the latter frustrated the purposes of the Williams Act. \(^\text{343}\)

The Court noted that in *Edgar v. MITE Corp.*, \(^\text{344}\) a plurality opinion, it had found the Williams Act's purpose to be to balance carefully the interests of offerors and target companies and that any state law that upset this balance was preempted. \(^\text{345}\) The Indiana law, however, was designed to protect the independent shareholders against the contending parties. \(^\text{346}\) It was not designed to favor either offerors or target companies.

The Court acknowledged that the Indiana law made tender offers more expensive and thus deterred them somewhat but that "this type of reasonable


\[^{341}\] Dynamics Corp. v. CTS Corp., 794 F.2d 250, 263 (7th Cir. 1986).


\[^{343}\] CTS, 481 U.S. at 79.


\[^{345}\] CTS, 481 U.S. at 80.

\[^{346}\] Id. at 82.
regulation” did “not alter the balance between management and offeror in any significant way.” Clearly, however, making tender offers more expensive favored management over offerors. Nevertheless, the Court held that the Indiana law did not frustrate the federal law’s purposes and thus was not preempted.

As Professor Rotunda has noted, a party claiming preemption has a heavy burden of proof. While Congress may expressly preempt an area, the Court is reluctant to infer preemption. It will not do so unless the Congress (or a federal agency claiming that its regulations have preemptive effect) speaks clearly. On the other hand, if the party claims that the state law conflicts with federal law, that party must show that it is physically impossible to obey both or must perform the difficult task of showing that the state law frustrates the purposes of the federal law. Even if the state requirement places hurdles in the way of federal regulation, the Court will not find preemption if “Congress did not intend to preclude concurrent state and federal regulations.”

Under this standard, the statutory authority of the Justice Department (or any other government agency) to conduct civil investigations does not preempt a state’s enforcement of the Rule. Congress has not expressly preempted state regulation of attorneys. In addition, it is not “physically impossible” for an agency to obey both its mandate to investigate and the Rule. Private plaintiffs’ attorneys operate under the burdens of the Rule and routinely prove their cases without the advantages enjoyed by government agencies. State agencies must operate under the Rule’s constraints and do not have the option of claiming preemption.

Finally, under the standard of CTS, the Rule does not stand as an obstacle to the accomplishment and execution of the full purposes of Congress. In fact, the case for preemption was much stronger in CTS. In

347. Id. at 82 n.7.
348. Indeed, Professor Rotunda has noted, “It is difficult to overemphasize the significance of CTS. Takeovers were one of the major forces behind the 1987 bull market in stocks. The CTS decision and other restrictions on takeovers were widely viewed as one of the causes leading to the stock market crash of October 19, 1987.” Rotunda, supra note 336, at 318 n.36. In addition, as stated previously, the Seventh Circuit believed that very few tender offers could meet the Indiana law’s requirements. CTS, 794 F.2d at 263.
349. CTS, 481 U.S. at 86-87.
351. See Evans v. Jeff D., 475 U.S. 717, 766 n.20 (1986) (Brennan, J., dissenting) (Congress has not sought to regulate legal ethical concerns.); cf. Nix v. Whiteside, 475 U.S. 157, 176 (1986) (Brennan, J., concurring in judgment) (The United States Supreme Court has no constitutional or statutory authority to regulate the conduct of lawyers practicing in state courts.).
352. See supra text accompanying notes 311-12.
353. The Illinois Department of Human Rights and the New York State Division of Human Rights comply with the Rule and are apparently able to perform their duties. See supra note 252.
CTS, the law affected the balance established by Congress. Here, the Rule affects all parties because all attorneys are subject to the Rule. The burden on the government is not great.

Indeed, as the ABA Report points out, while the supremacy clause argument depends on an actual conflict between federal and state regulation, many federal district courts have incorporated DR 7-104(A)(1) or MR 4.2 into their local rules. Furthermore, the Justice Department's own Standards of Conduct, codified in the federal regulations, mandate that Justice Department attorneys be guided by the ABA ethical rules.

The heavy burden on one asserting preemption is even heavier in areas where the state has traditionally had a strong interest, such as domestic relations. In these areas, a court will not find preemption unless the state regulation does "major damage to clear and substantial federal interests." The United States Supreme Court has recognized that the states have a strong interest in governing the conduct of attorneys who practice in the state. Thus in Leis v. Flynt, the Court stated that the licensing and regulation of lawyers had been left exclusively to the states "[s]ince the founding of the Republic." In Ohralik v. Ohio State Bar Association,

354. See supra note 348 and accompanying text.
355. ABA Report, supra note 6, at 4; see also N.Y. Committee, supra note 5, at 846-47 (Many federal district courts have adopted the state versions of the Model Code, including DR 7-104(A)(1), as local rules or have established procedures for disciplining alleged violations of the Model Code or state codes.). About two-thirds of the district courts have adopted some version of the Model Rules and/or Model Code as local rules. Rand v. Monsanto Co., 926 F.2d 596, 603 (7th Cir. 1991).
356. Department of Justice Standards of Conduct, 28 C.F.R. § 45.725-1(b) (1990); cf. General Standards for the Executive Office of the President, 3 C.F.R. § 100.735-1(c) (1989) (Attorneys employed by Executive Office agency are subject to ABA's ethical rules.); Secretary of Agriculture Hearing Procedure, 7 C.F.R. § 1.141(c) (1990) (Attorneys appearing at hearings must conform to standards of conduct for attorneys appearing in federal court.); Federal Energy Regulatory Commission Procedural Rules, 18 C.F.R. § 385.2101(c) (1990) (Persons appearing before the Commission must conform to standards of ethical conduct required of practitioners in federal court.); Housing and Urban Development Standards of Practice, 24 C.F.R. § 26.8 (1990) (Lawyers must conform to ethical rules required of practitioners in federal courts and by the bars of which the lawyers are members.); Federal Housing Commissioner Standards of Practice, 24 C.F.R. § 1720.135(a) (1989) (same); Occupational Safety and Health Review Commission Standards of Conduct, 29 C.F.R. § 2200.104(a) (1989); (Representatives appearing before the Commission must comply with letter and spirit of the Model Rules.); Postal Rate Commission Standards of Conduct, 39 C.F.R. § 3000.735-102(b) (1990) (Postal Rate Commission attorneys are subject to the Model Code.); Interior Department Practice Rules, 43 C.F.R. § 1.6(a) (1989) (Individuals practicing before Department of Interior should observe the ABA's ethical rules "by which the Department will be guided in disciplinary matters."); Department of Transportation, Maritime Administration Rules of Practice and Procedure, 46 C.F.R. § 201.181(a) (1989) ("The standing and the effectiveness of the Administration are in direct relation to the observance by it, its staff and the parties and attorney appearing before it of the highest of judicial and professional ethics.").
359. Id. at 442.
the Court found that the states bore a "special responsibility for maintaining standards among members of the licensed professions" and the states' interest in the regulation of lawyers was "especially great" because lawyers were essential to the administration of justice.\textsuperscript{361} In Middlesex County Ethics Committee v. Garden State Bar Association,\textsuperscript{362} the Court applied the Younger\textsuperscript{363} abstention doctrine to a state disciplinary proceeding because of the important state interests involved.\textsuperscript{364} In Nix v. Whiteside,\textsuperscript{365} the Court emphasized that, in examining attorney conduct to determine whether a criminal defendant was deprived of the effective assistance of counsel, courts

must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.\textsuperscript{366}

Indeed, federal courts have traditionally depended on the states for attorney regulation. The United States Supreme Court does not conduct separate bar exams but, instead, requires that attorneys be admitted to practice law before the highest court of a state for three years.\textsuperscript{367} Thus the Attorney General bears a heavy burden in attempting to preempt the states' traditional and important role in regulating attorneys.\textsuperscript{368}

In the DOJ Memo,\textsuperscript{369} the Attorney General cited two cases in support of the supremacy clause argument, Sperry v. Florida,\textsuperscript{370} a United States

\begin{itemize}
  \item \textsuperscript{361} Id. at 460; see also Sperry v. Florida, 373 U.S. 379, 383 (1963) ("Florida has a substantial interest in regulating the practice of law within the State . . . '").
  \item \textsuperscript{362} 457 U.S. 423 (1982).
  \item \textsuperscript{363} Younger v. Harris, 401 U.S. 37 (1971).
  \item \textsuperscript{364} For a discussion of these cases and the strong state interest involved in the regulation of attorneys, see Cleckley, supra note 335, at 618.
  \item \textsuperscript{365} 475 U.S. 157 (1986).
  \item \textsuperscript{366} Id. at 165.
  \item \textsuperscript{367} Sup. Ct. R. 5.
  \item \textsuperscript{368} In addition, President Reagan issued an Executive Order requiring federal agencies to construe federal statutes to preempt state law only when the statutes contain an express preemption provision or when there is "firm and palpable evidence compelling the conclusion" that Congress intended to preempt state law or when the state law "directly conflicts" with federal law. Any regulatory preemption must be restricted to the "minimum level necessary" to achieve the statute's objectives. The agency should only promulgate such regulations after consulting with the state to attempt to resolve the conflict, if such consultation is practical. (One of the criticisms of the DOJ Memo is the Justice Department's unwillingness to discuss the issue with the ABA. ABA Report, supra note 6, at 8). The Executive Order, however, bars judicial review of its requirements. Executive Order No. 12,612, 3 C.F.R. 252 (1988). In spite of the lack of judicial review, the Order clearly reflects a policy favoring federalism. The DOJ's blunderbuss approach flies in the face of this policy. For a short discussion of this Executive Order, see Rotunda, supra note 336, at 311-12.
  \item \textsuperscript{369} The DOJ Memo itself cannot preempt state regulation of attorneys. An agency regulation, under certain circumstances, can preempt state law. \textit{Louisiana Pub. Serv. Comm'n},
Supreme Court case, and Kolibash v. Committee on Legal Ethics, decided by the Fourth Circuit. In Sperry, the Florida Supreme Court enjoined a nonlawyer registered to practice before the United States Patent Office from engaging in the practice of law. The United States Supreme Court, however, vacated the judgment. Congress had specifically authorized the Commissioner of Patents to promulgate regulations governing the recognition of agents, attorneys, and other persons representing parties before the Patent Office. The state could not enforce licensing requirements that, though valid in the absence of federal regulations, gave the state a veto over the federal determination that the person was qualified to perform certain functions.

Sperry is clearly distinguishable from the Rule's application to federal attorneys. In Sperry, Florida had enjoined conduct expressly and specifically authorized by federal law and regulations. As discussed previously, there is no such direct conflict between the Rule and federal law.

476 U.S. at 369. It is highly unlikely, however, that a mere memo can do so. As stated by the court in Wabash Valley Power Ass'n v. Rural Electrification Admin., 903 F.2d 445 (7th Cir. 1990):

In order to preempt state authority, the [agency] must establish rules with the force of law. Regulations adopted after notice and comment rulemaking have this effect . . . Yet [the agency] did not follow the procedures the [Administrative Procedure Act] prescribed for rulemaking. It sent . . . a letter. There was no notice, no opportunity for comment, no statement of basis, no administrative record, no publication in the Federal Register . . . .

We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication.

Id. at 453-54.

Even if a memo could preempt state regulation, the DOJ Memo would not have the power to preempt the Rule. A federal agency can preempt state regulation "only when and if it is acting within the scope of congressionally delegated authority" because the "agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." Louisiana Pub. Serv. Comm'n, 476 U.S. at 374. As the main discussion makes clear, the Department of Justice cannot bear the heavy burden of showing that Congress, in granting investigative authority to the agency, intended to give the agency the power to exempt DOJ attorneys from the ethical rules.


371. 872 F.2d 571 (4th Cir. 1989).

372. Sperry, 373 U.S. at 381-85.

373. Other cases involving a direct conflict between federal law and state ethical provisions are similarly distinguishable. In Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991), the district court had refused to certify a class because the class representative was unwilling to pay all the costs of the lawsuit. The district court reasoned that DR 5-103(B), forbade counsel to bear the costs of a lawsuit and required the party to remain responsible for costs. The Seventh Circuit reversed, noting that the nature of a class action itself, involving small individual claims and large aggregate claims, ensured that the representative would be unwilling to pay the entire costs. Rand, 926 F.2d at 599. The district court's broad reading of DR 5-103(B), therefore, conflicted with Federal Rule of Civil Procedure 23 "because it would cripple the class action device" Rule 23 creates. Rand, 926 F.2d at 600; see also County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407 (E.D.N.Y. 1989) (accord).

Similarly, in Baylson v. Disciplinary Bd., 764 F. Supp. 328 (E.D. Pa. 1991), a state ethical rule required a prosecutor to obtain judicial approval before subpoenaing an attorney when
In Kolibash, the West Virginia State Bar Association, in the course of an investigation of an Assistant United States Attorney for allegations of conflicts of interest, brought charges against United States Attorney Kolibash for failing to adequately supervise the assistant. Kolibash petitioned to remove the state disciplinary proceeding to federal district court, and the state disciplinary authorities moved to remand the action to the state system. The federal district court remanded the proceeding, stating that professional licensing was a state function and that federal attorneys were subject to West Virginia’s Code of Professional Responsibility, which was the “cornerstone of licensure to practice the profession.”

The Fourth Circuit reversed. The court noted that federal law generally barred review of a district court’s remand order. The Court of Appeals, however, held that it could review this remand order because the district court’s order was a discretionary decision based on public policy (the state interest in regulating attorney misconduct) rather than a lack of subject matter jurisdiction. The Fourth Circuit held that federal law barred review of a remand order only in the latter context.

After dealing with this procedural question, the court held that removal was proper under the federal officer removal statute. This statute provides for removal of any civil action or criminal prosecution commenced against an officer of the United States for an action taken under color of office. The court said that, while the regulation of lawyers implicated significant state interests, the federal interest in protecting federal officers in the performance of federal duties was paramount. The court explicitly refused to decide the merits of the case but said that Kolibash had a colorable claim of immunity that should be judged by federal standards in federal district court.

the prosecutor sought to obtain evidence from the attorney about the attorney’s client. The court held that the ethical rule conflicted with the Federal Rules of Criminal Procedure, the historic function of the grand jury, and federal law and practice dealing with subpoenas. But see United States v. Klubock, 832 F.2d 664 (1st Cir. 1987). In Klubock, the Massachusetts Supreme Judicial Court, at the behest of the state bar, had adopted a rule making it unethical for a prosecutor to subpoena an attorney to appear before a grand jury without prior judicial approval when the prosecutor sought to compel the attorney/witness to provide evidence about a client. The United States District Court for the District of Massachusetts adopted the rule. The United States and various federal prosecutors sued, claiming that promulgation of the rule violated the supremacy clause. United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), aff’d en banc by equally divided court, 832 F.2d at 664 (1st Cir. 1987). The First Circuit held that the supremacy clause was only relevant to state law and that, since the district court had adopted the rule, it had become federal law. Klubock, 832 F.2d at 667. The equally divided court affirmed the district court’s opinion declaring the rule valid.

In Rand, Long Island Lighting, and Baylson the conflicts between federal law and ethical provisions were direct. There is no such conflict between the Rule against communicating with represented parties and the federal government’s authority to engage in civil investigations.

374. Kolibash, 872 F.2d at 572.
375. Id. at 573.
377. Kolibash, 872 F.2d at 573-75.
The Fourth Circuit also rejected the state bar's argument that the federal officer removal statute did not cover a state disciplinary proceeding because the proceeding was not a "civil action or criminal prosecution commenced in State court," as required by the statute. The court rejected a narrow reading of the law, holding that if a state investigative body operated in an adjudicatory fashion and subjected a federal officer to its process the requirements of the federal officer removal statute were satisfied.\(^\text{378}\)

In an excellent article, Professor Cleckley has argued convincingly that the Fourth Circuit incorrectly decided *Kolibash*.\(^{379}\) Even assuming, however, that the court correctly decided *Kolibash*, the decision offers little support for the Attorney General's position.

The *Kolibash* court decided the discrete question of whether removal was proper under the federal officer removal statute. It expressly declined to decide the merits of the case. The court did not decide whether immunity attached; it considered only whether Kolibash had a "colorable" claim of immunity.\(^{380}\) Such a decision provides no support for the Attorney General's Memo purporting to create a blanket exemption from the Rule.

\(^{378}\) *Id.* at 576.

\(^{379}\) Professor Cleckley has severely criticized *Kolibash* on several grounds, stating that the decision rests on "inapposite authority, faulty analysis," and "unsound reasoning." Cleckley, *supra* note 335, at 578. First, Professor Cleckley contends that the district court's remand order rested on jurisdictional—not policy—grounds, thus barring review of the order. *Kolibash*, 872 F.2d at 578, 585-94. Professor Cleckley also notes that the *Kolibash* decision was inconsistent with the United States Supreme Court's recent decision in *Mesa v. California*, 489 U.S. 121 (1989). In *Mesa*, the Supreme Court required that, to satisfy the under-color-of-office requirement, the federal officer had to plead "the close connection between the state prosecution and the federal officer's performance of his duty." *Id.* at 132. Kolibash could not meet this pleading requirement. Cleckley, *supra* note 335, at 594-603.

Furthermore, according to Professor Cleckley, in addition to failing to meet the pleading requirements, Kolibash could not avail himself of even a colorable immunity defense. He could not proceed under a theory that his actions were necessary and proper for performance of his federal duties because it "was virtually inconceivable that a prosecutor's federal duties could ever require him or her to violate" the ethical rules. *Id.* at 603-04.

Neither could prosecutors base an immunity defense on the immunity of prosecutors from civil damages for common law or constitutional torts while acting within the scope of their prosecutorial duties. The reasoning of *Mesa*, in which the Court held that such immunity did not place officials beyond the reach of the criminal law also implied that federal officials were not beyond the reach of state disciplinary action. Furthermore, the Supreme Court had stated on several occasions that prosecutors, although immune from civil liability, were still subject to state disciplinary proceedings. *Id.* at 604-09.

Professor Cleckley argued that the case was not properly removed for other reasons. The federal officer removal statute authorized removal only of a civil action or criminal proceeding brought in state court and a disciplinary proceeding does not satisfy this requirement. *Id.* at 621-29. Removal to federal court interfered with the state court's fundamental right to review the moral fitness of members of its bar and remove unfit members from the rolls. *Id.* at 629-32. The decision was also inconsistent with important policies militating against inconsistent adjudication of professional misconduct cases between federal and state courts and placing disciplinary proceedings in the hands of an overburdened federal judiciary that is relatively inexperienced in disciplinary matters. *Id.* at 638-44.

\(^{380}\) *Kolibash*, 872 F.2d at 575.
No reason is apparent why federal attorneys should not be subject to the same ethical rules as state government attorneys. State government attorneys cannot argue that the Rule is preempted. If state government attorneys are able to operate under the constraints of the Rule, surely federal attorneys can do so. The need to treat targets of investigations fairly is as strong at the federal level as it is at the state level. Indeed, all government lawyers, including United States Attorneys, have a greater duty than private attorneys to behave ethically and to ensure that opponents are treated fairly.

Of course, the Department of Justice could promulgate regulations and subject the regulations to notice and comment procedures that would delineate the circumstances under which DOJ investigators and lawyers could communicate directly with parties. Communications made pursuant to properly promulgated regulations that the Justice Department submits to notice and comment procedures would be “authorized by law.” Any regulations should be narrowly drawn and specific and should not grant a blanket exemption from the Rule. Regulations should not significantly alter the traditional balance between the Department of Justice and opposing parties and should only alleviate the specific concerns expressed by the Department.

381. See supra notes 64-65 and accompanying text.
382. In describing the special obligations of the United States Attorney in criminal matters, the Supreme Court has said:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

While the United States Attorney's ethical responsibilities in administering the criminal laws differ from his responsibilities in representing government agencies in civil matters, he still has a duty to the public that goes beyond that of a private attorney. As a former United States Attorney has observed, “Even in civil matters . . . [the United States Attorney’s] public responsibility may overshadow the particular interest of a government agency since he is responsible for maintaining ultimate control over litigation tactics and strategy; and he must ensure that opposing parties are treated fairly and even-handedly by the government.” Edwards, supra note 60, at 513.

383. Attorney General Thornburgh, in the DOJ Memo, proposed to amend the Department of Justice's Standards of Conduct, 28 C.F.R. § 45.735 (1990), to exempt the Department's attorneys from the Rule in criminal and civil enforcement matters. DOJ Memo, supra note 5, at 9. Aside from the fact that this is simply too broad an approach, the regulations will not provide legal “authorization” unless the Justice Department submits them to notice and comment procedures. See supra notes 151-73 and accompanying text. The Justice Department has apparently not submitted the current Standards of Conduct to such procedures. See 46 Fed. Reg. 52,357-74 (1981) (amending Standards of Conduct); 30 Fed. Reg. 17,202-06 (1965) (promulgating Standards of Conduct).
The Rule is designed to prevent overreaching and enable an attorney to represent a client adequately. It prevents a lawyer from driving a wedge between an opposing attorney and her client. It bars an attorney from obtaining confidential information. The Rule prevents an attorney from obtaining damaging admissions or any useful information from the opposing party, except as provided by the normal discovery mechanisms.384

Government lawyers engaged in civil investigations are, and should be, subject to the Rule's constraints.385 Any communication between an agency's lawyer and a party must be made through the party's attorney unless the communication is specifically authorized by law.

The general authority to investigate does not provide a blanket exemption from the Rule. Any legal "authorization" should be specific and justified by policy considerations. If the communication is more than merely ministerial and could potentially frustrate the purposes of the Rule, the authorization must be specific and supported by significant policy justifications. In deciding whether a particular "law" provides authorization for a communication, authorities should look at four factors: (1) the specificity of the authorizing language; (2) the inherent dangers in the communication; (3) the type of "law" involved—for example, whether the measure is a constitution, statute, court order, or substantive or procedural regulation; and (4) the policies favoring the communication.386

An agency procedural regulation can provide legal authorization for merely ministerial communications. If, however, the communication could frustrate the Rule's purposes, the agency should establish a nexus between the regulation and authorizing statute and should subject the regulation to notice and comment procedures (or analogous procedures), when available to avoid a scenario in which any agency could unilaterally exempt itself from the Rule.387

Under most circumstances, government agency investigators, engaged in civil investigations, should obey the Rule. Lawyers may not authorize or ratify an investigator's unethical communications or approve of or benefit from such communications. Lawyers supervising nonlawyers must take reasonable steps to ensure that nonlawyers obey the Rule, as should lawyers exercising managerial authority within a government agency.388

The Rule should be amended to allow government agencies to deal with the concerns of whistleblowers. If an employee of a party wishes to talk

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384. See supra notes 50-59 and accompanying text.
385. See supra notes 60-79 and accompanying text.
386. See supra notes 174-77 and accompanying text.
387. See supra notes 151-73 and accompanying text.
388. See supra notes 178-232 and accompanying text.
with a government agency and makes a written, unsolicited request that the employer's attorney not be present, the agency should be able to question the employee-whistleblower about factual matters without notifying the employer's attorney. The agency and whistleblower, however, should not discuss privileged matters, settlement, or any other improper subject.389

Federal agencies engaged in civil investigations should not be treated differently than state agencies engaged in such investigations. Federal lawyers and investigators are subject to the Rule. A federal agency's general authority to investigate does not preempt the Rule nor "authorize" ex parte communications with a represented party. If a federal agency (or, for that matter, any agency) has particular concerns that the Rule will unduly and unfairly inhibit aspects of its investigations, it can promulgate narrowly tailored regulations authorizing its employees to make communications in specific sets of circumstances. Such regulations will only provide authorization for ex parte communications if the communications are merely ministerial or if the agency subjects the regulations to notice and comment procedures (or analogous procedures), when available, and establishes a nexus between the regulations and the underlying statutory authorization.390

All attorneys must operate under the Rule's constraints. Government attorneys engaged in civil investigations should not be treated differently. The approach discussed above is flexible and will not unduly hamper government civil investigations. In addition, a government agency has advantages not enjoyed by private attorneys.391 The Rule is an important, long-standing principle of our adversary system.392 Allowing government agencies to ignore it will harm that system and erode the rights of targets to be effectively represented by counsel.

389. See supra notes 243-51 and accompanying text.
390. See supra notes 326-83 and accompanying text.
391. See supra text accompanying notes 311-12.
392. See supra notes 40-46 and accompanying text.