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WHITE HOUSE TRAVEL OFFICE INVESTIGATION

I. ISSUE STATEMENT

The White House Telegraph and Travel Office ("Travel Office") arranges air and ground transportation as well as accompany the President on trips around the country and abroad. While its employees are on the federal payroll and serve at the pleasure of the President, all expenses incurred in connection with the press trips arranged by the office are paid for by news organizations. After receiving allegations of improprieties in the Travel Office, the White House asked Peat Marwick to conduct a three day review of the office's operations. Among other things, Peat Marwick found a lack of financial controls and discrepancies relating to the Travel Office's petty cash fund. On May 19, 1993, the White House summarily terminated all seven employees in the Travel Office, and referred the matter to the FBI for investigation. The firing attracted a substantial amount of media attention, with newspapers reporting allegations that money had been stolen from the petty cash fund as well as that certain Travel Office employees demanded and received kickbacks from charter airline companies. Allegations were also made that the firings were merely an effort by the Administration to replace career employees with Clinton-Gore campaign staff, including a distant cousin of the President, and to provide charter and travel companies involved in the campaign, or closely aligned with campaign supporters, with lucrative White House business. The Justice Department has publicly announced that a criminal investigation is being conducted by the FBI, under the supervision of the Criminal Division's Public Integrity Section. The White House has conducted an internal management review relating to the Travel Office firings and criticized the manner in which they were handled. All of the employees (with the exception of the former Director and Deputy Director) were reinstated and offered new positions in the Executive branch.

2. STATUS

The criminal investigation is ongoing.

3. DEPARTMENT POSITION

The Department does not publicly comment on open criminal investigations.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

While Committee interest is unknown, the Republican leadership has sent several letters to the Attorney General inquiring about the criminal investigation and its scope. The General Accounting Office Report has now been completed; it does not criticize DOJ's handling of this matter, although there is some criticism directed at the White House.

Contact: Jo Ann Farrington

3/94

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IVAN (JOHN) DEMJANJUK**1. ISSUE STATEMENT****Summary**

Given the finding of prosecutorial misconduct by the Court of Appeals for the Sixth Circuit, should the Department continue to pursue the expulsion of Ivan (John) Demjanjuk from the United States? DOJ Position: The Department's Congressionally-mandated mission to denaturalize and deport persons who took part in Nazi crimes requires that the Department seek judicial resolution of Demjanjuk's status.

Background

Ivan (John) Demjanjuk was denaturalized and ordered deported after lengthy proceedings in federal district court and in immigration court based on his SS service at the Treblinka death camp and the Trawniki SS Training Camp in Nazi-occupied Poland and on his misrepresentations to immigration officials when he entered the United States. Before he could be deported, he was ordered extradited to Israel on the Treblinka "Ivan the Terrible" charges, where he was subsequently tried and convicted of war crimes. On appeal, the Israeli Supreme Court reversed his conviction on the basis of newly discovered evidence not previously made available by the Soviet Union when he was on trial in the U.S. and in Israel. Prior to the decision of the Israeli Supreme Court, the Sixth Circuit, on its own motion and acting on the basis of press reports, reopened the extradition proceedings and appointed a Special Master to hear evidence as to whether fraud was committed in the extradition proceedings.

After considering voluminous documentation and extensive testimony gathered over nine months, the Special Master issued a 210-page report in which he found that "[n]othing uncovered in these proceedings or, indeed, in the twelve years since [the district court's] decision in the denaturalization case, has cast any doubt on [the court's] finding that Mr. Demjanjuk served in the German SS at the Trawniki training camp." The Special Master rejected Demjanjuk's central allegation that government attorneys fraudulently concealed evidence that another man, Ivan Marchenko, operated the gas engines at Treblinka. Most importantly, the Special Master concluded that government attorneys were not reckless, did not commit fraud, and had acted in good faith at all times.

On December 30, 1993, the Department filed a petition seeking reversal of the panel's decision by the full court and urging the Sixth Circuit to adopt the report of the Special Master. Simultaneously, the Department filed a motion in federal district court in Cleveland, asking the court to reopen the denaturalization case in order to finally lay to rest Demjanjuk's claim that the denaturalization order entered against him is invalid. The

government asked the court to reaffirm its original finding that Demjanjuk served the Nazi SS at Trawniki and to take whatever steps it deems appropriate, including receiving additional evidence, to ensure the validity of its judgment. On February 24, 1994, the Sixth Circuit denied the government's petition for rehearing and for en banc review. The motion to reopen is still pending before the district court.

The Solicitor General anticipates filing a petition seeking a writ of certiorari to review the Sixth Circuit's finding of prosecutorial misconduct. The government will argue that it was improper for the court of appeals to overturn a final judgment for "fraud upon the court" based on its dissatisfaction with good-faith actions by government attorneys, because its decision is inconsistent with other circuits, which require a "plan or scheme" and specific intent to defraud, and is contrary to the express language of Rule 60(b).

Discussion

Although litigation of this matter will require substantial resources, the interests of justice and the clear mandate of the Department to pursue legal action against Nazi persecutors demands that we see this case through to a just resolution. The Department firmly believes that the government attorneys involved in this litigation acted in complete good faith. Although the Israeli Supreme Court found reasonable doubt that Demjanjuk is Ivan the Terrible of Treblinka, it found no basis to doubt that Demjanjuk was at Trawniki, as the federal district court found in its denaturalization judgment; and it found substantial evidence that Demjanjuk was a guard at the Sobibor death camp (as originally alleged by OSI in 1981) and at other camps within the Nazi concentration camp system.

2. STATUS

Demjanjuk has filed his response in federal district court, opposing the government's motion to reopen the denaturalization case. The government filed its reply on March 7, 1994. Demjanjuk filed a further response on March 18, 1994. The government filed a supplemental brief on March 27, 1994. Further action by the district court is anticipated.

The Solicitor General is presently considering whether to file a petition for a writ of certiorari in the Supreme Court concerning the Sixth Circuit's decision finding prosecutorial misconduct in the extradition proceedings. The Department's petition must be filed by May 25, 1994. It is anticipated that the Solicitor General will authorize filing of the petition.

3. DEPARTMENT POSITION

The Department firmly believes that the government attorneys involved in this litigation acted in complete good faith. Further,

the government believes that the denaturalization judgment previously entered by the federal district court remains valid on grounds independent of those found by the Israeli Supreme Court to require dismissal of their case.

Quotes from AG: (1) We will continue to do everything possible to uphold the court orders denaturalizing and deporting Mr. Demjanjuk. (September 1, 1993)

(2) While our objective is still to bring about Mr. Demjanjuk's prompt removal from the United States, we want there to be no doubt in any reasonable person's mind that Mr. Demjanjuk served in Nazi death camps and concealed that fact when he applied to become a U.S. citizen. (December 30, 1993)

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

No member of the Committee has taken a particular interest in the Demjanjuk case. Generally, there is strong bipartisan support for the Department's Office of Special Investigations ("OSI"). Several members have long records of expressing strong support for OSI (Biden, Kennedy, Metzenbaum, Hatch, Spector) and one member (Heflin) has previously expressed concern about an unrelated OSI matter involving a former resident of his state. (Arthur L.H. Rudolph). Metzenbaum is Jewish and from Ohio, so this is a sensitive issue for him, but he generally supported keeping Demjanjuk out of the country.

Contact: Ronnie Edelman

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTION PRESENTED

Whether attorneys for the government who acted in good faith and without a subjective intent to defraud nevertheless committed fraud upon the court by failing to disclose during respondent's denaturalization and extradition proceedings information that they did not consider exculpatory.

II

PARTIES TO THE PROCEEDINGS

R.H. Rison is presently the Warden at the Federal Prison Medical Facility at Springfield, Missouri. In 1985, when respondent filed his habeas corpus petition seeking relief from extradition, Joseph Petrovsky was the warden of the facility, and the decisions below accordingly bear his name. The remaining defendants in respondent's habeas corpus action were the Attorney General, the Secretary of State, and the United States District Court for the Northern District of Ohio. Because we do not represent the United States District Court, that entity technically is a respondent in this Court. For convenience, the petition nevertheless refers to Demjanjuk as respondent in the singular.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

The Solicitor General, on behalf of R.H. Rison, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals vacating its 1985 judgment allowing respondent's extradition (App. 1a-86a) is reported at 10 F.3d 338. The report of the special master (App. 87a-305a) is not reported. A related opinion of the court of appeals allowing respondent's extradition is reported at 776 F.2d 571. Related opinions of the district court finding that respondent was subject to extradition and denying his petition for a writ of habeas corpus seeking relief from extradition are reported at 612 F. Supp. 544 and 571, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. A petition for rehearing was denied on February 24, 1994. App. 307a-308a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 60(b), Fed. R. Civ. P., provides in part as follows:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party * * *. The motion shall be made within a reasonable time, and for reason * * * (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * * This rule does not limit the power of a court * * * to set aside a judgment for fraud upon the court.

STATEMENT

1. Respondent was born in 1920 in what was then the Ukrainian Republic of the Soviet Union. In 1940, he was conscripted into the Soviet Army; sometime in the next few years, he was captured by the Germans. By July of 1942, respondent, like other Soviet soldiers captured by the Germans, had been transferred to an SS training camp in Trawniki, Poland. That camp was established to carry out "Aktion Reinhard," the Nazi plan for the extermination of the Jews from countries under Nazi control. The Trawniki camp trained the Soviet prisoners of war to

serve as guards at death camps set up at Belzec, Sobibor, and Treblinka and to round up and transport Jews from the ghettos to which they had been confined. In 1952, respondent was admitted to the United States as a lawful permanent resident after executing documents stating that he had worked as a farmer in Sobibor from 1934 until 1943; the documents that respondent executed omitted any reference to his service in the SS. See *United States v. Demjanjuk*, 518 F. Supp. 1362, 1363-1365 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982); Gov't C.A. App. 323-332 (reproducing documents executed by respondent in connection with his entry to this country).

In the 1980s, a federal district court denaturalized respondent and the Attorney General ordered his deportation based on respondent's service during World War II as an SS guard at the camps in Treblinka and Trawniki and the misrepresentations he made to immigration officials when he entered the United States. At the denaturalization trial, the government introduced into evidence an original German war document bearing respondent's picture and indicating his service at Trawniki. After considering respondent's objections, as well as expert testimony, the court concluded that the document was an authentic identification card issued to respondent at Trawniki.¹ *United States v. Demjanjuk*, 518 F. Supp. at 1365-1369 (denaturalization); *In re Demjanjuk*, No. A8 237 417 (Executive Office for Immigration Review May 23, 1984)

¹ Relying principally on a notation on the Trawniki identification card indicating that respondent had been posted to the Sobibor death camp in March of 1943, the denaturalization complaint also alleged that respondent had served as an SS guard at that camp. The district court had no occasion to consider that allegation because it found other adequate grounds for denaturalization, as explained in the text. 518 F. Supp. at 1376 n.31.

(reproduced in Gov't C.A. App. 344-358), appeal dismissed, No. A8 237 417 (BIA Feb. 14, 1985) (reproduced in Gov't C.A. App. 359-374), aff'd, *United States v. Demjanjuk*, 767 F.2d 922 (6th Cir.) (Table), cert. denied, 474 U.S. 1034 (1985).

2. In November 1983, the State of Israel requested that the United States extradite respondent for trial on charges that he committed war crimes involving the murder of civilians at the Treblinka death camp, in violation of Israel's Nazi and Nazi Collaborators (Punishment) Law, 5710-1950. See Gov't C.A. App. 389-404 (reproducing Israel's request for extradition). Israel supported its request with the affidavits and testimony of six Treblinka survivors who identified respondent's photograph as depicting a Ukrainian guard named "Ivan" who operated the gas chambers. Pursuant to its obligation under the Convention on Extradition, Dec. 10, 1962, U.S.-Israel, 14 U.S.T. 1707, the government filed a complaint in the Northern District of Ohio seeking a warrant authorizing respondent's extradition to Israel. On April 15, 1985, the district court held that respondent was subject to extradition because the survivor affidavits established probable cause to believe that respondent had murdered civilians at Treblinka in 1942 and 1943. 612 F. Supp. 544.

The district court thereafter denied respondent's petition for a writ of habeas corpus, which sought relief from extradition. 612 F. Supp. 571 (1985). The court of appeals affirmed. 776 F.2d 571 (1985). Noting that "[t]he scope of review in habeas corpus following an extradition order is quite narrow," the court quoted the general principles articulated by Justice Holmes in *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925), which confine review of the extradition order to the question "whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." 776 F.2d at 576. After

reviewing the "sworn testimony by affidavits from six witnesses who were at Treblinka in 1942 and 1943 who identified [respondent]," the court concluded: "Surely the evidence in this case satisfied this lenient standard." *Ibid*. This Court denied certiorari, 475 U.S. 1016 (1986), and respondent thereafter was extradited to Israel.

In April 1988, a three-judge panel in Israel convicted respondent of war crimes after finding beyond a reasonable doubt that respondent was the Treblinka gas chamber operator known as "Ivan the Terrible." *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988).² While respondent's appeal to the Supreme Court of Israel was pending, Israeli prosecutors obtained from the former Soviet Union interrogation records of individuals who identified a photograph of an individual named Ivan Marchenko as the photograph of a gas chamber operator at Treblinka; one guard stated that Ivan Marchenko had been known to the Jewish prisoners as "Ivan the Terrible." *Demjanjuk v. Israel*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), slip op. 388, ¶ 453 (see Gov't C.A. Reh. App. C11).³

3. In 1992, based on press reports that the Department of Justice had possessed information relating to Mar-

² At pages 431-645 of its appendix in the court of appeals, the government reproduced an English translation of the verdict in that case, which was published in 1991 as *The Demjanjuk Trial* by the Israel Bar Publishing House in Tel Aviv.

³ Because we have not yet received a complete official English translation of the opinion of the Supreme Court of Israel in the *Demjanjuk* case, this petition cites directly to the paperbound version of the original opinion, which was issued by the court in Hebrew. Appendix C to the government's petition for rehearing in the court of appeals provides an English translation of portions of the opinion. This certiorari petition provides cross-references to that translation for the convenience of the Court.

chenko that was not disclosed to respondent at the time of the extradition, the court of appeals reopened its extradition judgment and appointed a special master, United States District Judge Thomas A. Wiseman, Jr., to determine whether government attorneys committed fraud upon the court in the proceedings against respondent. App. 43a-45a, 46a-49a, 306a.

4. Over a period of about six months, the special master heard the live testimony of six attorneys, accepted the deposition testimony of several other witnesses, and reviewed over 300 exhibits. App. 93a-94a. On June 30, 1993, the special master issued a 210-page report in which he concluded that the case should not be reopened. *Id.* at 87a-305a.

a. The special master rejected each of respondent's allegations of fraud. App. 250a-258a. The special master's findings with respect to three specific allegations made by respondent are important to this petition: those regarding the so-called Fedorenko protocols, a Polish Main Commission list of Treblinka guards, and the identification testimony of Otto Horn.

i. The special master explained that in 1978 the United States government received materials from the Soviet Union in response to a request for information regarding Treblinka guard Feodor Fedorenko. Those materials—generally referred to as the Fedorenko protocols—included an excerpt of a 1945 record of interrogation of a Treblinka guard named Pavel Leleko (who had been executed in 1945) and a 1978 statement of another guard named Nikolai Malagon. App. 119a-123a (special master's factual discussion of acquisition of Fedorenko protocols). Leleko stated that the gas chambers were operated by

"Marchenko and Nikolay," whom Leleko described as "motorists." *Id.* at 58a-59a (appendix to opinion of court of appeals reproducing text of statement). Malagon stated that a guard named "Marchenko, Nikolay [*sic*]" worked near the "diesel engines by the gas chambers." Gov't C.A. App. 149 (text of statement).⁴

After reviewing those statements, the special master concluded that the government's conduct regarding them was not improper. The special master noted that neither statement mentioned "Ivan the Terrible" or any guard named Ivan, and also pointed out that the statements did not "refer to Ivan's notorious acts [and] provided nothing to connect the two names [Marchenko and Nikolay] with either Ivan the Terrible or Ivan Demjanjuk." App. 259a. Most important, based on the testimony and contemporaneous notes of the two government attorneys who had read the Fedorenko protocols, the special master concluded that those attorneys had not considered the statements to be exculpatory. *Id.* at 123a, 126a-127a, 159a-167a. Instead, following receipt of a second statement by Malagon, in which Malagon indicated that there were two gas chamber "engine operator[s]" at Treblinka named Nikolay Marchenko and "Ivan Demedyuk or Ivan Dem'yanyuk" (Gov't C.A. App. 214-216, 850 (text of subsequent

⁴ The comma between the names "Marchenko" and "Nikolay" appears to have been introduced by the translator, because it does not appear in the original Russian. Although the statement is reproduced as an appendix to the opinion of the court of appeals (App. 60a-64a), this petition cites to the photocopy included in our court of appeals appendix because the printed version attached to the opinion of the court of appeals has different spacing than the original English translation available to the government attorneys.

Malagon statement)⁵), the attorneys concluded that Marchenko's first name was Nikolay. App. 165a-167a.

ii. The special master also discussed another document that apparently refers to Marchenko, a 1975 article about Treblinka published by the Polish Main Commission for the Investigation of Hitlerite Crimes. App. 128a-132a. That article listed 43 "known" Treblinka guards, including one "Marczenko Iwan"; the article provided no additional information about that guard. See Gov't C.A. App. 282-283 (relevant portion of article). The special master found that the government had provided respondent with an English translation of that article in August 1982, more than three years before respondent's extradition to Israel. App. 129a-130a, 199a-200a.

iii. The special master also rejected respondent's contention that the government committed fraud in presenting the testimony of former SS guard Otto Horn at the denaturalization trial. App. 140a-154a, 250a-251a. In a

⁵ The court of appeals reprinted both the first and second statements as appendices to its opinion, App. 60a-67a. This petition cites for clarity to the government's appendix in the court of appeals, which contained both those items (Gov't C.A. App. 144-156, 214-216), and a later partial version (Gov't C.A. App. 850) correcting the translation of the second statement.

The second statement was produced when Soviet officials reinterviewed Malagon in October of 1979. In that interview, Malagon stated that he had known a Treblinka guard named "Ivan Demedyuk or Ivan Dem'yanyuk" who began as a cook and later was transferred to a position as an engine operator at the gas chambers. Gov't C.A. App. 214-216, 850. Although Malagon indicated in that statement that he would be able to identify a photograph of the man named "Ivan Demedyuk," he was unable to identify respondent's photograph. The government disclosed Malagon's name and address to respondent before the denaturalization trial in response to an interrogatory requesting the names of persons who had failed to identify respondent's photograph. App. 253a, 301a.

November 1979 interview in his Berlin apartment, Horn told government attorney Norman Moscovitz that a Ukrainian named "Ivan" had operated the gas chambers at Treblinka. To avoid becoming a witness to a possible identification, Moscovitz turned his back while investigators presented two spreads containing respondent's photographs. After the interview, the investigators told Moscovitz that Horn had made a "good, valid identification" of respondent; the investigators thereafter confirmed the positive identification in reports to their supervisor. *Id.* at 140a-143a.

Horn repeated the identification in February 1980 in a deposition, but Horn described the photospread procedure somewhat differently than the investigators described it in their reports. App. 144a-146a. Moscovitz did not disclose any problem with the identification proceeding to respondent before the denaturalization trial; he explained to the special master that he was not aware of the discrepancy because he did not read the reports until long after the denaturalization trial. *Id.* at 147a. The special master accepted that explanation, noting that it was supported by "the unanimous testimony in these proceedings," and that "there is no substantial evidence in the record to gainsay the crux of Mr. Moscovitz's testimony." *Id.* at 147a, 148a; see *id.* at 251a ("I find that Norman Moscovitz in fact did not know that Otto Horn's identification of [respondent's] photographs proceeded in the manner described in the [investigators'] reports."). The special master suggested that Moscovitz may have "felt that his conversations [on the day of the identification] with [the investigators] provided him with ample information on the way in which the [photo identification] was conducted." *Id.* at 149a. Accordingly, the special master concluded that respondent's contention that Moscovitz

committed fraud when he did not disclose the circumstances of the identification was "without merit." *Id.* at 251a.

b. In addition to rejecting each of respondent's particularized allegations of fraud, the special master evaluated the conduct of the government attorneys who had participated in the extradition proceedings. The special master stated that they had "cooperated fully in this investigation," that "they testified truthfully, and that they are now, and were then, principled, albeit fallible." App. 263a. Similarly, he found that the attorneys possessed "good-faith beliefs, based on credible evidence [at the relevant times], * * * that [respondent] had served at both Treblinka and [the] Sobibor [death camps]," *id.* at 189a-190a; that they "had a good faith belief that they had met their discovery obligations," *id.* at 258a; and that they "did not believe that they possessed and withheld exculpatory information," *id.* at 243a.⁶ The special master concluded (*id.* at 263a):

[The government attorneys] acted in good faith. They did not intend to violate the Rules or their ethical obligations. They were not reckless; they did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what

⁶ In the portion of his report describing the government's response to respondent's discovery requests, the special master stated that the government attorneys at one point were "playing hardball" by narrowly construing one of respondent's interrogatories. App. 234a. The special master expressly found, however, that the "attorneys acted in good faith in [interpreting the interrogatory]." *Ibid.*; see 518 F. Supp. at 1385 n.52 (denaturalization court did "not ascribe any sinister motivation" to government's construction of fourth set of interrogatories).

we may now perceive to be the truth, they were not wilfully blind.

Because the special master found no fraud and no other basis for reopening the extradition proceedings, he concluded his report by recommending that "the case of *Demjanjuk v. Petrovsky, et al.* be closed." *Id.* at 266a.

5. In July 1993, the Supreme Court of Israel issued its decision reviewing respondent's conviction as a Nazi collaborator. The court applied a strict standard under which it could uphold the conviction only if the only rational conclusion the record would support was that respondent was the gas chamber operator known as Ivan the Terrible of Treblinka. *Demjanjuk v. Israel*, slip op. 391, ¶ 456 (see Gov't C.A. Reh. App. C16).⁷ After reviewing evidence that an individual named Ivan Marchenko might have been a gas chamber operator at Treblinka, the court concluded that there was a reasonable doubt that respondent was the individual who had been known as Ivan the Terrible, and accordingly overturned his conviction. Slip. op. 392, ¶¶ 456-457 (see Gov't C.A. Reh. App. C18-C20).

The Supreme Court of Israel stressed that, in its view, none of the new evidence derogated from the evidence that proved that respondent had served as an SS guard at Trawniki, service that the court characterized as an integral part of the German extermination machine. *Demjanjuk v. Israel*, slip op. 393, ¶¶ 458-459 (see Gov't C.A. Reh. App. C20-C21). The court also found that other new

⁷ That standard is much stricter than the standard for reviewing the adequacy of the record to support factual conclusions in this country. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (critical question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

evidence, not available at the time of respondent's extradition or trial, confirmed respondent's service in the SS and completely vitiated his claim that his Trawniki identification card was a forgery. Slip. op. 383, ¶ 447 (see Gov't C.A. Reh. App. C1-C2). Furthermore, the court concluded that respondent's extradition had been lawful, because the survivor identifications on which the extradition was based had provided an adequate basis for the extradition decision.⁸ Slip. op. 404 (see Gov't C.A. Reh. App. C40).

6. In November 1993, the court of appeals vacated its 1985 judgment and the judgment of the district court allowing respondent's extradition. App. 1a-86a.⁹ The court started by summarizing the background of the case and the special master's report, including the special master's findings that the attorneys for the government "acted in good faith, * * * did not intend to violate the Rules or their ethical obligations[,] * * * did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance." *Id.* at 25a (quoting *id.* at 263a). The court concluded that it "cannot find [those findings] clearly erroneous." *Id.* at 25a.

The court did, however, overturn the special master's conclusion that the attorneys were not reckless. App.

⁸ The Supreme Court of Israel also affirmed the trial court's finding that the testimonies of the identification witnesses, including Otto Horn, were reliable. See *Demjanjuk v. Israel*, slip op. 386-388, ¶¶ 450-452 (see Gov't C.A. Reh. App. C6-C10). The specific discussion of the Horn identification appears at slip op. 387 (¶ 451(beth)).

⁹ On August 6, 1993, after the Supreme Court of Israel announced its decision, the court of appeals issued an order granting interim relief that prohibited the United States government from preventing respondent's return to the United States. See Order, No. 85-3435 (6th Cir. Aug. 6, 1993).

25a-31a. It reasoned that recklessness "should be determined from an objective examination of the actions of the parties in a particular set of circumstances." *Id.* at 26a. The court concluded that, evaluated against that objective standard, the government attorneys acted recklessly on three occasions: (1) in failing to produce the Fedorenko protocols; (2) in delaying production of the Polish Main Commission list of Treblinka guards¹⁰; and (3) in failing to read and produce investigative reports describing the identification procedures followed with Otto Horn. *Id.* at 27a-31a.

The court of appeals then considered whether a judgment should be reopened for fraud upon the court based solely on an objective finding of recklessness, without a subjective intent to commit fraud. App. 32a-33a. The court acknowledged that "there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court," but nevertheless concluded that "subjective intent to commit fraud * * * is not required in a case such as this. Reckless disregard for the truth is sufficient." *Id.* at 33a.¹¹

¹⁰ The opinion of the court of appeals states (App. 28a) that the list was not furnished until 1992. That statement is incorrect; the list was furnished to respondent in 1982, as respondent expressly acknowledged on page 5 of the chart appended to respondent's "First Brief for Petitioner," filed in the court of appeals on July 27, 1992. The court of appeals may have been aware of the correct date, see App. 30a (statement of court of appeals that list should "have been furnished in 1979, * * * not three years later"), but it declined to correct the erroneous reference to 1992 even after the government specifically called the error to the panel's attention in its petition for rehearing, see Gov't C.A. Pet. for Reh. 15 & n.9. The court also declined to correct its erroneous statement (App. 11a) that the list included "more than 70" names. As review of the list demonstrates, there were only 43 names on the list. See Gov't C.A. App. 282 (reproducing list); Gov't C.A. Pet. for Reh. 14 (noting panel's error).

¹¹ The court of appeals stated (App. 33a-36a) that its holding that subjective bad faith is not required for a finding of fraud upon the court

Accordingly, because it had concluded that the attorneys had acted recklessly, the court entered an order vacating the judgment in the extradition proceedings "on the ground that the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court." *Id.* at 42a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a court may exercise its power to overturn a judgment for "fraud upon the court," as described in the last clause of Fed. R. Civ. P. 60(b), even when a party acted in "good faith." Applying its holding that "subjective intent to commit frau[d] is not required," App. 33a, the court of appeals overturned a final judgment based on its dissatisfaction with good-faith actions taken by attorneys who represented the government in the litigation that led to the prior judgment. Both the court's understanding of its power to set aside a final judgment and its decision in this case are inconsistent with the decisions of other courts of appeals and the language of Rule 60(b). As every other court to interpret that Rule has held, the power to set aside civil judgments that are not challenged within a year is confined to instances in which a party has engaged in egregious and deliberate misconduct, such as bribery of a judge or fabrication of evidence. The decision below warrants review because of the circuit conflict it creates, the destabilizing effect of its holding on the reliability of civil judgments, and the impact of the decision on the extensive litigation involving respondent.

was supported by this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). The court concluded that *Brady* applies in denaturalization and extradition cases in which the government relies on proof of criminal conduct (App. 34a), and pointed out that *Brady* applies "irrespective of the good faith or bad faith of the prosecution." *Ibid.* (quoting *Brady*, 373 U.S. at 86).

1. The court of appeals' observation that "there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court" (App. 33a) considerably understates the distance between the court's approach and the decisions of other courts exercising the "fraud upon the court" power. In fact, the standard adopted by the court of appeals in this case is inconsistent with standards articulated by the overwhelming majority of the courts of appeals. Recognizing the "deep-rooted policy in favor of the repose of judgments" (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)), the First, Fourth, Fifth, Eighth, and Ninth Circuits have held that the power described in Rule 60(b) to set aside a judgment for "fraud upon the court" cannot be exercised without proof of a "plan" or "scheme" to defraud.¹² That formu-

¹² *E.g.*, *Aoude v. Mobil Oil Corporation*, 892 F.2d 1115, 1118 (1st Cir. 1989) ("A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982) (requiring "deliberate scheme to directly subvert the judicial process"), cert. denied, 459 U.S. 1128 (1983); *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir.) (fraud upon the court "requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision") (internal quotation marks omitted), cert. denied, 493 U.S. 977 (1989); *Browning v. Navarro*, 826 F.2d 335, 344 (5th Cir. 1987) (fraud upon the court doctrine provides that claimant "must demonstrate * * * a scheme or collusion that is designed to influence corruptly the proceedings, or to inhibit the ability of an adverse party to fully present his case or defense"); *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1338 (5th Cir. 1978) ("[I]t is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision."); *Pfizer, Inc. v. International Rectifier Corp.* (*In re Coordi-*

lation, which the court of appeals expressly rejected, unmistakably requires intentional misconduct. Under that standard, the special master's findings that the government attorneys had a good-faith belief that they had met their discovery obligations and that they did not intentionally violate any rules or ethical obligations—findings that the court of appeals expressly declined to overturn (App. 25a)—would mandate rejection of respondent's efforts to have the extradition judgment set aside. Compare *United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 69 (1878) (failure to come forward with information is not fraud upon the court in the absence of a "corrupt motive").

Similarly, the Second, Third, and Eleventh Circuits have adopted the following formulation suggested by Professor Moore:

"Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases.

nated Pretrial Proceedings in Antibiotic Antitrust Actions), 538 F.2d 180, 195 (8th Cir. 1976) (fraud upon the court is "a scheme to interfere with the judicial machinery"), cert. denied, 429 U.S. 1040 (1977); *Alexander v. Robertson*, 882 F.2d 421, 425 (9th Cir. 1989) (rejecting a claim of fraud where there was no evidence that the misconduct was "designed to improperly influence the court in its decision"); *Abatti v. C.I.R.*, 859 F.2d 115, 118 (9th Cir. 1988) ("Fraud on the court must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision.") (internal quotation marks omitted); see also *Hazel-Atlas Glass Co.*, 322 U.S. at 245 (fraud upon the court doctrine satisfied by proof of "a deliberately planned and carefully executed scheme to defraud" the court).

Senate Realty Corporation v. CIR, 511 F.2d 929, 931 (2d Cir. 1975) (quoting 7 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60.33, at 515 (2d ed. 1974)); *Virgin Islands Housing Authority v. David*, 823 F.2d 764, 767 (3d Cir. 1987) (same)¹³; *SEC v. ESM Group, Inc.*, 835 F.2d 270, 273 (11th Cir.) (same), cert. denied, 486 U.S. 1055 (1988); see also *Gekas v. Pipin (In re Met-L-Wood Corporation)*, 861 F.2d 1012, 1018 (7th Cir. 1988) ("[T]he fraud must involve corruption of the judicial process itself."), cert. denied, 490 U.S. 1006 (1989). As noted by the Second Circuit, the common element in cases in which a final judgment has been set aside for fraud upon the court is "evil intent, deceit, or collusion, [a] narrow definition [that] reflects the policy of putting an end to litigation." *Senate Realty Corporation*, 511 F.2d at 933.

2. Nor can the standard articulated by the court of appeals be reconciled with the structure and language of Rule 60(b). Even if the court of appeals were correct in rejecting the special master's conclusion that the government attorneys were not reckless,¹⁴ the findings in this case cannot

¹³ To be sure, the Third Circuit suggested in *David* that something less than deliberate conduct could constitute fraud upon the court. See 823 F.2d at 767 (stating that a misrepresentation made with a "callous disregard" of the record can support a finding of fraud upon the court). But whatever the boundaries of that standard, it would not justify invalidation of the judgment in this case, in which the court of appeals expressly declined to disturb the special master's finding that the government attorneys "did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance." App. 25a (quoting *id.* at 263a).

¹⁴ The court of appeals concluded that the government attorneys showed a reckless disregard for their obligations to disclose information to respondent under a standard that includes a situation in which an individual "does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." App. 26a. The court relied on a provision of the Restatement (Second) of

properly be construed to constitute "fraud upon the court" as described in Rule 60(b).

First, the structure of the Rule indicates that only the most egregious misconduct should be sufficient to invalidate a civil judgment that is not challenged within one year. Rule 60(b)(3) permits a judgment to be overturned for "fraud * * *, misrepresentation, or other misconduct of an adverse party," but only if "[t]he motion [is] made within a reasonable time, and * * * not more than one year after the judgment * * * was entered." Because the penultimate sentence of Rule 60(b) permits a judgment to be invalidated at any time for "fraud upon the court," the natural inference is that "fraud upon the court" is limited to a particularly egregious subset of the "fraud" described in Rule 60(b)(3); a broad interpretation extending the "fraud upon the court" provision to all cases of fraud would remove any force from the one-year time limitation on motions for relief under Rule 60(b)(3). See 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and*

Torts that articulates a standard for establishing reckless disregard of another individual's physical safety. See 2 Restatement (Second) of Torts § 500, at 587 (1965). That standard is substantially different from this Court's definition of "reckless disregard for the truth"—the equivalent of "actual malice" in a defamation action—as requiring a "high degree of awareness of * * * probable falsity" or "serious doubts as to the truth of [the statement]." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (internal quotation marks omitted); see also 1 *Model Penal Code* § 2.02(2)(c), at 226 (1985) ("A person acts recklessly * * * when he consciously disregards a substantial and unjustifiable risk * * *. The risk must be of such a nature and degree that * * * its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe."). Thus, even if recklessness can suffice to show fraud upon the court, the court of appeals erred in extending recklessness in this context to include conduct that a court considers to be, at worst, objectively unreasonable.

Procedure § 2870, at 253-254 (1973); cf. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (inherent power "to set aside fraudulently begotten judgments, * * * [b]ecause of [its] very potency, * * * must be exercised with restraint and discretion"); *Hazel-Atlas Glass Co.*, 322 U.S. at 244 ("courts of equity have been cautious in exercising their [inherent] power over * * * judgments").

Moreover, by concluding that it can overturn judgments solely because of errors counsel made in good faith, the court of appeals went further than extending "fraud upon the court" to the entire universe of cases involving "fraud" within the meaning of Rule 60(b). The definition articulated by the court of appeals extends the court's power to cases that cannot plausibly be included within any customary definition of fraud. As *Black's Law Dictionary* puts it, fraud is "synonymous" with "bad faith." *Black's Law Dictionary* 660 (6th ed. 1990). It is "an act of trickery or deceit esp. when involving misrepresentation." *Webster's Third New International Dictionary* 904 (1986). Similarly, Justice Joseph Story concluded that the "true definition" of fraud is "any cunning, deception, or artifice used to circumvent, cheat, or deceive another." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 186, at 185 (Jairus W. Perry 12th ed. 1877) (quoting a Roman jurist). Similarly, this Court has characterized it as "mean[ing] an intention to deceive." *Lord v. Goddard*, 54 U.S. (13 How.) 198, 211 (1851). The Court went on to explain in that case that a "party [who] honestly stated his own opinion, believing at the time that he stated the truth," could not be held liable for fraud, "although the representation turned out to be entirely untrue." *Ibid.*

None of those definitions properly can be applied to this case, given the undisturbed findings that the government attorneys acted in "good faith" and did not intentionally withhold information that they believed they were obli-

gated to disclose.¹⁵ The worst that can be said of the conduct of the attorneys is that they failed to recognize the significance of the Fedorenko protocols.¹⁶ The court of

¹⁵ Contrary to the suggestion of the Sixth Circuit (App. 33a-36a), nothing in *Brady v. Maryland*, 373 U.S. 83 (1963), requires a contrary result in this case. *Brady* establishes only that the government violates a criminal defendant's right to due process when it fails to disclose evidence that is both material to guilt or punishment and favorable to the accused. 373 U.S. at 87. Although an unintentional *Brady* violation may provide a basis for attacking a criminal conviction, the prosecutor who unwittingly violates the *Brady* rule has not committed fraud upon the court. Moreover, for the reasons discussed below, we do not believe it plausibly can be said that the government withheld evidence that was material to the decision to extradite respondent.

¹⁶ The court of appeals' reliance on the Polish Main Commission list and on the materials related to the Horn identification is entirely misplaced. First, because the government provided respondent with a copy of the Polish list in August 1982, more than three years before respondent's extradition (see note 10, *supra* (discussing panel's confusion about date list was produced)), the timing of that production cannot plausibly provide a basis for vacating the extradition judgment. In any event, it is difficult to see how the omission of respondent's name from an admittedly incomplete list of Treblinka guards (the list contained 43 of the "approximately 100" Trawniki guards at Treblinka (App. 29a)) could have affected the conclusion that the eyewitness identifications submitted by Israel established probable cause to extradite petitioner. Respondent did not make such an argument during the three-year period between his receipt of the list and his extradition.

The irrelevance of the materials related to Horn's identification is, if anything, even more clear: Because Israel did not submit SS officer Horn's identification of respondent in support of its extradition request, the government's failure to produce reports that could cast doubt on the validity of that identification could not possibly have misled the court of appeals into allowing respondent's extradition. Moreover, respondent's criticisms of that identification are not persuasive. After carefully reviewing the identification procedure, including the investigators' reports on which respondent relies, the three-judge Israeli trial court concluded that "it is difficult to find fault with this identification procedure." Gov't C.A. App. 564; see *id.* at 563-564 (discussing procedure); see also note 8, *supra* (discussing approval of identification by Supreme Court of Israel).

appeals upheld the master's finding that the two attorneys who read the protocols did not in fact consider them exculpatory or responsive to respondent's discovery requests in the denaturalization case.¹⁷ Moreover, although the court of appeals stated without explanation that those protocols "name a man other than [respondent] as the notoriously cruel 'Ivan the Terrible' who ran the motors of the gas chambers," App. 9a, their relevance to the identity of the man known as Ivan the Terrible is quite ambiguous. As the special master commented after his detailed review of the extensive record, the Fedorenko protocols did not "refer to Ivan's notorious acts [and] provided nothing to connect the two names [Marchenko and Nikolay] with * * * Ivan the Terrible." *Id.* at 259a. Although the court

¹⁷ Even George Parker, the attorney most skeptical of the government's proof that respondent operated the Treblinka gas chambers, did not see anything in the protocols that undermined that conclusion. As the special master explained, "[t]he most striking aspect of [Parker's] memorandum [detailing his doubts] is its complete silence regarding the references [in the Fedorenko protocols] to a man named Marchenko at the gas chambers." App. 180a; see *id.* at 162a (discussing evidence that Parker "did not believe that * * * the [Fedorenko] protocols exculpated [respondent]"), 21a (court of appeals' agreement with special master that Parker "did not make the Marchenko connection").

Similarly, Attorney Norman Moscowitz in fact thought at first that the protocols were significantly inculpatory because the Marchenko name mentioned in the protocols resembled the name respondent offered in his immigration documents as his mother's maiden name, Martschenko. Far from recklessly disregarding the protocols, Moscowitz pursued that lead until he received Malagon's second statement, in which Malagon claimed to have known both a "Nikolay Marchenko" and an "Ivan Dem'yanyuk or Ivan Demedyuk" at Treblinka. Moscowitz then concluded that Marchenko's first name was Nikolay, and that respondent was the Ivan who operated the gas chambers. See App. 163a-167a (special master's discussion of Moscowitz's investigation of the protocols).

of appeals might have been correct in concluding, based on all of the evidence that is *now* available, that the protocols provide some support for respondent's claim, it is unfair to characterize the interpretation the government's attorneys placed on those documents as reckless. And it is prodigal to characterize their actions as constituting fraud upon the court, so as to justify invalidation of the judgment in the extradition proceeding.

The ease with which the court of appeals (having the benefit of new evidence revealed after the dissolution of the Soviet Union) was willing to second-guess the judgments made by the attorneys at the time of the litigation shows the accuracy of Judge Friendly's comment that it is "all too easy to fall into the error of condemning conduct with the aid afforded by the bright glare of hindsight," *Kupferman v. Consolidated Research and Manufacturing Corporation*, 459 F.2d 1072, 1080 (2d Cir. 1972). Although we do not in the least "minimiz[e] the unqualified duty of scrupulous candor that rests upon government counsel in all dealings with th[e] court, to characterize [the conduct in this case] as amounting to fraud upon the [c]ourt is, to say the least, utterly extravagant," *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 358 (1963).

3. The circuit conflict created by the decision below warrants resolution by this Court. By diluting the standards for fraud upon the court, the court of appeals' decision undermines the traditional finality of civil judgments. As the frequent rejection of "fraud upon the court" claims by the courts of appeals demonstrates, a court's power to invalidate a judgment at any time is extremely attractive to litigants, and any broadening of that power can be expected to lead to a significant increase in litigation seeking to invalidate the final judgments of federal courts. Because the decision of the court of appeals introduces a geographic differential into the prospect of success in such litigation,

review by this Court is warranted to ensure that the civil judgments of federal courts have the same strength and finality throughout the country.

Nor does respondent's acquittal in Israel, following the extradition, deprive the decision below of continuing importance with respect to respondent. If left undisturbed, there is a significant likelihood that the decision below will hinder the government's efforts to remove respondent from the United States. Respondent's service as an SS guard at Trawniki—which, as the Israeli Supreme Court noted, has been substantially confirmed by new evidence, *Demjanjuk v. Israel*, slip op. 393, ¶¶ 458-459 (see Gov't C.A. Reh. App. C20-C21)—as well as his false statements concealing that service at the time he entered, rendered him subject to denaturalization even if he was not the man known as Ivan the Terrible. See *Fedorenko v. United States*, 449 U.S. 490 (1981); see also App. 266a (special master's explanation that new evidence does not "cast any substantial doubt" on the conclusion that respondent's conduct required denaturalization). The decision of the court of appeals, however, has called into question the validity of the existing judgment of denaturalization, and it thus may hinder the government's efforts to obtain an expeditious and definitive resolution of respondent's status.¹⁸ If the judgment below

¹⁸ Shortly after the panel issued its opinion invalidating the extradition judgment, the government, of its own volition, filed a motion in the denaturalization case asking the district court to reaffirm the denaturalization judgment on the ground that respondent's service at Trawniki furnished an independent basis for his denaturalization. See Motion To Reopen Judgment (filed Dec. 30, 1993). Respondent, on the other hand, has argued that the Sixth Circuit's finding of fraud upon the court in the extradition proceeding justifies required vacating the denaturalization judgment and dismissal of the complaint with prejudice. See Def's Resp. to Plf's Reply in Supp. of Mot. To Reopen Judgment at 4 (filed Mar. 18, 1994).

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becomes final, the government may be precluded in the proceedings involving respondent's denaturalization from challenging determinations made in the course of the decision below. Cf. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 170-171 (1984) (applying collateral estoppel against the government); *Montana v. United States*, 440 U.S. 147, 155-162 (1979) (same). Accordingly, the judgment of the court of appeals continues to involve a live and very real controversy between the parties.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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THE INSLAW AFFAIR

1. Issue Statement

In 1982, the Department of Justice entered into a 3-year, \$10 million contract with INSLAW, Inc., to implement and install a case management software package known as PROMIS in 20 large U.S. Attorneys' offices and a PROMIS-like word processing based software program in 74 other USA offices. The PROMIS program which was to be installed by INSLAW had been developed by INSLAW primarily through LEAA grants and thus was in the public domain.

The relationship between DOJ and INSLAW deteriorated almost immediately. The conflict centered primarily on whether the version of PROMIS installed by INSLAW (and later self-installed by DOJ) contained proprietary enhancements developed at private expense for which INSLAW was entitled to additional compensation. INSLAW and its lawyers (including former Attorney General Elliot Richardson) also maintain that senior DOJ officials conspired to steal an enhanced version of PROMIS from INSLAW.

INSLAW has put forth several theories to explain the purpose of the alleged conspiracy, including the following:

- ♦ Enhanced PROMIS was stolen at AG Ed Meese's direction in order to pay back Earl Brian (a member of Ronald Reagan's gubernatorial cabinet) for his role in orchestrating the October Surprise conspiracy; and
- ♦ Enhanced PROMIS was stolen at Judge Lowell Jensen's (the DAG at the time) direction in an effort to promote a competing software which he had helped develop.

INSLAW has also alleged that DOJ and other federal agencies have been involved in the illegal international distribution of PROMIS to various intelligence agencies around the world. According to INSLAW, the US government equipped the PROMIS software with a "trap door" which allows US intelligence agencies to gain access to the databases of the PROMIS purchasers.

Finally, INSLAW has asserted that DOJ and others were involved in the 1991 death of Daniel Casolaro. Casolaro, a freelance writer who had been working on the INSLAW conspiracy allegations, was found dead in a West Virginia motel in 1991. Although his death was ruled a suicide by local authorities, there has been wide spread speculation, fueled in part by INSLAW, that the death was a murder.

2. Investigations

In 1988, Judge Bason of the U.S. Bankruptcy Court in the District of Columbia ruled that DOJ had stolen the enhanced version of PROMIS from INSLAW by "fraud, trickery and deceit." In a harsh, 83 page opinion, the Court condemned the Department, concluded that most of the DOJ employees that had testified lacked credibility, and awarded INSLAW approximately \$6.8 million. The decision was overturned on jurisdictional grounds in 1991 by the Court of Appeals for the D.C. Circuit.

In addition, both chambers of Congress have investigated INSLAW's allegations. The 1989 report by the Senate Permanent Committee on Investigations concluded that there was "no proof of the existence of a broad conspiracy" against INSLAW, though it was critical of DOJ's administration of the PROMIS contract. In 1992, the House Committee on the Judiciary issued a more-critical report. It concluded that DOJ should compensate INSLAW for the harm that has been caused and called for the appointment of an independent prosecutor.

In 1991, Attorney General William Barr appointed retired Federal Judge Nicholas J. Bua as special counsel to investigate all allegations of wrongdoing arising from the INSLAW matter. Judge Bua submitted his report, which concludes that there is no credible evidence of a conspiracy, to Attorney General Reno in March 1993.

3. Current Status

The Attorney General asked Webb Hubbell to review Judge Bua's report, to conduct whatever follow-up investigation was required and to make recommendations to her on the matter. The review has been completed, and a report summarizing the findings of that review has been provided to the Attorney General and the Deputy Attorney General. They are in the process of reviewing Webb Hubbell's report. It is anticipated that the report will be made public in the near future.

Hubbell's report concurs with the findings of the Special Counsel that there is no credible evidence of a conspiracy and recommends that no additional compensation be paid to INSLAW.

4. Senate Judiciary Committee

Senator Moseley-Braun questioned both Webb Hubbell and the Attorney General about the INSLAW matter during their confirmation hearings. She emphasized the need for the allegations to receive a fair hearing. Senator DeConcini has also written the Attorney General about the INSLAW allegations and the need for an impartial review.

Contact: John Dwyer

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CONTACTS WITH REPRESENTED PERSONS

1. ISSUE STATEMENT

Every state has adopted some version of Model Rule 4.2 or DR 7-104 which prohibit attorneys from contacting directly a represented party without the consent of that party's counsel. The applicability of those rules to Department of Justice attorneys engaged in law enforcement activities has been an issue of considerable controversy over the last five years.

The controversy erupted in 1989 when the Department issued the "Thornburgh Memorandum" which purported to authorize all contacts by Department attorneys with represented persons during the course of authorized law enforcement activities. The Thornburgh Memorandum was loudly denounced by the defense bar, was officially condemned by the American Bar Association, and, more recently, was thoroughly criticized by two federal courts. The organized bar condemned the rule as creating a double standard in which certain prohibitions apply to defense lawyers but not government lawyers, and the courts made it clear that the Memorandum did not have the force of law.

Nevertheless, the issue remains of great concern to the Department. Over the last year, U.S. Attorneys have almost uniformly asserted to the Attorney General that the most pressing matter facing their offices is the need for a uniform national rule governing when Department attorneys may contact represented individuals during law enforcement investigations. There are several factors contributing to the concern. First, federal prosecutors today are working much more closely with investigative agents at the early stages of complex investigations than was true in the past. When agents were handling these investigations alone, state ethical rules governing attorneys' conduct, including those rules concerning contacts with represented persons, were simply inapplicable. However, with the increasing involvement of attorneys in investigations, the no-contact rules are being applied to situations in which they were never intended. Second, the interpretation of the no-contact rules vary significantly from state to state creating significant confusion for Department attorneys. This situation is exacerbated given the fact that many Federal prosecutors are working in U.S. Attorneys' offices in states other than the ones in which they are licensed. And third, the defense bar has shown an increasing willingness over the last several years to threaten seeking disciplinary action against Assistant U.S. Attorneys for violating state no-contact rules. We have received substantial anecdotal evidence that this fact along with the uncertain state of the law has had a significant chilling effect on the pursuit of legitimate investigative efforts by AUSAs around the country.

In the last eighteen months, proposed regulations governing this subject have been issued for notice and comment by the

Department on three separate occasions. A proposal which essentially codified the Thornburgh Memorandum (and which was developed by the previous Administration) was published for comment in November 1992 and again in July 1993. Following the July publication, the Department created a working group made up of representatives from the Deputy's Office, the Associate's Office, the AGAC and members of the ABA and National Association of Criminal Defense Lawyers to discuss the issue. The group met on five or six occasions in the fall of 1993.

2. STATUS

On March 3, 1994, the Attorney General authorized the publication of a substantially revised regulation reflecting the new Administration's commitment to the principles underlying the no-contact rules and to effective law enforcement. The thirty-day comment period expired on April 4, 1994. A final regulation reflecting minor changes from the rule published in March was submitted to the Attorney General on May 12 for her approval. The Deputy Attorney General is currently reviewing that rule. (A copy of the proposed final rule and related commentary is attached.)

Among the comments received during the March 1994 comment was an extensive letter brief submitted by the Conference of State Supreme Court Chief Justices. The Conference strongly objects to any effort by the Department to issue a regulation in this area and argues that the Attorney General lacks the authority to issue such a regulation. Although we have met with representatives of the Conference on several occasions, it is clear that they continue to strongly object to any action by the Department in this area. The ABA also submitted a lengthy document challenging the Attorney General's authority to promulgate such a regulation as well as the need for such a regulation.

3. DEPARTMENT POSITION

The Department has not yet taken a public position on the attached final rule as it has not yet been issued. However, at the time of the March 1994 publication, the Department made clear that it believes the proposal represented a balanced and reasonable approach toward accommodating the fundamental principles served by Rule 4.2 of the Model Rules of Professional Conduct without adversely affecting legitimate law enforcement efforts. Indeed, the proposal and the attached final rule reflect the current practice in an overwhelming majority of districts throughout the country and is consistent with most judicial precedents.

The Attorney General stated in March that the proposal "ensures that government prosecutors will be able to enforce federal law vigorously without the fear that they may inadvertently be putting their licenses at risk." Furthermore,

the proposal "reflects the Department's commitment to respect the role of the state courts in defining and enforcing high ethical standards."

The essential features of the attached final rule are the following:

- In pursuing criminal and civil law enforcement investigations, Department of Justice attorneys and agents may make, or cause to be made, contacts with any individuals, whether or not represented by counsel, for the purpose of developing factual information, until such individuals are arrested, charged with a crime or made parties to a civil law enforcement action.
- The rule would prohibit Department of Justice attorneys at any time from attempting to negotiate plea agreements, settlements, statutory or non-statutory immunity agreements, or other dispositions of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with an individual who is known to be represented by counsel without the consent of the attorney.
- Once a represented person is arrested or indicted, the regulations would preclude, with certain narrow exceptions, all contacts with that person without the consent of counsel.
- The principal exception is where the defendant voluntarily and knowingly initiates contact with the Department of Justice attorney, in which case the regulation requires the Department of Justice attorney to go before a district court or magistrate judge for approval or appointment of separate counsel for the defendant.
- The rule clearly provides that, with respect to employees of organizations, a claim by an attorney that he or she represents all or a large number of individual current and/or former employees does not suffice to establish that those employees are individually represented under the regulation.
- The rule provides that if an employee of a represented organization is a "controlling individual" -- that is, if he or she is known by the Department of Justice attorney to be participating as a decision maker in the determination of the organization's legal position in the underlying proceeding or investigation -- then a communication with that employee qualifies as a communication with the organization.
- The rule explicitly provides that the Office of Professional Responsibility shall have exclusive authority to investigate alleged violations of the regulation. The proposal is

intended to preempt the application of state and local laws or rules to the extent they relate to contacts by Department of Justice attorneys with represented individuals.

- In addition to the final rule, we intend to issue a new section to the U.S. Attorneys' Manual that would, among other things, limit overt contacts by Department of Justice attorneys with represented targets of a criminal or civil enforcement investigation without the consent of counsel. This is subject to certain enumerated exceptions, including prior authorization by a high-level official when exceptional circumstances exist and direct communication with a represented target is necessary for effective law enforcement.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

This is a highly controversial issue, and the ABA may make its opposition known to members of the Senate Judiciary Committee. As of this moment, however, we are not aware of any particular Member's concerns about or interest in this matter.

5. REFERENCE MATERIALS

- A. May 12, 1994 memorandum to the Attorney General transmitting, inter alia, the final rule and accompanying commentary.



Office of the Associate Attorney General

Washington, D.C. 20530

May 12, 1994

EXECUTIVE SUMMARY

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL *WCH*

FROM: John C. Dwyer *JCD*
Assistant Associate Attorney General

SUBJECT: Regulation Governing Contacts by Department of Justice Attorneys with Represented Individuals and Organizations

PURPOSE: To obtain the approval of the Attorney General to publish the attached regulation (Attachment 1) in the Federal Register as the Department's final rule on contacts by Department attorneys with represented persons, and to obtain the approval of the Attorney General for the issuance of the attached U.S. Attorney Manual provisions on the same subject (Attachment 2).

TIMETABLE: There is no external deadline for this action. However, I recommend acting as expeditiously as possible in light of the importance placed on this matter by the U.S. Attorney community.

DISCUSSION: On March 3, 1994, the Department of Justice published a proposed rule governing contacts by Department attorneys with represented persons for the third time in eighteen months. The attached regulation and U.S. Attorney Manual provisions provide a framework consistent with the Department's commitment to ensuring its attorneys adhere to the highest ethical standards and its obligation to enforce vigorously federal law.

RECOMMENDATION: That the Attorney General sign the attached regulation and the attached Manual provisions.

APPROVE _____

DISAPPROVE _____

OTHER _____

Concurring Components

OLC Tab 1

OPD _____

List of Attachments

- | | |
|--------------|--|
| Attachment 1 | Final Rule Governing Contacts by Department Attorneys with Represented Individuals, 28 C.F.R. part 77, and Accompanying Commentary |
| Attachment 2 | Red-lined Version of the Final Rule Reflecting Changes Made from the Proposal Published in March 1994 |
| Attachment 3 | U.S. Attorney Manual Provisions
USAM 9-13.200 and USAM 4-8.1300 |
| Attachment 4 | Summary of Comments Received Regarding March 1994 Proposal (March 3, 1994 - April 4, 1994) |
| Attachment 5 | Comments on March 1994 Proposal from the American Bar Association and from the Conference of Chief Justices |



Washington, D.C. 20530

May 12, 1994

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL *WCB*

FROM: John C. Dwyer *(signature)*
Assistant Associate Attorney General

SUBJECT: Regulation Governing Contacts by Department of Justice Attorneys with Represented Individuals and Organizations

PURPOSE: (1) To obtain the approval of the Attorney General to publish the attached regulation in the Federal Register as the Department's final rule on contacts by Department attorneys with represented persons. (2) To obtain the approval of the Attorney General for the issuance of the attached U.S. Attorney Manual provisions on the same subject.

SYNOPSIS: Over the last year, U.S. Attorneys have almost uniformly asserted that the most pressing issue facing their offices was the need for a uniform national rule governing when it is appropriate for Department attorneys to contact represented persons during criminal and civil law enforcement investigations and proceedings. On March 3, 1994, the Department published a proposed rule governing contacts with represented persons for notice and comment. It was the third time in eighteen months that the Department had published a proposed rule on that subject. The March 1994 proposal was considerably different from the earlier proposals and was the result of substantial discussions within the Department, with the individual U.S. Attorneys' offices as well as the Attorney General's Advisory Committee, with representatives of the American Bar Association and National Association of Criminal Defense Lawyers, with members of state and federal benches and with others. The attached regulation and Manual provisions reflect the results of that effort as well as some additional modifications made as a result of comments received following the March publication.

DISCUSSION:

The Rule

The attached regulation (Attachment 1), along with the proposed additions to the United States's Attorneys Manual (Attachment 3), reflects our efforts to devise a framework dealing with this issue that is consistent with both the Department's commitment to fostering ethical behavior consistent with the principles informing DR 7-104(A)(1) and Model Rule 4.2 and our need to set forth clear and uniform national guidelines upon which Department attorneys can rely in carrying out their federal law enforcement responsibilities. We are convinced that these rules will promote effective federal law enforcement efforts that conform to the highest standards of legal ethics.

The regulation permits federal prosecutors and agents to continue to conduct legitimate criminal and civil law enforcement investigations against all individuals, whether or not they are represented by counsel. The regulation allows Department attorneys to continue to make or direct overt or covert contacts with represented individuals or organizations up until the point at which they are arrested or charged with a crime or named as defendants in a civil law enforcement action. It prohibits contacts, with certain limited exceptions, after an arrest, indictment or the filing of a complaint on the subject matter of the representation. It also generally prohibits department attorneys from negotiating plea agreements, settlements or similar legal arrangements with individuals represented by counsel without the consent of counsel.

The Manual provisions will provide additional guidance and some further restrictions. They prohibit overt contacts by Department attorneys with represented targets of criminal or civil law enforcement investigations without the consent of counsel unless certain enumerated exceptions are met.

Changes from March 1994 Proposal

The attached regulation is nearly identical to the proposal published in March 1994. A redlined version of the regulation is attached as Attachment 2 for your review. The following are the only significant changes that were made:

(1) Section 77.2: The definition of "attorney for the government" was amended to specifically include "the Chief Counsel of the DEA and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI, and, in addition, any attorney employed in, or head of, any other legal office in a Department of justice Agency." This change was made at the request of the FBI and the DEA.

(2) Section 77.6(b): The exception to the general prohibition for contacts made pursuant to judicial or administrative process was clarified by providing that such contacts must be made "in accordance with the orders or rules of the court or other tribunal where the matter is pending."

(3) Section 77.6(d): The exception for contacts made after a represented party waives his or her right to counsel at the time of arrest was clarified by specifying that the voluntary and knowing waiver of Miranda rights at the time of arrest constitutes a waiver of any protections under this regulation. This clarification was made at the suggestion of USA Dettmer.

(4) Section 77.12: The language regarding the preemptive force and scope of the regulation was modified to correct ambiguities that existed in the March 1994 proposal. The changes were suggested initially by OLC and OPD.

The Parties

Mary Jo White has reviewed the attached regulation and, on behalf of the AGAC, recommends its promulgation. Further, she recommends that the Attorney General issue the attached Manual provisions. Because those provisions have changed little from earlier proposals, she does not think that they need to be presented to the AGAC.

Eldie Acheson and Walter Dellinger have reviewed and approved the attached regulation. Because the changes from the March 1994 proposal reflected in the attached regulation are relatively minor and do not change the substance of the rule in any significant way, the regulation was not redistributed throughout the entire Department. (The March 1994 version was thoroughly distributed throughout Main Justice and the U.S. Attorneys' offices for internal comments before it was published.)

At various times throughout the drafting process, we met with representatives of various bar organizations as well as representatives of the Conference of Chief Justices. Despite extensive consultations with these groups, there is no question that they strenuously object to the promulgation of this regulation. The Conference of Chief Justices argue, among other things, that attorney discipline is within the province of the licensing courts (i.e. state supreme courts) and, as a result, the Attorney General does not have the authority to promulgate such a rule. (See Conference of Chief Justices comment at Attachment 5.) The Office of Legal Counsel has reviewed their arguments and concluded that the Attorney General does have this authority.

The American Bar Association contends that the regulation would create a double standard by which Department attorneys are exempted from ethical rules that apply to all other attorneys. The ABA also charges that the Attorney General does not have authority to promulgate such a rule. (See ABA comment at Attachment 5.) According to Margaret Love, the Standing Committee on Ethics and Professional Responsibility is currently working on an opinion regarding the applicability of Model Rule 4.2 to law enforcement investigations and proceedings.

RECOMMENDATION: That the Attorney General sign the attached regulation (thus authorizing its publication as a final rule) and the attached Manual provisions (thus authorizing their distribution).



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 12, 1994

MEMORANDUM FOR JANET RENO
Attorney General

Re: Proposed Attorney General Order
Promulgating a Final Rule Governing
Communications With Represented Persons

ACTION MEMORANDUM

The attached proposed Attorney General Order was submitted to this Office by the Associate Attorney General for review with respect to form and legality. The order is a final rule that would govern the circumstances in which Department attorneys may communicate with represented persons, including employees of represented organizations. The Department has published versions of this rule three times for comment, and has amended the rule in response to some of these comments, although the final rule does not differ significantly from the proposal published in March 1994.

The final rule generally would permit contacts with represented persons before arrest, indictment, or the filing of a civil law enforcement complaint, and generally would prohibit such contacts thereafter. Exceptions to both principles are set forth. The commentary to the final rule states that the Department anticipates amending the United States Attorneys' Manual in order to place further restrictions on Department attorneys, by generally prohibiting ex parte communications with "targets."

The proposed order is approved with respect to form and legality.

Walter Dellinger
Assistant Attorney General
Office of Legal Counsel

DEPARTMENT OF JUSTICE

28 CFR PART 77

[AG ORDER NO.]

Communications with Represented Persons

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule governs the circumstances under which attorneys employed by the Department of Justice ("Department") may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.

The purpose of this rule is to impose a comprehensive, clear, and uniform set of regulations on the conduct of government attorneys during criminal and civil investigations and enforcement proceedings. The rule is intended to ensure that government attorneys adhere to the highest ethical standards, while eliminating the uncertainty and confusion arising from the variety of interpretations of state rules, some of which have been incorporated as local court rules in a number of federal district courts.

The rule establishes, prospectively, a general prohibition, subject to limited enumerated exceptions, against contacts with "represented parties" without the consent of counsel. This prohibition derives from the American Bar Association ("ABA") Code of Professional Responsibility and its successor, the ABA Model Rules of Professional Conduct. The rule, on the other

hand, generally permits investigative contacts with "represented persons": that is, individuals or organizations that are represented by counsel but that have not yet been named as defendants in a civil or criminal enforcement proceeding or arrested as part of a criminal proceeding. However, the rule does not permit contacts with represented persons without the consent of counsel for the purpose of negotiating plea agreements, settlements, or other similar legal arrangements.

In addition, the Department intends to issue substantial additions to the United States Attorneys' Manual ("Manual") to provide additional direction to Department attorneys when they deal with represented individuals and organizations, in order to accommodate more fully the principles and purposes underlying the state bar rules. Those provisions will further restrict government attorneys when they contact targets of criminal or civil law enforcement investigations who are known to be represented by counsel, and when they communicate with other represented persons.

EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: F. Mark Terison, Senior Attorney, Legal Counsel, Executive Office for United States Attorneys, United States Department of Justice, (202) 514-4024. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule on the subject of communications with represented persons culminates a lengthy rulemaking process in which a proposed rule on the same subject was issued three separate times for comment. See 59 FR 10086 (Mar. 3, 1994); 58 FR 39976 (July 26, 1993); and 57 FR 54737 (Nov. 20, 1992). Comments received after the publication in November 1992 and in July 1993 of earlier versions of the rule resulted in major substantive changes being made to the rule. As a result, a new proposal reflecting these changes was published on March 3, 1994. During the most recent comment period, the Department received many thoughtful comments from private attorneys, local bar organizations, state courts, federal prosecutors, and others. The Department closely scrutinized all of these comments. After considering those comments, the Department made several relatively minor amendments to the proposed rule. Therefore, the final rule remains in substantially the same form as the proposed rule issued in March 1994.

The final rule reflects the Department's commitment to fostering ethical behavior consistent with the principles informing DR 7-104(A)(1) of the ABA Code of Professional Responsibility and Rule 4.2 of the Model Rules of Professional Conduct, while setting forth clear and uniform national guidelines upon which government attorneys can rely in carrying out their responsibilities to enforce federal laws. (The term "attorney for the government" is defined in paragraph 77.2(a), and where this phrase, or a variant of it, such as "government

attorney," is used elsewhere in this commentary, it has the meaning set forth in paragraph 77.2(a), unless the context clearly indicates otherwise, and it is typically used interchangeably with "Department attorney."). In essence, this regulation permits federal prosecutors and agents to continue to conduct legitimate criminal and civil investigations against all individuals, whether or not those persons are represented by counsel. It allows government attorneys to continue to make or direct undercover or overt contacts with individuals and organizations represented by counsel for the purpose of developing factual information up until the point at which they are arrested or charged with a crime or named as defendants in a civil law enforcement action. However, the regulation generally does not permit federal prosecutors to attempt to negotiate plea agreements, settlements, or similar arrangements with individuals represented by counsel without the consent of their attorneys. This regulation also precludes, with certain narrow exceptions, any contacts with represented parties after an arrest, indictment, or the filing of a complaint on the subject matter of the representation.

Additionally, the Department plans to add provisions to the United States Attorneys' Manual that will set forth further guidance. The Department intends to prohibit overt approaches by federal attorneys to represented targets of criminal or civil enforcement proceedings without the consent of counsel, unless certain enumerated exceptions are met. The planned provisions

also will generally require that government attorneys receive approval from their supervisors before communicating with any represented party or represented target.

Since early in this century, the rules of professional conduct that govern attorneys have required that lawyers for one party in a dispute communicate only through an adverse party's lawyer, rather than directly. DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility provides:

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

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

Rule 4.2 of the ABA Model Rules states:

In representing a client, a lawyer shall not communicate 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.

Disciplinary authorities in all 50 states and in the District of Columbia have adopted one of these rules, or a similar prohibition. Underlying these rules is the recognition that when two parties in a legal proceeding are represented, it is generally unfair for an attorney to circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party.

At the same time, the courts have long recognized that government law enforcement agents must be allowed broad powers, within constitutional limits, to investigate crime and civil violations of police and regulatory laws. These powers properly include the authority to conduct undercover operations and to interview witnesses, potential suspects, targets, and even those defendants who waive their right to remain silent. Although the Fifth and Sixth Amendments significantly restrict contacts with defendants after their initial appearance before a judge or after indictment, these constraints generally do not apply before a person has been taken into custody or charged in an adversary proceeding. Sound policies support this substantial power of police to investigate. The general public, victims of crime, and even potential suspects have a strong interest in vigorous inquiry by law enforcement officers before arrest or the filing of charges.

As long as investigations were treated as within the province of the police alone, the traditional rule forbidding counsel from directly contacting represented persons did not come into conflict with legitimate law enforcement activities. In recent years, however, the Department of Justice has encouraged federal prosecutors to play a larger role in preindictment, prearrest investigations. Some of this increased involvement stems from the wider use of law enforcement techniques, such as electronic surveillance, which require the preparation of legal filings. Also, complex white collar and organized crime

investigations necessitate more intensive engagement of lawyers, who present such cases to grand juries. Most important, greater participation of lawyers at the preindictment stage of law enforcement has been regarded as helpful in assuring that police investigations comply with legal and ethical standards.

This extension of the traditional prosecutor's responsibility has been a salutary development. One by-product, however, has been uncertainty about whether the traditional professional limitation on attorney contacts with represented parties should be viewed as a restriction upon prosecutors engaged in investigations and, by extension, the agents with whom they work. The overwhelming preponderance of federal appellate courts have held that the restriction on contacts with represented persons does not apply at the preindictment investigation stage. See, e.g., United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855 (1990); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852 (1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Weiss, 599 F.2d 730, 739 (5th Cir. 1979); and United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974). Only the Second Circuit has suggested otherwise. See United States v. Hammad, 846 F.2d 854, amended, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). However, that suggestion was muted significantly in a revised opinion by the Second Circuit that "urge[d] restraint in applying

the rule to criminal investigations," 858 F.2d at 838, and ultimately concluded that "a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations" Id. at 839. By contrast, state courts and state bar organizations have varied widely in their interpretation of the scope of the prohibition on contacts embodied in DR 7-104, Model Rule 4.2, and their analogs. Some examples of the varying interpretations are detailed below.

Uncertainty about the scope and applicability of DR 7-104, Model Rule 4.2, and their state counterparts has directly affected the investigative activities of agents, including Federal Bureau of Investigation and Drug Enforcement Administration personnel, who work with prosecutors. The expansive application of these rules in some jurisdictions may have the effect of blocking preindictment interviews or undercover operations that most courts have held permissible under federal constitutional and statutory law. Additionally, the heightened threat of disciplinary action that accompanies the expansive application of these rules has created a chilling effect on prosecutors responsible for directing these legitimate investigative activities.

These problems are compounded when federal attorneys assigned to the same case are members of different state bars. Under federal law, a Department attorney must be a member in good standing of a state bar, but he or she need not belong to the bar in each state in which he or she is practicing for the

government. Therefore, prosecution teams often comprise attorneys admitted to different bars. The application of different state disciplinary rules to these individuals creates uncertainty, confusion, and the possibility of unfairness. Indeed, one member of a two-member federal prosecution team could receive a commendation for effective law enforcement while the other member, licensed in a different state, might be subject to state discipline for the same conduct.

In light of these circumstances, the Department has concluded that a compelling need exists that warrants a uniform federal rule to reconcile the traditional rule against contacts with a represented party with the obligation of the Department of Justice to enforce the law vigorously. Indeed, absent a uniform federal rule, prosecutors have been moved on occasion to reduce their participation in the investigative phase of law enforcement so as to leave federal agents unfettered by state disciplinary rules that were never intended to govern police behavior. Such a retreat from the field by prosecutors serves neither efficiency nor the interest in elevating legal compliance and ethical standards in all phases of law enforcement.

Furthermore, the disciplinary rules themselves invite promulgation of a regulation such as this one. Nearly all the states have adopted rules that include an "authorized by law" exception. This final rule, a duly promulgated regulation, is intended to constitute "law" within the meaning of those exceptions.

Finally, the Department has long maintained, and continues to maintain, that it has the authority to exempt its attorneys from the application of DR 7-104 and Model Rule 4.2 and their state counterparts. Furthermore, the Department maintains that whether, and to what extent, such prohibitions should apply to Department attorneys is a policy question. See Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. O.L.C. 576, 577 (1980). In light of the fact that all 50 states and the District of Columbia have adopted some form of a prohibition on contacts with represented parties, and in view of the long history of those rules, the Department believes that its attorneys should adhere to the principles underlying those rules to the maximum extent possible, consistent with the Department's law enforcement responsibilities. Therefore, even though the Department has the authority to exempt its attorneys from the reach of these rules, the Department has decided not to implement a wholesale exemption.

Rather, this regulation attempts to reconcile the purposes underlying DR 7-104 and Model Rule 4.2 with effective law enforcement. Recognizing the importance of the attorney-client relationship and the desirability that an individual who is represented by counsel be fully advised by counsel before negotiating legal agreements, this regulation provides that federal attorneys may not negotiate plea bargains, settlement agreements, immunity agreements, or similar arrangements without

the consent of the individual's attorney. There is a heightened risk in this context of the prosecutor's superior legal training and specialized knowledge being used to the detriment of the untutored layperson. Thus, the regulations comport with the principal purpose of DR 7-104 and Model Rule 4.2 by insisting that the individual's attorney participate in these types of negotiations. Further, even when contacts are allowed, the regulation is designed to minimize any intrusion into the attorney-client relationship. At the same time, this regulation does permit direct contacts at the preindictment, prearrest investigative stage with any individual, whether or not he or she is represented by counsel. The regulation is drafted to conform to the approach of most federal appellate courts that have considered the matter. See, e.g., United States v. Ryans, 903 F.2d 731 (10th Cir.) (discussing cases), cert. denied, 498 U.S. 855 (1990), and other cases cited previously in connection with the discussion of preindictment contacts. The Department believes that public policy and effective law enforcement would not be served if the simple act of retaining an attorney could serve to exempt a person from lawful, court-approved investigative techniques. The Department believes that it is inappropriate to alter investigative techniques based upon an individual's financial ability to retain counsel before the point at which an indigent would be afforded court-appointed counsel.

This regulation and the planned changes to the United States Attorneys' Manual also will give effect to other important

aspects of the bar rules against contacts with represented parties. For example, the regulation precludes federal attorneys from disparaging an individual's counsel or from attempting to gain access to attorney-client confidences or lawful defense strategy. The guidelines that the Department intends to add to the Manual also will make clear that once an individual is in a likely adversarial situation with the government and has retained an attorney to represent himself or herself with respect to the particular subject matter under investigation, the government attorney must take greater care before making any ex parte contacts. While the regulation authorizes most communications before arrest, the planned Manual changes provide that, as a matter of internal policy guidance, federal prosecutors generally should not make overt contacts with represented targets of investigations. However, the planned Manual provisions permit overt contacts with a represented target when initiated by the target; when necessary to prevent death or physical injury; when the relevant investigation involves ongoing or additional crimes, or different crimes from that to which the representation relates; or when a United States Attorney or an Assistant Attorney General expressly concludes, under all of the circumstances, that the contact is needed for effective law enforcement.

Finally, the regulation and planned Manual provisions also address when a government attorney may communicate with an employee, officer, or director of a represented corporation or

organization without the consent of counsel. The regulation generally prohibits a government attorney from communicating with a current, high-level employee of a represented organization who participates as a "decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter" once the organization has been named as a defendant in a criminal or civil law enforcement proceeding. Further, the contemplated Manual provisions would generally prohibit contacts without the consent of counsel with controlling individuals of organizations that have not yet been named as defendants but are targets of federal criminal or civil law enforcement investigations.

This final rule recognizes that state courts and disciplinary bodies generally play the primary role in regulating the conduct of all attorneys, including those who work for the federal government. The Department also recognizes that with respect to most matters, Department attorneys are subject to the bar rules and disciplinary proceedings of the states in which they are licensed. However, the Department believes it must be the final arbiter of the scope of policing with respect to ex parte contacts involving federal prosecutors, subject to the Constitution and the laws of the United States. As noted above, because of the expanded participation of federal prosecutors in preindictment investigations, and the trend of state courts increasingly to apply DR 7-104 and Model Rule 4.2 expansively against federal prosecutors, these rules have affected and

circumscribed the power of federal officials to carry out their legally mandated responsibilities. This regulation provides that the Attorney General shall have exclusive authority to determine these rules. Further, the Department's rules are intended fully to preempt and supersede the application of state and local court rules relating to contacts by Department of Justice attorneys when carrying out their federal law enforcement functions. Only if the Attorney General finds that a Department attorney has willfully violated these new rules would that attorney continue to be subject to the full measure of state disciplinary jurisdiction.

The Department is confident that, taken together, this regulation, the planned Manual amendments, and this supplemental information will promote the public interest in effective law enforcement in a manner that also conforms to the highest standards of legal ethics.

The procedures established by this rule apply to conduct occurring after the rule's publication.

II. Rulemaking History

On November 22, 1992, the Department of Justice published in the **Federal Register** a proposed rule regarding communications with represented persons. 57 FR 54737. By December 21, 1992, the close of the comment period, the Department had received comments from 20 sources.

The Department was concerned that not all interested parties had received sufficient opportunity to respond during the initial

comment period. Noting "the complex and important nature of the rule to the criminal and civil justice systems and the licenses and livelihoods of its attorneys," on July 26, 1993, the Department reissued the proposed rule for an additional 30-day comment period. 58 FR 39976. The Department received 219 comments following this second publication of the proposed rule.

On March 3, 1994, the Department issued a new proposed rule governing the same subject matter for an additional 30-day comment period. 59 FR 10086. In response to concerns raised by bar organizations, bar counsel, state and federal judges, and others, that proposal reflected substantial changes from the earlier proposals. This publication of the proposed rule was accompanied by the issuance of companion provisions that the Department intends to include in the United States Attorneys' Manual, which set forth certain more restrictive policies with regard to overt investigatory communications. The discussion that follows summarizes the issues that were raised in response to the Department's latest publication of the proposed rule.

III. Summary of Comments Received

During the most recent comment period, which closed on April 4, 1994, timely comments were received from 31 sources, including nine individuals, nine organizations, four state court judges, one federal court judge, five U.S. Attorney's Offices, two Department of Justice components, and one other federal agency. Of the 31 comments received, nine comments supported promulgation of the proposed rule, 20 comments opposed the rule, and two other

comments failed to take any definitive position on the proposed rule as a whole. As with previous versions of this rule, many writing in opposition to the Department's proposal argued that it unfairly permits the Department to hold its attorneys to ethical rules different from those that apply to all other attorneys. Other opponents of the proposed rule -- most notably the ABA and a special committee of the Conference of State Supreme Court Chief Justices -- challenged the proposed rule on constitutional and statutory grounds, arguing that the Department lacks authority to preempt state ethics rules or to supersede local federal district court rules. Those writing in support of the proposal generally praised it for bringing certainty and clear guidance to an area that previously has been unclear and disruptive of law enforcement functions.

The Department has considered carefully each comment and appreciates the thoughtfulness reflected in them. The Department's responses to those comments are discussed below, either in the "General Comments" section or in the context of the particular section or paragraph to which they pertain as part of the "Section-by-Section" analysis. All revisions adopted in the final rule are indicated.

IV. General Comments

Comments were received on the following three general issues: (1) the need for the rule; (2) the constitutional and statutory authority for the rule; and (3) the sufficiency of the rule's internal enforcement mechanisms. These general comments

essentially repeated comments received in response to previous versions of the proposed rule. After careful reconsideration of these recurring issues, the Department's position on many of these subjects -- in particular, the constitutional and statutory basis for this rule and the need for and advisability of such a rule -- remains the same. Therefore, the Department's response in this section builds upon responses published in previous commentaries.

A. The Need for the Rule. One state court judge, one federal judge, five individuals, and six organizations criticized the proposed rule as holding government attorneys to lower ethical standards than those that apply to all other attorneys. This comment was formulated in a variety of ways, with the following as illustrative examples: "[t]he rules apply to everyone, and it should especially apply to attorneys in Government service;" "I do not know why it is that the department somehow thinks [it] can exempt [its] attorneys from the rules of conduct that all of the lawyers must abide by;" "[Department] lawyers should be treated as subject to the same rule of law that applies to the conduct of all other lawyers;" and "[f]airness simply will not tolerate exalting the role of one adversary's advocate above the other."

In response to these comments, the Department finds it important, first, to make clear that this rule is not designed to diminish the ethical responsibilities of government attorneys; it is intended to clarify those responsibilities. The current

situation, in which state contact rules purport to govern the substantive conduct of federal law enforcement attorneys, has proven unsatisfactory because the standards of ethical conduct are uncertain and subject to unpredictable and varying interpretations. This uncertainty as to what constitutes appropriate conduct by Department attorneys has interfered with the responsible exercise of the law enforcement duties of Department attorneys. The basic purpose of this regulation is to provide a uniform rule of ethics regarding contacts with represented persons that can be consistently and predictably applied. By doing so, the regulation will allow all Department attorneys involved in a federal law enforcement proceeding to understand and abide by applicable standards. There is simply no basis for believing that there will be a reduction in compliance with ethical standards by federal prosecutors.

Many commenters opposing the proposed rule dismissed as unnecessary the creation of a uniform set of rules for Department attorneys. Some commented that the ex parte contact rules currently in place do not vary significantly, given that virtually every jurisdiction has adopted some version of the ABA's anti-contact rule. Other commenters argued that, in any event, state and local ethics rules do not interfere substantially with federal law enforcement activities because only in rare instances have federal prosecutors actually been investigated by a state disciplinary authority.

Although an anti-contact rule is in effect in nearly all jurisdictions, it is not interpreted uniformly. Among other things, jurisdictions differ as to whether the anti-contact rule applies in the investigatory stage, compare United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855 (1990) with United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990); whether the rule applies to prosecutors, compare Matter of Doe, 801 F. Supp. 478 (D.N.M. 1992) with District of Columbia Rules of Professional Conduct Rule 4.2 cmt. ¶ 8; whether the rule applies to former employees of a represented corporate party, compare Public Serv. Elec. & Gas v. Associated Elec. & Gas, 745 F. Supp. 1037, 1042 (D.N.J. 1990) with Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 628 (S.D.N.Y. 1990); and whether the rule applies to all corporate employees who could make admissions on behalf of the corporation or only to employees who belong to a so-called "control group." Compare Model Rules of Professional Conduct Rule 4.2 cmt. (1983) with Wright by. Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1984). The lack of uniformity in interpreting existing anti-contact rules has created concern among government attorneys of inadvertently running afoul of state court or federal district court rules. The threat of disciplinary proceedings (and the possible resulting loss of license and livelihood) against a government attorney engaged in legitimate law enforcement activities has had a chilling effect on the responsible exercise of law enforcement duties. Many

federal prosecutors who submitted comments in connection with the earlier versions of this rule stated that they feel compelled to refrain from authorizing or participating in legitimate and ethical law enforcement activities because of the current uncertainty as to the acceptability of various ex parte contacts.

To add to the confusion inherent in the current situation, the Department's attorney staff consists of members of many different state bars who commonly appear in multiple jurisdictions. Under the Model Rule's approach, an attorney practicing in a jurisdiction in which he or she is not a member of the bar remains subject to the jurisdiction of the bar of which he or she is a member, but if the rules in the two places differ, principles of conflict of laws may apply. Model Rules of Professional Conduct Rule 8.5 and cmt. (1983). As a result, when state anti-contact rules purport to govern the conduct of federal attorneys, the question of which rule governs the conduct of Department lawyers may often be complicated. Indeed, as was noted in the "Background" section of this commentary, government attorneys may be subject to substantially different rules when they are working alongside one another on the same case. One commenter proposed that instead of issuing a uniform contacts rule for Department attorneys, the Department should encourage its attorneys to practice only in a given jurisdiction and to obtain bar membership in that jurisdiction. However, Congress has made clear that Department attorneys should be able to practice in different jurisdictions so long as they are a member

of some state bar, and there is a significant federal interest in preserving the Department's ability to assign its attorneys wherever there are law enforcement needs to be met. This uniform rule regarding contacts with represented persons achieves consistency and high ethical standards without hampering federal law enforcement activity.

In formulating this uniform rule, the Department has not disregarded existing state ethics rules, as a number of comments imply. As set forth in section 77.12, this regulation is specifically intended to fit within the structure of DR 7-104 and Model Rule 4.2, as well as analogous state and local district court disciplinary rules. Both DR 7-104 and Model Rule 4.2 provide that communications that are "authorized by law" are exempted from the general prohibition of the rule and, according to the Reporter for the commission that developed the Model Rules, Yale Law School ethics professor Geoffrey Hazard, this exception was drafted with the "government lawyer" problem in mind. See Letter of January 19, 1994 from Professor Geoffrey C. Hazard, Jr. to Chief Justice E. Norman Veasey, at 2 ("I can state from first-hand knowledge that this [authorized by law] qualification was drafted mindful of the government lawyer problem, among others. In my opinion it is within the authority of the federal government, particularly the Justice Department, to promulgate such regulations.") (This letter and all comments are on file with the Office of the Associate Attorney General, United States Department of Justice). As explained later in this

commentary, the Department's position is that communications with represented persons undertaken pursuant to this duly promulgated regulation clearly constitute communications "authorized by law." Therefore, in nearly all jurisdictions, communications approved under the Department's rules will be appropriate under existing ethical rules as well.

Furthermore, the content of this rule derives largely from DR 7-104 and Model Rule 4.2 and is wholly consistent with the principles underlying these rules. This regulation grants greater latitude for lawyer communications with a represented "person" during the investigative phase of law enforcement than with a represented "party" after adversarial proceedings have commenced. This distinction appears in the texts of DR 7-104 and Model Rule 4.2, which prohibit only communications with "a party" the lawyer knows to be represented by another lawyer in the matter. This distinction also accords with the great weight of federal court interpretations of the state ethics rules. See Ryans, 903 F.2d at 739 ("We are not convinced that the language of [the anti-contact rule] calls for its application to the investigative phase of law enforcement" because "the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting"); United States v. Sutton, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986) (anti-contact rule "was never meant to apply to [pre-indictment, non-custodial] situations such as this one"); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983) (agent's "noncustodial interview of

[suspect] prior to the initiation of judicial proceedings against the appellant did not constitute an ethical breach"); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) (anti-contact rule does not prohibit prosecutors from using undercover informants to communicate with represented persons prior to indictment), cert. denied, 464 U.S. 852 (1983); United States v. Jamil, 707 F.2d 638 (2d Cir. 1983) (prosecutor's use of undercover informant in pre-indictment, non-custodial setting to communicate with represented person does not violate DR 7-104); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982) (anti-contact rule was not intended to prohibit use of undercover informants prior to indictment); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.) ("the government's use of such investigative techniques at this stage of a criminal matter does not implicate the sorts of ethical problems addressed by the Code"), cert. denied, 452 U.S. 920 (1981); United States v. Weiss, 599 F.2d 730, 739-40 (5th Cir. 1979) (prosecutor's investigatory communications upheld against challenge under anti-contact rule); United States v. Lemonakis, 485 F.2d 941, 953-56 (D.C. Cir. 1973) (anti-contact rule does not apply prior to indictment, and use of undercover informant did not violate rule in any event), cert. denied, 415 U.S. 989 (1974); In re U.S. Dept. of Justice Antitrust Investigation, 1992-2 Trade Cases (CCH) ¶ 69,933, at 68,469 (D. Minn. 1992) (Minnesota's Rule 4.2 held inapplicable because "[t]he word 'parties' in Rule 4.2 indicates the presence of a lawsuit" and "[t]he present

controversy relates to an investigation, not a lawsuit"); United States v. Infelise, 773 F. Supp. 93, 95 n.3 (N.D. Ill. 1991) (DR 7-104(A)(1) "speaks in terms of communications with a 'party', suggesting that the rule is to be applied only when adversarial proceedings have been initiated"); United States v. Western Electric Co., 1990-2 Trade Cases (CCH) ¶ 69,148, at 64,314 & n.6 (D.D.C. 1990); United States v. Buda, 718 F. Supp. 1094, 1096 (W.D.N.Y. 1989); United States v. Chestman, 704 F. Supp. 451, 454 (S.D.N.Y. 1989), rev'd on other grounds, 903 F.2d 75 (2d Cir. 1990), aff'd in part, 947 F.2d 551 (2d Cir. 1991) (en banc); United States v. Galanis, 685 F. Supp. 901, 903-04 (S.D.N.Y. 1988); United States v. Guerrerio, 675 F. Supp. 1430, 1438 (S.D.N.Y. 1987). But see United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (pre-indictment communications may be improper if accompanied by "misconduct" on the part of the government), cert. denied, 498 U.S. 871 (1990); United States v. Pinto, 850 F.2d 927, 935 (2d Cir.), cert. denied, 488 U.S. 867 (1988); United States v. Sam Goody, Inc., 518 F. Supp. 1223, 1224-25 n.3 (E.D.N.Y. 1981), appeal dismissed, 675 F.2d 17 (2d Cir. 1982); see also Comment to ABA Model Rule 4.2 (notwithstanding use of the term "party," the rule does not require that a person be "a party to a formal legal proceeding").

The courts have readily recognized that Department attorneys engaged in criminal and civil law enforcement matters perform distinctly different functions from attorneys engaged in the private practice of law. The courts have further recognized that

the rules governing communications with represented persons should take account of these differences. To disregard these differences would therefore impose substantial and deleterious restrictions on the legitimate law enforcement duties of Department attorneys that do not presently exist.

For much the same reasons, the Department believes that there is a basis for distinguishing for purposes of this regulation between Department attorneys engaged in law enforcement activities (who are covered by this regulation) and Department attorneys engaged in civil suits in which the United States is not acting under its police or regulatory powers (who are not covered). One commenter proposed extending these rules to cover also the latter activities of Department attorneys; however, because government attorneys engaged in other, ordinary civil litigation are not engaged in distinctly different functions from private attorneys involved in civil cases, the Department sees no reason to bring them under this regulation.

Two organizations further criticized the Department for holding government attorneys to ethical standards no higher than what the Constitution provides. The Department agrees that the constitutional baseline does not provide the proper measure of government attorneys' ethical obligations. But this regulation does not purport to equate the two standards. On the contrary, the Department's final rule imposes a range of restrictions that go beyond those that are constitutionally compelled. For example, the regulation prohibits government attorneys generally

from engaging in negotiations of certain specified legal agreements with any represented individual without the consent of that individual's counsel, even if that individual is not in custody and not formally charged. Such communications are not constitutionally proscribed. See Brewer v. Williams, 430 U.S. 387, 398 (1979); Miranda v. Arizona, 384 U.S. 436 (1966). Additionally, the Department plans to issue United States Attorneys' Manual provisions that will place significant limits on the ability of government attorneys to engage in noncustodial communications with a represented "target" of a federal criminal or civil law enforcement investigation, even though narrowing an investigation to focus on a particular suspect does not trigger the suspect's right to counsel. See Hoffa v. United States, 385 U.S. 293 (1966). Therefore, in constructing these standards to guide the ethical conduct of its attorneys, the Department has imposed ethical restrictions on Department attorneys that extend significantly beyond what the Constitution requires.

B. The Constitutional and Statutory Authority for the Rule. 1. The Department's Authority to Promulgate the Rule. A number of commenters argued that the Attorney General lacks delegated authority to promulgate this regulation. Comments stressed that "[n]o act of Congress purports to authorize the Department to adopt regulations to override state ethics rules governing lawyers," and that the proposed regulation in fact is "contrary to . . . the explicit mandate of Congress" that every

Department attorney must get a license from a State and maintain that license.

Rules governing the conduct of Department attorneys, or any other officials of the Executive Branch, may be promulgated only pursuant to constitutional or statutory authority. Congress's delegation of authority need not be specific or explicit.

Chrysler Corp. v. Brown, 441 U.S. 281, 307-08 (1979). The Department believes that it possesses appropriate statutory authority to promulgate this regulation pursuant to two distinct sources: 5 U.S.C. 301 ("commonly referred to as the 'housekeeping statute,'" Chrysler Corp., 441 U.S. at 309 (citation omitted)), and title 28 of the United States Code, which in a variety of provisions authorizes the Attorney General and the Department to enforce federal law and to regulate the conduct of Department attorneys.

Section 301 of title 5, United States Code, authorizes the Attorney General to "prescribe regulations for the government of [her] department," "the conduct of its employees," and "the distribution and performance of its business." 5 U.S.C. 301. The Supreme Court has held that this provision authorizes the Attorney General to issue regulations with extra-departmental effect. See, e.g., Georgia v. United States, 411 U.S. 526, 536 (1973) (holding that section 301 provided the Attorney General with "ample legislative authority" to issue regulations that established procedural and substantive standards binding on state and local governments); United States ex rel. Touhy v. Ragen, 340

U.S. 462 (1951) (federal government attorney could not be held in contempt for following an Attorney General regulation promulgated pursuant to a predecessor to section 301).

Title 28 of the United States Code grants the Attorney General and the Department a variety of law enforcement powers including the power (through intermediary officials) to conduct grand jury proceedings or any other kind of civil or criminal legal proceeding; to conduct litigation, and to "secur[e] evidence" therefor; to detect and prosecute crimes; and to prosecute "civil actions, suits, and proceedings in which the United States is concerned." 28 U.S.C. 515(a), 516, 533, 547; see 28 U.S.C. 509, 510. The Attorney General is also authorized to "supervise all litigation" to which the United States is a party and to direct United States Attorneys and other subordinate attorneys in the "discharge of their respective duties." 28 U.S.C. 519. These provisions grant the Attorney General extremely broad authority to supervise the enforcement of federal law.

In order for a Department regulation to have the force and effect of law, it must rest on a reasonable construction of the statutes delegating the authority to promulgate it and must not in substance contradict any act of Congress. See, e.g., NLRB v. United Food and Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699-700 (1989). These rules represent the reasoned judgment of the Attorney General and of the Department about the lawful

authority of federal lawyers effectively to investigate and prosecute crimes.

One individual and a number of organizations, including the Conference of Chief Justices, posited that the Department is acting outside the scope of its congressionally delegated authority because this regulation assertedly contravenes the Department of Justice Appropriation Authorization Act of 1979, which requires all Department attorneys to be "duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia." Pub. Law No. 96-132, § 3(a), 93 Stat. 1040, 1044 (Nov. 30, 1979), as carried forward by Pub. Law No. 103-121, 107 Stat. 1153, 1163 (Oct. 27, 1993) (reenacting provisions of Pub. Law No. 96-132). These commenters suggested that when Congress required Department attorneys to be licensed by a state bar, Congress implied that Department attorneys should be subject to all the rules and regulations of state authorities, regardless of their impact on officials carrying out federal law enforcement. Therefore, this regulation, by shielding Department attorneys from state disciplinary proceedings for violations of state rules interfering with effective federal law enforcement, is alleged to violate Congress's clear intent in enacting the Department's appropriation statute.

The Department believes that these comments mistake the purpose and effect of the congressional requirement that federal attorneys have state licenses. That requirement, which is

satisfied by admission to the state's bar and maintenance of bar membership, simply serves to ensure that the professional qualifications of all Department lawyers have in fact been examined. No comment received by the Department demonstrates that Congress intended the requirement to have the further effect of interfering with the Attorney General's ability to ensure effective federal law enforcement or of compelling federal attorneys to comply with state bar ethical standards that contradict federal rules.

2. The Department's Power to Preempt State Ethics Rules.

One individual, one state court judge, and five organizations, including the Special Committee of the Conference of Chief Justices, commented that the Department does not have the constitutional power to preempt state regulation of its attorneys.

It should first be noted that in most instances the force and effect of these rules should not depend on whether they preempt state ethics rules under the Supremacy Clause. As already noted, communications within the scope of the regulation are intended to constitute communications that are "authorized by law" within the meaning of DR 7-104, Model Rule 4.2, and analogous disciplinary rules. Therefore, if the relevant state rule contains an authorized-by-law exception, this regulation should be seen as constituting such authorization, thereby bringing any attorney communication permissible under these rules

in conformity with that state law and eliminating the Supremacy Clause issue.

The Committee of Chief Justices commented that it is the exclusive province of the state supreme courts to construe state disciplinary rules and to determine whether this regulation falls within the "authorized by law" exception to these rules. The Department has simply expressed its intention to fit communications made pursuant to these rules within the "authorized by law" exception to state and local federal court rules, and its belief that this regulation indeed constitutes legal authorization for such communications. The Department notes that it would seem to require a very strained reading to conclude that a regulation duly promulgated after notice and comment and within the scope of its delegated authority does not also constitute "law." Cf. Chrysler Corp., 441 U.S. at 295-96 (1979) ("It has been established in a variety of contexts that properly promulgated substantive agency regulations have the 'force and effect of law.' . . . It would therefore take a clear showing of contrary legislative intent before the phrase 'authorized by law' in [18 U.S.C.] § 1905 could be held to have a narrower ambit than the traditional understanding." (citation omitted)).

However, the Department recognizes that situations may arise in which the power of this regulation to displace state rules will depend on its preemptive force under the Supremacy Clause. Such situations may arise in several forms: where the applicable

ethics rule has no "authorized by law" exception; where this regulation is deemed not to constitute "law" for purposes of such exception; or where a communication is held to violate the applicable ethics rule and not be "authorized" by this regulation. Therefore, an important feature of this regulation is its express intention to preempt and supersede the operation of state and local federal court rules as they relate to contacts by Department attorneys, regardless of whether such rules are inconsistent or consistent with this regulation, absent a finding of a willful violation of these rules by the Attorney General.

The preemption of state regulation of contacts with represented persons, except when the Attorney General has found a willful violation of the federal regulation, was an integral feature of this rule as proposed earlier. The proposed rule reflected the Department's belief that preemption of state and local rules, which have been unevenly applied, is necessary to ensure that government attorneys' conduct respecting ex parte contacts is subject to uniform and predictable standards. The Department has made minor revisions to section 77.12 to clarify that the Department's intent is to displace even purportedly consistent state regulation in this area (or, as it is commonly phrased, to "occupy the field" of reviewing ex parte contacts by Department attorneys). The rules and this commentary now state in more express terms the Department's intention to preclude any state regulation of government attorneys respecting the subject

matter of these rules, unless the Attorney General first finds a willful violation of these rules.

Several comments suggested that the Attorney General lacks the authority to preempt state disciplinary rules, absent an explicit Congressional authorization to do so. These comments misconceive the power of a federal agency or department to preempt state regulation. Congress may, of course, expressly preempt all state regulation in a particular field, see Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 247, 255 (1947); accord Jones v. Rath Packing Co., 430 U.S. 519, 536-37 (1977), and, in proper circumstances, a federal agency similarly "may determine that its authority is exclusive and preempts any state efforts to regulate in the forbidden area." City of New York v. FCC, 486 U.S. 57, 64 (1988). See generally Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153-54 (1982) ("[f]ederal regulations have no less pre-emptive effect than federal statutes" under the Supremacy Clause); Hillsborough County, Fla. v. Automated Med. Labs, 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."). A federal agency may preempt state regulation whenever the agency, in doing so, is acting within the proper scope of its congressionally delegated authority. Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986). Accord City of New York, 486 U.S. at 64 ("if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the

agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned' " (citation omitted)). Thus, contrary to the commenters' suggestion, "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law" Fidelity Federal Sav. & Loan Ass'n, 458 U.S. at 154.

In promulgating this regulation, the Department is acting within the scope of its discretionary authority. The ample consideration given to this regulation and its earlier versions reflects the Department's effort reasonably to accommodate the relevant policies concerning law enforcement and professional conduct, and, as discussed in the previous section, there is no basis for concluding that the Department has exceeded its statutory authority. Moreover, the purpose of these rules, as defined in section 77.1, is to "ensure the Department's ability to enforce federal law effectively and ethically" and so fulfill the Department's statutory responsibilities. See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700 (1984) (authority to regulate extends to all regulatory actions necessary to ensure the achievement of statutory responsibilities).

The "presumption against finding preemption of state law in areas traditionally regulated by the States," California v. ARC America Corp., 490 U.S. 93, 101 (1989), and the traditional state regulation of legal practice and lawyers' ethics, Leis v. Flynt, 439 U.S. 438, 442 (1979), does not foreclose the Attorney General

from concluding that it is appropriate here to displace those state rules that regulate the conduct of federal officials in the performance of their law enforcement duties. Here, the presumption against preemption is overcome by this regulation's express preemption provision, which is fully effective even in matters traditionally occupied by the states.

Furthermore, under the intergovernmental immunity doctrine, states may not directly regulate or punish federal officials for acts undertaken in their official capacities, or otherwise substantially interfere with the lawful functions of federal officials. See, e.g., Hancock v. Train, 426 U.S. 167, 178-79 (1976); M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 437 (1819); Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. O.L.C. 576, 601-02 (1980). "An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any further than such laws have been adopted and sanctioned by the legislative authority of the United States." Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 63 (1825). Contacts covered by this regulation fall within the scope of federal attorneys' duties to carry out the law enforcement activities of the United States. The application to those attorneys of state ethics laws prohibiting such conduct therefore would constitute interference with the activities of the federal government forbidden by the intergovernmental immunity doctrine.

For the foregoing and other reasons, the Department believes

that this regulation effectively preempts state ethical rules regarding contacts with represented persons.

3. The Department's Authority to Supersede Federal District Court Rules. Most federal district courts have adopted as local federal district court rules one of the two sets of ABA rules or a similar anti-contact rule of the state in which the district court sits. See Rand v. Monsanto Co., 926 F.2d 596, 601-603 (7th Cir. 1991). Such adoption gives the state rules the force of federal law. See United States v. Hvass, 355 U.S. 570, 575 (1958). One individual and two organizations commented that this regulation, if promulgated, would abrogate the primary authority of federal courts to regulate the conduct of attorneys arising out of federal law enforcement proceedings.

The Department views this concern as significant but essentially theoretical, because the regulation has been crafted so that it will not operate in a way that puts it into conflict with local district court rules. However, in response to these comments, it should be noted that through this regulation, the Department does intend not only to preempt the application by state courts of state rules relating to contacts by attorneys for the government, but also to supersede the application by federal courts of the local federal district court rules relating to contacts by government attorneys. See § 77.12 and accompanying commentary.

There are two reasons why the promulgation and operation of this regulation is unlikely to present the issue of abrogation of

federal court authority identified by these commenters. The first is that the regulation adopts the line of analysis adopted by the great weight of authority interpreting local district court rules governing contacts with represented persons. See United States v. Ryans, 903 F.2d 731, 739 (10th Cir.) (discussing cases), cert. denied, 498 U.S. 855 (1990). The Department has not sought in this regulation to validate conduct that would otherwise be invalid under most local district court rules.

The second reason why this regulation is unlikely to provoke the clash in federal authority on which the comments are premised is that nearly all district courts that have adopted local rules governing contacts with represented persons have incorporated the "authorized by law" exception in the Model Rules or in the corresponding state rule. See generally Rand, 926 F.2d at 601-603. As explained above, this regulation constitutes "law" within the meaning of any such exception. Thus, the conduct this regulation authorizes is for that reason equally authorized by these local district court rules.

Thus, this regulation in practice should not present any tension between the federal executive and judicial powers. In response to the commenters' suggestion that any tension would have to be resolved in favor of the judicial power, however, the Department disagrees. Were the issue to arise, it would be properly considered, as an initial matter, as a question of the proper exercise of delegated legislative authority. Congress, not the courts, has the primary power to prescribe rules for the

federal courts. See Palermo v. United States, 360 U.S. 343, 353 n. 11 (1959); Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941). See generally Hanna v. Plumer, 380 U.S. 460, 472-73 (1965). In the case of this regulation, Congress has delegated that authority by statute to the Attorney General. This regulation therefore has no less legal force than, for example, the Federal Rules, which derive their ultimate authority from legislation. See 28 U.S.C. §§ 2071 et seq. Local district court rules, even those dealing with attorney discipline, may not displace legislatively-authorized national rules of procedure. Rand, 926 F.2d at 600 (Rules of Civil Procedure). Accord, Baylson v. Disciplinary Bd. of Supreme Court of Pa., 975 F.2d 102, 107 (3d Cir. 1992) (Rules of Criminal Procedure). A local rule inconsistent with a regulation lawfully issued under statutory authority is, as a matter of law, inconsistent with the underlying statute, and must yield to Congress's paramount authority as delegated to the department or agency issuing the regulation. Thus, the conclusion that the Attorney General has the statutory authority to promulgate the proposed regulation entails the further conclusion that the regulation displaces inconsistent local federal court rules.

Furthermore, the regulation has been carefully drawn in such a way so that once a person has been brought before a court, in general no substantive communication can occur without the consent of counsel unless: the court finds a knowing, intelligent, and voluntary waiver; the communication is made

pursuant to court-approved discovery procedures; or the communication concerns a criminal or civil offense different from the offense before the court. The regulation thus accords substantial and appropriate deference to the court's supervisory authority over the parties and proceedings before it. Moreover, this regulation does not purport to disturb the authority of federal courts to fashion appropriate remedies when an ex parte contact violates the Constitution. See § 77.11(b) and accompanying commentary. Therefore, federal courts will retain significant powers under the Constitution to respond to or sanction improper ex parte contacts by government attorneys with represented parties.

The balance of the regulation regulates contacts with persons who are not before the court, and as to whom the supervisory authority of a federal court is, at best, attenuated. See, e.g., United States v. Payner, 447 U.S. 727, 735 n. 7 (1980) ("The supervisory power merely permits federal courts to supervise the administration of criminal justice among the parties before the bar."); United States v. Williams, 112 S. Ct. 1735, 1742 (1992) (federal court has no "supervisory" judicial authority to prescribe standards of prosecutorial conduct before the grand jury in the first instance). It would raise significant separation of powers concerns for a district court to assert supervisory authority to regulate and sanction the conduct of executive branch attorneys when the Attorney General has adjudged such conduct legitimate and necessary for law

enforcement purposes, when that judgment has been embodied in a duly promulgated regulation, and when the conduct concerns persons who have not yet come before the court.

C. Sufficiency of Internal Enforcement Mechanisms. Four organizations and two individuals commented that these rules, as proposed, lacked enforcement mechanisms sufficient to deter prohibited communications. These comments took two forms: (1) a general suggestion that the Department could not be trusted to police itself (or as, one commenter put it, it would be a case of "the fox maintain[ing] . . . guard over the hen-house"); and (2) a specific concern that the restrictions to be placed in the United States Attorneys' Manual would not in fact be enforced against Department attorneys who violated them.

The Attorney General has exclusive authority over any violations of these rules. As a general matter, violations of these rules will be addressed as matters of attorney discipline by the Department, rather than by any external disciplinary authority. Only if the Attorney General finds a willful violation of these rules may sanctions for the violations be imposed by a state disciplinary authority. This disciplinary structure reflects the Department's belief that allowing sanctions to be issued independent of the Department's internal review process would frustrate the Department's efforts to eliminate the current uncertainty arising from the differing interpretations of the various anti-contact rules by federal courts, state courts, and state disciplinary authorities. The

Department intends fully to enforce these rules and to issue appropriate and strong sanctions for any violation of these rules.

The Department also disagrees with those comments that suggest that the provisions the Department currently intends to add to the United States Attorneys' Manual will not be enforced. The Manual contains a great number of significant Department of Justice policies, many of which impose substantial restrictions on Department attorneys. There is no evidence that such policies are routinely overlooked by Department attorneys or that violations of policies set forth in the Manual are not regarded by the Department as serious breaches of professional duties. On the contrary, the failure to follow such policies is taken very seriously. The Department expects its attorneys involved in criminal or civil law enforcement to follow all provisions in the Manual amendments that it intends to issue regarding ex parte contacts. Failure to follow such rules will result in appropriate discipline by the Department.

V. Section-by-Section Analysis

Section 77.1: Purpose and authority.

Comments relating to this section are addressed in the "General Comments" section above. No changes have been made to this section.

Section 77.2: Definitions.

The following terms are defined in section 77.2 of this part. In the final rule, unlike in the proposed rule, these terms are arranged alphabetically for the reader's ease.

a. "Attorney for the government." The term "attorney for the government" includes virtually all Department of Justice attorneys with investigative, litigative, or management responsibilities, regardless of title. It does not, however, include law enforcement agents employed by the Department of Justice who are also members of state bars, if they are employed as, and are performing the function of, agents rather than attorneys. The Federal Bureau of Investigation, Drug Enforcement Agency and other investigative agencies have long recruited individuals with advanced degrees -- including, for example, engineering, business, and law degrees -- to serve as agents. The Department strongly encourages the recruitment of educated and specially-trained individuals for positions as agents. An agent's bar membership should not adversely affect his or her ability to conduct comprehensive investigations and otherwise to fulfill his or her law enforcement functions. Therefore, the rule specifically exempts attorney-agents from its scope if they are employed by the government as investigative agents and not as attorneys.

The term also does not include attorneys for departments or agencies outside the Department of Justice, regardless of their litigative authority, except to the extent such persons have been specially appointed pursuant to 28 U.S.C. 515 or 543.

Two Department of Justice components commented that the definition of "attorney for the government," which explicitly covers attorneys employed in the six main divisions of the Department, should be amended to cover all attorneys working in the legal offices of the various Department agencies, such as the Drug Enforcement Administration and the Federal Bureau of Investigation. The Department agrees that the definition of "attorney for the government" should not distinguish between attorneys employed in the Department's divisions and attorneys employed in the Department's agencies, given that both sets of attorneys exercise similar functions and responsibilities with respect to criminal investigations and prosecutions. Accordingly, the definition of "attorney for the government" has been modified to include explicitly "the Chief Counsel of the DEA and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI, and, in addition, any attorney employed in, or head of, any other legal office in a Department of Justice agency."

b. "Civil Law Enforcement Investigation." This term includes any investigation of potential civil violations of, or claims under, federal law that may form the basis of a civil law enforcement proceeding, as defined in paragraph 77.2(c).

c. "Civil Law Enforcement Proceeding." The term "civil law enforcement proceeding" encompasses a variety of activities

beyond the particular areas identified in the definition, which are intended only to be illustrative.

The exclusion of proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand (CID) is intended to ensure that the filing of such a proceeding does not trigger the limitations of section 77.5, which generally prohibits ex parte communications once adversary proceedings have commenced against a represented "party." Thus, the filing by the United States of a proceeding to enforce a subpoena, summons, or CID will not prohibit further investigatory communications regarding the underlying substantive violations.

The final sentence of paragraph 77.2(c)(2) ensures that the United States need not be the plaintiff in order for a civil action to be "brought by the United States," but may be a counterclaimant or cross-claimant if the counterclaim or cross-claim otherwise fits within the description of civil law enforcement.

d. "Cooperating witness or individual." A "cooperating witness or individual" is defined to include informants, witnesses, and other persons who are not law enforcement agents, but only to the extent that such a person is acting "to assist the government in an undercover or confidential capacity."

e. "Employee." The term "employee" is not limited to its literal meaning, but also includes officers, directors, partners, members, and trustees. See § 77.10 (communications involving

organizations). An independent contractor would not be considered an "employee" for purposes of these rules.

f. "Organization." The term "organization" includes any corporation, partnership, association, joint-stock company, union, trust, pension fund, unincorporated organization, state or local government or political subdivision thereof, or non-profit organization. It does not, of course, include groups of individuals "associated in fact" within the meaning of the racketeering statutes. See 18 U.S.C. 1961(4).

Communications with organizations and their employees are governed generally by section 77.10.

g. "Person." The term "person" includes individuals and organizations as defined in paragraph 77.2(f).

h. "Undercover investigation." Under this definition, the hallmark of an "undercover operation" is an investigation in which an individual "whose identity as an official of the government or a person acting at the behest thereof is concealed or is intended to be concealed." This definition is intended to be read broadly to include every type of law enforcement investigation in which the identity of a government employee, or the fact that an individual is cooperating with the government, is concealed.

Section 77.3: Represented party; represented person.

This section differentiates between a represented "party" and a represented "person." This distinction is fully consistent with the language of and principles underlying DR 7-104(a)(1) and

Model Rule 4.2, which establish general prohibitions against ex parte contacts with a represented "party." Section 77.5 of this part generally prohibits government attorneys from initiating ex parte contacts with represented parties, but does not prohibit ex parte contacts with represented persons. (However, sections 77.8 and 77.9 also prohibit certain contacts with represented persons).

An individual is considered to be a "represented party" under paragraph 77.3(a) if: (1) the person is represented by counsel; (2) the representation is current and concerns the subject matter in question; and (3) the person has either been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation. If the person is currently represented in fact regarding the subject matter in question, but has not been charged or arrested, that person is considered a "represented person." Thus, witnesses, suspects, and targets of investigations who have not been indicted or arrested, but are represented regarding the subject matter in question, are considered represented persons under this rule.

Several commenters argued that this section's basic distinction between represented "persons" and represented "parties" runs counter to the policy considerations underlying DR 7-104(A)(1) and Model Rule 4.2. However, as discussed in the "General Comments" section, this distinction is consistent with the vast majority of federal court opinions interpreting DR 7-

104(A)(1) and Model Rule 4.2., as well as the text of those rules. Furthermore, this distinction is grounded in logic and common sense, given the legitimate necessity for attorneys for the government to be able to direct agents and cooperating witnesses to contact represented persons during undercover investigations.

One organization commented that prosecutors will hold back on filing formal charges in order to maximize their ability to communicate with represented "persons." The Department does not agree that prosecutors are likely to engage in this kind of systematic manipulation. The capacity to do so exists under the Sixth Amendment (given that the Sixth Amendment right to counsel attaches only once formal charges are filed, see Brewer v. Williams, 430 U.S. 387, 398 (1979)), but there is no evidence of systematic prosecutorial abuse of the charging process under the Sixth Amendment. Furthermore, the Department intends to add a new provision to the United States Attorneys' Manual that will forbid a Department attorney from communicating overtly with a "target" of an investigation before he or she is formally charged or named as a civil defendant, except in specifically enumerated circumstances.

Section 77.4: Constitutional and other limitations.

This section makes clear that this regulation does not purport to authorize any communication prohibited by the Constitution or any federal statute or Federal Rule of Criminal or Civil Procedure. Although these rules do not supersede the

Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, this limitation does not extend to other rules regarding procedure in federal courts. Thus, rules of procedure adopted by individual courts as local rules, many of which incorporate state bar rules, are not included in this limitation; and, in fact, this regulation is explicitly intended to supersede local federal court rules regarding ex parte contacts by attorneys for the government. See § 77.12 and accompanying commentary.

No specific comments were received regarding this section, and it has not been changed.

Section 77.5: General rule for civil and criminal enforcement; represented parties.

This section closely tracks the language of DR 7-104(A)(1) and Model Rule 4.2 and applies similar prohibitions to attorneys for the government. The section prohibits an attorney for the government from communicating with a represented party, as defined in section 77.3, about the subject matter of the representation without the consent of that individual's attorney. As with DR 7-104(A)(1) and Model Rule 4.2, the prohibition applies only if the attorney for the government knows that the represented party is, in fact, represented by counsel. Therefore, communications by an attorney for the government with a represented party will not violate this rule if the attorney for the government is unaware of the fact of representation.

This section also prohibits an attorney for the government from causing another individual to communicate with a represented party. Accordingly, this rule proscribes an attorney from directing a government investigator to do what the attorney himself or herself is prohibited from doing. Conversely, a government attorney will not be personally responsible for the actions of agents in communicating with represented persons unless, in doing so, the agents were acting as the attorney's "alter ego." See United States v. Heinz, 983 F.2d 609, 612-14 (5th Cir. 1993).

It also should be noted that this provision is violated (and thus, a basis for departmental discipline exists) when an inappropriate communication takes place, regardless of whether or not the communication results in eliciting an inculpatory statement or is otherwise prejudicial to the represented party.

No specific comments were received regarding this section, and it has not been changed.

Section 77.6: Exceptions; represented parties.

This section describes the circumstances under which Department attorneys may communicate, or cause others to communicate, with a represented party whom the Department attorney knows is represented concerning the subject matter of the representation, without first obtaining the consent of the represented party's counsel.

Paragraph (a): Determination if representation exists.

This exception recognizes the fact that there is no reason to prohibit a limited inquiry about whether an individual is, in fact, represented by counsel regarding the relevant subject matter. Such an inquiry does not involve the kind of communication about which courts have expressed concern and has little potential for undermining the attorney-client relationship. It is also consistent with DR 7-104(A)(1) and Model Rule 4.2.

There may be uncertainty about the existence of representation with respect to whether it has been established, whether it may have been terminated, and whether a particular subject falls within the scope of the representation. The first issue typically arises before a judicial or other appearance, when the government attorney has some information suggesting that the person may be represented. It also may arise when an attorney purports to represent a group of persons, such as all the employees of a corporation. Uncertainty about the termination of the representation may arise when substantial time has passed since it was made known that the person was represented by counsel or when the attorney for the government has reason to believe that the representation has ceased. It is unlikely, however, that such uncertainty will arise when there are pending judicial proceedings, because in such circumstances the court in most jurisdictions must approve termination of representation.

In response to one comment, it is worth clarifying that when actual representation has not clearly ceased, that representation is presumed to cease to be current for purposes of these rules when the matter in question has reached a final judgment (i.e., once the direct appeals process, including any petition for certiorari, has run its full course), unless there is reason to believe that representation is continuing.

When inquiring about the status of representation, government attorneys and agents generally must refrain from stating whether it is necessary or desirable to be represented by counsel. After the right to counsel has attached, a statement or implication suggesting that counsel is not providing proper or effective representation could violate the Sixth Amendment right to effective assistance of counsel. See United States v. Morrison, 449 U.S. 361, 364 (1981).

This exception is not intended to and does not create a duty on the part of the attorney for the government to inquire about the status of representation. However, if the attorney for the government has any reason to believe that the individual is represented by counsel with regard to the relevant subject matter, he or she should, as a matter of course, make the appropriate inquiries before engaging in substantive discussions with the individual.

One organization commented that the right to inquire whether a party is represented by counsel is an invitation to a more substantive conversation with a represented party with respect to

the matter underlying the representation, which would violate these rules. The Department does not agree that this paragraph creates a significant potential for abuse. This exception, which is clear in its terms, allows Department attorneys to do no more than determine whether a person is in fact represented by counsel. The Department expects that all Department attorneys will understand the limited parameters and purpose of this exception, and any attempt to use this paragraph to gather additional information about the subject matter of the representation would be a clear violation of these rules and would constitute sanctionable conduct.

Paragraph (b): Discovery or judicial or administrative process.

Any communication that is authorized by discovery procedures, such as a deposition of a party-opponent, or by judicial or administrative process, such as a grand jury, deposition, or trial subpoena or an administrative summons, obviously should not be prohibited by any rule. See United States v. Schwimmer, 882 F.2d 22, 28 (2d Cir. 1989), cert. denied, 493 U.S. 1071 (1990) (prosecutor's questioning of represented person before the grand jury outside the presence of counsel is "authorized by law" under DR 7-104). Among other reasons for this exception, a person who is served with process has an opportunity to consult with counsel prior to his or her appearance at the proceeding, and may have counsel present if desired during the proceeding (except, of course, while

testifying before a grand jury). More generally, communications authorized by discovery procedures already have in place appropriate mechanisms for protection of the attorney-client relationship. This provision ensures that this regulation does not prevent such communications from continuing to be allowed.

This exception does not purport to authorize any communications not otherwise available pursuant to approved discovery procedures or legal process. However, one individual commented that the text of paragraph (b), as proposed in March 1994, might be construed to authorize certain discovery procedures -- such as the taking of a party's deposition testimony in the absence of the party's attorney and without the attorney's prior agreement -- even where such practice was not in accordance with the rules of the applicable tribunal. To clarify that this paragraph's intent is to authorize only approved discovery procedures or legal process, this paragraph has been amended in the final rule to exempt only those communications made pursuant to discovery procedures or legal process "in accordance with the orders or rules of the court or other tribunal where the matter is pending."

Paragraph (c): Initiation of communication by represented party.

This paragraph sets out the circumstances under which it is proper for a government attorney to communicate with a represented party who has initiated contact, without the consent of that party's counsel.

A defendant may wish to communicate with the government outside the presence of counsel for many valid reasons. For instance, a defendant may wish to cooperate with the government but not want his or her attorney to know for fear that the attorney will disclose the defendant's intentions to others. This situation may arise, for example, when the defendant's attorney is being paid by another individual involved in a criminal enterprise, and the defendant questions whether he or she has the attorney's undivided loyalty. The same problem may arise when a single attorney represents multiple parties who are part of the same criminal enterprise.

When the desire of a defendant or arrestee to speak with the attorney for the government outside the presence of his or her counsel is "voluntary, knowing, and informed," there is no valid reason to prohibit the government from engaging in such communications. In fact, the Department believes that it would be a dereliction of its obligation vigorously to enforce federal law if it promulgated a rule that would prohibit such communications.

It is well established that an individual who is entitled to counsel under the Fifth Amendment or the Sixth Amendment may waive that right and choose to communicate with the government outside the presence of his or her attorney, "provided the waiver is made voluntarily, knowingly and intelligently." Moran v. Burbine, 475 U.S. 412, 421 (1986) (internal quotations omitted); Patterson v. Illinois, 487 U.S. 285, 292 (1988); Brewer v.

Williams, 430 U.S. 387, 404-06 (1977). In such a situation, the defendant should not be prohibited from engaging in communications that are allowed by the Constitution by a disciplinary rule that was intended to protect that individual in the first place. Neither common sense nor the principles underlying DR 7-104 and Rule 4.2 requires such a result.

This paragraph includes procedural protections designed to ensure that such waivers are in fact voluntary, knowing, and informed. After a represented individual has been arrested or charged in a criminal proceeding or is named as a defendant in a civil law enforcement proceeding, this paragraph requires that several steps be taken before a government attorney may engage in a substantive discussion with the represented party. First, the government attorney must inform the individual of his or her right to speak through his or her attorney and to have that attorney present for any communications with the government attorney. Second, the represented party must manifest his or her desire to waive the right to counsel in a voluntary, knowing and informed way. If at all possible, the attorney for the government should obtain a signed written waiver. Third, the attorney for the government must bring the matter before the appropriate district court judge, magistrate judge, or other tribunal of competent jurisdiction. Then, it is up to the court to determine that the waiver satisfies the provisions of this rule or that substitute counsel is in place (including counsel