

SPECIFIC COMMENTS

Here follows a summary of the most significant comments:

Attorney Organizations

1. American Bar Association (ABA). The ABA strongly opposes the proposed rule. It argues that the Department has exaggerated the need for a regulation and that there is no "crazy quilt" of variations in the anti-contact rule across the country. The discipline of lawyers -- including those who are employed by the Justice Department -- is an area traditionally regulated by states. Federal law explicitly recognizes the role of state authorities to regulate the conduct of Justice Department lawyers, and the Department's attempt to hinder states from exercising their power is ultra vires. The Department has also created for itself a serious separation-of-powers problem, for federal district courts have in almost every case incorporated state rules of professional conduct into their local rules.

The "authorized by law" exception was never meant to permit the lawyer for one of the adversaries in a criminal or civil matter to exempt herself (or her subordinates) from the prohibition of the anti-contact rule. There is no basis in Rule 4.2 to distinguish between represented parties and represented persons; the term "party" in Rule 4.2 is meant to include a much broader category of people and activities than that covered by the narrow definition in the Department's proposed rule. Whether and when a particular person is formally charged is entirely within the discretion of the prosecutor, and it is unfair to have so much rest on such a distinction. People seek counsel for a variety of purposes prior to arrest or indictment or to the filing of a complaint (e.g., to challenge subpoenas or compulsion orders), and the ethical rules prohibiting contact with them without the consent of their attorneys should apply in these cases as well. A constitutional right to waive counsel is not the same as a right to waive the ethical obligations of prosecutors.

In the absence of some threshold basis for believing that a person is not in fact represented, prosecutors ought not to be given a signal that it is acceptable to inquire of a defendant whether he or she is represented once a lawyer has made it known to the prosecutor that he or she represents the defendant. The rule is not limited to those cases where the Department has a legitimate cause for concern -- where a lawyer purports to represent multiple clients or where a client is legitimately fearful that his attorney may learn of his intent to communicate directly with the prosecutor.

The proposed rule provides for an exception to the general prohibition against contacts with represented parties where the client has waived his or her rights at the time of arrest [§ 77.6(d)]. But under Miranda, once a person chooses to have counsel, all interrogations must cease; why is this not still true if, prior to arrest, a person has already chosen counsel? The "conflict of interest" exception to the provision purporting to respect the attorney-client relationship [§ 77.9(a)(2)] permits the prosecutor to raise doubts and disparage defense counsel in the eyes of the client. The proper procedure in all cases where a conflict of interest is suspected would be for the prosecutor to move the court to disqualify defense counsel. The exception to the prohibition against contacts with represented parties for investigations of "additional" or "different" criminal conduct [§ 77.6(e)] gives agents authority to elicit information about long-completed acts. Once illegal behavior has been completed, and a person is represented, such interference is unjustified absent special circumstances.

The provisions of the U.S. Attorney's Manual purporting to restrain prosecutor's conduct with respect to "targets" of investigations are illusory for any direct communication with a represented target can be justified as necessary for the "effective performance of law enforcement functions" [USAM 9-13.241(g)]. Finally, the provision governing corporate employees [§ 77.10] is in direct conflict with Comment 2 of Rule 4.2 -- communications are forbidden with all managers and any other person whose act or omission may be imputed to the organization for purposes of liability, or whose statement may constitute an admission. The Department's proposed rule is also in conflict with Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure governing when prosecutors must disclose the statements of corporate employees to a corporate defendant. Rule 16 avoids the unfairness to a corporate defendant by enacting a broad view of who the corporation is. There is no precedent for the position taken by the Department of Justice.

2. The National Association of Criminal Defense Lawyers (NACDL). The NACDL is also opposed to the Department's proposed rule. It argues that codes of professional conduct are designed to govern the conduct of all lawyers practicing before the courts, and the idea that one side could unilaterally opt out of this, or any, ethical rule simply because it finds it to be burdensome is an affront to any concept of fundamental fairness. The Attorney General's opinion is not "law" within the "authorized by law" exception. States are exclusively responsible for the discipline of lawyers. Rule 4.2 and DR 7-104 have been incorporated into federal law by the local rules of the majority of federal courts. There is no basis in Rule 4.2 to distinguish those who have been formally charged or arrested from

those who have not been. Rules should be designed to encourage citizens to seek ethical and legal advice well in advance of arrest or indictment.

Prosecutorial immunity under 42 U.S.C. § 1983 was justified, in part, by assurances that prosecutors, perhaps unique among federal officials whose acts could deprive persons of constitutional rights, were accountable to an association of their peers. This would no longer be the case under the Department's proposed rule. The "necessary for effective law enforcement" exception to the U.S. Attorneys' Manual prohibition against contacts with represented targets is too broad, for any direct communication with a represented target could arguably further effective law enforcement. Similarly, the "additional" or "different" crimes exception is too broad, for it authorizes communications by undercover agents to elicit information about past deeds.

3. American College of Trial Lawyers. The American College of Trial Lawyers opposes the Department's proposed rule. It argues that the Department does not have the unilateral authority to permit its attorneys to engage in conduct that would violate the ethics rules of state bars and those of federal and state courts. The rule creates a double standard. The proposed rule constitutes an unjustified intrusion into the attorney-client relationship. Contact with represented persons by government lawyers may be justified in certain limited and clearly defined circumstances, and these could be "authorized by law." But such authorization must be judicial in nature, and it should be restricted to those situations in which the Department is able to make a "warrant-like" showing to a judge or magistrate judge pursuant to specific guidelines.

This rule will undoubtedly be only the first attempt to exempt government lawyers from ethical rules. If adopted, this rule will lead to similar attempts to exempt state and local prosecutors from the ethical standards applicable to all other attorneys. The distinction between "person" and "party" is nowhere found in the Model Rules or Code of Professional Responsibility. The "conflict of interest" provision [§ 77.9] is unnecessary, for in those circumstances where permission must be sought to make the contact with the represented person or party, it is not unreasonable to require that such permission be obtained from a U.S. district judge or magistrate judge. If this provision is adopted, it should be modified to require the approval of an Assistant Attorney General with the responsibility for setting forth specific standards for making the required showing. Permanent records should be maintained. Allowing just any U.S. Attorney to authorize such conduct would permit broadly varying standards across the country, and even within multi-

district states. As to the disciplinary provisions [§§ 77.11, 77.12], the Department has assumed the role of both judge and jury, and this unique status is objectionable.

4. Public Defender Service for the District of Columbia (PDS). Although PDS recognizes that the March 3 version of the proposed rule is an improvement over its predecessors, PDS continues to oppose it on the grounds that it elevates the narrow interests of the government as prosecutor over the broader ethical precepts of the legal profession. A rule that was narrowly tailored to deal with the "house counsel," subsequent conduct, and corporate representation problems would accomplish the legitimate objectives of the rule without licensing prosecutors to do what any other lawyer would be disciplined for doing.

The proposed rule treats the scope of the Sixth Amendment's suppression doctrine as the limit of the prosecutor's ethical responsibility. It is like treating the "ineffective assistance of counsel" standard as the limit of defense counsel's duty to provide zealous representation. Prosecutors can manipulate the filing of charges to avoid turning a represented person into a represented party. A person suspected of many robberies but who is charged by complaint with only one of them may have counsel appointed for a particular charged offense. That person will be a represented party as to the charged offense but only a represented person as to the others. The purpose of the ethical rule applies to this situation, and it would make little sense to make the propriety of a particular conversation turn on the formality of counsel's appointment.

The Department's internal enforcement process will not sufficiently deter improper contacts. Experience suggests that comparable violations of ethical rules have not received any effective internal disciplinary action. Federal prosecutors playing by different rules undermines the appearance of justice. The U.S. Attorney Manual provisions will not create a sufficiently enforceable legal obligation to protect defendants from unfairness and overreaching. Finally, the Attorney General lacks the authority to preempt state disciplinary rules. Only the vaguest and most general authority exists for rulemaking, and Congress must be explicit when it alters the federal-state balance, either directly or by delegation. Congress has provided that Department attorneys must be members of a state bar, implying that it intended Department attorneys to be subject to state standards of professional ethics and discipline.

5. National Organization of Bar Counsel, Inc. (NOBC). The NOBC opposes the proposed rule. If the Department truly believes that the disciplinary rules unduly restrict the government's

ability to perform its proper enforcement functions, it should seek remedial legislation in Congress, or it should request the ABA to consider suitable amendments to Model Rule 4.2. Congress has provided that government attorneys may practice anywhere so long as they are members of a bar in some jurisdiction. Congress' mandate is pointless if the executive branch can declare itself exempt from disciplinary rules.

The prohibition against any contact with represented persons for purposes of discussing plea agreements and other similar agreements [§ 77.8] is undercut by the permission the government would grant itself to engage in contacts up to the point of negotiating a plea agreement or settlement agreement. In any case, there is little reason to trust the Office of Professional Responsibility (OPR). It does not share the results of its investigations or even advise the members of the NOBC when it recommends that discipline be imposed on a government attorney. The proposal makes no provision for OPR disclosure and appears to foreclose disciplinary proceedings before state bars even when the Department finds that an attorney has committed a willful violation.

6. New York State Association of Criminal Defense Lawyers. This organization strongly opposes the rule. It advises the Department that any violation by a prosecutor within New York State of DR 7-104(A)(1) will be referred to the appropriate grievance committee for further investigation and action. This rule will have the effect of fomenting grievance complaints against prosecutors rather than curtailing them. Licensing and disciplining attorneys have always been the responsibility of states. This is so well settled that this rule, if adopted, will provoke legal opposition; under these circumstances, government pleadings may be subject to Rule 11 sanctions.

7. Los Angeles County Bar Association. The Board voted unanimously to oppose the rule on the grounds that it would exempt Department attorneys from the traditional ethical requirement that an attorney wishing to communicate with a person represented by counsel do so only through that person's counsel.

8. California Attorneys for Criminal Justice (CACJ). This organization wholly concurs with the positions of the NACDL and the ABA. The proposed rule places the federal government above the Constitution. It eviscerates the rights to due process, counsel, and fair trial. It also misconstrues federal authority to preempt state ethics rules and permits virtually unfettered interference with the attorney-client relationship.

State Judges

1. Special Committee of the Conference of Chief Justices (Veasey Committee). The Veasey Committee strongly opposes the Department's proposed rule. The Committee argues that it is unquestionably the exclusive province of the state supreme courts to construe Rule 4.2 and to determine whether or not the Department's proposed regulation falls within the "authorized by law" exception. In any case, the regulation clearly does not come within the "authorized by law" exception, for the ABA interpreted the phrase in 1967 to apply only where statutes or procedural rules or rules of law in a particular jurisdiction expressly permit the contact.

The Committee also argues that the Supremacy Clause does not apply because Department attorneys are required by federal law to comply with state ethics rules. There is a presumption against preemption. The proposed rule is also contrary to congressional intent, for Congress has consistently provided in the Department's appropriation authorization act that every Department attorney "shall be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia" The regulation also violates the principle of separation of powers, for federal courts have generally adopted the rules of professional conduct of the state in which they sit, and the regulation of attorneys is the exclusive prerogative of the judicial branch.

Although the committee stresses that "Rule 4.2 does not need amending," it suggests that one option would be for state supreme courts simply to delete the "authorized by law" exception. In the committee's view, this would moot the proposed regulation. Alternatively, "in the spirit of compromise," the committee offered the following alternative version of Rule 4.2, which it would be prepared to recommend to the full Conference:

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:

(a) the lawyer has the consent of the other lawyer in the matter;

(b) the lawyer is expressly authorized to do so by a specific Act of Congress, statute of this jurisdiction, or rule of a court of competent jurisdiction; or

(c) the represented party initiates the contact with the lawyer and the lawyer reasonably believes that notifying the party's lawyer creates the risk of death or substantial bodily harm.

2. Covington, Ann K. (CJ, Sup Ct of Missouri). The Supreme Court of South Carolina shares the view of a number of other jurisdictions that the regulation is an invasion of states' rights to regulate lawyer discipline.

3. Feldman, Stanley G. (CJ, Sup Ct of Arizona). I agree with the views of the Veasey Committee that the regulation should not be adopted. I believe that the better course is to amend the comment to Rule 4.2.

4. Holmes, Richard W. (CJ, Sup Ct of Kansas). The proposed rule is an attempt to "bootstrap" an executive agency policy allowing clear ethical violations of state rules into acts "authorized by law." This demeans the Office of the Attorney General and flies in the face of the high standards the public expects from the Department of Justice. Two separate standards of legal ethics cannot be tolerated. Attorney General Reno will not be attorney general forever, and this rule represents the "camel's nose under the tent." The problem of the Department's avoiding compliance with state ethical standards appears to go much deeper than the limited one of contact with represented parties.

5. Miller, Robert A. (CJ, Sup Ct of S. Dakota). I share the concerns expressed by the Veasey Committee. I sincerely appreciate the Attorney General's many courtesies in this matter.

U.S. Attorneys

1. Dettmer, Michael H. (W.D. Michigan). His office is generally pleased with the Department's proposed rule. The rule should make it clear that giving Miranda warnings is sufficient to obtain a waiver of one's counsel at the time of arrest [§ 77.6(d)]. The prohibition contained in the U.S. Attorneys' Manual against contacting represented "targets" creates a subjective test, and it will in all likelihood generate confusion, litigation and disparate treatment of "targets" in the various districts. Consensual, non-custodial "target interviews," often used in white collar criminal cases, will become unethical under the Manual guidelines, even though they clearly satisfy all constitutional and due-process safeguards. Finally, the proposed rule should be amended to apply to Department attorneys engaged in civil suits even where the United States is not acting under its police or regulatory powers. The "defensive" civil attorneys also need the uniform protection and guidance that a Department regulation can and should provide.

2. Famularo, Joseph L. (E.D. Kentucky). Our office urges that the proposed rule be adopted as published. One AUSA

expressed the concern that because state bar associations may amend their "authorized by law" provisions, the Department should rely explicitly on the Supremacy Clause. This would avoid nullifying the rule should the state bars react in this way.

3. Lillehaug, David L. (D. Minnesota). We continue to support the adoption of a regulation creating a national standard against which the conduct of government attorneys can be judged. One weakness in the proposal is its failure to pinpoint when the attorney-client relationship generating the contact bar can safely be deemed to have come to an end. The Department should define the end point to be the moment when a defendant's rights to direct appeal have been exhausted. This office remains troubled by the U.S. Attorneys' Manual provisions restricting overt communications with represented targets [USAM 9-13.240]. It is anomalous that covert communications with represented targets are approved while overt communications are generally prohibited. The net result of these provisions is to undermine the clarity of the rule's bright line and to continue the uncertainty which was the impetus for the regulation in the first place.

4. Stiles, Michael R. (E.D. Pennsylvania). We strongly support the establishment of clear rules governing contacts, and we believe the proposal will dissipate the undue chill and unnecessary uncertainty that now affect our work. The proposal also does not diminish the ethical responsibilities of government attorneys.

5. Sweeney, Emily M. (N.D. Ohio). The commentary to the willful violation section [§ 77.12] should be amended to make clear that only deliberate violations of the regulation will result in loss of federal preemption. Such a deliberate violation would not be "authorized by law," so Rule 4.2 would continue to govern. We also recommend that the commentary make clear that it is permissible to collapse the steps involved in securing a waiver from a represented party who initiates contact by immediately taking the party before a judicial officer after the initial contact [§ 77.6(c)]. One of the exceptions to the prohibition against discussing plea or settlement agreements with represented persons [§ 77.8] is where the represented person initiates the contact and the government attorney has complied with appropriate procedures to ensure that the waiver of counsel is voluntary, knowing, and informed [§ 77.6(c)]. This exception was omitted in the discussion contained in the U.S. Attorneys' Manual [USAM 9-13.230], and it should be included.

Other Commentators

1. Turner, Judge Jerome (W.D. Tennessee). Your attempt to authorize United States Attorneys to have contact with represented parties except in very limited circumstances is a misguided attempt to turn attorneys for the government into law enforcement agents. You denigrate your attorneys by such attempted exemptions and cloud the judiciary's ability to trust them as attorneys who will be governed by all aspects of the ethical regulations that apply to other attorneys. Government attorneys should be held to the highest ethical standards; it is unwise and short-sighted to treat them as less than fully bound by the ethics of the state which has licensed them to practice law.

2. Hoffman, Dennis F. (Chief Counsel, DEA). We request that the definition of "attorney for the government" [§ 77.2(a)] be amended to include attorneys working on the legal staffs of the various agencies in the Department of Justice. We also believe that the exception for waivers at the time of arrest [§ 77.6(d)] be clarified by indicating that waivers can occur any time after arrest and before the represented party is presented to a judicial officer. Finally, with respect to attorney-client meetings [§ 77.9(b)], we believe that an undercover agent should be prohibited from attending attorney-client meetings only if he or she has a reasonable basis to believe that the meeting or communication with the attorney will concern legal advice with respect to defense strategy, trial preparation, or other matters relating to the lawful handling, management, or response to a criminal or civil enforcement investigation or proceeding. As currently written, the prohibition is too broad.

3. Shapiro, Howard M. (General Counsel, FBI). Though the FBI generally opposes any restriction of its investigative prerogatives beyond the strictures of the Constitution, the proposed regulation will result in minimal impact on the effectiveness of the FBI. We also recommend that the definition of "attorney for the government" be changed to include noninvestigative attorneys working in the Department's law enforcement components.

4. Becker, Leonard H. (Bar Counsel, D.C. Ct of Appeals). The Department's proposal strives commendably to strike a balance between the law-enforcement needs of the federal government and the legitimate interest of the states to regulate the professional conduct of attorneys subject to their respective jurisdictions. I do not understand, however, why government lawyers should be permitted to issue notices of depositions and to take depositions without notice to the represented parties' attorneys [§ 77.6(b)]. The regulation is also too sweeping; it

should be limited to the legitimization of undercover operations and investigations by appropriate accredited agents. The claim that attorneys are subject to disparate standards is overstated. Government lawyers can avoid any anomaly that may exist by seeking and obtaining bar membership in the jurisdiction in which they practice. The "controlling individual" test is too narrow. The exclusive enforcement provision is disquieting in the absence of meaningful disclosure of the findings of violations. Finally, the statutory authority to promulgate the rule is shakier than the Department's commentary lets on.

5. Fox, Lawrence J. (D.C. Attorney, Drinker, Biddle & Reath). The Department's proposed regulation is dramatically overbroad to meet the stated concerns of the Department -- namely, the need to supervise undercover operations; the desire to speak with persons who are fearful of the attorneys whom their superiors have appointed for them; and the concern with a corporation's counsel's claiming that he or she represents all employees of the enterprise. In any case, the Department's concerns are not unique; the patchwork of ethical rules affects all lawyers to exactly the same degree. All lawyers would like to undertake investigations free from the restrictions placed upon them by Rule 4.2. A regulation imposed unilaterally does not constitute "law"; Department lawyers are simply acting adverse to another set of lawyers in a system in which Article III judges are the only neutral parties. It should not be for the Department to decide when an attorney is operating under a conflict of interest; a court should make that judgment. All of the critical legal assistance in many cases is provided prior to an indictment or the filing of a complaint -- *i.e.*, when Department lawyers would be free to contact parties known to be represented. Rule 4.2 was not intended to apply only when the Sixth Amendment's right to appointed counsel attaches. The proposal curiously ignores the fact that the rules have been adopted by most federal district courts.

6. Nolan, Thomas J. (Cal. Attorney, Nolan & Armstrong). Any rule that makes a distinction between prosecutors and attorneys in terms of their ethical responsibilities is another step towards eliminating the legal profession as we know it. Too much power has been placed in the hands of federal prosecutors, and too little control is exercised over their behavior. Why should some lawyers appearing before courts not be bound by the ethical standards of all other lawyers appearing before the same courts?

7. O'Neill, Brian (Cal. Attorney, O'Neill, Lysaght & Sun). I am a former Assistant U.S. Attorney now practicing in a firm with six other former Department of Justice lawyers. The proposal's distinction between represented persons and

represented parties is clearly designed to frustrate and impede the right of people under criminal investigation to adequate representation. Although the Sixth Amendment applies only post-charge, that does not mean that a person who has chosen to engage counsel should be denied the benefits of his or her counsel in the pre-charging stage of the case. There is also no logic in the claim that the Attorney General has the authority to exempt Department attorneys from provisions of state ethical codes simply because she has the obligation to enforce federal law. The two are unrelated. The "additional" or "different" offense exception to the prohibition against contacting represented parties [§ 77.6(e)] would permit a government attorney, merely by alluding to other offenses, to initiate contacts with represented parties. To believe that advocates and investigators would not aggressively exploit this rule is to ignore human nature.

8. Reitz, Curtis R. (Professor, U. of Pennsylvania Law School). The Department should withdraw its proposed rule. It completely fails to take account of the fact that the primary and exclusive source of authority to regulate the conduct of all attorneys in judicial matters arising out of federal law enforcement proceedings lies with the federal courts. All federal district courts have adopted local rules governing professional conduct of attorneys, and the Department's proposed rule fails to recognize that the primary law governing government attorneys are these federal rules adopted by federal courts. Preemption of state law, whatever that may mean in this context, does not affect or change controlling federal law. The solution to the problem faced by the Department is to formulate proposals for national rules to be adopted under the rulemaking powers of the federal courts. If state courts or disciplinary authorities were to exert their powers to discipline conduct authorized by the rules of federal courts, the Supremacy Clause would bar such action.

9. Thomas, James B., Jr. (IG, Dep't of Education). We wish to voice our support for the new proposal. We are especially pleased with the bright line drawn with regard to communications that are allowed with past and present employees of represented organizations as long as the employee is not a "controlling individual" in the organization.

CONCLUSION

The working group rewrote the commentary accompanying the rule to respond more effectively and completely to each of the comments summarized above. In response to these comments, the working group decided to make only a few changes to the rule itself. They were as follows:

- (1) Section 77.2(a). The definition of "Attorney for the government" was amended to 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" [Hoffman, Shapiro].
- (2) Section 77.6(b). The exception for contacts made pursuant to judicial or administrative process is clarified by making clear that such contact must be made "in accordance with the orders or rules of the court or other tribunal where the matter is pending" [Becker].
- (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 is clarified by specifying that the voluntary and knowing waiver of Miranda rights constitutes a waiver of counsel for purposes of this rule [Dettmer].

Although not strictly in response to a particular comment, the working group decided to clarify section 77.12 -- the provision dealing with the relationship between this rule and state and local regulations -- by specifying that the Department's rule is intended to "preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by Department of Justice attorneys." Furthermore, the commentary makes clear that the Department's intent is to preempt all state and federal district rules relating to contacts with represented persons, not just those that are arguably in conflict with the Department's rule.



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April 4, 1994

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HAND DELIVERY

Dear Mr. Hubbell:

Enclosed, please find the American Bar Association's comments with regard to the proposed rule of the Department of Justice on communications with represented parties by government lawyers, 28 C.F.R. Part 77 (AG Order No. 1851-94).

Sincerely,

Robert D. Evans

Enclosure

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**COMMENT OF
THE AMERICAN BAR ASSOCIATION**

on

**THE PROPOSED RULE
OF THE DEPARTMENT OF JUSTICE**

Concerning

**COMMUNICATIONS WITH REPRESENTED
PARTIES BY GOVERNMENT LAWYERS**

April 4, 1994

**COMMENT OF
THE AMERICAN BAR ASSOCIATION
ON THE PROPOSED RULE
OF THE DEPARTMENT OF JUSTICE
ON COMMUNICATIONS WITH REPRESENTED
PARTIES BY GOVERNMENT LAWYERS**

The American Bar Association objects to the Proposed Rule on Communications with Represented Parties published at 59 Fed. Reg. 10086 (Mar. 3, 1994). Like prior Department of Justice proposals, which it in substance resembles, the Proposed Rule is contrary to well-recognized principles of legal ethics. Worse still, the Proposed Rule declares that Department of Justice lawyers alone in the legal profession are free to ignore the rules of ethics adopted by the state and federal courts. This declaration is a profound mistake which will propel the Department into wholly unnecessary conflict with the organized bar, state disciplinary tribunals and the state and federal courts without ultimately solving the problems the Department wants to address.

This Comment sets forth the background to the controversy, articulates general objections to the Proposed Rule, discusses its constitutionality, and comments on its specific provisions.

I. The Background of the Controversy

Ethics rules have always applied equally to private practitioners and government lawyers, including federal prosecutors. The particular rule which forbids a lawyer from communicating with another lawyer's client is no exception. The rule has been with us for almost ninety years as Canon 9 of the

American Bar Association, Disciplinary Rule 7-104, and now as Model Rule 4.2. It was conceived and enacted to prevent lawyers from using their superior skill and acumen to contact represented laypeople and take advantage of them in the absence of their attorneys.

Until 1989, despite some internal musings, the Department of Justice did not publicly question the application of the rule to the attorneys who worked there. In June of that year, then Attorney General Thornburgh issued a memorandum advising all attorneys in the Department that "contact with a represented individual in the course of authorized law enforcement activity does not violate DR 7-104."

The Thornburgh Memorandum was ostensibly a response to a recent decision of the Second Circuit in United States v Hammad, 846 F.2d 854 (2d Cir. 1988), revised by 858 F.2d 834 (2d Cir. 1988). The first decision held that an Assistant United States Attorney's use of an informant to contact a represented target in an undercover investigation was unethical. Although the revised decision modified the earlier holding that indirect contacts by a prosecutor with a represented target violated the ethics rule, Attorney General Thornburgh felt the case would "exacerbate the uncertainty felt by many government attorneys over what is appropriate conduct in this area," and that the now-famous Memorandum was necessary to clarify the issue.

The Memorandum asserted that any disciplinary rule for the profession which placed a burden on Department of Justice attorneys

was invalid under the Supremacy Clause of the Constitution, and that the rule against contacts with represented parties (sometimes referred to as DR 7-104 and later as Rule 4.2) was unenforceable against federal lawyers.

The Memorandum created immediate controversy. The American Bar Association's House of Delegates formally rejected the assertion that the Thornburgh Memorandum preempted the ethics rule and that the Supremacy Clause empowered the Attorney General to do so. In Congress, the Committee on Governmental Operations wrote a report strongly critical of the Memorandum and its premise.

The federal courts have been no more sympathetic. In United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), rev'd on other grounds, 4 F.3d 1455 (9th Cir. 1993), both the District Court and the Court of Appeals held that contacts by a federal prosecutor with a represented defendant were violations of the state rule (which had also been adopted by the federal court) subjecting the prosecutor to the risk of discipline.

In In re Doe, 801 F. Supp. 478 (D.N.M. 1992) the District Court for the District of New Mexico remanded to that state's Disciplinary Board a proceeding against an Assistant United States Attorney who had attempted to remove the matter to federal court on Supremacy Clause grounds. When the Department later sought an injunction from the District of Columbia District Court against the New Mexico inquiry concerning Doe (the Assistant had committed the alleged violation in the District of Columbia), Judge Norma Holloway Johnson rejected the Supremacy Clause arguments with

practically the same analysis as courts had applied in Lopez and Doe. United States v Ferrara, No. 92-2869 (D.D.C. May 28, 1993) (appeal pending).

None of the decisions accepted the argument that the rule permits contacts with represented parties which are "authorized by law," and that the Thornburgh Memorandum constituted "law" for that purpose. To add force to its argument on that point for future cases, the Department published for comment in the Federal Register on November 20, 1992 a Proposed Rule permitting the contacts. A number of sources commented on the rules but because of the change in administrations, they never became final.

The Proposed Rule did nothing to allay the concerns and criticisms the Memorandum had provoked. They authorized contacts with represented parties in criminal and civil investigations at any time before litigation began and after it began if the person initiated the contact and waived the right to counsel. They prohibited communications with employees of a represented organization only if the employees were "controlling individuals" and then only after litigation had begun. They were flatly and admittedly contrary to the disciplinary rule. To their critics, the proponents of the new rules had simply added fuel to the charge that the Attorney General (by then William Barr) wanted Department of Justice lawyers exempt from ethics rules whenever he said so.

It came as something of a surprise when Attorney General Reno republished the identical Proposed Rule for comment on July 26, 1993, "in light of the complex and important nature of the rule to

the criminal and civil justice systems and the licenses and livelihoods of [the Department's] attorneys." When ABA representatives were invited to serve on a working group to discuss the July 26, 1993 Proposed Rule, it was hoped that improvements might result. Unfortunately, the new Proposed Rule suffers from many of the same flaws as its predecessors.

II. General Objections to the Proposed Rule

Before addressing the specific provisions of the Proposed Rule, some general observations are in order. First, the ABA believes the claims that a regulation is needed are overblown and that the evidence cited in support of those claims is largely apocryphal. The Association is aware of only one Assistant United States Attorney who is being investigated by a state disciplinary board for allegations that he violated Rule 4.2. See In re Doe, Disciplinary No. 08-90-194 (Sup. Ct. N.M. Disciplinary Bd., filed Aug. 22, 1990). The Department of Justice has cited no other evidence of past or present proceedings before state disciplinary boards which suggests that federal prosecutors are being improperly chilled from doing their duties by fears of discipline. That Assistant U.S. Attorneys may occasionally have to deal with motions seeking relief based upon asserted violations of Rule 4.2 may be annoying, but is hardly ground for launching the Department into a controversy with the bar over ethics.

The argument that federal prosecutors should not have to deal with state-by-state variations in ethics rules has some appeal, but it does not withstand analysis. In the first place, there are not

practical variations in the rule against contact with represented parties among the states. The General Discussion accompanying the Proposed Rule cites no evidence to support the assertion that there is a crazy-quilt quality to the application of the rule across the country. Bright lines in ethics, as in other matters, are always desirable, but the reality of federal criminal practice is that lawyers do confront areas in which their conduct is not always subject to bright-line analysis. It is a good thing, not a bad thing, that they have to be vigilant about ethics rules and think about what they are doing. It is not a trite rejoinder to the argument for uniformity that lawyers in the private bar are responsible for knowing the rules of all the courts in which they practice. Why should federal prosecutors be any different?

The ABA believes that the reputation of the Department will suffer in a struggle over whether its lawyers are governed by the same principles of ethics as other lawyers. Ethics rules are different from constitutional guarantees. They are intended to govern the behavior of lawyers, not the rights of citizens. In many instances, they impair a lawyer's ability to do things which would directly and substantially benefit his/her client. They often act as a restraint upon zealous advocacy and remind us that in our practice as members of this profession, the end never justifies the means.

There is a real, not an imagined, concern in the bar (both organized and otherwise) that the public's fear and concern over crime has fostered a growing number of incidents in which Federal

prosecutors behave as if the end does justify the means. For example, the Ninth Circuit recently expressed outrage at the conduct of Federal prosecutors in United States v. Kojayan 8 F.3d 1315 (9th Cir. 1993). That opinion discusses numerous recent abuses by prosecutors. Id. at 1324. In light of these events, the ABA questions whether the Department should be primarily responsible for determining whether prosecutors have had improper contacts with represented parties. For the Department to attempt to create for itself wholesale exceptions to the rule against contacts with represented parties and then entrust, as the Proposed Rule does, the monitoring of those safe harbors to the direct superiors of the government attorneys alleged to have violated them raises serious questions about the objectivity of the enforcement process.

III. The Constitutional Issue

The Department of Justice incorrectly asserts that the Proposed Rule is defensible under the intergovernmental immunities doctrine of the Supremacy Clause, which holds that federal officers are not subject to state interference with acts necessary and proper to the accomplishment of their federal duties. See In re Neagle, 135 U.S. 1 (1890). This doctrine is inapplicable because the Proposed Rule is contrary to both the explicit mandate of Congress and the ethical rules of the federal courts.

A. The states are presumed to be responsible for the discipline of all attorneys.

Under the Supremacy Clause, conflicts between federal and state power are resolved in favor of the national government.

M'Culloch v. Maryland, 4 Wheat. 316, 427 (1819). However, the federal courts are reluctant to find that a conflict exists and to interfere with the operation of state law. Hillsborough County, Fla. v. Automated Medical Lab., 471 U.S. 707, 715-16 (1985); United States ex. rel. Drury v. Lewis, 200 U.S. 1, 6 (1906) (when interfering with state process, the federal courts exercise "an exceedingly delicate jurisdiction we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court.") If a conflict is alleged to arise in an area traditionally regulated by the states, the federal courts presume that federal and state law "can constitutionally coexist." Hillsborough, 471 U.S. at 716; Jones v. Rath Packing Co., 430 U.S. 519, 525 ("This assumption provides assurance that 'the federal-state balance,'... will not be disturbed unintentionally by Congress or unnecessarily by the courts.") reh'g denied, 431 U.S. 925 (1977). The party asserting the conflict must rebut this presumption by providing "clear and manifest" evidence to the contrary. Hillsborough, 471 U.S. at 715-716.

The Supreme Court has made clear that the discipline of all lawyers, including those who happen to work for the Department of Justice, is an area traditionally regulated by the states:

Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Leis v. Flynt, 439 U.S. 438, 442 (1979), reh'g denied, 441 U.S. 956

(1979) (emphasis added), cited in Lidge, 67 Ind. L. J. at 624-25. See also, Nix v. Whiteside, 475 U.S. 157, 165 (1986) (federal courts must be careful not to "intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts"); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'"), reh'g denied, 423 U.S. 886 (1975); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982) ("States traditionally have exercised extensive control over the professional conduct of attorneys"). Accordingly, the burden is on the Department of Justice to prove that federal and state law conflicts. See Hillsborough, 471 U.S. at 715-16.

B. Federal statutory law authorizes state discipline of Department of Justice lawyers

The Department cannot meet its burden because federal law explicitly authorizes the discipline of Department of Justice lawyers by the disciplinary authorities traditionally governing professional ethics: the states. The federal statute authorizing the states to regulate Department of Justice lawyers is the Department of Justice Appropriation Authorization Act of 1979 ("the DOJ Act"). The DOJ Act provides that:

None of the sums to be appropriated by this Act may be used to pay the compensation of any person employed after the date of the enactment of this act as an attorney (except foreign counsel employed in special cases) unless

such person shall be duly licensed and authorized to practice as an attorney under the laws of a state, territory, or the District of Columbia.

Pub. L. No. 96-132, 93 Stat. 1040, 1044 (1979) (emphasis added). This provision (which has been continuously reenacted and is currently in force) requires that every Department of Justice attorney must get a license from a state and keep it. If a lawyer were to obtain a license and let it lapse, he would no longer be "duly licensed and authorized." See Dent v. West Virginia, 129 U.S. 114, 123 (1889) (state may require a licensed professional to satisfy additional conditions after the license is granted); Brown v. McGarr, 774 F.2d 777, 783 (7th Cir. 1985) (citing Dent). A lawyer gets a license by meeting certain educational, testing and character requirements; a lawyer keeps that license by fulfilling such ongoing obligations as the payment of license fees, participation in continuing legal education, and above all, compliance with the ethical rules of the jurisdiction. See, e.g., U.S. District Court (D.C.) R. 706 (continued membership in bar of the court subject to compliance with disciplinary rules).

The power to license must as a matter of logic include the power to investigate, discipline, and revoke the license. "The legislative imposition of a grave responsibility ordinarily carries with it, as a matter of necessary implication, power to employ the means by which it may be discharged." D.C. Transit Sys., Inc. v. Washington Metro. Area Transit Comm'n, 466 F.2d 394, 412 (D.C. Cir.), cert. denied, 409 U.S. 1086 (1972). Congress imposed upon the states "the grave responsibility" of licensing and

authorization of Department of Justice attorneys. "As a matter of necessary implication," Congress must have intended state courts to exercise the means by which their licensing responsibilities for federal lawyers are discharged. Those means are investigations, discipline and the withdrawal of the license. Otherwise, the licensure is meaningless.

The existence of the DOJ Act furthermore prohibits the Proposed Rule under constitutional principles of delegation. The power of an administrative agency to act is limited to authority delegated to it by Congress. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 1368 (D.C. Cir. 1990). When Congress delegates a power to the states, a federal administrative agency which prevents the exercise of that power is acting ultra vires. Amalgamated, 894 F.2d at 1368-70. Congress in the DOJ Act has, in plain language, explicitly adopted state licensing as a condition of federal employment. To the extent that the Department of Justice would prevent the exercise of state licensing power, it is acting ultra vires. See Amalgamated, 894 F.2d at 1368-70 (where federal statute gave states responsibility for formulating safety plan, federal agency may not interfere with that responsibility by imposing plan of its own).

C. The Rules of the Federal Courts apply state disciplinary rules to Department of Justice lawyers

Even absent Congressional authorization, the Supremacy Clause would be inapplicable to this case because the federal judiciary has adopted the very rule here at issue. If state and federal law

agree that a certain act is forbidden, then state law does not conflict with federal law and the Supremacy Clause is inapposite. See Hillsborough, 471 U.S. at 713 ("actual conflict" between state and federal law is required as predicate for Supremacy Clause claim); Neagle, 135 U.S. at 75 (only if state law prohibits "an act which [a federal actor] was authorized to do by the law of the United States" does immunity lie under the Supremacy Clause). The First Circuit has specifically held that the Supremacy Clause is not implicated where the validity of a state ethics law adopted by a federal district court is being analyzed. United States v. Klubock, 832 F.2d 649, 651 (1st Cir. 1987), aff'd en banc, 832 F.2d 664, 667 (1st Cir. 1987).

Rule 4.2 and DR 7-104(A)(1) have been incorporated into federal law by the local rules of federal courts. See Rand v. Monsanto Co., 926 F.2d 596, 601-603 (7th Cir. 1991). The federal courts generally apply the disciplinary rules of the state in which they sit. See, e.g., D.D.C. Rule 706(a). All fifty states have adopted some form of the rule against contacts with represented parties. R. Crampton and L. Udell, State Ethics Rules and Federal Prosecutors: the Controversies Over the Anti-Contact and Subpoena Rules, 53 U. Pitt. L. Rev. 291, 292 fn. 3 (1992). The state and federal courts have consistently held that the rule applies to prosecutors. See, e.g., People v. Green, 405 Mich. 273 (1979) (even if suspect initiates communication, prosecutor must refuse it and tell suspect that defense counsel must consent prior to any contact); Hammad, 858 F.2d at 839; Lopez, 4 F.3d at 1459 ("the

trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with [the prosecutor]. . . . As a result, uncurbed communication with represented parties could have deleterious effects well beyond the context of the individual case, for our adversary system is premised upon functional lawyer-client relationships."). Thus, under federal court precedents and rules, conduct of the kind permitted by the Proposed Rule is subject to discipline.

The fact that the federal courts have adopted state disciplinary rules means that the Proposed Rule also violates constitutional principles governing the separation of powers. The separation of powers doctrine holds that if there is an unnecessary and disruptive assumption of powers essential to one branch of government, by another branch, then the constitution is violated. Lopez, 765 F. Supp. at 1455. The power to discipline prosecutors is not essential to the executive branch alone, but also to the judicial branch: because a federal lawyer is an officer of the court, the court may discipline him or her. Id. This is necessary because courts cannot be administered in an orderly fashion without such rules. Id.

The Attorney General lacks the power to promulgate a regulation which, while purporting to regulate the states, has the logical consequence of invalidating the local rules of the federal courts, or their supervisory jurisdiction. "Whatever may be the effect of the Constitution's Supremacy Clause with respect to local disciplinary bodies . . . that Clause obviously does not establish

a memorandum issued by the Attorney General as supreme over rules issued by a federal court." United States v. Adonis, 744 F. Supp. 336, 347 n.50 (D.D.C. 1990).

For these reasons, every court to consider the question has rejected the attempt of the federal government to subvert Rule 4.2. See Lopez; Doe; Matter of Gorence, 1992 WL 406496 (D.N.M. Dec. 28, 1992); Ferrara. These courts have wisely chosen not to upset the traditional primacy of state regulation for all lawyers, including government lawyers, under the Supremacy Clause. The ABA believes the courts will find the Proposed Rule is equally unacceptable.

IV. Objections to Specific Provisions of the Proposed Rule

The following discussion focuses on certain parts of the Proposed Rule which are particularly objectionable. However, the American Bar Association objects to the entire Proposed Rule to the extent that it is inconsistent with Rule 4.2 as interpreted by the courts and disciplinary authorities. Furthermore, while the discussion which follows emphasizes the application of the Proposed Rule to criminal cases, the Proposed Rule applies equally to civil cases and is equally inappropriate therein.

A. Utilization of the "authorized by law" exception to Rule 4.2

The "authorized by law" exception in Rule 4.2 was never meant to permit the lawyer for one of the adversaries in a criminal or civil matter to exempt herself, or the lawyers under her, from the prohibition of that Rule. Regardless of her rule-making authority under federal law, in this situation, the Attorney General cannot perform her rule-making function objectively. At the very least,

she creates the appearance of a conflict of interest, itself an ethically problematic act.

The Supreme Court addressed a comparable conflict in Coolidge v. New Hampshire, 401 U.S. 443 (1970). There the Attorney General of New Hampshire was also, under New Hampshire law, a justice of the peace with the power to issue search warrants. In a murder investigation under his jurisdiction, the Attorney General issued a search warrant in his capacity as a justice of the peace. The Supreme Court held this warrant invalid and emphasized that whatever power the Attorney General may have had as a justice of the peace, he could not exercise it in a case he was prosecuting. Writing for the Court, Justice Stewart stated that

there could hardly be a more appropriate setting than this for a pro se rule of disqualification rather than a case-by-case evaluation of all the circumstances. Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson [requiring objectivity in issuing search warrants] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations--the "competitive enterprise" that must rightly engage their single-minded attention.

Id. at 450 (Bracketed material supplied.) These sentiments apply with equal force to the Attorney General's promulgation of the Proposed Rule.

B. §77.3: The definition of "represented party"

The Proposed Rule draws upon Sixth Amendment jurisprudence to distinguish between pre-arrest investigatory communications with represented persons, which are permitted, and post-arrest contacts with represented parties, which are prohibited. There is no basis

under Rule 4.2 or its comments and history to support such a distinction. In fact, both the black letter and the purpose of Rule 4.2 (and DR 7-104(A)(1)) make clear that the term "represented party" is meant to include a much broader category of people and entities than that covered by the Proposed Rule.

The Proposed Rule confuses the Supreme Court's constitutional rulings applying the exclusionary rule of evidence with the enforceability of ethical rules on federal prosecutors. None of the relevant Supreme Court constitutional rulings address legal ethical obligations. These rulings reviewed the conduct of state or federal police officers, not that of lawyers. Indeed, in Massiah v. United States, 377 U.S. 201 (1964), Justice White's dissent specifically emphasized the difference between the application of a constitutional exclusionary rule of evidence based on the conduct of police officers and the enforcement of ethical rules controlling the conduct of prosecutors. He said at 210-211:

This case cannot be analogized to the American Bar Association Rule forbidding an attorney to talk to the opposing party litigant outside the presence of his counsel. Aside from the fact that the Association's canons [predecessor to the Rules of Professional Conduct], are not of constitutional dimensions, the specific canon argued is inappropriate because it deals with the conduct of lawyers and not with the conduct of investigators. Lawyers are forbidden to interview the opposing party because of the supposed imbalance of legal skill and acumen between the lawyer and the party litigant. The reason for the rule does not apply to nonlawyers . . . (Bracketed material supplied).

Another serious flaw in allowing contacts with represented persons but not with represented parties is that it allows the prosecutor to decide whether contacts may continue simply by

withholding the charge decision. If a person is not arrested, charged, or sued they are not a represented party, and communications are permissible. The "represented persons-represented parties" distinction furthermore fails to account for persons or entities who may want to litigate subpoenas or compulsion orders. No definition so limited can adequately take into account the myriad circumstances in which persons seek and retain counsel and in which the ethical rule properly prohibits contacts by opposing counsel.

C. §77.6 (a): Inquiries about representation

On its face, the right to inquire of a represented party as to whether he is represented and if so, by whom, is unexceptional. In practice, allowing such contacts is an invitation to more wide-ranging conversation. In the absence of some threshold basis for believing that the person is not represented, prosecutors ought not be given a signal that it is acceptable to inquire of a defendant whose lawyer has made himself known to the prosecutor whether the lawyer in fact represents his client.

The rationale advanced for the provision is that it is needed when a lawyer asserts that he represents multiple clients. The Proposed Rule is not limited to that situation, however, and permits an open right to question represented parties on the subject. Given the provisions of the Proposed Rule for waiver by the client, such inquiries pose serious dangers of loss of counsel rights.

D. §77.6 (c): Waiver by initiation of communications by represented parties

This provision is ostensibly justified by the necessity to deal with the "fearful" client who wants to discuss his case with the prosecutor, but believes he will be endangered if his lawyer is notified of his intent. However, the Proposed Rule is not restricted to this rationale. Section 77.6(c) would permit communications with a represented party in the absence of counsel for no reason other than the client's often misguided belief that he can help himself by talking to the prosecutor.

The Department of Justice seems to believe that because a person can waive counsel for all purposes, he ought to be able to waive counsel for specific communications. Here again, the Proposed Rule confuses constitutional rulings on the exclusionary rule of evidence, such as Edwards v. Arizona, 451 U.S. 477 (1981), with the ethical duties of prosecutors. It is undisputed that criminal defendants may, by initiating a communication with police, waive their constitutional right to counsel. This does not, as a matter of legal ethics, justify a prosecutor's taking advantage of a represented defendant's belief that he can hold his own in an ex parte communication with the prosecutor. Rule 4.2 is intended precisely to prevent the creation of this circumstance.

§77.6(c) furthermore permits a prosecutor to communicate with a represented party post-arrest without the presence or consent of counsel. The precondition for such a communication is the giving of warnings to the represented party and obtaining a waiver of counsel. This effectively authorizes a violation of the arrested party's constitutional rights under Miranda. That case

specifically held that custodial interrogation must cease when the arrested party chooses to have counsel. If this restriction applies even before such a person has retained counsel, it surely applies when the prosecutor knows he has already done so. In essence, this provision permits the prosecutor to insinuate himself between the client and the client's lawyer and cause the client to waive his right to be advised by the very lawyer he has already chosen.

E. §77.9 (a): Communications regarding conflicts of interest

Although this section of the Proposed Rule is headed ". . . respect for attorney-client relationship", paragraph (a) permits the exact opposite. It authorizes prosecutors to communicate with a represented party, without consent of defense counsel, about a conflict of interest the prosecutor believes the defense counsel has. In acting under this provision, the prosecutor will (even if there is a legitimate conflict) inevitably disparage defense counsel to the client. This not only violates widely-acknowledged ethical norms but may also cause the client to enter into an incriminating discussion with the prosecutor. The correct procedure where the prosecutor believes defense counsel has a conflict of interest is for the prosecutor to move the court to disqualify counsel.

F. §77.6 (e) Undercover investigations of on-going and "additional" or "different" crime

There is widespread agreement that communications by undercover agents with represented parties who are currently engaged in ongoing crime or conspiracies is ethically permissible. However, the Proposed Rule goes far beyond this basic requirement.

The Proposed Rule would permit undercover agents acting under a prosecutor's instructions to elicit information about long-completed acts from represented parties, under the label of communications about "additional" or "different" unlawful conduct. Once allegedly illegal behavior has been completed and a person is represented by counsel, such interference is unjustified absent special circumstances. Interference with client-lawyer relations is equally offensive whether the interference is in relation to the allegation for which a represented party has been indicted or for an additional or different allegation where judicial proceedings have not commenced.

G. USAM §9-13.241(g): The "effective performance of law enforcement" exception

While the proposed additions to the United States Attorneys' Manual appear to contain additional restrictions on communications with represented persons, those restrictions are illusory because of proposed U.S. Attorney's Manual Section 9-13.241 (g). That section permits direct communication by a prosecutor with a represented target on a finding by the United States Attorney (or a higher Justice department official) that the communication "is necessary for effective law enforcement . . ."

Any direct communication with a represented party can be justified as "necessary for effective law enforcement," because any such communication advances the prosecution case, or at least might do so. Accordingly, all the proposed USAM additional restrictions amount to is that a prosecutor may not communicate with represented targets pre-arrest unless his superiors permit him to. The

aspirational language introducing this cavernous exception, which requires "exceptional circumstances" and the giving of "due regard" to the importance expressed in the Proposed Rule of "avoiding any undue interference with the attorney-client relationship", can have little practical effect, and serves merely as accommodating decoration.

H. §77.10: Contacts with Organizations and Employees

Section 77.10 of the Proposed Rule permits a range of contacts with organizational employees which is contrary to common practice and common sense. Under the Proposed Rule, the government may at any time initiate communications with virtually any employee of an organization--even after judicial proceedings against the organization have commenced. The only exception to this rule is that once proceedings (arrest or civil complaint) begin, the government may not communicate with a "controlling individual," defined as a high-level employee who is known by the government to be making decisions about the organization's legal position in the proceeding.¹ But even when it comes to such a "controlling individual," the government is free to engage in ex parte contacts before the onset of process.

A slight additional restriction is put on the government by the USAM changes. They provide that the government may not communicate with controlling individuals before process commences if the company is a "target." However, the definition of target is

¹ This prohibition is of course subject to the exceptions set forth in § 77.6.

extraordinarily narrow, and the restriction is subject to the loophole discussed above for "communications necessary for effective law enforcement."

The ABA believes that most lawyers, including many who work for the Department of Justice, would consider the contacts permitted by the Proposed Rule highly improper. Model Rule 4.2 is designed to protect clients from misuse by an attorney having superior acumen and skill. By allowing free access to most corporate employees, including most employees in positions of authority, the government is inviting the abuses the rule is designed to guard against.

The surest proof that the Proposed Rule is contrary to the policy of the Model Rule is that the Comments to the Model Rule reject the Department of Justice's position. Comment [2] to ABA Model Rule 4.2 provides that communications are forbidden with all managers and any other person whose act or omission may be imputed to the organization for purposes of liability, or whose statement may constitute an admission. This broad prohibition on contacts insures that organizational employees who are laypeople will not be taken advantage of to the detriment of the organization. Unfortunately, the Proposed Rule ignores the ABA's position.

In fact, there is little or no precedent for the position taken by the Department of Justice. Dozens of jurisdictions have considered this issue. Several definitions of controlling individual have emerged. See Jerome N. Krulewitch, Ex Parte Communications with Corporate Parties: The Scope of the

Limitations on Attorney Communications with One of Adverse Interest, 82 Nw. U.L. Rev. 1274, 1285 (1988). The Department of Justice adopts none of the leading positions. Instead, it has chosen a position which apparently has been endorsed only by the District of Columbia Rules of Professional Conduct.²

The Department of Justice's position is, finally, inconsistent with the rules governing the United States Federal Courts. Federal Rule of Criminal Procedure 16(a)(1)(A) provides, in relevant part, that

Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

While Rule 16 concerns a somewhat different situation--when prosecutors must disclose statements of corporate employees to a corporate defendant--it is relevant to our problem because Rule 16 is informed by the identical purpose. The authors of Rule 16 were

² The Opinion of the Legal Ethics Committee of the District of Columbia adopting the narrow definition of a controlling individual is itself open to question. See D.C. Bar Legal Ethics Committee Opinion No. 129 (1983). That Opinion purports to be based upon ABA Comm. on Ethics and Prof. Resp. Informal Opinion 1410 (February 14, 1978), yet the ABA Informal Opinion has been read to endorse a rule which is much broader than the D.C. standard. See Krulewitch, 82 Nw. U.L. Rev. at 1298 (discussing the ABA test).

attempting to protect the defendant from receiving an unfair plea or trial as a result of the superior knowledge of the prosecutor, who might withhold information to gain an advantage in plea bargaining or at trial. See Fed. R. Crim. P. 16, Notes of Advisory Committee on Rules, 1974 Amendment (Rule 16 was adopted "in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; [and] by minimizing the undesirable effect of surprise at the trial") Similarly, the rationale for Rule 4.2, is to protect the represented party--be it an individual or an organization--from being unfairly overborne as a result of the superior acumen and skill of opposing counsel. Rule 16 responds to the risk of unfairness by enacting a broad view of who the corporation is. The Department of Justice has chosen to reject this teaching, and instead adopts the narrowest possible view of who the corporation is.

V. Conclusion

Since the beginning of our republic, federal authorities have recognized that states have ultimate supervisory responsibility over all attorneys. Congress has codified this proposition; the federal and state courts have repeatedly expressed it. Until recently, the Department of Justice did not disagree. Now the Department has promulgated a Proposed Rule which would place federal lawyers, alone among American attorneys, above the law. That Proposed Rule is a mistake of immense proportions which

should and will be denounced by the public, the bar and the courts alike.

Conference of Chief Justices

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March 31, 1994



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The Honorable Janet Reno
The Attorney General
Department of Justice
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10th Street & Constitution Avenue NW
Washington, DC 20530-0001

VIA FEDERAL EXPRESS

Dear Attorney General Reno:

**Re: Proposed Rule Relating to Communications with
Represented Persons**

I enclose the comment (the "Comment") of the special committee (the "Committee") of the Conference of Chief Justices (the "Conference") to the proposed regulation (the "proposed regulation") published on March 3, 1994, by the Department of Justice (the "Department"). The names and addresses of the members of the Committee are as follows:

The Honorable E. Norman Veasey (Chair)
Chief Justice, Supreme Court of Delaware
P.O. Box 1997
Wilmington, DE 19899

The Honorable Malcolm M. Lucas
Chief Justice, Supreme Court of California
303 Second Street, South Tower
San Francisco, CA 94107

The Honorable Luis D. Rovira
Chief Justice, Supreme Court of Colorado
State Judicial Building
2 East 14th Avenue
Denver, CO 80203

The Honorable Janet Reno
March 31, 1994
Page 2

The Honorable Richard W. Holmes
Chief Justice, Supreme Court of Kansas
Kansas Judicial Center, 301 W. Tenth Street
Topeka, KS 66612

The Committee has been authorized to act in this matter by resolution of the Conference unanimously adopted at the regular midwinter meeting of the Conference held on February 10, 1994. A copy of that resolution was sent to you under cover of my letter to you of February 15, 1994, and is set forth at pages 1-2 of the Comment.

Two members of the Committee (Chief Justices Veasey and Rovira) and Justice Randy J. Holland of the Delaware Supreme Court were privileged to meet with you and your staff on March 14, 1994. As I stated in my letter to you of March 18, 1994, we appreciate very much your invitation to the meeting and to continue the dialogue in an attempt to reach an accommodation. Following the meeting on March 14, we received a letter dated March 17, 1994, from Irvin Nathan, Esquire, of your office. Mr. Nathan's letter sets forth a lengthy list of areas where the Department believes it needs to be exempted from Rule 4.2. This list of exceptions essentially would swallow the rule.

In our meeting of March 14, 1994, confirmed in my letter of March 18, 1994, we undertook to propose a clear and discrete exception to Rule 4.2 which would be acceptable to the Conference. We believe "authorized by law" in the present Rule 4.2, when read in the context of the official comment, is narrow and clear, and does not admit of the breadth of the proposed regulation or the long list in Mr. Nathan's letter. In our view Rule 4.2 does not need amending.

Nevertheless, one option for each state supreme court would be to delete the "authorized by law" exception in its entirety. This course of action would seem to moot the proposed regulation. Another option is to offer an amendment, without prejudice, in the spirit of compromise. Accordingly, we propose for your consideration the following draft amendment to Rule 4.2 which the Committee is prepared to recommend to the Conference if agreement can be reached with the Department:

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 Honorable Janet Reno
March 31, 1994
Page 3

(a) the lawyer has the consent of the other lawyer in the matter;

(b) the lawyer is expressly authorized to do so by a specific Act of Congress, statute of this jurisdiction, or rule of a court of competent jurisdiction; or

(c) the represented party initiates the contact with the lawyer and the lawyer reasonably believes that notifying the party's lawyer creates the risk of death or substantial bodily harm.

Subsection (c) of this proposal is designed to parallel the analogous exception in Rule 1.6(b)(1) of the Model Rules of Professional Conduct relating to the attorney-client privilege.

We look forward to meeting further with you and your colleagues to continue the dialogue. We suggest, with the utmost deference, that if there is a good faith desire on the part of the Department to negotiate, it would be consistent with the spirit of compromise to hold in abeyance the official promulgation of the Regulation so those negotiations may promptly proceed.

I am enclosing an extra copy of this letter and comment for your convenience.

Respectfully,

A handwritten signature in black ink, reading "E. Norman Veasey". The signature is written in a cursive style with a large, looping initial "E" and a long, sweeping underline.

ENV/jer
Enclosure

cc: (w/enclosure)
The Honorable Malcolm M. Lucas
The Honorable Luis D. Rovira
The Honorable Richard W. Holmes
The Honorable Randy J. Holland
Mr. Larry L. Sipes
Mr. Thomas A. Henderson

CONFERENCE OF CHIEF JUSTICES

**COMMENT ON PROPOSED REGULATION
GOVERNING CONTACTS BY DEPARTMENT OF JUSTICE
ATTORNEYS WITH REPRESENTED PERSONS
28 C.F.R. PART 77**

**Special Committee of the Conference of Chief
Justices on the Proposed Regulation**

Chief Justice E. Norman Veasey, Delaware (Chair)

Chief Justice Malcolm M. Lucas, California

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
THE SCOPE AND BACKGROUND OF THE PROPOSED REGULATION	2
SUMMARY OF POSITION OF THE CONFERENCE	6
I. THE PROPOSED REGULATION DOES NOT COME WITHIN THE “AUTHORIZED BY LAW” EXCEPTION TO RULE 4.2 AND DR 7-104(A)(1) . .	7
A. Only State Supreme Courts May Create and Construe Ethical Rules	8
B. “Authorized by Law” is a Narrow Exception	8
II. THE SUPREMACY CLAUSE DOES NOT APPLY BECAUSE DEPARTMENT ATTORNEYS ARE REQUIRED BY FEDERAL LAW TO COMPLY WITH STATE ETHICS RULES	11
A. Regulation of Lawyers is the Exclusive Province of States	12
B. Presumption Against Preemption	13
C. Congress Defers to State Supreme Courts	14
D. The Proposed Regulation is Contrary to Congressional Act	15
E. Federal Courts Adopt State Ethical Standards	16
III. THE PROPOSED REGULATION VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS	18
A. Separation of Powers	18
B. Judicial Branch Governs Lawyers	19
CONCLUSION	21

INTRODUCTION

This comment is submitted by a special committee (the "Committee") of the Conference of Chief Justices (the "Conference") on a regulation which the Department of Justice (the "Department") proposes to adopt as 28 C.F.R. Part 77, governing contacts by Department attorneys with represented persons (the "proposed regulation"). The position of the Conference is set forth in the following resolution unanimously adopted by the Conference at its midyear meeting on February 10, 1994:

WHEREAS, the Attorney General of the United States plans to promulgate for comment a proposed regulation which would permit U.S. Department of Justice lawyers to communicate with represented persons under certain circumstances; and

WHEREAS, Department of Justice lawyers derive authority to practice law from their admission to the bar of the highest court of a State; and

WHEREAS, each State, under the authority of its highest court, is responsible for regulating the professional conduct of the members of its bar and establishing appropriate ethical standards and enforcement mechanisms; and

WHEREAS, this authority is essential to the administration of justice in each State, and could be eroded by such a regulation.

NOW, THEREFORE, BE IT RESOLVED that, in an effort to avoid a constitutional confrontation, a special committee be appointed by the President of the Conference and that it be charged with the responsibility of communicating to the Attorney General the grave concerns of the Conference regarding the proposed regulation.

In furtherance of the resolution, the Committee sets forth herein the position of the Conference.

THE SCOPE AND BACKGROUND OF THE PROPOSED REGULATION

. While purporting to be limited,^{1/} the proposed regulation authorizes a broad range of contacts between attorneys for the Department and persons represented by counsel, both in criminal and in civil matters. According to a draft "Monograph on Communications with Represented Persons and United States Attorneys' Manual Changes," dated July 1993 (the "Monograph"), the proposed regulation is a response to the claim that "many defendants have asserted that otherwise valid law enforcement communications were prohibited by DR 7-104(A)(1) of the American Bar Association Code of Professional Responsibility (and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct), and analogous state and local rules." Monograph at 1. Disciplinary Rule 7-104(A)(1) of the ABA Code of Professional Responsibility ("DR 7-104(A)(1)") 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 representa-

^{1/} The primary limitation to this authorization is set forth in Section 77.4, which provides that a communication is not permitted if it is prohibited by the United States Constitution, any federal statute, the Federal Rules of Criminal Procedure, or the Federal Rules of Civil Procedure.

tion 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 of Professional Conduct ("Rule 4.2"), which was adopted by the House of Delegates of the ABA in August 1983, provides:

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.

DR 7-104(A)(1), Rule 4.2, or their equivalents have been adopted in all 50 states and the District of Columbia.

The prohibition against a lawyer communicating with a represented party is a well-established and venerable principle of American ethics jurisprudence.^{2/} The prohibition has coexisted harmoniously for decades with the efficient administration of justice. It is based on deeply rooted concepts of ethical conduct which the proposed regulation would erode. Federal and state prosecutors have long been able to perform their important roles in law enforcement without violating the ethical restriction of Rule 4.2.

The purpose of this ethical rule is to protect against the "imbalance of legal skill and acumen between the lawyer and the party litigant" which makes contact by a lawyer

^{2/} See generally John Leubsdorf, *Communication With Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. Pa. L. Rev. 683 (1979); Gregory G. Sarno, Annotation, *Communication with Party Represented by Counsel as Ground for Disciplining Attorney*, 26 A.L.R. 4th 102 (1983).

with a represented person fundamentally unfair. *Messiah v. United States*, 377 U.S. 201, 211 (1964). Although the restriction may make it more difficult to obtain information in some instances, this consequence is comparable to other fundamental legal protections such as the attorney-client privilege. Like the attorney-client privilege embodied in Rule 1.6, Rule 4.2 recognizes that fairness in our judicial system outweighs information-gathering convenience. In fact, Rule 4.2 helps protect the attorney-client privilege by preventing a represented party from inadvertently waiving the privilege.

The concerns of the Department apparently originated with the decision of the Second Circuit in *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990). In response to the *Hammad* decision, then-Attorney General Richard Thornburgh issued a memorandum dated June 8, 1989 (the "Thornburgh Memorandum"). The Thornburgh Memorandum concluded:

In the near future, the Department will codify language in the Standards of Conduct, 28 C.F.R., Part 45, that will make the Department's position clear to the bench and bar. We intend to make clear that the "authorized by law" exemption in DR 7-104 applies to all communications with represented individuals by Department attorneys or by others acting at their direction. The Department also anticipates that the language will clarify that the Supremacy Clause will continue to provide Department attorneys and agents with adequate assurance that the United States will support them if any disciplinary authority other than the United States attempts to interfere with the legitimate investigative prerogatives of the government.

Thornburgh Memorandum at 7.

The Thornburgh Memorandum was widely criticized because it purported unilaterally to alter or limit the ethical obligations of Department attorneys whose ethical obligations arise because they are required to be admitted to practice in one of the 50 states or the District of Columbia. Of particular concern was the apparent view of the Department that it could disregard ethical obligations simply because such obligations were found to be inconvenient. The unlimited potential for abuse, along with the disturbance of the traditional balance between the powers of the government and the rights of the individual, prompted widespread opposition to the Department's policy.

On February 12, 1990, the ABA House of Delegates unanimously adopted a resolution opposing "any attempt by the Department of Justice unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers under applicable rules of the jurisdictions in which they practice." We concur with that resolution. The ABA resolution included a report^{3/} analyzing the Department's policy as set forth in the Thornburgh Memorandum, and concluded that neither the Supremacy Clause nor the "authorized by law" exception in Rule 4.2 provided a basis for excluding Department attorneys from the prohibition against contact with represented persons. The ABA's conclusions regarding DR 7-104(A)(1) and Rule 4.2 must be considered authoritative in

^{3/} The ABA's report was prepared by members of its Standing Committee on Professional Discipline, its Standing Committee on Ethics and Professional Responsibility, its Special Coordinating Committee on Professionalism, its Section of Criminal Justice, its Section of Individual Rights and Responsibilities, and its Section of Litigation. The report therefore reflects the views of a broad range of experienced practitioners and other experts.

right of the ABA's role in formulating those rules. This 1990 finding and conclusion of the ABA with respect to the Thornburgh Memorandum is equally applicable to the Department's currently proposed regulation. For an excellent discussion of the entire issue, *see* The Honorable Jamie S. Gorelick, "Government Contact With Persons Represented By Counsel" (May 1990) (provided to the Judicial Conference of the District of Columbia Circuit) (the "Gorelick paper").

SUMMARY OF POSITION OF THE CONFERENCE

After careful review of the legal positions offered by the Department, the ABA, and various courts and commentators, we are of the opinion that the proposed regulation is contrary to law for three reasons which are developed in detail *infra* under each of the following respective headings:

- I. The proposed regulation does not come within the "authorized by law" exception to Rule 4.2 and DR 7-104(A)(1) (*see* pp. 7-11 *infra*).
- II. The Supremacy Clause does not apply because Department attorneys are required by federal law to comply with state ethics rules (*see* pp. 11-18 *infra*).
- III. The proposed regulation violates the constitutional principle of separation of powers (*see* pp. 18-20 *infra*).

We respectfully recommend, therefore, that the Department reconsider the proposed regulation.

I. THE PROPOSED REGULATION DOES NOT COME WITHIN THE “AUTHORIZED BY LAW” EXCEPTION TO RULE 4.2 AND DR 7-104(A)(1)

Section 77.12 of the proposed regulation provides:

Communications with represented parties and represented persons pursuant to these rules are intended to constitute communications that are “authorized by law” within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, DR 7-104(A)(1) of the ABA Code of Professional Responsibility, and analogous state and local federal court rules. In addition, these rules are intended to preempt the application of state and local laws and rules to the extent that they relate to contacts by attorneys for the government, and those acting at their discretion or under their supervision, with represented parties or represented persons in criminal and civil investigations and litigation. They are designed to govern the conduct of attorneys for the government in the discharge of their duties to the extent that state and local laws or rules are inconsistent with these rules. When the Attorney General finds a willful violation of any of these rules, however, sanctions for the violation of this rule may be applied, if warranted by the appropriate disciplinary authority.

This section states that the Department “intends” the communications authorized by the proposed regulation to come within the “authorized by law” exception to Rule 4.2 and DR 7-104(A)(1). It also provides that, if there is a conflict, the proposed regulation preempts any inconsistent state or local law. As discussed herein, these assumptions underlying the proposed regulation are plainly inconsistent with applicable law.

Unless the proposed regulation comes within the “authorized by law” exception, it is in direct conflict with Rule 4.2. The proposed regulation would authorize numerous contacts between Department attorneys and represented persons but would “limit” those

contacts to periods prior to the commencement of formal proceedings. But this “restriction” does not exempt the proposed regulation from the prohibition of Rule 4.2. The comment to Rule 4.2 clearly provides that such rule “covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” (Emphasis added.) With the exception of New Hampshire, every state that has adopted both Rule 4.2 and its comment has retained the above-quoted language. The proposed regulation therefore would permit communications that are otherwise prohibited by Rule 4.2.

A. Only State Supreme Courts May Create and Construe Ethical Rules

The state supreme courts adopted the ABA Model Rules with the ABA comment (in most instances). Who, then, is to determine the proper interpretation of Rule 4.2 and the intended scope of the “authorized by law” exception? It is unquestionably the exclusive province of the state supreme courts to construe Rule 4.2 and DR 7-104(A)(1) and to determine whether or not the Department’s proposed regulation falls within the “authorized by law” exception. The Department may not unilaterally do the construing or the imposing of its interpretation of state rules of ethics so as to be authoritative or binding on state supreme courts.

B. “Authorized by Law” is a Narrow Exception

The ABA and the courts have been consistent in limiting the application of the “authorized by law” exception to specific constitutional or statutory authorizations, or

rules of court. Because the Department's proposed regulation does not fall into any of these categories, it does not come within the exception.

The Department relies on an over-broad interpretation of "authorized by law." Prior to the adoption of Rule 4.2, the ABA issued an informal opinion indicating the scope of "authorized by law" as used in Canon 9 (the predecessor to DR 7-104(A)(1)). The ABA's informal opinion stated that the "authorized by law" exception applied to a situation where "applicable statutes or procedural rules or rules of law in a particular jurisdiction expressly permit [the contact]." ABA Comm. on Professional Ethics and Grievances, Informal Op. 985 (1967). No broader scope to the exception was authorized by the opinion. This narrow treatment of the exception is confirmed by other informal ethics opinions of the ABA.^{4/}

When the ABA adopted Rule 4.2, it did so premised upon its view of the narrow scope of the "authorized by law" exception. The comment to Rule 4.2 demonstrates this limited scope. The example given in the comment of a communication authorized by law is "the right of a party to a controversy with a government agency to speak with government officials about the matter." The selection of this example, where a party (as opposed to an attorney) exercises a constitutional right (not a regulation-created right) to

^{4/} See Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties*, 67 Ind. L.J. 549, 569-73 (1992) (comprehensively analyzing "the ABA's traditional narrow treatment of the exception") (hereinafter cited as "Lidge").

communicate with government officials, evidences the ABA's intention that the "authorized by law" exception was to be interpreted narrowly and applied only in limited circumstances.^{2/}

The ABA's limitation on the "authorized by law" exception is further confirmed by its 1990 resolution in opposition to the Thornburgh Memorandum. "[T]he 'authorized by law' exemption was intended to be considerably narrower and more specific than the Attorney General's Memorandum claims." *Id.* at 6. The ABA rejected the assertion that the Department could create an exemption for itself.

Recent case law corroborates the narrow scope of the "authorized by law" exception and refutes the Department's argument in support of its proposed regulation. In *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993), the Ninth Circuit held that "the 'authorized by law' exception to [the California Rule] requires that a statutory scheme expressly permit contact between an attorney and a represented party." *Id.* at 1461 (emphasis added). The court rejected the argument that the Department's general enabling statutes permitted the contact for purposes of the "authorized by law" exception.

^{2/} Although Professor Geoffrey C. Hazard, Jr., has expressed his recollection that the "authorized by law" exception "was drafted mindful of the government lawyer problem" (Professor Hazard's letter to Chief Justice E. Norman Veasey dated January 19, 1994, at 2), this recollection is "unsupported by anything in the record of the drafting or approval of the Rule" (Professor Samuel Dash's letter to Chief Justice E. Norman Veasey dated February 1, 1994, at 2). The official comment to Rule 4.2 does not mention the "government lawyer problem." Moreover, notwithstanding Professor Hazard's role in the drafting of the Model Rules, it is the interpretation of the entire ABA (as manifested in its opinions and its February 1990 resolution) that is the authoritative interpretation.

See also Lidge, 67 Ind. L.J. at 574-81 (concluding that principles of statutory interpretation, as well as compelling policy considerations, support a narrow interpretation of the exception).

II. THE SUPREMACY CLAUSE DOES NOT APPLY BECAUSE DEPARTMENT ATTORNEYS ARE REQUIRED BY FEDERAL LAW TO COMPLY WITH STATE ETHICS RULES

The Supremacy Clause of the United States Constitution provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. The United States Supreme Court has consistently recognized the limited scope of the Supremacy Clause. In *California v. Arc America Corp.*, 490 U.S. 93 (1989), the Supreme Court held that there is a “presumption against finding pre-emption of state law in areas traditionally regulated by the States.” *Id.* at 101. Accordingly, “[w]hen Congress legislates in a field traditionally occupied by the States, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also* *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (holding that “a ‘clear and manifest purpose’ of pre-emption is always required”).

A. Regulation of Lawyers is the Exclusive Province of States

The regulation of lawyers is traditionally the exclusive province of the states. The Supreme Court has unequivocally recognized that:

Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct.

Leis v. Flynt, 439 U.S. 438, 442 (1979). The Court has emphasized that “the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1974). See also *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (describing how “a court must be careful not to . . . intrude into the state’s proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts”). Lawyers working for the federal government are bound, as officers of the court, to comply with their ethical obligations. See, e.g., *Berger v. United States*, 295 U.S. 78 (1935).^{6/}

^{6/} The power of states to license lawyers, including those admitted to practice in federal courts, has been recognized by both Congress and the federal judiciary. See Fed. R. App. P. 46; *Theard v. United States*, 354 U.S. 278, 281 (1957).

B. Presumption Against Preemption

The Supremacy Clause cannot be used to justify preempting a state ethics rule by means of a regulation adopted by the Department. Because the regulation of attorneys is an area traditionally entrusted to the states, a presumption against preemption exists.⁷¹ *California v. Arc America*, 490 U.S. at 101. Congress has not expressed a “manifest and clear purpose” to permit the Department to intrude upon this traditionally state regulated field. *See R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 140 (1986) (“In determining whether Congress has invoked this pre-emption power, we give primary emphasis to the ascertainment of congressional intent.”).

To preempt state law, Congress must do so expressly. The Department does not claim that Congress has expressly preempted state ethics rules or expressly permitted the Department to do so. The Department relies solely on general statutes which are not applicable. Neither the authorization of the Attorney General, as a departmental head, to prescribe regulations for the Department, 5 U.S.C. § 301, nor the general provisions authorizing the Department to prosecute civil and criminal matters, 28 U.S.C. §§ 515(a),

⁷¹ In fact, there have been many instances where federal intervention has been found to be inappropriate in areas traditionally occupied by state governments. *See, e.g., Trammell v. United States*, 445 U.S. 40 (1980) (area of marriage and domestic relations traditionally reserved for state regulation); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (daily operation of local school systems traditionally reserved for state regulation); *Turner v. Safely*, 482 U.S. 78, 84 (1987) (state prison administration not an appropriate area for federal interference).

6, 533, 547, expressly state an intent by Congress to empower the Department with the ability to preempt state ethics rules.^{8/}

C. Congress Defers to State Supreme Courts

Finally and dispositively, a Supremacy Clause argument is unnecessary and inapplicable in light of the federal adoption of Rule 4.2 and DR 7-104(A)(1). The Department of Justice Appropriation Authorization Act, Fiscal Year 1980 (the "Act") prohibits "the compensation of any person hereafter employed as an attorney (except foreign counsel employed in special cases) unless such person shall be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia." Pub. L. No. 96-132, 93 Stat. 1040, 1044 (1979) (emphasis added). This federal requirement has been repeatedly reenacted by Congress and remains currently in effect. *See* Pub. L. No. 102-395, 106 Stat. 1828, 1838, § 102(a) (1992). The Department's Monograph on the proposed regulation concedes that "[a]l Department

^{8/} The Department's position that the general statutory provisions cited above authorize the proposed regulation is untenable for the additional reason that it would permit the Department to enact regulations in which the Department has an inherent conflict of interest. There is an important distinction between adopting regulations specifying internal operating procedures, which is permissible, and adopting regulations that benefit the Department at the expense of the rights of third parties or in an attempt to override state law. Under its interpretation of 5 U.S.C. § 301 and 28 U.S.C. §§ 515(a), 516, 533, 547, the Department could exempt itself from ethical rules or even rules of civil or criminal procedure as long as its investigatory or prosecutorial powers were enhanced for its benefit under the "banner" of law enforcement or "fighting crime." Congress clearly did not intend to confer such a sweeping power on an agency that would have a natural bias in favor of removing such restrictions. Congress has not empowered a conflicted agency to adopt regulations which would override state ethics rules to benefit the litigation position of the conflicted agency.

attorneys are required to be members of the bar of one or more states.” Monograph at 78.

Accordingly, in adopting the Act, Congress has affirmatively enacted a federal statute expressly manifesting its intent that Department attorneys must be subject to the rules and regulations applicable to members of the bar of a State, territory, or the District of Columbia. Such requirements necessarily include applicable rules governing professional conduct. In fact, a 1979 Department memorandum recognizes that the Act “reflects a congressional decision to defer to the States, territories and the District of Columbia the threshold judgment regarding a person’s qualifications and suitability to practice law.” Memorandum of the Department Re Petition of the Board of Governors of the District of Columbia Bar for Amendment of Rules Implementing Canon 9 (Sept. 11, 1979) at 5.^{2/}

D. The Proposed Regulation is Contrary to Congressional Act

The proposed regulation attempts to limit the obligation of the Department’s attorneys to comply with the ethical rules as adopted by, and interpreted by, the jurisdiction(s) in which they are licensed to practice. As a result, the proposed regulation is in direct conflict with the Act, which requires such attorneys to be licensed by a State, territory, or the District of Columbia, and abide by the obligations necessarily imposed

^{2/} Furthermore, the Department’s own regulations recognize that its attorneys “should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association.” 28 C.F.R. § 45.735-1(b).

such a privilege. Because of this conflict, the provisions of the proposed regulation must yield to the superior authority of the Act. As the leading commentator on statutory construction has written:

Thus administrative regulations rank below statutes in the order of precedence. In the event of conflict between the provisions of a statute and an administrative regulation, the former prevails.

2 Norman J. Singer, *Sutherland Statutory Construction* § 36.03, at 60 (5th ed. 1993).^{10/}

The proposed regulation itself recognizes that it must give way in the event of conflict with another federal statute. Section 77.4 states that “[n]otwithstanding any other provision of these rules, any communication that is prohibited . . . by any federal statute . . . shall be likewise prohibited under these rules.” Thus, well-established federal statutory law and the proposed regulation itself mandate that the regulation’s provisions limiting the effect of Rule 4.2 or DR 7-104(A)(1) are invalid.

E. Federal Courts Adopt State Ethical Standards

The ethical obligations of Rule 4.2 and DR 7-104(A)(1) have also been incorporated into federal law by the local rules of federal courts. Nearly all United States district courts have adopted either the ABA Model Rules of Professional Conduct or the ABA Code of Professional Responsibility. *See Rand v. Monsanto Co.*, 926 F.2d 596,

^{10/} See also *Int’l Ry. Co. v. Davidson*, 257 U.S. 506, 514 (1922) (“A regulation to be valid must be reasonable and must be consistent with law.”); 1 Am. Jur. 2d *Administrative Law* § 133 (1962) (“The rulemaking power of administrative agencies does not permit the enactment of regulations which are inconsistent with the expression of the lawmakers’ intent in statutes other than those under which the regulations are issued.”).

601-603 (7th Cir. 1991) (containing a detailed listing of each district court and the method by which the Code or Model Rules have been incorporated). The majority of these district courts have incorporated the ethical requirements of the state in which the court is located, while the remainder have directly adopted the Code, Model Rules, or both. *Id.*

Because the inconsistency between Rule 4.2 and the proposed regulation is a federal-federal conflict, the Supremacy Clause has no application. As the Eighth Circuit has recognized, “Supremacy Clause considerations do not come into play when a court balances competing federal rules.” *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1179 n. 14 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). The First Circuit has specifically held that the Supremacy Clause is not implicated where the validity of a state ethics law adopted by a federal district court is at issue. In *United States v. Klubock*, 832 F.2d 649 (1st Cir. 1987), the court held:

It is axiomatic that the Supremacy Clause of the Constitution has relevance only to *state* interference with federal law. Yet, since its adoption by the District Court, PF 15 [the Massachusetts ethics rule] can no longer be considered to be a state law, because by its incorporation into the local rules, PF 15, has become *federal* law. It is immaterial that its origin lies with a rule of the [Supreme Judicial Court of Massachusetts (“SJC”)]. By its absorption into the local rules, first indirectly in the original version of Local Rule 5(d)(4)(B), and later by specifically including SJC Rule 3:08 (which contains PF 15) within the text of Local Rule 5(d)(4)(B), PF 15 is as much federal law as if enacted initially by the district court. To that extent, the Supremacy Clause argument is clearly spurious.

at 651 (emphasis in original) (footnote and citations omitted). This holding was affirmed by the First Circuit *en Banc*. See *United States v. Klubock*, 832 F.2d 664, 667 (1st Cir. 1987) (reaffirming that “the supremacy clause was not implicated because the Massachusetts rule had been incorporated as a federal local rule”).

The proposed regulation is inconsistent with long-standing federal statutes and federal court rules. Accordingly, the proposed regulation cannot be upheld based on the Supremacy Clause of the United States Constitution.

III. THE PROPOSED REGULATION VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS

A. Separation of Powers

The doctrine of “separation of powers” is a bedrock element of our constitutional system. The United States Constitution divides and disperses governmental power among three co-equal branches: the Executive, the Legislative, and the Judicial. As stated by the United States Supreme Court, “the ultimate purpose of this separation of powers is to protect the liberty and the security of the governed.” *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 256 (1991). The founders of our nation realized that the true separation of powers necessary to prevent “a gradual concentration of the several powers in the same department” could be accomplished only by assuring that each branch of government had

the constitutional means "to resist the encroachment of the others." *The Federalist* No. 51, at 321-322 (James Madison) (Clinton Rossiter ed., 1961).

B. Judicial Branch Governs Lawyers

The United States Supreme Court has consistently reaffirmed the importance of the separation of powers as central to our system of limited government.^{11/} Federal and state courts have repeatedly recognized that the regulation of attorneys is the exclusive prerogative of the judicial branch. Among federal courts, "the principle is firmly established that the judicial branch of the government, acting through the courts, has exclusive jurisdiction to admit, control, and disbar attorneys." *Feldman v. State Board of Bar Examiners*, 438 F.2d 699, 702 (8th Cir. 1971). This exclusive jurisdiction has also been characterized as a duty: "Lawyers are officers of the court and the courts have a duty to supervise their conduct." *Saier v. State Bank of Michigan*, 293 F.2d 756, 760 (6th Cir. 1961).

State courts uniformly recognize the exclusivity of the judiciary's role in regulating lawyers. The Delaware Supreme Court has emphasized "the fundamental constitutional principle that [the Supreme] Court, alone, has the sole and exclusive responsibility over

^{11/} See, e.g., *Metropolitan Washington Airports Auth.*, 501 U.S. at 256; *Bowsher v. Synar*, 478 U.S. 714, 725 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935). The Supreme Court has firmly stated that "we have not hesitated to invalidate provisions of law which violate this principle." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). See also *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 420 (9th Cir. 1980) ("Executive or legislative actions which contravene the principle of separation of powers are unconstitutional").

all matters affecting governance of the Bar.” *In re Infotechnology, Inc. Shareholder Litig.*, 582 A.2d 215, 220 (Del. 1990). The Wisconsin Supreme Court has stated that “the regulation of the practice of law is a judicial power and is vested exclusively in the supreme court.” *State of Wisconsin v. The Wisconsin Senate*, 454 N.W.2d 770, 773 (Wis., 1990). The court emphasized that it has the power to “modify or declare void any such rule, law, or regulation by whomever promulgated, which appears to the court to interfere with the court’s control of such practice.” *Id.* at 773. Similarly, the Court of Appeal of Louisiana has held that it has “exclusive and plenary power to define and regulate all facets of the practice of law, including . . . the professional responsibility and conduct of lawyers.” *Chaffin v. Chambers*, 577 So.2d 1125, 1130 (La. Ct. App. 1991).

The proposed regulation clearly violates the doctrine of separation of powers as well as principles of federalism. The Department, an agency of the federal executive branch, is attempting to regulate attorney conduct, an area that is the exclusive realm of the state judicial branches. It is a basic tenet of separation of powers that one branch of government may not encroach upon areas allocated to another branch of government. *See Powell v. McCormack*, 395 U.S. 486, 519 (1969); *Nixon v. United States*, 113 S. Ct. 732 (1993).

CONCLUSION

We are concerned that if the Department's position is not reconsidered, there will be a confrontation of constitutional proportions. Litigation in some form would seem to be inevitable in view of the attempt by the Department to promulgate what we respectfully submit is an invalid regulation. The aggressive actions recently taken by the Department in Colorado and Kansas have significantly heightened this concern. See *United States v. Supreme Court of Colorado*, C.A. No. 93-Z-2672 (D. Colo.);^{12/} *United States v. Monnat and Spurrier*, C.A. No. 93-1326-PFK (D. Kan.). We respectfully urge that the Department give serious consideration to the position of the Conference as supported by the authorities set forth herein, including the Gorelick paper.

Rule 4.2, or its equivalent, has been adopted by the highest court of nearly every state. The United States district courts sitting in each of those respective states have, in most instances, likewise adopted Rule 4.2 or its equivalent. It follows ineluctably that the proper construction of the "authorized by law" exception to the prohibition against lawyers communicating with represented persons is the sole and exclusive province of each state's supreme court. The Department's understandable desire for uniformity provides no basis or support for its unilateral attempt to impose authoritatively its

^{12/} It is extremely significant that the aggressive attempt by the Department to enjoin the Colorado Supreme Court's enforcement of Colorado Rules of Professional Conduct 3.3(e) and 3.8(f) was thwarted when the Department's complaint was dismissed on March 18, 1994, by order of Judge Zita L. Weinshienk of the United States District Court of the District of Colorado.

interpretation of Rule 4.2 under any state's code of professional conduct. Only the supreme courts of the states may do so, just as they have the sole power to delete in its entirety or amend the "authorized by law" exception. Our interest as state courts is in overseeing the conduct of our state-licensed lawyers. Our jurisdiction does not extend to the federal courts or the operations of the Department, and we are not interested in interfering with or controlling their procedures and activities. Our only concern is that every lawyer admitted to practice by a state supreme court, including federal and state government lawyers, must abide by and be governed by that court's ethical rules.

As a matter of policy and ethics, as well as principles of federalism and separation of powers, state supreme courts have the sole and exclusive responsibility to supervise the practice of law in each jurisdiction. The state supreme courts cannot permit one class of lawyers (in this case lawyers employed by the Department, an agency of the executive branch of the federal government) to exempt itself from ethical rules imposed upon all lawyers by the judiciary of each state and the local federal district courts. Indeed, the exception for government lawyers embodied in the proposed regulation would essentially swallow the ethical rule as to that class of lawyers. Assuming Rule 4.2 could or should be amended or construed to permit some narrow law enforcement exemption, it must be the state supreme courts which do the amending or construing, not the Department.

The proposed regulation does not fit within the term "authorized by law," and it would fly in the face of the official comment and the ethical underpinning of Rule 4.2.

Moreover, the ABA House of Delegates (which adopted Rule 4.2 in the first place) unanimously opposed the principle behind the proposed regulation.

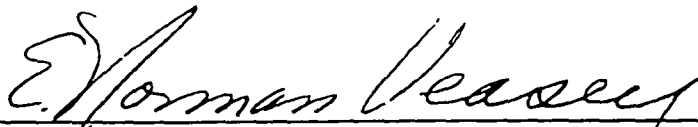
The proposed regulation cannot operate as a “law” for purposes of the Supremacy Clause. There is a presumption against preemption. No Act of Congress has adopted the provisions of the proposed regulation. No Act of Congress undertakes to preempt state law in this area. No Act of Congress purports to authorize the Department to adopt regulations to override state ethics rules governing lawyers. There is no support for the argument that Congress, in giving the Department the right to adopt procedural and internal rules, intended that such authority could be used to preempt state law in areas traditionally regulated by the states. Regulation of ethics of lawyers is undeniably an area traditionally regulated by the states. Not only does the proposed regulation fly in the face of principles of ethics ingrained in state law, it violates principles of federalism and separation of powers.

Federal statutory law itself, rather than supporting the Department’s Supremacy Clause argument, would invalidate the proposed regulation to the extent that it purports to create a “law” for purposes of the Supremacy Clause. The Act, a federal statute, requires Department lawyers to be authorized to practice law by a state, and, therefore, those lawyers are subject to state court ethical regulation. This is a Congressional Act which defers to the states. The proposed regulation must yield to the superior authority of this statute. Moreover, the ethical obligations of Rule 4.2 have been incorporated into

federal law by virtue of having been adopted in local rules of federal district courts. These are federal-federal conflicts, not federal-state conflicts. The Supremacy Clause, therefore, is inapplicable.

The only way, in our view, to attain the uniformity the Department seeks would be a discrete and limited amendment to Rule 4.2 adopted by each of the state supreme courts. Representatives of the Conference are quite willing to sit down and negotiate in good faith with representatives of the Department to that end.

**Special Committee of the Conference of Chief
Justices on the Proposed Regulation**

A handwritten signature in cursive script, reading "E. Norman Veasey", written over a horizontal line.

Chief Justice E. Norman Veasey, Delaware (Chair)

Chief Justice Malcolm M. Lucas, California

Chief Justice Luis D. Rovira, Colorado

Chief Justice Richard W. Holmes, Kansas

March 31, 1994

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CHICAGO PUBLIC HOUSING SWEEPS ISSUE

You are familiar with the "sweeps" issue already, but here is a brief account of where we have been on the issue.

When the Temporary Restraining Order issue was before Judge Anderson in Chicago, we were asked to consider whether to file a brief in support of the CHA's random sweeps policy. We decided not to file a brief, and the court enjoined CHA from engaging in sweeps in the future. The President responded to the decision, however, by requesting that the Attorney General and the Secretary of HUD come up with proposals for sweeps (or other effective law enforcement mechanisms) that would survive constitutional challenge.

After consultation with HUD, the Attorney General and the Secretary wrote a letter to the President outlining a constitutional law enforcement policy that included various methods, including securing the lobbies of public housing authority buildings, searching vacant apartments and common spaces, conducting frisks of suspicious persons, conducting warrant-authorized searches, conducting searches on the basis of exigent circumstances, and making arrests on probable cause and (in appropriate cases) with warrants. In addition, we noted that "consent searches" could be conducted based on the authority of lease provisions, under which tenants would give their consent by signing the leases. In the letter, we made it clear that those "searches" would be akin to emergency and maintenance inspections, which are routinely authorized by "consent clauses" in leases, both in public housing authorities and in private apartment complexes.

The President adopted our letter, in effect, in one of his Saturday radio addresses. The "consent search" provision, which was referred to in the address, aroused public commentary in the press and in Congress (the Senate passed a resolution endorsing the President's proposal). We have subsequently had several occasions to expand upon the brief reference to the "consent search" policy in the letter.

Our position, in brief, is this: We do not advocate forcing public housing tenants to sign consents to full-scale searches of their dwellings as a condition of obtaining any form of public housing. The type of lease condition we advocate is one that would permit routine administrative inspections for firearms pursuant to a "maintenance inspection" type clause that could be inserted into public housing leases. The inspection that we envision would be similar to the type that occurs under the consent decree agreed to by the CHA and the ACLU in the Summeries litigation in Chicago (the predecessor to the "sweeps" case). Under the consent decree, the housing authority sends inspectors to conduct routine inspections for firearms (and other illegal activity), either with advance notice or, in case of emergency, without advance notice. The inspectors examine the interior of the tenant's apartment, but do

not search the tenant's personal property or effects. The inspection system has proved effective in identifying "problem" apartments, and even though it may not turn up all firearms that may be concealed in an apartment, it is effective in identifying apartments that are being used for drug and gang activity. CHA has found the consent decree inspection procedure to be quite useful, and we believe it can be effective elsewhere as well. Because it does not involve full-scale searches of personal property, it has much more in common with an inspection by a maintenance man than a police stem-to-stern law enforcement search. We believe that such a procedure is constitutional, and that a housing authority may insist on consent to such a regime as a condition of the lease.

If a housing authority wishes to conduct more intensive searches, we believe that it may still do so with valid consent, but in such cases the housing authority must take care to ensure that the consent is voluntary. In the case of persons who have no other choice but public housing, a lease term requiring that they consent to full searches of their apartments as a condition of obtaining housing may be regarded as coercive, and there is litigation risk in insisting on such a clause. We have not advocated putting public housing tenants in that position. If it is considered absolutely essential to conduct regular full-scale searches of apartments in particular buildings, it may be necessary for public housing authorities to offer tenants who do not want to consent to such searches either the opportunity to "opt out" of such clauses or the opportunity for housing elsewhere in the system where they would not be required to consent to full-scale searches.

This policy was the subject of a House committee hearing in Chicago on April 22 and a White House meeting with public housing authority directors on May 4, but there has not been any apparent public or press interest in the subject since that time.



Office of the Attorney General
Washington, D. C. 20530

April 14, 1994

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On April 8, 1994, you asked us to work together to devise law enforcement measures that would be effective and constitutionally valid in dealing with the severe problems of violent crime in urban public housing developments such as Robert Taylor Homes and Stateway in Chicago. During the past week, we have worked productively toward that end. This letter outlines the conclusions we have reached regarding a variety of law enforcement techniques that might be used in combatting this grave problem.

You are familiar with the background: In response to the escalation of violence and the prevalence of firearms in public housing projects in Chicago, the Chicago Housing Authority (CHA) instituted a policy of conducting warrantless, apartment-to-apartment searches of CHA public housing projects. On April 7, 1994, a federal court in Chicago held that CHA's search policy violated the Fourth Amendment. On that basis, the court enjoined CHA from undertaking further warrantless apartment-to-apartment searches of CHA housing units. The court made clear, however, that its ruling did not preclude CHA from taking other steps to conduct searches in and around the housing projects.

In the Chicago case, although some tenants opposed the CHA's "sweep search" policy, many others supported the policy and supported CHA's efforts to maintain order and combat gang violence in the housing projects. The case also made vividly clear once again how pervasive violence has become in many of our inner-city housing projects. While striking down the particular "sweep search" policy employed by CHA, the judge recognized that the level of violence in the housing projects represents a grave threat to the lives and safety of innocent persons in and around the CHA buildings.

Following the court's ruling and your request for us to focus intensively on this issue, the Department of Justice consulted with the Department of Housing and Urban Development regarding the

options available to a public housing agency such as CHA in conducting searches on the premises of public housing projects that suffer from very high rates of violent crime. We outline here the options that we considered, and which we concluded are constitutionally valid, at least in the extraordinary circumstances presented by the crime problem in the Robert Taylor Homes and Stateway developments.

1. Securing the Building Entrances and Lobbies. Any effort to stem violence in crime-ridden public housing projects must begin in the lobbies of the buildings. In some high-rise public housing projects, gang members effectively control access to the buildings. They move freely in and out of the buildings. While some buildings are protected by security guards, those guards are often intimidated by gang members, and they therefore let unauthorized persons enter the buildings unchallenged.

It is essential that the housing authority gain control of building lobbies and common areas. To accomplish that end, the authority can erect fences around buildings, issue identification cards to tenants, and install magnetometers or metal detectors at the building entrances. Security personnel should be accorded the authority to conduct follow-up searches with hand-held metal detectors when necessary. They should also be authorized to search packages and clothing, and to refuse entry to anyone who does not submit to inspection. Most importantly, the authority and the local police must cooperate to ensure that the security guards have sufficient protection to do their screening work effectively. If the ground floor of the building is secure, other techniques may not be necessary; if it is not, other techniques are likely to prove futile.

2. Consent Searches. A search is lawful if it is conducted pursuant to an uncoerced consent. Leases in housing projects, as elsewhere, typically include a standard consent clause permitting the housing authority to conduct routine maintenance inspections and to enter the tenant's apartment in case of emergency. Where crime conditions in the housing development make unit-by-unit inspections essential, similar lease consent clauses could be employed to authorize periodic administrative inspections of tenants' units for unlicensed or unauthorized firearms.

As in the case of maintenance inspections, such firearms inspections should be conducted on a routine basis, during daylight hours, and should be no more intrusive than absolutely necessary to determine whether weapons are present in the tenant's unit.

If the agency gives advance notice of the fact that an inspection will be conducted and the general period within which it will take place the intrusiveness of the inspection will be lessened and any constitutional objection to the inspection thereby reduced.

In appropriate circumstances, tenant associations should be encouraged to endorse the use of building entrance security devices and the inclusion of consent clauses in lease agreements. A resolution by a tenant association would demonstrate widespread tenant support for such measures, which is an important factor in determining whether to include such a clause in the lease. In addition, a showing of widespread tenant support would be helpful in responding to challenges by particular tenants to the constitutionality of restrictions on entry and consent clauses in leases.

3. Searches of Common Areas and Vacant Apartments. Experience in Chicago teaches that gangs commonly use vacant apartments as bases of operation. The housing authority can search the common areas of public housing projects and vacant apartments without consent or a warrant, and at any time of the day or night.

4. Weapons Frisks of Suspicious Persons. If police or security personnel have reason to believe that an individual is involved in criminal activity and that he is armed, they may frisk him for weapons. Where police establish a presence in an area and use their lawful power to stop and frisk persons engaged in suspicious behavior, the use of that power can be effective in disrupting and deterring violent crime.

5. Warrant Searches on Probable Cause. Whenever law enforcement officials have probable cause to believe that a specific dwelling contains evidence of a crime, a search may be conducted with a judicial warrant. Police should make use of expedited techniques for obtaining warrants, such as by telephone or by having magistrates readily available to issue warrants.

6. Searches Based on Exigent Circumstances. Housing authority officials may conduct warrantless searches of individual units where there is justification for a search but insufficient time to obtain a judicial warrant.

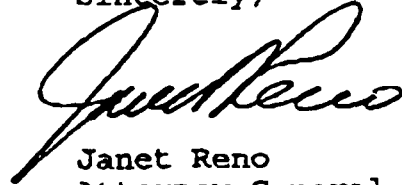
7. Arrest Warrants. Housing or local police may enter a dwelling unit to execute an outstanding arrest warrant if the fugitive resides in the unit and the police have reason to believe he is present.

During staff consultations between the two Departments, we have discussed these alternatives and others in more detail, and we

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will continue working together in devising and refining law enforcement strategies that can be applied to deal with this crisis.

Sincerely,



Janet Reno
Attorney General



Henry Cisneros
Secretary of Housing and
Urban Development

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PROSECUTION OF BRANCH DAVIDIANS IN WACO, TEXAS

1. ISSUE STATEMENT

O This investigation and prosecution is related to the shootout between ATF agents and former residents of the Branch Davidian compound near Waco, Texas, on February 28, 1993, and ensuing events. Four ATF agents were killed in the shootout with David Koresh and his followers; sixteen other agents were injured.

O On August 6, 1993, twelve followers of David Koresh were indicted on charges related to the shootout between ATF agents and former residents of the Branch Davidian Compound near Waco, Texas, on February 28, 1993, and the ensuing events that culminated in a fire at the compound on April 19, 1993. The following defendants were indicted: Kathryn Schroeder, Brad Eugene Branch, Kevin A. Whitecliff, Clive J. Doyle, Jaime Castillo, Livingstone Fagan, Paul Gordon Fatta, Woodrow Kendrick, Norman Washington Allison, Graeme Leonard Craddock, Renos Avraam, and Ruth Ottman Riddle. Charges in the ten-count indictment included conspiracy to murder federal law enforcement officers, aiding and abetting the murder of four ATF agents, attempt to murder federal law enforcement officers, using a firearm during a crime of violence, and various other firearms offenses. At the direction of the Attorney General, the Criminal Division is supervising the case. A Division attorney is on the trial team.

On September 9, 1993, Kathryn Schroeder pled guilty to one count of aiding and abetting in forcibly resisting federal law enforcement officers while armed and agreed to cooperate in the prosecution of the remaining defendants. Schroeder was at the compound during the shootout with ATF on February 28, 1993, but was released, along with her children, during the ensuing standoff with federal agents. Her husband, Michael Schroeder, was killed in a second shootout with ATF agents on February 28.

The Trial of the remaining eleven defendants commenced on January 10, 1994. On February 26, 1994, the jury acquitted all defendants of conspiracy to murder federal agents. The jury convicted five of the defendants -- Brad Eugene Branch, Kevin Whitecliff, Jaime Castillo, Livingstone Fagan, and Renos Avraam -- of aiding and abetting the voluntary manslaughter of ATF agents. The five defendants and two others, Graeme Leonard Craddock and Ruth Ottman Riddle, were also convicted of using a firearm during a crime of violence in violation of 18 U.S.C. § 924 (c). Additionally, Craddock was convicted of unlawful possession of an explosive grenade. Paul Fatta was convicted of two counts related to the possession of machineguns. Following the verdict, the district court indicated an inclination to

set aside the verdicts under 924(c) since the jury acquitted the defendants of conspiracy to murder federal agents, the underlying predicate for the § 924(c) counts.

0 The initial raid of the compound by ATF on February 28, 1993, and the decision to allow the FBI to introduce teargas into the compound on April 19, 1993, have been the focus of considerable controversy and the subject of internal reviews by this Department and the Department of the Treasury.

2. STATUS

On February 28, 1994, the government filed a motion in support of maintaining the § 924(c) verdicts. The government cited federal cases in support of the position that a verdict under § 924(c) may stand notwithstanding an acquittal of the predicate offense as long as the evidence would have supported a guilty verdict. On March 9, 1993, the trial judge issued an order reinstating the § 924(c) counts. Sentencing for the eight convicted Branch Davidian defendants is set for June 16 and 17 in San Antonio, Texas. A sentencing date for cooperating defendant Kathy Schroeder has not been set.

3. DEPARTMENT POSITION

In a statement to the press on February 26, 1994, the Attorney General described the jury's verdict as a thoughtful one. While press accounts have generally described the verdict as "a blow" to the government, our view is that, in light of all the events surrounding this case, the verdict was favorable and reasonable.

4. DEVELOPMENTS

Following the fire at the Branch Davidian Compound, the Attorney General instituted crises management training for her senior staff. Such training took place at Quantico on April 18 and 19 and was attended by the Attorney General and her senior staff. Additional training sessions are planned. The Terrorism and Violent Crime Section has submitted a proposal to Jo Ann Harris concerning a procedure to create a crises response team for future hostage/barricade incidents. The mission of this team would be to provide legal support to assist law enforcement officials on the scene to resolve the crisis and promote efforts relating to the subsequent investigation and prosecution of the actors involved in the incident.



Department of Justice

FOR IMMEDIATE RELEASE
Saturday, February 26, 1994

AG
(202) 514-2007
TDD (202) 514-1888

STATEMENT OF U.S. ATTORNEY GENERAL JANET RENO ON WACO VERDICT

WASHINGTON D.C. -- The jury in this case has spoken after seven weeks of trial. It is clear that the jury recognized in its verdict that the killings of the four ATF agents were not justified.

The findings that these deaths were not justified makes clear that the government had a responsibility to act. The shooting of law enforcement officers doing their duty can never be tolerated.

I am grateful for the excellent and professional efforts of the prosecutors Ray and LeRoy Jahn, Bill Johnston, John Phinizy and John Lancaster, and for the splendid efforts of the Texas Rangers and the Texas Department of Public Safety.

This closes another chapter in the Waco tragedy.

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LESSONS LEARNED -- ACTIONS TAKEN

A Summary: One Year After the Events Near Waco

February 28, 1994

Introduction

As we look back one year after ATF's tragic experience near Waco, Texas, the Department of the Treasury's Office of Assistant Secretary (Enforcement) determined that it would be appropriate to take stock of both the lessons learned from that experience and the actions taken since the Waco Report was issued on September 30, 1993. The following summary represents its overview of significant lessons learned and actions taken.

In addition, the Bureau of Alcohol, Tobacco and Firearms (ATF) has prepared a more detailed report of lessons learned and actions taken by ATF -- which will serve as a blueprint for ATF's continuing efforts to build upon the lessons learned from the Waco experience. Because of the sensitive nature of that report, and its discussion of law enforcement techniques, it is not being made public -- although certain appropriate portions of it are quoted here.

Although no inquiry and no reforms can bring back any of the lives lost near Waco, it is Treasury Law Enforcement's goal that the review and its resulting changes will prevent the recurrence of such a tragedy in the future.

The Waco Administrative Review

One of the most powerful lessons learned from the Waco tragedy is that Government can, when properly directed and motivated, investigate its own conduct objectively and fairly. In accordance with the President's directive to conduct a "vigorous and thorough" review of the events leading to the loss of law enforcement and civilian lives, Secretary Bentsen established the Waco Review, a team of agents and attorneys drawn from outside the Department of the Treasury and inside Treasury law enforcement's ranks (excluding ATF). The Review Team was guided and supervised by three prominent independent reviewers, Los Angeles Chief of Police Willie Williams, former chief Watergate prosecutor Henry Ruth and Pulitzer Prize winning journalist Edwin Guthman, and led by Assistant Secretary (Enforcement) Ronald K. Noble. Noble promised that the Review would "leave no stone unturned." The Review delivered on his promise.

As Secretary Bentsen said after the Review's Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco and Firearms Investigation of Vernon Wayne Howell, also known as "David Koresh," (the "Report") was released:

The Review gave me the truth and a full accounting of the facts, good and bad. That enabled me to tell

the American people what really happened near Waco. The Review became a model for internal investigations. It showed government can investigate itself -- do it right -- and do it quickly.

The American public hailed the Report for its fairness and thoroughness. Representative Gordon Lightfoot emphasized that the Report "reflects the hard work and dedication of many individuals." According to Senator Dennis DeConcini, the Report was "thorough, impartial and self-effacing." Representative Steny Hoyer called the report "comprehensive," the *Los Angeles Times* called it a "courageous, candid evaluation" and the *Sacramento Bee* proclaimed "no punches have been pulled."

The objective, fair, searching and thorough review conducted by the Waco Review identified and discussed in a systematic manner the weaknesses that needed to be addressed. The Report, released on September 30, 1993, after a five month investigation, set forth a roadmap for Treasury and ATF to follow to strengthen the agency.

Moreover, a significant added benefit to staffing the Review with agents drawn from all of Treasury's law enforcement bureaus, (Customs, Secret Service, IRS, FLETC and FinCEN), is that each of those agents brought back to their respective bureaus three important messages: 1) Treasury law enforcement's bureaus can work together cooperatively and successfully as a team to produce a comprehensive and honest product; 2) Some things went wrong near Waco and 3) How to avoid such occurrences in the future. In a sense, these agents, upon the Review's completion became ambassadors for the Review -- teaching their fellow agents about the lessons they had learned through the review process.

The Report as a Tool for Learning

The Review's Report, unlike many government reports, has not simply been gathering dust since its issuance. To the contrary, it is very much a living document. One of incoming ATF Director John Magaw's first directives was to make the Report mandatory reading for all ATF agents -- from those on the line all the way up through the agency's command. In so doing, Director Magaw made significant strides in educating ATF's agents about the errors made near Waco and how to avoid them in the future. As one ATF agent was quoted shortly after the Report was released, "the Report could spur the reinventing of a better Bureau." In addition, both at the Federal Law Enforcement Training Center ("FLETC") and in law enforcement training courses across the nation, the Report is used as a teaching device.

Personnel Actions

One lesson learned from Waco was that ATF needed better leadership -- most importantly, in light of the Report's findings, the Bureau needed experienced leadership with unquestionable integrity. Upon receiving the Report, Secretary Bentsen took swift action to provide ATF with new leadership.

First, the Secretary removed ATF's top leadership when the Report was released. The Secretary removed from their positions five persons -- all of whom had been dishonest either with the Review or the American people. Included in those five were the two principal raid commanders, SAC Phillip Chojnacki and ASAC Charles Sarabyn. (ATF Director Higgins resigned a few days before the Report was issued. His integrity was not challenged.)

The Secretary selected John Magaw to serve as ATF's new Director. Magaw, who was previously the Director of the Secret Service, brought a wealth of law enforcement experience to the Bureau as well as a reputation for integrity. The Secretary and Magaw, who recognized that Higgins had not been kept properly informed by his subordinates, acted to tighten the lines of authority at ATF and to insure that the Director was kept properly informed. First, they restructured the composition of ATF's command by creating a "Deputy Director" position; second they filled that slot with Daniel Black, a veteran of over 25 years in federal law enforcement. In addition, Secretary Bentsen placed ATF's law enforcement operation in the capable hands of Charles Thomson, a career ATF agent who previously headed ATF's New York office and led its successful investigation of the World Trade Center bombing. Magaw also replaced Chojnacki and Sarabyn, the field commanders who had led the failed raid, and lied afterwards, with top notch agents.

In so doing, Secretary Bentsen provided ATF with a new leadership team, both in the field and at headquarters -- a team committed to change and to improving the agency's performance after Waco. Moreover, Secretary Bentsen sent a powerful message to all Treasury law enforcement that honesty must be guarded.

During the five months since the release of the Report and Secretary Bentsen's personnel actions, both ATF and Treasury have taken significant additional actions.

Rebuilding Morale -- Trust in Leadership

After Waco, Assistant Secretary Noble, Director Magaw and ATF's other new leaders undertook an intense effort to rebuild the Bureau's morale and its trust in ATF leadership. To show their commitment to this rebuilding effort, these leaders visited on multiple occasions Dallas, Houston and New Orleans, the

offices which contributed agents to Waco, and which bore the brunt of the casualties. During those trips, agents and employees were given the opportunity to ask any questions they wished. All questions were answered.

Improved Communication between Treasury and the Agencies

One of the key problems identified by the Report was that the Office of Enforcement received less than 48 hours advance notice of the Waco plan, despite the fact that ATF was about to embark on the biggest and most unusual raid in its history. As the Report stressed, this lack of adequate notice was the product of a pattern of inadequate oversight by the Office of Enforcement and insufficient communication between that office and the bureaus it is charged with supervising.

Accordingly, Assistant Secretary Noble has taken definitive action to improve oversight and increase communication with the bureaus. He has sought to achieve a reasonable balance between providing the bureaus with flexibility, yet maintaining sufficient accountability. Shortly after Waco, Noble instituted several regular forums for communication between the bureaus and the Office of Enforcement -- none of which had existed before his tenure. First, the bureau chiefs now meet once a week with Noble to review significant issues. Second, each of the bureau chiefs meets individually with Noble on a monthly basis to review their respective bureau's operations. Third, Noble has enhanced greatly the level of informal communication between his office and the bureaus -- in large part because he has strengthened and better organized the Office of Enforcement. In so doing, he has increased the points of contact for the bureaus. Fourth, Noble has established a Treasury Law Enforcement Council, consisting of the Directors of ATF, Secret Service and FLETC, the Commissioner of Customs and the Assistant Commissioner for the Criminal Investigative Division of IRS. The formation of this Council ensures that all Treasury law enforcement is part of a team. Finally, in August 1993, Noble sent a directive to all the bureaus outlining those matters which require meaningful advance notice for the Office of the Assistant Secretary (Enforcement). Among those matters are any involving "non-traditional groups and guns" of the sort encountered near Waco.

In addition, both ATF and the other bureaus are in the process of training personnel in the field to better identify sensitive matters that require early involvement of headquarters. Taken together with the experience and judgment of ATF's new leadership, these actions go a long way toward preventing a repeat of the inadequate notice given by ATF to the Office of Enforcement before the Waco raid.

Awareness that Certain Missions Require Additional Resources

One of the strongest criticisms of ATF, both in the Report and in the media, was that the Bureau failed to recognize that the mission they were undertaking near Waco required assistance and resources from outside the agency. ATF has recognized and taken action to address this problem at two levels.

First, with respect to those occasions when the Bureau confronts non-traditional adversaries such as Koresh and the Branch Davidians, particularly when the situation involves groups of people possessing large amounts of weapons, ATF has taken comprehensive measures to insure that agents recognize the need for outside assistance and that outside experts are consulted in a timely manner:

- *ATF has established criteria for ATF agents to use to determine if an investigation calls for outside experts;

- *ATF is training their field agents to recognize those situations which require outside experts;

- *ATF has established a reporting structure to insure that headquarters learns promptly when an investigation involves groups or organizations which require seeking outside assistance; and

- *ATF is developing a resource library and network of contacts of credible experts both in the tactical and the behavioral science fields. This information will be shared with the Department of Justice. As part of that effort, ATF is in the process of establishing a working relationship with a major American university and also will consult with other federal agencies.

Second, on those occasions when ATF seeks to undertake an operation of the scale similar to that mounted near Waco, ATF has recognized that it cannot and should not go it alone. As their report states:

The first lesson we learned is that an agency of ATF's size cannot independently carry out every conceivable operation that might be encountered....[P]rior to Waco we did not have a formal plan for other Federal agencies to become involved where an operation was larger or more complex than ATF was equipped to handle. Waco has taught us that we must be prepared to seek help and assistance from other agencies when necessary.

Both ATF and Treasury have taken action to insure that ATF has the resources it needs to conduct such operations. ATF has developed formal plans for seeking assistance from other agencies

under appropriate circumstances. Treasury's Office of the Assistant Secretary (Enforcement) is conducting an evaluation of whether Treasury law enforcement needs a "Treasury National Response Team" or similar such entity to conduct large scale operations or specialized activities such as those attempted near Waco. Such a Team would focus on situations currently handled by ATF's Special Response Teams (SRTs) and would not specialize in hostage rescue missions that are presently handled by the Federal Bureau of Investigation's Hostage Rescue Team (FBI HRT).

The Department of the Treasury and the Department of Justice formally recognized and agreed that any future Treasury law enforcement action of the nature undertaken near Waco requires timely notification of the Department of Justice -- either through the U.S. Attorney's Office responsible for the investigation, as was done with the Waco investigation, or through communication in Washington, D.C. at the departmental level -- preferably both. In addition, the Assistant Secretary (Enforcement) and the Deputy Attorney General have instituted bi-weekly meetings.

Waco Confirmed ATF's Powerful Investigative Capabilities

The Report concluded that ATF's investigation of Koresh and the Branch Davidians, which posed difficult investigatory challenges for the Bureau, was both properly initiated and developed sufficient evidence to support the issuance of search and arrest warrants. The Report, in fact, commended ATF both for its willingness to take on an investigation which involved a cult possessing an enormous arsenal of weapons, including dozens of machineguns and a large cache of grenades and for the evidence generated by its investigators.

ATF is building upon its investigative capabilities and reputation. In the past year, ATF has made thousands of arrests and executed numerous search warrants without incident. Moreover, not only was ATF instrumental in the successful investigation of the World Trade Center bombing, but its actions with regard to the series of bombings in upstate New York a few months ago demonstrated the Bureau's expertise in firearms investigations and quickly solved a case with national implications.

ATF Has Addressed Its Significant Operational Weaknesses

The Report determined that ATF had significant weaknesses in its tactical planning capabilities, including its intelligence operation, its operational security, its command and control during the raid and its ability to handle scrutiny after the raid failed. ATF is making progress with respect to each of these

areas.

ATF Has Improved Its Tactical Planning and Intelligence Operations

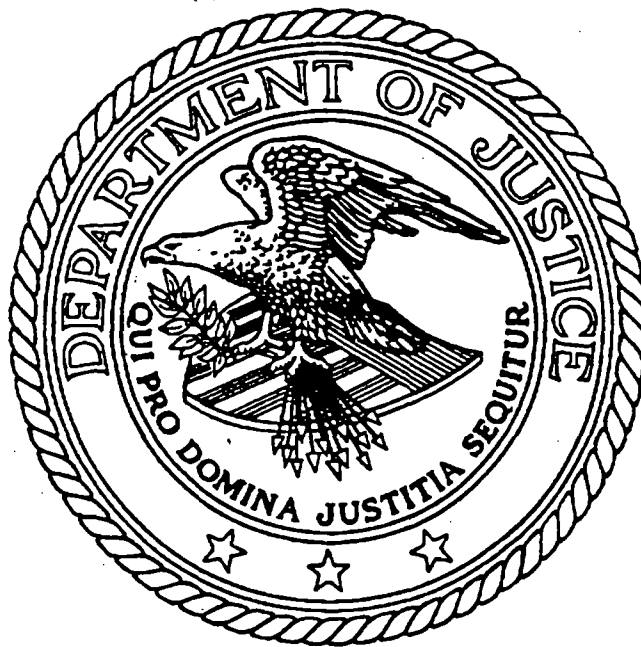
ATF's tactical planning effort in the Waco operation was seriously flawed. First, ATF failed to consider adequately all available options before it chose to raid the Compound. Specifically, the tactical planners prematurely abandoned efforts to lure Koresh away from the Compound. Moreover, because of weaknesses in their intelligence operation and planning process, ATF's tactical planners and raid commanders failed to reach a common understanding of their plan's key assumptions. And they were mistaken about key facts -- especially their flawed belief that the men and the weapons would be separated at the time of the raid. ATF has acted to improve both its intelligence operations and its tactical planning capabilities.

With respect to its intelligence operation, ATF has taken steps to develop the tactical intelligence structure that the Bureau was lacking before Waco. That structure includes an intelligence program manager in headquarters, an intelligence officer in each of ATF's 24 field offices and an "Intelligence Response Team" of specialists to support major investigations. The intelligence specialists will work to make sure tactical planners seek appropriate intelligence from agents in the field and that the intelligence gathering process insures accurate and timely intelligence. In addition, although the undercover agent in the Waco investigation did an excellent job, to insure that undercover agents receive the support they need, and to improve communication between tactical planners and undercover agents, ATF has instituted a program of pairing each long-term undercover agent with a trained "control agent" who will regularly debrief them.

ATF has also overhauled its process for selecting both tactical planners and raid commanders. At Waco, they were chosen based on their rank and geographical proximity to the site of the investigation. In the future, ATF will select the planners and the commanders based on their training and expertise. To prepare them for situations like Waco, potential commanders and planners, as well as key headquarters leaders, are also receiving crisis management training from the International Association of Chiefs of Police (IACP). Moreover, to insure that tactical planners adequately consider the full range of options, ATF agents are receiving additional training in non-dynamic entry techniques -- including containment callouts, sieges and the use of "lure techniques" to arrest suspects away from their premises.

Lessons of Waco: Proposed Changes in Federal Law Enforcement

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LESSONS OF WACO: PROPOSED CHANGES IN FEDERAL LAW ENFORCEMENT

by

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INTRODUCTION

The studies by the Department of Justice and the Department of the Treasury of the confrontation with the Branch Davidians at Waco have raised many questions about our capacity to handle similar situations. In order to identify potential improvements in federal law enforcement, Assistant Secretary of the Treasury for Enforcement Ronald K. Noble and I asked ten experts in law enforcement and the behavioral sciences to review our ability to handle hostage/barricade incidents and recommend improvements. We assembled a very distinguished and varied group of experts from three nations to help us learn from the experience at Waco, and we have learned a great deal.

The experts were given broad access to law enforcement officials and received briefings about the events in Waco, although our detailed factual findings were not yet completed. I am grateful to them for taking the time to assist us in this effort. I am also grateful to the many law enforcement professionals who cooperated with the experts during their review.

The experts' reports, which will be published as a supplement to this paper, provide a useful source of constructive suggestions as well as a further explanation of the reasons for my proposals. I have not adopted all of the experts' recommendations but I propose that a significant number of them

be put into effect.¹ Some of the others are consistent with practices already in place in federal law enforcement.

1. Complex Hostage/Barricade Incidents

The type of situation about which we are concerned occurs when an unusually large number of well-armed individuals, often accompanied by others whose relationship to the armed persons may range from hostage to willing supporter, have committed or are threatening to commit a serious crime and are likely to resist arrest violently. These crises in which suspects barricade themselves, often along with hostages, are referred to as "complex hostage/barricade" incidents or situations. Complex hostage/barricade situations may involve a broad range of underlying motivations. They could involve a radical religious group, a terrorist group, or a large-scale extortion or threat to life or property.

It is worth exploring the nature of these incidents. We focus on situations involving a significant number of well-armed individuals because a number of federal law enforcement agencies are especially trained and highly capable in dealing with the far more familiar situation of one or a few individuals -- perhaps

¹ The experts who provided recommendations are Dr. Nancy Ammerman, Mr. Colin Birt, Dr. Robert Cancro, Mr. Richard Davis, Mr. Robert Loudon, Mr. Ronald McCarthy, Dr. Ariel Merari, Dr. Lawrence Sullivan, and Mr. William Webster. One expert, Dr. Alan Stone, felt that his recommendations would benefit from a far fuller account of what happened at Waco. We have therefore agreed that his recommendations will follow, and thus can draw upon, the release of the other reports today.

bank robbers -- who have been trapped and are holding a small number of hostages. There are a well established set of procedures and very skillful and highly capable people prepared to deal with such situations when they involve Americans in foreign countries; our concern here is with domestic situations.

Hostage/barricade situations are sometimes resolved by negotiated surrenders, sometimes by the use of tear gas or other non-lethal force to incapacitate the suspects or force them to leave their stronghold, and sometimes by dynamic, high-risk entries by law enforcement officers. In dynamic entry operations, developed by counterterrorist teams, law enforcement officers enter the area in which the suspects are located through an overpowering assault and try to take them into custody; the officers must be prepared to shoot anyone who threatens them with a weapon.

The Branch Davidian confrontation is an example of the tremendous firepower that may be amassed by private citizens to engage in small-scale warfare with law enforcement personnel. Recent events such as the bombing of the World Trade Center teach us that terrorism may indeed strike within our borders. Now is the time for us to take stock of our resources and prepare for the broad range of threats that may confront us.

2. The Unique Aspects of Waco

The confrontation with the Branch Davidians was an unusually difficult form of hostage/barricade situation in several

respects. Most important, the number of inhabitants who were armed and prepared to shoot federal law enforcement officers was very large, making a dynamic entry extraordinarily dangerous.

Second, the rules of engagement were complicated by the fact that many of the inhabitants were not suspects but also were not traditional hostages because they had no desire to leave. This category includes the children and any of those adults who shared Koresh's beliefs but did not take up weapons. The rules of engagement for freeing hostages where innocent civilians are at imminent risk of harm are different from the rules of engagement in situations where there is no imminent threat to life. If an innocent person's life is in immediate danger at the hands of the suspects, then immediate action using deadly force against the suspects may be justified. This urgency characterizes many hostage situations, especially terrorist incidents. In other situations, like the one at Waco, the absence of an imminent threat means there is time to develop a plan and carefully review it. It also complicates decisions about the use of deadly force.

Finally, the Waco situation was shaped by the fact that the FBI became involved only after agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF") had been killed. Responding to a crisis in which people have already died is substantially different from planning an operation in which bloodshed may be avoided. Certain peaceful negotiated outcomes, such as holding out the hope that some suspects might escape prosecution for serious offenses, were necessarily foreclosed. For David Koresh,

surrender meant giving up everything, and possibly facing a death sentence. There was little for negotiators to offer him. This was of great significance.

My recommendations should not be taken as an assessment of either fault or praise. Their purpose is different: to improve the likelihood that future complex hostage/barricade incidents will be resolved by arrests without loss of life.

RECOMMENDATIONS

1. An Overview

The crises about which we are concerned pose great dangers and require skills that are not routinely available to law enforcement agencies, including those that have teams with advanced training in Special Weapons and Tactics ("SWAT"). When faced with complex hostage/barricade incidents, law enforcement must respond with four critical elements and an organization that provides additional support functions. The critical elements are (1) a well-equipped and highly skilled tactical team to contain the suspects and bring the incident to a close, using, if necessary, appropriate force; (2) trained and experienced negotiators, supported by pertinent research on successful techniques in similar situations, who can attempt to achieve a peaceful resolution; (3) behavioral science experts who can advise the tacticians and the negotiators about the suspects and assist them in developing strategies; and (4) a command structure that integrates the other elements and develops a coherent