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COMMUNICATION WITH REPRESENTED PERSONS: THE DILEMMA OF DEFENDANT-INITIATED CONTACTS*

I. INTRODUCTION

In September, 1989, Drug Enforcement Administration agents arrested Jose Orlando Lopez after he attempted to sell them fifty kilograms of cocaine and two kilograms of heroin.[1] The arrest culminated a lengthy undercover investigation which captured Lopez acting as the chief negotiator for the drug sales on fifty audio and video tapes.[2]

Detained without bail, Lopez sought to obtain release prior to trial.[3] Although he was willing to consider cooperating with the government,[4] his attorney refused to represent him in any discussions with the authorities that involved cooperation.[5] Subsequently, Lopez contacted the prosecutor through his co-defendant's attorney.[6] Before meeting with the prosecutor, he waived his right to counsel before a United States magistrate.[7] However, the district court, in an exercise of its supervisory power, dismissed the indictment against him, citing the government's flagrant disregard of the ethical rule which prohib-

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* *Editor's Note:* On the eve of publication, the Ninth Circuit Court of Appeals issued its decision on the government's appeal of United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), the facts of which have been used extensively in this comment to illustrate the dilemma of defendant-initiated contacts. *See* United States v. Lopez, 93 C.D.O.S. 1901 (9th Cir. March 17, 1993). This decision supports two propositions advanced by this comment. First, the court indicates in dicta that, in an appropriate case, contact with a represented party by a prosecutor is permissible by court order. *Id.* at 1903. Additionally, it acknowledges that the ethical rule prohibiting contacts with represented persons does not bar contacts with defendants who have waived their right to counsel. *Id.* at 1904. However, in dicta, the court concludes that the prosecutor materially misled the magistrate judge into believing that Lopez' attorney was being paid by a third party whose interests were inimical to Lopez', and that Lopez did not waive his right to counsel. *Id.* at 1903-04. Finally, the court reinstates the indictment against Lopez because it concludes that he was not substantially prejudiced by the government's actions. *Id.* at 1904.

1. Appellant's Excerpt of Record at 2-5, 20, United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991) (Nos. 91-10274, 91-10393) [hereinafter Excerpt of Record].

2. *Id.*

3. United States v. Lopez, 765 F. Supp. 1433, 1438 (N.D. Cal. 1991).

4. *Id.* at 1439-40.

5. *See infra* notes 85-89 and accompanying text.

6. *See infra* notes 85-89 and accompanying text.

7. Excerpt of Record, *supra* note 1, at 330-33.

its an attorney from communicating with a represented person without the consent of that person's counsel.[8]

The ethical prohibition against an attorney communicating with a party known to be represented by counsel is embodied in the American Bar Association's Disciplinary Rule 7-104(A)(1) of the Model Code of Professional Responsibility[9] and Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct.[10] Although courts are nearly unanimous in applying this ethical rule to federal criminal prosecutors through their local rules, they do not agree on the appropriate scope of the rule.

The district court's response in *United States v. Lopez*[11] is a direct challenge to a Department of Justice policy that advocates a narrow application of DR 7-104(A)(1), Rule 4.2 and their counterparts to federal prosecutors.[12] In June 1989, then-Attorney General Dick Thornburgh issued a memorandum to Department of Justice attorneys asserting that a broad application of the rule to federal prosecutors was impeding federal criminal investigations.[13] The Thornburgh Memorandum maintains that when a represented person desires to cooperate with the government and initiates contact because of a belief that his attorney represents interests inimical to

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8. *Lopez*, 765 F. Supp. at 1463.

9 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1983).

10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1990). This comment assumes that Rule 4.2 and DR 7-104(A)(1) embody the general prohibition against communicating with represented persons, but recognizes that the text of the rule may vary in different jurisdictions.

The formal position of the American Bar Association (hereinafter ABA) on legal ethics from 1969 to 1983 is found in the Model Code of Professional Responsibility (hereinafter ABA Model Code). STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS - WITH RECENT SUPREME COURT DECISIONS 237 (1991). However, in 1977 the ABA appointed a Commission on the Evaluation of Professional Standards to recommend revisions to the Code. *Id.* at 3. After making significant changes to the Model Code, the ABA adopted the Model Rules of Professional Conduct (hereinafter ABA Model Rules) in August 1983. *Id.* Thus, the ABA Model Rules represent the ABA's official position on legal ethics from 1983 to the present. *Id.*

Since 1983, approximately 35 states have adopted some form of the ABA Model Rules, while the remaining states have retained some form of the ABA Model Code. *Id.* at 3, 237. Furthermore, many of those states that still retain the ABA Model Code are currently considering adopting the Model Rules. *Id.* at 237. Additionally, the standards governing the conduct of Department of Justice attorneys incorporate the ABA Model Code. *See* 28 C.F.R. § 45.735-1(c).

11. 765 F. Supp. 1433 (N.D. Cal. 1991).

12. *See infra* notes 83-109 and accompanying text.

13. Memorandum from Dick Thornburgh to all Justice Department Litigators Re Communication with Persons Represented by Counsel (June 8, 1989) (on file with SANTA CLARA LAW REVIEW) [hereinafter Thornburgh Memorandum].

his own, the rule does not apply.[14]

This comment examines whether defendant-initiated contacts with a prosecutor are barred by DR 7-104(A)(1), Rule 4.2, or their counterparts. Part II explores the policy reasons behind the rule and discusses the different ways courts have applied it in a criminal context.[15] Part III analyzes the nature of a defendant's rights under the rule and whether it creates a right of the defendant's attorney that cannot be waived by the defendant.[16] In particular, the impact of the rule on a defendant's Sixth Amendment right to counsel is evaluated.[17] Finally, Part IV proposes to amend Rule 4.2 and its counterparts[18] to allow a prosecutor to communicate with a defendant at the defendant's initiative and after the defendant has appeared before a judicial officer.[19]

II. BACKGROUND

A. *The History of Rule 4.2 and Its Counterparts*

The ethical rule prohibiting an attorney's communication with represented persons without the consent of that person's counsel has been adopted in some form by nearly two-thirds of the United States District Courts as part of their local rules.[20] Virtually all these district courts have adopted some variation of DR 7-104(A)(1) or Model Rule 4.2.[21]

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 representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized

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14. *Id.*

15. *See infra* notes 20-183 and accompanying text.

16. *See infra* notes 184-217 and accompanying text.

17. *See infra* notes 199-217 and accompanying text.

18. This comment refers almost exclusively to Rule 4.2 and DR 7-104(A)(1) for simplicity's sake because they are models for the ethical prohibition against communicating with a represented party. However, the text of the rule may vary depending on the jurisdiction. *See supra* note 10. Additionally, since Rule 4.2 is the ABA's most recent promulgation of the ethical prohibition, DR 7-104(A)(1) cannot be revised by the ABA. *See supra* note 10. However, to the extent DR 7-104(A)(1) has been adopted by federal district courts in their local rules, DR 7-104(A)(1) may be revised by them.

19. *See infra* notes 217-223 and accompanying text.

20. United States v. Lopez, 765 F. Supp. 1433, 1454-55 n.40 (N.D. Cal. 1991).

21. *Id.*

by law to do so.[22]

Essentially identical to DR 7-104, Model Rule 4.2 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.[23]

When included in a district court's local rules, the ethical prohibition becomes federal law.[24]

Both rules originate from the American Bar Association's Canons of 1908.[25] Although the Canons did not contain a policy statement for the prohibition against communicating with a represented party, the ABA Model Code states that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel."[26]

Supporters of the prohibition against communicating with a represented party cite the protection of the client as one reason for the prohibition's existence. According to this rationale, the rule prevents an opposing attorney from "bamboozling" a party into giving away his or her case without the protection of counsel.[27] As one court has noted, an uncounseled layperson has difficulty in "marshalling the information and foresight required to conduct negotiations about complex legal issues with a lawyer representing a party

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22. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1983) (footnote omitted).

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1990).

24. *In re* Heriberto Medrano, 956 F.2d 101, 103 (5th Cir. 1992) (stating local rules adopted by district court are federal law). *See also* Baylson v. Disciplinary Bd., 764 F. Supp. 328, 332 (E.D. Pa. 1991). The extent to which a local rule concerning contacts with represented persons regulates the out-of-court investigatory conduct of Justice Department attorneys and whether such an application of the local rule may exceed the authority of the district court under 28 U.S.C. § 2071 is beyond the intended scope of this comment. For a discussion of this separation of powers issue *see* Eric Johnson, *The Impact of Disciplinary Rule 7-104 on Law Enforcement Contact With Represented Persons*, 40 KAN. L. REV. 63 (1992).

25. John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683, 686 (1979). The Canons of Professional Ethics were the ABA's first attempt at codifying ethical rules. STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS - WITH RECENT SUPREME COURT DECISIONS, xiii (1991). They remained in effect for over 60 years until the ABA replaced them with the ABA Model Code. *Id. See supra* note 10. Canon 9 provided "[a] lawyer should not in any way communicate with a party represented by counsel; much less should he undertake or negotiate or compromise the matter with him, but should deal only with his counsel." ABA CANONS OF PROFESSIONAL ETHICS No. 9 (1908).

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1983).

27. Leubsdorf, *supra* note 25, at 686.

whose interests are, in some measure, adverse."[28] In addition, commentators argue that Rule 4.2 and its counterparts further the settlement of disputes by conveying them through dispassionate parties,[29] and that it fosters consistent judicial procedures.[30]

Furthermore, courts have been concerned that negotiations between a party and opposing counsel conducted behind an attorney's back will destroy the confidence essential to the attorney-client relationship.[31] Such negotiations may also hamper the attorney's ability to represent the client in subsequent stages of the representation.[32] Thus, by placing the control of communications with a client in the hands of his or her attorney, the rule enables a client to receive the benefits of representation unhampered by his or her own legal ignorance. This in turn protects the client's interest in receiving the effective assistance of counsel.[33]

Another reason for the prohibition is to protect the lawyer's interest in retaining his client base. This is evident in the California Rules of Professional Conduct, in which Rule 2-100, which prohibits communications with a represented party, appears in Chapter 2, the chapter entitled "Relationship Among Members."[34] Justifications for the rule include fostering "ultraprofessional" relationships and protecting lawyers' fees.[35] In addition, one commentator suggests

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28. United States v. Batchelor, 484 F. Supp. 812, 813 (E.D. Pa. 1980).

29. Leubsdorf, *supra* note 25, at 686.

30. Marc A. Schwartz, Note, *Prosecutorial Investigations and DR 7-104(A)(1)*, 89 COLUMB. L. REV. 940, 942 (1989).

31. United States v. Lopez, 765 F. Supp. 1433, 1449 (N.D. Cal. 1991). *But see* Texas Disciplinary Rules of Professional Conduct which permits an attorney to communicate with a person represented by counsel if the communication is initiated by a client. TEX. GOV'T CODE ANN. Tit. 2, subtit. G-App., Art. 10 § 9, Rule 4.02 (West Supp. 1993). Under this rule, an attorney (1) is permitted to communicate with another attorney's client as long as the first lawyer does not cause or encourage the communication; and (2) is permitted to provide a second opinion to a represented person who requests one. *Id.* at Rule 4.02 cmt. 2. The rule does not impose an affirmative duty to discourage communications between the lawyer's client and other represented persons. *Id.*

32. *Batchelor*, 484 F. Supp. at 813.

33. Bruce A. Green, *A Prosecutor's Communications With Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 285 (1988). An attorney has the duty to provide a client with "competent" representation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1990). Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* Furthermore, the Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The government violates this right when it interferes with a counsel's ability to make independent decisions in conducting the defense. *Id.*

34. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-100 (May 27, 1989). *See infra* note 104 for text of Rule 2-100.

35. Schwartz, *supra* note 30, at 942.

that the rule rescues lawyers from the conflict between their duty to represent their client's interests and their duty not to overreach an unprotected opposing party.[36] Thus, Rule 4.2 and its counterparts also protect the party's attorney from an overreaching opposing counsel.

B. *Applicability to Criminal Prosecutions*

Although DR 7-104(A)(1) was drafted with civil practitioners in mind, district courts have consistently applied it to prosecutors.[37] In addition, several courts have extended the rule to federal agents who are working with a prosecutor on an investigation because they are considered to be the prosecutor's "alter ego."[38]

Generally, courts have agreed that Rule 4.2 is not violated when non-custodial, pre-indictment contacts occur.[39] For example in *United States v. Kenny*,[40] the Ninth Circuit Court of Appeals upheld the use of an audio tape obtained by an agent through electronic surveillance, even though the prosecutor knew of the surveillance and he knew the suspect had retained counsel.[41] The court said "[t]he government's use of such investigative techniques at this stage

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36. Leubsdorf, *supra* note 25, at 687.

37. United States v. Ryans, 903 F.2d 731, 735 (10th Cir.), *cert. denied*, 111 S. Ct. 152 (1990). *See also In re* John Doe, Esquire, 801 F. Supp. 478 (D.N.M. 1992).

38. *Ryans*, 903 F.2d at 735 (stating DR 7-104(A)(1) applies to agents of public prosecutors when they act as the "alter ego" of prosecuting attorneys). *See also* United States v. Hammad, 858 F.2d 834, 837-38 (2d Cir. 1988) (stating ethical prohibition may apply to non-attorney government law enforcement officers). However, it is not clear that these cases actually bind non-lawyers to an ethical rule that governs the conduct of lawyers. For example, Rule 4.2 prohibits an attorney from *causing another* to communicate with a represented party. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1990). Thus, the "alter ego" concept is a means to hold attorneys accountable for the conduct of non-attorneys under their supervision and is not intended to hold the non-attorneys liable for an ethical violation. *See* United States v. Standard Drywall, 617 F. Supp. 1283, 1301 (E.D.N.Y. 1985) (finding attorney not responsible if agent acted on his own).

39. *See Ryans*, 903 F.2d at 740 ("DR 7-104(A)(1)'s proscriptions do not attach during the investigative process before the initiation of criminal proceedings"); United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986) (finding DR 7-104 does not apply at the investigatory stage before the initiation of any judicial proceedings); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983) (holding FBI agent's noncustodial interview of defendant prior to initiation of judicial proceedings was not ethical violation); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983) (holding pre-indictment use of informant to gather information against represented suspect was not an ethical violation); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981) (holding ethical considerations not implicated by pre-indictment investigative techniques); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974) (holding disciplinary rule not applicable prior to indictment).

40. 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981).

41. *Id.* at 1339.

of a criminal matter does not implicate the sorts of ethical problems addressed by the code."[42]

However, some courts have taken the position that DR 7-104(A)(1) and its counterparts may apply in a *custodial* pre-indictment setting.[43] For example in *United States v. Foley*,[44] the Second Circuit Court of Appeals held that some practices, such as pre-arraignment interviews outside the presence of counsel, may violate DR 7-104(A)(1) even though they may pass constitutional muster.[45] In *Foley*, the prosecutor interviewed the defendant prior to his arraignment and against the express request of the defendant's soon-to-be appointed attorney.[46] The court indicated it was "troubled by the practice" of pre-arraignment interviews because such interviews "contravened the principles of DR 7-104(A)(1)," but declined to hold the practice unethical.[47] Similarly, in *United States v. Durham*,[48] the Seventh Circuit Court of Appeals suggested that an FBI agent's pre-indictment interview with the defendant, who was in custody on another charge, raised "ethical questions" because the agent conducted the interview without the knowledge of the suspect's attorney.[49]

One court has concluded that some situations may warrant applying DR 7-104(A)(1) to non-custodial, pre-indictment contacts.[50] In *United States v. Hammad*,[51] the defendant was being investigated by the grand jury for Medicaid fraud.[52] In order to obtain incriminating evidence against Hammad, the prosecutor gave a cooperating witness a sham grand jury subpoena and had him contact Hammad, even though he was aware that Hammad was represented by counsel for the purposes of the grand jury investigation.[53] Hammad encouraged the witness to lie to and withhold records from the grand

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42. *Id.*

43. *See* United States v. Foley, 735 F.2d 45, 48 (2d Cir. 1984), *cert. denied*, 469 U.S. 1161 (1985). *See also* United States v. Durham, 475 F.2d 208, 211 (7th Cir. 1973).

44. *Foley*, 735 F.2d at 45.

45. *Id.* at 48.

46. *Id.*

47. *Id.*

48. 475 F.2d 208 (7th Cir. 1973).

49. *Id.* at 210.

50. United States v. Hammad, 858 F.2d 834 (2d Cir. 1988).

51. 858 F.2d at 834.

52. *Id.* at 835. In November 1985, an arsonist set the Hammad Department store in Brooklyn on fire. *Id.* An investigation into the fire indicated that the owners of the store had defrauded Medicaid in the amount of $400,000. *Id.* The government suspected that the fire was set to destroy evidence, and initiated a grand jury investigation into the fraud. *Id.*

53. *Id.* at 835-36.

jury.[54] The district court found that DR 7-104(A)(1) applied before Hammad was a target of the investigation and prior to his indictment.[55] The court of appeals agreed.[56] In its initial opinion, the appellate court refused to find that the rule attached at indictment because "a government attorney could manipulate grand jury proceedings to avoid [the rule's] encumbrances."[57] However, it later revised its opinion, expressing concern that its original opinion might unduly hamper criminal investigations, particularly in cases where career criminals have attempted to immunize themselves by hiring "house counsel."[58] The court did not elaborate on the type of situations that may violate DR 7-104(A)(1). In particular, it noted that where ethical standards are involved, such a delineation is best accomplished on a case-by-case basis.[59] The court recognized that "under DR 7-104(A)(1), a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations."[60] Accordingly, it found that absent the kind of misconduct that occurred in this case, the use of informants to gather evidence in pre-indictment, non-custodial situations will generally fall within the ambit of such authorization.[61]

While most courts have declined to apply DR 7-104(A)(1), Model Rule 4.2 or its counterparts to criminal investigations prior to the imposition of formal charges, they have differed on how to apply the rule post-indictment. For example, in *United States v. Massiah*,[62] the Second Circuit Court of Appeals found no violation of DR 7-104(A)(1) in a post-indictment, undercover contact by a gov-

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54. *Id.* at 836.

55. United States v. Hammad, 678 F. Supp. 397, 401 (E.D.N.Y. 1987).

56. United States v. Hammad, 846 F.2d 854 (2d Cir. 1988).

57. *Id.* at 859. The circuit court implies that a prosecutor would attempt to delay a grand jury indictment to avoid having to comply with the ethical prohibition.

58. United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988).

59. *Id.* at 840.

60. *Id.* at 839. Accordingly, cases interpreting *Hammad* have identified specific "authorized by law" exceptions to the rule. *See* United States v. Buda, 718 F. Supp. 1094, 1096 (W.D.N.Y. 1989) (stating taped conversations acquired through the use of an informant, pre-indictment, and absent any prosecutorial misconduct fall within "authorized by law exception" of DR 7-104(A)(1)); United States v. Chestman, 704 F. Supp. 451 (S.D.N.Y. 1989) (same). *See also* United States v. Schwimmer, 882 F.2d 22, 28-29 (2d Cir. 1989) (stating a prosecutor is "authorized by law" to question a convicted defendant, known to be represented by counsel, before a grand jury), *cert. denied*, 493 U.S. 1071 (1990).

61. *Hammad*, 858 F.2d at 840.

62. 307 F.2d 62 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964). The Supreme Court overruled *Massiah* without reaching the ethical question. *See infra* notes 71-74 and accompanying text.

ernment agent.[63] Although defendant Massiah was indicted, he was released on bail.[64] Subsequent to his release, the agent placed a listening device in a co-defendant's car with the co-defendant's consent.[65] The co-defendant, Colson, was able to elicit incriminating statements from Massiah, and those recorded conversations were used against Massiah at trial.[66] On appeal, Massiah argued that it was a denial of his rights under DR 7-104(A)(1) "for any government representative to procure and listen to his conversations with Colson unless his lawyer was present."[67] The court of appeals disagreed and asserted that the government had a duty to continue its investigation because it was in the public's interest to ensure that all involved would be prosecuted.[68] It concluded that there was no conflict between this view and the ethical standard that forbids direct communication between an attorney and another party represented by counsel.[69] The court noted that assuming "it would be improper for a prosecutor to interview a criminal defendant under indictment in the absence of his retained counsel, such a prohibition would not require that government investigatory agencies also refrain from any contact with a criminal defendant not in custody simply because he had retained counsel."[70]

Massiah was later reversed by the United States Supreme Court, which found that the government's conduct violated Massiah's Sixth Amendment right to counsel.[71] The Court held that a defendant has the right to counsel during post-indictment interrogation.[72] Therefore, Massiah's incriminating statements could not be used against him at trial because federal agents deliberately and surreptitiously elicited the statements from him after he had been indicted and in the absence of counsel.[73] However, the majority did not comment on the ethical considerations, and the dissent concluded that the rule did not apply to investigators or other non-lawyers.[74]

In contrast, the Tenth Circuit Court of Appeals stated in

63. *Massiah*, 307 F.2d at 66.
64. *Id.*
65. *Id.* at 64.
66. *Id.* at 65.
67. *Id.* at 65-66.
68. *Id.* at 66.
69. *Id.*
70. *Id.* (citations omitted).
71. Massiah v. United States, 377 U.S. 201, 205 (1964).
72. *Id.*
73. *Id.*
74. *Id.* at 210 (White, J., dissenting).

United States v. Ryans[75] that the ethical prohibition applies, even to non-lawyers, when the government initiates criminal proceedings.[76] In *Ryans*, an informant taped his conversations with the defendant as part of a grand jury investigation.[77] Several of the taped conversations disclosed advice given to Ryans by his attorney.[78] Ryans sought unsuccessfully to suppress the audio tapes at his trial, claiming a violation of DR 7-104(A)(1).[79] The court found that because adversarial proceedings had not begun, Ryans was not entitled to the protection of the rule.[80] However, the court stated that while in this situation the government interest in effective law enforcement outweighed the threat to the attorney-client relationship, there would have been a different result if adversarial proceedings had begun.[81] It concluded that "the purpose of the disciplinary rule is to prohibit *all* communications between an attorney and a represented party, but after initiation of adversary [sic] proceedings."[82] Thus, the *Ryans* court suggested that *no* post-indictment contacts are appropriate, regardless of law enforcement objectives.

C. *The Lopez Case*

In *United States v. Lopez*,[83] the district court ruled that it is an ethical violation for a prosecutor to communicate with a defendant, even when the defendant initiates the contact and a judicial officer sanctions the communication.[84] In *Lopez*, the defendant contacted the prosecutor through his co-defendant's attorney and indicated that he might be interested in a plea bargain.[85] He did not wish to involve his counsel because the attorney was unwilling to negotiate with the government.[86] In a sworn affidavit to the court, Lopez' attorney stated:

> Under our agreement, if an offer of cooperation was presented by the Assistant United States Attorney, I would convey that offer to Mr. Lopez for his consideration. I would not, however,

75. 903 F.2d 731 (10th Cir.), *cert. denied*, 111 S. Ct. 152 (1990).
76. *Id.* at 740.
77. *Id.* at 732.
78. *Id.* at 734.
79. *Id.*
80. *Id.* at 740.
81. *Id.*
82. *Id.* at 741.
83. 765 F. Supp. 1433 (N.D. Cal. 1991).
84. *Id.* at 1439-49.
85. *Id.*
86. *Id.* at 1440.

> be personally involved in the continuing negotiations with the government, since this conduct is personally, morally and ethically offensive to me. Since Mr. Lopez has retained me to vigorously defend and try the case, another attorney would be willing and better able to arrange his informant activities.[87]

Additionally, Lopez' attorney stated that if Lopez wished to negotiate with the government, he would find another attorney for him at the additional cost of $2,000 to $3,000.[88] However, according to the co-defendant's lawyer, Lopez believed that his attorney would not represent him at all if he cooperated with the government.[89]

The Assistant United States Attorney (hereinafter AUSA) had reason to believe that Lopez' family had been threatened by the criminal organization of which Lopez allegedly was a member.[90] The AUSA believed that the organization was paying for Lopez' representation and that notifying his attorney of any discussions with the government would further endanger Lopez' family.[91]

Two interviews were conducted at Lopez' request, but prior to both interviews, and at the request of the AUSA, a United States magistrate conducted an in camera interview with the defendant.[92] Both times the magistrate conducted a lengthy interview with Lopez, admonishing him of the risks of talking with the government without counsel present.[93] In addition, the magistrate advised Lopez that counsel could be appointed for the limited purpose of the interview with the government.[94] At the first interview, Lopez indicated at least seven times that he understood his rights, and that he did not wish to have a lawyer present because he didn't trust attorneys.[95] At both in camera hearings the magistrate read Lopez his *Miranda* rights and Lopez executed a written waiver of the right to counsel

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87. *Id.* at n.12.

88. Brief for the United States at 4 n.3, United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991) (Nos. 91-10274, 91-10393) (October 25, 1991) [hereinafter Appellate Brief].

89. *Id.* at 5 n.5.

90. United States v. Lopez, 765 F. Supp. 1433, 1441 (N.D. Cal. 1991).

91. *Id.*

92. Excerpt of Record, *supra* note 1, at 305-06.

93. *Id.* at 310-46, 350-53.

94. *Id.* at 316, 350-52.

95. *Id.* at 324-27. In response to the magistrate's advisement that a new lawyer could be appointed for him in his meeting with the government, Lopez remarked, "I don't trust no lawyers. Do you — can't you understand? I don't trust no damn lawyers." Excerpt of Record, *supra* note 1, at 318. Later in the proceedings he insisted, "I understand. I understand and appreciate very much what you're trying to make me understand, and everything. I do. I appreciate it very much . . . . But I have — I have not heard of anybody that's done any better with lawyers. I have not." Excerpt of Record, *supra* note 1, at 319-20.

for the purposes of his discussions with the government.[96]

After Lopez executed his waiver of the right to counsel, the AUSA indicated that he would not use any of Lopez' statements made in the interview against him.[97] Additionally, prior to each meeting, the AUSA again advised Lopez of his *Miranda* rights and warned him that he should have counsel present.[98] At the first meeting, Lopez asked whether cooperating with the government would result in his release so that he could be with his children, and whether the government could offer him protection if he cooperated.[99] At the second meeting, Lopez gave two names of people about whom he could provide information.[100] Other than the provision of the two names, Lopez did not make any incriminating statements at either interview.[101]

Subsequently, Lopez' attorney became aware of the discussion and withdrew from the case.[102] Lopez obtained a new attorney and filed a motion to dismiss the indictment.[103] He argued that the government's conduct violated his Sixth Amendment right to counsel and also violated Rule 2-100 of the California Rules of Professional Conduct[104] which prohibited communication with represented

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96. Excerpt of Record, *supra* note 1, at 330-33, 353.

97. *Id.* at 336, 353.

98. *Id.* at 136, 678.

99. United States v. Lopez, 765 F. Supp. 1433, 1442 (N.D. Cal. 1991).

100. *Id.* at 1443.

101. Appellate Brief, *supra* note 88, at 10, 12.

102. *Lopez*, 765 F. Supp. at 1444.

103. *Id.*

104. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-100 (May 27, 1989) provides:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
>
> (B) For purposes of this rule, a "party" includes:
>
> (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
>
> (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.
>
> (c) This rule shall not prohibit:
>
> (1) Communications with a public officer, board, committee, or body;
>
> (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or
>
> (3) Communications otherwise authorized by law.

Id.

persons.[105]

The district court did not find a Sixth Amendment violation because Lopez was able to retain new counsel when his initial counsel withdrew from the case.[106] However, the court did conclude that the government violated Rule 2-100, even though it was Lopez who initiated the contact.[107] The court noted that "[c]ourts have consistently ruled that the ethical prohibition bars a prosecutor from communicating with a represented individual without his or her counsel even if it is the individual who makes the first contact."[108] Finding that the prosecutor intentionally violated the ethical prohibition embodied in the court's local rules, the court dismissed the indictment against Lopez.[109]

D. *The Thornburgh Memorandum*

The district court's dismissal of the indictment in *Lopez* was a consequence of the official Department of Justice policy which advocates exempting federal prosecutors from the dictates of DR 7-104(A)(1) and Model Rule 4.2 when compliance would impede their federal law enforcement responsibilities.[110] In June 1989, then-Attorney General Dick Thornburgh issued a policy memorandum stating that DR 7-104(A)(1), Rule 4.2 and its counterparts were not applicable to Justice Department attorneys because their law enforcement responsibilities fell within the "authorized by law" exception.[111] He asserted that "where the Constitution and federal law

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105. *Lopez*, 765 F. Supp. at 1444.

106. *Id.* at 1456. The court did not address the issue of whether Lopez was denied counsel for the purposes of the interviews with the government. Rather, the court's Sixth Amendment analysis focused on whether the government's actions deprived Lopez of his right to chosen counsel. *Id.* at 1455-56. However, the court did indicate that Lopez' waiver was not valid because he did not have standing to waive an ethical rule. *See infra* note 125 and accompanying text.

107. *Lopez*, 765 F. Supp. at 1451.

108. *Id.*

109. *Id.* at 1460.

110. *Id.* at 1461.

111. Thornburgh Memorandum, *supra* note 13, at 2. Recently, the Department of Justice has attempted to strengthen this policy by proposing comprehensive new administrative regulations that would permit Department attorneys to have contact with represented persons under certain proscribed circumstances. *See* 57 Fed. Reg. 54737 (November 20, 1992). Pursuant to 5 U.S.C. § 301, the Attorney General has the power to promulgate regulations governing the conduct of Justice Department attorneys. The proposed rules would amend chapter I of Title 28 of the Code of Federal Regulations by adding a new part 77. 57 Fed. Reg. at 52741. The adoption of these regulations has been put on hold by the incoming Clinton administration pending further study. Memorandum from Leon E. Panetta to Heads and Acting Heads of Agencies Re Regulatory Revisions (January 22, 1993) (on file with SANTA CLARA

permit legitimate investigative contact, DR 7-104 does not present an obstacle . . . . [I]t is the Department's position that contact with a represented individual in the course of authorized law enforcement activity does not violate DR 7-104."[112]

Thornburgh argues that the issue arises in several contexts:

> (a) instances of covert contacts with a suspect by undercover agents or informants, or (less frequently) overt interviews by investigators or attorneys, after the suspect has retained counsel; or
> (b) instances of multiple representation, where a single attorney represents either several individuals (one of whom is the principle target and is paying for everyone's representation) or an organization and all its employees (when the organization is the target and is paying for the representation), and where the attorney insists that all contacts by prosecutors or agents must come through him, *even if initiated by one of the "represented" individuals.*[113]

This comment is particularly concerned with his assertion that a prosecutor may communicate directly with a represented person who initiates contact.

Such communications generally arise when the represented party wishes to cooperate but fears that his or her attorney will no-

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LAW REVIEW). If and when these regulations are adopted, they will have the force of federal law and will arguably fall within the "authorized by law" exception embodied in most versions of the rule. However, the proposed regulations may conflict with a court's local rule if it does not contain the "authorized by law" exception. *See e.g.* N.D. Fla. Local Rule 4(G)(1). FLORIDA RULES OF COURT, FEDERAL 123 (West 1992).

112. Thornburgh Memorandum, *supra* note 13, at 7. At least one jurisdiction has amended its ethical rules to accommodate the Department of Justice's position. The District of Columbia's rule regarding communication with represented persons provides:

> This Rule is not intended to regulate the law enforcement activities of the United States or the District of Columbia. A body of law has been developed that recognizes both the authority of the government to seek to obtain statements from a suspect, and the Fifth and Sixth Amendment rights of the suspect. The Rules of Professional Conduct do not apply to government conduct that is valid under this body of law. Generally speaking, Rule 4.2 will apply once a defendant is formally charged, elects to be represented by counsel, and obtains or is appointed counsel. But there are situations in which a defendant who is represented by counsel will seek to communicate with the government without defense counsel's being aware of the communication. Some communications will serve to protect the defendant and to identify sham representations. Although communications between charged defendants and the government without notice to defense counsel must be viewed with suspicion, such communications cannot be prohibited in all instances.

D.C. RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 8 (1991).

113. Thornburgh Memorandum, *supra* note 13, at 2 (emphasis added).

tify the other defendants or the criminal organization that is paying for the attorney's services.[114] An example of how closely an attorney may be aligned with such a criminal organization is *United States v. Cintolo*,[115] in which an attorney was convicted of obstruction of justice for preventing his client from testifying before the grand jury.[116] Cintolo was an attorney hired by Gennaro Anguilo, a reputed mob boss, to represent Walter LaFreniere in a grand jury investigation.[117] LaFreniere possessed damaging information linking various members of the Anguilo organization to illegal gambling and loansharking activities.[118] Cintolo was hired to keep him from testifying truthfully before the grand jury.[119] At one point Anguilo ordered, in Cintolo's presence, that LaFreniere be killed.[120] Although LaFreniere was not killed, Cintolo was successful in preventing him from testifying.[121]

If a represented person initiates contact under these circumstances, Department of Justice policy is to advise the represented party to consult with alternative counsel.[122] In the event the party cannot afford additional counsel, the Department encourages the individual to seek court-appointed counsel so the party may receive the benefit of legal advice without advertising his or her cooperation.[123] The government attorney should seek the intervention of a judicial officer whenever possible.[124]

However, the *Lopez* court found these measures to be an inade-

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114. Memorandum from Edward S. G. Dennis, Jr., Acting Deputy Attorney General to all Justice Department Litigators Re Contacts With Represented Persons 1 (September 19, 1989) (on file with SANTA CLARA LAW REVIEW).

115. 818 F.2d 980 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987).

116. *Id.* at 988.

117. *Id.* at 984.

118. *Id.*

119. *Id.* at 984.

120. *Id.* at 985.

121. *Id.* at 988; *see also* United States v. Stuckey, 917 F.2d 1537 (11th Cir. 1990). In *Stuckey*, the defendants were drug couriers for a large drug-trafficking syndicate. *Id.* at 1538. The court disqualified one attorney because it concluded that he had been hired by the syndicate to prevent the defendants from cooperating with the government and revealing the identities of those in the syndicate who gave them their "marching orders." *Id.* at 1542-43. The court concluded that "[s]uch control can be devastating to the rights of an accused; rather than getting credit through a charge bargain with the prosecutor or a reduced sentence from the trial judge, the accused stands mute and takes all the blame." *Id.* at 1543.

122. Thornburgh Memorandum, *supra* note 13, at 6; *see also* Unites States Attorney's Manual § 9-13.253 (on file with SANTA CLARA LAW REVIEW) [hereinafter USAM].

123. Thornburgh Memorandum, *supra* note 13, at 6; *see also* USAM, *supra* note 122, § 9-13.253.

124. Thornburgh Memorandum, *supra* note 13, at 6; *see also* USAM, *supra* note 122, § 9-13.257.

quate substitute for compliance with the ethical rule prohibiting contacts with represented persons.[125] Rather, the court concluded that the Thornburgh Memorandum advises Department of Justice attorneys to ignore an ethical prohibition adopted by district courts across the United States: "The government misconduct at issue is thus the result of an explicit policy of the Attorney General of the United States which promises to wreak havoc in federal trial courts everywhere."[126] Furthermore, the court held that the waiver executed by Lopez before the magistrate was invalid because "the ethical prohibition applies to attorneys and is designed in part to protect their effectiveness, [and] a represented party may not waive it."[127]

E. *Other Courts' Treatment of Defendant-Initiated Contacts*

Other courts have also found that post-indictment contacts initiated by the defendant violate DR 7-104(A)(1) and its counterparts regardless of whether the defendant waived the right to have counsel present during the interview.[128] For example, in *United States v. Partin*,[129] a former codefendant, Sykes, contacted the prosecutor after his conviction was affirmed on appeal and indicated his willingness to testify against Partin. Sykes and Partin had the same attorney, and Sykes feared for his own safety should the attorney be notified.[130] Signing a waiver of his right to counsel, Sykes gave two statements to the FBI.[131] Subsequently, Partin was convicted with the use of Sykes' testimony.[132] On appeal, Partin argued that the district court should have suppressed the statements because they were made in violation of DR 7-104(A)(1).[133] The court of appeals agreed that a violation had occurred, but refused to reverse Partin's conviction.[134] It concluded that the ethical duty owed to Sykes by the prosecutor was a personal one.[135] Consequently, Partin did not have the standing to challenge the violation of the prosecutor's ethical duty

125. United States v. Lopez, 765 F. Supp. 1433, 1461 (N.D. Cal. 1991).

126. *Id.*

127. *Id.* at 1452.

128. United States v. Partin, 601 F.2d 1000 (9th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980); United States v. Thomas, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

129. *Partin*, 601 F.2d at 1005.

130. *Id.* The court does not indicate why Sykes feared for his safety.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1006.

to Sykes.[136]

In *United States v. Thomas*,[137] the defendant contacted the case agent and requested an interview.[138] Without the knowledge of Thomas' attorney, the agent obtained a *Miranda* waiver and a written statement from Thomas which was later used in his trial during cross-examination.[139] On appeal, the court stated that once a criminal defendant has counsel, any statement obtained in an interview may not be offered in evidence for any purpose unless the accused's attorney was notified and was given a reasonable opportunity to be present. "To hold otherwise, we think, would be to overlook conduct which violated both the letter and the spirit of the canons of ethics. *This is obviously not something which the defendant alone can waive.*"[140] Nevertheless, the court affirmed Thomas' conviction because the question was an ethical one governing the conduct of attorneys practicing before the United States courts and did not present a problem of constitutional dimensions.[141]

F. *Sixth Amendment Right to Counsel*

As discussed above, one of the justifications for DR 7-104(A)(1) and Rule 4.2 is to ensure the effective assistance of counsel, a right also guaranteed by the Sixth Amendment.[142] Consequently, the ethical issue of communicating with a represented party often arises in the same factual context as the Sixth Amendment right to counsel. Accordingly, the courts that have discussed the ethical concerns surrounding post-indictment contacts with defendants have also considered whether the government's conduct violated the accused's Sixth Amendment right to counsel.[143] In order to better understand the relationship between the ethical prohibition embodied in Rule 4.2 and the Sixth Amendment, it is necessary to examine the protections

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136. *Id.*

137. 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

138. *Id.* at 111.

139. *Id.*

140. *Id.* at 112 (emphasis added).

141. *Id. See also* State v. Morgan, 646 P.2d 1064 (Kan. 1982). In *Morgan*, the defendant asked to speak with a county attorney while still in the courtroom after his first appearance. *Id.* at 1068. The defendant waived his right to remain silent and to have his counsel present. *Id.* Soon after he made a statement incriminating himself which was used against him at trial. *Id.* The court concluded that an ethical violation had occurred, but found that the provisions of the Code of Professional Responsibility prescribe standards of conduct for lawyers and "are not constitutional or statutory rights guaranteed to individual persons." *Id.* at 1069 (quoting People v. Green, 274 N.W.2d 448 (Mich. 1979)).

142. *See supra* note 33 and accompanying text.

143. *See supra* notes 62-82 and accompanying text.

afforded by the Sixth Amendment in post-indictment interviews and a defendant's ability to waive such protections.

It is well settled that a defendant has the Sixth Amendment right to the assistance of counsel during post-indictment interviews with the government.[144] Should the defendant invoke this right, the government must cease interrogation altogether.[145] However, the defendant may be interviewed if he or she waives the right to counsel prior to formally invoking it or if he or she initiates the communication.[146] If a defendant chooses to waive the right to counsel, he or she may do so solely for the purpose of post-indictment questioning without prejudicing the right in future proceedings.[147]

In *United States v. Mohabir*,[148] the Second Circuit held that a Sixth Amendment waiver of counsel must conform to a higher standard than a Fifth Amendment waiver.[149] In *Mohabir*, the defendant had been indicted but had not retained counsel.[150] On the advice of a co-defendant's attorney, Mohabir contacted the prosecutor.[151] Mohabir confessed after the prosecutor advised him of his *Miranda* rights and Mohabir's statements were used against him at trial.[152] The court of appeals ruled that Mohabir's waiver was not valid because a Sixth Amendment waiver must conform to a "higher standard" than a Fifth Amendment waiver, and that it must be preceded by "a federal judicial officer's explanation of the content and significance of this right."[153]

In *Patterson v. Illinois*,[154] the Court rejected the *Mohabir* court's argument that a Sixth Amendment waiver of counsel should be more difficult to execute than a Fifth Amendment waiver of counsel.[155] In *Patterson*, the defendant executed a *Miranda* waiver in an

144. Patterson v. Illinois, 487 U.S. 285, 290 (1988).

145. *Id.* at 291.

146. *Id.*

147. *Id.* at 293 n.5.

148. 624 F.2d 1140 (2d Cir. 1980).

149. *Id.* at 1153. The Fifth Amendment guarantee against self-incrimination includes the right to request the presence of counsel during custodial interrogation by the government *prior* to the imposition of criminal charges. Miranda v. Arizona, 384 U.S. 436 (1966). In contrast, the Sixth Amendment right to counsel attaches *after* the imposition of criminal proceedings. Michigan v. Jackson, 475 U.S. 625, 632 (1986). Additionally, the Sixth Amendment right to counsel includes the right to have the assistance of counsel at every "critical stage" of the prosecution. *Id.* at n.5.

150. *Mohabir*, 624 F.2d at 1145.

151. *Id.*

152. *Id.*

153. *Id.* at 1153.

154. 487 U.S. 285 (1988).

155. *Id.* at 296-97.

interview with a prosecutor prior to his arraignment and his statements were used against him at trial.[156] On appeal, Patterson argued that a *Miranda* warning was not sufficient to execute a knowing and intelligent waiver of the Sixth Amendment right to counsel.[157]

The Supreme Court found that the scope of the right to counsel is defined by "a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel."[158] The *Patterson* Court did not find a substantial difference between the usefulness of counsel during pre-indictment custodial interrogation and his value to the accused after indictment.[159] It held that "an accused who is admonished with the warning prescribed by this Court in *Miranda* has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one."[160] Thus, the *Patterson* Court concluded that whatever warning was satisfactory under *Miranda* was sufficient for a Sixth Amendment waiver.[161]

However, the Court also observed that because the Sixth Amendment protects the right to rely on counsel as a "medium" between the defendant and the State, it extends beyond *Miranda's* protections once a defendant has counsel.[162] The Court commented that it was significant that "petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect."[163] This means that once a defendant has been indicted and has asserted his right to the assistance of counsel, the government may not knowingly circumvent this right.[164]

In an earlier case, *Maine v. Moulton*,[165] the Supreme Court held that the Sixth Amendment is not violated when, by luck or hap-

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156. *Id.* at 289.

157. *Id.* at 299-300.

158. Patterson v. Illinois, 487 U.S. 285, 298 (1988).

159. *Id.* at 298-99.

160. *Id.* at 296 (citations omitted).

161. *Id.* at 298.

162. *Id.* at 297 n.9.

163. *Id.* at 290 n.3 (citations omitted).

164. Massiah v. United States, 377 U.S. 201, 205 (1964); *see supra* notes 62-74 and accompanying text.

165. 474 U.S. 159 (1985).

penstance, the State obtains incriminating statements from a defendant after the right to counsel has attached.[166] "However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity."[167] Accordingly, the *Moulton* Court noted that in some cases a valid waiver of the Fifth Amendment right to counsel under *Miranda* would not suffice under the Sixth Amendment.[168] For example, the Supreme Court has upheld a Fifth Amendment *Miranda* waiver where the government failed to inform a suspect that his lawyer was trying to reach him during questioning.[169] If the Sixth Amendment right to counsel had attached, this waiver would not be valid.[170] Likewise, a surreptitious conversation between an undercover agent and an unindicted suspect would not violate *Miranda* as long as the interview was not custodial.[171] However, if the suspect were indicted, the Sixth Amendment right to counsel would prohibit such questioning.[172] Thus, unlike the Fifth Amendment, the Sixth Amendment protects the attorney-client relationship in addition to the right to counsel.[173]

The Sixth Amendment's protection of the attorney-client relationship is not absolute; it also permits the defendant to reject the attorney's assistance.[174] For example, in *Faretta v. California*,[175] the state court forced the defendant to accept a state-appointed public defender and prevented him from conducting his own defense.[176] The United States Supreme Court reversed, remarking,

> What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

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166. *Id.* at 176.
167. *Id.*
168. *Id.*
169. Moran v. Burbine, 475 U.S. 412, 424, 428 (1986).
170. *Patterson,* 487 U.S. at 296 n.9.
171. *Id.*
172. *Id.*
173. *Id.* 297 n.9
174. Faretta v. California, 422 U.S. 806 (1975). Additionally, 28 U.S.C. § 1654 provides that all litigants in federal court may personally conduct their own cases. 28 U.S.C. § 1654 (1988).
175. 422 U.S. 806 (1975).
176. *Id.* at 810-11.

> . . . When the administration of the criminal law is hedged bout [sic] as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.[177]

The Court reasoned that an attorney's authority rests in the defendant's consent to have the attorney as his or her representative.[178] Absent this consent, counsel's training and experience works imperfectly.[179] The Court stated that the right to defend is personal as it is the defendant and not his lawyer or the state who will bear the personal consequences of a conviction.[180] Therefore, the defendant must be free to decide whether in his particular case counsel is to his advantage.[181] Even though "he may conduct his own defense ultimately to his own detriment; his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' "[182]

The *Faretta* Court concluded that denying a defendant the right to self-representation violates the Sixth Amendment right to counsel.[183] Thus, if a court's interpretation of DR 7-104(A)(1) and Rule 4.2 prevents a defendant from exercising this right to self-representation, then the ethical issue of communicating with represented persons becomes one of constitutional dimensions. The question then becomes who may waive the protections of the ethical rule and how may it be done properly.

III. ANALYSIS

A. *Benefits Conferred by Rule 4.2 on the Attorney*

Some courts have held that Rule 4.2 and its counterparts cannot be waived by the defendant because they protect the attorney's interests.[184] For example, the *Lopez* court found that the rule prohibiting

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177. *Id.* at 815 (quoting Adams v. United States *ex. rel.* McCann, 317 U.S. 269, 279-80 (1942)).

178. *Id.* at 820-21.

179. *Id.* at 834.

180. *Id.*

181. *Id.*

182. *Id.* (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

183. *Id.* at 836.

184. United States v. Lopez, 765 F. Supp. 1433, 1452 (N.D. Cal. 1991); United States v. Thomas, 474 F.2d 110 (10th Cir.) *cert. denied*, 412 U.S. 932 (1980). *See also* United States v. Batchelor, 484 F. Supp. 812, 814 (E.D. Pa. 1980) (stating DR 7-104 presupposes a different model than waiver by the defendant).

communication with represented parties applies only to attorneys.[185] Additionally, the *Thomas* court indicated that a defendant could not waive the rule alone.[186] Even the language of the rule itself, by allowing communication only with the consent of the attorney, suggests that it can be waived only by the attorney.[187]

Undeniably, the rule prohibiting communication with a represented party benefits attorneys in some respects. The ability to prevent opposing counsel from communicating with a client reduces the possibility that an opposing counsel will impair a client's confidence in his or her attorney.[188] Furthermore, negotiations with opposing counsel are legitimate tasks to be billed to the client.[189] Finally, and most importantly, giving an attorney control regarding communications with a client assures that he or she has complete knowledge of all that has transpired in a client's case. An attorney has an interest in his or her own effectiveness and compliance with DR 7-104(A)(1) protects this interest.[190]

B. *Benefits Conferred by Rule 4.2 on the Defendant*

Rule 4.2 and its counterparts do not exist in a vacuum; they also confer important benefits on the defendant. A defendant with little or no experience with the criminal justice system may have great difficulty judging when it is in his or her own best interest to talk with the government.[191] An uncounseled defendant risks making damaging admissions in interviews with the government that may later be used against him or her at trial. For example, in *United States v. Thomas*,[192] the defendant contacted the case agent, executed a *Miranda* waiver, and made inculpatory statements that were later used against him during cross-examination.[193] Such damaging statements may ultimately discourage defendants from taking the stand in their own defense,[194] or cause them to plead guilty instead of going to trial. Thus, an uncounseled defendant stands to lose a great deal

185. *Lopez*, 765 F. Supp. at 1452.

186. *Thomas*, 474 F.2d at 112.

187. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1990).

188. *Batchelor*, 484 F. Supp. at 813.

189. *See supra* notes 34-36 and accompanying text.

190. *See supra* notes 26-33 and accompanying text.

191. *Batchelor*, 484 F. Supp. at 813.

192. 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1980).

193. *Id.* at 111.

194. United States v. Foley, 735 F.2d 45, 48 (2d Cir. 1984), *cert. denied*, 469 U.S. 1161 (1985).

when talking to the government.

Furthermore, while an attorney may have an interest in his or her own effectiveness, the client has an even greater interest in that effectiveness as under the Sixth Amendment there is a constitutional right to the effective assistance of counsel.[195] An attorney who has personal knowledge of all that has transpired with the government is in a better position to provide this kind of assistance. Additionally, the presence of an attorney may make a defendant less vulnerable to psychological manipulation by the government.[196] Generally, an attorney who can prevent a defendant from talking to the government may provide the defendant with more defense options in the long run. Thus, to the extent that Rule 4.2 and its counterparts protect an attorney's effectiveness, they actually protect the defendant's constitutional right to the effective assistance of counsel.

The idea that the ethical prohibition actually protects the defendant's Sixth Amendment right to the effective assistance of counsel is consistent with courts' application of the rule in criminal cases. Most courts have refused to apply the rule pre-indictment and instead apply it when the government initiates judicial criminal proceedings against the defendant.[197] If the protection of the attorney were paramount, then courts would see a need to apply Rule 4.2 pre-indictment. Yet courts consistently rule that prior to the return of an indictment, law enforcement objectives outweigh the impact to the attorney-client relationship.[198]

C. *Impact of Rule 4.2 on the Defendant's Right to Counsel*

If Rule 4.2 and its counterparts cannot be waived by the defendant, then it interferes with the defendant's ability to waive his or her Sixth Amendment right to counsel. The requirement of obtaining the attorney's consent before a client communicates with the government[199] limits the client's ability to waive counsel when he or she believes the attorney does not represent his or her best interests. On the one hand, Rule 4.2 does not prevent a defendant from waiving counsel if the defense attorney interprets the rule to mean that

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195. Strickland v. Washington, 466 U.S. 668 (1984).

196. *Foley*, 735 F.2d at 48.

197. *See supra* notes 37-61 and accompanying text.

198. *See supra* notes 37-61 and accompanying text.

199. MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 4.2 (1990). "[A] lawyer shall not communicate . . . 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 . . . ." *Id.* (emphasis added).

consent must be given if the client so directs. If the client intends to waive the right to counsel, the attorney could counsel against such a waiver, but would respect the client's wishes and consent to the interview with the government. However, the rule becomes a problem in cases where the defendant fears for his or her life should the attorney be alerted to his or her cooperation.[200] In such cases, a strict construction of Rule 4.2 could block a defendant's attempt to represent himself or herself in discussions with the government by giving such an attorney the opportunity to withhold consent and effectively veto the defendant's decision to waive counsel.

The concept of allowing a defense attorney to have veto power over a defendant's decision to waive Sixth Amendment rights is contrary to the notion that a defendant has a constitutional right to self-representation. In *Faretta*, the Court found the right to counsel to be a personal one.[201] "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense."[202]

If a defendant has the right to represent himself or herself at trial, it does not make sense to prevent him or her from representing himself or herself during post-indictment questioning where the dangers and disadvantages of self-representation are "less substantial and more obvious to an accused than they are at trial."[203] Furthermore, the right to self-representation exists even if exercising it would not be in the defendant's best interest. The *Faretta* court recognized that in most criminal prosecutions, a defendant is better off with the guidance of counsel.[204] However, it felt that in rare instances a defendant may be a more effective advocate for himself or herself than a hired representative.[205] Since it was the defendant who faced the personal consequences of a possible conviction, the judicial system should respect his or her election.[206]

As previously discussed, it is a risk for a defendant to deal with the government alone.[207] However, in some situations, it may be ad-

200. *See infra* notes 212-15 and accompanying text.
201. Faretta v. California, 422 U.S. 806, 819 (1975).
202. *Id.* at 820.
203. Patterson v. Illinois, 487 U.S. 285, 299 (1988).
204. *Faretta*, 422 U.S. at 834.
205. *Id.*
206. *Id.*
207. *See supra* notes 191-94 and accompanying text.

vantageous for a defendant to approach the government without his or her attorney's knowledge. In *Lopez*, even assuming that the defendant was not in physical danger, his attorney's categorical refusal to assist him in the event he decided to cooperate impeded Lopez' ability to decide whether a plea bargain was a viable option.[208] This is because Lopez believed he would be without *any* representation if his attorney discovered his interest in talking with the AUSA.[209] However, the decision of whether to plea bargain is reserved for the defendant, not the attorney.[210] Lopez' attorney may have been "morally and ethically" offended by Lopez' informant activities, but it was Lopez who faced the possibility of a conviction at trial. The evidence against Lopez was such that it was reasonable for him to consider cooperation as an option.[211] Communicating through Lopez' attorney would have discouraged Lopez from pursuing the possibility of a plea bargain—a decision that he should be able to make without the threat of losing representation altogether.

Furthermore, in organized crime cases, communication with the government without the attorney's consent could save the defendant's life. For example in *Lopez*, if the AUSA's information was correct, Lopez' real fear may have been for the safety of himself and his family and not that he would lose his attorney.[212] As the case of *United States v. Cintolo*[213] dramatically demonstrates, the attorney may actually represent the larger criminal organization.[214] A defendant may wish to cooperate for any number of reasons, including ex-

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208. *See supra* notes 85-89 and accompanying text.

209. *See supra* note 89 and accompanying text.

210. Although the ethical duties of defense attorneys are beyond the scope of this comment, it is interesting to note that the ABA Model Rules provide that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with a lawyer, as to a plea to be entered, whether to waive a jury trial, and whether the client will testify." MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.2(a) (Scope of Representation) (1991). The commentary to that rule states that "the client may not be asked to agree . . . to surrender . . . the right to settle litigation that the lawyer might wish to continue." *Id.* at cmt 5. Furthermore, the ABA Standards for Criminal Justice advise that "[i]t is unprofessional conduct for the lawyer intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea." ABA STANDARDS FOR CRIMINAL JUSTICE § 5.1(b) (1980). Finally, DR 7-101(A)(1) provides, "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1983). Thus, the decision of whether or not to enter into a plea bargain is exclusively the defendant's and any attempt by the attorney to unduly influence the defendant's decision is arguably an ethical violation.

211. *See supra* notes 1-8 and accompanying text.

212. *See supra* notes 90-91 and accompanying text.

213. 818 F.2d 980 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987).

214. *See supra* notes 114-21 and accompanying text.

tracting himself from the organization or reducing his sentence. However, it is unlikely that an attorney hired by the organization to restrict the flow of information to the government would permit cooperation. In *Cintolo*, the mere possibility that the client, LaFreniere, would testify truthfully before the grand jury resulted in the Anguilo organization placing a death sentence on him with the knowledge and acquiescence of his attorney.[215] Notifying such an attorney that his client wished to cooperate with the government could endanger the client's life.

Consequently, even if the ethical prohibition confers rights on the attorney, a strict construction of Rule 4.2 may prevent the defendant from exercising a constitutional right. Although an ethical rule adopted by the court may have the effect of federal law,[216] it cannot supersede constitutional principles.[217] Thus, the rule must be interpreted in a way that does not conflict with the defendant's Sixth Amendment right to self-representation.

IV. PROPOSAL

The interests DR 7-104(A)(1) and Rule 4.2 protect are valid. These rules protect a defendant's right to the effective assistance of counsel and decrease the likelihood that a defendant may incriminate himself or herself.[218] However, an outright ban on defendant-initiated contacts prevents a defendant from exercising the constitutional right to self-representation.

One option is for courts to interpret defendant-initiated contacts as falling within the "authorized by law" exception that appears in most versions of the ethical rule. However, this is not to suggest that prosecutors are "authorized by law" to communicate with defendants who initiate contact solely because of their general authority to enforce the law as the Thornburgh Memorandum asserts.[219] Rather, because the Constitution authorizes a defendant to represent himself or herself, it also "authorizes" the prosecutor to respect that right.

Courts which have adopted a rule barring contacts with a represented person should interpret it to allow defendant-initiated con-

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215. *Cintolo*, 818 F.2d at 986.

216. *See supra* note 24 and accompanying text.

217. *See In re* Primus, 436 U.S. 412, 439 (1978) (holding bar rule that infringes on constitutional right is invalid); *cf.* Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2734 (1991) (plurality opinion) (stating disciplinary rules cannot punish activity protected by the First Amendment).

218. *See supra* notes 191-96 and accompanying text.

219. *See supra* note 111 and accompanying text.

tacts with the government after the defendant has met with a judicial officer in camera. The judicial officer would advise the defendant of his or her constitutional rights and either have the defendant execute a waiver of counsel or appoint counsel for the purposes of the interview with the government. A judicial officer is better situated than a prosecutor to discern a defendant's actual intentions because he or she is not the adversary of the defendant. Furthermore, a judicial hearing would guarantee that the proceedings were preserved in a transcript, facilitating review if necessary. However, such proceedings should remain confidential so that the defendant could act without the fear of reprisals.

This procedure is similar to the one proposed in *United States v. Mohabir*,[220] but would occur in instances where the defendant already has counsel.[221] The intervention of a judicial officer ensures that the government does not circumvent a defendant's right to counsel. These additional requirements for executing a Sixth Amendment waiver are consistent with the Supreme Court's recognition that the attorney-client relationship is a protected interest.[222] Accordingly, the dissent in *Patterson* suggested that contacts with a represented person were allowable with the permission of the court.[223]

Another option is for courts to revise their ethical rules prohibiting communication with represented persons. For example, Rule 4.2 should be amended as underlined:

> 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, *or in criminal prosecutions, after appropriate review by a judicial officer.*

Accordingly, district courts which have adopted DR 7-104(A)(1) should revise it as underlined:

> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of his lawyer representing such other party, or is

220. 624 F.2d 1140 (2nd Cir. 1980). *See supra* notes 148-53 and accompanying text.

221. *Mohabir* involved the Sixth Amendment waiver of a defendant who did not have counsel at the time of the waiver. 624 F.2d at 1145.

222. *See supra* notes 162-64 and accompanying text.

223. Patterson v. Illinois, 487 U.S. 285, 301, 302 (1988) (Stevens, J. dissenting).

authorized by law to do so, *or in criminal prosecutions, after appropriate review by a judicial officer.*

Counterparts to Rule 4.2 and DR 7-104(A)(1) should be amended similarly.

V. CONCLUSION

When applied in a criminal context, Rule 4.2 and its counterparts may impede a defendant's ability to initiate contacts with the government and to waive the Sixth Amendment right to counsel. While the ethical prohibition offers protection to both the attorney and the defendant, the defendant's interests are paramount. An attorney may be concerned about his or her own effectiveness, but this effectiveness is part and parcel of the defendant's Sixth Amendment rights which the defendant can waive. Furthermore, a defendant must have some way of extricating himself from an attorney-client relationship which primarily benefits someone else or a larger organization. Particularly where an attorney has a serious conflict of interest, the defendant's interests should prevail because he or she is the one who must face the consequences of a possible conviction. Finally, a defendant has a constitutional right to self-representation which must be recognized and respected by the judicial system. An ethical rule adopted by a court cannot take away a right secured by the Constitution.

The intervention of a neutral judicial officer strikes a balance between the defendant's right of self-representation and the legitimate ethical concerns of a prosecutor communicating with a defendant outside the presence and knowledge of the defendant's attorney. This proposed amendment to Rule 4.2 and its counterparts protects the defendant from an overreaching prosecutor by having the judicial officer verify that the defendant indeed wishes to waive his or her right to counsel. Additionally, the proposed amendment protects the defendant's right to self-representation. Furthermore, if the defendant seeks appointment of counsel for the purposes of meeting with the government, then the judicial officer may effectuate this. Thus, the proposed amendment protects the defendant's rights while preserving the central principles of the ethical prohibition embodied in Rule 4.2 and its counterparts.

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