


Summer 2005

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Recommended Citation

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RULE OF ETHICS OR SUBSTANTIVE LAW: WHO CONTROLS AN INDIVIDUAL'S RIGHT TO CHOOSE A LAWYER IN TODAY'S CORPORATE ENVIRONMENT

JOAN COLSON*

INTRODUCTION

"I wish we could get caught. We are a crooked company. . . ."¹ These are the words of former Enron employee, Sherron Watkins, written in a memorandum to Kenneth Lay, Enron's Chairman of the Board of Directors.² At the time, Sherron Watkins did not know there were ethical rules that effectively prevent law enforcement officials from interviewing employees about potential crimes committed by the corporation; thus affording corporations greater protections from getting caught.

Enron, WorldCom, Adelphia Communications, ImClone – it would be extremely difficult these days to find a person in the United States who is not aware of at least one, if not all, of these companies.³ Why? Because the

* J.D. Candidate, The John Marshall Law School, January 2007. I would like to thank my colleagues at the U.S. Attorney's Office for their topic suggestions. I would also like to thank my family and friends for their support and encouragement.

1. Carolyn Said, *Corporate Crusader; Enron Whistle-Blower Campaigns for Moral Values in Business*, S.F. CHRON., May 17, 2002, at B1. Sherron Watkins, an accountant, anonymously sent Enron Chairman Kenneth Lay a letter and 5-page memorandum after realizing that the company's "off-the-books partnerships" were actually accounting fraud. *Id.* Congressional investigators later leaked this memo to the press. *Id.*

2. *Id.* See also *Penalties for White-Collar Offenses: Are We Really Getting Tough on Crime: Hearing of the Crimes and Drugs Subcomm. of the Sen. Judiciary Comm.*, 107th Cong. (2002) (statement of Michael Chertoff, Asst. Att'y Gen., Criminal Division). "[T]he CEO's of America somehow felt nobody was watching." *Id.*

3. See, e.g., Edward Iwata, *Setbacks Won't Deter Prosecution of White Collar Crime*, USA TODAY, Apr. 5, 2004, at 3B (discussing corporate scandals and the investigation outcomes of their corporate officers); Carrie Johnson & Peter Behr, *Charges Against Enron's Fastow to Change*, THE WASH. POST, Dec. 6, 2002 at E03 (discussing Enron and a seventy-eight count indictment against its former chief financial officer); Michael Hedges, *The Fall of Enron; Skilling Feeling the Heat; Ex-Enron CEO Expects Charges*, THE HOUSTON CHRON., Aug. 11, 2002, at A1 (discussing Enron and possible charges against its former CEO stating that "Skilling reaped millions of dollars in compensation while the company's true financial condition was unknown to stockholders"); Tom Fowler, *More Light May be Shed on Enron; Banker's Transactions Required Inside Cooperation, Officials Say*, THE HOUSTON CHRON., June 29, 2002, at 1 (discussing the extended implications of Enron's hedge deals with various banks, who participated in a

unethical accounting and corporate reporting practices of corporate executives⁴ in these corporations cost investors “tens of billions of dollars” since the end of 2001.⁵ Enron alone cost investors approximately sixty billion dollars.⁶ At the time of its collapse on December 2, 2001, Enron, on paper at least, was the seventh largest corporation in America.⁷ As we now know, Enron executives and accountants overstated its financial position by hiding losses and various liabilities through inter-related companies, making the company’s financial position appear strong, when in fact, it was not.⁸ When Enron finally restated its financial position in 2001, the numbers showed that the company had falsely overstated its net income by approximately fifty-nine billion dollars over a period of several years.⁹

As a result of Enron and other corporate scandals that plagued the U.S. financial markets in recent years,¹⁰ Congress passed the Sarbanes-Oxley Act

scheme to buy Enron stock). “The three British bankers. . . netted a profit of \$7.3 million and split it three ways. . .” *Id.* The Enron executives “reaped nearly \$8 million from the deal” and “Fastow is reported to have earned \$4.5 million from his investment.” *Id.*

4. Alex Berenson, *Market Watch: A Self-Inflicted Wound Aggravates Angst Over Enron*, N.Y. TIMES, Sept. 9, 2001, § 3, at 1 (discussing Enron and the difficulty of accounting for assets and liabilities when they have been transferred to other related companies); Hedges, *supra* note 3 (stating that “although the Enron investigation is bewildering in its complexity, the goal of prosecutors when it comes to Skilling and other top executives is straightforward,” however, Enron accounting managers “reportedly told investigators they believed Skilling knew about an effort to hide \$500 million in Enron losses in special purpose entities called the Raptors”); Iwata, *supra* note 3 (stating that prosecutorial statistics include the former Big Five accounting firm of Arthur Anderson). A Houston jury convicted the firm of obstruction of justice in 2002. *Id.*

5. See Iwata, *supra* note 3 (discussing the scandals of Enron, Tyco, Worldcom and similar companies, and setting forth a status of corporate executives, whether pleading guilty, found guilty, or awaiting trial).

6. Stephen Labaton, *Enron’s Collapse: The S.E.C. Chairman; Balancing Deregulation and Enron*, N.Y. TIMES, Jan. 17, 2002, § C, at 1.

7. *The Role of the Enron Board in the Collapse of Enron Corporation: Hearing of the Permanent Investigations Subcomm. of the S. Governmental Affairs Comm.*, 107th Cong. (2002) [hereinafter *Levin Testimony*] (testimony of Sen. Carl Levin). Senator Levin discusses the prior position of Enron as a large conglomerate and industry leader. *Id.*

8. Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron Admits to Overstating Profits by About \$600 Million*, N.Y. TIMES, Nov. 9, 2001, § C, at 1. “In a filing with the S.E.C., Enron also indicated that part of last year’s reported profits came from transactions with partnerships controlled by Andrew S. Fastow, who was the company’s chief financial officer until he was ousted Oct. 24.” *Id.*

9. *Id.* “In a sweeping restatement of its profits, Enron said that its actual net income for the years 1997 to 2000 was \$591 million less than it had reported on its financial statements.” *Id.*

10. See *Sarbanes-Oxley Act Oversight: Hearing Before the Comm. on S. Banking, Housing and Urban Affairs*, 108th Cong. (2003) [hereinafter *Donaldson Testimony*] (statement of William H. Donaldson, Chairman, U.S. Securities and Exchange Commission) (referencing the financial ups and downs of the financial markets from the mid-1990’s to early 2000). Mr. Donaldson characterized the stock market price increases and the dot com company phenomenon of the early to mid 90’s as “new wealth.” *Id.* The expansion of new markets and changing investing habits of the public “brought millions of individuals with their savings into our stock markets for the first time.” *Id.*

of 2002.¹¹ The Act created, among other things, the Public Accounting Oversight Board,¹² which was designed to oversee accounting practices and standards throughout the country.¹³ In addition, President Bush authorized, by Executive Order, the formation of the Corporate Fraud Task Force¹⁴ to investigate and uncover white-collar crime.¹⁵ The Task Force was designed to “increase the ability of agents and prosecutors to catch white collar criminals.”¹⁶ The Sarbanes-Oxley Act and the formation of the Corporate Fraud Task Force was the government’s response to wide-spread corporate fraud.¹⁷ Collectively, they were designed to prevent financial fraud by establishing oversight of accounting practices.¹⁸ However, if prevention failed, they were to provide law enforcement with the necessary tools to investigate and prosecute violators.¹⁹ In tandem, the government’s actions were intended to protect the public from becoming monetary casualties of corporate greed.²⁰ But do they? Considering the words of Sherron Watkins, the answer is no.

11. Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of titles 11, 15, 18, 28 & 29 of the U.S. Code).

12. See 15 U.S.C. § 7201 (2000) (setting forth, at part 5, that the term ‘Board’ means the Public Company Accounting Oversight Board); 15 U.S.C. § 7211 (establishing the Public Company Accounting Oversight Board to “oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports”).

13. See 15 U.S.C. § 7211 (2000) (establishing the formulation and scope of the Public Company Accounting Oversight Board).

14. *White Collar Crime Penalties: Hearing Before the Comm. on Sen. Judiciary*, 107th Cong. (2002) [hereinafter *Chertoff & Mercer Testimony*] (statements of Michael Chertoff, Asst. Att’y Gen., Criminal Division and William W. Mercer, U.S. Att’y, District of Montana and Chairman, Att’y Gen.’s Advisory Comm. on S. Judiciary United States Senate). According to the President, the Task Force was formed in order to “strengthen the efforts of the federal government in its investigation and prosecution of financial crimes. *Id.* “The Task Force will provide direction for the investigation and prosecution of white collar crimes, including significant cases of securities fraud, accounting fraud, and other financial and white-collar crimes.” *Id.*

15. See *id.* (stating President Bush “sent a very clear message: that fraud, obstruction of justice, and other types of criminal activity in the business world will not go unpunished or receive merely a slap on the wrist. . .”).

16. *Chertoff & Mercer Testimony*, *supra* note 14.

17. See *Donaldson Testimony*, *supra* note 10, at *2 (discussing the events that led to the passage of the Sarbanes-Oxley Act, including the misconduct of business principles and practices).

18. 15 U.S.C. § 7211.

19. See *Donaldson Testimony*, *supra* note 10 (referencing the Sarbanes-Oxley Act of 2002 as “new tools” for the Commission to “further our enforcement mission”); *Chertoff & Mercer Testimony*, *supra* note 14 (stating that the Corporate Fraud Task Force will enhance the ability of federal law enforcement and federal prosecutors to take on large, complex fraud cases).

20. *Donaldson Testimony*, *supra* note 10. Mr. Donaldson notes that “[c]ommunications, the explosion of information technology and changes in the culture of equity investing, including the shift to more self directed retirement accounts, brought millions of individuals with their savings into our stock markets for the first time.” *Id.*

Unless Congress reevaluates old ethics rules that prohibit law enforcement from contacting employees of corporations that are under investigation, many investigations of corporate fraud will continue to be ineffective.²¹ This Comment will focus on the no-contact provision of the American Bar Association's Ethics Rule 4.2²² as it is applied to federal prosecutors investigating corporate fraud.

This Comment will begin by discussing the origins of the no-contact rule and the reasons for its continued existence. Next, this Comment will discuss the tenuous relationship that has formed over the years between the American Bar Association and the United States Department of Justice because of the differing views on how the no-contact rule should be applied to federal prosecutors and in turn, federal law enforcement officials. This Comment will also discuss the rights of a corporation as well as the rights of an individual, and compare and contrast the effect the no-contact rule has on both of them, individually and collectively. For instance, should a corporation be afforded more rights than an individual? Should the rights of a corporation afford it the opportunity to thwart detection of criminal activity at the expense of the public? Should an individual's constitutional rights be subservient to a corporation's rights obtained through rules of ethics?

These are just a few important questions that have been at issue with respect to the application of the no-contact rule to federal prosecutors. This Comment will specifically address each issue, outlining the states' positions regarding the applicability of the no-contact rule in various situations, describing the substantive effect the no-contact rule has had on federal law enforcement by creating large investigative barriers in contradiction to the President and Congress's corporate fraud agenda, and discussing the differences between ethics and substantive law. In addition, this Comment will analyze the constitutionality of the no-contact rule with respect to individuals, federal prosecutors, and law enforcement officers. Finally, this Comment will set forth a proposal to limit or alleviate the extra protections afforded corporations because of this ethics rule, which will, in turn, reestablish an individual's right to choose whether to participate in catching and prosecuting criminal activity in the corporate arena.

21. *Department of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1999, Amendment No. 11 offered By Mr. Hutchinson, House of Representatives, August 5, 1998, at H7240 [hereinafter Hutchinson Amendment]* (statements of Mr. Hutchinson). Mr. Hutchinson expressed concern regarding conflicting state ethics rules harming investigations by federal prosecutors. *Id.* Restrictions on investigative techniques are also a concern following the passage of the Citizen's Protection Act. Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 613-14 (2004).

22. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002), states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.

I. BACKGROUND

A *The ABA's No-Contact Rule*

The American Bar Association (ABA) codifies rules that regulate ethical conduct of lawyers in the ABA Model Rules of Professional Conduct.²³ ABA Rule 4.2, entitled "Communication with Person Represented by Counsel,"²⁴ is commonly referred to as the "no-contact" rule or the "anti-contact" rule.²⁵ The no-contact rule states that a lawyer²⁶ can not communicate with a person who they know to be represented by a lawyer "about the subject of the representation" unless the lawyer gives consent or the communication is authorized by law or by court order.²⁷

With the growing number of corporate investigations,²⁸ case law began to evolve, distinguishing between employees that could or could not be

23. *See generally id.* (setting forth ethical and disciplinary rules for lawyers). The ABA is a self-regulating agency. Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over The Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 310 (1992). The ABA is a private association of lawyers that accredit law schools and recommend to state and local bar associations rules and standards to be considered for promulgation. *Id.* at 306. "There is strong evidence that lawyers when they regulate themselves are inclined to take positions that favor the use of lawyers and enhance their authority and prestige." *Id.* at 317. In addition, the no-contact rule serves the interests of lawyers by allowing them to maintain control over information disseminated to their clients. *Id.* at 325. Ethics rules almost never take into consideration "the full range of interests that should govern the uneasy balance between effective law enforcement and a defendant's procedural and substantive rights." *Id.* at 333.

24. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002). The Model Rules of Professional Conduct were originally adopted in 1983. Cramton & Udell, *supra* note 23, at 300-01. Prior to the Model Rules of Professional Conduct, the ABA promulgated the Model Code of Professional Responsibility. *Id.* at 323. The Model Code of Professional Responsibility's version of Rule 4.2 was set forth in DR 7-104(A)(1) which stated:

During the course of his representation of a client, a lawyer shall not: communicate or cause another to communicate on the subject of the representation by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(A)(1).

25. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-408 (1997) (referring to Rule 4.2 as the no-contact rule); *See also* Cramton & Udell, *supra* note 23, at 323 (referring to ABA Rule 4.2 as the anti-contact rule).

26. For purposes of the no-contact rule, a lawyer includes law enforcement personnel if that person is acting on behalf of the lawyer. Organized and complex crimes require the resurgence of federal prosecutors in a much earlier stage of the investigatory process than ever before. Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 680 (1992). "When an investigation is conducted largely through document subpoenas and grand jury questioning, rather than through search warrants and street level interviews, the law enforcement personnel involved are far more likely to be prosecutors than police officers." *Id.*

27. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

28. DAN K. WEBB ET AL., CORPORATE INTERNAL INVESTIGATIONS §1.12[2] (2004). From the 1970's to the 1990's, federal prosecutions rose from a few dozen per year to over 400 per year. *Id.*

contacted pursuant to the no-contact rule.²⁹ One factor in the courts' reasoning was determining which employees were considered "adverse parties."³⁰ As a result, the ABA ethics rules began to change with respect to corporate employees.³¹ Currently, Comment 7 to Rule 4.2 specifically addresses corporations and states in relevant part:

In the case of a represented organization, this Rule prohibits communication with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer . . . or has authority to obligate the organization with respect to the matter or whose acts or omissions in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.³²

Rule 4.2, read in conjunction with Comment seven, bars contact with constituents or persons regarding the subject matter under investigation who may obligate the corporation in criminal matters.³³

The original purposes of the no contact-rule was to: 1) "contribute[] to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer;"³⁴ 2) "foster and protect legitimate attorney-client relationships;"³⁵ and 3) "reduce[] the likelihood that clients will disclose privileged or other information that might harm their interests."³⁶ Each state bar association may choose to adopt the ABA rules or to utilize alternate ethics rules.³⁷ To date, every state has adopted Rule

29. Mark H. Aultman, *The Story of a Rule*, 2000 L. REV. M.S.U.-D.C.L. 713, 722-23 (2000). The advent of various corporate structures has forced changes in the way rules encompass the new forms. *Id.* Corporations are separate legal entities, but the corporation can only act through its officers and employees agents, who may be potential witnesses. *Id.* Early case law conferred substantive rights to corporations. *Id.* at 723.

30. *Id.*

31. *Id.* The 1969 Code of Profession Ethics underwent changes as a result of case law forming as corporate structures were evolving. *Id.*

32. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

33. *Id.*

34. Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part I)*, 70 TENN. L. REV. 121, 142 (2002). It is important to discuss the reasons behind the rule in order to interpret the rule and evaluate it properly.

35. *See id.* at 142 (discussing Utah's comment to Rule 4.2). The rule guards "against inequities that exists when a lawyer speaks to an untrained lay person." *Id.*

36. *Id.* The author compares the Utah Rule to that of Georgia. Georgia's rule purports to serve

important public interests which preserve the proper functioning of the judicial system and the administration of justice by a) protecting against misuse of the imbalance of legal skill between a lawyer and a layperson; b) safe-guarding the client-attorney relationship from interference by adverse counsel; c) ensuring that all valid claims and defenses are raised in response to inquiry from adverse counsel; d) reducing the likelihood that clients will disclose privileged or other information that might harm their interests; and e) maintaining the lawyer[']s ability to monitor the case and effectively represent the client.

Id.

37. Cramton & Udell, *supra* note 23, at 295. For example, California adopted the California Rules of Professional Conduct Rule 2-100(C)(3) which states that "while representing a client, a member shall not communicate directly or indirectly about the subject matter of the representation with a party the member knows to be represented by

4.2, either in full or in part.³⁸ In addition, most federal courts have adopted the applicable state or local rules of ethics.³⁹

B. The Beginning of the War: The Department of Justice Strikes Out Against the No-Contact Rule

On June 8, 1989, then U.S. Attorney General Richard Thornburgh issued a memorandum to all federal prosecutors⁴⁰ stating that the Department's interpretation of the no-contact rule coincided with constitutionally granted rights. It further stated that "contact with a represented individual in the course of authorized law enforcement activity does not violate [the no-contact rule]."⁴¹ By invoking the supremacy clause of the United States Constitution, Thornburgh reasoned that federal laws should determine what activity is authorized with respect to federal prosecutors.⁴² While acknowledging that states have the right to regulate ethical conduct, Thornburgh relied on Supreme Court precedent in concluding that states may regulate "federal attorneys only if the regulation does not conflict with federal law or with the attorneys' federal

another lawyer in the matter, unless the member has the consent of the other lawyer." *United States v. Talao*, 222 F.3d 1133, 1136 (9th Cir. 2000)). The Utah Rules of Professional Conduct Rule 4.2 state that "[i]n 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 authorize[d] by law to do so." *Weider Sports Equip. Co., v. Fitness First, Inc.*, 912 F. Supp 502, 505 (D. Utah 1996). The Tenth Circuit holds that "party" implies an adversarial proceeding and that as such, the no-contact rule does not apply pre-indictment. *Id.* at 506-07.

38. Neals-Erik William Delker, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U.L. REV 855, 858 (1995). Thirty-five states have adopted versions of the Model Rules of Professional Conduct, while most of the remaining states have adopted versions of its predecessor, the Model Code of Professional Responsibility. Cramton & Udell, *supra* note 23, at 323. However, the differences in lawyer's duties between states are rapidly increasing. *Id.*

39. Cramton & Udell, *supra* note 23, at 296.

40. Attorney General Thornburgh's memorandum issued a response to the Second Circuit Court of Appeals' decision in *United States v. Hammand*, 858 F.2d 834 (2d Cir. 1988). Cramton & Udell, *supra* note 23, at 319-20. The Second Circuit held that New York's no-contact rule applied to federal prosecutors in the criminal context. *Hammand*, 858 F.2d at 838-39. The Second Circuit also refused to hold that the no-contact rule was "coextensive with the sixth amendment." *Id.* at 837. Although the Second Circuit recognized the fact that applying the no-contact rule to investigative matters may handcuff law enforcement officials in obtaining evidence, the court urged restraint to prevent this from happening. *Id.* at 838. The court was not persuaded by district court opinions that refused to apply the no-contact rule during the investigatory stage of a case. *Id.* *But see* *United States v. Lopez*, 989 F.2d 1032, 1037 (9th Cir. 1993) (holding that "a number of courts have held that there is no breach of a prosecutor's ethical duty to refrain from communications with represented parties when investigating officers question or contact suspects prior to their indictment").

41. Attorney General Richard Thornburgh Memorandum, *Reprinted in Hearing before the Government Information, Justice, and Agriculture Subcomm. of the Comm. on Government Operations*, 101st Cong. 289 (1990) [hereinafter *Thornburgh Memorandum*].

42. *Id.*

responsibilities.”⁴³ Thornburgh reasoned that “where the Constitution of the United States and federal law permit legitimate investigative contact, [the ethics rule] does not present an obstacle.”⁴⁴ The Attorney General further backed up his position by arguing historical precedent, stating that “the original comments on the Model Rules included language to the effect that its prohibition against contacts with represented persons was not intended to relate to certain established law enforcement techniques.”⁴⁵

In 1994, following up on Thornburgh’s memo, former Attorney General Janet Reno promulgated 28 C.F.R., Part 77, which allowed federal prosecutors to contact employees who were not “high level employee[s] known by the government to be participating as a decision maker in the determination of the organization’s legal position.”⁴⁶ However, the Eighth Circuit Court of Appeals found 28 C.F.R., Part 77 to be unlawful because the Department had overstepped its “housekeeping” authority.⁴⁷

In 1998, in response to the Department of Justice’s attempt to exclude federal prosecutors from each state’s rules of ethics, Congress passed the Citizens Protection Act, 28 U.S.C. § 530B, which was co-sponsored by Congressman Joseph McDade⁴⁸ and is commonly referred to as the McDade Amendment.⁴⁹ The Act states, in pertinent part:

43. *Id.* at 285 (citing *Sperry v. Florida*, 373 U.S. 379,402 (1963)).

44. *Id.* at 289. Attorney General Thornburgh was concerned with state ethics laws impeding federal investigations that were authorized by the United States Constitution. *Id.*

45. Cramton & Udell, *supra* note 23, at 318, n.85.

46. 28 C.F.R. Part 77, Fed. Reg. Vol. 59, No. 149 (1994).

47. *United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1988).

48. In 1992, a grand jury in the Eastern District of Pennsylvania returned a five-count indictment which alleged that Pennsylvania Congressman Joseph McDade illegally accepted over \$100,000 in gifts from officials and employees of United Chem Con in exchange for government contracts. *United States v. McDade*, No. 92-249, 1992 U.S. Dist. LEXIS 9703, at *2-3 (D. Pa. June 22, 1992). Congressman McDade was eventually acquitted of all charges. See Eric Pianin, *McDade Under Fire Despite Acquittal; Eight-Year Probe Took Its Toll on Congressman*, THE WASH. POST, Oct. 10, 1996, at A31 (discussing the fact that Pennsylvania constituents knew the Congress and had faith in him). “Frankly, I think he could have been convicted and still been reelected, said Len Champney, a University of Scranton political science professor.” *Id.*

49. 28 U.S.C. § 530B (2000) states that:

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term attorney for the Government’ includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.⁵⁰

The Citizens Protection Act (CPA) specifically overrode Justice Department regulations set forth in Title 28 C.F.R., Part 77,⁵¹ and subjected federal prosecutors to all ethics rules in each state that the attorney conducts business.⁵²

Although there has been much controversy over the application of the no-contact rule to federal prosecutors in recent years,⁵³ the rule has undergone little change from its original 1909 predecessor.⁵⁴ Even after passing the CPA, in its 2002 revision to the no-contact rule, the ABA failed to substantively alter it from its 1995 version.⁵⁵ Specifically, the ABA ignored the recommendations of the Conference of Chief Judges to address its applicability and scope with respect to federal prosecutors,⁵⁶ as well as

50. *Id.* (emphasis added).

51. *See id.* (specifically discussing Title 28 C.F.R., Part 77, and ordering the Attorney General to amend any rules to abide by part a of § 530B). The McDade Amendment specifically targeted the Thornburgh memo and the Reno rule in its codification, leaving no doubt that Congress was taking away any authority the Department of Justice believed they had with respect to setting forth no-contact rules with respect to their employees. *Id.*

52. *S. Judiciary Ethics Rules and Federal Law Enforcement Officers: Hearing Before the Subcomm. on S. Judiciary, 106th Cong. (1999)* [hereinafter *Smietanka Testimony*] (statement of John Smietanka, member, Michigan Attorney Discipline Board). Smietanka was appointed Special Counsel to the Attorney General under William Barr. *Id.* He was Special Assistant United States Attorney for the Northern District of Illinois during the high-profile "El Rukris 1" prosecutions and is currently on the panel for the Michigan Attorney Discipline Board. *Id.* In his opinion, "[t]he systematic pursuit of abuse of governmental power began to become a national question with a series of National events: Watergate, ABSCAM, the Mafia, the War on drugs, and the scandals of big business or big labor gone amok." *Id.*

53. Cramton & Udell, *supra* note 23, at 320.

54. *Id.* at 324-25. In 1909, the ABA promulgated its first rules of ethics, called the Canons of Professional Ethics. *Id.* Canon 9 contained the first formal ABA no-contact provision. *Id.* Since 1909, every set of ethics rules promulgated by the ABA, now referred to as the ABA Model Rules of Professional Conduct, have included a no-contact provision.

55. *See Pierce, supra* note 34, 122-38 (discussing the various drafts and recommendations to ABA Rule 4.2). ABA Model Rule 4.2 changed the word "party" to "person to make it clear the Rule applies beyond parties to litigation." *Weider Sports Equip. Co.*, 912 F. Supp at 506.

56. *Pierce, supra* note 34, at 121-22. In 1998, amidst the growing controversy over the applicability of Rule 4.2 to federal prosecutors, the ABA's Commission on the Evaluation of the Rules of Professional Conduct (Commission) began its review of Rule 4.2. *Id.* at 123-24. The Commission reviewed a discussion draft prepared by the Conference of Chief Justices (COCJ), which consisted of state supreme court justices and representatives of the U.S. Department of Justice. *Id.* The discussion draft was submitted to the ABA Standing Committee and "contained numerous special provisions allowing communication with represented persons by government lawyers engaged in criminal and civil law enforcement matters." *Id.* at 126. Although the Chief Justices and the Department of Justice representatives did not fully agree regarding the application of Rule 4.2 to federal

separate recommendations submitted by the Department of Justice and representatives of the ABA's Standing Committee on Ethics.⁵⁷

II. WHY IS 18 U.S.C. § 530B AND ABA'S RULE 4.2 IMPORTANT TO THE ADMINISTRATION OF JUSTICE?

The types of federal financial crimes being perpetrated by corporations on the investing public in recent years have been very complex and costly.⁵⁸ Investigations of corporate activities have also become complex, often involving multiple jurisdictions,⁵⁹ and necessitating the early involvement of federal prosecutors to advise and partner with agents to identify various criminal acts, criminal actors, and to make informed prosecutorial decisions as the investigation evolves.⁶⁰ One essential investigatory tool frequently used by all federal law enforcement officials is interviewing.⁶¹ "When the government is investigating possible corporate wrongdoing, an employee may have information that is . . . harmful to the corporation."⁶² Talking to individuals regarding the chain of events of a potential crime or circumstances surrounding a particular occurrence is one of the most effective means of gathering information about what happened from those who may know.⁶³

In the corporate environment, where the corporation and/or its principals may have committed fraud, § 530B and ABA Rule 4.2 have essentially taken the interviewing tool away from federal agents.⁶⁴ Although

prosecutors, "they both attempted to break a decade long impasse over the applicability of Rule 4.2 to DOJ lawyers." *Id.* at 125.

57. *Id.* at 128-29. In 1998, the ABA Commission was given three draft proposals to consider for its analysis and revisions to Rule 4.2. *Id.* at 129-30.

58. *Levin Testimony, supra* note 7. Senator Levin discusses the collapse of Enron, with its stock dropping from approximately eighty dollars a share to almost nothing within a ten month period. *Id.* Enron consisted of a large number of financial transactions that were very complex. *Id.*

59. *S. Judiciary Ethics Rules and Federal Law Enforcement Officers: Hearing Before the Subcomm. on S. Judiciary, 106th Cong. (1999)* [hereinafter *Justice Testimony*] (statement of John R. Justice, Circuit Solicitor of the Sixth Circuit of South Carolina). Mr. Justice describes the adverse effects of the Citizens Protection Act on behalf of local prosecutors. *Id.* He states that "the strength of the federal system of criminal justice are those serious cases that necessitate investigations that cross state lines. . . . When the 'Citizens Protection Act' was introduced in the House the consequences for local prosecutors would have been truly devastating." *Id.*

60. *Id.* Given the nature of complex cases, local prosecutors work with joint task forces to combat federal crimes such as "drug trafficking, domestic terrorism, money laundering, and other crimes that involve cross-jurisdictional efforts and interests." *Id.*

61. Cramton & Udell, *supra* note 23, at 339. *See also Thornburgh Memorandum, supra* note 41, at 286 (describing interviewing employees as a means of investigating alleged False Claims Act violations).

62. Cramton & Udell, *supra* note 23, at 339.

63. DAN K. WEBB ET AL., CORPORATE INTERNAL INVESTIGATIONS § 9.02 at 1 (2004).

64. One view regarding the application of the no-contact rule to federal prosecutors is a hybrid one. *See* Caroline Heck Miller, *Knowing the Dancer From the Dance: When the Prosecutor is Punished for the Government's Conduct*, 29 STETSON L. REV. 69, 85 (1999) (comparing roles of federal prosecutors to other attorneys and law enforcement officials).

interviewing individuals in the presence of corporate counsel is an option, this option may not elicit completely honest or frank answers. As a result, corporate investigations are being compromised.⁶⁵

During the late 1990s and into early 2000, while Enron and other large corporations were participating in large-scale fraud,⁶⁶ federal law enforcement officials, bound by the no-contact rule, lacked one of the most effective means of protecting investors from being victimized by corporate greed – the ability to conduct unimpeded interviews with employees like Sherron Watkins.

III. DUAL RIGHTS: A CORPORATION'S RIGHTS VS. AN INDIVIDUAL'S RIGHT TO CHOOSE

A. *An Individual's Freedom to Choose*

When a corporation is under investigation, the corporation has the right to counsel.⁶⁷ One issue surrounding the applicability of the no-contact rule is when, or if, the employee has any rights. If so, are those rights trumped by the rights of the corporation? Arguably, the answer is yes. Using Enron as an example, if federal officers wanted to speak to Sherron Watkins regarding possible accounting irregularities at Enron, the no-contact rule essentially would have barred such contact if the investigation was conducted with the advice and assistance of federal prosecutors,⁶⁸ and if Enron was represented by counsel.⁶⁹

Miller concludes that federal prosecutors should be held to the ethical standards of law enforcement personnel in some situations and attorneys in other situations. *Id.* at 87. For instance, when federal prosecutors are acting in a police role, assisting in the investigation of a corporation by advising law enforcement officials, the prosecutor should be treated similar to a police officer. *Id.* When federal prosecutors function as attorneys, such as when they participate in court proceedings, they should be treated as any other attorney, "accountable to the additional ethical obligations of legal practice." *Id.*

65. Cramton & Udell, *supra* note 23, at 296. "[A]ggressive efforts by counsel for corporations and potential defendants to expand its application. . . have created substantial problems for law enforcement officials." *Id.*

66. See *Donaldson Testimony*, *supra* note 10 (referring to the fact that the economic increases in the stock market halted in the second quarter of 2000). Mr. Donaldson characterized the second quarter of 2000 as a bursting bubble. *Id.* This time period in America's history was overcome by "the grossest displays of greed and malfeasance." *Id.*

67. *United States v. O'Keefe*, 961 F.Supp 1288, 1292 (E.D. Mo. 1997). Under the theory of respondeat superior, liability may be imposed on a company by the acts of its employees. *Id.*

68. See generally *United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) (discussing the applicability of the no-contact rule to all federal law enforcement personnel).

69. See Miller, *supra* note 64, at 83 (discussing the fact that some corporations retain lawyers to represent them).

Most corporations are represented by counsel who are continuously on retainer.⁷⁰ Thus, when a corporate lawyer claims “umbrella representation”⁷¹ of all employees, the employee is not choosing a lawyer, but rather, is having one chosen for him or her. The lack of choice for most employees is emphasized by the fact that the employee may not even know that the corporate attorney is claiming to represent him or her.⁷² Corporations are able to use retained counsel to prevent contact with employees by investigators.⁷³ Abiding by the no-contact rule, federal officials may be barred from even asking the employee if they wish to be represented by their employer’s attorney, or if they wish to speak.⁷⁴

One important issue that exists in this scenario is that legally, the corporate attorney, does not actually represent the individual, but instead represents the client corporation.⁷⁵ Therefore, the employee is deemed to be represented for purposes of the no-contact rule only, and is not actually represented as an individual.⁷⁶ Ironically, two of the reasons behind the original promulgation of the no-contact rule are to protect individuals who have chosen lawyers and to protect the sanctity of the attorney-client privilege; however, the no-contact rule in the corporate context does not address these concerns. As an individual, an employee cannot effectively choose a lawyer if she does not know that she is represented. And because they are not represented, the sanctity of the attorney-client privilege is irrelevant if the attorney’s actual client is the corporation.⁷⁷ In addition, “umbrella representation” applicable to an employee is not representation of the individual at all, but serves to insulate corporations against investigation by controlling the release of potentially harmful information and preventing government officials from effectively investigating crimes.⁷⁸

B. An Individual’s First Amendment Right to Freedom of Speech

The express language of the no-contact rule appears to make the rule

70. *Thornburgh Memorandum*, *supra* note 41, at 289. Attorney General Thornburgh expressed the Department of Justices’ view that many corporations have “counsel continuously on retainer, which counsel claims to represent all employees on all corporate matters. . . .” *Id.* This creates a “difficult situation” and probably runs afoul of a true attorney client relationship. *Id.*

71. *See Smietanka Testimony*, *supra* note 52, at *2 (discussing the fact that some corporate attorneys make claims of blanket or umbrella representation with respect to all employees of a company under investigation).

72. Karlan, *supra* note 26, at 701.

73. *Id.*

74. MODEL RULES OF PROF’L CONDUCT R. 4.2 (2002).

75. Cramton & Udell, *supra* note 23, at 339-40. Corporate attorneys represent their clients, the corporation. Therefore, the concern with protecting the attorney-client relationship appears to be an excuse for lawyers to control information to “potential or actual adversaries.” *Id.* “A prosecutor is under the obligation not to speak” because they may disadvantage the represented party. Delker, *supra* note 38, at 903.

76. Cramton & Udell, *supra* note 23, at 339-40.

77. *Id.* at 341.

78. *Id.*

applicable even in situations where the employee voluntarily approaches the government with information of wrong-doing on behalf of the corporation.⁷⁹ For example, if Sherron Watkins went to the United States Attorney's Office to inform them of accounting irregularities, the Assistant U.S. Attorney may be barred from speaking to her.⁸⁰ In this example, an ethics rule effectively trumps an individual's First Amendment right of free speech.⁸¹

In a post-*Miranda*⁸² world – a world that also includes the Fifth,⁸³ Sixth,⁸⁴ and Fourteenth Amendments⁸⁵ to the United States Constitution – a person has the constitutionally granted right to choose not to speak to law enforcement agents. A person has a right to say “I have a lawyer,” “I want a lawyer,” or “I do not want to speak.” However, if a person wishes to speak out, they have a personal right under the First Amendment to do so.⁸⁶ An employee should be afforded the opportunity to exercise his or her constitutionally granted rights to speak or not to speak.

79. *Id.* at 341-42. Although constitutional rights may be waived, a lawyer's ethical obligations may not be waived by the client. *Id.* Only the lawyer may waive this right. *Id.* See also John G. Douglas, *Prosecuting White-Collar Crime: Jimmy Hoffa's Revenge: White Collar Rights Under the McDade Amendment*, 11 WM. & MARY BILL OF RTS. J. 123, 138-39 (2002) (describing this approach as “paternalistic”). But see *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000) (holding that conflict of interest concerns gives an individual the right to approach government officials without corporate counsel if the prosecutor advises the individual of their rights to be represented).

80. Cramton & Udell, *supra* note 23, at 341-42.

81. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). “[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Id.* (citations omitted).

82. *Miranda* warnings serve to protect individuals from incriminating themselves with respect to a crime. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). This “Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” *Id.* at 467. “In order to . . . permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.” *Id.*

83. The Fifth Amendment of the United States Constitution states, in pertinent part, “[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. V.

84. The Sixth Amendment to the United States Constitution states, in pertinent part, that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.

85. Section One of the Fourteenth Amendment to the United States Constitution states that,

[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

86. U.S. CONST. amend. I. The First Amendment states, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” *Id.*

Although a person chooses to be associated with a company through employment, that association should not trump the individual's right to speak. In *Madsen v. Women's Health Center*, the United States Supreme Court held that "freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights."⁸⁷ Therefore, although an individual has chosen to be an employee of a particular corporation, the corporation should not be able to quash the individual's rights to free speech, especially not through a rule of ethics.

One option open to law enforcement personnel working with federal prosecutors that does not violate the no-contact rule is to request, via corporate counsel, to interview a particular employee.⁸⁸ In representing the corporation, the lawyer has a right to consent to the contact and be present for the interview,⁸⁹ even though the corporate lawyer should notify the employee that he does not represent him or her personally.⁹⁰

One overwhelming element of human nature is that employees invariably wish to remain employed.⁹¹ Therefore, a corporate lawyer who does not represent the individual employee but is present at the interview, listening to the questions asked and the answers given regarding the corporation itself, hampers the legitimacy of the interview and makes the interviewing process counter-productive.⁹² It is unlikely that the employee is going to say anything derogatory about the corporation, his or her supervisor, or other high-level corporate individuals in the presence of the corporate

87. *Madsen*, 512 U.S. 753, 776 (1994).

88. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

89. *Id.*

90. See MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. (1983) (acknowledging that "[c]are must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual").

91. Cramton & Udell, *supra* note 23, at 340. See also *Hearing of the Crime and Drugs Subcomm. of the S. Judiciary Comm.: Subject Penalties for White Collar Offenses: Are We Really Getting Tough on Crime?*, 107th Cong. (2002) [hereinafter *Devine Testimony*] (statement of Tom Devine, Legal Director, Government Accountability Project) (discussing the importance of whistleblowers to federal investigators and prosecutors). Mr. Devine describes whistleblowers as the "Achilles heel of . . . corruption." *Id.* Mr. Devine also describes Sherron Watkins, the Enron executive, as a "corporate Paul Revere". *Id.*

92. Cramton & Udell, *supra* note 23, at 340. "[T]he presence of corporate counsel . . . may deter employees who wish to cooperate due to fear that retaliation will flow from the provision of information." *Id.* Congress recognized the importance of anonymity with respect to corporate employees when enacting laws such as the whistle-blower statute, but failed to recognize the same need for anonymity when enacting the McDade Amendment. See *Devine Testimony*, *supra* note 91 (discussing the whistle-blower statute). Employees should not fear retaliation from corporate executives via the information the executives receive through corporate counsel. *Id.*

attorney.⁹³ Because the attorney represents the corporation, the attorney is obligated to repeat what he or she heard during the interview.⁹⁴ In this type of situation, the no-contact rule effectively places an employee in the difficult position of not speaking at all or of speaking in front of corporate counsel and having to face possible retaliation from the employer.⁹⁵

According to Comment 7 to Rule 4.2, one reason for the no-contact rule in the corporate context is to protect the corporation by decreasing the chances that someone will disclose privileged information or disclose information that may be harmful to the corporation's interests.⁹⁶ Because of the potential liability to corporations for the disclosure of information from employees, proponents of the no-contact rule continue to advocate that federal prosecutors should be barred from contacting some, if not all, employees.⁹⁷ Although many states have adopted no-contact rules that have attempted to limit which employees fall under the no-contact rule,⁹⁸ some

93. See generally *Devine Testimony*, *supra* note 91 (discussing the fact that whistleblowers face retaliation from employers). "[T]he norm is that whistleblowers proceed at their own risk when sounding the alarm. . . . [T]here are several hundred whistleblowers who. . . are openly fired for disloyalty, for disloyalty to company managers whom themselves often were breaching their fiduciary duty to the shareholders." *Id.* Mr. Devine noted that Sherron Watkins, the former Enron executive who wrote an anonymous letter describing some of Enron's potential accounting problems, "only survived because Enron collapsed before retaliation could be carried out." *Id.*

94. *Hutchinson Amendment*, *supra* note 21, at H7238. Congressman Hutchinson discussed a common problem with conflict of interest issues by using an example of a drug dealer.

If you arrest a low level drug dealer in the State, the kingpin can hire a lawyer for that low level drug dealer and as a prosecutor, you cannot talk to that low level drug dealer without that lawyer being present who is actually hired by the kingpin. You know what plays out in that situation. If that person talks to you, he may well be dead the next day.

Id. Although corporate crime may be considered less violent than crimes committed by drug dealers and drug kingpins, Congressman Hutchinson's point is still valid with respect to an employee's fear of retribution by their employer if they speak negatively about their employer in front of the corporation's counsel.

95. See *Devine Testimony*, *supra* note 91 (discussing the ramifications of whistleblowers). "Legislators of both parties have historically lionized whistleblowers and chastised those who violated their duty by remaining silent. . . . But the rhetoric rings hollow to someone who is fired and facing bankruptcy for warning a corporation of that same risk." *Id.* Although whistleblowers generally do so anonymously, the employee has no anonymity when speaking to a federal agent while a corporate attorney is present. *Id.* Although the ramifications, as described by Mr. Devine, regarding retaliation for whistleblowers are severe, they do not compare to the fear of individuals who have to face corporate lawyers and their employers while speaking, or in effect not speaking, to federal investigators. *Id.*

96. Karlan, *supra* note 26, at 701. If the no-contact rule is read literally, law enforcement objectives would obviously be impeded with respect to complex crimes. *Id.*

97. Cramton & Udell, *supra* note 23, at 355 n.267. Florida has effectively abolished the "authorized by law" provision of the no-contact rule by banning contact with all current and former employees. *Id.*

98. Aultman, *supra* note 29, at 735. The definition of represented persons or parties has changed over time. Initially, corporations tried to establish that contact with all salaried employees was prohibited. *Id.* However, this approach appeared too broad, so

states, like Florida, have interpreted the no-contact provisions broadly and have effectively extended the ban to include not only all current employees but former employees as well.⁹⁹

Although a corporation's interest to prevent disclosure of harmful information is an important one, it is an interest that is not afforded to individuals. Consider an individual under investigation for mail fraud, which is a federal offense. Even after the right to counsel attaches, whether through the Fifth¹⁰⁰ or Sixth Amendment,¹⁰¹ federal prosecutors investigating a federal crime are not barred from attempting to interview the individual's best friend just because the information the friend may convey is harmful to the person being investigated.

The no-contact rule, as applied in the corporate context, effectively extends extra rights to a corporation by shielding its employees from questioning.¹⁰² By shielding a corporation from scrutiny at the employee level, the no-contact rule acts contrary to this country's stated public policy objectives: to protect the public from unscrupulous business practices by identifying and prosecuting corporate criminal activity.¹⁰³

C. Conflict of Interest Concerns

The no-contact rule places corporate lawyers in conflicting positions with regard to the corporation's interests and the individual's interests.¹⁰⁴

some courts adopted the prohibition of contacting a corporation's "control group" or those with managerial authority, because both of these groups were deemed able to "bind the company". *Id.* Other courts prohibited contacting employees who were "implementing the advice of counsel. . . . These prohibitions, if taken literally, would effectively insulate corporations from any investigations that are not initiated through formal discovery proceedings." *Id.* One court held that "a middle management level employee with no authority to commit the organization to a position regarding the subject matter of the litigation could be contacted [because] this reading of the rule was necessary to ensure that Rule 4.2 remains a rule of ethics, rather than of corporate immunity." *Id.* at 736.

99. Cramton & Udell, *supra* note 23, at 355 n.267.

100. U.S. CONST. amend. V.

101. U.S. CONST. amend VI.

102. Cramton & Udell, *supra* note 23, at 339-40. The purpose of the no-contact rule seems to be "burdening the government's access to information." *Id.* at 340.

103. *Donaldson Testimony*, *supra* note 10 at *3. The government needs to take measures to improve public confidence to the financial markets. *Id.*

104. *Wood v Georgia*, 450 U.S. 261, 268-71 (1981). Conflict of interest concerns were present when a lawyer was hired by a person's employer. *Id.* There are "inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when a third party is the operator of the alleged criminal enterprise." *Id.* at 268-69. "One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest." *Id.* See also *Smietanka Testimony*, *supra* note 52, at *2 (describing potential conflicts of interest for counsel which may be forced upon another by an employer).

Take the case of the member of an organized criminal venture who wants to cooperate with the government, but has an attorney not of his choosing publicly representing him. The dilemma: if he tells the attorney he wants to cooperate or plea bargain with the government, he risks injury to his family or himself.

Id.

According to the United States Supreme Court, “[s]ince a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.”¹⁰⁵

IV. EXCEPTIONS TO THE NO-CONTACT RULE AS “AUTHORIZED BY LAW”

A. In General

Although ABA Rule 4.2 sets forth the general no-contact provisions, the rule also states that contact is *not* prohibited if a lawyer is “authorized by law to do so or by court order.”¹⁰⁶ In *United States v. Lopez*,¹⁰⁷ the Department of Justice argued that investigations conducted with respect to federal crimes are, in and of themselves, authorized by federal statutes and are therefore exceptions to the no-contact rule as “authorized by law.”¹⁰⁸ The Ninth Circuit Court of Appeals disagreed in *Lopez*, stating that federal statutes were “generally enabling statutes” and that there needed to be an express or implied authority to exempt federal prosecutors pursuant to the “authorized by law” exception to California’s no-contact rule.¹⁰⁹ However, some courts have applied the “authorized by law” exception for investigations only in situations where there is ongoing criminal activity because “[e]thics rules prohibit a lawyer from assisting a client with criminal conduct.”¹¹⁰

B. Undercover Operations

Most states have decided that undercover investigations are exempt from the no-contact rule as “authorized by law.”¹¹¹ In *United States v.*

105. *Wood*, 450 U.S. at 271 (citing MODEL CODE OF PROF’L RESPONSIBILITY EC 5-23 (1980)). The ABA Code also states that “[a] person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers.” *Id.* However, the ABA seems to be picking sides on the representation matter. On one hand, ABA Rule 4.2 prohibits contact by one lawyer to a party represented by another lawyer. See MODEL RULES OF PROF’L CONDUCT R. 4.2, (discussing the no-contact rule). On the other hand, the ABA recognizes a potential conflict of interest, but merely acknowledges the fact that they recognize this conflict and warns lawyers of the potential. Compare MODEL RULES OF PROF’L CONDUCT R. 4.2, with MODEL CODE OF PROF’L RESPONSIBILITY EC 5-23 (1980) (establishing the ABA’s positions with respect to the no-contact rule and conflict of interest concerns).

106. MODEL RULES OF PROF’L CONDUCT R. 4.2 (2002).

107. 765 F.Supp 1433 (N.D. Cal. 1991), *vacated*, 989 F.2d 1032 (9th Cir. 1993), *amended and superceded*, 4 F.3d 1455 (9th Cir. 1993).

108. *Delker*, *supra* note 38, at 868.

109. *Lopez*, 989 F.2d 1032.

110. *Cramton & Udell*, *supra* note 23, at 337. The no-contact rule applies to “specific, past crimes.” *Id.*

111. *United States v. Heinz*, 983 F.2d 609, 614 (5th Cir. 1993). “The dullest imagination can comprehend the devastating effect that such a rule would have on undercover operations.” *Id.*

Ryans, the Tenth Circuit Court of Appeals held that Rule 4.2 “was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel.”¹¹² Therefore, according to *Ryans*, taping a conversation with an employee during an undercover investigation may be “authorized by law” for purposes of the no-contact rule, but a federal agent overtly approaching an employee and providing them with all the constitutional freedoms of choosing not to speak, is not “authorized by law.”¹¹³ This rationale seems to conflict with personal rights, personal freedoms, and stated public policy.

V. INCONSISTENT RULES FOR FEDERAL MULTI-JURISDICTIONAL INVESTIGATIONS IMPEDES THE ABILITY TO INVESTIGATE COMPLEX CRIMES

With respect to the application of the no-contact rule, lack of uniformity between states is problematic for federal prosecutors.¹¹⁴ The varying interpretations of the no-contact rule can be found in areas pertaining to which employees are exempt, whether federal prosecutors may speak to an employee who approaches the government, and which law enforcement activities may be “authorized by law.”¹¹⁵ The lack of uniformity is also problematic for federal prosecutors because many investigations involving federal white-collar crime extend beyond state lines.¹¹⁶

For some cases, a prosecution team is formed, which may include an Assistant United States Attorney (AUSA) and law enforcement personnel from different agencies and areas of the country.¹¹⁷ The AUSA’s may be admitted to different state bar associations.¹¹⁸ As a result, attorneys working

112. 903 F.2d 731, 739 (10th Cir. 1990). The court considered the ramifications of Rule 4.2 to covert operations and concluded that applying the rule would “stymie undercover operations” and “hamper. . . legitimate investigations.” *Id.* (citations omitted).

113. *United States v. Vasquez*, 675 F.2d 16 (2d Cir. 1982). The *Vasquez* court noted that by not excluding undercover operations, the unintended result would enable criminals to potentially circumvent a legitimate investigation. *Id.* at 17.

114. 28 C.F.R. Part 77.

115. *Id.*

116. *Hutchinson Amendment*, *supra* note 21, at H7238. Congressman Bryant used the Oklahoma City bombing as an example of an investigation and prosecution that encompassed lawyers and investigators from throughout the United States. *Id.* According to Congressman Bryant, “in that investigation, [prosecutors and investigators] gathered evidence in Michigan and New York and other states and brought that together in Oklahoma City for coordination.” *Id.* The non-uniformity of various state rules hampers legitimate multi-jurisdictional law enforcement investigations. *Id.*

117. *Chertoff & Mercer Testimony*, *supra* note 14, at *2. The Corporate fraud task force, chaired by the Deputy Attorney General, will include U.S. Attorneys from various large cities throughout the United States. *Id.*

118. See *Hutchinson Amendment*, *supra* note 21, at H7240 (describing the problems with multi-state investigations coupled with non-uniform rules).

In the multistate investigations we have, when you are traveling down to Florida to interview a witness, when you are going to Louisiana, when you have multi-states involved, you have conflicting laws with different states. My good friend from Massachusetts has some very stringent bar rules that are in conflict with the ethics

on the same case “may be subject to substantially different rules.”¹¹⁹ In addition, although most circuits agree that Rule 4.2 applies to criminal cases,¹²⁰ not all courts agree as to whether the rule applies to undercover operations pre-indictment.¹²¹

The result of varying rules between jurisdictions for federal prosecutors, who many times deal with multi-jurisdictional cases, is an impediment to legitimate, substantive investigations.¹²² The more complex the investigation, the greater the need for uniformity in interviewing witnesses and gathering evidence.¹²³ If a discrepancy exists or it is unclear as to whether contact may be deemed “ethical,” the practice has been to forego employee interviews and potentially compromise investigative results.¹²⁴ “[T]he risk of disciplinary sanction is great enough that a prosecutor counseling police officers in their conduct . . . might well advise them to forego [contact]. . . . The loser is the client, who is deprived of the benefit of statements law enforcement agents might have obtained.”¹²⁵

VI. ETHICS OR SUBSTANTIVE LAW

Defense attorneys began threatening federal prosecutors with state disciplinary actions for violations of the no-contact provisions.¹²⁶ As a

laws in our State and hamstring what a prosecutor might be trying to do and what could be perceived as unfair.

Id.

119. See 28 C.F.R. Part 77 (outlining the jurisdictional difficulties of investigating crime under Rule 4.2). As an example, the Department of Justice Regulations discuss the situation in which varying jurisdictions may have completely different results. “Indeed, one member of a two-member federal prosecution team could receive a commendation for effective law enforcement while the other member, licensed in a different state, might be subject to state discipline for the same conduct.” *Id.*

120. *Ryans*, 903 F.2d at 739. *But see Vasquez*, 675 F.2d at 17 (doubting the applicability of Rule 4.2 to criminal matters).

121. *United States v. Grass*, 239 F.Supp 2d 535, 541 (M.D. Penn. 2003). The Second Circuit disagrees with all other circuits that have “held that the no-contact rule does not prevent non-custodial pre-indictment communications by undercover agents with represented parties.” *Id.*

122. *Hutchinson Amendment*, *supra* note 21, at H7238. To add more confusion as to whom a federal prosecutor may or may not speak with, the *O’Keefe* court stated that “because the statements of some of defendant’s former employees may subject defendant to liability, the Court agrees with defendant that some limits should be placed on the Government’s access to these employees.” *O’Keefe*, 961 F.Supp. at 1295.

123. *Hutchinson Amendment*, *supra* note 21, at H7238.

124. See 28 C.F.R. Part 77 (discussing the practical effects of the possibility of violating Rule 4.2).

The threat of disciplinary proceedings (and the possible resulting loss of license and livelihood) against a government attorney engaged in legitimate law enforcement activities has had a chilling effect on the responsible exercise of law enforcement duties. Many federal prosecutors . . . stated that they feel compelled to refrain from authorizing or participating in legitimate and ethical law enforcement activities. . . .”

Id.

125. *Miller*, *supra* note 64, at 82.

126. *Cramton & Udell*, *supra* note 23, at 318 n.85. The practices of the Department of

result, the Department of Justice issued an opinion via the Thornburgh Memorandum stating that since each federal criminal case involved federal prosecutors applying federal law in a federal court, the Supremacy Clause¹²⁷ trumped state rules of ethics.¹²⁸ However, federal courts' adoption of state and local ethics rules, as well as the passage of the CPA, arguably makes the Supremacy Clause inapplicable.¹²⁹ However, legal scholars agree that the no-contact rule was "not intended to apply to the investigatory activities of law enforcement officials,"¹³⁰ especially in the criminal context,¹³¹ and that sound public policy dictates a need to have uniform federal rules.¹³²

Most federal courts, however, continue to hold that the no-contact rule is applicable to federal prosecutors,¹³³ and continue to recognize their ability to sanction prosecutors for violations of ethics rules.¹³⁴ But at the same time, most federal courts are "reluctant to apply an exclusionary rule" for violations unless the violation is one of constitutional proportions.¹³⁵ Because the Sixth Amendment right to counsel does not attach until adversarial proceedings commence,¹³⁶ and Fifth Amendment rights to counsel attach in a custodial setting,¹³⁷ constitutional safeguards are generally not implicated when the no-contact rule is violated.

When constitutional safeguards remain unaffected, "a majority of courts are unwilling to allow the ethics rule to be used by defense attorneys as substantive law."¹³⁸ "Thus, to some extent, [federal courts] have aligned the no-contact rule with constitutional restraints imposed under the Fifth and Sixth Amendments."¹³⁹ However, even though federal courts have not applied the exclusionary rule for violations of the no-contact rule, state bar agencies may nevertheless impose sanctions on federal lawyers.¹⁴⁰ For example, federal prosecutors, abiding by all federal laws in conducting their jobs, may nevertheless be sanctioned by a state bar agency for ethical

Justice coexisted peacefully with the no-contact rule until defense attorneys began using it as a tactic to threaten a federal prosecutor. *Id.*

127. U.S. CONST. art. VI.

128. *Thornburgh Memorandum*, *supra* note 41.

129. Cramton & Udell, *supra* note 23 at 354.

130. *In re John Doe*, 801 F.Supp 478, 485 (Dist. N.M. 1992). In *In re Doe*, the constitutionality question pertaining to the McDade Amendment focused on whether ABA ethical rules should be applied to federal prosecutors as a whole. *Id.* The court held that federal prosecutors should, in fact, abide by ethical standards. *Id.*

131. Cramton & Udell, *supra* note 23, at 326.

132. *Id.* at 319.

133. Delker, *supra* note 38, at 878. All federal prosecutors must be members of a state bar. *Id.* States have regulatory and licensing power over their members. *Id.*

134. *Id.* at 885. The Supreme Court has granted federal courts the power to control attorneys that practice before them. *Id.*

135. Cramton & Udell, *supra* note 23, at 348.

136. *Id.* at 328.

137. *Id.*

138. *Id.* at 348.

139. Karlan, *supra* note 26, at 703.

140. Cramton & Udell, *supra* note 23, at 370.

violations. Therefore, the practical implication of the no-contact rule is to halt or impede federal enforcement of federal crimes;¹⁴¹ thereby acting as substantive law,¹⁴² not solely a rule of ethics.

VII. HOW TO SOLVE THE PROBLEMS CAUSED BY THE MCDADE AMENDMENT

None of the original reasons for the adoption of the CPA (McDade Amendment) are actually addressed or solved by Rule 4.2 or the CPA (McDade Amendment). The no-contact rule does not address Department “leaks”¹⁴³ of information or unwarranted, costly prosecutions. These “leaks” concerned Congressman McDade the most.¹⁴⁴ The no-contact rule, applicable through the CPA, governs the point at which law enforcement officials may interview employees of a corporation under investigation.

There have been vast changes in the world since the original adoption of the Canons of Ethics in 1909. However, the no-contact rule has undergone only minor changes.¹⁴⁵ The application of the no-contact rule in today’s corporate environment overly protects corporations from being subjected to meaningful investigation and prosecution. Such a result is adverse to subsequent laws enacted by Congress, such as the Sarbanes–Oxley Act.¹⁴⁶ Therefore, the no-contact provisions, as applied through the CPA, have been implicitly preempted by subsequent congressional legislation, such as the Sarbanes-Oxley Act.¹⁴⁷

Therefore, Congress should explicitly abolish the no-contact rule as applied to employees of a corporation in light of subsequent laws and the President and Congress’ more recent stated public policy objectives. Alternatively, Congress should recognize that the employee no-contact provisions of Rule 4.2, as applied through the CPA, acts as substantive law and should amend the CPA to exempt federal prosecutors from the no-contact rule while conducting federal crime investigations.

A third recommendation is for Congress to promulgate its own no-contact rule to be applied to federal prosecutors consistent with the right to counsel provisions of the United States Constitution as interpreted by the United States Supreme Court. The practical effect of any of these

141. Miller, *supra* note 64, at 82. “[T]he risk of disciplinary sanction is great enough that a prosecutor counseling police officers in their conduct . . . might well advise them to forego [contact]. . . . The loser is the client, who is deprived of the benefit of statements law enforcement agents might have obtained.” *Id.*

142. *Id.* at 91. Miller cautions that history shows that bar rules may quickly become substantive law. *Id.*

143. *Hutchinson Amendment, supra* note 21, at H7244.

144. *Id.*

145. Pierce, *supra* note 34, at 138.

146. Pub. L. No. 107-204, 116 Stat. 745 (2002).

147. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n.*, 505 U.S. 88, 98 (1992). Without explicit preemptive language, conflict preemption, which is a form of implied preemption, exists “where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

recommendations is to usurp the ABA rule and its state progenies,¹⁴⁸ thereby restricting state power to dictate and impede the actions of federal prosecutors and agents.

Recognizing the implied preemption of the no-contact rule or expressly exempting federal prosecutors from the no-contact rule acknowledges the fact that federal prosecutors are different than most other lawyers¹⁴⁹ because they routinely participate in multi-jurisdictional investigations¹⁵⁰ that can only be conducted efficiently and effectively with a uniform rule of conduct.¹⁵¹ An exemption or recognized preemption will also indicate Congress's recognition of the fact that protecting a corporation from investigation does not outweigh an individual's rights in the corporate environment; namely, the right to freedom of speech and the right to have a lawyer of their choice.¹⁵² In addition, the need for federal prosecutors to be able to conduct or participate in both overt and covert operations is tantamount to the administration of justice.

However, there are some legitimate concerns that, if gone unchecked, federal prosecutors may act unethically.¹⁵³ Certainly, no one questions the fact that errors in judgment sometimes occur at the prosecutorial level.¹⁵⁴ However, the Department of Justice has formal disciplinary proceedings set up to address concerns regarding the conduct of its employees.¹⁵⁵ The Department's internal procedures for employee misconduct addresses legitimate ethical issues that may arise.¹⁵⁶

148. Uniformity of rules for federal prosecutors is extremely important given the multi-jurisdictional component of federal law enforcement. *Hutchinson Amendment*, *supra* note 21, at H7240.

149. See generally Miller, *supra* note 64, at 70-71 (outlining how federal prosecutors are unique).

150. See Miller, *supra* note 64, at 88 (discussing the effect the McDade Amendment had on the existing Department of Justice Regulations concerning ethics). The CPA was clearly intended to stop the Department of Justice from exempting federal prosecutors from the no-contact rule. *Id.* The CPA was also "a Congressional rejection of the proposition that prosecutors should be treated differently from other attorneys." *Id.*

151. See *Smietanka Testimony*, *supra* note 52, at *2 (discussing unique problems faced by federal prosecutors such as the advent of corporate and union investigations and attorney claims of "umbrella representation for all members of the body").

152. See generally *Miranda*, 384 U.S. 436 (protecting an individual from incriminating themselves).

153. See *Hearing Before the House Appropriations Comm. Subcomm. Commerce, Justice and State, and the Judiciary*, 100th Cong. (1998) (prepared statement of Gerald B. Lefcourt, President, Nat'l Ass'n of Criminal Defense Lawyers) (describing the need to contain "the unfettered power of federal prosecutors and the dangers posed by ethical, abusive and improper conduct by U.S. Department of Justice employees").

154. *Hutchinson Amendment*, *supra* note 21.

155. Former Attorneys General Thornburgh and Reno attempted to promulgate no-contact rules for Assistant United States Attorney's. *Thornburgh Memorandum*, *supra* note 41.

156. See generally *Hutchinson Amendment*, *supra* note 21, at H7234 (discussing the Department's procedures for handling attorney misconduct). "There are mechanisms already in place to address prosecutorial abuse and prosecutorial misconduct." *Id.*

Over the past several years, corporate fraud has resulted in billions of dollars in losses to the investing public.¹⁵⁷ Although Congress is addressing the need for tough and accurate financial reporting, it is time that Congress announces clearly and loudly that corporate fraud will not flourish in the future. Congress has the obligation to the public to rectify any prior inconsistent laws that may serve as an impediment to law enforcement.¹⁵⁸ The public deserves laws that prevent fraud, and to the extent that federal laws do not violate constitutional rights, they should be designed to promote individual rights over the corporation, and protect the public from corporate wrong-doing.

The CPA (McDade Amendment), as currently written, contradicts legislative intent to protect the public.¹⁵⁹ Congress should expressly acknowledge that the McDade Amendment, as applied to the no-contact rule, has been implicitly preempted by subsequent laws and Presidential Executive Orders designed to give federal law enforcement the tools necessary to investigate and prosecute corporate fraud. Alternatively, Congress should explicitly exempt federal prosecutors from the no-contact rule or rewrite the no-contact rule to allow for the employee to choose whether to accept representation from a corporate lawyer or another lawyer of their choice. These changes will give a proper balance to the rights of the corporation, the rights of the individual, and the rights of the public in being protected by corporate fraud.

CONCLUSION

The Citizens Protection Act of 1998 was hastily enacted as a rider to a 1998 Omnibus Appropriations Bill.¹⁶⁰ It mandates that federal prosecutors are bound by state and federal ethics rules. ABA Rule 4.2 contains what is commonly referred to as the no-contact or anti-contact rule. Most states have adopted ethics rules similar to that of Rule 4.2.

157. See Iwata, *supra* note 3 (discussing various corporate fraud cases resulting in billions of dollars of loss to the investing public. *Id.*

158. *In re Doe*, 801 F.Supp at 485.

In order for a Supremacy Clause defense to arise, . . . there must be a conflict between a federal prosecutor's duties under federal law and his duties under state law. A conflict arises when . . . state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id.

159. Cramton & Udell, *supra* note 23, at 316. Substantive and procedural rights should not vary between states when federal law is involved. *Id.* "Any deference accorded to state law or to local federal district court rules should serve important public purposes and not really random choices of federal judges in choosing the ethics rule adopted by reference in local court rules." *Id.*

160. See *S. Judiciary Ethics Rules and Federal Law Enforcement Officers: Hearing Before the Subcomm. on Criminal Justice Oversight*, 106th Cong. (1999) (statement of Richard L. Delonis, President, Nat'l Ass'n of Assistant Senate Judiciary Ethics Rules and Federal Law Enforcement Officers) (discussing the fact that the Citizens Protection Act was attached to an omnibus bill which was "hurriedly enacted in the closing moments of the last Congress").

Rule 4.2 serves to protect corporations from meaningful investigation into allegations of wrong-doing by prohibiting federal prosecutors or federal law enforcement officials when working with federal prosecutors, from contacting employees without first contacting the corporate attorney and allowing the corporate attorney the opportunity to be present during any interview or conversation with federal law enforcement officials. Although states have defined the no-contact rule in various ways, the rule's non-uniformity coupled with the existence of multi-jurisdictional investigations poses a problem that is unique to federal prosecutors.¹⁶¹ In addition, because Congress has subsequently enacted laws to protect the public from fraudulent corporate activity and because these laws contradict the effect that the CPA has on law enforcement activities, the no-contact rule, as applied through the CPA, should be void as having been preempted by subsequent congressional laws.

The continued existence of the CPA is contrary to current public policies and personal freedoms. An individual, who is also an employee, must be free to choose to speak to the government without the corporation's counsel present. An individual's right to speak to the government without an attorney must be outweighed by a corporation's need to keep any potential illegal activity secret. An individual's fear of losing their job must not be in direct conflict with legitimate law enforcement investigations. A law enforcement official should not, by an ethical rule, be able to place an employee in the situation of being threatened by coercive or retaliatory measures, even if these threats are unspoken. An ethics rule, which expands the constitutional definition of the right to counsel, should not be able hold a federal prosecutor hostage in his or her job, forcing him or her to forego otherwise legitimate investigative techniques at the expense of justice.

Laws that put corporate needs before the Bill of Rights and the President's agenda to deter, uncover, and/or punish those found to have committed white-collar crime, are not ethical in nature, but are actually substantive law that affects the federal process.

The Citizens Protection Act should be abolished. Alternatively, it should be rewritten to afford both individuals and corporations a level playing field with respect to the rights they are afforded, taking into account the policy concerns of protecting the public from unscrupulous business practices.

161. Cramton & Udell, *supra* note 23 at 316. "Larger issues of substantive justice are involved: the effective, efficient, and uniform enforcement of regulatory and criminal statutes, and the constitutional allocation of lawmaking authority." *Id.*