WISDOM WITHOUT POWER: THE DEPARTMENT OF JUSTICE'S ATTEMPT TO EXEMPT FEDERAL PROSECUTORS FROM STATE NO-CONTACT RULES

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INTRODUCTION

The states, through their bar associations, have long had primary responsibility for regulating the ethical conduct of lawyers.[1] Despite this history of state control over ethical standards, on August 4, 1994, the Department of Justice (Department), under Attorney General Janet Reno, adopted a regulation known as the "Reno Rule."[2] The Reno Rule purports to exempt federal prosecutors from the "no-contact" rules of the states in which they are licensed to practice law.[3] No-contact rules, adopted in some form by each state bar association, prohibit attorneys, unless authorized by law, from knowingly contact-

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[1] See Note, Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses, 107 Harv. L. Rev. 1547, 1581-82 (1994) [hereinafter Developments]. States historically have adopted model ethical codes articulated by the American Bar Association (ABA). See Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Provide Too Little Enforcement?, 8 St. Thomas L. Rev. 69, 73 (1995). The first attempt to establish a uniform norm of ethical conduct for all attorneys was introduced by the ABA in 1908. See ABA Canons of Professional Ethics (1908) (representing ABA's first effort at codifying ethical rules); see also Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethical Codes, 6 Geo. J. Legal Ethics 241 (1992) (tracking antecedents to Canons of Professional Ethics).

[2] Communications with Represented Persons, 28 C.F.R. § 77 (1995).

[3] See Communications with Represented Persons, 59 Fed. Reg. 39,910, 39,912 (1994) (codified at 28 C.F.R. § 77 (1995)) [hereinafter Communications] ("[T]he Department's rules are intended fully to preempt and supersede the application of state and local court rules relating to contacts by Department of Justice attorneys when carrying out their federal law enforcement functions."). Under federal law, a Department lawyer need be licensed by only one state bar; she need not be licensed by the state(s) in which she practices for the government. See Act of Nov. 30, 1979, Pub. L. No. 96-132, § 3(a), 93 Stat. 1040, 1044, as carried forward by Act of Aug. 26, 1994, Pub. L. No. 103-317, § 102, 108 Stat. 1724, 1734, 1735 (reenacting provisions of Pub. L. No. 96-132).

The Reno Rule addresses only federal attorneys engaged in law enforcement; it excludes from its coverage those attorneys representing the federal government in civil suits. See Communications, supra, at 39,914-15. This Note has the same focus.

ing a represented party about the subject matter of that representation without the consent of the party's attorney.[4]

Adoption of the Reno Rule was preceded by an interesting and contentious chronicle. As prosecutors began to play larger roles in more complex criminal investigations, the Department urged that the proscriptions of the traditional no-contact rule were inconsistent with the modern demands on its prosecutors.[5] Thus, in 1980 the Department informally posited that its prosecutors were not bound by the ethics rules of the states that licensed them.[6] This was necessary, they maintained, because interpretations of the no-contact rule by state regulatory bodies had become increasingly divergent.[7] Because of the uncertainty caused by the inconsistent interpretations, federal prosecutors feared sanctions by state disciplinary boards[8] and were therefore stifled in their law-enforcement efforts.[9] In fact, one member of a federal prosecution team could receive commendation for effective law enforcement while another member, licensed in a different state,

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[4] See Model Rules of Professional Conduct Rule 4.2 (1994); Model Code of Professional Responsibility DR 7-104 (1983).

[5] The Department of Justice explained:

> [Previously,] the traditional rule forbidding counsel from directly contacting represented persons did not come into conflict with legitimate law enforcement activities. In recent years, however, the Department of Justice has encouraged federal prosecutors to play a larger role in preindictment, prearrest investigations [stemming] from the wider use of law enforcement techniques, such as electronic surveillance, [and the increase in the number of] complex white collar and organized crime investigations . . . .

Communications, supra note 3, at 39,911; see also Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required, H.R. Rep. No. 986, 101st Cong., 2d Sess. 4-5 (1990) [hereinafter Federal Prosecutorial Report] (recognizing that different roles prosecutors play influenced Department's position that its prosecutors must be able to make formerly impermissible contacts with represented individuals); Irvin B. Nathan, Fixing the Rule on Contact with Represented Parties, Legal Times, Mar. 14, 1994, at 21 (asserting that traditional no-contact rule is no longer appropriate for federal prosecutors because it does not contemplate changing needs of law enforcement over past 20 years).

[6] See Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4B Op. Off. Legal Counsel 576, 577 (1980) [hereinafter Ethical Restraints] ("[S]tate bar associations may not . . . impose sanctions on a government attorney who has acted within the scope of his federal responsibilities.").

[7] See Alafair S.R. Burke, Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate, 46 Stan. L. Rev. 1635, 1636 (1994) (explaining that impetus for Department's position was lack of consensus among states about scope of their no-contact rules). Compare State v. Richmond, 560 P.2d 41, 46 (Ariz. 1976) (holding that no-contact rule does not apply to prosecutors), cert. denied, 433 U.S. 915 (1977) with People v. White, 567 N.E.2d 1368, 1386 (Ill. App. Ct.) (holding that no-contact rule applies to prosecutors, even before filing of formal charges), appeal denied, 575 N.E.2d 922 (Ill. 1991).

[8] See Ethical Restraints, supra note 6, at 601 (asserting that risk of state disciplinary proceedings is "real threat"); see also infra Part I.B.

[9] See Ethical Restraints, supra note 6, at 577 (explaining that application of state rules can impinge upon federal law-enforcement practices); see also infra Part I.B.

might be subject to state discipline—including losing her license—for the same conduct.[10]

The debate about exempting federal prosecutors from the no-contact rule has been polarized and intense.[11] On the one hand, federal prosecutors have professed that the lack of uniformity in state disciplinary board applications of the no-contact rule and threats by defense attorneys to refer prosecutors to these boards have encroached upon their ability to fight crime.[12] Prosecutors further contest that defense attorneys are improperly attempting to afford additional protection to their clients through the no-contact rule.[13] On the other hand, the defense bar, state bar associations, and state judges have responded by arguing that the Department's cries about nonuniform rules are exaggerated.[14] These critics charge that the Department's position threatens to undermine the attorney-client relationship,[15] creates an unequal playing field between federal

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[10] See Communications, supra note 3, at 39,911; see also Susanna Felleman, Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct, 95 Colum. L. Rev. 1500, 1519 & n.142 (1995) (noting that members of prosecutorial team might be subject to different state standards); Geoffrey C. Hazard, Jr., Uniform Discrepancies, Nat'l L.J., Mar. 20, 1995, at A19 (explaining that prosecutors face disparate standards due to discrepancies in state no-contact rules).

[11] Before the controversy over the scope of the rule, there was very little litigation in this area. As one federal court noted, as of the late 1950s there was not a single reported decision (and only two ethics opinions) concerning the no-contact rule in the criminal sphere. United States v. Jamil, 546 F. Supp. 646, 652 (E.D.N.Y. 1982), rev'd on other grounds, 707 F.2d 638 (2d Cir. 1983).

[12] See Communications, supra note 3, at 39,911 (describing "retreat from [participation in the investigative phase of law enforcement] by prosecutors" brought about by multiplicity of standards); F. Dennis Saylor, IV & J. Douglas Wilson, Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors, 53 U. Pitt. L. Rev. 459, 461 (1992) (contending that recent lack of consensus on scope of no-contact rule has restricted legitimate law-enforcement investigative activity).

[13] See Memorandum from Dick Thornburgh, Attorney General, United States Department of Justice, to All Justice Department Litigators (June 8, 1989), reprinted in In re Doe, 801 F. Supp. 478, exh. E, at 489-93 (D.N.M. 1992) [hereinafter Thornburgh Memo] (asserting that defense attorneys are attempting to achieve through ethical rule "what cannot be achieved through the Constitution: a right to counsel at the investigative stage of a proceeding").

[14] See William W. Taylor III, Justice's Ethics: Bad Policy Redux, N.J. L.J., Mar. 14, 1994, at 17, 17. Taylor, a criminal defense attorney, describes the Department's position as "overkill" because "there is no evidence that [the no-contact rule] has stymied federal lawyers" and because "[a]ll attorneys are responsible for knowing the rules of the courts in which they practice." Id.

[15] See, e.g., Jeffrey Kanige, Ex Parte Interviews: Bright Lines, Big Debate, N.J. L.J., June 13, 1994, at 5, 5 (presenting contention of defense attorneys that "unfettered ability of prosecutors" to contact their clients and extract potentially incriminating statements is "blatant violation" of client's right to counsel); see also Maria B. Rubin, The Thornburgh Memo, Now the Reno Rule: A Case of Ethics, N.Y. L.J., Sept. 23, 1994, at 1, 4. Rubin, chairman of the New York State Bar Association's Committee on Professional Ethics, ex-

prosecutors and defense attorneys,[16] usurps the states' traditional power to regulate the attorneys that it licenses[17] (creating a precedent by which other federal agencies could claim exemptions from state ethical codes),[18] and allows federal prosecutors to shirk their ethical duties.[19] The debate about excusing Department prosecutors from state no-contact rules has intensified due to the promulgation of the Reno Rule.[20]

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plained that the Reno Rule "threatens serious disruption of the traditional attorney-client relationship." Id.

16 See Letter from Robert D. Evans, Director, American Bar Association, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 1 (Apr. 4, 1994) [hereinafter Letter from Evans] (on file with the *New York University Law Review*) (explaining that American Bar Association objects that "Department of Justice lawyers alone in the legal profession are free to ignore the rules of ethics adopted by the state and federal courts"); Elkan Abramowitz & Frederick N. Saal, Can We Talk? The Need to Reform DR 7-104(A)(1), N.Y. L.J., May 4, 1993, at 3. Abramowitz and Saal, criminal defense attorneys, argue that the Department's position gives government attorneys an advantage relative to defense attorneys. Id. at 10.

This contention has inflamed the controversy, but it has very little substantive merit. It can be inferred from a recent Second Circuit case that federal prosecutors will not play upon an unequal field: defense attorneys, like prosecutors, are precluded from making contacts with represented individuals after indictment in order to ensure vigorous advocacy and not chill investigations. See Grievance Comm. for S. Dist. of N.Y. v. Simels, 48 F.3d 640, 650-51 (2d Cir. 1995) (narrowly construing "party" in no-contact rule and holding that defense attorney's preindictment contact with codefendant without codefendant's attorney's permission did not violate no-contact rule); accord United States v. Santiago-Lugo, 162 F.R.D. 11, 13 (D.P.R. 1995) (agreeing with *Simels*'s narrow construction, but holding that postindictment unilateral contacts by attorney for one codefendant with separately represented codefendant violated no-contact rule).

17 See Mark Curriden, State Court Chiefs Flex New Muscle, Nat'l L.J., Oct. 17, 1994, at A1 (describing condemnation of Reno Rule by state chief judges).

18 See In re Doe, 801 F. Supp. 478, 487 (D.N.M. 1992) (refusing to exempt federal prosecutors from state ethical rules in part because of danger that Department's position could also apply to all other federal agencies with investigative authority). For an example of an agency claiming authority to regulate the ethical conduct of attorneys appearing before it, see In re Carter, Exchange Act Release No. 597, Admin. Proc. File No. 3-5464 [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,146-47 (Feb. 28, 1981) (asserting that SEC can regulate securities lawyers).

19 One enraged commentator exclaimed that Department attorneys should start selling used cars since they would find the ethical standards of that profession more to their liking. See Letter from David L. Norvell, Attorney, Albuquerque, New Mexico, to Mark Terison, Esq., Senior Attorney, Legal Counsel 1 (Aug. 2, 1993) (on file with the *New York University Law Review*).

20 See Rubin, supra note 15, at 4 (outlining protests following promulgation of Reno Rule, including new threats of "increased enforcement by state courts against federal prosecutors in their states of admission as a reaction to this rule"); see also Curriden, supra note 17, at A1, A26 (describing reaction of Conference of State Chief Justices to Reno Rule as "'mad as hell and just not going to take it anymore'" (quoting Supreme Court of Minnesota Chief Justice A.M. Keith)). Ohio Chief Justice Thomas J. Moyer explained that state judges have "'drawn [their first] line in the sand'" and threaten to discipline federal prosecutors who breach these rules. Id.

In analyzing the Reno Rule, this Note goes beyond the policy-focused debate to examine the limits on the Department's authority.[21] It argues that, although the Reno Rule is justifiable from a policy standpoint, it is invalid as currently promulgated because it exceeds the Department's delegated authority. Part I demonstrates that by withdrawing jurisdiction from state bar associations to create, interpret, and enforce no-contact rules, the Reno Rule provides considerable benefits. A validly promulgated Reno Rule would eliminate the uncertainty caused by divergent interpretations of the no-contact rule by state bar associations and thus remove the infringement on prosecutors' use of their full investigatory powers.

Part II asserts that despite the history of state regulation of attorney conduct, the Reno Rule would allow the Department to preempt state enforcement of the no-contact rule if properly enacted. Part III argues, however, that the Rule is invalid as currently enacted. This Part first discusses the possibility that the Reno Rule might conflict with a federal statute. Then, after considering this statute in conjunction with the enabling statutes that delegate rulemaking power to the Department and evaluating the legal standards under which the Department's rule would be reviewed, this Part concludes that Congress has not delegated sufficient authority to the Department to allow it to usurp a function traditionally carried out by the states.

Finally, the Conclusion suggests that, in order to squelch the chill on federal prosecutors' investigatory activities due to the nonuniform administration of no-contact rules by state ethical boards, Congress should delegate authority to promulgate the Reno Rule to the Department. With such authority the Department could permissibly preempt state jurisdiction of the ex parte contacts of federal prosecutors.[22]

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[21] For analysis and criticism of the policies underlying the Department's attempt to excuse federal prosecutors from state no-contact rules, see, e.g., Burke, supra note 7, at 1660-61 (stating that Reno Rule "intrude[s] upon the attorney-client relationship in ways unwarranted by the needs of effective law enforcement"); 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, 318-24 (1992) (describing evolution of and significant issues in controversy surrounding efforts to exempt federal prosecutors from no-contact rules).

[22] This Note will focus primarily on whether the Department has been delegated authority to promulgate the Reno Rule. Other commentators have questioned the validity of the Rule on other grounds. See, e.g., Amy R. Mashburn, A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts, 8 Geo. J. Legal Ethics 473, 500-06 (1995) (suggesting that Reno Rule is not preemptive of state ethical regulation because it conflicts with federal statute, exceeds Department's authority delegated by Congress, and intrudes into supervisory powers of federal courts); Neals-Erik William Delker, Comment, Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Attorneys, 44 Am. U. L. Rev.

I
THE RENO RULE AND POLICY

This Part illustrates the need for the Reno Rule. After introducing the no-contact rule and its purposes in Section I.A, Section I.B describes problems caused by the considerable variation among states in the implementation of this ethical standard, including, most significantly, the chilling effect on the law-enforcement efforts of federal prosecutors caused by the fear of personal sanction. Section I.C introduces the Reno Rule and argues that the Rule helps eliminate uncertainty by providing uniform self-regulation for the Department's prosecutors.

A. Introduction to the No-Contact Rule

The no-contact rule is a fundamental principle of legal ethics[23] which has enjoyed a long history:[24] it first formally appeared in 1908 in the ABA Canons of Professional Ethics.[25] The ethical rule protects the attorney-client relationship by preventing an attorney, or her alter

855, 874-89 (1995) (arguing that Reno Rule cannot preempt state ethics rules because it clashes with federal statute and infringes upon inherent supervisory powers of courts to regulate attorney conduct). But see Elizabeth A. Allen, Federalizing the No-Contact Rule: The Authority of the Attorney General, 33 Am. Crim. L. Rev. 189, 223-24 (1995) (arguing that Reno Rule, carrying full force and effect of federal law, must be incorporated into state no-contact rules which reference federal law or, alternatively, that Congress has delegated sufficient authority to Department to preempt all no-contact rules). In order to reveal the underpinnings of this focus, rather than centering its analysis on the conflict between the Reno Rule and a federal statute, this Note develops concerns basic to administrative law: It considers the enabling statutes through which Congress allegedly has delegated power to the Department to promulgate its regulation and then determines the appropriate level of deference to be accorded such a regulation by a federal court before concluding that the Department's authority is too limited to support the regulation.

This Note concentrates on the delegation issue because, as Part III explains, this mode of analyzing the power of agencies to promulgate rules is both more persuasive and more logical for three reasons: first, a finding that the regulation conflicts with Congress's intent is just another way of declaring that Congress did not delegate sufficient authority to the Department; second, concluding that the regulation conflicts with a vague statute is dubious, especially considering that the intergovernmental immunity doctrine precludes such a judgment without a clear resolution of the statute's meaning; and most importantly, a finding that the regulation did not conflict with a federal statute would not preclude a court from declaring the authority delegated to the Department to be insufficient to support its promulgation of the regulation.

[23] See Ernest F. Lidge III, Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties, 67 Ind. L.J. 549, 558 (1992). Lidge cites to a number of cases that highlight the significance of the rule. See, e.g., State v. Yatman, 320 So. 2d 401, 402 (Fla. Dist. Ct. App. 1975) (asserting that "there is probably no provision of the Canons of Ethics more sacred" than the no-contact rule).

[24] See In re Doe, 801 F. Supp. 478, 485 & n.17 (D.N.M. 1992) (describing English case from 1835 as source of "common law tradition" behind modern no-contact rule).

[25] ABA Canons of Professional Ethics Canon 9 (1908) (negotiations with opposite party).

ego,[26] from taking advantage of an opposing lay party by soliciting information that might undermine the ability of the lay party's lawyer to represent her client.[27] It applies to attorneys in both civil and criminal settings,[28] though generally more narrowly in the latter.[29]

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[26] If a nonlawyer has been instructed how to elicit statements by being told what to say or how to act by the prosecutor, this nonlawyer becomes an alter ego of the prosecutor and is able to take advantage of the imbalance of legal skill relative to the lay party. As such, contact between the alter ego and an opposing lay party also is proscribed by the no-contact rule. See Model Code of Professional Responsibility DR 7-104(A)(1) (1983); see also United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988) (finding that where prosecutor issued subpoena for informant "not to secure his attendance before the grand jury, but to create a pretense that might help the informant elicit admissions from a represented suspect," informant acted as alter ego of prosecutor in conducting investigation), cert. denied, 498 U.S. 871 (1990). If the prosecutor has no knowledge of the contact, the agent will not be an alter ego. See United States v. Jamil, 707 F.2d 638, 646 (2d Cir. 1983) (holding that government investigators were not acting as alter egos of prosecutor when recorded contacts were made because prosecutor "only became aware of the recording *after* it was made, and he neither took part in the decision to record the conversation nor had knowledge that the conversation would be recorded").

[27] See United States v. Massiah, 377 U.S. 201, 210-11 (1964) (White, J., dissenting) (explaining that no-contact rule forbids lawyers from interviewing opposing party because of imbalance of legal acumen); see also Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 73 (3d ed. 1992) (listing several policy reasons informing no-contact rule); John Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest, 127 U. Pa. L. Rev. 683, 686-87 (1979) (discussing costs and benefits of no-contact rule); Lidge, supra note 23, at 559-63 (discussing acts that rule is designed to prevent, such as undermining opposing party's confidence in his lawyer, obtaining advantageous settlement, and obtaining privileged and unprivileged information).

[28] The no-contact rule was "drafted with civil practitioners in mind." Bruce A. Green, A Prosecutor's Communications with Defendants: What Are the Limits?, 24 Crim. L. Bull. 283, 285 (1988). However, the rule also applies to prosecutors. See, e.g., United States v. Ryans, 903 F.2d 731, 735 (10th Cir.) ("It is now well settled that [the no-contact rule] applies to criminal prosecutions as well as to civil litigation."), cert. denied, 498 U.S. 855 (1990); Lidge, supra note 23, at 563-64 (asserting that "the courts have explicitly recognized that the [no-contact rule] applies to government attorneys," including prosecutors). But see Saylor & Wilson, supra note 12, at 462-74 (arguing that rule does not apply to federal prosecutors).

Federal prosecutors have raised many unsuccessful arguments in disputing that the rule applies to them. For example, they have argued that although other ethics rules expressly refer to prosecutors, the no-contact rule does not. Id. at 463-64. Prosecutors have also suggested that the no-contact rule seems to exclude them because they do not represent specific clients, but rather represent the government. Id. Other failed arguments for not applying the no-contact rule to prosecutors include the unavailability of discovery, the fact that defendants are served well enough by the Fifth and Sixth Amendments, and that the government has special law-enforcement needs. See Burke, supra note 7, at 1639 n.25 (listing articles that argue that no-contact rule should not apply to federal prosecutors); Cramton & Udell, supra note 21, at 326 (offering arguments and citing sources).

[29] For a discussion of the scope of the no-contact rule in criminal settings, see infra Part I.B. In the civil setting, the rule "provides a represented party's *only* protection against an opposing counsel's attempts to interfere with the attorney-client relationship." Burke, supra note 7, at 1639. In the criminal context, courts have appreciated both the prosecutor's special interest in protecting society through law enforcement and the defense attorney's duty to represent the defendant zealously and have therefore proscribed less conduct

The text of the rule varies little between states. Disciplinary authorities in all fifty states and the District of Columbia use either Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility,[30] Rule 4.2 of the ABA Model Rules of Professional Conduct,[31] or a similar provision as their no-contact rule.[32] Model Rule 4.2, the most common version of the no-contact rule, entitled "Communicating with a Person Represented by Counsel," states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[33]

Federal prosecutors, like all lawyers, are regulated by the ethical rules promulgated by the high courts of the states which have licensed them to practice law.[34] Generally, these courts delegate to independent disciplinary bodies the power to devise and administer these rules.[35] If a judge or attorney suspects that a federal prosecutor has violated her licensing state's no-contact rule, she may refer the prosecutor to that state's ethical board.[36] In addition, when federal prosecutors practice in federal courts, they also are regulated by district court local rules proscribing ex parte contacts.[37] District courts often

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through the rule. See id. at 1644 & n.58 (citing cases holding that no-contact rule's proscriptions do not apply during prosecutor's preindictment investigations because of concern that undercover investigations would be hindered); see also Grievance Comm. for S. Dist. of N.Y. v. Simels, 48 F.3d 640, 650-51 (2d Cir. 1995) (holding that no-contact rule must be applied narrowly to defense attorneys in order not to chill investigation essential to defense attorney's zealous preparation for trial).

30 Model Code of Professional Responsibility Rule DR 7-104(A)(1) (1983).

31 Model Rules of Professional Conduct Rule 4.2 (1994).

32 See Cramton & Udell, supra note 21, at 292 n.3 (stating that no-contact rule "is in effect in all jurisdictions in one form or another").

33 Model Rules of Professional Conduct Rule 4.2 (1994). Disciplinary Rule 7-104(A)(1), Communicating with One of Adverse Interest, is substantially the same, stating:

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

Model Code of Professional Responsibility DR 7-104(A)(1) (1983) (footnote omitted).

34 Gillers, supra note 27, at 3 (indicating that inherent powers doctrine has left authority to govern lawyers' behavior to courts, rather than to executive or legislative branches).

35 Id.

36 See Model Rules of Professional Conduct Rule 8.3(a) (1994) (stating general reporting procedures for professional misconduct).

37 See Green, supra note 1, at 73-74 ("Federal prosecutors, like other lawyers practicing before a federal district court, are subject to professional standards incorporated in district court rules, as interpreted by federal courts of the district.").

adopt the rules of the state in which the district court sits[38] and often have disciplinary committees to which an attorney may be referred.[39] However, the role of these federal committees is of little significance in the no-contact-rule arena for two reasons. First, federal judges generally have been reluctant to refer federal prosecutors to disciplinary bodies;[40] when they do, however, they typically refer lawyers to state boards rather than these federal committees.[41] Second, these federal committees may be of little effect because the federal courts have consistently interpreted the no-contact rule quite narrowly.[42]

Thus, in the most likely scenario, a defense attorney would refer a federal prosecutor to a state disciplinary board. In fact, defense attorneys have not hesitated to do so.[43] If the disciplinary committee finds a violation, the federal prosector may be admonished, reprimanded, suspended, or even disbarred.[44] Significantly, such personal sanctions are only used for violations of ethical standards, such as the no-contact rule; constitutional violations, on the other hand, only lead to

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[38] See Felleman, supra note 10, at 1509; Green, supra note 1, at 73-74; Developments, supra note 1, at 1590.

[39] See Mashburn, supra note 22, at 537 (explaining that local rules can provide for grievance procedures); see also E. & S.D.N.Y. Gen. R. 4(a) ("The chief judge shall appoint a committee of the board of judges . . . which . . . shall have charge of all matters relating to discipline of attorneys.").

[40] See Federal Prosecutorial Report, supra note 5, at 36 (noting that federal judges often do not take disciplinary action but instead "defer to the Department of Justice"); Green, supra note 1, at 82-83 (same); Mashburn, supra note 22, at 537 (hypothesizing that judges rarely use formal federal disciplinary process).

[41] See Green, supra note 1, at 83-84 (explaining that because of ad hoc nature of federal disciplinary committees and traditional deference to state regulation of lawyers, federal judges are more inclined to refer federal prosecutors to state disciplinary boards); see also Mashburn, supra note 22, at 537 (suspecting that federal judges are more likely to refer federal lawyers to state rather than federal disciplinary authorities).

[42] See infra notes 47-48 and accompanying text (explaining that federal courts generally agree on narrow interpretation of no-contact rule).

[43] See, e.g., In re Gorence, 810 F. Supp. 1234 (D.N.M. 1992) (noting that defense attorney filed complaint against prosecutor with state ethics board); see also Letter from Thomas F. Liotti, Attorney at Law, to President William Clinton 6 (Aug. 23, 1993) (on file with the *New York University Law Review*) (objecting to positions expressed in Reno Rule and suggesting that defense attorneys will mount "avalanche of litigation" and will not "submit to allowing Government attorneys into the defense camp"); Letter from New York State Association of Criminal Defense Lawyers to the Office of the Associate Attorney General 1 (Mar. 21, 1994) (on file with the *New York University Law Review*) (asserting that members of association will report any violation of no-contact rule by New York licensed federal prosecutor because, notwithstanding Reno Rule, association members are bound to do so).

[44] See Standards for Imposing Lawyer Sanctions § 5.2 (A.B.A. 1991) (failure to maintain public trust); id. § 5.1 (failure to maintain personal integrity); see also In re Wright, 310 A.2d 1, 8, 12 (Vt. 1973) (disbarring attorney for communicating with adverse represented party as well as for committing other ethical violations).

suppression of evidence.[45] Courts have recognized that disciplinary proceedings are a more effective deterrent than suppression;[46] if the penalty is suppression, the prosecutor may lose the case; but if the penalty is disciplinary action, the prosecutor may lose her license to practice. Thus, being sanctioned for a violation of the no-contact rule has more serious personal consequences for a prosecutor than does violating a constitutional proscription.

B. The Problems of Inconsistent Interpretation

Although the language of the no-contact rule is fairly constant across jurisdictions, its interpretation has differed greatly. Federal courts, receptive to the needs of federal law enforcement, have uniformly narrowed the scope of the no-contact rule to apply only in custodial or postindictment settings.[47] Under the federal interpretation,

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[45] See Weeks v. United States, 232 U.S. 383, 398 (1914) (announcing exclusionary rule as remedy for constitutional violations). Ethical infractions, unlike violations of constitutional rights, are not breaches of a defendant's personal rights because the ethical standards are aimed at regulating the profession. Model Rules of Professional Conduct scope cmt. 6 (1994); cf. United States v. Lopez, 4 F.3d 1455, 1462-63 (9th Cir. 1993) (explaining that "the rule against communicating with represented persons is fundamentally concerned with the *duties* of attorneys, not with the *rights* of parties"). Additionally, courts have not been inclined to exclude from the trier of fact incriminating statements which have been made voluntarily to prosecutors. See, e.g., Michigan v. Harvey, 494 U.S. 344, 345-46 (1990) (holding that voluntary statement made after defendant invoked his Sixth Amendment right to have counsel present may be used to impeach defendant's false or inconsistent testimony); Oregon v. Elstad, 470 U.S. 298, 300, 318 (1985) (holding that Fifth Amendment does not require suppression of confession made after *Miranda* warnings were given, even though police had obtained earlier tainted confession); see also Cramton & Udell, supra note 21, at 332 & n.157 (noting that Supreme Court has cautioned lower courts not to use their supervisory powers for exclusion expansively and concluding that suppression has been rejected as remedy for no-contact rule violations); Pamela S. Karlan, Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel, 105 Harv. L. Rev. 672, 703 (1992) (indicating "that courts may be reluctant to expand the scope of the exclusionary rule . . . because they fear that the rule would frequently suppress reliable evidence of guilt"). But see United States v. Hammad, 858 F.2d 834, 840-42 (2d Cir. 1988) (discussing use of suppression as remedy where evidence is obtained by practice amounting to extraordinary ethical, but not constitutional, breach), cert. denied, 498 U.S. 871 (1990).

[46] See, e.g., Suarez v. State, 481 So. 2d 1201, 1206-07 (Fla. 1985) (asserting that bar disciplinary action, not suppression, is appropriate remedy and suggesting that such discipline is effective deterrent), cert. denied, 476 U.S. 1178 (1986); see also United States v. Dennis, 843 F.2d 652, 657 (2d Cir. 1988) (stating that where defendant's counsel communicated with codefendant directly, "the sanction . . . should be disciplinary action, not a limitation of the cross-examination"); Model Rules of Professional Responsibility scope cmt. 6 (1994) (indicating that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons" and restricting their use to disciplinary actions and self-assessment).

[47] See, e.g., United States v. Powe, 9 F.3d 68, 69 (9th Cir. 1993) (noting that no-contact rule does not apply to preindictment, noncustodial investigations); United States v. Four Star, 428 F.2d 1406, 1407 (9th Cir.) (finding that prosecutor who knowingly participated in

the no-contact rule therefore does not begin to apply until the Fifth or Sixth Amendment right to counsel attaches.[48] On the other hand, state standards are far more divergent.[49] Many states have not interpreted the no-contact rule coextensively with the Fifth and Sixth Amendments and proscribe contacts permissible under the federal interpretation.[50] Other states do not even apply the rule to prosecutors.[51] Some excuse certain investigatory conduct under the

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custodial interrogation of represented accused in absence of counsel violates no-contact rule), cert. denied, 400 U.S. 947 (1970).

Only the Second Circuit has found that contact by the prosecutor in a noncustodial, preindictment setting violates the no-contact rule. In United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990), the Second Circuit narrowly held that the no-contact rule is applicable to preindictment investigations of represented targets but suggested that because of the need for effective law enforcement, all prosecutorial investigatory activities that did not rise to the egregious level of misconduct in that case would fall under the "authorized by law" exception to the no-contact rule. Id. at 839-40. However, the Second Circuit has since questioned the efficacy of this anomalous position. See Grievance Comm. for S. Dist. of N.Y. v. Simels, 48 F.3d 640, 649-51 (2d Cir. 1995) (questioning *Hammad*'s analysis and instead establishing "more principled" clear-line test, like that employed by majority of circuits, centered around time of indictment for determining whether no-contact rule has been violated); United States v. Schwimmer, 882 F.2d 22, 29 (2d Cir. 1989) (announcing that *Hammad* was explicitly "limited to [its] circumstances"), cert. denied, 493 U.S. 1071 (1990); see also United States v. Santiago-Lugo, 162 F.R.D. 11, 13 (D.P.R. 1995) (adopting analysis presented in *Simels*). But see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396, at 12 (1995) (communications with represented persons) [hereinafter ABA Formal Opinion] (stating that ABA prefers "authorized by law" standard as applied in *Hammad* to standard based on timing).

[48] In order to protect against self-incrimination, the Fifth Amendment right to counsel requires law-enforcement officials to advise a defendant in custody of his rights and to obtain a waiver; otherwise, "no evidence obtained as a result of interrogation can be used against [the defendant]." Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). The Sixth Amendment right to counsel forbids deliberate elicitation of information after a defendant has been charged or indicted. The right "means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." Brewer v. Williams, 430 U.S. 387, 398 (1977).

[49] See Burke, supra note 7, at 1642 (explaining that there is "no consensus" among state courts concerning scope of no-contact rule in criminal context). See generally Felleman, supra note 10, at 1503-08 (describing increasing disparity in state ethics codes).

[50] See, e.g., People v. White, 567 N.E.2d 1368, 1386 (Ill. App. Ct.) (holding that rule is not coextensive with Sixth Amendment and may provide protection to criminal suspect even prior to filing of formal charges), appeal denied, 575 N.E.2d 922 (Ill. 1991); see also Communications, supra note 3, at 39,911 ("The expansive application of [no-contact] rules in some [state] jurisdictions may have the effect of blocking preindictment interviews or undercover operations that most courts have held permissible under federal constitutional and statutory law.").

[51] See, e.g., State v. Richmond, 560 P.2d 41, 46 (Ariz. 1976) (holding that no-contact rules are generally for purposes of assuring civil litigants protection guaranteed to criminal defendants by Constitution and that statements by criminal defendants are admissible as long as freely and voluntarily given and as long as law enforcement complies with constitutional requirements), cert. denied, 433 U.S. 915 (1977); State v. Nicholson, 463 P.2d 633, 636-37 (Wash. 1969) (same).

"authorized by law" exception;[52] but at least one state has no "authorized by law" exception.[53] In some states, the standard is unintelligible.[54]

The overarching result of this divergence is uncertainty. In comparison to the uniform federal interpretation, the state standards provide a dearth of guidance. This, of course, is problematic because federal prosecutors cannot discern what conduct is permissible under the guidelines of the states which licensed them and which can now discipline them.[55] As a result, federal prosecutors worry that the scope of state no-contact rules will be determined in disciplinary proceedings at their expense.[56]

The uncertainty and resulting fear has stymied federal prosecutors in a number of situations. For example, federal prosecutors are sometimes faced with a defense attorney who asserts that she represents an unindicted individual for all purposes and that all contacts must be made through her.[57] Although federal courts are willing to

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[52] See, e.g., State v. Wolf, 643 P.2d 1101, 1105 (Kan. Ct. App. 1982) (holding that in most instances "authorized by law" exception applies when prosecutor confers with persons concerning criminal investigations). The purpose of the "authorized by law" exception to the no-contact rule is to except any contacts permissible under valid federal or state law from the proscriptions of the no-contact rule.

[53] See Florida Rules of Professional Conduct Rule 4-4.2 (1994) (providing no "authorized by law" exception in no-contact rule).

[54] Cf. Developments, supra note 1, at 1583-90 (explaining that disparity among ethical rules leads to general uncertainty and hampers effectiveness of such rules).

[55] See supra Part I.A.

[56] See Daniel Wise, Are Federal Prosecutors Beyond State Discipline?, N.Y. L.J., Mar. 8, 1991, at 1 (paraphrasing former U.S. Attorney Otto G. Obermaier) (explaining that prosecutors will face discipline in order for scope of no-contact rule to be determined); Letter from L. Stuart Platt, Chief, Criminal Division, Eastern District of Texas, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 7 (Aug. 24, 1993) [hereinafter Letter from Platt] (on file with the *New York University Law Review*) (quoting prosecutor in office as saying, "I don't want to put my license on the line" to determine what conduct is permissible); see also Letter from Carl K. Kirkpatrick, United States Attorney, Eastern District of Tennessee, to Phillip B. Heymann, Deputy Attorney General, United States Department of Justice 2 (Nov. 24, 1993) (on file with the *New York University Law Review*) ("Our prosecutors are extremely concerned about maintaining ethical standards and standing in good stead with their respective state bar associations. . . . [I]t is unfair to direct and ask Assistant United States Attorneys to expose their livelihoods and professional careers without [clear guidance].").

[57] Such claims are usually made by "house counsels" for civil organizations or organized-crime groups. See, e.g., Letter from Michael L. Levy, First Assistant United States Attorney, Eastern District of Pennsylvania, to Janet Reno, Attorney General, United States Department of Justice 2 (Nov. 1, 1993) (on file with the *New York University Law Review*) (enclosing copy of letter from defense attorney in which attorney claimed to represent all present and past employees of company for all purposes and stated that all contacts should be made through him); see also Burke, supra note 7, at 1663-64 (describing "'mob lawyer'" situation). The Reno Rule clarifies that contacts in these "house counsel" situations are permissible. 28 C.F.R. § 77.3(a)(2)-(3) (1995).

allow contacts in such situations because the contacts precede arrest or indictment,[58] prosecutors nevertheless have been deterred from aggressively investigating due to the uncertain interpretations by state disciplinary boards.[59] Second, prosecutors are apprehensive about making postindictment contacts unrelated to the subject matter of a defendant's representation.[60] While federal courts are willing to permit contacts by undercover agents concerning unrelated crimes,[61] prosecutors, acting cautiously, may thwart investigations into such matters because they are uncertain whether state disciplinary boards

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[58] See supra notes 47-48 and accompanying text.

[59] See, e.g., Letter from James J. Allison, Interim United States Attorney, District of Colorado, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 1-2 (Aug. 6, 1993) (on file with the *New York University Law Review*) (asserting that when faced with "threat[s]" not to contact unindicted individuals in the absence of their attorney, federal prosecutors are "presented with the dilemma of conducting the investigation in an effective manner while having to guess at the prospect of adverse ethical ramifications before state bar committees"); Letter from Platt, supra note 56, at 7 ("I can attest to the fact that the use of sham multiple representation claims has had a chilling effect on investigation of criminal matters."); Letter from Robert M. Twiss, United States Attorney, Eastern District of California, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 1-4 (Aug. 23, 1993) [hereinafter Letter from Twiss] (on file with the *New York University Law Review*) (explaining that federal prosecutors face unjustified and unpredictable "pressure of Bar disciplinary action" when "threatened" to make all communications to attorney rather than to unindicted present and former members of professional association and that this pressure "interferes with the fulfillment of their sworn duties").

[60] For example, the prosecutor may wish to investigate a separate crime. See, e.g., Letter from J. Ramsey Johnson, United States Attorney, District of Columbia, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 2-3 (Aug. 25, 1993) [hereinafter Letter from Johnson] (on file with the *New York University Law Review*) (citing cases where prosecutors investigated separate crimes). Alternatively, the prosecutor may wish to act upon information that a defendant is attempting to obstruct justice by tampering with evidence, witnesses, or jurors, or that he is plotting to threaten the life of the prosecutor or judge. See, e.g., Letter from Twiss, supra note 59, at 2 (presenting two typical situations where prosecutors desire to investigate evidence tampering).

The Reno Rule permits contacts in both of these situations. See 28 C.F.R. § 77.6(e) (1995) (allowing investigations of additional, different, or ongoing crimes or civil violations); id. § 77.6(f) (allowing investigations to protect safety or life).

[61] Although the law-enforcement agent or undercover informant may be seen as an alter ego of the prosecutor, see supra note 26, such contacts may be permissible when unrelated to the previous matter. See United States v. Masullo, 489 F.2d 217, 222-24 (2d Cir. 1973) (limiting prohibition of no-contact rule to particular charge); see also Maine v. Moulton, 474 U.S. 159, 180 & n.16 (1985) (recognizing need to "unnecessarily frustrate the public's interest in the investigation of criminal activities" and announcing that police may investigate crimes not yet charged of represented individual already under indictment and that statements pertaining to those crimes may be used); United States v. Crook, 502 F.2d 1378, 1379 (3d Cir. 1974) (rejecting view that interrogation by government agents of defendant whom they know to be represented in unrelated case is always unlawful), cert. denied, 419 U.S. 1123 (1975).

will also find such contacts permissible.[62] Third, sometimes represented defendants initiate contact with the prosecutor in order to further their self-interests.[63] Though prosecutors may be able to communicate with such defendants under certain circumstances,[64] uncertainty has made federal prosecutors hesitant to do so.[65]

These dynamics have chilled prosecutors from effectively doing their jobs. Although all attorneys fear personal sanction, federal prosecutors have been handcuffed in their law-enforcement efforts by the heightened degree of uncertainty and the resulting magnified fear.[66]

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[62] See, e.g., Letter from Johnson, supra note 60, at 1, 4 (welcoming exception to ban on ex parte contacts made for investigations into unrelated matters by Reno Rule so that investigation of criminal activities is not unnecessarily frustrated); Letter from Platt, supra note 56, at 2 (explaining difficulties in deciding whether to contact defendant in such situation because of uncertainty as to whether contact will be appreciated as unrelated).

This fear is not unreasonable, especially considering that some state courts have been reluctant to declare matters unrelated. Compare In re Conduct of Burrows, 629 P.2d 820, 825 (Or. 1981) (finding that uncharged drug activities were not unrelated to murder and rape charges) with People v. Bing, 558 N.E.2d 1011, 1012-13, 1022-23 (N.Y. 1990) (holding that police may question defendant on burglary charge unrelated to prior pending burglary charge).

[63] See, e.g., In re Doe, 801 F. Supp. 478, 480 (D.N.M. 1992) (finding that prosecutor was not permitted to communicate with represented defendant who initiated contacts); State v. Morgan, 646 P.2d 1064, 1069-70 (Kan. 1982) (same); People v. Green, 274 N.W.2d 448, 453 (Mich. 1979) (same). The Reno Rule allows a prosecutor who has obtained permission from a judge to talk to a defendant who has knowingly "waived" the protection of the no-contact rule. 28 C.F.R. § 77.6(c) (1995).

[64] See United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) (noting that in appropriate cases prosecutors can communicate with represented defendants who initiate contact).

[65] See Letter from Edgar R. Ennis, Jr., United States Attorney, Middle District of Georgia, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 2, 3 (Aug. 16, 1993) (on file with the *New York University Law Review*) (describing "untenably vulnerable position" of prosecutors who can be disciplined if they communicate with defendant who initiates contact); Letter from Platt, supra note 56, at 8 (describing prosecutor's dilemma when contacted by represented defendant who had "information on his attorney" and explaining that prosecutors may be hampered as result).

[66] See Letter from Douglas N. Frazier, United States Attorney, Middle District of Florida, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 9-10 (Aug. 24, 1993) (on file with the *New York University Law Review*) (stating that "[l]ine prosecutors are badly in need of a bright-line rule to guide them" because, otherwise, they must "restrain law enforcement" efforts so as not to face disciplinary proceedings); Letter from Johnson, supra note 60, at 3-4 (arguing that uniform rule is essential to eliminate uncertainty and chilling of law enforcement because federal prosecutors fear threat of discipline); Letter from Richard W. Murphy, Assistant United States Attorney, District of Maine, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 1 (Aug. 17, 1993) (on file with the *New York University Law Review*) (stating that federal prosecutors have been "hamper[ed] . . . as they attempt to effectively carry out their duties" under "an appalling lack of guidance in this area"); Letter from John J. Thar, United States Attorney, Southern District of Indiana, to Webster L. Hubbell, Associate Attorney General, United States Department of Justice 1 (Aug. 20, 1993) (on file with the *New York University Law Review*) (explaining that "real concern" of prosecu-

This prosecutorial apprehension has been inflamed by the eagerness of defense attorneys to refer federal prosecutors to disciplinary boards.[67] In fact, some defense attorneys see doing so as their duty, and many have vowed to file complaints with ethics boards against prosecutors as a means of protecting their clients.[68] This inflamed sense of fear has not been assuaged even though there has yet to be adverse disciplinary action against a federal prosecutor for violating the no-contact rule.[69]

C. *The Reno Rule*

Contention over the Department's position, maintained informally since 1980, that federal prosecutors are exempt from the no-contact rules of the states which licensed them, did not erupt until 1989. At that time the Department's position was formally avowed by then-Attorney General Richard Thornburgh in an eight-page memorandum, known as the "Thornburgh Memo."[70] The Thornburgh Memo, however, was ruled simply "a policy memorandum issued by the head of an executive agency [which cannot amount to] federal law sufficient for supplanting state regulation."[71] In order to fully exempt its attorneys from state implementation of the no-contact rule, the Department needed to take further action. Therefore, the Department

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tors is subjection "to the whimsical agendas of competing interests throughout the country" and asserting that "bright-line" guidance is necessary).

[67] See Letter from Twiss, supra note 59, at 1, 3 (lamenting that prosecutors fear that defense attorneys will file bar complaints against them, resulting in potential disbarment).

[68] See supra note 43.

[69] Federal prosecutors are now anxiously awaiting an official announcement of the status of an action by the New Mexico Disciplinary Board against a federal prosecutor. See N.M. Stat. Ann. § 17-304(A)(1) (Michie 1995) (explaining that the status of investigatory hearings shall be entirely confidential unless and until they become matters of public record). The federal prosecutor, licensed by the state of New Mexico, allegedly violated New Mexico's no-contact rule by communicating with a represented defendant about the subject of representation; although the defendant initiated contacts with the government, the prosecutor had not obtained the permission of the defendant's attorney before communicating with the defendant. See United States v. Ferrara, 54 F.3d 825, 826-27 (D.C. Cir. 1995).

[70] Thornburgh Memo, supra note 13. The memo was a response to United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). *Hammad* held that preindictment investigations were subject to the no-contact rule and that the use of a fake grand jury subpoena during an investigation violated the rule because it did not fall within the rule's "authorized by law" exception. Id. at 840. The memo referred to the case as the "high-water mark" of the defense bar's attempt to use the no-contact rule to limit federal investigations; Thornburgh objected to the case because he thought it would "exacerbate the uncertainty felt by many government attorneys over what is appropriate conduct in this area." Thornburgh Memo, supra note 13, at 490.

[71] United States v. Ferrara, 847 F. Supp. 964, 969 (D.D.C. 1993) (citing Wabash Valley Power v. Rural Elec. Admin., 903 F.2d 445, 454 (7th Cir. 1990)), aff'd, 54 F.3d 825 (D.C. Cir. 1995).

sought to promulgate a rule which would: (1) have the force and effect of federal law; (2) establish a comprehensive and predictable standard for federal prosecutors; and (3) end the controversy surrounding the Department's ongoing effort to exempt its attorneys from state no-contact rules. To this end, the Department adopted the Reno Rule after three notice and comment periods on proposed rules.[72]

The Reno Rule has the potential to eliminate the uncertainty facing federal prosecutors and ensure that they are not stifled in performing their duties. The Rule definitively states the permissible contacts for federal prosecutors by adopting the uniform standards of the federal courts—standards which allow federal prosecutors to make contacts with represented individuals who have not yet been placed in a custodial situation or indicted.[73] Additionally, the Rule permits some contacts that are necessary for effective law enforcement but not permissible under most state interpretations of the no-contact rule.[74]

Significantly, the Rule also withdraws from state disciplinary boards all regulatory authority over federal prosecutors' ex parte contacts.[75] While this approach is not above criticism,[76] if the Department did not completely remove all regulatory authority from the

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[72] See Communications, supra note 3, at 39,910 (noting three comment periods).

[73] See id. at 39,914; see also supra notes 47-48 and accompanying text.

[74] Although the Fifth and Sixth Amendments are waivable, a literal reading of the no-contact rule suggests that it can only be waived with the consent of the attorney. See Model Rules of Professional Conduct Rule 4.2 (1994). Recognizing that this may have detrimental effects upon a defendant, who in order to further his self-interest may want to approach a prosecutor in secret, the Reno Rule provides that, after following certain procedures, a federal prosecutor can contact a represented defendant who has voluntarily "waived" the protections of the no-contact rule. 28 C.F.R. § 77.6(c) (1995). Additionally, the Reno Rule ensures that federal prosecutors can investigate unrelated matters after indictment. Id. §§ 77.3(a), 77.6(e). The Rule also specifies that contacts can be made when there is "a threat to the safety or life of any person." Id. § 77.6(f).

For a detailed (and somewhat critical) discussion of the new powers granted to federal prosecutors under the Reno Rule, see Burke, supra note 7, at 1660-61.

[75] See Communications, supra note 3, at 39,912.

[76] Neither the Department nor its rule will be credible if the Department does not enforce the Rule with the same aggressiveness with which it enforces all of the laws of the country. The Department's approach is already of questionable credibility because it enunciates, implements, and adjudicates its own standard. For a general discussion of the Department's internal disciplinary procedures, see Lyn M. Morton, Note, Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?, 7 Geo. J. Legal Ethics 1083, 1109-15 (1994); see also Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 Sw. L.J. 965, 966 (1984) (lamenting that prosecutors are not appropriately punished).

The Department, however, is not the only agency seeking to play an exclusive role in policing the conduct of lawyers in order to assure uniformity. See Developments, supra note 1, at 1606-28 (explaining how federal agencies are regulating banking and securities lawyers, having wrestled "control away from bar associations in order to institute more contextualized schemes of lawyer regulation"); see also Fred C. Zacharias, Federalizing Legal Ethics, 73 Tex. L. Rev. 335, 385 (1994) (arguing that ethics regulations should be

states, but instead allowed the states to interpret the Reno Rule and to discipline for violations of it, the uncertainty that is the result of varying state *interpretations* of the no-contact rule would persist. Furthermore, in their interpretation of the Reno Rule, state boards will likely be swayed by their intense disagreement with the Rule.[77] For example, the Conference of State Chief Justices has urged disciplinary committees to continue to follow their state's interpretation rather than the Department's.[78]

In sum, it is only through the Reno Rule and self-regulation that the Department can cease the disparate and unpredictable interpretations of the no-contact rule and thereby dissipate the fear that has chilled law-enforcement efforts.

II

THE RENO RULE AND FEDERALISM

Part I concluded that the Reno Rule is beneficial because it prevents prosecutors from being hampered by the unpredictable scope of divergent state no-contact rules. This Part examines the relevant federalism issues stemming from the Department's attempt to remedy this concern. After first introducing doctrines of preemption in Section II.A, it concludes in Section II.B that, if delegated sufficient au-

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federalized as more federal agencies, including the FDIC, the FTC, the IRS, the National Credit Union Administration, and the SEC, exercise discretion to regulate lawyers).

[77] See Communications, supra note 3, at 39,927 (observing likelihood that state and local boards will continue to view government contacts as inconsistent with local rules despite Reno Rule); see also Zacharias, supra note 76, at 378, 397 (asserting that states displeased with federal legislation may undermine federal standard through different degrees of enforcement). But cf. Burke, supra note 7, at 1674 (arguing that state disciplinary boards should regulate federal attorneys under narrower version of new rule).

[78] See Letter from Jean A.E. Norman Veasey, Chief Justice, Supreme Court of Delaware, on behalf of the Conference of Chief Justices, to Janet Reno, Attorney General, United States Department of Justice 2 (Mar. 31, 1994) [hereinafter Letter from Veasey] (on file with the *New York University Law Review*); see also Curriden, supra note 17, at A1, A26 (explaining that state chief judges unanimously agreed to "tell their state bars and state supreme courts to ignore the federal rule and discipline federal prosecutors no differently from any other lawyer"). As a reaction to the Reno Rule, the District of Columbia Bar has proposed to amend the comment to its rule, asserting that federal prosecutors will not receive special treatment. See Report to the Board of Governors of the District of Columbia Bar, Proposed Amendments to the District of Columbia Rules of Professional Conduct 59-62 (Dec. 8, 1993) (on file with the *New York University Law Review*) (proposing to replace comment noting that no-contact rule "is not intended to regulate the law enforcement activities" of prosecutors with instructions that no-contact rule "is not intended to enlarge or restrict the law enforcement activities" of prosecutors). Additionally, the American Bar Association has voted to oppose the Department's efforts to exempt federal prosecutors from state rules. Letter from Evans, supra note 16, at 5.

thority, the federal government can, through the Supremacy Clause,[79] abrogate any state role in the regulation of the ex parte contacts of federal prosecutors under either field or conflict preemption.

The Department, however, asserts that the effect of the Reno Rule generally does not depend upon preemption under the Supremacy Clause.[80] The Department's principal assertion is that because the Reno Rule constitutes law, any contacts permitted under it will be permissible under those state no-contact rules that except from their proscriptions any contacts "authorized by law."[81] This approach, however, is deficient because it does not remove disciplinary authority from state boards. Instead, it simply changes the issue decided by the state boards from whether the federal prosecutors followed the state no-contact rule to whether the prosecutor acted within the scope of the Reno Rule. Additionally, prosecutors still would be subject to the no-contact rules of those states that do not contain "authorized by law" exceptions.[82] Only through the Supremacy Clause can the Department remedy the uncertainty of state regulation: it allows the Department to withdraw from state boards both the power to discipline federal prosecutors for violating state no-contact rules and the power to interpret the Reno Rule by analyzing it within the "authorized by law" exceptions to state no-contact rules.[83]

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79 The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

80 Although the Reno Rule invokes the Supremacy Clause as a possible ground for eliminating state regulation of ex parte contacts made by federal prosecutors, it also claims that "in most instances the force and effect of these rules should not depend on whether they preempt state ethics rules under the Supremacy Clause." Communications, supra note 3, at 39,916; see also The Attorney General Responds, 74 Judicature 290, 291 (1991) (defending Thornburgh Memo and arguing that "the Supremacy Clause is not the principal or the only arrow in our quiver").

81 See Communications, supra note 3, at 39,916 (expressing belief that in most instances communications permitted by Reno Rule are to be incorporated into state no-contact rules under their "authorized by law" exceptions).

82 Florida, for example, does not provide an "authorized by law" exception in its no-contact rule. See Florida Rules of Professional Conduct Rule 4-4.2 (1994). Additionally, some states might remove or limit the scope of their "authorized by law" exceptions. See Letter from Veasey, supra note 78, at 2 (recommending that each state ethics board delete its "authorized by law" exception).

83 It appears that the Department needed to use the Supremacy Clause in this manner in order to remove disciplinary authority from the states. The Department's attempts at removal under 28 U.S.C. § 1442 (1994) have been unsuccessful. The removal statute does not provide for removal of disciplinary regulatory proceedings; rather it provides only for the removal of criminal prosecutions or civil suits. See In re Gorence, 810 F. Supp. 1234, 1238 (D.N.M. 1992) (barring removal); In re Doe, 801 F. Supp. 478, 484 (D.N.M. 1992) (same).

A. Preemption Doctrines

The Supreme Court has dictated that under the preemption doctrine, which is derived from the Supremacy Clause, if a state law interferes with a federal purpose, the former must yield to the latter.[84] Because the ultimate question is whether state law interferes with a federal purpose, preemption analysis is a form of statutory interpretation. Indeed, Congress's purpose is the "'ultimate touchstone'" of any preemption analysis.[85]

The power to preempt, however, is not limited to Congress.[86] A federal agency's properly promulgated substantive regulations that reflect congressional intent have no less preemptive effect than do federal statutes.[87] The fact that state bar associations, rather than state legislatures, are being preempted also does not change the analysis. For example, the Supreme Court, in *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*,[88] explained that under "the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."[89] Simply, "[w]hat matters is whether the substance of [an ethics rule] established by a state board actually conflicts or is incompatible with federal law."[90] If

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[84] See Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law . . . which interferes with or is contrary to federal law, must yield." (citations omitted)); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 42 (1824) (explaining that because of federal supremacy, when "a [s]tate law . . . operate[s] to limit, restrict or defeat the effect of a statute of congress . . . the [s]tate law yields"). But see Stephen A. Gardbaum, The Nature of Preemption, 79 Cornell L. Rev. 767 (1994). Gardbaum criticizes Supreme Court opinions and scholars who assume that preemption is derived from the Supremacy Clause. Id. at 773-74. He argues that preemption is a greater federal power than supremacy, and therefore preemption cannot derive from the Supremacy Clause. Id. at 770-71. Gardbaum explains that preemption is a jurisdiction-stripping concept, unlike supremacy, which can only resolve conflicts. Id. at 770-77, 774 n.22.

[85] Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)); see also Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986) ("The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.").

[86] See Hillsborough County, Fla. v. Automated Medical Lab., Inc., 471 U.S. 707, 713 (1985) (noting that federal regulation can also preempt state laws).

[87] See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.").

[88] 471 U.S. 707 (1985).

[89] Id. at 713.

[90] Baylson v. Disciplinary Bd. of the Sup. Ct. of Pa., 975 F.2d 102, 111-12 (3d Cir. 1992) (holding that state ethics rule was preempted because it conflicted with Federal Rule of Criminal Procedure), cert. denied, 507 U.S. 984 (1993). Although reaching a different result, a district court in Massachusetts analyzed whether its state ethics rule was preempted in the same manner: "the issue is whether [the state ethics rule] actually conflicts with federal law." United States v. Klubock, 639 F. Supp. 117, 125 (D. Mass. 1986), aff'd per curiam by an equally divided court, 832 F.2d 664 (1st Cir. 1987) (en banc).

in fact there is such interference, a federal agency's regulation can preempt a state ethics rule.

Although preemption classifications are not "'rigidly distinct,'"[91] three categories can be defined. First, Congress may expressly command through a statute's language its intent to preempt state law.[92] Second, Congress can implicitly preempt any conflicting state laws if federal law requires one action (or inaction) and a state law requirement is directly contradictory.[93] Indeed, a conflict may be found even without an obvious and direct inconsistency. For example, a state law is preempted if it "stands as an obstacle" to the achievement of Congress's purpose.[94] Significantly, a state's compelling interest in its law is irrelevant under conflict preemption analysis.[95]

Under the third category of preemption classification, "[t]he scheme of federal regulation [is] so pervasive" or the "federal interest is so dominant" that no room remains in the field for state participation.[96] In such an instance, an entire field of state legislation may be preempted even if there is no conflict between the federal and state laws.[97] Courts, however, are cautious in recognizing field preemption: such a comprehensive assumption of power by a federal interest requires "that the nature of the regulated subject matter permits no

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[91] Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 104 n.2 (1992) (quoting English v. General Elec. Co., 496 U.S. 72, 79 n.5 (1990)).

[92] See, e.g., Shaw v. Delta Air Lines, 463 U.S. 85, 91 (1983) (recognizing preemption where Congress, with some enumerated exceptions, provided that federal authority shall supersede "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan"); Jones v. Rath Packing Co., 430 U.S. 519, 543 (1977) (finding that federal law expressly preempted any state law concerning package labels).

[93] See, e.g., McDermott v. Wisconsin, 228 U.S. 115, 133-34 (1913) (finding that where labeling for syrup containers complied with federal regulations, and it was impossible for labeling to comply also with state law, state law had to yield).

[94] See John Hancock Mut. Life Ins. Co. v. Harris Bank, 114 S. Ct. 517, 526 (1993) (explaining that even without literal impossibility, preemption will occur when state law "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress'" (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984))).

[95] See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) ("'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" (quoting Free v. Bland, 369 U.S. 663, 666 (1962))).

[96] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see id. at 224-29, 236 (holding that United States Warehouse Act, having provided for regulation of rates, discrimination, dual position of warehousemen, mixing of grain, rebates, unsafe elevators, abandonment of service, and filing and publishing of rates, put all matters beyond reach of state regulation); see also City of N.Y. v. FCC, 486 U.S. 57, 65 (1988) (holding that FCC preempted field of technical standards governing quality of cable television signals).

[97] *City of N.Y.*, 486 U.S. at 63-64 (explaining that under field preemption "'a federal agency . . . may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law" (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986))).

other conclusion, or that the Congress has unmistakenly so ordained [preemption]."[98] Moreover, a second hurdle may apply: if the field that federal law claims to preempt has traditionally been in the domain of the states, there is a presumption against this preemption. "[T]he historic police powers of the States [a]re not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[99]

B. Analysis of the Department's Preemption Effort

In attempting to preempt state regulation of the no-contact rule, the Department invoked field preemption rather than conflict preemption.[100] In choosing between the two, the Department faced a tradeoff: while the field preemption doctrine is conceptually neater considering the Department's goal, application of conflict preemption is technically more sound. This Section analyzes both doctrines because a reviewing court could review the Department's preemption effort under either the field or the conflict preemption doctrine.[101] Subsection II.B.1 tackles the field preemption approach, the doctrine upon which the Department relied, and subsection II.B.2 analyzes the Department's preemption effort under the conflict preemption doctrine.

1. Field Preemption

The Department presumably relied upon field preemption rather than conflict preemption because field preemption terminates the sharing of coequal powers and unconditionally denies the states the authority to regulate in the area—whether or not state rules are inconsistent with the Reno Rule.[102] Conflict preemption, on the other hand, recognizes cooperative federal and state power in the area of law at issue.[103] Admitting that the states have regulatory authority

98 Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

99 *Rice*, 331 U.S. at 230.

100 See Communications, supra note 3, at 39,916 (explaining Department's intention to displace even consistent state regulation by "occupy[ing] the field").

101 See Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 104 n.2 (1992) (illustrating that court's analysis need not be constrained by rationale offered by government).

102 See *Rice*, 331 U.S. at 234 ("[In intending to preempt the field] Congress did more than make the Federal Act paramount over state law in the event of conflict. It remedied the difficulties which had been encountered in the Act's administration by terminating the dual system of regulation.").

103 See *Gade*, 505 U.S. at 103 (holding under conflict preemption doctrine that state law was invalid to extent it was inconsistent with federal law and explaining that federal law "does not foreclose a State from enacting its own laws to advance [its goals] but it does restrict the ways in which it can do so").

until their laws conflict with federal intent would be inconsistent with the Department's assertion that states have absolutely *no* authority to regulate ex parte contacts by federal prosecutors.[104]

In order to justifiably preempt, as a field, state review of ex parte contacts by Department prosecutors, Congress must have "unmistakenly ordained" field preemption and demonstrated a "clear purpose" to do so in spite of the traditional state role in this area.[105] In *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*,[106] the Supreme Court recognized that an agency's statement is "dispositive on the question of . . . intent to pre-empt unless . . . the agency's position is inconsistent with clearly expressed congressional intent."[107] To that end the Department has expressly stated that its "intent is to displace even purportedly consistent state regulation in this area (or, as it is commonly phrased, to 'occupy the field' of reviewing *ex parte* contacts by Department attorneys)."[108] Thus, if this express assertion is consistent with Congress's intent,[109] it would be as if Congress itself had unmistakenly ordained field preemption.

The Department's express statement also illustrates a clear federal purpose sufficient to overcome the presumption against preempting a field which has been customarily dominated by the states. Even though federal courts play some role in regulating federal prosecutors,[110] the licensing and regulation of lawyers, including federal prosecutors, is a traditional function of the states.[111] As a result, courts

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104 "The Department made clear that the Attorney General shall have *exclusive* authority to determine these rules." Communications, supra note 3, at 39,912 (emphasis added). Furthermore, "the Department believes it must be the final arbiter of the scope of policing with respect to *ex parte* contacts involving federal prosecutors." Id.

105 See supra notes 98-99 and accompanying text.

106 471 U.S. 707 (1985).

107 Id. at 714-15 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984)); accord California Coastal v. Granite Rock Co., 480 U.S. 572, 593 (1987) (refusing to recognize field preemption because Forest Service did not expressly state intent to preempt field).

108 Communications, supra note 3, at 39,916.

109 See infra Part III.

110 Although federal courts generally adopt the ethical norms of the state in which they sit, see supra note 38 and accompanying text, some federal courts have held that the application of these rules is a matter of federal law. See In re Snyder, 472 U.S. 634, 645 n.6 (1985) (noting that "state code of professional responsibility does not by its own terms apply to sanctions in federal courts"); In re American Airlines, 972 F.2d 605, 610 (5th Cir. 1992) (noting that federal court applications of ethical standards are questions of federal law), cert. denied, 507 U.S. 912 (1993); see also Theard v. United States, 354 U.S. 278, 281 (1957) ("While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route.").

111 See Leis v. Flynt, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia. . . . The States prescribe the qualifications for admission to practice and the

generally have been reluctant to allow the federal government to encroach upon a state's ability to regulate the attorneys it has licensed.[112] However, courts have permitted the federal government to preempt traditional state strongholds if the federal government clearly expresses its preemptive intent.[113] Moreover, the traditional state interest in state ethical regulation has been surmounted in the past under the Supremacy Clause.[114] Finally, preemption is necessary in order to establish a uniform standard for federal prosecutors.[115]

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standards of professional conduct. They are also responsible for the discipline of lawyers.").

112 See, e.g., Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("When examining attorney conduct, a court must be careful not to . . . intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts."); Evans v. Jeff D., 475 U.S. 717, 766 n.20 (1986) (Brennan, J., dissenting) ("Since Congress has not sought to regulate ethical concerns . . ., the legality of such arguments is purely a matter of local law.").

113 The Court has not recognized preemption of a traditional state field without such an express statement of preemptive intent. Compare Cipollone v. Liggett Group, Inc., 505 U.S. 517, 530-31 (1992) (finding that "enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted," and therefore holding that Federal Cigarette Labeling Act did not preempt traditional state field); California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (finding no field preemption when there was no "claim that the federal . . . laws expressly pre-empt state laws" in "an area traditionally regulated by the States") with Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979) (holding that federal law preempted state community property laws despite traditional state role in family law); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 233-36 (1947) (holding that Congress's "strong language" and intent to terminate dual system of regulation was sufficient to preempt field despite traditional state occupation of grain storage regulation).

114 See, e.g., Supreme Court v. Friedman, 487 U.S. 59, 70 (1988) (striking down state bar admission rule which discriminated against nonresidents); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792-93 (1975) (holding that local bar association rule enunciating minimum-fee schedules violated Sherman Act despite alleged approval by state); Sperry v. Florida, 373 U.S. 379, 385, 403-04 (1963) (preempting state ethics rule proscribing nonattorneys from representing clients); Baylson v. Disciplinary Bd. of the Sup. Ct. of Pa., 975 F.2d 102, 111-12 (3d Cir. 1992) (invalidating application of state ethics rule which required judicial approval of grand jury subpoenas), cert. denied, 507 U.S. 984 (1993); Rand v. Monsanto Co., 926 F.2d 596, 600 (7th Cir. 1991) (holding that federal rule preempted state standard regarding class action litigation funding).

115 See supra Part I.B. Uniformity has been a significant interest in other preemption decisions. See, e.g., Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 102 (1992) (allowing preemption because of need to establish uniform federal occupational health and safety standards); International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 389 (1986) (holding that preemption was necessary to create centralized administration necessary to obtain uniform application); Allis-Chalmers v. Lueck, 471 U.S. 202, 211 (1985) (allowing preemption in order to achieve interpretive uniformity in labor-contract law); Jones v. Rath Packing Co., 430 U.S. 519, 543 (1977) (finding preemption based on congressional objective to establish uniformity in packaging and measures); *Rice*, 331 U.S. at 236 (recognizing intent to replace dual regulation with uniform system).

2. Conflict Preemption

Alternatively, the Department could have prevented states from regulating the ex parte contacts of federal prosecutors and thus eliminated the stifling uncertainty through conflict preemption. Although this approach, as it appreciates cooperative federal and state power, would be inconsistent with the Department's insistence that states have no power to regulate federal prosecutors, it would be technically more sound. The Department would avoid the linguistic stretch of calling "the preemption of one state ethics rule" a *field*. Field preemption becomes more appropriate as the field to be preempted becomes more comprehensive.[116] Comprehensive fields have included labor,[117] communications,[118] and immigration.[119] In contrast, the Reno Rule does not address as comprehensive a field. Moreover, the Department would need less delegated authority under conflict preemption (where only those state laws which conflict with the federal intent are terminated) than under field preemption (where all state laws in a field are extinguished).[120] Similarly, under the conflict preemption doctrine a state's interests in its laws are irrelevant,[121] but under field preemption, when a traditional state function is to be preempted, the Tenth Amendment (which explicitly reserves power for the states)[122] must be seriously weighed.[123]

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116 See Gardbaum, supra note 84, at 811 (asserting that as field to be occupied is more comprehensive, inference of field preemption is more reasonable); see also Hillsborough County, Fla. v. Automated Medical Lab., Inc., 471 U.S. 707, 717 (1985) (suggesting that comprehensiveness is necessary, but not sufficient, requirement and that clear congressional intent must also be manifested).

117 See, e.g., Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 276, 296 (1971).

118 See, e.g., City of N.Y. v. FCC, 486 U.S. 57, 69 (1988); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 716 (1984).

119 See, e.g., Toll v. Moreno, 458 U.S. 1, 3 (1982).

120 See Gardbaum, supra note 84, at 774-75 (explaining that complete congressional abrogation of state's lawmaking power marks "a greater inroad on state power than the principle that federal law trumps state law [only] when the two conflict"); see also supra notes 93, 96-97 and accompanying text.

121 See supra note 95 and accompanying text.

122 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

123 It is because of the states' Tenth Amendment interests in regulating their traditional state functions that field preemption requires a clear congressional mandate before state regulation is to be superseded. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236-38 (1947) (holding that field preemption requires clear congressional mandate before traditional state powers are abrogated).

The Supreme Court has expressed its intent that state autonomy be respected in many ways. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 320 (1851) (noting that some subjects are inherently local). Although Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), seems to diminish the significance of the Tenth Amend-

With respect to the Reno Rule, defining the conflict is the most important step in analyzing conflict preemption and in determining whether such preemption could achieve uniformity. If the conflict is narrowly defined—such that the Reno Rule's standards for what contacts are permissible are compared to those contacts allowable under a state no-contact rule—the Department's goal of uniformity could not be accomplished because this scheme would allow each state ethics board to independently interpret and apply the standard established by the Reno Rule rather than removing the board's regulatory authority. This inadequate result would be the same regardless of whether the state ethics rule had an "authorized by law" exception, and therefore the disciplinary board applying that rule was forced to incorporate the Reno Rule standard into its own rule, or whether the state ethics rule did not have an "authorized by law" exception, and therefore the disciplinary board was forced to interpret and implement the more permissive Reno Rule with which its rule was in conflict.[124] Moreover, in addition to the divergent interpretations of the Reno Rule which would be likely to arise when it was construed in good faith, interpretations of the Reno Rule could be further balkan-

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ment, see id. at 552 (holding that when Congress passes generally applicable laws, states must rely upon political process to protect state sovereignty), three subsequent cases have resurrected the Amendment's vitality. See United States v. Lopez, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring) (noting that Gun-Free School Zones Act offended Tenth Amendment principles because it intruded on state sovereignty by reducing state autonomy and accountability); New York v. United States, 505 U.S. 144, 174-77 (1992) (holding that direct order to state to regulate waste infringes on core state sovereignty reserved by Tenth Amendment); Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (holding that some traditional state functions are deserving of respect such that Congress must clearly intend to infringe upon such functions before state sovereignty is overcome).

[124] A court need not find a literal conflict to preempt state ethics rules. The Third Circuit has determined that an ethics rule which "'impose[d] . . . conditions not contemplated by Congress'" was incompatible with and therefore yielded to federal law even though the court acknowledged that there was a not a literal conflict between the state ethics rule and federal law. Baylson v. Disciplinary Bd. of the Sup. Ct. of Pa., 975 F.2d 102, 112 (3d Cir. 1992) (quoting Sperry v. Florida, 373 U.S. 379, 385 (1963)), cert. denied, 507 U.S. 984 (1993). The Third Circuit explicitly rejected United States v. Klubock, 639 F. Supp. 117, 122 (D. Mass. 1986) (per curiam), aff'd per curiam by an equally divided court, 832 F.2d 664 (1st Cir. 1987) (en banc), which required a literal conflict between state ethics rule and federal law. *Baylson*, 975 F.2d at 109; see also Almond v. United States Dist. Court, 852 F. Supp. 78, 86-87 (D.N.H. 1994) (rejecting *Klubock* analysis in finding ethics rule which interfered with functions of federal grand juries, but did not literally conflict with federal law, void under Supremacy Clause). But see In re Almond, 603 A.2d 1087, 1089 (R.I. 1992) (following *Klubock*). Notably, this would not be the first time that the no-contact rule would be preempted for conflicting with a federal law. See Harper v. Missouri Pac. R.R. Co., 636 N.E.2d 1192, 1202 (Ill. App. Ct. 1994) (holding that state no-contact rule is preempted to extent it conflicts with Federal Employers' Liability Act).

ized because many state boards disagree with the standard imposed by it and might not employ that standard faithfully.[125]

However, uniformity could be achieved through conflict preemption if analysis of the conflict also includes the jurisdiction to regulate federal attorneys.[126] On the one hand, in order to prevent uncertainty and the chilling of federal law enforcement, the Department intends to have sole authority to create norms for ex parte contacts by federal prosecutors[127] and to discipline for violations of these norms.[128] At the same time, state disciplinary boards claim that they are also empowered to regulate federal prosecutors.[129] Because the Department's claim for sole jurisdictional authority literally conflicts with the state boards' claims for at least some authority, the federal intent must prevail under the Supremacy Clause.[130] In this manner, uniformity would be achieved as the Department would exercise exclusive jurisdiction over the ex parte contacts of federal prosecutors.

As this Part demonstrated, the Department relies, in effect, solely upon the Supremacy Clause to ensure uniform regulation over the ex parte contacts of federal prosecutors and thereby eliminate the uncertainty thwarting federal prosecutors. Although the Department claims to preempt state regulation under the field preemption doctrine, it also could have relied upon conflict preemption to achieve its ends. However, as Part III now illustrates, the Department currently lacks sufficient authority to preempt state no-contact rules under either manner of preemption.

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125 See supra note 78 and accompanying text.

126 See Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 104 & n.2 (1992) (explaining that conflict need not be between substance of federal and state laws but rather can exist if Congress's intent to proscribe state regulation conflicts with state's attempt to regulate in that area).

127 Communications, supra note 3, at 39,912 ("[T]he Attorney General shall have *exclusive* authority to determine these rules." (emphasis added)).

128 Id. ("[T]he Department believes it must be the final arbiter of the scope of policing with respect to *ex parte* contacts involving federal prosecutors.").

129 See, e.g., Model Rules of Professional Conduct Rule 8.5 (1994) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.").

130 See, e.g., *Gade*, 505 U.S. at 98-99 (holding that state's claim to licensing authority was "pre-empted as in conflict with the full purposes" of the Occupational Safety and Health Act "to subject employers and employees to only one set of regulations").

III
THE RENO RULE AND POWER

The Department can only preempt state regulation through the Reno Rule if delegated sufficient authority to promulgate the Rule.[131] A "[p]roperly promulgated substantive agency regulation[ ] ha[s] the 'force and effect of law'" as if Congress itself had enacted the regulation.[132] Such a regulation must be of a substantive nature and conform with the procedural requirements imposed by Congress.[133] Additionally, it must be rooted in a grant of congressional power such that the agency's regulation was reasonably within Congress's contemplation.[134]

The Reno Rule is of a substantive nature since it affects individual "rights and obligations."[135] The Department's regulation influ-

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131 The focus of this Note and the current debate is federalism—that is, whether the Department's rule is properly promulgated to preempt state authority. The Rule, however, also claims to supersede application by federal district courts of their local rules concerning contacts by government prosecutors. See Communications, supra note 3, at 39,116. The Department asserts that its regulation is duly promulgated pursuant to appropriate congressional authority and that it therefore can supersede any inconsistent rules adopted by federal courts because "Congress, not the courts, has the primary power to prescribe rules for the federal courts." Id. at 39,917 (citing Palmero v. United States, 360 U.S. 343, 353 n.11 (1959), and Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941), which recognize congressional power to regulate the practice and procedure of federal courts). Thus, any district court local rule that is inconsistent with federal law will fall outside the court's rulemaking authority pursuant to 28 U.S.C. § 2071(a) (1994), which provides that rules made by district courts "shall be consistent with Acts of Congress." See, e.g., Baylson v. Disciplinary Bd. of the Sup. Ct. of Pa., 975 F.2d 102, 107-11 (3d Cir. 1992) (holding that local district court rule must yield to conflicting Federal Rule of Criminal Procedure). Of course, the Rule would not be inconsistent with those district court rules which have "authorized by law" exceptions.

Superseding the application of district court local rules will not likely violate the separation of powers doctrine. In the same manner that Congress was able to delegate traditional judiciary functions to a Sentencing Commission, see Mistretta v. United States, 488 U.S. 361, 374 (1989), Congress can delegate to the Department the power to supersede a function that Congress had formerly entrusted to the judiciary without usurping power from the judiciary branch. But see Mashburn, supra note 22, at 541-48 (suggesting that Department's effort may fail because of federal courts' inherent authority to regulate lawyers who appear before them); Delker, supra note 22, at 881-89 (same).

132 Chrysler Corp. v. Brown, 441 U.S. 281, 295 n.18 (1979) (citing Supreme Court cases which held that agency regulations have "force and effect of law").

133 See id. at 310, 313 & n.44 (citing to Administrative Procedure Act, 5 U.S.C. § 553 (1994)).

134 See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 843 n.9 (1984) (explaining that judiciary is final authority on issues of statutory construction and must reject constructions of law not explicitly or implicitly contemplated by legislature); *Chrysler*, 411 U.S. at 306 (rejecting agency interpretation as contrary to clear congressional intent).

135 Morton v. Ruiz, 415 U.S. 199, 232-33 (1974) (noting that Administrative Procedure Act requirements for "substantive" rules apply to those "rules that affect substantial individual rights and obligations"); see Charles H. Koch, Jr., Administrative Law and Practice

ences the rights of attorneys by determining when they may be subject to discipline. Moreover, it defines duties that federal prosecutors owe to the public. The Rule is procedurally adequate because the Department provided for notice and comment and published the final regulation in the Federal Register as required by the Administrative Procedure Act.[136]

This Part demonstrates that, nonetheless, the Reno Rule is not a properly promulgated regulation. Section III.A explores the possibility that the Rule is inconsistent with a congressional statute. Although a conflict between the Rule and the statute would invalidate the Rule,[137] this Section concludes that it is unclear whether there is a conflict. Instead, because this analysis raises questions as to whether Congress has delegated sufficient power to the Department to promulgate the Rule, it is used to buttress the argument made in Section III.B, which concludes that the power to preempt state regulation of ex parte contacts of federal prosecutors has not been delegated to the Department through its enabling statutes.

A. The DOJ Act

It has long been held that an executive agency cannot promulgate a regulation that conflicts with a federal statute.[138] Such action would violate principles of the separation of powers doctrine.[139] It is not clear, however, whether the Reno Rule conflicts with a federal statute. The statute in question is the Department of Justice Appropriation Authorization Act (DOJ Act),[140] which has been reenacted every year

§ 3.4 (1985 & Supp. 1996) (contrasting substantive rules, which affect rights and obligations, with procedural rules, which merely affect way agency conducts its business).

136 See 5 U.S.C. § 553(b) (1994).

137 Cf. Mashburn, supra note 22, at 498-99 (stating that Department's regulation arguably conflicts with federal statute); Delker, supra note 22, at 880 (suggesting that Department lacks delegated authority partly because statute "left the licensing and regulation of federal government attorneys to the States").

138 See, e.g., International Ry. Co. v. Davidson, 257 U.S. 506, 514 (1922) ("A regulation to be valid must be reasonable and must be consistent with [statutory] law."); Morill v. Jones, 106 U.S. 466, 467 (1882) (holding that regulation which conflicted with statute exceeded agency's authority); 2 Norman J. Singer, Sutherland Statutory Construction § 36.03 (5th ed. 1993) (stating that in event of conflict between provisions of statute and administrative regulation, statute prevails).

139 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952) (holding that executive branch cannot usurp powers from legislative branch because "[t]he Founders of this Nation entrusted the lawmaking power to the Congress"); see also U.S. Const. art I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

140 Act of Nov. 30, 1979, Pub. L. No. 96-132, § 3(a), 93 Stat. 1040, 1044, as carried forward by Act of Aug. 26, 1994, Pub. L. No. 103-317, § 102, 108 Stat. 1724, 1734 (reenacting provisions of Pub. L. No. 96-132).

since originally enacted in 1979 and currently remains in effect.[141] It provides that:

> None of the sums authorized to be appropriated by this Act may be used to pay the compensation of any person employed after the date of the enactment of this Act as an attorney (except foreign counsel employed in special cases) *unless such person shall be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia.*[142]

One interpretation of the DOJ Act is that, in contrast to the intent of the Reno Rule, Congress mandated there to be some state role in the *ethical* regulation of federal attorneys.[143] Inherent in the Supremacy Clause, however, is the rebuttable presumption "'that the activities of the Federal Government are free from regulation by any state.'"[144] This presumption of intergovernmental immunity dictates that federal officials are only subject to state regulation if Congress *clearly* mandates such regulation.[145] Thus, in order to determine whether the Reno Rule conflicts with the DOJ Act, it is necessary to determine whether Congress, through the phrase "duly licensed and authorized to practice as an attorney under the laws of a state," clearly mandated that states regulate the ethical conduct of Department attorneys.

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141 See Act of Aug. 26, 1994, Pub. L. No. 103-317, § 102, 108 Stat. 1724, 1734 ("Subject to subsection (b) of section 102 of the Department of Justice and Related Agencies Appropriations Act, 1993, authorities contained in Public Law 96-132, 'The Department of Justice Appropriation Authorization Act, Fiscal Year 1980,' shall remain in effect until the termination date of this Act or until the effective date of a Department of Justice Appropriation Authorization Act, whichever is earlier.").

142 § 3(a), 93 Stat. at 1044 (emphasis added), as carried forward by Pub. L. No. 103-317, § 102, 108 Stat. at 1734.

143 See Mashburn, supra note 22, at 498-99 (stating implausibility of notion that Congress meant Department of Justice lawyers to be free of any state ethical restraints); Delker, supra note 22, at 878-79 (same).

144 Hancock v. Train, 426 U.S. 167, 178 (1976) (quoting Mayo v. United States, 319 U.S. 441, 445 (1943)); see also id. (asserting that presumption derives from Supremacy Clause). Although Congress can subject federal functions to state regulation, see, e.g., City of Cleveland v. United States, 323 U.S. 329, 333 (1945), the Court in *Hancock* held that federal installations discharging air pollutants could not be regulated by states because there was no clear and unambiguous authorization by Congress to subject these federal installations to state enforcement. *Hancock*, 426 U.S. at 198.

145 *Hancock*, 426 U.S. at 179 ("Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'" (footnotes omitted)); see also EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 227-28 (1976) (explaining that if Congress intends to approve state regulation of federal activities, "it may legislate to make that intention manifest").

In support of the Reno Rule, the Department proposes a very narrow reading of the phrase "licensed and authorized." It argues that the purpose of the DOJ Act simply is to require federal prosecutors to have licenses by "ensur[ing] that the professional qualifications of all Department lawyers have in fact been examined" by the states.[146] Thus, the Department contends that the DOJ Act only serves to relieve the Department of having to administer a national bar exam to test the educational qualifications of its attorneys[147] and that it does not grant state disciplinary boards the power to regulate ethical conduct.[148]

There are two counterarguments to the Department's reading. First, the Department's construction renders the word "authorized" meaningless.[149] As Professor Mashburn has argued, Congress intended for states to ensure that Department attorneys are continually authorized to practice law.[150] She asserts that Congress recognized that possessing a license based upon an attorney's intellectual qualifications tested through a bar exam is a necessary but not sufficient requirement to practice law.[151] That is, it has long been held that states can require licensees to meet additional conditions,[152] such as adhering to their ethical codes.[153] Indeed, Judge Laurence H. Silberman of the District of Columbia Circuit Court of Appeals stated that "the word 'authorized' plainly contemplate[d] the [application of]

146 Communications, supra note 3, at 39,915.

147 See id. (explaining that the "purpose and effect of the congressional requirement that federal attorneys have state licenses . . . simply serves to ensure that the professional qualifications of all Department lawyers have in fact been examined"); see also Brief for Appellant at 42, United States v. Ferrara, 54 F.3d 825 (D.C. Cir. 1995) (on file with the *New York University Law Review*) ("This provision on its face suggests an intent by Congress to ensure that attorneys employed by the Justice Department have satisfied minimum educational and training standards.").

148 See Communications, supra note 3, at 39,915.

149 In fact, in arguing that its Rule does not conflict with the DOJ Act, the Department does not even recognize the requirement that DOJ attorneys be authorized by states—it merely refers to state licenses. See Communications, supra note 3, at 39,915.

150 See Mashburn, supra note 22, at 498-99.

151 See id. ("[I]t seems implausible that Congress meant for DOJ lawyers to be tested by the state for competency and character requirements and then to proceed to practice law free from *any* ethical restraints."); see also In re Doe, 801 F. Supp. 478, 488 (D.N.M. 1992) (stating that whether federal prosecutor acted unethically is a determination "more appropriately reserved for the state bar, which implements procedures for testing both the moral and intellectual qualifications of the attorneys it chooses to license").

152 See Dent v. West Virginia, 129 U.S. 114, 123-24 (1889) (holding that states may require conditions other than just testing intellectual qualifications in regulating professionals).

153 See Model Rules of Professional Conduct Rule 8.5(a) (1994) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction . . . .").

ethical standards of the states."[154] Moreover, requiring states to regulate the ethical conduct of federal prosecutors, and thereby safeguard that they are authorized to practice law, is consistent with the purpose of the Act: to abate departmental autonomy over fiscal affairs and policy matters, including the monitoring of *professional standards* within the Department.[155] The second counterargument is that the Department's reading ignores a 1990 House Report that contended that all federal prosecutors are bound by the ethical codes of the states in which they are admitted.[156] One commentator has observed that by reenacting the DOJ Act in the presence of the House Report, Congress may have confirmed that the DOJ Act requires federal prosecutors to be subject to state ethical regulation.[157]

However, these counterarguments, viewed in light of the presumption against intergovernmental immunity, are not sufficient to instruct that Congress *clearly* mandated through the DOJ Act that the ethical conduct of prosecutors be solely state regulated. First, while it is probable that Congress did not intend the Department's narrow reading of the phrase, "licensed and authorized to practice law," it is not *clear* that it instead broadly dictated that states must ensure that federal prosecutors are continuously authorized to practice law. Second, reenacting the DOJ Act after the House Report does not dispositively reveal Congress's intent. Principles of statutory interpretation dictate that the Report, as "subsequent" legislative history, is not persuasive[158] and that the implications of the subsequent reenactment are

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154 Harvey Berkman, Judges Give Reno Grief, Nat'l L.J., Dec. 19, 1994, at A6. Judge Silberman made this remark during the oral arguments of the appeal of United States v. Ferrara, 847 F. Supp. 964 (D.D.C. 1993), aff'd, 54 F.3d 825 (D.C. Cir. 1995).

155 See S. Rep. No. 173, 96th Cong., 1st Sess. 8 (1979), reprinted in 1979 U.S.C.C.A.N. 2003, 2010 (stating that "[t]he Committee is concerned [with the] OPR's [(the Department's Office of Professional Responsibility's)] present mode of operations" because they are too autonomous).

156 Federal Prosecutorial Report, supra note 5, at 32 (disagreeing "with the Attorney General's attempts to exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong").

157 See Delker, supra note 22, at 879 ("In light of the findings and recommendations of the Subcommittee, Congress carried forward the Act requiring Department attorneys to be licensed in a State without change.").

158 The Supreme Court has cautioned of the dangers of relying on subsequent legislative history. Although "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction," Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969), statements by individual members of Congress that do not represent the will of Congress as a whole do not constitute subsequent legislation, see Southeastern Community College v. Davis, 442 U.S. 397, 411 n.11 (1979) ("[I]solated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment."). Relying on individuals' statements from a subsequent Congress is "an extremely hazardous basis for inferring the meaning of [an earlier] congressional

not constructive.[159]

In sum, because the DOJ Act is not a clear mandate that states must regulate the ethical conduct of federal prosecutors, the intergovernmental immunity doctrine precludes a definitive finding that the Reno Rule conflicts with the DOJ Act. Significantly, however, although a reviewing court likely would not find a clear conflict, the questions that this analysis has raised—questions about Congress's intent to grant authority to the Department to regulate federal prosecutors—are helpful in evaluating whether Congress actually delegated sufficient authority to the Department to enact the Reno Rule.

B. Statutes Do Not Provide Sufficient Authority

Although the Reno Rule may not conflict with the DOJ Act, the Department cannot preempt state regulation of federal prosecutors unless Congress has affirmatively delegated it sufficient authority. As this Part will show, the Rule is not based upon proper authorization because Congress has not delegated sufficient authority to the Department. The Rule must therefore be invalidated because it usurps power from the legislative branch in violation of the separation of powers doctrine.[160] "[T]he basic doctrine of administrative law . . . is the doctrine of ultra vires. . . . The statute is the source of agency

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enactment." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117-18, 118 n.13 (1980).

[159] "It is settled law that when a statute has an authoritative interpretation, and Congress reenacts it without change, 'Congress is presumed to be aware of [the] interpretation . . . and to adopt that interpretation. . . .'" In re North, 50 F.3d 42, 45 (D.C. Cir. 1995) (quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978)). The Supreme Court, however, has explicitly declared that a House Report cannot be an authoritative interpretation of the original statute because "it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." Pierce v. Underwood, 487 U.S. 552, 566 (1988); accord *North*, 50 F.3d at 46 ("The legislative history of a reenactment cannot change existing law.").

In fact, an argument can be made that Congress approved of the Department's narrow reading of the phrase "licensed and authorized" because Congress reenacted the DOJ Act in the presence of the Department's interpretation. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974) ("[C]ongressional failure to revise or repeal the agency's interpretation [of a statute] is persuasive evidence that the interpretation is the one intended by Congress."). But see Massachusetts Mut. Life Ins. Co. v. United States, 288 U.S. 269, 273 (1933) (holding that reenactment doctrine does not apply where regulation is inconsistent with statute).

[160] See Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are '*ultra vires*,' and courts must invalidate them." (citing 5 U.S.C. §§ 701, 706(2)(C) (1988), which authorizes judicial review of agency actions "in excess of statutory jurisdiction, authority, or limitations")); Steele v. FCC, 770 F.2d 1192, 1194 (D.C. Cir. 1985) ("The APA, 5 U.S.C. § 706(2)(C) (1976), states that a 'reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations or short of statutory right.'").

authority as well as its limits."[161] Thus, an agency may not take action simply because it believes that such action is necessary to effectuate a federal policy.[162]

An agency's actions must be upheld on the statutory grants of authority upon which it relies.[163] This Section examines the two sources of authority that the Department claims provide sufficient power to enact the Reno Rule—the housekeeping statute and provisions of Title 28 of the United States Code. This Section concludes that neither grant of power is sufficient.

1. The Housekeeping Statute

One basis upon which the Department rests its authority to preempt state regulation of no-contact rules is the "housekeeping statute."[164] The statute is so named because it authorizes only "rules of agency organization, procedure or practice"[165] and allows the Department to promulgate rules regarding "the day-to-day . . . housekeeping in the . . . [D]epartment[ ]."[166] The housekeeping statute does not, however, provide authority for promulgating substantive rules.[167] The Reno Rule, because it affects individual rights and obligations, is a substantive rule.[168] As a result, the housekeeping statute cannot authorize the Reno Rule.

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161 Bernard Schwartz, Administrative Law: A Casebook 75 (4th ed. 1994); see also Lyng v. Payne, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress.").

162 See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374-75 (1986) (asserting that because agency only has that power conferred to it by Congress, it "may not confer power upon itself" because this would give agency "power to override Congress").

163 See SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) (explaining that in reviewing regulations, court confines its review to grounds upon which agency itself bases its action).

164 Communications, supra note 3, at 39,915. The housekeeping statute, 5 U.S.C. § 301 (1994), provides that "[t]he head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

165 Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979). The Court in *Chrysler* held that, although the Secretary of Labor maintained that § 301 granted authority to adopt such rules as he deemed appropriate, nothing in the legislative history granted authority to promulgate substantive regulations. Id.

166 Id. at 310 n.41 (quoting H.R. Rep. No. 1461, 85th Cong., 2d Sess. 12 (1958)).

167 See id. at 310 (concluding that § 301 is not "a substantive grant of legislative power to promulgate rules"). The Department claims that the Supreme Court, in Georgia v. United States, 411 U.S. 526 (1973), held that the housekeeping statute provides authority for making substantive regulations. See Communications, supra note 3, at 39,915. In *Georgia*, however, the housekeeping statute simply authorized a procedural regulation; the Department's regulation only clarified where a federal statute had been "silent as to the procedures the Attorney General is to employ." *Georgia*, 411 U.S. at 536.

168 See supra text accompanying note 135.

2. *An Analysis of Title 28 Through the* Chevron *Prism*

The Department also claims sufficient power to promulgate the Reno Rule based upon a handful of statutes within Title 28.[169] While these statutes can authorize substantive regulations, they can only authorize those contemplated by Congress. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[170] the Supreme Court detailed the approach for determining whether a regulation is authorized by Congress.[171]

In reviewing the Reno Rule under *Chevron*, a court must first look to the empowering statutes in Title 28 and ask whether Congress has explicitly entrusted the Department with the power to preempt state jurisdiction over the ethical regulation of the ex parte contacts of federal prosecutors.[172] Although these statutes offer the Department general authority to investigate, litigate, and prosecute, as general enabling statutes, they do not expressly authorize the contacts contemplated by the Reno Rule.[173]

Thus, a reviewing court must proceed to the second step of *Chevron*: the court must ask—granting "considerable weight" to the agency's construction of its enabling statutes—whether the agency's

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169 See Communications, supra note 3, at 39,915.

170 467 U.S. 837 (1984).

171 The Court explained:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted); cf. The Honorable Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 512 (describing *Chevron* as "a highly important decision—perhaps the most important in the field of administrative law since Vermont Yankee Nuclear Power Corp. v. NRDC," 435 U.S. 519 (1978)); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2075 (1990) (asserting that *Chevron* "has established itself as one of the very few defining cases in the last twenty years of American public law").

172 See *Chevron*, 467 U.S. at 842; see also MCI Telecommunications Corp. v. American Tel. & Tel. Co., 114 S. Ct. 2223, 2232-33 (1994) (limiting interpretation of Communications Act of 1934, § 203(b)(2), as amended, 47 U.S.C.A. 203(b)(2), strictly to congressional purpose).

173 See United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) ("[T]he statutes cited by the government are nothing more than general enabling statutes. Nothing in these provisions expressly or impliedly authorizes contact with represented individuals beyond that permitted by case law.").

construction is a "permissible interpretation."[174] Subsection III.B.2.a introduces this analysis by examining the Title 28 statutes which the Department cited in support of the Reno Rule. It explains that these statutes have not been broadly interpreted. Next, subsection III.B.2.b analyzes the appropriate level of deference to be afforded to the Department's interpretation. While this review is generally deferential, it is not hollow.[175] This subsection explains that when an agency adopts a new interpretation of general statutes that have long been in existence and when such an interpretation increases the agency's power, courts are less deferential. Finally, subsection III.B.2.c concludes that due to the limitations on both the Department's statutory authority and the deference afforded to its regulation, its interpretation is impermissible, and the Reno Rule is therefore invalid under the second step of *Chevron*.

a. The Title 28 Statutes. The Department asserts that the delegation of law-enforcement powers under Title 28 affords it sufficient authority to promulgate its regulation.[176] Pursuant to 28 U.S.C. § 519, the Attorney General is authorized to supervise and direct all federal prosecutors in the discharge of their law-enforcement duties.[177] Four sections of Title 28 delineating such duties are relied upon by the Department: they authorize Department attorneys to conduct investigations,[178] litigation,[179] prosecutions,[180] and other proceedings.[181] In

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174 *Chevron*, 467 U.S. at 843 ("[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute.").

175 See, e.g., Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370-73 (1986) (holding that FCC's attempt to preempt field of state regulation over property depreciation exceeded its statutory authority); see also Sunstein, supra note 171, at 2085 & n.69 (1990) (citing Supreme Court cases since *Chevron* in which Court rejected agency interpretations of law).

176 See Communications, supra note 3, at 39,915 ("The Department believes that it possesses appropriate statutory authority to promulgate this regulation pursuant to . . . title 28 of the United States Code, which in a variety of provisions authorizes the Attorney General and the Department to enforce federal law and to regulate the conduct of Department attorneys.").

177 See 28 U.S.C. § 519 (1994); see also 28 U.S.C. § 509 (1994) (vesting functions of Department in Attorney General); 28 U.S.C. § 510 (1994) (allowing Attorney General to delegate functions throughout Department).

178 28 U.S.C. § 533 (1994).

179 28 U.S.C. § 516 (1994).

180 28 U.S.C. § 547 (1994).

181 28 U.S.C. § 515(a) (1994). The Department stated:

> Title 28 of the United States Code grants the Attorney General and the Department a variety of law enforcement powers including the power (through intermediary officials) to conduct grand jury proceedings or any other kind of civil or criminal legal proceeding; to conduct litigation, and to "secur[e] evidence" therefor; to detect and prosecute crimes; and to prosecute "civil actions, suits, and proceedings in which the United States is concerned."

general, these four sections, discussed here in turn, have not been broadly construed.

Perhaps the statutory provision most analogous to the Department's need is 28 U.S.C. § 533, which authorizes the Department to detect and investigate crimes against the United States. However, one federal court rejected the claim that in investigating a murder an Assistant United States Attorney was "authorized by law" under § 533 to make ex parte contacts with a defendant—contacts that would not have been permitted under the ethical provisions of the prosecutor's state bar.[182] Moreover, even the Department has recognized limits to its investigative authority, determining that its attorneys cannot encroach upon state authority.[183]

Additionally, 28 U.S.C. § 516, which empowers the Department to conduct litigation in which the United States is a party, has been subject to narrow construction.[184] The provision serves merely as a "housekeeping provision which authorizes the Attorney General to bring an action where there is independent statutory authority."[185] The power granted by the statute "is limited to the conduct of pending litigation."[186] The power to conduct litigation does not exempt Department lawyers from the laws governing an agency that the Department represents: "[I]t [would be] alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of . . . litigation."[187]

Furthermore, while 28 U.S.C. § 547 provides for Department prosecutors to prosecute offenses against the United States, it does

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Communications, supra note 3, at 39,915 (alteration in original) (citing 28 U.S.C. §§ 515(a), 516, 533, 547). Although the Department relies upon these statutes in support of the Reno Rule in its commentary, it does not specifically analyze them.

182 See In re Doe, 801 F. Supp. 478, 486 (D.N.M. 1992) (holding that because § 533 does not grant authority to ignore state codes of ethics, "authorized by law" exception must be narrowly construed).

183 See Authority of the Federal Bureau of Investigation to Investigate Police Killings, 5 Op. Off. Legal Counsel 45, 47 (1981) (stating that investigating violations of state law would be beyond authority conferred on Department by 28 U.S.C. § 533).

184 See Hughes Aircraft Co. v. United States, 534 F.2d 889, 901 (Ct. Cl. 1976) (dictating that power to conduct all litigation in which United States is a party under § 516, "because so broadly inclusive, must be narrowly construed" (citing United States v. Daniel, Urbahn, Seelye & Fuller, 357 F. Supp. 853, 858 (N.D. Ill. 1973))); FDIC v. Irwin, 727 F. Supp. 1073, 1074 (N.D. Tex. 1989) (same (citing *Hughes Aircraft Co.*, 534 F.2d at 901)), aff'd, 916 F.2d 1051 (5th Cir. 1990) (holding that power conferred under 28 U.S.C. §§ 516 and 519 must be narrowly construed).

185 United States v. Mattson, 600 F.2d 1295, 1297 & n.1 (9th Cir. 1979) (citing United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977)).

186 *Hughes Aircraft Co.*, 534 F.2d at 901.

187 Executive Business Media, Inc. v. United States Dep't of Defense, 3 F.3d 759, 762 (4th Cir. 1993) (asserting that § 516 "does not include license to agree to settlement terms that would violate the civil laws governing the agency" that it represents).

not excuse prosecutors from their obligation to prosecute fairly. Prosecutors may "strike hard blows," but the Supreme Court has directed that they are "not at liberty to strike foul ones."[188] Cognizant of the prosecutors' duty to act fairly, one federal court rejected a federal prosecutor's contention that § 547 permitted him to make ex parte contacts under the "authorized by law" exceptions to state no-contact rules.[189]

The final statutory authority upon which the Department relies is 28 U.S.C. § 515(a). While the other statutes cited by the Department direct Department attorneys to investigate, litigate, or prosecute, this provision—perhaps the least empowering—only authorizes Department attorneys to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates."[190] It does not, however, govern or authorize conduct outside such proceedings and thus cannot authorize the Department's attempt to excuse its attorneys from state ethics rules regarding ex parte contacts.

b. The Standard of Review under Chevron. Although review under *Chevron* is generally extremely deferential, there are numerous factors[191] that can diminish the degree of deference a regulation is

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188 Berger v. United States, 295 U.S. 78, 88 (1935); see also United States v. Bess, 593 F.2d 749, 754 (6th Cir. 1979) (stating that prosecutors must refrain from improper methods); United States v. Lopez, 765 F. Supp. 1433, 1448, 1463 (N.D. Cal. 1991) (collecting cases criticizing prosecutorial malfeasance), aff'd in part and vacated in part, 4 F.3d 1455 (9th Cir. 1993).

189 See *Lopez*, 765 F. Supp. at 1447-48 (refusing to find that "authorized by law" exception to state no-contact rules exempted federal prosecutors from "their obligations to act fairly and with proper deference to the rights of the accused"), aff'd in part and vacated in part, 4 F.3d at 1461 (stating that general enabling statutes do not allow contacts by federal prosecutors with represented defendants under "authorized by law" exception); see also United States v. Ferrara, 847 F. Supp. 964, 969 (D.D.C. 1993) (refusing to find that ex parte contacts are "'necessary and proper' to the performance of [the] duties [of] a federal prosecutor"), aff'd, 54 F.3d 825 (D.C. Cir. 1995).

The authority of federal prosecutors under § 547 has been questioned in another context. Compare San Pedro v. United States, 79 F.3d 1065, 1069-71 (11th Cir. 1996) (holding that § 547 does not authorize federal prosecutors to enter into agreements with criminal defendants which bind Immigration and Naturalization Service (INS) not to oppose motions for relief from deportation) with Thomas v. INS, 35 F.3d 1332, 1339-41 (9th Cir. 1994) (finding that federal prosecutor's authority to bind INS as part of plea agreement is implicit in her grant to prosecute crimes in § 547).

190 28 U.S.C. § 515(a).

191 See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984) (asserting that such factors include whether "the regulatory scheme is technical and complex, [whether] the agency considered the matter in a detailed and reasoned fashion, and [whether] the decision involves reconciling conflicting policies" (footnotes omitted)); National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (noting that such factors include whether regulation is "substantially contemporaneous con-

afforded upon review.[192] Three factors, when taken in the aggregate, suggest that a reviewing court would grant the Reno Rule a lesser amount of deference than that customarily granted under *Chevron*: (1) the Department has sought to augment its own power, (2) it has not acted pursuant to specific authority, and (3) its regulation is based on a new interpretation of law.

First, courts are generally more skeptical of an agency's interpretation of law when such interpretation buttresses the agency's own power. The heart of the *Chevron* analysis focuses on power—a reviewing court must ask whether Congress reserved a power for itself or delegated it to an executive agency. Judges must ensure that an executive agency does not seize power from Congress, thereby offending the separation of powers doctrine.[193]

Specifically, when previously determining whether past Department regulations were authorized, courts have been more skeptical of interpretations that bolstered the Department's power and increased the authority of the executive branch.[194] Moreover, in questioning whether an agency has exceeded its power, reviewing courts also have looked to the manner in which an agency has increased its power.

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struction of the statute, . . . the length of time [that] the regulation has been in effect, the reliance placed on it, . . . and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute").

192 See Strickland v. Commissioner, Me. Dep't of Human Servs., 48 F.3d 12, 18 (1st Cir. 1995) ("To be sure, the *Chevron* doctrine has a protean quality. Under it, courts afford varying degrees of deference to agency interpretations in varying circumstances.").

193 See Stark v. Wickard, 321 U.S. 288, 309-10 (1945) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. . . . The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress . . . ."); see also In re Appletree Markets, 19 F.3d 969, 973 (5th Cir. 1994) (stating that "[t]o give effect to regulations that [are unauthorized] would upset the balance of powers among the constitutional branches," and therefore Congress delegates "to the Executive Branch authority to act in an essentially legislative manner to fill the interstices of the statute").

194 For examples of courts invalidating regulations that have increased the power of the Department, see, e.g., United States v. Giordano, 416 U.S. 505, 513-14 (1974) (holding that 28 U.S.C. §§ 509 and 510 did not empower Attorney General to enlarge Department's power to authorize wiretap applications); United States v. Robinson, 468 F.2d 189, 192 (5th Cir. 1972) (noting that "§ 510 must not be read as liberating the narrow limits Congress placed on who could initiate the wiretap process"); cf. Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (stating that interpretations by Justice Department of criminal statutes which they are charged to enforce are not given *Chevron* deference).

For examples of courts upholding regulations that did not increase the power of the Department, see, e.g., United States v. Nixon, 418 U.S. 683, 694 (1974) (holding that Attorney General successfully relied on 28 U.S.C. §§ 509, 510, 515, and 533 to delegate authority to special prosecutor); In re Sealed Case, 829 F.2d 50, 55 (D.C. Cir. 1987) (holding that Attorney General lawfully delegated authority to Office of Independent Counsel pursuant to Title 28), cert. denied, 484 U.S. 1027 (1988).

Some courts have suggested that less deference should be afforded to an agency's regulation when the agency aims to increase its authority by preempting state regulation.[195] Additionally, a regulation that increases an agency's jurisdiction relative to state authority and relative to other related regulatory agencies is also closely scrutinized.[196] The dangers of agency bias also suggest that less deference should be afforded to those agency interpretations which define the agency's own scope of authority.[197] Therefore, courts will likely be more skeptical

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[195] See Teper v. Miller, 82 F.3d 989, 997-98 (11th Cir. 1996) (explaining that because "there is an inherent tension between *Chevron* deference . . . and preemption doctrine" and because "federalism concerns offset [the separation of powers] rationale for *Chevron* deference in preemption cases," it is not clear that *Chevron* deference should be given to regulation seeking to preempt state law); Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 195-96 (3d Cir. 1995) (Nygaard, J., dissenting) (asserting that *Chevron* deference is not appropriate in context of preemption); City of N.Y. v. FCC, 814 F.2d 720, 726 (D.C. Cir. 1987) (suggesting that "whether *Chevron* deference is required in, or appropriate to, judicial review of an agency's assertion of preemption authority is unsettled"), aff'd, 486 U.S. 57 (1988); id. at 729-30 (Mikva, J., concurring in part and dissenting in part) (arguing that court should not afford *Chevron* deference to an agency's preemption claim because "the federalism concerns at the heart of preemption doctrine are far more compelling than the separation-of-power concerns at the heart of *Chevron* jurisprudence"); cf. Colorado Pub. Utils. Comm'n v. Harmon, 951 F.2d 1571, 1579 (10th Cir. 1991) (giving less deference to agency's determination of legal issue of preemption than would be given to agency's interpretations within its areas of expertise).

The Supreme Court has not explicitly addressed whether *Chevron* deference is required in reviewing agency regulations which assert preemptive power. In upholding a regulation claiming to preempt state law, the Court did not refer to *Chevron*; it emphasized that a "'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law,'" but rather on whether it represents a reasonable accommodation of conflicting policies. City of N.Y. v. FCC, 486 U.S. 57, 64 (1988) (quoting Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 154 (1982)). In Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986), the Court, without mention of *Chevron* deference, overturned an agency preemption determination. Id. at 374-78 (holding that Congress had not delegated sufficient authority to agency to preempt state regulation although "it is, no doubt, possible to find some support" for agency's preemption argument).

[196] See Dimension Fin. Corp. v. Board of Governors, 744 F.2d 1402, 1406, 1410 (10th Cir. 1984) ("[A] complete change . . . which is a redefinition and expansion of jurisdiction by an agency [relative to states and other regulatory agencies] requires that different standards be met than are demanded in a typical administrative regulation not involving such elements."), aff'd, 474 U.S. 361 (1986).

[197] See Sunstein, supra note 171, at 2097-2100 (suggesting that degree of deference should depend on extent to which agency is extending its power); cf. Morrison v. Olson, 487 U.S. 654, 694 (1988) (noting with approval that Congress had not tried to increase its own powers). Compare Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 386-87 (1988) (Brennan, J., dissenting) (arguing that deference should not be extended to agency's interpretation of its authority because such interpretation may not involve agency expertise or unbiased balancing of conflicts between "policies . . . committed to the agency's care") with id. at 381 (Scalia, J., concurring) ("[I]t is plain that giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate. It is *necessary* because there is no discernable line be-

of the Department's interpretation because it relies upon provisions of Title 28 to support an empowering regulation which would isolate the Department as the only agency preempting state ethical authority over ex parte contacts.[198]

The second factor which suggests that a court reviewing the Reno Rule would grant a lesser amount of deference than that customarily given under *Chevron* is whether or not the Department has acted pursuant to specific authority. Courts generally show less deference to agency regulations when such regulations are based upon a broad grant of authority. Although regulations promulgated pursuant to general grants of authority have been validated in some situations when they are "reasonably related to the purposes of the enabling legislation,"[199] the Court has stated that it is more deferential to "a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."[200] The Court has advised that even "in our increasingly complex society [where Congress] cannot do its job absent an ability to delegate power under broad directives," this delegation must be "sufficiently specific and detailed."[201]

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tween an agency's exceeding its authority and an agency's exceeding authorized application of its authority."); Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 676 (D.C. Cir. 1994) (en banc) (noting that there is no difference between agency's exceeding its jurisdictional authority and agency's exceeding authorized application of that authority), cert. denied, 115 S. Ct. 1392 (1995).

Although interpretations which expand an agency's authority are to be scrutinized more sharply, they must be given some amount of deference; otherwise, built into the *Chevron* deference doctrine would be an "antiregulatory 'tilt,'" contrary to Congress's decision to establish the agency. Sunstein, supra note 171, at 2097 n.124.

198 Cf. In re Doe, 801 F. Supp. 478, 487 (D.N.M. 1992) (arguing that if Department attorneys are exempted from ethical codes, "it is conceivable that any other agency vested with investigatory authority would claim exemption from ethical codes in other contexts as well" (citing NLRB v. Autotronics, Inc., 596 F.2d 322 (8th Cir. 1979))).

199 Mourning v. Family Publications Serv., 411 U.S. 356, 369 (1973) (citing cases upholding regulations reasonably related to purposes of enabling legislation). But cf. Koch, supra note 135, § 3.13 ("[T]he Court [in *Mourning*] upheld the legislative rulemaking authority in the face of the fact that the [statute] contains other provisions which make specific grants of rulemaking authority.").

200 United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); see also National Ass'n of Regulatory Util. Comm'rs v. ICC, 41 F.3d 721, 727 (D.C. Cir. 1994) (asserting that *Chevron* deference is most appropriate when congressional delegation is focused and detailed, thereby limiting agency's discretion); Steiben v. INS, 932 F.2d 1225, 1227-28 (8th Cir. 1991) (finding that presence of specific delegation was significant in determining that Attorney General, in promulgating immigration regulation, did not exceed congressional authority). For a textbook example of a regulation promulgated pursuant to specific regulation, see Basic, Inc. v. Levinson, 485 U.S. 224, 230 (1988) (noting that Rule 10b-5 was promulgated pursuant to very specific authority in § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j).

201 Mistretta v. United States, 488 U.S. 361, 374 (1989).

In support of the Reno Rule, the Department maintains that the provisions of Title 28 "grant the Attorney General extremely broad authority to supervise the enforcement of federal law."[202] However, specific authority has been required in situations analogous to the Department's attempt to excuse its attorneys from state no-contact rules through preemption. In particular, the Court has required a specific delegation of power when a regulation affects federalism values[203] or undertakes an unprecedented assumption of power.[204] Thus, because the Reno Rule attempts to preempt a state stronghold through an unprecedented usurpation of power, a reviewing court will likely look more skeptically upon the general grant of power delegated to the Department.

With respect to the third and final factor, courts may be less deferential when an agency's interpretation of a statute is not contemporaneous with the statute's enactment. In cases preceding *Chevron*, the Supreme Court warned that new interpretations of a long-existing statute would be reviewed more stringently than would consistently held agency constructions.[205] While the post-*Chevron* line of cases has reduced the degree of skepticism directed towards new interpretations, these more recent cases still give some weight to the notion that a changed interpretation might subject a regulation to less deference.

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202 Communications, supra note 3, at 39,915.

203 See California State Bd. of Optometry v. Federal Trade Comm'n, 910 F.2d 976, 982 (D.C. Cir. 1990) ("An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it."); see also Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 670 (1985) (explaining that Court was "reluctant" to apply *Chevron* deference in determining whether Secretary of Education had correctly determined that state had violated statutory requirements that "were not always clear"); Sunstein, supra note 171, at 2110-13, 2113 n.196 (citing cases and explaining that Court has sometimes required explicit legislative statements and thus denied *Chevron* deference in order to ensure congressional rather than merely administrative consideration about constitutional questions).

204 See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 645 (1980) (finding that in absence of clear mandate, it would be unreasonable to assume that Congress gave agency unprecedented power over American industry); Kent v. Dulles, 357 U.S. 116, 129-30 (1958) (holding that broad authority did not grant Secretary of State "pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations").

205 See, e.g., *Kent*, 357 U.S. at 127-28 (disallowing broad interpretation of Secretary of State's power to deny passports because such power had long been exercised quite narrowly); see also NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 & n.5 (1974) (noting and citing Supreme Court cases that hold that "a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration"); Richard A. Posner, The Federal Courts: Crisis and Reform 279-80 (1985) (noting that in absence of longstanding, consistent interpretation, regulations often have not been entitled to great deference).

Chevron and its progeny, including *Rust v. Sullivan*,[206] appreciate that regulatory agencies do not establish rules to last forever, but must adapt their rules to the nation's changing needs.[207] As a result, the Court has recognized that some degree of deference should be afforded to agency interpretations—whether or not they were made contemporaneously with delegating statutes.[208] At the same time, suggesting that inconsistency in an agency's interpretation might be a factor in determining the level of deference given to a regulation, the Court has not afforded traditional *Chevron* deference to new agency constructions of delegating statutes. In *Rust*, in addition to determining whether the new interpretation was permissible, the Court also closely considered the new construction to ascertain whether it was supported by "'reasoned analysis.'"[209] Moreover, since *Chevron* the Supreme Court often has reiterated that inconsistent constructions of a governing statute can be subject to more stringent judicial scrutiny,[210] and the federal circuit courts have followed this lead.[211] Finally, it has been suggested that courts have afforded less

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206 500 U.S. 173 (1991). The Court in *Rust* held that the regulation which changed a governmental agency's interpretation of Title X and prohibited Title X projects from abortion advocacy was a permissible construction of the statute and did not violate First Amendment free speech rights of fund recipients. Id. at 193-200.

207 See id. at 186-87 (stating that agency must be given latitude to adapt its rules to demands of changing circumstances); *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."); see also Scalia, supra note 171, at 518 ("[T]he capacity of the *Chevron* approach to accept changes in agency interpretation *ungrudgingly* seems to me one of the strongest indications that the *Chevron* approach is correct.").

208 *Rust*, 500 U.S. at 186-87; *Chevron*, 467 U.S. at 863-64.

209 See *Rust*, 500 U.S. at 187 (quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983)); see also Arent v. Shalala, 70 F.3d 610, 614-16 (D.C. Cir. 1995) (explaining that *Chevron*, which "is principally concerned with whether an agency has authority to act under a statute," and *State Farm*, which is concerned with whether a discharge of authority was reasonable, "overlap at the margins").

210 See Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2388 (1994) (stating that new interpretation may be given considerably less deference than consistently held agency view); Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151, 2161 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 698 (1991) ("[A]s a general matter the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); INS v. Cardozo-Fonseca, 480 U.S. 421, 446 n.30 (1987) (asserting that new interpretations are "'entitled to considerably less deference' than a consistently held agency view" (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981))). But see Smiley v. Citibank, N.A., 116 S. Ct. 1730, 1733 (1996) (noting that antiquity of regulation issued more than century after enactment of statute was not condition of invalidity).

211 See, e.g., Hanauer v. Reich, 82 F.3d 1304, 1311 n.4 (4th Cir. 1996) (noting that normal *Chevron* deference does not apply to agency's interpretation that conflicts with agency's previous interpretation of statute); E.I. du Pont de Nemours & Co. v. Commissioner, 41 F.3d 130, 135 (3d Cir. 1994) (noting that delay in exercising rulemaking authority

deference to new interpretations as opposed to longstanding constructions because of the desire to "import principles of stare decisis into administrative processes in order to protect reliance and expectations."[212]

The Department interprets the four Title 28 statutes as granting the agency the power to preempt state regulation of ex parte contacts made by federal prosecutors. However, this new interpretation comes years after the codification of the enabling statutes in their current form.[213] As a result, a reviewing court is likely to carefully evaluate both the reasoned basis for the Department's action and the nexus between the new interpretation and delegating statutes.

c. The Reno Rule is Invalid under the Second Step of Chevron. The Department relies on its enabling statutes to support the Reno Rule—a regulation that has a significantly unsettling effect on federalism values. The Department attempts to abrogate all state regulation concerning the ex parte contacts by federal prosecutors even though regulation of lawyers—federal prosecutors included—has traditionally been a function of the states. However, this interpretation of the enabling statutes, when viewed through the *Chevron* prism, is not a permissible one.

As noted in subsection III.B.2.a, the Department has overestimated its power: the enabling statutes in Title 28 have been narrowly construed. In fact, "the Department did not identify a single case interpreting these statutes as evidencing a congressional intention to exempt" Department lawyers from state regulation.[214] Title 28 does not permit the Department to encroach upon state authority,[215] ignore

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may alter degree of deference); Himes v. Shalala, 999 F.2d 684, 690 (2d Cir. 1993) (observing that inconsistent interpretation of governing statute, while not sufficient alone, is one reason to afford less deference); Lewis v. Grinker, 965 F.2d 1206, 1220 (2d Cir. 1992) (concluding that changed positions alone are not enough to defeat agency's claim to deference but can undermine degree of judicial respect afforded to new interpretation); West v. Bowen, 879 F.2d 1122, 1134 (3d Cir. 1989) (Mansmann, J., concurring and dissenting) (asserting that deference is given on sliding scale depending upon consistency of interpretation); see also Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 669 (D.C. Cir.) (en banc) (finding it "telling" that only recently had agency claimed authority to act in finding that agency did not have authority), cert. denied, 115 S. Ct. 1392 (1994).

212 Sunstein, supra note 171, at 2102.

213 See Pub. L. No. 89-554, § 4(c), 80 Stat. 611, 613-17 (1966) (codifying relevant statutes in Title 28).

214 See Mashburn, supra note 22, at 504.

215 See Authority of the Federal Bureau of Investigation to Investigate Police Killings, 5 Op. Off. Legal Counsel 45, 47 (1981) (stating that 28 U.S.C. § 533 does not allow department to encroach upon state authority by investigating violations of state law in cases where there is no violation of federal law).

rules governing its attorneys,[216] or otherwise act unfairly.[217] Perhaps most significant, two federal courts balked at the suggestion that two Title 28 statutes excused federal prosecutors from state no-contact rules under the "authorized by law" exceptions to those rules.[218] Additionally, although Section III.A concluded that the meaning of the DOJ Act could not be discerned unambiguously, the Act still reveals that there are limits to the Department's power. There are strong indications that Congress sought to require the states to regulate the intellectual qualifications of attorneys and also assume some role in ensuring that attorneys continue to be ethically qualified to practice law.[219] This argument that Congress did not contemplate complete Departmental autonomy in regulating the ex parte contacts of federal prosecutors furthers the conclusion that the Department has misread its Title 28 enabling statutes.

Moreover, as outlined in subsection III.B.2.b, the Department's interpretation will not be afforded the customary *Chevron* deference as dictated by the specific circumstances under which the Reno Rule was enacted. Courts have been less deferential to regulations increasing an agency's power,[220] especially when those regulations are not promulgated pursuant to specific delegations.[221] Additionally, less respect will be given to the Rule because it augments the Department's assumption of power in relation to other agencies.[222] Finally, because the Department's interpretation was not made contemporaneously with the delegating statute, a judge will look more attentively at the Reno Rule.[223]

Thus, due to the Department's limited statutory power—viewed in light of the questions raised about the agency's authority by the DOJ Act and the more skeptical review that the regulation would receive—the Department's interpretation would not be found permissi-

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216 See Executive Business Media, Inc. v. United States Dep't of Defense, 3 F.3d 759, 761-62 (4th Cir. 1993) (asserting that 28 U.S.C. §§ 516 and 519, statutes empowering Attorney General to conduct litigation, do not allow government lawyers to violate laws).

217 See Berger v. United States, 295 U.S. 78, 88 (1935) (averring that prosecutors have duty to refrain from improper methods calculated to produce wrongful conduct).

218 See United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) (holding that 28 U.S.C. § 547 does not empower prosecutor to contact represented defendant under "authorized by law" exception to state no-contact rule); In re Doe, 801 F. Supp. 478, 486-87 (D.N.M. 1992) (holding that federal prosecutor was not "authorized by law" under 28 U.S.C. § 533 so that his contacts with represented defendant were not excepted from state no-contact rule).

219 See supra notes 149-57 and accompanying text.

220 See supra notes 194-95 and accompanying text.

221 See supra notes 203-04 and accompanying text.

222 See supra notes 196 and accompanying text.

223 See supra notes 209-12 and accompanying text.

ble. The Reno Rule, because it is improperly promulgated, violates the separation of powers doctrine and therefore would be declared invalid. Thus, without authorization to make the contacts contemplated by the Reno Rule, federal prosecutors will be subject to discipline imposed by state regulatory boards.[224]

CONCLUSION

Part I explained that the Reno Rule reflects wise policy considerations. The Rule is necessary to alleviate the uncertainty and resulting overdeterrence that frustrates federal prosecutors in their law-enforcement activities. However, good policy does not always make valid law. Although Part II concluded that with proper authority the Department could successfully preempt state regulatory jurisdiction, Part III demonstrated that the Department has not been afforded sufficient power. The statutes delegating authority to the Department do not suggest that Congress contemplated the agency's field or conflict preemption of state no-contact rules. The Reno Rule is therefore presently invalid.

However, recognizing that there is a need to alter the current system of regulating the ex parte contacts of federal prosecutors, Congress, empowered by the Commerce Clause,[225] is now seeking to

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[224] The doctrine of intergovernmental immunity will not isolate federal prosecutors from state disciplinary boards. The doctrine provides that a federal official cannot be regulated by a state "for . . . act[s] which he was *authorized* to do by the law of the United States, which it was his duty to do . . . and if in doing that act he did no more than what was necessary and proper for him to do." In re Neagle, 135 U.S. 1, 75 (1890) (emphasis added); see also Johnson v. Maryland, 254 U.S. 51, 56-57 (1920) (holding that Post Office employee cannot be convicted under state driver's license regulation if directed by United States to deliver mail). Without proper authority, however, federal prosecutors cannot rely upon this doctrine. See, e.g., United States v. Ferrara, 847 F. Supp. 964, 969 (D.D.C. 1993) (finding that intergovernmental immunity doctrine did not protect prosecutor whose conduct was not "necessary and proper"), aff'd, 54 F.3d 825 (D.C. Cir. 1995). Moreover, although prosecutors are protected from civil actions by qualified immunity for investigatory actions, see, e.g., Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2613 (1993) (noting circumstances under which government officials are not subject to damages liability for performance of discretionary functions), they are not immune from disciplinary proceedings, see Theard v. United States, 354 U.S. 278, 281-82 (1957) (defining standards for disciplining attorney practicing in federal court); United States v. Thomas, 320 F. Supp. 527, 528-29 (D.D.C. 1970) (holding that federal prosecutors are subject to discipline for improper ethical conduct); Waters v. Barr, 747 P.2d 900, 902 (Nev. 1987) ("[T]he fact that Nevada attorneys have been functioning as Assistant United States Attorneys in the federal courts does not insulate them from accountability for misbehavior . . . even if the misbehavior in question is effectuated in whole or in part through activities in the federal courts.").

[225] U.S. Const. art. I., § 8, cl. 3; see also Felleman, supra note 10, at 1521-22 (arguing that Congress does have power to regulate attorneys involved in interstate legal practice); Zacharias, supra note 76, at 337 & n.4 (asserting that regulation of attorneys fits within Congress's Commerce Clause powers).

delegate appropriate authority to the Department.[226] Section 502 of the Senate's proposed Violent Crime Control and Law Enforcement Improvement Act of 1995 provides that "[n]otwithstanding the ethical rules or the rules of the court of any State, Federal rules of conduct adopted by the Attorney General shall govern the conduct of prosecutions in the courts of the United States."[227] If this section becomes law, the Department would be authorized to repromulgate the Reno Rule and remedy the fear that has chilled federal prosecutors.[228]

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226 See Federal Prosecutorial Report, supra note 5, at 33 (stating that Attorney General, after reviewing state bar conflicts with Federal prosecutors, should seek appropriate legislative remedy if such review demonstrates undue burden on Federal prosecutions); see also Grievance Comm. for S. Dist. of N.Y. v. Simels, 48 F.3d 640, 651 (2d Cir. 1995) (suggesting that choices between federal law-enforcement concerns and defendants' interests are properly decided by Congress).

227 Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, 104th Cong., 1st Sess. § 502.

228 A federal prosecutor could rely on the new regulation as a defense to a state's attempt to regulate the prosecutor through the state's no-contact rule. Alternatively, the prosecutor could seek declaratory and injunctive relief from state regulation in federal court on the ground that the federal regulation preempts such state action. See Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14 (1983) (noting that a "plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve"); accord Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 259 n.6 (1985). However, if a complaint has already been filed in the state disciplinary proceeding, the prosecutor will probably not be successful in enjoining the action, see Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433-35 (1982) ("The importance of the state interest in the pending state judicial proceedings [(bar disciplinary proceedings)] and in the federal case calls *Younger* abstention [(Younger v. Harris, 401 U.S. 37, 45 (1971))] into play. So long as the constitutional claims of [the attorneys] can be determined in the state proceedings . . . the federal courts should abstain."); Fieger v. Thomas, 74 F.3d 740, 742 (1996) (citing *Middlesex* as controlling in decision to abstain from federal proceedings in light of ongoing state proceedings), or in removing it, see supra note 83.