

## DOUBLE STANDARD: HOW DOJ FLOUTS THE NO-CONTACT RULES OF PROFESSIONAL RESPONSIBILITY

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### INTRODUCTION

TO be admitted to practice law in any state of the United States, as well as the District of Columbia, the applicant must have demonstrated a comprehension of the applicable Rules of Professional Responsibility. Fundamental among these rules is the prohibition from engaging in ex parte communications with a represented party.<sup>1</sup> Put plainly, if a lawyer knows that a person is represented by counsel, the lawyer is barred from making contact with the person in connection with the subject matter of the representation without first obtaining permission from the person's counsel.<sup>2</sup> The rule promotes the sanctity of the attorney-client relationship by preventing outside lawyers from gaining access to privileged communications or from eliciting statements or information from a represented person—damaging or otherwise—without the participation of that person's counsel.<sup>3</sup> The rule covers not only persons who are represented in their individual capacities but employees of corporations who are represented by company counsel in connection with company subject matter.<sup>4</sup> And it applies to government lawyers in their attempts to contact represented persons, as well. While there is an exception to the rule for government lawyers directing legitimate covert investigative activities, United States Department of Justice (DOJ) lawyers routinely violate the rule with impunity in non-covert contexts by making overt ex parte contacts<sup>5</sup> with represented persons, creating essentially a double standard in relation to other lawyers. This Article explores the evolution of this double standard and makes the case for its discontinuance.

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1. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (AM. BAR. ASS'N 2016).

2. *Id.*

3. See *id.* cmt. 1.

4. *Id.* cmt. 7.

5. See *United States v. Beck*, No. 1:19-CR-0184-MHC-JSA, U.S. Dist. LEXIS 214705, \*8-9 (N.D. Ga. Nov. 18, 2019) (“The distinction between overt or express lawyer or law enforcement contact, and *covert* or *undercover* contacts such as through a secretly-cooperating informant, is important. The latter typically involves merely ‘engaging in a conversation with an individual [that a suspect] believed to be his ally against the prosecution.’ . . . [And where the suspect is] less likely to feel intimidated by a power imbalance with a lawyer, and less likely to be subject to ‘artful’ interrogation by a lawyer (or a lawyer’s agent).” (first alteration in original) (internal citations omitted)).

## I. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is a centuries-old bedrock doctrine of American jurisprudence.<sup>6</sup> It protects from disclosure to third parties confidential communications between a lawyer and client where such protection has not otherwise been waived.<sup>7</sup> The rationale behind the doctrine instructs:

[T]he rule has been founded in the interest of the administration of justice and is intended to enable a client to place unrestricted and unbounded confidence in his attorney in matters affecting his rights and obligations without danger of having disclosures forced . . . .<sup>8</sup>

In *Upjohn Co. v. United States*,<sup>9</sup> the United States Supreme Court validated the application of the attorney-client privilege in the corporate context.<sup>10</sup> While some jurisdictions previously had limited the privilege to exist just between company counsel and “decisionmakers” or the “control group,”<sup>11</sup> the *Upjohn* decision expanded the privilege’s reach in the corporate context to also protect communications between company counsel and other employees where the “communications concerned matters within the scope of the employees’ corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.”<sup>12</sup> In fact, in post-*Upjohn* corporate internal investigations conducted at the direction of company counsel, it is standard for the lawyer to issue a so-called “*Upjohn* Warning” before commencement of the interview. This warning admonishes the employee/interviewee that the content of the interview is protected under the attorney-client privilege, that the privilege is held by the company, and that the content of the interview should therefore be treated with utmost confidence.<sup>13</sup>

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6. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”); 8 WIGMORE, EVIDENCE § 2292 (3d ed. 1940); 58 AM. JUR. WITNESSES § 462 (1948).

7. See *supra* note 6.

8. *Upjohn*, 449 U.S. at 389 (“Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”); 58 AM. JUR. WITNESSES § 462.

9. *Upjohn*, 449 U.S. at 383.

10. *Id.*

11. *Id.* at 390–94.

12. *Id.* at 394.

13. See, e.g., GLOSSARY (2021) Thomson Reuters, Practical Law.

## II. EX PARTE COMMUNICATION

Other legal and ethical protections are in place to further preserve the attorney-client privilege. For example, improperly obtained privileged information is not discoverable in litigation or admissible in court,<sup>14</sup> and is subject to suppression in criminal matters.<sup>15</sup> Of significance here, Rule 4.2 (commonly referred to as the “no-contact rule”) of the Model Rules Professional of Responsibility prohibits ex parte communications between a lawyer and a person represented by counsel:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer *or is authorized to do so by law or a court order*.<sup>16</sup>

The comments to Rule 4.2 make clear the rationale behind the rule:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.<sup>17</sup>

Consistent with *Upjohn*, Rule 4.2 applies to organizations:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the

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14. See FED. R. CIV. P. 26(b)(1); FED. R. EVID. 502.

15. See, e.g., *United States v. Koerber*, 966 F. Supp. 2d 1207 (D. Utah 2013).

16. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR. ASS'N 2016) (emphasis added). The well-understood and uncontested scenario that most typically comes under the “authorized by law” exception involves the government prosecutor directing, through the use of federal agents, informants and cooperating witness, covert investigative activities. See, e.g., *United States v. Elliott*, 684 F. App'x 685 (10th Cir. 2017) (under Wyoming's no-contact rule, proper for prosecutors to use informants to communicate with represented suspects); *United States v. Brown*, 595 F.3d 498 (3d Cir. 2010) (fictitious letter created by the government to influence a recorded conversation between a confidential informant and a suspect did not violate the Model Rules as part of a pre-indictment investigation); *United States v. Powe*, 9 F.3d 68 (9th Cir. 1993) (prosecution did not violate ethical rules by using informant to talk to a suspect); *Fesenmaier v. Cameron-Ehlen Grp., Inc.*, 442 F. Supp. 3d 1101 (D. Minn. 2020) (no violation of Minnesota no-contact rule where relator in qui tam action was directed by DOJ/FBI to surreptitiously record conversations with represented person).

17. MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. 1 (AM. BAR. ASS'N 2016); see also *United States v. Binder*, 167 F. Supp. 2d 862, 865 (E.D.N.C. 2001) (“Rule 4.2(a) is simply a codification of the century old principle that an attorney must not communicate with an opposing party who is represented by counsel.”).

organization with respect to the matter *or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability*.<sup>18</sup>

Because of the reach of agency principles such as respondeat superior, the range of acts or omissions that can be imputed to an organization—and the number and type of employees this can touch—is vast.<sup>19</sup> Each jurisdiction has adopted the essence of this prohibition, if not virtually identical language, in its respective Rules of Professional Responsibility.<sup>20</sup>

### III. HISTORY OF THE NO-CONTACT RULE AND THE DEPARTMENT OF JUSTICE

By federal statute, government lawyers are bound by the ethics rules, including “no-contact” rules, in those jurisdictions where they conduct enforcement activity or are licensed to practice law (“McDade Amendment” or “Citizens Protection Act”).<sup>21</sup> Prior to passage of the McDade Amendment in 1998, DOJ lawyers, at the express declaration of the Attorney General of the United States (AG), considered themselves outside the reach of these basic ethics rules. Specifically, AG Dick Thornburgh, in the now-infamous 1989 memo to all DOJ litigators, exempted government lawyers from state ethics rules that barred contact with represented persons:

[I]t is the Department’s position that contact with a represented individual in the course of authorized law enforcement activity does not violate DR 7-104. The Department will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques . . . . Accordingly, an attorney employed by the Department, and any individual acting at the direction of that attorney, is authorized to contact or communicate with any individual in the course of an investigation or prosecution unless the contact or communication is prohibited by the Constitution, statute, Executive Order, or applicable federal regulation.<sup>22</sup>

Subsequently, in 1994, AG Janet Reno sought to promulgate a rule in the Code of Federal Regulations that pulled back somewhat from a com-

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18. MODEL RULES OF PROF’L CONDUCT r. 4.2 cmt 7 (AM. BAR. ASS’N) (emphasis added).

19. See RESTATEMENT (THIRD) OF AGENCY: RESPONDEAT SUPERIOR § 2.04 (AM. LAW INST. 2006).

20. See *Additional Legal Ethics and Professional Responsibility Resources*, ABA, [https://www.americanbar.org/groups/professional\\_responsibility/resources/links\\_of\\_interest/](https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest/) [<https://perma.cc/YR6J-8UZM>] (last visited Nov. 30, 2020).

21. 28 U.S.C. § 530B (1998).

22. In re John Doe, 801 F. Supp. 478, 489, 493 (D.N.M. 1992) (internal citations omitted) (internal quotation marks omitted) (discussing the *Thornburgh Memo*.)

plete exemption from the no-contact rules for government lawyers by limiting the prohibition to high-level decisionmakers:

A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part *only if the employee is a controlling individual. A 'controlling individual' is a current high level employee who is known by the government to be participating as a decision maker* in the determination of the organization's legal position in the proceeding or investigation of the subject matter.<sup>23</sup>

This regulation was challenged in *United States ex rel. O'Keefe*,<sup>24</sup> where the United States Court of Appeals for the Eighth Circuit affirmed the district court's holding that AG Reno lacked authority to issue the regulation without a statutory basis.<sup>25</sup> As a result, under Missouri's no-contact rule, DOJ's ex parte contacts with McDonnell Douglas employees via a questionnaire that went to the heart of the issue being investigated, and whose answers could be imputed to the organization in the government's civil false claims investigation, were prohibited.<sup>26</sup> Following DOJ's defeat in *O'Keefe*, Congress moved swiftly to address the situation.<sup>27</sup> Congress's repudiation of DOJ's efforts to exempt itself from governing ethics rules led to passage of the McDade Amendment in 1998.<sup>28</sup>

#### IV. DOJ PRACTICES—POST-MCDADE

Examining DOJ's practices in the area of overt ex parte contacts since enactment of the McDade Amendment, as well as its related advocacy in the courts, leads to the conclusion that despite early attempts to comply with the no-contact rules that every lawyer is obliged to follow, DOJ has inexorably backslidden to a position that amounts to a double standard for government lawyers. Sadly, today's practices are too reminiscent of the

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23. 28 C.F.R. § 77.10(a) (1998) (emphasis added).

24. 132 F.3d 1252 (8th Cir 1998).

25. *Id.* at 1257.

26. *Id.*

27. *See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1999*; Hearing on H.R. 4276 Before the H. Comm. on the Whole House on the State of the Union, 105th Cong. (1998) 7232 (remarks of Rep. Kanjorski) ("[T]he prosecutors in the United States today, whether they be special counsels or regular prosecutors, have shown us that they are going to push it to the end of the envelope and beyond. They are going to write their own definition of what standards are."); *id.* at 7233 (remarks of Rep. King) ("Prosecutors are out of control. They are ruining the civil liberties of people in this country"); *id.* at 7234 (remarks of Rep. Fowler) ("Time and time again it has come to my attention that Department of Justice lawyers have conducted themselves in a questionable manner while representing the Federal Government without any penalty or oversight.").

28. 28 U.S.C. § 530B (1998).

culture and attitudes that existed before the McDade Amendment, a mere twenty-three years ago.

It should be noted as an initial matter that there is a lack of empirical evidence for the proposition that DOJ litigators routinely, overtly contact represented persons without first gaining permission or even notifying the person's counsel. This is especially true for employees of corporations that are targets of government investigations, who often are represented by company counsel. The supporting evidence exists anecdotally but is nevertheless widespread and commonly understood. And while DOJ annually trumpets its dollar haul in fines and penalties from organizations who cop to wrongdoing, we will not find included in these pronouncements any statistics regarding the means used to achieve the end, i.e., how often DOJ helped to make its case by overtly contacting represented persons without going through those persons' counsel.<sup>29</sup> In other words, we are invited to marvel at the finished sausage but don't necessarily see the unsavory way in which the sausage was made.

Often, these unsolicited contacts are made in connection with the service of a subpoena for testimony or company documents in the employee's possession, which turns into interviews of the employees by government agents that go to the merits of the issues under investigation.<sup>30</sup> These interviews are conducted (or attempted) despite the government's actual knowledge, or well-founded understanding, that these employees (1) are represented by company or individual counsel, and (2) might make incriminating statements that could be imputed to the corporation—the very things the attorney-client relationship along with Rule 4.2 are intended forestall. As previously stated, this scenario is distinct from the sanctioned use of well-established covert investigative tools that typically involve the use of informants or cooperating witnesses, or a whistleblower employee who affirmatively reaches out to the government to report alleged wrongdoing.<sup>31</sup>

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29. See U.S. DEP'T OF JUST., FRAUD SECTION: YEAR IN REVIEW 2020 (2021) (reporting \$8.9 billion paid out globally in fines and penalties, including \$4.4 billion in the U.S.).

30. See, e.g., *O'Keefe*, 132 F.3d at 1253 (DOJ directed investigative agents to make ex parte contacts with employees of McDonnell Douglas without the consent of McDonnell Douglas' counsel, where such contacts went to the core issues in the government's False Claims Act investigation); *United States v. Sabeau*, No. 2:15-CR-175-GZS, 2016 U.S. Dist. LEXIS 136658 (D. Me. Oct. 3, 2016) (despite government knowing target was represented, law enforcement agents traveled to target's home and interviewed target from prepared outline that went to substance of investigation); *In re Amgen, Inc.*, No. 10-MC-0249 (SLT) (JO), 2011 U.S. Dist. LEXIS 63043 \*2 (E.D.N.Y. June 10, 2011) (although the government initially accepted company counsel's assistance in reaching out to company employees, the government "abandoned this protocol and began to contact the employees directly, attempting to conduct interviews and to subpoena documents in their possession.").

31. See, e.g., *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000) (employee reached out to government to express concern that company lawyer might pressure her to commit perjury).

These overt practices largely go unchecked because the target company, once it learns of the ex parte contact, cannot afford to lodge a formal, or even firm, objection. Doing so could jeopardize earning precious “cooperation credit” that the target company seeks in order to reduce any applicable fines or penalties if it came out on the losing end of an adjudication on the underlying merits of the case.<sup>32</sup> DOJ rakes in billions of dollars annually in matters against target companies that are overwhelmingly resolved short of a trial and which come under the label of “deferred—[or] non—prosecution agreements” for criminal matters, or civil false claim settlements. Because companies are understandably driven by the economic bottom line, there is often little incentive to engage in protracted adversarial proceedings with DOJ but, instead, boards of directors and senior management deem it better to write a check, agree to certain internal remedial measures, then move on, which is often the desire of shareholders and other stakeholders. The result leaves DOJ more emboldened to push its practices to an unlawful limit, much like a bully who operates unchecked will persist in intimidation until someone says enough is enough. Twenty-three years ago, after DOJ's arrogant self-exemption from no-contact rules, the light shone on these unethical practices, leading to passage of the McDade Amendment.

Historically, DOJ, through publication of its DOJ Manual (“Justice Manual” formerly known as the United States Attorney Manual (“USAM”)) has set forth, among other things, agency guidelines that it undertakes to follow in carrying out investigations and prosecutions.<sup>33</sup> Tellingly, after passage of the McDade Amendment, DOJ, in the 2005 version of the Justice Manual, addressed the subject of ex parte communications, quite clearly showing that DOJ was sensitive to the issues associated with such contacts with an eye towards complying with the applicable rules. Like the 2005 version, the current Justice Manual states as follows:

*Communications with Represented Party*

Department attorneys are governed in criminal and civil law enforcement investigations and proceedings by the relevant rule of professional conduct that deals with communications with represented persons. In determining which rule of professional conduct is relevant, Department attorneys should be guided by 28 C.F.R. Part 77 (1999). Department attorneys are strongly encouraged to consult with their Professional Responsibility Officers or supervisors—and, if appropriate, the Professional

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32. *Justice Manual § 9-28.700—The Value of Cooperation*, U.S. DEP'T OF JUST., <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700> [<https://perma.cc/BM8B-VAKS>] (last updated Nov. 2018) (“Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution.”).

33. See generally *Justice Manual*, U.S. DEP'T OF JUST., <https://www.justice.gov/jm/justice-manual> [<https://perma.cc/N3BM-QQZT>] (last updated 2018).

Responsibility Advisory Office—when there is a question regarding which is the relevant rule or the interpretation or application of the relevant rule.<sup>34</sup>

The 2005 version of the Justice Manual further expounded on the subject of ex parte communications. Following citation to Rule 4.2, the Justice Manual articulated several considerations for DOJ lawyers to analyze in determining whether a particular communication with a represented person is proper in the governing jurisdiction. Among the considerations cited was whether formal proceedings have been filed against the represented person. Regarding this, the 2005 Justice Manual properly acknowledged that “[m]ost states apply the contact rule to a represented person whether or not a complaint, indictment, or other charging instrument has been filed.”<sup>35</sup>

Another consideration flagged by the 2005 Justice Manual concerned the treatment of employees when an organization is represented. In so doing DOJ gave a nod to Rule 4.2, Comment 7:

The contacts rules vary from state to state in how they define a “represented person” when that “person” is an organizational entity. Some states prohibit communications only with those high-level employees who can bind the organization in the matter on which the organization is represented. Other states prohibit communications concerning the matter in representation with persons having managerial responsibility on behalf of the organization. *Many states prohibit communications with any person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability. And a number of states preclude contact with a corporate employee or constituent whose statement may constitute an admission on the part of the organization.*<sup>36</sup>

In contrasting covert contacts with overt contacts, the 2005 version of the Justice Manual acknowledged, “[g]enerally, the case law recognizes covert contacts in non-custodial and pre-indictment situations as ‘author-

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34. *Id.* § 9-13.200—*Communications with Represented Persons* (last updated 2020) (internal citations omitted).

35. *Id.* § 296—*Communications with Represented Persons—Issues for Consideration* (last updated May 2005); *see also* United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (“The timing of an indictment’s return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances.”); *Talao*, 222 F.3d at 1139 (“Under these circumstances, involving fully defined adversarial roles, impending grand jury proceedings, and awareness on the part of the responsible government actors of [company employees’] ongoing legal representation, [California’s no-contact rule] governed AUSA Harris’s pre-indictment, non-custodial communications with [employee].”).

36. *Justice Manual* § 296—*Communications with Represented Persons*, *supra* note 33 (emphasis added).



ized by law,'<sup>37</sup> while noting that "[a] few courts have recognized such an [authorized by law] exception in connection with overt, pre-indictment contacts during a criminal investigation."<sup>38</sup>

The 2005 Justice Manual, as well as prior versions, also included what was titled the Criminal Resource Manual ("CRM"). The CRM illuminated the agency rules with more specificity. Regarding permitted overt communication, the CRM prescribed what type of overt communications *are* permitted:

A Department attorney may communicate directly, or may cause another to communicate, with a represented person concerning the subject matter of the representation in the following circumstances.

- A. The communication is limited to determining whether the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding.
- B. The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including but not limited to testimony before a grand jury or the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena, or civil investigative demand.<sup>39</sup>

What the manual *did not* say is that overt ex parte communications are encouraged or permitted, save for the narrow exceptions of CRM section 297, implying that operating outside these exceptions was atypical and problematic.

Curiously, in 2018, DOJ quietly dropped the CRM, with the above-discussed guidance, from the Justice Manual. The current version retains the general provision that reminds DOJ lawyers that they are subject to applicable rules of professional responsibility and that the lawyers "are strongly encouraged to consult with their Professional Responsibility Officers or supervisors—and, if appropriate, the Professional Responsibility Advisory Office—when there is a question regarding which is the relevant

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37. *Id.* (internal citations omitted).

38. *Id.* (first citing *United States v. Dobbs*, 711 F.2d 84 (8th Cir. 1983); then citing *United States v. Binder*, 167 F. Supp. 2d 862 (E.D.N.C. 2001)). As discussed in Part VI *infra*, cases permitting such overt contacts go against not only the weight of authority but the fundamental basis for the doctrine of the attorney-client privilege.

39. *Justice Manual § 297—Overt Communications with Represented Person—Circumstances Not Covered by the Contact Rule*, *supra* note 33 (archived content from the U.S. Department of Justice website).

rule or the interpretation or application of the relevant rule.”<sup>40</sup> The inescapable inference is that DOJ no longer wanted to be constrained by its own expressed guidance in the 2005 Justice Manual, which had simply brought DOJ lawyers in line with the same ethics rules that every other lawyer is bound to follow.

The inference that the *sub silentio* removal of the agency rules pertaining to ex parte contacts was intended to cast off internal restraints is well supported by a recently reported case. In an emphatic rebuke of DOJ’s practices, a federal district court judge in Pennsylvania granted an emergency motion by Glenmark Pharmaceuticals, ordering DOJ to cease all overt ex parte contacts with Glenmark executives in India.<sup>41</sup> In this criminal price-fixing case, Glenmark complained that despite DOJ knowing that its Indian executives were represented by Glenmark counsel, the government refused to cease the contacts in violation of the Pennsylvania no-contact rule. Glenmark argued:

To make matters worse, when Glenmark’s counsel learned of these improper contacts, the Antitrust Division refused to stand down, ignoring undersigned counsel’s repeated representations that Glenmark India and its executives are represented parties, and taking the position that these matters are not the business of Glenmark’s counsel . . . . [Such conduct also] raises serious Fifth Amendment concerns.<sup>42</sup>

Providing a glimpse into DOJ’s strong-arm tactics, Glenmark reported that DOJ told them that it would cease the contacts only if the Glenmark attorneys stayed out of the matter and the executives retained separate counsel, although DOJ apparently never proffered either before or during the hearing that a conflict of interest actually existed that mandated separate counsel being retained. Accordingly, Glenmark argued:

On this record, the government has no standing to object to Glenmark’s counsel representing senior executives that the company is being compelled to produce for interview, and no power to bar Glenmark’s counsel from representing them and the company which they can bind with their statements . . . .<sup>43</sup>

The *Glenmark* court therefore ruled, “The United States and its counsel are further ordered to transmit this order to their Indian counterparts.

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40. *Id.* § 9-13.200—*Communications with Represented Persons*.

41. *United States v. Teva Pharmaceuticals Inc.*, No. 20-200, 2021 U.S. Dist. LEXIS 197791 (E.D. Pa. 2021); *see also*, Khorri Atkinson, *DOJ Barred from Interviewing Glenmark Execs Without Attys*, LAW360 (July 28, 2021), <https://www.law360.com/articles/1407591/doj-barred-from-interviewing-glenmark-execs-without-attys> [permalink unavailable].

42. Atkinson, *supra* note 41.

43. *Id.*

The United States and its counsel will confirm in writing to this court that such transmission has occurred.”<sup>44</sup>

V. DOJ LEGAL ADVOCACY ON OVERT EX PARTE COMMUNICATIONS—POST-McDADE

Before *Glenmark*, there was a paucity of case law deciding squarely whether DOJ's use of overt ex parte contacts violated applicable ethics rules. *United States v. Koerber*<sup>45</sup> provides the most comprehensive and thorough analysis of the various issues that arise in such cases.

Koerber, a Utah business owner, was the target of a DOJ white collar investigation involving potential wire and securities fraud and tax violations. Despite the fact that DOJ lawyers and law enforcement agents had actual knowledge that Koerber had been represented by four different lawyers over the prior several years of the investigation, a DOJ lawyer directed the agents to conduct two overt ex parte interviews of Koerber.<sup>46</sup> During the first interview, Koerber clearly stated that he believed he was still represented by counsel.<sup>47</sup> The court found this to be a violation of Utah's no-contact rule:<sup>48</sup> “The Government violated [Utah's no-contact rule] when it contacted and interviewed Defendant knowing him to be represented by counsel without first obtaining his counsel's consent or court approval.”<sup>49</sup> Further, during the second interview the government inquired about whether Koerber would rely on an advice of counsel defense; in response, the court found that:

[T]he Government violated Rule 4.2(e)(1), which provides that “[w]hen communicating with a represented person pursuant to this Rule, no lawyer may inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person's counsel.” As instructed by the prosecutors, the agents asked Defendant during the second interview whether he would be willing to waive privilege and whether he intended

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44. *Id.*

45. 966 F. Supp. 2d 1207 (D. Utah 2013).

46. *Id.* at 1213.

47. *Id.* at 1215.

48. Similar to Model Rule 4.2, Utah's no-contact rule provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer . . . . Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by law, rule, or court order . . . .

Utah Rules of Prof'l Conduct § 04.02(a) (Nov. 1, 2005), <https://www.utcourts.gov/resources/rules/approved/2005/11/RPC04.02.pdf> [<https://perma.cc/F3KS-ZBUA>].

49. *Koerber*, 966 F. Supp. 2d at 1225.

to rely on an “advice of counsel” defense at trial, both prohibited inquiries under Rule 4.2(e)(1).<sup>50</sup>

The government argued that even assuming it had actual knowledge of Koerber’s legal representation, the *ex parte* contact was nevertheless “authorized by law” as set forth in the Utah ethics rules.<sup>51</sup> In rejecting this argument, the court explained:

The Government, however, argues that even if it knew of Defendant’s representation, its *ex parte* contact and interviews of Defendant were within the “authorized by law” exception contained in the Rule, which provides that “an attorney may, without such prior consent, communicate with another’s client if authorized to do so by any law, rule, or court order . . . . The Government’s summary, however, omits “covert” or “undercover” as a qualifier in describing the *ex parte* contacts that are within the ‘authorized by law’ exception as expressed in *Ryans*.<sup>52</sup>

The court squarely rejected the notion that there was a safe haven for the DOJ practices under review:

The court does not accept that it is a “well-established investigatory technique” for the IRS and FBI to jointly interview a target known to be represented by counsel at the instruction of prosecutors . . . . To the contrary, the court finds that this technique is off limits, both by operation of Utah’s no-contact rule and as a result of the internal policies of all the agencies/offices involved in the investigation and prosecution of Defendant . . . .<sup>53</sup>

In *Ryans*, cited in *Koerber*, the court, like some courts in other jurisdictions applying their respective no-contact rules, used broad language that could be construed to exempt government attorneys from following local ethics rules in more situations than just the use of traditional covert investigatory contacts.<sup>54</sup> The *Koerber* court addressed this ambiguity head on:

The Government’s citation to and reliance on *Ryans* to justify its approach in instructing the agents to contact Defendant outside the presence of his known counsel is misplaced. First, despite broad language in the Court’s analysis, *Ryans* (and its progeny, including in other jurisdictions) related to *covert* investigation techniques in the noncustodial, pre-indictment investigation of a represented target. In supplemental briefing, the Government did not provide any cases in which undercover or covert police

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50. *Id.* at 1225 n.1.

51. *Id.* at 1227–28.

52. *Id.* (internal citation omitted) (citing *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990)).

53. *Id.* at 1232 (footnote omitted).

54. *See Ryans*, 903 F.2d at 740.

operations did not similarly define the analysis. *Ryans* is therefore straightforwardly distinguishable on that basis alone, given that, in this case, *the Government initiated overt communications with Defendant* rather than pursuing the investigation through use of an undercover informant as in *Ryans* or through other covert means.<sup>55</sup>

The court finds therefore that the current Utah Rule 4.2(a) . . . prohibits overt *ex parte* communications with any person known to be represented in the matter “whether or not the person is a party to a formal legal proceeding.”<sup>56</sup>

The court also found that not only did the government’s *ex parte* contact violate Utah’s no-contact rule but necessarily violated federal law in the form of the McDade Amendment, as well as governing DOJ and IRS agency rules.<sup>57</sup> Because these rules were promulgated to protect citizens’ fundamental rights, the court found a due process violation, requiring suppression of the two interviews:

Suppressing the two interviews and all fruit derived therefrom is necessary here to protect Defendant’s due process rights. And, from a policy perspective, excluding the evidence under the circumstances of this case will help overcome a natural disincentive within the agencies involved to monitor the conduct of their attorneys and agents and ensure their compliance with internal procedures that protect citizens’ rights and implicate due process. In addition, suppression in this case will help prevent the erosion of “citizens’ faith in the evenhanded administration of the laws.”<sup>58</sup>

It is notable that when *Koerber* was decided in 2013, the 2005 version of Justice Manual then in effect included the provisions regarding *ex parte* contacts discussed *supra*, setting forth guidance to DOJ lawyers as well as limitations and considerations to be evaluated before engaging in such contacts. The *Koerber* court found it curious that the DOJ lawyers before it, in arguing on multiple grounds that they had committed no violation, were essentially taking positions directly at odds with their agency’s own rules:

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55. *Koerber*, 966 F. Supp. 2d at 1229 (emphasis added).

56. *Id.* at 1231-32.

57. *Id.* at 1236 (“[A]n agency of the federal government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.” (internal quotations omitted) (quoting *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969))).

58. *Id.* at 1245 (quoting *United States v. Leahey*, 434 F.2d 7, 10 (1st Cir. 1970)).

The Government's implicit dismissal of the insightful Utah State Bar Ethics Advisory Opinion No. 95-05 is particularly curious in light of the instruction that federal prosecutors should be guided by precisely this interpretation. The USAM [Justice Manual] also notes that "[m]ost states apply the contact rule to a represented person whether or not a complaint, indictment, or other charging instrument has been filed." By contrast, the Government argued forcefully against this notion . . . . Most tellingly, however, the USAM specifically outlines the "overt communications" that are permissible with "represented persons":

A Department attorney may communicate directly, or may cause another to communicate, with a represented person concerning the subject matter of the representation in the following circumstances.

- A. The communication is limited to determining whether the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding.
- B. The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including but not limited to testimony before a grand jury or the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena, or civil investigative demand.<sup>59</sup>

*Koerber's* reasoning, as it pertains to whether overt, non-custodial, pre-indictment contacts are prohibited under applicable ethics rules, has not come under serious attack in the years since the ruling was issued. While some cases have deemed such contacts permissible, they have done so under a blanket exemption for all pre-indictment contacts, whether covert or overt.<sup>60</sup> The illogic behind this blanket exemption simply does not withstand muster in the context of overt communications, as tacitly acknowledged by DOJ in the now-defunct 2005 Justice Manual provisions discussed above.

There has been no ascertainable public explanation by DOJ as to why the prior Justice Manual, which included the helpful rules on ex parte contacts, has been withdrawn. Given the clear impact of these defunct rules on the attorney-client privilege, one would have expected DOJ to

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59. *Id.* at 1243-44 (internal citations omitted).

60. *See, e.g.,* United States v. Sabean, No. 2:15-CR-175-GZS, 2016 WL 5721135, at \*4 (D. Me. Oct. 3, 2016) (overt ex parte interview of defendant by government agents not a violation Maine's no-contact rule inasmuch as "prohibition on contact begins when there is an 'accused,' thereby marking the actual commencement of criminal proceedings").

speak clearly.<sup>61</sup> Instead, given DOJ's subsequent bullyish practices, reported<sup>62</sup> and unreported, we are left to ascribe an improper motive. With the agency rules cited in *Koerber* now removed, it would seem that the argument that overt ex parte contacts violate DOJ agency rules, can no longer be as cleanly made, which presumably was the whole point behind their removal.

Yet, even with DOJ's express agency rules having been watered down, DOJ cannot use this maneuver to condone practices that nevertheless violate applicable state ethics rules, as mandated by the McDade Amendment. As was made clear in *Koerber*, the now-defunct agency rules were consistent with the preferred interpretation of state ethics rules that requires DOJ to more faithfully respect the attorney-client relationship. Therefore, the sound reasoning of *Koerber* with its interpretation of the Utah no-contact rule should still inform other courts grappling with the question under other similar state ethics rules.

#### CONCLUSION

Ideally, DOJ, instead of silently retreating to its pre-McDade Amendment culture, would be held to comply with *Koerber* and applicable state law ethics rules, which have not changed and are still the operative law regarding contact—by government attorneys or others—with represented parties. One can hope that with fresh leadership at DOJ, the agency will take the opportunity to reaffirm its commitment to practices and related rules interpretations in a way that is most consistent with honoring, and not trampling, the sacrosanct attorney-client privilege, particularly for corporate and other organization employees who are represented by counsel.

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61. One of the proclamations of the Justice Manual is that “[c]ompliance with Government ethic rules and rules of professional conduct supports the credibility of and faith in government decisions and promotes the common good.” *Justice Manual* § 1-4.010—*Introduction*, *supra* note 33 (providing more, not less, clarity to DOJ lawyers after the ex parte rules were watered down could have enhanced the credibility of the government in its practices).

62. See *United States v. Teva Pharmaceuticals Inc.*, No. 20-200, 2021 U.S. Dist. LEXIS 197791 (E.D. Pa. 2021).