

NOTES

A “NEW” NO-CONTACT RULE: PROPOSING AN ADDITION TO THE NO-CONTACT RULE TO ADDRESS QUESTIONING OF SUSPECTS AFTER UNREASONABLE CHARGING DELAYS

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This Note considers prosecutorial charging discretion and its interaction with the no-contact rule. Charging delays instituted in order to continually question suspects outside the presence of counsel have racial and social class implications. The no-contact rule should be modified to prevent prosecutors, once they reasonably believe they have enough evidence to pursue a successful conviction, from continuing to question suspects without charging them. Disciplinary sanctions, however, are a more appropriate remedy for such improper questioning than is suppression of the resulting statements.

INTRODUCTION

A prosecutor has two virtually identical drug cases. Both involve suspected drug dealers, and in both cases the prosecutor believes that she has enough evidence to arrest, charge, indict, and convict at the present time. The only salient difference is that, in one case, the suspect is sufficiently wealthy to retain counsel. In the other case, the suspect is indigent and the court has not yet assigned counsel.

The no-contact rule, a rule of professional responsibility, generally forbids lawyers from speaking with a person whom they know to be represented by a lawyer unless they have the consent of that lawyer.¹ The no-contact rule creates an incentive for prosecutors to delay charging indigent people in order to prolong the period that

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¹ This rule is codified in both the Model Rules and the Model Code:

they can be questioned without the benefit of counsel. For potential defendants who can afford counsel, there is no such incentive. In all likelihood, the represented suspect will not make any incriminating statements during an interview with his attorney present, as the attorney will advise him against doing so. The other suspect, however, currently does not have a lawyer, and because he is indigent, will not receive counsel until the court appoints a public defender. This will not occur until after the prosecutor charges him with a crime.² After the suspect is charged, the Sixth Amendment prevents the prosecutor from questioning the suspect outside the presence of his appointed lawyer.³ This is a constitutional protection and therefore cannot be modified by statute or rule. The no-contact rule, on the other hand, is an ethical rule enacted by the states and therefore can be expanded or contracted as necessary.

The prosecutor may, in light of this situation, decide to delay charging the indigent suspect in order to interview him outside the presence of a lawyer in an effort to strengthen her case by eliciting incriminating information (ideally, a confession). If she can do so, this will greatly increase the likelihood of a guilty plea and thereby save her office and the court the effort of a trial. However, the practice of delaying charges in order to continue questioning raises ethical questions. And if the practice is unacceptable, what remedy would be appropriate?

Courts, government officials and commentators have struggled for years with these questions regarding the no-contact rule in the

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.

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

During the course of his representation of a client a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1980).

² See *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (“[T]he right to counsel granted by the Sixth and Fourteenth Amendments 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”) (emphasis added).

³ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); see *Escobedo v. Illinois*, 378 U.S. 478, 490–92 (1964) (holding that once criminal process “shifts from investigatory to accusatory,” denial of accused’s request to consult with attorney is violation of Sixth Amendment right to counsel, and that any statement thereby obtained is inadmissible at accused’s trial).

criminal context. Prosecutors in particular have focused on this rule because, by delaying the decision to charge an indigent defendant, they have the power to influence the point at which a suspect receives counsel.⁴

While it is difficult to quantify the frequency of charging delays, the case law reveals that such actions do occur. For example, in *United States v. Ramos*,⁵ the District Court for the Southern District of New York, one of the largest and busiest districts in the federal system, noted that the United States Attorney's Office for the Southern District of New York had a unique policy at the time of conducting a pre-presentment interview with defendants *after* arrest.⁶ While this policy may well have been an anomaly, there is reason to think that the technique of conducting custodial interviews of suspects *prior to* arrest is more common.⁷

Some courts and commentators argue that the ethical rules should permit prosecutors to speak (or have their agents speak) with *represented* suspects pre-proceeding without counsel present and that forbidding them from doing so hamstring prosecutors' ability to gain confessions, thereby slowing the justice system.⁸ In addition, the no-contact rule arguably may impede prosecutors' search for the truth, as confessions are a powerful tool in getting key information about crimes.⁹ Furthermore, the resources expended during the trial of a guilty defendant who would have confessed cannot be allotted to the

⁴ For a discussion of the effects of this rule on various parties, see STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 122–34 (6th ed. 2002).

⁵ 605 F. Supp. 1057 (S.D.N.Y. 1985).

⁶ *Ramos*, 605 F. Supp. at 1059 n.2 (“Apparently, the United States Attorney’s Office for the Southern District of New York [is] the only prosecutor’s office which employs this practice.”).

⁷ See GILLERS, *supra* note 4, at 122–24. The United States Supreme Court has discussed, in the Due Process context, the notion that prosecutors sometimes improperly delay charging for tactical reasons. See, e.g., *United States v. Lovasco*, 431 U.S. 783, 795 (1977) (comparing investigative and tactical delay tactics); *United States v. Marion*, 404 U.S. 307, 324 (1971) (noting that “the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice [and] was an intentional device to gain tactical advantage over the accused”). I thank Professor Kim Taylor-Thompson, whose experience as both a public defender and clinical professor contributed to this insight.

⁸ See, e.g., *United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996) (“[S]uch a rule would significantly hamper legitimate law enforcement operations by making it very difficult to investigate certain individuals.”); see also Marc A. Schwartz, Note, *Prosecutorial Investigations and DR 7-104(A)(1)*, 89 COLUM. L. REV. 940, 954–58 (1989) (arguing no-contact rule should not apply in prosecutorial setting).

⁹ See *Balter*, 91 F.3d at 436 (“Prohibiting prosecutors from investigating an unindicted suspect who has retained counsel would serve only to insulate certain classes of suspects from ordinary pre-indictment investigation.”).

investigations of other crimes.¹⁰ Others have disagreed, arguing that the no-contact rule serves an important function, and that delay tactics by prosecutors are an abuse of power that undermines the spirit of the rule.¹¹ Defenders of the rule add that violations erode the values inherent in our justice system.¹² Finally, delay tactics have social class implications. Wealthy suspects may retain counsel at any time, but indigent suspects must wait until after judicial proceedings have begun to receive appointed counsel.¹³

It is worthwhile at this point to outline briefly the process that occurs from investigation to conviction, with an eye towards the role defense counsel and prosecutors play in this process. In the type of situations principally addressed in this Note, the police suspect the commission of a crime but have not made an arrest. They may suspect a particular individual has committed the crime, and therefore may (with the prosecutor) ask him to come in for an interview. At this point, an indigent suspect would not have counsel present at the interview. Further interviews may occur, also without counsel. Ultimately, the prosecutor must charge the suspect with a crime. This charging decision may occur after multiple interviews or before any have occurred.

As mentioned above, it is not clear how often such charging delays occur. It is possible that many prosecutors do not delay charging in order to get a tactical advantage over suspects who cannot afford counsel. As I will explain in Part II.C, however, prosecutors who delay tactically are not only depriving defendants of fairness in the criminal justice system, but they are also giving their colleagues an undeserved reputation for untrustworthiness.¹⁴ Redressing this

¹⁰ See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 38–39 (2002) (recognizing role of limited resources of prosecutors' offices in plea bargaining).

¹¹ See, e.g., *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.”).

¹² See, e.g., *United States v. Foley*, 735 F.2d 45, 48 (2d Cir. 1984) (“We think that this practice of routinely conducting pre-arraignment interviews raises serious constitutional [and ethical] questions . . .”).

¹³ *Id.* (“Our concern is enhanced by the fact . . . that when a defendant is known to be represented by private counsel the government does not conduct a pre-arraignment interview. In effect, therefore, the practice is invoked only against a defendant who is poor and unrepresented.”).

¹⁴ The actions of prosecutors have effects on the community both inside and outside of the criminal justice system. See generally NICK DAVIES, *WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE* (1991) (providing excellent example of how prosecutorial misconduct has strong impact on not only parties involved, but also community).

problem not only will improve the situation for particular defendants but may also improve the reputation of prosecutors generally.

In this Note, I propose an addition to the no-contact rule that would prohibit prosecutors from making the tactical decision to delay charging in order to question a defendant without counsel if they reasonably believe that they could prove the particular charge at issue beyond a reasonable doubt with the evidence they already have. This rule tries to strike a balance between, on the one side, the prosecutor's duties to investigate and prosecute crime and, on the other side, both suspects' rights and the prosecutor's ethical duties to act fairly towards suspects. I attempt to draw a distinction between delays to allow investigative questioning and delays to allow redundant questioning that may increase the efficiency of the investigation. By investigative questioning, I refer to questioning intended to gather evidence that the prosecutor reasonably believes she needs in order to secure a conviction. This is to be contrasted with redundant questioning, which is instead intended to gather evidence with a view to reducing a prosecutor's caseload (e.g., obtaining guilty pleas or other particularly damaging evidence increases the chances of avoiding trials).¹⁵ It is redundant because, by definition, the prosecutor does not need the additional evidence to prove her case. I will further argue that the remedy when a prosecutor violates this rule should not be suppression of the statements obtained, but rather professional discipline against the individual prosecutor.¹⁶

Part I of this Note provides a history of the no-contact rule and situates it within the landscape of other protections for suspects. Part II lays out the proposed addition to the no-contact rule, discusses the potential problems flowing from failure to enforce the no-contact rule, and explains how the proposed change addresses these problems inside the historical framework of the no-contact rule and its goals.

¹⁵ It is my intention in this Note to focus on the conceptual issues included in a rule to deter charging delays. I will address some suggested enforcement mechanisms in Part III. Furthermore, as stated below, in most routine cases the rule would not come into play. In addition, I leave as an open question how this analysis would be compatible with multiple potential charges of significantly varying punishment levels. For example, consider a prosecutor who has sufficient evidence to charge a drug kingpin with conspiracy to sell marijuana, but wants to interview the represented drug kingpin with the hope of getting incriminating information to bring charges of conspiracy to commit murders-for-hire. In this situation, it seems likely that the policy justification for delaying would outweigh those for charging immediately. At the same time, however, there would have to be a good faith basis for believing that the other crime occurred.

¹⁶ Others have called for similar responses. *See, e.g.,* United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993) (rejecting dismissal of indictment as appropriate remedy and citing sanctions as appropriate). What distinguishes my argument, however, is the focus on prosecutors who, instead of violating the rule itself, delay charging to circumvent the rule.

Part III examines different remedies for violations of the new rule and concludes that disciplinary sanctions are the most appropriate.

I

THE BACKGROUND AND RATIONALE OF THE NO-CONTACT RULE

In this Part, I describe the constitutional rules regarding contact with suspects and defendants. In addition, I explain the policy rationales behind the no-contact rule. By the end of this Part, it will be clear in which situations defendants are protected solely by the no-contact rule, not by the Constitution.

The concept of forbidding at least some forms of contact between suspects and prosecutors has constitutional roots. Both the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel provide some protection to defendants with regard to these interactions. These constitutional protections do not generally apply to the situations on which I focus. It is important nonetheless to describe them in order to provide a framework for our discussion.

The Fifth Amendment privilege against self-incrimination provides some protections for pre-proceeding questioning.¹⁷ In the famous case of *Miranda v. Arizona*,¹⁸ the Supreme Court addressed requirements for custodial interviews of suspects. The main holding in *Miranda* relevant to our discussion is that “specified warnings are required to dispel the compelling pressure of custodial interrogation.”¹⁹ The *Miranda* warning creates a right to counsel for suspects who refuse to waive their right against self-incrimination before being interrogated.²⁰

The Sixth Amendment states that, in the criminal context, “the accused shall . . . have the Assistance of Counsel for his defence.”²¹ In response to this decree, courts appoint counsel for criminal defen-

¹⁷ U.S. CONST. amend. V (“[No person] shall be compelled in any criminal case to be a witness against himself.”).

¹⁸ 384 U.S. 436 (1966). The literature discussing the case is enormous. See, e.g., Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 435 (1987) (“Few decisions of the Warren Court have attracted as much attention and controversy as its 1966 ruling in *Miranda v. Arizona*.”).

¹⁹ Schulhofer, *supra* note 18, at 436. See *Miranda*, 384 U.S. at 479 (requiring that suspects be warned of right to remain silent, possibility of self-incrimination, and right to court-appointed attorney).

²⁰ See Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, CRIM. JUST., Winter 2005, at 18, 24 (“*Miranda* creates a right to counsel during [custodial] interrogations.”).

²¹ U.S. CONST. amend. VI.

dants who cannot afford their own counsel. In *Gideon v. Wainwright*,²² the Supreme Court spoke boldly regarding the right to counsel. In this case, a Florida state court refused to appoint counsel for a criminal defendant, stating that under Florida law the only time a defendant received appointed counsel was in capital cases.²³ The Supreme Court concluded that the Fourteenth Amendment extended the Sixth Amendment right to counsel to defendants in state criminal proceedings.²⁴ The Court stated clearly that "lawyers in criminal courts are necessities, not luxuries."²⁵ The Court was also concerned about the power imbalance between the government, which is always represented by counsel, and a defendant, who is not similarly represented.²⁶ Consequently, all criminal defendants must have a right to counsel in both federal and state court to avoid this disparity.

The Supreme Court followed *Gideon* with *Brewer v. Williams*, which clarified that the fairness inherent in the Sixth Amendment right to counsel included a no-contact concept.²⁷ The Supreme Court in *Brewer* interpreted the Sixth Amendment right to counsel to mean that the government cannot question a suspect without his counsel present after "judicial proceedings have been initiated."²⁸ Judicial proceedings included a "formal charge, preliminary hearing, indictment, information or arraignment."²⁹

Gideon, *Brewer*, and *Miranda* created certain rights for defendants in their communications with prosecutors both before and after proceedings have begun. The Sixth Amendment forbids the questioning of the defendant without the presence of counsel after proceedings have begun and employs a remedy of suppression. The Fifth

²² *Gideon v. Wainwright*, 372 U.S. 335 (1963). For an excellent analysis of this case and its implications, see generally ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

²³ *Gideon*, 372 U.S. at 337.

²⁴ *Id.* at 344 (noting that "noble ideal" of "procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him").

²⁵ *Id.*

²⁶ *See id.* at 344.

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. . . . The right of one charged with [a] crime to counsel [is fundamental]. . . . This noble ideal cannot be realized if the poor man charged with [a] crime has to face his accusers without a lawyer to assist him.

Id.

²⁷ 430 U.S. 387, 398–401 (1977).

²⁸ *Id.* at 398.

²⁹ *Id.* (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

Amendment requires that during custodial interrogations, the suspect must receive *Miranda* warnings before questioning.

The no-contact rule has an even older and just as established pedigree as these cases,³⁰ and has gained almost universal acceptance.³¹ In essence, the no-contact rule states that a lawyer cannot directly contact a represented party without that lawyer's consent or presence. The rule dates back at least to an 1835 English case, *In re Oliver*, where an attorney obtained the signature of a represented woman without her lawyer present.³² Even though it appeared that the client was competent, did not ask to see her lawyer, and looked at the document prior to signing it, the court required the document to be returned because allowing the lawyer's behavior would create bad precedent.³³

The Model Rules and Model Code state that the no-contact principle articulated in *Brewer* for post-proceeding communications applies as an ethical rule to all communications with represented parties, including pre-proceeding contacts.³⁴ There are a number of important rationales for this rule. First, and most obviously, the prosecutor may obtain a confession or other incriminating statement from the defendant by questioning him outside the presence of counsel.³⁵ Second, and more specifically, the prosecutor might learn facts that would not have been revealed if the suspect had counsel present.³⁶ Third, the prosecutor may be able to find out "the opponent's strategy or gain[] information protected by the attorney-client privilege and the work-product privilege."³⁷ Fourth, the prosecutor may be able to

³⁰ Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties*, 67 IND. L.J. 549, 558 (1992) (noting long and storied history of no-contact rule); see also *Lumbermens Mut. Cas. Co. v. Chapman*, 269 F.2d 478, 481 (4th Cir. 1959) (noting that violation of Rule represents "unseemly insensitiveness to the ethics of [a lawyer's] calling"). The ABA Canons of Professional Ethics have included a no-contact rule since 1908. CANONS OF PROF'L ETHICS Canon 9 (1908), reprinted in ABA COMM. ON PROF'L ETHICS AND GRIEVANCES 75-90 (1931).

³¹ *State v. Yatman*, 320 So. 2d 401, 402-03 (Fla. Dist. Ct. App. 1975) (observing that "there is probably no provision of the Canons of Ethics more sacred [than the no-contact rule]").

³² *In re Oliver*, (1835) 111 Eng. Rep. 239, 239-40 (K.B.); see also *In re Doe*, 801 F. Supp. 478, 485 & n.17 (D.N.M. 1992) (citing *In re Oliver*).

³³ See *Oliver*, 111 Eng. Rep. at 240.

³⁴ See *supra* note 1.

³⁵ GILLERS, *supra* note 4, at 110; see also Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 472 (1996) (noting this rationale).

³⁶ GILLERS, *supra* note 4, at 110.

³⁷ *Id.*; see also Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 744 (1997) (arguing, in corporate client context, that "the attorney-client privilege and the anti-contact rule should be viewed and evaluated together, rather than in isolation").

criticize the suspect's story or counsel personally in order to "weaken[] the opposing client's resolve."³⁸ Without counsel present, a suspect will not have an advocate of any kind in the room and therefore may be particularly susceptible to questioning tactics, such as "good cop, bad cop," designed to take advantage of suspects' lack of familiarity with the judicial system.

Despite the Model Rule and Model Code pronouncements, controversy exists over exactly what is permitted before judicial proceedings commence. While the no-contact rule has been adopted in every state,³⁹ the rule is an ethical requirement, not a constitutional one. The extent and merits of the no-contact rule have been the subject of significant debate, including an effort by former U.S. Attorney General Thornburgh to interpret the rule narrowly in order to exempt federal prosecutors from its requirements.⁴⁰ Congress laid that particular debate to rest somewhat in 1998 with the McDade Amendment, passed into law as 28 U.S.C. § 530B.⁴¹ This statute states that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."⁴² At least on its face, this suggests that the state no-contact rules do in fact apply to federal prosecutors in the same way that they apply to state prosecutors.⁴³

Notwithstanding Congress's efforts through the McDade Amendment to prevent one particular narrow interpretation of the no-contact rule, most courts have tended to interpret the rule narrowly in the criminal context. In *United States v. Balter*,⁴⁴ the Third

³⁸ GILLERS, *supra* note 4, at 110.

³⁹ Sapna K. Khatiwala, Note, *Toward Uniform Application of the "No-Contact" Rule: McDade Is the Solution*, 13 GEO. J. LEGAL ETHICS 111, 129 (1999).

⁴⁰ See Memorandum from Richard L. Thornburgh, U.S. Attorney General, to All Justice Department Litigators (June 8, 1989), reprinted in *In re Doe*, 801 F. Supp. 478, 489-93 (D.N.M. 1992) (arguing that state ethics rules do not apply to federal prosecutors). Thornburgh cited three main justifications to support his declaration: the Supremacy Clause, the "is authorized by law" exception in the no-contact rule, and case law. *Id.* Cf. *United States v. Hammad*, 858 F.2d 834, 837 (2d Cir. 1988) ("We decline to hold, as the government suggests, either that DR 7-104(A)(1) [the state's no-contact rule] is limited in application to civil disputes or that it is coextensive with the [S]ixth [A]mendment.").

⁴¹ Joseph McDade, the statute's Republican sponsor, had been acquitted of racketeering after a long investigation. See Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 625 (describing McDade's case).

⁴² 28 U.S.C. § 530B (2000).

⁴³ See, e.g., *United States v. Talao*, 222 F.3d 1133, 1140 (9th Cir. 2000) (noting that this statute "made state ethics rules applicable to government attorneys").

⁴⁴ 91 F.3d 427 (3d Cir. 1996).

Circuit examined the case law from numerous circuits, providing a catalog of various cases on the issue.⁴⁵ The court concluded that “[i]ndeed, with the exception of the Second Circuit, every court of appeals that has considered a similar case has held . . . that [no-contact] rules such as New Jersey Rule 4.2 do not apply to pre-indictment criminal investigations by government attorneys.”⁴⁶ In other words, courts have generally refused to enforce the no-contact rule against prosecutors who conduct pre-proceeding interrogations.⁴⁷

To summarize, there are constitutional protections under the Fifth and Sixth Amendments which apply to suspects in some of their interactions with prosecutors. In many pre-proceeding interactions, however, these constitutional protections do not apply. The no-contact rule, at least in theory, covers such interactions as long as the suspect has a lawyer. Courts have been reluctant to enforce the no-contact rule in criminal cases, however, instead interpreting it narrowly in favor of the government. In addition, prosecutors often have control over the timing of counsel appointment by virtue of the charging decision. They therefore have the ability to prevent suspects from retaining counsel prior to questioning.

II

POTENTIAL PROBLEMS FLOWING FROM CIRCUMVENTION OF THE RULE AND A PROPOSED SOLUTION

In Part II, I focus on the problems created by the willingness of courts to read the no-contact rule narrowly in the criminal context, thereby allowing prosecutors to circumvent the rule. I examine specifically the social class and racial impacts of this policy, as well as the systematic illegitimacy of such circumvention. I then provide a draft of a proposed addition to the no-contact rule to combat these problems and explain its application. By forbidding delays for redundant questioning (while still permitting investigative questioning), my

⁴⁵ *Balter*, 91 F.3d at 436. The cases listed are: *United States v. Powe*, 9 F.3d 68, 69–70 (9th Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir. 1990); *United States v. Sutton*, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986); *United States v. Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983); *United States v. Weiss*, 599 F.2d 730, 739–40 (5th Cir. 1979). *See also Hammad*, 858 F.2d at 837–42 (holding that prosecutors violated ethical obligations by communicating with represented party, but declining to suppress evidence based on this violation).

⁴⁶ *Balter*, 91 F.3d at 436.

⁴⁷ *Hammad* stands as an exception to this rule. *See supra* note 45. Even in the Second Circuit, however, *Hammad* would not last. Seven years later, in *Grievance Committee v. Simels*, 48 F.3d 640, 651 (2d Cir. 1995), the Second Circuit narrowly interpreted the text of New York’s version of the no-contact rule to avoid holding that the attorney had violated the rule.

proposed change to the no-contact rule will go a long way towards solving these problems without hamstringing prosecutors' ability to do their jobs.

A. Disparate Impact on Indigent Suspects

There is a strong opportunity for prosecutorial abuse in the context of public defense. In these cases the prosecutor has complete control over the timing of counsel appointment, as the suspect cannot afford to retain counsel. Here the no-contact rule itself means little without a corresponding rule to keep prosecutors from waiting to charge in order to question suspects without counsel present.

Some might respond that interrogating suspects absent the presence of counsel is the heart of criminal investigation, and that without this ability prosecutors would not be able to do their jobs effectively. There is of course a fundamental and important tension between providing prosecutors the tools with which to do their jobs and protecting suspects from unfair questioning. As I argue below, my proposed no-contact rule strikes a proper balance between these interests because it only applies in cases where prosecutors have a reasonable belief that they could get a conviction without questioning the suspect again outside the presence of counsel. In these cases, prosecutors by definition already can do their jobs effectively without violating the proposed change to the no-contact rule. In some of these cases, however, the prosecutor may overestimate her case and decline to question the suspect again before charging. The (now) defendant may then get an acquittal even though questioning without counsel present may have yielded a confession or other damaging evidence. Given the high conviction rates of the cases that go to trial in the United States, however, this situation will probably be relatively uncommon.⁴⁸ These uncommon cases are a small price to pay for avoiding some of the situations in which suspects without resources are disadvantaged because they cannot retain counsel.

B. Disparate Racial Impact

The fact that charging delay tactics have a disparate impact on indigent suspects suggests that they will also have a disparate impact on minority suspects. After all, a large proportion of indigent defen-

⁴⁸ Sandra Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, 5 HOW. SCROLL: SOC. JUST. L. REV. 1, 45 (2002) (noting high conviction rates in United States). It is admittedly true that conviction rates are high at least partially because under the current system prosecutors can delay charging. It seems unlikely, however, that the conviction rate in the small universe of cases in which prosecutors overestimate their own evidence and charge prematurely to comply with the rule will be significantly lower.

dants with appointed counsel are racial minorities.⁴⁹ Two types of racial impacts may occur with regard to charging decisions.

First, direct racism may play out when prosecutors exercise their discretion over when to charge to achieve racist ends. In 1987 Charles Lawrence wrote that “the job of the law enforcement officer in black communities has been to control the communities’ inhabitants and to protect the lives and property of whites who perceive blacks as the primary potential source of violence and crime.”⁵⁰ It takes little imagination to see this phenomenon translated into a prosecutor’s office. For example, prosecutors could delay charging only minority indigent suspects in order to place them at a comparative disadvantage to their white, indigent counterparts.

Such racism need not be conscious in nature. Jody Armour has written about unconscious and aversive racism, which she recognizes as “[t]he dominant model of prejudice in current literature.”⁵¹ Aversive racism is particularly hard to combat because “aversive racists do not recognize their antiblack attitudes, [and so] the prospects for prejudice reduction are particularly dim.”⁵² The phenomenon is particularly significant when nonracial justifications for an activity are present. “[W]hen the situation is normatively ambiguous, or when a *nonrace-related* justification is handy, the covert antiblack attitudes and beliefs of aversive racists find expression in racial discrimination.”⁵³ Such justifications, namely the desire for a confession and the presumed guilt of the suspect, are present in nearly all cases of prosecutorial discretion in charging. Both conscious and aversive racism therefore play some role in prosecutorial delays and the resulting interrogation without counsel, to the direct disadvantage of minorities.

It is true that the very existence of prosecutorial discretion provides the potential for racist abuses. The no-contact context is not unique in this sense. A strengthened no-contact rule, however, provides an opportunity to negate some of this potential racism with little or no impact on the ability of prosecutors to do their jobs.

⁴⁹ See Charles J. Ogeltree, *An Essay on the New Public Defender for the 21st Century*, LAW & CONTEMP. PROBS., Winter 1995, at 81, 83, 93 (noting that disproportionate number of public defender clients are minorities).

⁵⁰ Some scholarship suggests that law enforcement often has an anti-minority agenda. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 370–71 (1987).

⁵¹ Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 746 (1995) (discussing aversive racism and unconscious racism).

⁵² *Id.*

⁵³ *Id.* at 747.

Another major concern with the charging decision is that prosecutors will abuse the charging decisions against all indigent suspects, as discussed above in Part II.A, and that this will affect minority defendants disproportionately. The deck is already stacked against minorities in the criminal process.⁵⁴ The disproportionate number of black males in prison is well-known. "One of the most troubling features of the wave of harsh sentencing policies and prison-building over the past quarter century is its profound impact on the African American community. Nearly a third of young African American males are under some form of criminal justice supervision"⁵⁵

Some argue that empirical data do not suggest procedural problems in the criminal justice system that disadvantage minorities, but that instead the data merely reflect the existence of substantive criminal penalties that address particular crimes that are more common among minorities. "[T]here is much research that concludes that a significant portion of the racial disparities observed in the criminal justice system results from drug policies, sentencing policies, and decision-making by criminal justice practitioners that disproportionately harm minorities and poor people."⁵⁶ Further compounding these substantive criminal law concerns by permitting prosecutors to disadvantage indigent suspects works against modern efforts to make the criminal justice system fair and equitable for all participants.

C. Systematic Illegitimacy

Even in the case of nonindigent suspects who can afford to retain counsel, there is still potential for abuse. For instance, the prosecutor may decide not to interview a suspect formally, fearing that an interview will tip him or her off and lead to the retention of counsel. Instead, the prosecutor may use undercover agents to attempt to get incriminating information. For example, an undercover police officer may present himself to a white collar suspect as a potential client and strike up a conversation in hopes of eliciting incriminating statements

⁵⁴ See, e.g., Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992*, 31 *LAW & SOC'Y REV.* 789, 818 (1997) ("These findings strongly suggest that the mechanism by which the federal guidelines permit the exercise of discretion operates to the disadvantage of minority defendants."); see also *Developments in the Law—Race and the Criminal Process*, 101 *HARV. L. REV.* 1557, 1559 (1988) (arguing that "[m]inority underrepresentation on juries undermines the goal of racial equality . . . in a way that hurts minority defendants").

⁵⁵ Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 *STAN. L. & POL'Y REV.* 9, 15 (1999) (discussing disproportionate representation of black males in criminal justice system).

⁵⁶ *Id.*

and confessions. Undercover agents often use the lack of custody to place the suspect at ease and hope to obtain information by ploy rather than by force.⁵⁷ The potential for abuse here is smaller, given that the suspect could retain counsel at any time, whereas an indigent suspect has no preventive mechanism other than to stop communicating entirely. Nevertheless, there is still a loss of legitimacy when a prosecutor delays charging, despite the fact that she reasonably believes she can get a conviction, in order to try to take advantage of a suspect's ignorance of the situation through further questioning. Some might respond that the guilty suspect certainly knows he committed the crime. Why not, therefore, put the burden on him to assume he is being investigated and retain a lawyer?

First, in the case of an innocent defendant there is a genuine risk of unfairness. The defendant may end up making seemingly incriminating statements which could harm him at trial and which he would not have made had he been charged and retained a lawyer. In this sense, while the letter of the Sixth Amendment as well as the no-contact rule itself will have been followed, the spirit of those rules, namely protection of suspects in the criminal justice system, will have been lost.

Second, even in the case of guilty defendants, the efficiency gains from questioning after delays will not outweigh the legitimacy concerns of such behavior in the current age where guilty pleas are so prevalent.⁵⁸ As discussed below, considering the relatively loose standard for prosecutors and the narrow set of cases to which the change will apply, the gains in convictions will likely be rather small. At the same time, prosecutors, like all lawyers, should operate within a system of rules that reflects fundamental fairness. In an analogous situation, a prosecutor who fails to heed other ethical rules when prosecuting a defendant that the appellate court knows is guilty will probably succeed in having the conviction upheld, but will rightfully be subject to ethical sanctions for this behavior in the case.

⁵⁷ Attorney General Richard Thornburgh apparently saw undercover communications as a particularly significant issue. See Alafair S.R. Burke, Note, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule*, 46 STAN. L. REV. 1635, 1662 (1994).

⁵⁸ See, e.g., *Brady v. United States*, 397 U.S. 742, 752 (1970) (noting that guilty pleas are extremely common); see also Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 698 (2004) (“[T]he rise of plea bargaining has meant that the vast majority of criminal convicts never even appear before a trial jury.”).

D. The Proposed Change to the No-Contact Rule

It should now be clear that prosecutorial circumvention of the no-contact rule in order to question suspects without counsel can lead to undesirable results both for innocent suspects and for society at large. I therefore propose an addition to the no-contact rule that would help redress these problems.

My proposed addendum reads as follows:

If a prosecutor reasonably believes he or she has enough evidence against a suspect to convict the suspect of the crime suspected, the prosecutor must charge the suspect without delay. The presumption of propriety shall be in favor of prosecutors in making their charging decisions, and violations of this rule shall result in sanctions from the appropriate disciplinary body. Suppression of evidence based on a violation of this rule is not appropriate.

This rule would apply to both federal and state prosecutors and would apply until counsel has been retained, either before or after an arrest, as well as before the court appoints counsel (which would generally be after an arrest).

Obviously, there is little that is black and white in the area of prosecutorial discretion. What one prosecutor sees as an investigative communication, to another might seem a redundant communication. Prosecutors enjoy tremendous amounts of discretion with regard to the charging decision. And as Kenneth Melilli, a former prosecutor, wrote, "the notion of broad, prosecutorial charging discretion enjoys much support."⁵⁹ I do not seek to challenge this notion generally. I deal only with situations in which it is clear that the prosecutor will charge eventually, and the only question is whether to interview the suspect again without counsel before charging rather than charging the suspect and then conducting any further interviews in the presence of defense counsel.

Furthermore, I do not suggest second-guessing prosecutors in their routine charging decisions. I also do not argue that ethics review boards should generally weigh the evidence in cases to determine whether the prosecutor violated the rule. In addition, this rule, like many ethical rules, should serve as a practical deterrent to errant prosecutors but hopefully will not require frequent enforcement.⁶⁰ Practically speaking, it seeks to prevent egregious charging delays and

⁵⁹ Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 674 (1992) (arguing prosecutors should only prosecute those they think are guilty).

⁶⁰ See, e.g., Catherine M. Stone et al., *Civility in the Legal Profession: A Survey of the Texas Judiciary*, 36 ST. MARY'S L.J. 115, 138 (2004) (noting aspirational nature of ethical rules).

patterns of abuse (particularly those that appear motivated by race or social class). While hard data is difficult to collect, there is reason to believe that a variety of pressures push prosecutors to get guilty pleas, sometimes with disturbing effects. “Informal mechanisms—including public oversight, political realities, and internal and administrative supervision—set boundaries.”⁶¹ These pressures give reason to suspect that many prosecutors are evaluating charging decisions in their adversary role rather than their minister of justice role. The adversary role tends to emphasize getting convictions, arguing for higher plea bargains, and charging more counts rather than fewer. This role focuses on the interests of the rest of society versus the suspect. The minister of justice role takes a step back and considers the whole picture more even-handedly, asking what is fundamentally fair given the facts. These competing roles do not always produce different results, but when they do, the interests of career advancement, appeasing voters, and the desire to act in a way that produces a clear winner tend to push towards the adversary framework. In response to these pressures, the proposed change in the no-contact rule provides a framework to guide prosecutors in deciding when to charge.

There are incentives for prosecutors to delay charging individuals in order to question them without counsel present. If prosecutors are still investigating a crime, there is no problem with this behavior. Here I am referring to the gathering of evidence that would be needed at trial and without which there may not be enough evidence for a conviction. I refer to this as investigative questioning. Often, however, prosecutors and their agents are merely questioning the suspect in hopes of getting a confession or other incriminating statements, while reasonably believing a conviction is possible without such statement. This is what I term “redundant questioning.”

In the investigative questioning cases, the policy justifications for permitting questioning are obvious, because while there may be enough evidence to arrest and charge, there is not enough to convict (otherwise it would be a redundant communication). In such an instance, the prosecutor needs to gather more evidence, and therefore requiring a premature charge greatly impinges on the prosecutor’s ability to do her job.

⁶¹ Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 846–47 (2004); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2475 (2004) (“Prosecutors’ offices vary widely in evaluating defendants’ cooperation with the government . . . [such that] Blacks, Hispanics, males, older defendants, noncitizens, and high school dropouts receive fewer and smaller substantial-assistance discounts than whites, females, the young, citizens, and high school graduates.”).

In the redundant questioning cases, however, balancing the policy justifications for allowing the questioning against those for forbidding it indicates that questioning should not be permitted. There are policy reasons for allowing redundant questioning. Redundant questioning could lead to information that further strengthens the prosecution's case, which will increase the number of guilty pleas, a highly desired result given overcrowded dockets.⁶² Judicial efficiency is politically popular, and is admittedly an important policy motivation.⁶³ In addition, confessions are a special kind of statement, as they are often dispositive. A case that could take months without a confession can, during the course of a short interrogation, be reduced to a case in which pleading guilty is the only real option. My proposed rule generally focuses on eliciting confessions rather than building a case for trial. For the rule even to apply, the case must be built already so that the prosecutor is questioning only in hopes of eliciting a confession.⁶⁴

Standing against allowing such questioning are the above-discussed concerns over the legitimacy of the criminal justice system, the responsibilities of lawyers, and the rights of suspects. The proposed change may also improve relations between prosecutors and the defense bar. After all, the no-contact rule began as a rule of legal courtesy.⁶⁵ The proposed change in the no-contact rule essentially restricts prosecutors' abilities to circumvent the no-contact rule by delaying charging in order to question the suspect without counsel. Furthermore, placing the burden on nonindigent suspects to obtain a lawyer may restrict the ability of those suspects to retain the lawyer of their choice, given the pressure to be represented as soon as possible.

⁶² See, e.g., *In re Blodgett*, 502 U.S. 236, 243 (1992) (Stevens, J., concurring) ("Respect for our fellow judges means providing them latitude in the handling of their burgeoning dockets . . .").

⁶³ See, e.g., Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445, 445 (1992) ("[T]he federal courts have come under attack from scholars, practitioners, and other critics who have argued that docket delays in the federal courts have become intolerable . . .").

⁶⁴ In some cases, the prosecution will gather cumulative evidence (such as multiple witness statements saying substantially the same thing) with the intent of emphasizing particular events in front of the jury. It is somewhat unlikely that the prosecution would interview the suspect with only this intent (as the suspect's statements are likely to be unique) rather than to try to get a confession. In such a situation, however, the rule would not apply as long as the prosecution reasonably thought that without the statements she could not get a conviction.

⁶⁵ 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, 324 (1992) ("The anti-contact rule first appeared in 1908 as Canon 9 of the ABA Canons of Professional Ethics, prior to which it existed in looser form as a professional courtesy.") (paraphrasing John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 684-85 (1979)).

Another significant benefit to the proposed change is avoiding the appearance of prosecutorial impropriety, regardless of whether improper conduct is actually occurring. “[A] widespread lack of uniformity with respect to discretionary decision-making by prosecutors reduces the public’s perception that the legal system employs a fair and ethical process.”⁶⁶ A rule forcing prosecutors to charge an individual once their investigation yields evidence sufficient to get a conviction may increase uniformity and therefore improve the public perception of prosecutors. A perception of uniformity and fairness should increase the public’s opinion of prosecutors because it accords with public ideas of equal rights, openness in government, and fair play. These concerns have become more prominent in the last few years, as prosecutors have become increasingly aggressive in gathering information.⁶⁷ Given this climate, the proposed change is a timely attempt to redress this perception.

III

ENFORCEMENT IS KEY

Part III addresses two potential enforcement mechanisms for the proposed, new no-contact rule: suppression of the evidence and disciplinary sanctions. In deciding which remedy to impose for these new violations, it is important to have an eye towards fixing the specific problems. It is also important, however, to keep in mind that excessively harsh remedies will likely infringe on the necessary discretion prosecutors must possess to do their jobs effectively. In evaluating these two options, I will demonstrate that disciplinary sanctions are more effective at satisfying the goals of the rule change while respecting prosecutors’ role in the criminal justice system. Furthermore, certain creative sanctions are particularly well-tailored to the problem.

A. *Suppression of the Evidence*

Suppression as a remedy has been criticized generally for a variety of reasons.⁶⁸ Some might argue that general fairness to sus-

⁶⁶ Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511, 1514 (2000) (discussing public perceptions of prosecutors).

⁶⁷ Cf. Neil A. Lewis, *Ashcroft Defends Antiterror Plan and Says Criticism May Aid Foes*, *N.Y. TIMES*, Dec. 7, 2001, at B6 (noting concern of civil libertarians over potential civil rights abuses in suspect interrogations).

⁶⁸ See *Stone v. Powell*, 428 U.S. 465, 496–500 (1976) (Burger, C.J., concurring) (“[T]he exclusionary rule has been operative long enough to demonstrate its flaws.”); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411–18 (1970) (Burger, C.J., dissenting) (“[T]he history of the suppression doctrine demonstrates that it is both conceptually sterile

pects calls for a remedy of suppression, particularly given the harsher impact that evasions of the no-contact rule can have on the least sophisticated of criminals. While this logic makes intuitive sense, one should examine the categories of suspects who could potentially be interviewed by a prosecutor and evaluate the remedies for violations. A table is useful here:

	<i>Time of Interview Without Counsel Present</i>	<i>Likely Remedy</i>
1	Prior to proceedings, and prior to appointment or retention of counsel. Prosecutor has insufficient evidence to convict.	No remedy is currently available (and the new rule does not provide one).
2	Prior to proceedings, and prior to appointment or retention of counsel. Prosecutor has sufficient evidence to convict.	No remedy is currently available. Disciplinary sanctions available under the new rule.
3	Prior to proceedings, but after appointment or retention of counsel.	Suppression is unlikely, though possible. Disciplinary sanctions possible, maybe even likely, for violation of the no-contact rule.
4	After judicial proceedings have begun.	Suppression of statements for violation of the Sixth Amendment.

Suspects in group 2 do not have a reliance interest in the new rule, as it is not currently in force. To illustrate this, one might consider the constitutional issues raised in an article about the no-contact rule. "If courts enforced the no-contact rule by excluding evidence obtained in violation of it, the rule would essentially circumvent the temporal limitation on the right to counsel contained in the Sixth Amendment."⁶⁹ In other words, the Sixth Amendment requires counsel to be appointed upon the beginning of judicial proceedings, and allowing suppression for violations before that time frustrates the intention of the Sixth Amendment to require counsel only after such proceedings have begun. Suspects are (at least constructively) aware of the doctrine that the Sixth Amendment right to counsel does not

and practically ineffective in accomplishing its stated objective."). *But see* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 139-40 (2003) (supporting modified version of suppression).

⁶⁹ Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 701-02 (1992) (arguing that decisions about relational representation should be made on case-by-case basis).

attach until after judicial proceedings have begun. Many indigent and other suspects are not aware of the rules regarding suppression for violations of the right to counsel, and even those who are not have “constructive” awareness under the principle that people are charged with knowledge of the law. Suspects, therefore, have a reliance interest in the fact that statements acquired through violations of the right to counsel will be suppressed.⁷⁰ Because violations of the no-contact rule itself do not lead to suppression generally, suspects do not rely on a right to suppression of such statements. In addition, the right to suppression for Sixth Amendment violations is embodied in the Constitution and is, or at least should be, applied throughout the country.⁷¹ Since the no-contact rules, old and new, are ethical rules rather than constitutional ones, however, suppression of the evidence cannot be justified on constitutional grounds. Furthermore, there is no common law tradition of suppression in such cases. Therefore, one must justify suppression on policy grounds.

In looking at the public policy implications of suppressing statements, one must be concerned that the suspects who are making these statements are likely to be guilty of the offenses of which they are suspected.

[C]ourts faced with motions to suppress incriminating statements on the basis of the no-contact rule . . . can be relatively sure that factually guilty individuals are making such claims Thus, the courts may be reluctant to expand the scope of the exclusionary rule in this area⁷²

In the narrow set of cases included in my proposed rule, however, few acquittals would be caused by suppression because prosecutors (to be covered by the rule) must already have enough evidence that they believe they can secure a conviction. As a result, the suppression would not significantly harm the prosecution’s chances of a conviction. It would, however, lead to more of the court’s resources being occupied, due to the lack of a confession or other incriminating statement.

One might notice a seeming contradiction. The rule forbids prosecutors from delaying charging decisions merely for expediency through further questioning. If they do, however, the rule does not

⁷⁰ As was done, for example, in *Brewer v. Williams*, 430 U.S. 387, 406 (1977) (affirming reversal of conviction based on violations of defendant’s Sixth Amendment right to counsel).

⁷¹ I argue only that there is a body of Supreme Court case law fleshing out the contours of the doctrine. I do not mean to suggest that the courts have settled the law of the Sixth Amendment right to counsel.

⁷² Karlan, *supra* note 69, at 703.

permit suppression of the evidence because of the loss of expediency. This makes sense, however, for three reasons. First, unlike disciplinary sanctions, suppression will create inefficiency even if there are no violations. Defendants will move to suppress statements on the grounds of improper prosecutorial delay and questioning, the prosecutors will have to respond to these motions, and the court will have to rule on them, whether or not any actual violations occur. In a sense, the inefficiency has no connection to the problem and will not lessen significantly as the problem is solved. Second, if violations do happen, we should not inflict the burden of the prosecutor's error on the justice system as a whole by suppressing the statements, which would lead to more trials and fewer pleas. Unlike constitutional provisions that tend to focus on the rights of suspects and defendants, the no-contact rule is an ethical rule. As such it focuses on prosecutors' duties rather than suspects' rights, as the Ninth Circuit noted in *Lopez*.⁷³ Third, suppression of the evidence therefore is not well-tailored to this goal, as it provides a major windfall to the defendant, while simultaneously failing to single out the prosecutor for wrongdoing in front of his or her peers. Suppression hearings may be time-consuming, but they are frequent and therefore unremarkable in criminal court.⁷⁴ Given the many possible grounds upon which evidence can be suppressed, this remedy may not clearly indicate which prosecutors are violating the no-contact rule. Finally, suppression may turn the legal community's attention away from disciplinary sanctions against the prosecutor, which is a more effective way to deal with redundant questioning.

B. Disciplinary Sanctions

The Ninth Circuit stated in *United States v. Lopez* that "[t]he rule against communicating with represented parties is fundamentally concerned with the *duties* of attorneys, not with the *rights* of parties."⁷⁵ The Ninth Circuit's emphasis on attorney responsibility is likely based on the notion that as an attorney practicing in a given court, one has obligations to follow the ethical rules that apply to that court generally, not just to refrain from violating them when it will infringe on a particular adverse party's rights.⁷⁶ In this sense, the no-contact rule is concerned with a good deal more than simply the rights of parties, and

⁷³ *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1995).

⁷⁴ William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 881, 887 (1991) (noting that suppression hearings are frequent).

⁷⁵ *Lopez*, 4 F.3d at 1462.

⁷⁶ *Id.* ("Lyons' duties as an attorney practicing in the Northern District of California extended beyond his obligation to respect Lopez's rights.").

expects attorneys to behave properly even when a violation does not harm a defendant's rights. As such, it is a good idea to discourage prosecutors from acting irresponsibly even when their actions may not harm a suspect. Imposing sanctions against the prosecutor fits this goal well. It is worthwhile to consider a variety of disciplinary sanctions and assess their value with an eye to fairness, proportionality, and deterrence.

Disbarment and suspension intuitively appear to be excessive punishments in these cases, at least for first (or probably even second) time offenders. These remedies go directly to lawyers' ability to practice their profession and earn their livelihood. While these sanctions would certainly deter violators, they will often be disproportionate to the violations and could potentially result in the removal of good lawyers from practice. Imposing a disproportionate remedy may also cause prosecutors to be undesirably cautious in carrying out their duties.⁷⁷ Censure may be an appropriate remedy, but may not go far enough in deterring this behavior, particularly given the pressure that prosecutors are often under to elicit guilty pleas. In an environment where guilty pleas and convictions are the measuring stick of success, a censure may mean relatively little.

The most appropriate remedies are novel ones.⁷⁸ In California, attorneys can potentially have their ethical violations dismissed if they attend a legal ethics class and pass a test.⁷⁹ Other creative options include forcing lawyers to "retake a bar examination or the professional ethics portion of it, and mandatory CLE."⁸⁰

Creative, tailored options are good for violations of the new rule for three main reasons. First, they can take up a significant amount of the prosecutor's time. In the case of repeat violators, a rule requiring a much longer ethics course, perhaps fifty hours of instruction and a lengthy final exam, would be appropriate. This sort of punishment, for a likely overworked prosecutor, would have a strong deterrent effect on a behavior that is mostly designed to save time and effort itself. Second, these remedies could be specifically focused on the issue at hand. The legal ethics course could primarily deal with no-contact issues and discuss at length the problems of violations. More

⁷⁷ Cf. Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361, 367 & n.26 (1986) (discussing analogous problem that "a rule that allowed prosecutors only to bargain charges down might make prosecutors too cautious in offering concessions, out of concern that a concession, once offered, could not be retracted without violating the prohibition on bargaining upward").

⁷⁸ For a sampling of novel remedies, see GILLERS, *supra* note 4, at 836 (discussing various unconventional sanctions).

⁷⁹ *Id.* (noting that "nobody has ever failed and that recidivism is zero").

⁸⁰ *Id.*

specific remedies could be used for particular violations or patterns of violations. For example, if the prosecutor has a track record of delaying only with indigent suspects, education on the role of public defense and the resulting effect on both innocent and guilty indigent defendants would be particularly useful. Such disciplinary actions should emphasize the public perception of prosecutors and how delays affect these perceptions. Finally, these sanctions would serve to embarrass the prosecutors into not breaking the rules. It takes little imagination to think of the humiliation a senior prosecutor will feel when his or her subordinates (or worse yet, the judges before whom he or she practices) learn that he or she will be spending the next weekend retaking the MPRE exam.

C. Enforcing the Addition to the No-Contact Rule

Let us return for a moment to the case of the two drug dealers from the Introduction. The prosecutor decides to bring in the indigent drug dealer for questioning, and decides not to charge him because he is hoping for a confession. Say the prosecutor already has overwhelming evidence of guilt, including fingerprints and reliable third party witnesses. The prosecutor does not charge the defendant at this time. He instead questions him repeatedly without a lawyer present, because the suspect has not been charged and does not invoke his or her *Miranda* rights. The first two of these interviews results in no confession, but on the third attempt the defendant confesses to the crime.

Under my proposed rule, if the suspect or a third party (such as another prosecutor or the suspect's eventual lawyer) were to report this incident to the ethics board, the board would have to consider whether to discipline the prosecutor. As ethics board procedures are a bit more informal than a trial, the opportunity to understand why the lawyer did not charge will be easier than in a trial where the parties are litigating with unbridled zeal. The evidence itself is not to be weighed, but the actions of the prosecutor are relevant to indicate conscious violation of the rule. For example, a witness statement confirming that the prosecutor said, "we can nail this guy, but I would rather not charge him so we can try to avoid trial" would be relevant.

Disciplinary bodies will admittedly be reluctant to impose sanctions on prosecutors for these violations, as they will not wish to second guess the actions of prosecutors in managing their caseloads. As noted above, this Note does not suggest that disciplinary bodies should engage in a weighing of the evidence. Instead, the bodies should focus on punishing egregious offenses and patterns of behavior, while at the same time trying to deter more routine (and

debatable) violations. While the bodies would not be weighing the evidence, a particularly egregious offense would probably not call for weighing as the circumstances would be rather obvious. In fact, the more it seems that weighing is called for to determine if a violation occurred, the less likely it is that punishment is proper. After all, prosecutors have many difficult factors to consider when charging a suspect with a crime. Admittedly, adding the fear of sanctions for an unreasonable delay further complicates things. The rule is worthwhile, however, as it will only come into play for those who violate it either blatantly or repeatedly.

Disciplinary bodies could start by addressing patterns of abuse in which prosecutors routinely violate the rule, particularly with indigent suspects. In addition, these bodies may not have to impose sanctions often if the threat of such sanctions has a sufficient deterrent effect.

The cooperation of prosecutors' offices should also be sought. While some offices may initially resist my proposed change in the no-contact rule, after disciplinary sanctions are handed down these offices will have a strong incentive to avoid, rather than encourage, violations in order to avoid embarrassment and loss of man-hours. In addition, it may be useful for the American Bar Association to publicize which prosecutors' offices are doing a good job of complying with the rules and which are not.

CONCLUSION

I have proposed a rule whereby prosecutors who possess what they reasonably believe to be sufficient evidence to convict a suspect cannot delay charging in order to circumvent the no-contact rule. While prosecutorial delays generally have powerful law enforcement justifications, these justifications dissipate once the prosecutor has enough evidence to convict. When comparing the remaining efficiency gains with the problems posed by such prosecutorial delays, the balance tips in favor of requiring prosecutors to charge suspects when they have sufficient evidence to convict.

I have also argued that the interests of fairness, deterrence, and proportionality indicate that a remedy of disciplinary sanctions is appropriate, whereas suppression of the evidence is not. Sanctions which cause the prosecutor embarrassment and a significant loss of time while also serving an educational function are ideal.