

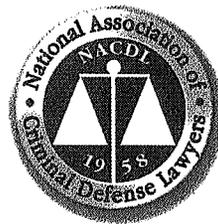
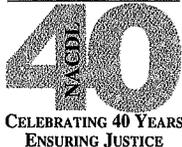
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1958 - 1998



STATEMENT OF GERALD B. LEFCOURT

ON BEHALF OF THE

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

AMERICAN BAR ASSOCIATION

ETHICS 2000 COMMISSION

FEBRUARY 4, 1999

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Dear Chairman Veasey, and Other Distinguished Members of the Commission:

Thank you for allowing me to speak to you today on behalf of the National Association of Criminal Defense Lawyers (NACDL) regarding proposed revisions to Rule 4.2.

The National Association of Criminal Defense Lawyers is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime and other misconduct. A professional bar association founded in 1958, NACDL's 10,000 direct members -- and 80 state and local affiliate organizations with another 28,000 members -- include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. I am the Immediate past President of NACDL, and currently chair the legislative committee. I have also served as the NACDL liaison to the ABA House of Delegates.

We look forward to aiding the Commission in its important work, especially on Rule 4.2. We believe we have an important and unique perspective on the proposals you are considering, as we routinely represent the persons and entities who would be questioned by investigating Justice Department attorneys and their agents outside the presence of counsel. We have been very active on this issue since the Department of Justice first began trying to carve out for its employees special, broad exemptions from the rules of attorney conduct, in 1989.

We applaud your Working Draft of November 10, 1998. It is a very good start. It is a vast improvement over another draft we have seen, the one embraced and advocated by the Standing Committee on Professional Responsibility, dated December 4, 1998.

I. Commission Working Draft Dated November 10, 1998

We think the proposed new Comment Number 1 in your November 10, 1998 Working Draft is a very important expression of the importance of a meaningful Rule 4.2 governing all attorneys. You are right to consider treating any special concerns with the black letter of the Rule in the commentary only -- thus avoiding carving out over-broad, or blanket sets or categories of lawyers and rules, with one class of lawyers being "above the rule."

"Authorized by Law" Court Orders?

1. *Reference in the Rule's Text?*

We understand that you remain undecided about whether to add phraseology regarding "or court order" as an authorizing exception to the rule. I recall meetings as far back as 1989, in which NACDL and ABA representatives offered the Department to join it in requesting changes to the

Rule or Commentary to address the extreme circumstance that the Department articulated for the Thornburgh Memorandum/Reno Regulation purporting to exempt the Department's attorneys and agents from Rule 4.2. The Department was focused on the situation in which someone reaches out to the government to cooperate, and may even be in physical danger, but the government is prevented from working with the person because the attorney involved is a "mobbed up" criminal enterprise attorney or otherwise conflicted corporate counsel (e.g., in a whistle-blowing situation).

As we have said to the Department, we agree that it may well be a good idea to add something to the Rule 4.2 Commentary explicitly recognizing "extreme circumstances." For example, when one is in danger, or when a person represented by an illegitimate ("mobbed up") counsel or corporate counsel for a company on which the person wishes to "blow the whistle" -- and the person has voluntarily and intelligently reached out to the government's attorneys or their agents -- the government should be able to bring her before the bench for court appointment of another, independent counsel to represent the person. Then, the government can deal with that lawyer in seeking contact with the person, without compromising its investigation, or placing the person's life or livelihood at risk. This would take care of the Department's sole articulated reason for needing special exception to Rule 4.2. This precise procedure has been used by various prosecutors in the past. See e.g., People v. Stewart, 656 NYS .2nd 210 (A.D. 1 Dept. 1997).

We agree, however, with those who counsel against adding any such clause to the Rule's text, as proposed in the shaded part of (a) on your November 10, 1998 draft. We oppose the inclusion of any such reference in the rule's text. We do not think a textual change is needed, and we think it could probably raise more questions and problems than it would answer.

We share the concern about the lack of a guiding standard for "court orders" in the abstract. We think the inclusion of such a blanket concept in the rule's text would generate an unworkable, and resource-inefficient hodgepodge of motions and orders for "special exceptions."

We agree also with those who point out that such a reference within the rule's text might prompt efforts by some to seek court orders in unexceptional circumstances. We think it is clear that this would indeed be the effect. These unexceptional circumstances motions will waste the courts' limited time, and/or, they will result in a patchwork quilt of court orders lowering the bar for "authorized by law" exceptions, in a manner undermining the very firewall purpose of the rule, so well articulated in your November 10 Working Draft's proposed Comment Number 1: "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 lawyer-client relationship, and the uncounselled disclosure of information relating to the representation."

Your proposed addition to Commentary Number 4 is likewise important in this respect. It too ensures a firewall of protection for the uncounselled citizen against overreaching by lawyers.

Indeed, in no case is the critical protection of Rule 4.2 more important than in those situations in which the awesome power of the state is investigating a person or entity for suspected wrongdoing. Moreover, as common past experience with the Department of Justice on the 4.2 issue makes plain, it is quite likely that it will be in just such circumstances that motions for a court order authorizing exceptions to 4.2 will become routine. The protections of 4.2 would be threatened with an evisceration through incessant, inefficient, court-by-court whittles and nibbles.

2. *"Court Order" Reference in the Rule's Commentary?*

We think the current wording of your November 10 Working Draft's Comment Number 3 may well be adequate to cover the law of court-authorized and recognized exceptions to the Rule. In our view, the shaded additions you are considering -- at least as currently written -- are unnecessary, and pose the same real risks of unintended, undesirable consequences as just discussed, relative to the contemplation of adding such language to the text itself.

At most, we think, you might consider adding a clarification within the proposed Commentary Number 3, making it plain that such seeking of court orders is only to be undertaken by a lawyer in "extreme circumstances." And then, such an order should only be allowed for the limited purpose of bringing the person before the bench for the court to make an appointment of another, truly independent counsel for the person, as I have discussed above. Again, this is a procedure prosecutors use successfully every day throughout the nation, when such a need arises.

We are troubled by the second shaded bracket in the proposed Commentary Number 3 in your November 10 Working Draft. We think it would be wiser to avoid seeking to specify, or trying to list, when "good cause" circumstances would exist. Moreover, we think far better, important phraseology to add to Comment Number 3 is the precise phrase, "extreme circumstances." This at least suggests that routine motions will not be allowed and could well be sanctioned by the courts -- an important power for the courts to retain, in order to curb abuses. See e.g., Arnold Burns, Warren Dennis & Amybeth Garcia-Bokor, "Curbing Prosecutorial Excess: A Job for the Courts and Congress," The Champion, at 12 (July 1998), at **Attachment A**. It would put lawyers on notice that they are to seek such exceptions only in the very rare, particularized situation. In light of recent practices by the Department of Justice in its insistence that a blanket exception exists for its attorneys and their agents, we think this sort of clarification is very important. Otherwise, past practices make plain that all too many government attorneys, at least, would choose to interpret the revision as an invitation to continue to push for roundly-criticized, blanket exceptions as a matter of course under this proposed revision. See e.g., United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (8th Cir. 1998) (Hansen, J.) (affirming protective order prohibiting federal attorneys and investigators from contacting current McDonnell Douglas employees in defense billing fraud investigation, even though under DOJ regulations, government attorneys were supposedly free to contact corporate employees outside a narrowly defined group of "controlling individuals."). See also Mark Curriden, "Is DOJ Above the Rules?," A.B.A.J. 26 (Nov. 1997) ("DOJ has incurred the wrath of the nation's 50 state

supreme court justices who have filed an amicus brief on behalf of [McDonnell Douglas].... Investigators with the office of the Inspector General of the Department of Defense sent a questionnaire to current and former employees of McDonnell Douglas. It inquired whether the employee ever engaged in mischarging for labor and if so at the direction of whom”).

II. Standing Committee Proposed Draft Dated December 4, 1998

We wholeheartedly share and applaud the evident concern of the Commission regarding the Standing Ethics Committee draft we have seen, dated December 4, 1998. This draft would effectively grant the Department and its investigatory and regulatory agents the very blanket exemption from the no-contact rule of 4.2 that the ABA House of Delegates denounced in its resolution of 1989. The ABA has rightly condemned the attempts by the Attorney General “to create unequal classes of both litigants and lawyers.” The ABA should not itself consider creating such an injustice under the Rule, especially given that the Department has yet to carry its burden of proof that it needs such blanket “special class” exceptions.

A. Department of Justice Fails to Meet Its Burden of Proof for Broad Exemptions From 4.2

As Congress just recognized in the very popular “Citizens Protection Act of 1998” (which passed the U.S. House of Representatives by the extraordinary bi-partisan margin of 345-82): law enforcement concerns do not justify the creation of less demanding ethics rules for federal attorneys and prosecutors. The judiciary has consistently read the rule against contacts with represented persons, and the other ethics rules, to permit federal prosecutors reasonable leeway to perform their duties. Indeed, we are unaware of Justice ever having cited one reported ethics case placing even arguably unreasonable restraints on law enforcement.

The Department’s plea for special rules of conduct has failed in the Bar. It has been roundly condemned by NACDL, ABA, the American Corporate Counsel Association, the Conference of Chief Justices, and, indeed, by many former federal prosecutors. It has failed in the courts. See e.g., *United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998); *U.S. v. Ferrara*, 847 F. Supp. 964 (D.D.C. 1993), aff’d 54 F.3d 825 (D.C. Cir. 1995); *Matter of Doe*, 801 F. Supp. 478 (D.N.M. 1992); *U.S. v. Lopez*, 765 F. Supp. 1433 (N.D. Cal. 1991), vacated on other grounds, 4 F.3d 1455 (9th Cir. 1993). Now, as well, it has been flatly rejected by a Congress far from insensitive to law enforcement concerns. See P.L. 105-277, Sec. 801, “Citizens Protection Act of 1998,” at **Attachment B**.

We support the principle, long supported by the ABA as well, that all lawyers -- including government attorneys and their agents -- are subject to the fundamental rules of ethics applied by the state supreme courts to the lawyers to whom they grant a license to practice law, and the local rules of the federal courts within whose jurisdiction these government lawyers and their agents perform their duties. It is sound policy to continue state and federal court supervision of government lawyers. As former Reagan Administration Deputy Attorney General Arnold Burns

has written, no form of self-regulation by the Department or its agencies can provide the objectivity which an independent, external observer delivers. See "Curbing Prosecutorial Excesses," supra, at **Attachment A**. This issue is of particular concern in light of recent questions about the Department's ethics monitoring procedures. Many critics, including judges, have noted that the Department has not disclosed improprieties by its personnel and has been reluctant to discipline its own. See e.g., McGee, "You Can't Ask People to Trust Something Which They Cannot See," Wash. Post, Jan. 15, 1993, at A1, A18; Rushford, "Watching the Watchdog," Legal Times, Feb. 5, 1990, at 1, 18. See also e.g., "Win at All Costs: Government Misconduct in the Name of Expedient Justice," Pittsburgh Post-Gazette, Nov.-Dec. 1998 (10-part series from several years' comprehensive investigation by award-winning investigative reporter into prosecutorial misconduct) (hereinafter, "Win at All Costs"); "Trial and Error: How Prosecutors Sacrifice Justice to Win," Chicago Tribune, Jan. 1999 (5-part series from similarly comprehensive investigation into cases since 1963 contaminated by unethical conduct by prosecutors) (hereinafter "Trial and Error"). See also Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, "Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required," H.R. Rep. 986, 101st Cong., 2d Sess. At 32 (1990); U.S. v. Van Engel, 15 F.3d 623, 626 (7th Cir. 1993) (Posner, J.); U.S. v. Kojayan, 8 F.3d 1315, 1320 (9th Cir. 1993) (Kozinski, J.).

B. December 4, 1998 Standing Committee Draft Is Especially Unnecessary and Unwise

The Standing Committee's proposal creates a new, black letter carving out of special rules within Rule 4.2 -- *above the rule* -- for government agents directed by government attorneys (or those agents who are also lawyers, as FBI, EPA, SEC, IRS and antitrust investigators so often are). That is, the government's attorneys alone would be allowed to engage in end-runs around 4.2, through their powerful investigatory agency agents. While no doubt well-intentioned, this proposal is extremely dangerous, as well as unnecessary.

Basically, the proposal would allow government lawyers to direct government agents to entrap, interrogate, try to involve in crime, and talk about past acts with all persons (including corporate persons) under investigations. The proposal appears to be based on the assumption that anyone being investigated by a government agent "must be guilty," and so is *less worthy* of the rights 4.2 provides to everybody else. But the reverse is actually true. Persons who are targets of criminal and regulatory investigations are *more* in need of the protections of Rule 4.2 than anyone else. This is their essential protection against having their precious rights under the Fifth Amendment stolen from them. It keeps them from being unsuspectingly seduced into criminal conversations (e.g., regarding vague corporate offenses like antitrust) by undercover interrogators or informants. Your Working Draft of November 10 recognizes this very clearly, in its proposed addition to commentary at paragraph 1: the Rule "protect[s] a person . . . against possible overreaching by other lawyers . . . and the uncounselled disclosure of information relating to the representation."

It is especially important to keep in mind how these types of sweeping proposals for special "law enforcement" authority and discretion can quickly turn around to bite legitimate enterprises and innocent citizens -- spreading from Mob Street to Wall Street, and Main Street. This has been the case with RICO legislation, for example. It would be the same with this proposal for 4.2. See generally e.g. Allan Van Fleet, "Full Contact v. No Contact: How Government Lawyers Tilt the Ethical Playing Field," Antitrust, at 13 (Fall 1998) (discussing cases and arguing strongly against acceptance of the Standing Committee proposal). See also e.g., United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (8th Cir. 1998).

Notwithstanding the arguments made about the need for RICO and the goal of using this high-powered weapon against organized crime, it quickly became the preferred tool against many prospective business targets, including securities firms. See e.g., United States v. Regan, 937 F.2d 823 (2d Cir. 1991) ("Princeton Newport"); 1991 U.S. App. LEXIS 13555; 91-2 U.S. Tax Cas. (CCH) P50,351; Fed. Sec. L. Rep. (CCH) P 96, 062; 68 A.F.T.R. (P-H) 5215; 1991 U.S. App. LEXIS 24444. The money laundering statutes are being perverted in much the same way, with garden variety, non-drug cases being charged as "money laundering" simply because they involve the use of financial institutions, but not because of laundering in the common understanding of that term.

C. Not Even What Government Has Said It Needed

This Standing Committee proposal is *not even what DOJ claimed that it needed* when it first tried to justify its self-created claim to special status for its attorneys under the *ex parte* contact rules. The Department then claimed it needed some "special consideration" when someone represented by a lawyer for the mob, for instance, or other criminal enterprise, comes to the government and wants to talk.

As we have discussed above, that situation is easily dealt with under some of the other sections or in a commentary to 4.2. Again, along with ABA representatives, we have consistently offered to work with and join the Department in requesting a commentary adjustment to address the realistic concern about extreme circumstances. But the Standing Committee's December 4 Draft is far beyond DOJ's initial claim for special consideration in limited circumstances. This is nothing less than a blanket invitation to go after any potential person under investigation who has a lawyer.

D. Now Is Certainly Not the Time to Weaken Rule 4.2:
Explosion of Federal Prosecutors "Has Brought With it Problems of Quality Control"

There has been much concern raised recently, from many quarters, about the need to ensure controls against prosecutorial excesses. In the last few years, the number of federal prosecutors has exploded, at least two to three-fold. As Seventh Circuit U.S. Court of Appeals Judge Richard Posner has so aptly put it: "[t]he increase in the number of federal prosecutors in recent years has brought with it problems of quality control." U.S. v. Van Engel, 15 F.3d 623, 626 (7th

Cir. 1993). Judge Posner went on to describe and condemn a campaign of harassment waged against a respected criminal defense attorney who was thereby forced to abandon his representation of a client in order to defend himself: "On meager grounds, the U.S. Attorney's office launched a sting operation against the lawyer for an individual under criminal investigation by the same office. Although the operation produced zero evidence or leads to evidence of illegal conduct, it dragged on for two years." *Id.* at 629.

Likewise, in a recent case in which an assistant U.S. attorney concealed evidence and then lied about it, Ninth Circuit U.S. Court of Appeals Judge Alex Kozinski wrote: "[t]roubled as we are by the prosecutor's conduct, we're more troubled still by the lack of supervision and control exercised by those above him How can it be that a serious claim of prosecutorial misconduct remains unresolved -- even unaddressed -- until oral argument in the Court of Appeals?" *U.S. v. Kojayan*, 8 F.3d 1315, 1320 (9th Cir. 1993).

In 1990, a congressional subcommittee looking into DOJ's internal controls asked the Department's Office of Professional Responsibility (OPR) what disciplinary action it had taken in each of ten cases in which federal judges had made written findings of prosecutorial misconduct. After lengthy delay, the panel was informed that "no disciplinary action has been taken in any of the ten cases." The subcommittee observed that "repeated findings of no misconduct, and the Department's failure to explain its disagreements with findings of misconduct by the courts, raises serious questions regarding what [it] considers 'prosecutorial misconduct.'". Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, "Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required," H.R. Rep. 986, 101st Cong., 2d Sess. (1990).

The problem of prosecutorial and regulatory excesses have not gotten any better lately. See e.g., "Win at All Costs," supra; "Trial and Error," supra. It is this now well-recognized, problematic phenomenon, to which Congress has just responded in its "Citizens Protection Act of 1998." P.L. No. 105-277, Sec. 801, at **Attachment B**. The new statute to overrule the Thornburgh Memorandum/Reno Regulation, which purported to self-exempt federal attorneys and their agents from Rule 4.2, is to take effect April 19, 1999 -- after a 180 day delay in implementation to allow the Department an opportunity to rewrite its rules and policies to get back into compliance with Rule 4.2 and other ethical norms of the profession. The law clarifies that government lawyers are not "above the rules."

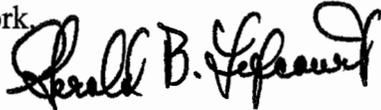
Simply put, this is no time to be weakening the essential protection for the citizen against prosecutorial and government agent overreaching that is contained in the current Rule 4.2. We are happy to discuss ways to ensure Rule 4.2 is capable of accommodating DOJ's legitimate concerns about exceptional circumstances. The Standing Committee's December 4, 1998 Draft, however, is wholly unacceptable.

In contrast to the Standing Committee's Draft, your Working Draft of November 10, 1998 is on the right track. We think you are especially right to recognize the pitfalls of allowing broad

exceptions by "court order," and, further, that you are right to even consider doing so only in the most "exceptional circumstances" -- and if then, only by explicit discussion in the commentary, not the text of the Rule.

III. Conclusion

Thank you again for affording NACDL this opportunity to participate in your consideration of proposed revisions to Rule 4.2. We look forward to future active participation in your important work.

A handwritten signature in black ink that reads "Gerald B. Lefcourt". The signature is written in a cursive style with a large, prominent initial "G".

Gerald B. Lefcourt
Immediate Past President, NACDL

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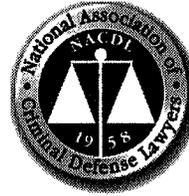
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