

LIMITING THE PROSECUTOR'S USE OF INFORMANTS: THE SECOND  
CIRCUIT'S MISREADING OF DR 7-104(A)(1)

*United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988)

In *United States v. Hammad*, (*Hammad II*)<sup>1</sup> the United States Court of Appeals for the Second Circuit limited the prosecutor's abilities to obtain evidence by construing Disciplinary Rule 7-104(A)(1) of the American Bar Association Model Code of Professional Responsibility<sup>2</sup> (DR 7-104(A)(1) or "the rule") to prohibit certain uses by a prosecuting attorney of informants to communicate with a counselled adverse party

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1. 858 F.2d 834 (2d Cir. 1988), *modifying* *United States v. Hammad (Hammad I)*, 846 F.2d 854 (2d Cir. 1988).

2. DR 7-104(A)(1) provides:

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

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

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1980). For further discussion of the rule's history and guiding policies, see *infra* notes 12-14 and accompanying text.

DR 7-104(A)(1) contains two elements. First, the attorney must communicate to an adverse party on the subject matter of the representation. AMERICAN BAR FOUNDATION ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 333 (1979) [hereinafter ABF CODE]. The American Bar Association held the rule inapplicable to situations in which an attorney asks an adverse party to supply the name of a witness after the adverse party's attorney fails to provide such information. ABA Comm. on Professional Ethics and Grievances, Formal Op. 66 (1932). The ABA Committee observed that ascertaining the name of a witness did not constitute a "subject of the controversy." *Id.*

Second, at the time of communication the attorney must have knowledge of the adverse party's representation by counsel. ABF CODE, *supra*, at 338. One court held the rule inapplicable where federal narcotics agents, unaware that the defendant retained counsel in the federal case, interviewed the defendant notwithstanding the agents' knowledge of the defendant's representation in a related state drug prosecution. *United States v. Masullo*, 489 F.2d 217, 223 (2d Cir. 1973). Several commentators argue that DR 7-104(A)(1) requires attorneys with knowledge of an adverse party's legal representation to give advance notice to the suspect's lawyer before contacting the suspect. See, e.g., Leubsdorf, *Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 702 (1979). See also *Nai Cheng Chen v. Immigration & Naturalization Serv.*, 537 F.2d 566, 569 (1st Cir. 1976) (court applies rule when attorney had prior consent of adverse party's attorney to interview adverse party). *But see* *United States v. Thomas*, 474 F.2d 110, 111 (10th Cir.) (rule violated even when party consented to interview without presence of counsel), *cert. denied*, 412 U.S. 932 (1973). See generally *United States v. Four Star*, 428 F.2d 1406, 1407 (9th Cir.) (defendant's attorney must have reasonable opportunity to present himself at interview), *cert. denied*, 400 U.S. 947 (1970); *Coughlan v. United States*, 391 F.2d 371 (9th Cir.) (suspect's attorney must have notice of an interview with his client), *cert. denied*, 393 U.S. 870 (1968); *Mathies v. United States*, 374 F.2d 312, 316 (D.C. Cir. 1967) (agents must notify counsel for accused before interrogating his client); Kurlantzik, *The Prohibition On Communication With an Adverse Party*, 51 CONN. B.J. 136 (1977); Uviller, *Evidence From the Mind of a Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1177-82 (1987).

during criminal investigations.<sup>3</sup>

In order to obtain inculpatory information, an Assistant United States Attorney utilized an informant to meet with Hammad, the target of a criminal investigation.<sup>4</sup> At the meeting between Hammad and the informant, government agents secretly recorded and videotaped their conversation.<sup>5</sup> Based on the recording and videotape, the grand jury returned an indictment against the defendants.<sup>6</sup> At trial, the United States District Court for the Eastern District of New York ordered the evidence suppressed because it found that the prosecutor acquired the videotape and recordings in violation of DR 7-104(A)(1).<sup>7</sup> On appeal,

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3. 846 F.2d at 859.

4. *Id.* at 855-56. The Office of the United States Attorney for the Eastern District of New York, in conjunction with the Bureau of Alcohol, Tobacco and Firearms, investigated an apparent arson of the Hammad Department Store on November 30, 1985. *Id.* During the course of the investigation, an Assistant United States Attorney (AUSA) discovered that the New York State Department of Social Services (Department) had audited the store's owners, Taiseer and Eid Hammad, for Medicaid fraud. The audit revealed a fraudulent overcharge of \$400,000. The Department revoked the Hammads' eligibility for Medicaid and demanded immediate repayment of the overcharge. In their challenge to the Department's determination, the Hammads submitted invoices falsified by Wallace Goldstein, a supplier to the store. *Id.*

Goldstein informed the AUSA that he provided the Hammads with false invoices. Government agents suspected that the Hammads set the fire to destroy actual sales records and conceal the Medicaid fraud. Accordingly, the prosecutor shifted the focus of the investigation toward the Hammads. Goldstein agreed to act as a government informant. The AUSA directed Goldstein to arrange and record a meeting with the Hammads. *Id.*

5. *Id.* at 856. The government agents recorded a telephone conversation in which Goldstein falsely represented to Taiseer that the government subpoenaed him to appear before a grand jury investigating Hammads' alleged Medicaid fraud. Taiseer did not deny defrauding Medicaid, but instead, urged Goldstein to lie to the grand jury and to refuse to produce his sales records. *Id.*

Five days later, Goldstein met with Taiseer Hammad, and showed him a sham subpoena supplied by the prosecutor. After accepting the subpoena as genuine, Hammad devised strategies to avoid complying with it. Government agents recorded and videotaped this meeting. *Id.*

6. *Id.* at 856. The grand jury returned a 45 count indictment against the Hammad brothers, including 38 counts of mail fraud for filing false Medicaid invoices. The grand jury also indicted Eid Hammad for arson and for fraudulently attempting to collect fire insurance. The grand jury also indicted Taiseer for obstruction of justice based on his attempt to influence Goldstein's grand jury testimony. *Id.*

7. *United States v. Hammad*, 678 F. Supp. 397, 401 (E.D.N.Y. 1987). At a pre-trial hearing, Taiseer Hammad moved to suppress the recordings and videotapes. Hammad alleged that the prosecutor knew Hammad was represented by counsel, and therefore violated the DR 7-104(A)(1) by communicating with him through the AUSA's "alter ego," Goldstein. Hammad produced an affidavit from his prior counsel, George Weinbaum, stating that Weinbaum represented Taiseer Hammad at the time of the recordings. Furthermore, Weinbaum testified that he telephoned the AUSA after the recordings, but before the indictment to inform the government that he "represented Taiseer Hammad and the Hammad department store." 846 F.2d at 856.

The government unsuccessfully argued that DR 7-104(A)(1) did not apply to criminal investiga-

the Second Circuit affirmed and held: DR 7-104(A)(1) prohibits a prosecutor from communicating with a counselled adverse party during the investigatory stage of criminal proceedings.<sup>8</sup>

The sixth amendment gives criminal defendants the right to be represented by counsel in all criminal prosecutions.<sup>9</sup> This constitutional right matures at least by the "critical stage" of indictment.<sup>10</sup>

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tions, or alternatively, the rule did not apply to investigations prior to the commencement of adversarial proceedings against a defendant. *Id.* See *infra* notes 10, 18 and accompanying text.

The district court found that the government "was clearly aware . . . that [Taiseer] had retained counsel in connection with this case," and that Goldstein acted as the prosecutor's "alter ego" during his discussions with Hammad. 678 F. Supp. at 401. The district court then held that the prosecutor had violated DR 7-104(A)(1). *Id.* See *infra* note 19 and accompanying text for a discussion of the "alter ego" concept.

The district court, however, limited its holding to instances in which a suspect has retained counsel specifically for representation in the criminal matter made the subject of the prosecutor's investigation. 678 F. Supp. at 401. Furthermore, the government must have knowledge of the representation. *Id.* These limitations stemmed from the district court's concern that application of DR 7-104(A)(1) to criminal investigations could allow criminals to escape undercover investigations simply by retaining counsel. *Id.*

8. 846 F.2d at 860. The court also held that the district court may exercise its discretion to suppress evidence obtained in violation of DR 7-104(A)(1), *id.* at 860, but chose not to suppress it in this case. See *infra* note 15 and accompanying text.

9. The sixth amendment commands that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. See *Massiah v. United States*, 377 U.S. 201, 206 (1964) (suppressing defendant's statements made without the presence of counsel after indictment). The sixth amendment protects the layman suspect who "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Powell v. Alabama*, 287 U.S. 45, 71 (1932). See also *Strickland v. Washington*, 466 U.S. 668, 684-88 (1984) (the sixth amendment right to counsel allows the defendant a fair trial). *But cf.* *Scott v. Illinois*, 440 U.S. 367 (1979) (state court does not have to appoint counsel for an indigent where imprisonment is authorized for a particular offense, but is not actually imposed).

10. See W. LAFAVE AND J. ISRAEL, *CRIMINAL PROCEDURE*, § 6.4 at 466 (1984). More specifically, the Supreme Court has held that a suspect is entitled to counsel at or after the time judicial proceedings have been initiated against him. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (defendant's right to counsel violated when police officers talk to uncounselled defendant after his arraignment). The court defined initiating the judicial proceedings as ". . . by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* The court reasoned that at a "critical stage" the adverse positions of government and defendant have solidified. *Id.* Moreover, at the "critical stage" the defendant finds himself immersed in the "intricacies" of substantive and procedural criminal law, and needs the guiding hand of an attorney. *Id.* See also *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (*citing Kirby v. Illinois*, 406 U.S. at 689 (1972)); *United States v. Ash*, 413 U.S. 300, 307-08 (1973) (accused has no right to counsel at pretrial photographic identification display); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (assistance of counsel required at every stage of criminal proceeding which affect substantial rights of accused); *Spano v. New York*, 360 U.S. 315, 327 (1959) (Stewart, J., concurring) (a suspect's sixth amendment rights attach upon initiation of judicial proceedings); W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 11.2 at 20 (1981).

DR 7-104(A)(1),<sup>11</sup> as a general rule, prohibits lawyers from directly discussing the subject matter of a controversy with an adverse party known to have retained legal representation.<sup>12</sup> The rule protects parties from the imbalance of skill and knowledge between laymen and lawyers.<sup>13</sup> The drafters of the rule particularly feared that a party confronted by a skilled attorney may unwittingly disclose either privileged information or a possible claim or defense.<sup>14</sup> In criminal matters, courts have excluded inculpatory evidence obtained in violation of DR 7-

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11. Similar policy concerns anchor the application of both the sixth amendment right to counsel and DR 7-104(A)(1). See *supra* note 9 and accompanying text.

Like the sixth amendment, DR 7-104(A)(1) protects a suspect from revealing prejudicial information to an adverse lawyer. Both the rule and the sixth amendment illustrate the concern that an uncounseled defendant should not grope blindly in the adversarial system. See *Moran v. Burbine*, 475 U.S. 412, 430 (1986); *Maine v. Moulton*, 474 U.S. 159, 170 (1985). See generally Note, *Application of the Impeachment Exception to the Sixth Amendment Exclusionary Rule: Seeking a Resolution Based on the Substance of the Right to Counsel*, 50 ALB. L. REV. 343, 366-97 (1986). See *infra* notes 36-40 and accompanying text.

12. Acceptance of this general rule in American jurisdictions dates from the American Bar Association Canons of 1908. See ABA CANONS OF PROFESSIONAL ETHICS No. 9. ("A lawyer should not in any way communicate with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel."). DR 7-104(A)(1) carried over Ethical Canon No. 9 with little controversy. Leubsdorf, *supra* note 2, at 685. "States have replaced the Model Code with the Model Rules of Professional conduct. As of the end of 1987, twenty five states have adopted new legal ethics rules patterned on ABA Model Rules, . . . [e]ven other states are still in the process of deciding whether to adopt a version of the ABA Model Rules." M. SCHWARTZ & R. WYDICK, PROBLEMS IN LEGAL ETHICS (2D ED. 1988).

Because the *Hammad* court discussed only DR 7-104(A)(1), this Comment will focus on the Model Code. However, the policies behind DR 7-104(A)(1) have been preserved and codified in Rule 4.2: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). Thus, the analysis of *Hammad* would apply in a state following the never Model Rules.

13. Kurlantzik, *supra* note 2, at 138. Professor Kurlantzik argues that because of the imbalance in knowledge and skill between a lawyer and a lay adverse party, even well-intended acts of the lawyer may coerce the party. In other words, this imbalance may induce the adverse party to disclose privileged information. *Id.* at 139. Another commentator observes that this rationale analogies the attorney to a shield protecting the client throughout the litigation and negotiation process. See Note, *Policing Attorneys: Exclusion of Unethically Obtained Evidence*, 53 U. CHI. L. REV. 1399, 1407 (1986). See also *United States v. Ash*, 413 U.S. 300, 317 (1973) (quoting *United States v. Bennett*, 409 F.2d 888 (2d Cir. 1969)) (counsel prevents the defendant from falling into traps devised by an opposing lawyer); *Massiah v. United States*, 377 U.S. 201, 211 (1964) (White, J. dissenting) (discussing the difference in acumen between lawyers and laymen). See generally, ABF CODE, *supra* note 2, at 331-39.

14. See Kurlantzik, *supra* note 2, at 139. See also *Massiah v. United States*, 307 F.2d 62 (2d Cir. 1962) *rev'd on other grounds*, 377 U.S. 201 (1964), (danger of an adverse party being tricked by a lawyer's artfully contrived questions into filing his case away). *Id.*

104(A)(1).<sup>15</sup> However, courts have reached no consensus on which stage of a criminal prosecution a party is entitled to the protections of the rule.

In *United States v. Massiah*,<sup>16</sup> the Second Circuit considered the applicability of an earlier version of DR 7-104(A)(1)<sup>17</sup> to the post-indictment stage of a criminal proceeding.<sup>18</sup> The court found the rule inapplicable when the government agents did not act as the prosecuting attorney's "alter ego."<sup>19</sup> The court indicated, however, that had the informant ac-

15. See *infra* notes 24-27.

Courts often employ the exclusionary rule to suppress evidence gathered by unconstitutional means. The rule's goal is to deter unreasonable searches and seizures by law enforcement officials. W. LAFAYE AND J. ISRAEL, *CRIMINAL PROCEDURE* § 3.1, at 135 (1984). See *Terry v. Ohio*, 392 U.S. 1, 12 (1968) (Court discussed exclusionary rule's deterrent effect on law enforcement officials).

The *Hammad I* court noted that the use of the exclusionary sanction to remedy a violation of DR 7-104(A)(1) constitutes a permissible exercise of the federal court's supervisory authority over the bar. 846 F.2d at 857 (citing *In re Snyder*, 472 U.S. 634, 645 n.6 (1985)).

Like *Hammad I*, see *supra* note 8, four other circuits have held that the exclusionary rule applies to evidence gathered in contravention of DR 7-104(A)(1). *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Crook*, 502 F.2d 1378, 1380 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

The *Hammad I* court, however, denied *Hammad's* motion to suppress the tapes and recordings obtained through the informant reasoning that the prosecuting attorney would not have his case prejudiced by the suppression of evidence in such an unsettled area of law. 846 F.2d at 861-62.

For a critique of the application of the exclusionary rule to a violation of DR 7-104(A)(1), see *Uviller, supra* note 2, at 1182 ("The complex interests of accurate and probative factual reproduction, privilege, and the demands of constitutional process that govern the reception of evidence in a criminal case do not normally take account of the canons regulating professional commitment between lawyers.").

16. 307 F.2d 62 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964).

17. ABA CANONS OF PROFESSIONAL ETHICS No. 9 (1908).

18. The Code of Professional Responsibility binds prosecutors and their agents to the same extent as lawyers in civil cases. *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983).

For earlier cases finding DR 7-104(A)(1), and its predecessor Canon 9, applicable to criminal proceedings see *United States v. Thomas*, 474 F.2d 110, 111 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *United States v. Springer*, 460 F.2d 1344, 1354 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972). See also *Uviller, supra* note 2, at 1177. See generally, *ABF CODE, supra* note 2, at 337-39.

Professor *Uviller* compellingly argues against applying the rule in criminal matters. He contends that in criminal investigations, public policy favors full prosecutorial investigation, and that constitutional limitations govern unfair or coercive police methods. He concludes that unthinking application of the rule in the criminal setting may achieve "intolerable results" while "undermining" a large body of sixth amendment law addressing the same issue. *Uviller, supra* note 2, at 1179.

19. 307 F.2d at 66. Under the alter ego theory, if the prosecutor had knowledge of the government agent's contact with the counselled suspect, then the prosecutor violated the rule. *Id.* See *United States v. Jamil*, 546 F. Supp. 646, 655 (E.D.N.Y. 1982) (quoting ABA Comm. on Professional Ethics and Grievances, Op. 95 (1933)) (municipal attorney responsible for acts of police officers under his supervision and control).

The Supreme Court has decided a line of cases which presented possible "alter ego" issues, but avoided addressing the potential ethical difficulties. See *Moran v. Burbine*, 475 U.S. 412, 430 (1986)

ted as the prosecutor's agent, the prosecutor would have violated the rule.<sup>20</sup> That situation, the court reasoned, would have allowed the prosecutor an opportunity to trick the defendant into revealing his defense.

Many courts have found that communications between a suspect and the prosecuting attorney during the investigatory phase of a criminal proceeding, including the use of informants, do not implicate the underlying policy concerns of the rule.<sup>21</sup> In *United States v. Lemonakis*,<sup>22</sup> for example, the District of Columbia Circuit found no ethical breach when prosecuting attorneys used an informant to record conversations with the defendant at the investigatory stage of a criminal proceeding.<sup>23</sup> In so concluding, the court first distinguished *Massiah* because the surveillance in that case took place after the indictment of the suspect.<sup>24</sup> The court noted that before the initiation of adversarial proceedings, a defendant has no particular defense strategy to reveal to a prosecutor. Furthermore, the court determined that the public's interest in forwarding a prosecution outweighed a criminal suspect's right to invoke the shield of the rule to protect the secrecy of his voluntary confession<sup>25</sup> to an under-

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(The Court did not consider the ethical questions surrounding an interview of a counselled suspect.); *United States v. Henry*, 447 U.S. 264, 275 n.14 (1980) (raising possible ethical violations in government's use of informant, but case decided on other grounds); *Hoffa v. United States*, 385 U.S. 293, 310 (1966) (not considering ethical question in upholding government's use of secret informants). Professor Uviller noted that if courts examine the alter ego and ethical questions concomitantly they may undermine this entire body of sixth amendment law. See Uviller, *supra* note 2, at 1182. See also *supra* notes 10, 18 and accompanying text.

20. 307 F.2d at 66.

21. Three federal courts of appeals have refused to apply DR 7-104(A)(1) to curtail a prosecutor's use of informants as agents to gather evidence during a criminal investigation. See *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986) (declining to find that a tape recording of a suspect made before the initiation of judicial proceedings violated the rule); *United States v. Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983) (noncustodial interview of suspect prior to the initiation of judicial proceedings did not constitute an ethical breach); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981) (government's tape recording made in noncustodial environment prior to suspect's charge, arrest, or indictment did not implicate the ethical problems addressed by the rule).

22. 485 F.2d 941 (D.C. Cir. 1973), *cert denied*, 415 U.S. 989 (1974).

23. *Id.* at 956.

24. *Id.* Following the basic rationale expanded in *Massiah*, the *Lemonakis* court reasoned that at the investigatory stage of a criminal proceeding a prosecutor would gain little from a suspect through "artful" legal questioning. *Id.*

25. *Id.* (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966)). This language reflects similar language in *Massiah* which pointed to a government agent's "duty" to continue investigating an indicted suspect. In *Lemonakis*, government agents recorded several conversations between the defendant and an accomplice turned informant for the government. *Id.* at 941. The defendant did not know the conversations were being recorded. Because government agents did not coerce the defendant into revealing information, the court believed that the defendant offered the evidence voluntarily.

cover agent. Thus, the court concluded that premature application of the rule would impair a prosecutor's use of informants in a criminal investigation.<sup>26</sup>

Moreover, several courts have also declined to find a violation of DR 7-104(A)(1) unless a defendant's sixth amendment right to counsel has been violated.<sup>27</sup> For example, in *United States v. Vasquez*,<sup>28</sup> the Second Circuit stated in dictum that a government informant's surreptitious recording during an investigation prior to adversarial proceedings did not violate the suspect's sixth amendment right to counsel.<sup>29</sup> The court rejected the suspect's argument that because he had retained counsel, the recording violated the protection afforded by DR 7-104(A)(1).<sup>30</sup> The court reasoned that finding a violation of the rule before a suspect's sixth amendment rights matured would curtail legitimate investigations.<sup>31</sup> Thus, under the *Vasquez* approach, a suspect cannot invoke DR 7-104(A)(1)'s protection until he has a sixth amendment right to counsel.

In *United States v. Jamil*,<sup>32</sup> however, the Second Circuit implicitly departed from its analysis in *Vasquez*. The court held that the government's use of an informant to elicit incriminating testimony during a criminal investigation did not violate DR 7-104(A)(1).<sup>33</sup> Relying on the *Massiah* rationale, the court in dictum suggested that it would have

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*Id.* at 946-47. Therefore, the court found Canon 9 did not protect the defendant's misplaced trust in whom he confides. *Id.* at 956.

26. *Id.*

27. See *supra* note 18. The basic rationale is that until a suspect's sixth amendment right to counsel matures, DR 7-104(A)(1) offers no protection. Although most courts have not explicitly found a nexus between the rule and the sixth amendment, they have implied that the attachment of sixth amendment rights triggers the application of the rule. One court, however, has specifically declined to find a violation of the rule before the onset of judicial proceedings. See *United States v. Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983). See also *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986) (neither the sixth amendment nor the Canons of Legal Ethics provides a basis for excluding a government informant's taped conversations with a suspect).

28. 675 F.2d 16 (2d Cir. 1982).

29. *Id.* at 16-17.

30. *Id.* at 17.

31. *Id.*

32. 707 F.2d 638 (2d Cir. 1983).

33. The district court extensively examined the "unity" between the sixth amendment and DR 7-104(A)(1). *United States v. Jamil*, 546 F. Supp. 646, 657 (E.D.N.Y. 1982). The district court concluded that the "two principles are not Siamese Twins and . . . require different means to effectuate their goals." *Id.* at 657. In its analysis, the district court compared the scope of the rule to that of the sixth amendment, observing that those protections afforded by the Constitution represent only "the minimum historical safeguards." *Id.* (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)). The court noted, however, that the ABA Code of Professional Responsibility articulates a lawyer's obligation "to maintain the highest standards of ethical conduct." *Id.* Hence, the court

found a violation of the rule had the informant acted as the prosecutor's alter ego.<sup>34</sup> Thus, if the prosecutor used informants to gather evidence against the defendant, DR 7-104(A)(1) might be violated even though the suspect's sixth amendment rights had not attached.<sup>35</sup>

Contrary to the approach taken by earlier cases, in *United States v. Guerrerio*,<sup>36</sup> the District Court for the Southern District of New York concluded that DR 7-104(A)(1) does not apply to the investigatory phase of a case.<sup>37</sup> The *Guerrerio* court reasoned that DR 7-104(A)(1), like the sixth amendment right to counsel, lends balance to an adversarial relationship which does not yet exist in the investigatory phase of a criminal proceeding.<sup>38</sup> Thus, the court predicted, application of the rule to investigations would render it devoid of meaning and confuse its scope.<sup>39</sup> The

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concluded that the duties prescribed by the Code remain operative even when a suspect's sixth amendment rights have not yet matured. *Id.* at 657-58.

For other cases in the Second Circuit finding DR 7-104(A)(1) violations in the absence of a sixth amendment violation, see *United States v. Foley*, 735 F.2d 45, 48 (2d Cir. 1984), *cert. denied*, 469 U.S. 1161 (1985) (pre-arraignment interview of suspect by prosecutor's agents violated the rule); *United States v. Sam Goody, Inc.*, 518 F. Supp. 1223, 1224 n.3 (E.D.N.Y.), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982) (government's use of an informant to elicit incriminating statements from a suspect found unethical, although not violative of the sixth amendment). For further discussion of the sixth amendment's relationship with DR 7-104 (A)(1) see *infra* notes 36-48 and accompanying text.

34. *Id.* at 646. The court held that DR 7-104(A)(1) did not apply because the prosecutor "was not privy to the electronic arrangements attending the investigation." *Id.* See also *supra* note 16 and accompanying text.

35. *Id.* The court in *Vasquez* did not reach the alter ego issue, because sixth amendment rights had not yet attached. 675 F.2d at 17. Whether or not the prosecutor knew of the informant's activity, DR 7-104(A)(1) simply would not apply in that situation.

36. 675 F. Supp. 1430 (S.D.N.Y. 1987). In *Guerrerio*, the defendant invoked DR 7-104(A)(1) to suppress conversations recorded by the prosecutor's informant at the pre-indictment stage, before maturation of sixth amendment rights.

37. *Id.* at 1438.

38. *Id.* The court observed that both the sixth amendment and the rule guarantee balance and fairness "in our adversarial system of justice." *Id.* at 1437. The court identified this broad policy inherent in the adversarial relationship between defendant and prosecutor as the nexus between the sixth amendment and the rule. The *Guerrerio* court declined to follow *Vasquez*. The court found *Vasquez* of little precedential value for two reasons. First, *Vasquez* suggested a nexus between sixth amendment rights and DR 7-104(A)(1) only in dictum. Second, because the *Vasquez* decision was a summary order the Second Circuit rules accord it no precedential value even though the court published the order in a per curiam opinion. Hence, because *Vasquez* only cursorily addressed the relationship of the sixth amendment and DR 7-104(A)(1) in dictum of a per curiam opinion, the *Guerrerio* court is at least arguably the first court to substantively make this connection.

39. *Id.* at 1438. The court emphasized language in the rule to illustrate this point. *Id.* The rule prohibits an attorney from communicating with an adverse party on the "subject of representation." The "subject matter" of a case, however, remains nebulous before the beginning of adversarial proceedings. *Id.* Accordingly, because a suspect has no substantial "subject matter" to discuss with a



court suggested that although the rule and the sixth amendment serve different functions, the policies fundamental to each apply simultaneously at the indictment stage of a criminal proceeding.<sup>40</sup>

In *United States v. Hammad*, (*Hammad I*)<sup>41</sup> the Second Circuit departed from *Massiah* and its progeny and held that during the investigatory stages of a criminal proceeding, DR 7-104(A)(1) prohibits a prosecutor from communicating with an adverse party represented by counsel.<sup>42</sup> The court rejected the government's argument that the rule is coextensive with the sixth amendment, and thus remains inoperative until the onset of adversarial proceedings.<sup>43</sup>

In making this determination, the court first discussed a series of district court decisions in the Second Circuit which analyzed the rule apart from the sixth amendment.<sup>44</sup> The court then discussed the separate purposes of the sixth amendment and DR 7-104(A)(1).<sup>45</sup> The Constitution, the court reasoned, provides a minimum standard of protection.<sup>46</sup> The rule, on the other hand, establishes an attorney's duty to maintain the highest standards of ethical conduct.<sup>47</sup> Thus, because DR 7-104(A)(1) defines an attorney's relationship with his client and adverse parties, it contemplates protections broader than those of the Constitution.<sup>48</sup>

The court, however, shared the government's concern that such a broad reading of the rule could allow criminals with permanent counsel to immunize themselves from infiltration by informants.<sup>49</sup> To remedy this concern, the *Hammad I* court prescribed two limitations on the

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prosecutor before the sixth amendment right to counsel attaches, application of the rule would render its language meaningless. *Id.* See *supra* notes 21-26 and accompanying text. For this reason, the *Guerrero* court found a principled and logical connection between DR 7-104(A)(1) and the sixth amendment.

40. 675 F. Supp. at 1438.

41. 846 F.2d 854 (2d Cir. 1988), *modified*, 858 F.2d 834 (2d Cir. 1988).

42. *Id.* at 860.

43. *Id.* at 858. The court refused to trigger the application of the rule upon an indictment. *Id.* at 859. The court expressed concern that a prosecutor could delay seeking an indictment so that he could continue eliciting statements from a suspect in violation of the rule. *Id.* See *supra* note 10 and accompanying text.

44. *Id.* at 858-59.

45. *Id.* at 859. The court found that the sixth amendment and the disciplinary rule serve "separate, albeit congruent purposes." *Id.*

46. *Id.* The court stated that the Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise. *Id.*

47. *Id.* See *supra* notes 12-14 & 33 and accompanying text.

48. 846 F.2d at 859. See *supra* note 33.

49. 846 F.2d at 859. The court wanted to impose "adequate safeguards without crippling law enforcement." *Id.* See also *supra* note 31 and accompanying text.

rule's scope.<sup>50</sup> First, the court restricted the rule's application to cases where the prosecutor knows<sup>51</sup> that, but for the pending investigation, the suspect would not have retained counsel.<sup>52</sup> This limitation, the court reasoned, would prevent a suspect from retaining permanent counsel to shield himself from any potential contact with government informants.

Second, the court posited the *Massiah* "alter ego" theory as an additional restriction on DR 7-104(A)(1).<sup>53</sup> In situations where the prosecutor does not actually contact the suspect, the rule would be inapplicable if the informant has only a tenuous relationship to the prosecutor.<sup>54</sup> The court stated that the "alter ego" limitation restricts the rule's application to circumstances in which a suspect risks "being tricked by a lawyer's artfully contrived questions into giving his case away."<sup>55</sup>

Finally, after affirming the lower court's conclusion that the prosecutor violated the rule, the Second Circuit, notwithstanding the government's request, declined to enunciate a bright line rule.<sup>56</sup> Instead, the court gave broad discretion to district courts to define the scope and application of DR 7-104(A)(1) on a case-by-case-basis, and so perform their duty to supervise the bar.<sup>57</sup>

Recognizing the inherent inadequacies in *Hammad I*,<sup>58</sup> the Second

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50. 846 F.2d at 859. The Second Circuit relied heavily on the district court's rationale in prescribing these limitations. See *Hammad*, 678 F. Supp. 347 (E.D.N.Y. 1987). See also *supra* note 7.

51. 846 F.2d at 859. For a prosecutor to "know" about representation, the defendant must notify the government that counsel represents him. The court stated it would require "far more precise notice" before it would enforce the rule against a prosecutor conducting an investigation. *Id.* The court, however, did not specify when or how a suspect should give notice.

52. *Id.*

53. *Id.* See *supra* note 19 and accompanying text.

54. 846 F.2d at 859.

55. *Id.* (quoting *Massiah*, 307 F.2d at 66).

56. 846 F.2d at 860.

57. *Id.* (citing *Allegaert v. Perot*, 565 F.2d 246, 248 (2d Cir. 1977)). The court illustrated two extreme situations in which the rule might and might not apply to prohibit a prosecutor's activity. 846 F.2d at 860. For instance, a "clandestine interrogation" by a prosecutor would clearly violate the rule, whereas an informant's release of incriminating information to a prosecutor who had no foreknowledge of the informant's activities would not. *Id.*

58. By failing to specify how and when a suspect should notify the prosecutor of his representation, the court made it possible for suspects with permanent counsel to effectively shield themselves from informant infiltration by manipulating the quality and timing of their notice. Thus the court protected the secrecy of the suspect's "voluntary confession at the expense of the public interest in the prosecution." See *supra* notes 25-31 and accompanying text. Further, the court in *Hammad I* suggested that the prosecutor's use of an informant pre-indictment violates DR 7-104(A)(1). See *supra* notes 47-48 and accompanying text.

Circuit reheard and modified it in *Hammad II*.<sup>59</sup>

The court recognized that the use of informants constitutes a legitimate investigatory technique.<sup>60</sup> However, the court restricted their use by holding that DR 7-104(A)(1) prevents a prosecutor from using "artfully contrived" devices or other "egregious misconduct" to reach a suspect via an informant.<sup>61</sup> The court "cited" the use of a sham subpoena, as used in *Hammad I & II*, as an example of such a device.<sup>62</sup> Such practices violate DR 7-104(A)(1) by transforming the informant into the prosecutor's "alter ego".<sup>63</sup> Despite this clarification, the court, as in *Hammad I*, left the policing of prosecutorial activities to the district court on a case by case basis.<sup>64</sup>

In the two *Hammad* cases, the Second Circuit significantly expanded the scope of DR 7-104(A)(1), which, in practice, may circumscribe a prosecutor's ability to use informants during a criminal investigation. However, in construing the rule's application so broadly, the court overlooked the rule's central policy.<sup>65</sup> The purpose of DR 7-104(A)(1) is to deter prosecutors from contacting suspects who have retained counsel, not to impede the prosecutor's ability to ferret out crime.

While the court correctly ascertained the conceptual distinctions between DR 7-104(A)(1) and the sixth amendment,<sup>66</sup> it failed to demonstrate why one should apply to criminal investigations and the other should not.<sup>67</sup>

The American Bar Association crafted the rule to protect adverse parties from revealing possible claims or defenses to an opposing attorney.<sup>68</sup> If, however, a prosecutor has not initiated adversarial proceedings against a suspect,<sup>69</sup> the suspect has little or no case strategy to reveal.<sup>70</sup>

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59. 858 F.2d 834 (2d Cir. 1988). *Hammad II* adapted *Hammad I*'s analysis of DR 7-104(A)(1) to a criminal investigation except for those changes in the text accompanying notes 60-64.

60. *Id.* at 839.

61. *Id.* at 840.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See supra* notes 2, 8-12 and 58-64 and accompanying text.

66. *See supra* notes 45-48 and accompanying text.

67. Although the court observed that the sixth amendment and the rule are based on similar principles and have similar characteristics, it did not illustrate these similarities, nor did it articulate the underlying policies fundamental to each. Rather, the *Hammad* court cursorily analyzed the scope of a Constitutional precept versus that of an ethical canon. *See supra* note 33 and accompanying text.

68. *See supra* notes 12-14 and accompanying text.

69. *See supra* notes 10, 39-41 and accompanying text.

Furthermore, the court's revisions in *Hammad II* merely confused the applicability of DR 7-104(A)(1) to criminal investigations. Although the court correctly perceived that *Hammad I* could severely limit a prosecutor's ability to use informants,<sup>71</sup> the court's new standard fails to offer a useful solution to the problem.

First, the court misread and misapplied *Massiah* and its progeny. *Massiah* held that the alter ego doctrine applies if the prosecutor knew of both the informant's activities and the suspect's representation by counsel.<sup>72</sup> The court undermined established law by substituting the "egregious conduct" standard for *Massiah*'s knowledge requirement in determining if the informant is the prosecutor's "alter ego."<sup>73</sup>

Second, in its attempt to rectify the problems created by the poorly reasoned *Hammad I* decision, the court perverts the language of DR 7-104(A)(1). The rule focuses on whether the attorney communicated with a represented adverse party.<sup>74</sup> It makes no mention of the attorney's conduct.<sup>75</sup> Yet the court found that "egregious conduct" triggers application of the rule.<sup>76</sup> Compounding this error is the failure of the court to define the term "egregious conduct." Hence, the court has replaced the plain language of the rule with an imprecise standard that only complicates the determination of whether a prosecutor violated the rule.

The *Hammad II* court's application of DR 7-104(A)(1) to the investigatory stage of criminal proceedings may severely curtail criminal investigations. Prosecutors will face the dismal choice of either abandoning the use of informants in criminal investigations,<sup>77</sup> or chancing crucial evidence obtained through informants to the district courts' varying interpretations of the *Hammad II* court's ambiguous application of the rule.<sup>78</sup>

The court's revision in *Hammad II* further confused the law in the

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70. See *supra* notes 21-26 and 36-40 and accompanying text.

71. See *supra* notes 49-55 and accompanying text.

72. *Massiah*, 377 U.S. at 206.

73. *Id.*

74. See *supra* note 2.

75. *Id.*

76. *Massiah*, 377 U.S. at 206.

77. See *supra* notes 53-55 and accompanying text.

78. See *supra* notes 56-57 and accompanying text.

Second Circuit. One can only hope the Second Circuit in a future case will reevaluate its misplaced application of DR 7-104(A)(1).

*D.J.S.*

