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Comment, Traitors in Our Midst: Attorneys Who Inform on Their Own Clients

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COMMENTS

TRAITORS IN OUR MIDST:
ATTORNEYS WHO INFORM ON THEIR CLIENTS

Aviva Abramovsky*

I. INTRODUCTION

Imagine a situation that is every criminal defendant’s worst nightmare. An individual is accused of a federal offense and retains counsel to defend him, entrusting his counsel with a great deal of confidential information necessary to file pretrial motions and prepare the case for trial. However, unbeknownst to the accused, his attorney is himself a target in a federal investigation and is anxious to reach a favorable agreement with the government. In order to do so, the attorney offers the government access to the most valuable asset he possesses—namely, his access to his client. With the enthusiastic agreement of the prosecutor, the attorney wears a recording device during his meetings with his client, all the while continuing to represent him. Ultimately, the information obtained through the government’s electronic surveillance of the attorney is used at his client’s criminal trial, and is instrumental in securing his client’s conviction.

This scenario may seem impossible given the sanctity traditionally afforded the attorney-client relationship in the United States—but this is exactly what happened to Ronald Arthur Ofshe, a defendant in a federal narcotics trafficking case in southern Florida. Even more incredibly, despite the Eleventh Circuit’s unequivocal condemnation of the prosecutor’s tactic, Ofshe’s conviction was upheld—opening the door for the same stratagem to be used by federal prosecutors throughout the United States. And, in fact, it has been so used.

Beginning in the early 1980s, the use of attorneys as informants, whether against their clients or their clients’ associates, has shown a marked increase

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1 See United States v. Ofshe, 817 F.2d 1508, 1510-12 (11th Cir. 1987) (detailing Glass’ role as an informant against Ofshe).

2 See id. at 1515-16. Although affirming Ofshe’s conviction, the Eleventh Circuit stated that the prosecutor’s conduct was “reprehensible” and invited the district judge to refer the case on remand to the attorney disciplinary commission. Id. at 1516 n.6.
as demonstrated by the number of reported decisions where this practice has been at issue. Moreover, it is likely that many instances of attorney-informants have gone unreported, as both prosecutor and defense attorney have a strong incentive to conceal the existence of the attorney informant relationship from the defendant. Thus, it is highly probable that the extent of this problem is significantly underestimated if notice is solely by reports in court decisions or in the news media.

As recently as 1991, the practice of "ratting," or using attorneys as informants against their clients, was described as a "new arrow in prosecutors' quiver," but this tactic has now persisted long enough to be regarded as an established prosecutorial tool. The roots of the attorney-informant stratagem are several, from a change in the nature of crimes commonly charged in federal courts, to a change in the attitude of federal prosecutors toward their counterparts in the criminal defense bar. There can be little doubt that use of defense attorneys as informants has become a significant source of information for federal and state prosecutors. These contacts further involve ethical considerations for both prosecutors and defense attorneys, especially since they may be initiated by either.

Moreover, despite the courts' use of terms such as "sleazy," "reprehensible," "shocking," and "bizarre" to describe this prosecutorial stratagem, they have implicitly endorsed it by affirming the great majority of convictions obtained through this method. By setting a standard so high that only the most outrageous violations of the attorney-client relationship will be punished, the courts have effectively given a green light to prosecutors to turn attorneys against their clients, secure in the knowledge that the worst they will
receive is a verbal slap on the wrist.\textsuperscript{14} Furthermore, although Congress passed the Citizens’ Protection Act of 1998 in part to remedy abuses such as the use of attorney-informants, subsequent legislation has eviscerated the protections which the Act was intended to provide.\textsuperscript{15}

The use of attorneys as informants against their clients, especially in criminal cases, has direct and profound constitutional implications. Courts have found that the use of attorney-informants violates both the Sixth Amendment right to counsel\textsuperscript{16} and the Fifth Amendment right to due process of law.\textsuperscript{17} In addition, this practice has severe implications for the continued viability of the attorney-client privilege and a lawyer’s ethical obligation to his client—areas which, although not of constitutional dimension in themselves, serve as important safeguards of constitutional protections.\textsuperscript{18}

Accordingly, this Comment will examine the history and extent of the use of attorneys as informants and will suggest means by which the courts might go beyond verbal expressions of displeasure and respond meaningfully to this problem. Part II of this Comment will detail the history of prosecutorial interference with the attorney-client relationship. Part III will examine each of the constitutional rights affected by this intrusion, and the stages of a criminal proceeding at which each applies. Part IV will analyze the courts’ response to this problem and set forth the reasons why that response has been inadequate. Finally, Part V will suggest that courts should combat the use of attorney-informants by using the doctrines of conflict of interest and outrageous government conduct to dismiss indictments and by seeking ethical and criminal sanctions against the attorneys who engage in this practice.

II. A BRIEF HISTORY OF RATTING

The use of attorneys as informants against their clients is the latest in a long series of methods used by prosecutors to undermine the relationship between a criminal defendant and his counsel. One of the early forms of this interference occurred in 1952, when federal prosecutors recruited an indictee to investigate a co-defendant, Bennie Caldwell, in exchange for leniency in his own case.\textsuperscript{19} As a result, the informant became intimately involved in preparing the defendant’s defense, and obtained information at defense meetings which was later used in obtaining Caldwell’s conviction in federal court.\textsuperscript{20} On appeal, Caldwell’s conviction was reversed, on the grounds that “high motives and zeal for law enforcement cannot justify spying upon and intrusion

\textsuperscript{14} See notes 189-217 infra and accompanying text.
\textsuperscript{15} See notes 281-87 infra and accompanying text.
\textsuperscript{16} See notes 135-60 infra and accompanying text.
\textsuperscript{17} See notes 161-74, 178-83 infra and accompanying text.
\textsuperscript{18} See notes 175-88, 214-17, 253-74 infra and accompanying text.
\textsuperscript{19} See Caldwell v. United States, 205 F.2d 879, 880 (D.C. Cir. 1953) (holding that bribery conviction must be overturned where government used informant to infiltrate attorney-client meeting).
\textsuperscript{20} Id. at 880.
into the relationship between a person accused of a crime and his counsel."21 In *Weatherford v. Bursey,*22 however, the Supreme Court held that the government's interest in maintaining an informant's cover may justify allowing the informant to attend defense meetings, as long as the informant does not convey information from those meetings to the prosecutor.23 In addition, the *Weatherford* decision left important issues of law open to question, including the degree of prejudice which must be proven by a defendant and the party who carries the burden of proving that confidential information was or was not used at trial,24 thus creating a considerable gray area in which prosecutors could place "spies in the camp" of the defense. Despite the courts' condemnation of this practice, the number of reported decisions where such conduct has been called into question demonstrates that attorney informants are frequently used as a prosecutorial tool.25

In the 1980s, certain prosecutors began taking an additional step into the attorney-client relationship. These prosecutors eliminated the middleman by recruiting the defense attorney himself, rather than a co-defendant, as an informant against his client. The first major case in which this occurred was "Operation Greylord," a 1983 anti-corruption investigation which became the central issue in the Eleventh Circuit case of *United States v. Ofshe.*26 In Operation Greylord ("Greylord"), federal prosecutors targeted corruption within the Cook County Circuit Court in Chicago, investigating court employees, judges and attorneys who practiced before the court.27 One of Greylord's targets was a prominent Chicago criminal defense attorney named Marvin Glass.28

At the time he learned that he was under investigation, Glass was engaged in the representation of Ronald Arthur Ofshe, who was under indictment in Miramar, Florida, for possession of cocaine with intent to distribute.29 In order to forestall his own indictment under Greylord, Glass contacted federal prosecutors in Chicago and offered to inform on the activities of his client, Ofshe.30 In response, Assistant United States Attorney Scott Turow undertook to have Glass wear a "body bug," or electronic recording device, and secretly

21 Id. at 881.
23 See id. at 556-58 (holding that "[t]here being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion [into the defense counsel's meetings by the informant]," the informant's attendance did not violate the defendant's Sixth Amendment rights).
24 See id. at 556 (noting only that "[a]s long as the information possessed by [the informant] remained uncommunicated, he posed no substantial threat to [the defendant's] Sixth Amendment rights").
25 The Shepard's entry for the *Weatherford* case contains more than 500 citations across every federal appellate jurisdiction and numerous states. Since the "spy in the camp" issue was the only substantive issue addressed by *Weatherford,* the great majority of these cases involve the use of informants to infiltrate meetings between criminal defendants and their attorneys.
26 817 F.2d 1508 (11th Cir. 1987).
27 See id. at 1511 n.2.
28 See id. at 1511.
29 See id. at 1510-11.
30 See id.
record conversations with his client.31 Glass agreed to wear such a device, and further agreed to conceal this agreement with his co-counsel, Mel Black.32 Turow did not warn Glass to withdraw as counsel for Ofshe, nor did he seek Glass’ disqualification. As a result, Turow was able to maintain surveillance over admittedly privileged communications for more than ten months, although Turow testified that the government followed strict procedure so as not to violate the attorney-client privilege.33 Glass’ surveillance of his client only ceased when Black discovered his conduct and moved for dismissal of the indictment against Ofshe on Fifth and Sixth Amendment grounds.34 The Eleventh Circuit concluded that Turow’s actions were reprehensible and implied that the Illinois Attorney Registration and Disciplinary Commission should investigate his conduct.35 However, Ofshe’s conviction was ultimately upheld by the Eleventh Circuit, a decision regarded by prosecutors as a vindication of the practice of using attorneys as informants.36 Moreover, when it was referred to the federal government, the Justice Department cleared Turow of any wrongdoing.37

In the same year, the Fifth Circuit considered another instance of the use of a criminal defense attorney as an informant, also in a narcotics case.38 In this case, James Harnage, a criminal defendant under indictment on drug charges, retained a well-known Denver attorney named James Smith as his counsel in late 1983 and paid a $1000 retainer fee.39 Smith himself, however, was under investigation for possible involvement in drug trafficking, and—like Glass—was recruited by federal authorities to act as an informant for the government.40 In that capacity, Smith provided to federal prosecutors a list of names of people involved in cocaine trafficking.41 This list included the names of two of Smith’s clients—Harnage and his girlfriend, Linda Whitman.42 Like Glass, Smith also wore a concealed recording device during meetings with his client.43 As a direct result of information provided by Smith, Whitman was approached by the government and told that she would be indicted and arrested on drug charges unless she also cooperated with

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31 See id. In addition to being a federal prosecutor, Turow is the author of ONE-L and PRESUMED INNOCENT. See Kuntz, supra note 5, at 22 (describing Turow as a “celebrated novelist!”).
32 Ofshe, 817 F.2d at 1510-11 (summarizing the details of Ronald Ofshe’s case).
33 See id.
34 See id. at 1512.
35 Id. at 1516 n.6 (“[W]e assume [the district judge] will refer this matter . . . for appropriate [disciplinary] action.”).
37 See Tom Gibbons, Turow Acted Properly, Feds Decide, CHICAGO SUN-TIMES, Apr. 30, 1988, at 4 (quoting investigators as finding that “Turow’s conduct was ‘fully consistent with federal law.’”).
38 See United States v. Fortna, 796 F.2d 724 (5th Cir. 1986) (sustaining the defendants’-appellants’ convictions).
39 See id. at 727.
40 See id.
41 See id. (Smith identified approximately twenty persons whom he said could supply cocaine).
42 See id. (Smith at the time claimed Harnage was not a client).
43 See id. (reporting that Smith “wore a concealed tape recorder and traveled around Denver in a vehicle with Harnage and others under FBI surveillance.”).
The information provided by Smith and Whitman ultimately led to the conviction of Harnage and several others on charges of conspiracy to import cocaine. Smith was ultimately disbarred for his unethical conduct during his relationship with Harnage.

Federal prosecutors' intrusion into the attorney-client relationship has extended both to current and former clients. In late 1984, the close friend and former attorney of a suspected cocaine trafficker named Dario Arteaga introduced Arteaga to a 'friend' who was purported to be interested in a drug transaction. The 'friend' that wanted to purchase Arteaga's cocaine was an undercover agent for the DEA, rather than a bona fide purchaser. Arteaga was subsequently arrested and convicted. His conviction was affirmed by the Fifth Circuit.

By the late 1980s, encouraged by the tepid response of the courts, prosecutors were pushing further and further into once-forbidden bounds. Possibly the most egregious example is the prolonged investigation of Steven Marshank, whose attorney acted as an informant against him and other clients between 1986 and 1990. In 1986, Ronald Minkin, a criminal defense attorney, approached federal prosecutors and struck a deal with them on behalf of two clients who wished to provide information to the government in exchange for immunity. Minkin and these two clients met with federal prosecutors and named Marshank—another of Minkin’s clients in a divorce proceeding—as a suspect in a major drug smuggling operation.

Subsequently, Minkin informed the government about the drug trafficking activities of yet another client, Seth Booky. The government used this information to indict Booky and then offered him immunity in return for acting as an informant against Marshank. With Minkin’s assistance, “Booky was ‘wired’ to record conversations with Marshank and engaged in other ‘active work’ on the government’s behalf.”

Throughout this time, as a federal judge later determined, prosecutors were fully aware that Minkin represented “[two clients] who had provided incriminating information about Booky and Marshank; . . . [and] Booky himself, who was actively obtaining and providing incriminating information

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44 See id. at 728 (Whitman signed an agreement to act as an informant in October of 1984).
45 See id. at 729 (noting that all charges dealt with acts done between January and April of 1985).
46 See People v. Smith, 778 P.2d 685 (Colo. 1989) (reporting that Smith received a two year suspension from the practice of law).
47 United States v. Arteaga, 807 F.2d 424, 425 (5th Cir. 1986) (holding that the use of a former attorney as an informant did not violate due process).
48 See id. (Artega delivered cocaine to this agent over a few months).
49 See id. at 425.
50 See id. (holding defendant had not been entrapped).
51 See United States v. Marshank, 777 F. Supp. 1507, 1511 (N.D. Cal. 1991) (holding that the collaboration between the government and the defense attorney violated the defendant’s Fifth and Sixth Amendment right thereby requiring dismissal of the indictment).
52 See id. at 1512.
53 See id.
54 See id.
55 See id at 1512-13.
56 Id. at 1515.
Moreover, Minkin told the government that, as Marshank’s long-time attorney, he would probably represent Marshank in upcoming criminal proceedings and that Marshank could likely be convinced to cooperate with the government. In fact, Minkin ultimately did represent Marshank for a three-year period between his arrest and the ultimate dismissal of his indictment, all the while providing information to the government about his client. Moreover, the government allowed Minkin and Booky to pressure Marshank to pay Booky’s “defense fees” in order to convince Marshank that Booky was not an informant—and didn’t make them return the money.

Marshank is one of the few reported instances where a criminal indictment was actually dismissed due to the government’s activities in using an attorney as an informant against his client. While this case may thus represent a high-water mark of prosecutorial interference, it does not represent a reversal or curtailment of the trend. As evidenced by subsequent decisions, the practice has remained widespread and has even grown in scope.

For instance, in 1990, Florida defense attorney Jose Manuel Insua “played a key role in [federal prosecutors’] failed attempt to convict former state Democratic Party leader Alfredo Duran of bribery and conspiracy.” In this case, Insua was used to actively recruit Duran into accepting payment for holding $12,000 in a fraudulent escrow account. Like the great majority of other attorneys who inform on their clients, Insua himself was in legal trouble, having agreed to plead guilty to importing more than five kilograms of cocaine in 1988 and subsequently to act as an informant.

At the same time, prosecutors were increasingly using the grand jury subpoena to coerce attorneys’ testimony against their clients. According to statistics compiled by the American Bar Association and published in the New York Law Journal, the number of subpoenas issued to attorneys by federal prosecutors rose from approximately 420 per year during 1985-87 to 645 per year between 1988 and 1990. Frequently, the subject matter of the subpoena concerned an attorney’s client or former client.

One of the most celebrated cases in which an attorney was subpoenaed by a grand jury involved radical defense lawyer Linda Backiel, who was subpoenaed to testify about the disappearance of her client Elizabeth Duke, a radical activist. Backiel fought the subpoena in court on the grounds that it would

57 Id.
58 See id.
59 See id. at 1516-17.
60 Id. at 1515-16.
61 See id. at 1523-24, 1528, 1530 (dismissing indictments on Fifth and Sixth Amendment grounds).
62 See infra notes 65-104 and accompanying text (documenting the expansion of the practice).
63 Kuntz, supra note 5, at 2, 22.
64 Id. at 22.
65 Id.
66 See Robert G. Morvillo, When an Attorney is Subpoenaed, N.Y.L.J., June 4, 1991, at 3 (reporting on the rift created between prosecutors and defense attorneys by the issue of subpoenaing client information).
67 See id.
68 See In re Backiel, 906 F.2d 78 (3d Cir 1990) (upholding the finding of contempt against the at-
TRAITORS IN OUR MIDST

require her to violate Pennsylvania Rule of Professional Conduct 1.6(a), which provides in part that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation...".  

The subpoena, however, was ultimately upheld by the Third Circuit in 1990, in a radical departure from prior case law. Prior cases generally held that attorneys may be subpoenaed to testify about their clients only when there is a showing of vital, urgent and immediate need for unique knowledge. Even after the Third Circuit's decision, Backiel still refused to testify concerning her client and served six months for criminal contempt beginning in January 1991. Her case received widespread attention in the media, including sympathetic editorial comments that raised concern about prosecutorial overreaching.

The most recent reported appellate decision to consider the problem of lawyer-informants is United States v. Voigt, decided by the Third Circuit in 1996. The defendant in that case, John Voigt, devised and implemented an elaborate scheme to defraud loan applicants and investors "by inducing them to pay substantial 'advance fees' for nonexistent loans and investments." To implement this scheme, Voigt created a fraudulent trust with fictitious ties to the Catholic Church and the Knights of Malta. In order to administer the trust, Voigt employed an attorney by the name of Mercedes Travis.

According to the record, Travis testified that she became concerned about the legitimacy of the trust during the summer of 1991, and accordingly, she approached the FBI with her concerns. At an interview with the FBI, Travis provided documents indicating that the trust was engaged in a fraud. At the same meeting, Travis denied that she had been appointed an attorney for the trust and insisted that a letter purporting to appoint her as such was false.

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69 See PA. RULES OF PROFESSIONAL CONDUCT 1.6(a); see also Monroe Freedman, When Keeping Secrets Becomes a Crime, TEX. LAWYER, Jan. 21, 1991, at 22 (describing the Backiel case and stating that "the phrase 'relating to representation' is intended to be read literally. Thus, the lawyer's obligation to withhold information about a client goes far beyond the more limited evidentiary attorney-client evidentiary privilege.").

70 See Backiel, 906 F.2d at 94 (remanding to allow Backiel to make a refusal in public and then commence contempt hearings in open court).

71 See, e.g., In re Terkeltoob, 256 F. Supp. 683, 686 (S.D.N.Y. 1966) (refusing to compel a witness to give grand jury testimony that he claimed was protected by attorney-client privilege).


74 89 F.3d at 1050 (3d Cir. 1996).

75 Id. at 1060.

76 See id.

77 See id. at 1061.

78 See id. Although, under Disciplinary Rule 4-101(C), attorneys may inform authorities of clients' plans to commit future crimes, this does not authorize the subsequent use of the attorney to further investigate the client. See United States v. Sabri, 973 F. Supp. 134, 145-46 (V.D.N.Y. 1996).

79 See Voigt, 89 F.3d at 1051.

80 See id. Travis conceded that she worked for the Trust in 1990, but claimed that she had not served it in a legal capacity. See id.
In the hope of gaining further information, FBI agents then "devised a pretext whereby Travis would reingratiate herself with the Trust by falsely informing Voigt that she had negotiated [a financial agreement]." As part of this pretext, Travis agreed to record conversations with administrators of the trust, including Voigt. The scheme was successful in that Voigt once again asked her to become the trust's attorney. At this point, Assistant United States Attorney Paul Zoubek warned her of the danger of conflict of interest and stated that she could not act as a government informant in her capacity as trust attorney. At the same meeting, however, her FBI contact requested that she provide information about the financial assets of the Trust, which she did. In addition, Travis was not taken off the books as a government informant until several months later, and the government used information she provided through allegedly unsolicited telephone calls to the FBI. Travis herself was ultimately indicted but was acquitted; Voigt was convicted and sentenced to 188 months of incarceration. Voigt's conviction, like the vast majority of convictions obtained through the use of attorney-informants, was upheld.

At the same time that the Voigt case was under consideration in the Third Circuit, the Western District of New York decided the case of United States v. Sabri. The Sabri case, which is the most recent district court decision to consider the practice of attorney-informants at the time of this writing, is unique because the government used an attorney representing an individual in a civil matter to investigate him on related criminal charges. The defendant in this case, Zafar Sabri, was a Pakistani immigrant who was the subject of deportation proceedings instituted by the Immigration and Naturalization Service ("INS"). He retained an attorney, Bonnie Crogan-Mazur, to represent him at a hearing before the immigration judge who was considering his case.

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1 See id.
2 See id. at 1062.
3 See id. Travis acted only to facilitate communications initially, but later was appointed as full attorney for the Trust. See id.
4 See id. The FBI informed Travis that any time spent working for the Trust would not be as a government informant, due to potential privilege difficulties. See id.
5 See id. Travis provided information that the Trust had sufficient funds to cover its existing loan commitments. See id.
6 See id. at 1062-63. Travis called to inform the agent of the Trust's insufficient funds and Travis' own representation of only the Trust in two grand jury subpoenas. See id.
7 See id. at 1060 (convicting Voigt of one count of conspiracy to commit wire fraud, fourteen counts of wire fraud, four counts of money laundering, two counts of tax evasion, and criminal forfeiture arising out of the money laundering counts).
8 See id. at 1096.
9 973 F. Supp. 134 (W.D.N.Y. 1996) (finding that the government's exploitation of an attorney's relationship with her client was outrageous and violated the defendant's due process rights).
10 See id. at 139 (stating that "[t]he parties have not cited, and the Court has not found, a similar case in which the government enlisted an attorney representing an individual in on-going civil proceedings to actively use the attorney-client relationship to investigate and obtain evidence against that individual for use in a criminal prosecution").
11 See id. at 137.
12 See id.
Subsequently, during a telephone conversation with Crogan-Mazur, Sabri stated that he held the INS responsible for “causing problems for him for 13 years of his life,” and threatened to retaliate with violent action in order to send a political message. Specifically, he “explain[ed] that change only occurs in America in response to ‘something like Oklahoma City,’” referring to the bombing of a federal office building in Oklahoma City in 1995 that had killed 168 persons. He further stated that he had “a focused plan that is going to cause change. . . . Killing 50 to 100 people . . . now that is a statement that people will have to be alerted to.” Sabri and Crogan-Mazur further discussed that “killing for a good cause is not considered a bad thing in some cultures.”

Understandably disturbed by this conversation, Crogan-Mazur contacted the immigration judge and the INS trial counsel responsible for Sabri’s case and informed them of his threat. The INS counsel brought FBI investigators into the case, and asked Crogan-Mazur to tape a subsequent telephone conversation with Sabri while continuing to act as his attorney in the immigration proceeding. Approximately eight days after the initial threatening statements were made, Sabri again telephoned Crogan-Mazur and made further threats toward government officials, which Crogan-Mazur recorded on tape.

Upon a subsequent motion to dismiss, Sabri was granted partial relief—the charges based upon the second conversation, but not the first, were dismissed. However, as demonstrated above, even this partial degree of relief is rarely granted to defendants who are informed upon by their attorneys. Although there are no reported appellate decisions since Sabri that directly address the attorney-informant problem, there is also no indication that this practice has abated. Rather, commentators have recently indicated that defense attorneys have become one of the primary targets of the prosecution, and that use of lawyer-informants is one of the major tools employed for that purpose.

Proponents of “ratting” are few, and generally limited to the prosecutors who foster the practice. Even the courts that have affirmed convictions obtained through ratting have nevertheless expressed their disapproval of the use

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95 Id. at 137-38. Sabri blamed the INS for his inability to leave the country to visit his dying father in Pakistan and wished to tell the INS judge of his resulting “heartache.” Id.
96 Id. at 138 (reporting the defendant’s statement that “[n]o one listens to anything unless there is violence”).
97 Id.
98 Id.
99 See id.
100 See id.
101 See id. Several of Sabri’s statements were identified as the basis for the charge in a Bill of Particulars. Id.
102 See id. at 147-48.
103 Moushey, supra note 6, at A1 (reviewing three recent cases where prosecutors targeted defense attorneys who had become entangled with their clients).
104 See, e.g., Kuntz, supra note 5, at 22 (quoting former federal prosecutor Scott Turow as defending use of attorney-informants because “[y]ou can’t have a relationship which is sacrosanct from investigation”).
of attorneys to investigate their clients. Moreover, the proponents of the use of attorney-informants often base their reasoning on factors that are at odds with practical experience. For instance, Professor H. Richard Uviller—who supports the use of attorneys as informants—has suggested that a defense attorney who “visits the client’s warehouse in the course of preparing a defense in a case of tax evasion and while there learns [of] . . . a major drug smuggling operation” might permissibly inform the government of his clients’ drug trafficking activities. However, as another commentator has pointed out, the case law contains no instances of “noble ratting” in the interests of justice. Rather, as the discussion above demonstrates, the great majority of cases that do not involve coercion by subpoena involve attorneys who were themselves under investigation and acting out of motives of self-preservation. Accordingly, the proponents of “ratting” rest their defense at best on a shaky foundation.

Why, then, is the use of attorney-informants so prevalent? One reason may lie in the changing nature of the offenses commonly prosecuted in federal court. One commentator quotes a Justice Department official as saying:

Twenty-five years ago, federal prosecutors did interstate car theft and bank robberies . . . The bad guys were bank robbers, and that was the level of sophistication of the prosecutions . . . Now we’re doing continuing-criminal- enterprise cases and money-laundering cases. Wherever there’s that kind of money, there are lawyers involved in the underlying transactions. They’re buying shopping centers for people who made money in a criminal enterprise. They’re legitimate targets.

In other words, more attorneys have come under investigation for federal crimes, and thus there is a larger pool of attorneys who might be induced to become informants. Moreover, attorneys may become informants either

103 See supra notes 9-12 and accompanying text (calling the practice of attorney-informants sleazy, reprehensible, shocking and bizarre).
105 Tremblay, supra note 4, at 54. Since the authorship of Professor Tremblay’s article in 1993, however, the case of United States v. Sabri, 973 F. Supp. 134 (W.D.N.Y. 1996) (described supra note 89 and accompanying text) was decided, involving an attorney who voluntarily approached government investigators out of concern that her client might commit terrorist acts. See id. at 137-38. This attorney, who was not under investigation by the government or under any other apparent motivation to curry favor, might arguably have engaged in “noble ratting.” The Voigt case might also arguably constitute an instance of “noble ratting,” as there are indications that attorney Mercedes Travis may have gone to the FBI voluntarily out of her concern for victims of fraud. See United States v. Voigt, 89 F.3d 1050, 1060-61 (3rd Cir. 1996). However, Travis' ultimate status as a co-defendant, combined with the fact that she returned to work for Voigt’s Trust despite her knowledge of its fraudulent activities, id. at 1061-63, suggest that she had no ethical objection to earning money through fraud and that her primary desire was to ingratiate herself with the government in the event of indictment. In any event, the rarity of noble ratting among the reported decisions that concern attorney-informants provides strong evidence that the great majority of such instances are motivated not by concern for potential victims but for the attorney’s own well-being.
106 Kuntz, supra note 5, at 2. For examples of statutes which have been used to expand the scope of federal criminal liability, see 18 U.S.C. § 1956 (money laundering); 18 U.S.C. §§ 1961-68 (racketeering); 18 U.S.C. § 1341 (mail fraud).
107 For examples of attorneys who have recently been convicted of crimes, see Ronald Gift Mullins,
proactively or reactively. That is, they may be recruited by federal authorities or may alternatively approach prosecutors on their own initiative.

Another reason is the change in the nature of federal prosecutorial offices. As one commentator recently pointed out, the past ten to fifteen years have seen an increase in the number of Assistant United States Attorneys who are "career" prosecutors with no private-sector experience to temper their zeal. Thus, as one former federal prosecutor asserts, "the philosophy of the past 10 years is that whatever works is all right." In addition, federal prosecutors in recent years have much greater financial resources to use in recruiting and maintaining informants, and political considerations have often demanded the increased use of informants in order to obtain high-profile convictions.

In addition, the "Thornburgh Rule," under which federal prosecutors are not required to obey state ethical rules, has freed Assistant United States Attorneys from the ethical shackles which might have constrained their use of attorney-informants in an earlier time. This rule, which was codified in 1995 by an act of Congress and only recently repealed, provides not only that federal prosecutors need only follow the Justice Department's internal ethical rules but that they may only be disciplined by the Justice Department itself. Thus, the Thornburgh Rule, prior to its appeal, has effectively insulated federal prosecutors from any independent oversight and left the policing of their ethical standards entirely to their own agency. This rule has, for instance, allowed federal prosecutors to ignore state ethical rules under which failure to report another attorney's ethical violation may itself be disciplined. Thus, federal prosecutors could encourage a defense attorney to en-

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105 See Little, *supra note 111, at 357. This codification may have come in response to the decision of the District of Columbia Circuit in *United States v. Ferrara*, 847 F. Supp. 964 (D.C. Cir. 1993), in which the District of Columbia Circuit held that the Thornburgh Rule was a mere Justice Department policy which could not be regarded as federal law, and that the New Mexico state disciplinary board could therefore initiate proceedings against a federal prosecutor who communicated *ex parte* with a defendant without the knowledge or consent of his counsel.

106 See generally Little, *supra note 111.

107 *See Kuntz, supra note 5, at 2, 22 (discussing federal prosecutors' use of defense attorney Jose Manuel Insua, who negotiated an agreement in which he pled guilty to importing cocaine, as an infor-

Apr. 2000] TRAITORS IN OUR MIDST 687
gage in conduct amounting to a conflict of interest by diminishing the fear
that their behavior will subject them to disbarment or suspension.

This change in the character of federal prosecutorial offices has brought
with it a change in attitude under which prosecutors have increasingly viewed
defense attorneys as co-conspirators with their clients rather than as fellow
members of the bar. Specifically, some prosecutors are becoming increas-
ingly frustrated in their attempts to fight crime, and have come to see the at-
torneys of their targets as their enemies. Moreover, many prosecutors have
come to view defense attorneys not only as "enemies" but as criminals.
According to one commentator, many federal prosecutors believe that defense
attorneys must "[get] into bed with their clients" in order to prepare a defense
in a complex narcotics or money-laundering case. Since federal prosecutors
increasingly view criminal defense attorneys as no different from criminals,
they treat defense lawyers as they would their clients—by trying to recruit
them as informants.

A related view held by at least some prosecutors is that criminal defend-

dants, or at least those who are accused of certain offenses, do not really de-
serve the assistance of counsel. For instance, one federal prosecutor has de-
defended the use of forfeiture proceedings against legal fees in narcotics cases,

stating that he "hope[s] it . . . [has a chilling effect] on attorneys . . . When
attorneys decide to make a living off narcotics dealers, that's their prob-
lem." In other words, this prosecutor apparently believes that accused nar-
cotics dealers do not deserve to retain counsel and, further, that their attorneys
are knowing co-conspirators in narcotics dealing.

This attitude harks back to the opinion of Judge Julius Hoffman, ex-
pressed during the trial of the Chicago Seven, that the wide availability of
lawyers in the United States explained the unrest in the country However,
modern prosecutors have tools which were unavailable in Judge Hoffman's
time in order to give effect to his opinion. For instance, broad-sweeping laws
such as the Racketeer Influenced and Corrupt Organizations Act (RICO) and expanded interpretations of mail and wire fraud and money laundering
statutes have resulted in an increasing number of prosecutors alleging that at-

See id. at 22 ("[W]e're doing continuing-criminal-enterprise cases and money-laundering cases.
Wherever there's that kind of money, there are lawyers involved . . . They're legitimate targets."); see also Peter L. Zimroth, When Defense Goes Begging, NAT'L L.J., June 25, 1990, at 14 (stating that
"[m]ore and more, we are seeing government officials treating defense counsel not as a shield between
the government and the individual, but rather as an unnecessary obstruction to speedy justice which
must be removed, or, more insidiously, as an instrument of government that should be used to further
the government's investigatory or prosecutorial goals").

See Timothy S. Robinson, Targeting Lawyers, NAT'L L.J., Jan. 21, 1985, at 1, 26 ("[M]any prosecutors [believe] that attorneys are playing an increasing role . . . in allowing criminal activity to
flourish").

Moushey, supra note 6, at A1 (quoting William Aronwald, a former federal prosecutor).

See Kuntz, supra note 5, at 2 (discussing the "recruitment of lawyers as snitches").

Robinson, supra note 116, at 27.

(paraphrasing Judge Hoffman).

trorneys are co-conspirators with their clients. Increases in sentencing, including harsh mandatory minimum sentences in many narcotics cases, have combined with these statutes to render defense attorneys vulnerable to long prison terms for conspiracy and, thus, vulnerable to being turned into informants.

In addition, courts have become more sympathetic to subpoenas which compel attorneys to provide records or to testify concerning a client before a grand jury. Moreover, statutes requiring disclosure of cash transactions have frequently been used to require attorneys to become de facto informants against their clients in money laundering cases. Courts have also adopted an increasingly strict standard of proof for allegations of ineffective assistance of counsel, including proof of conflict of interest. This has led in turn to increasing acceptance of representation of multiple clients by a single attorney in criminal cases, which poses the risk that an attorney might seek to gain leniency for one client by informing on another.

The use of attorneys as informants is in fact part of a trend involving such diverse elements as fee forfeitures and subpoenas which has the collective effect of undermining the attorney-client relationship in criminal cases. Many commentators within and without the criminal defense bar see this pattern as no accident but rather, as a calculated effort on the part of federal prosecutors to undermine the effectiveness of criminal defense attorneys.

According to one commentator,

[i]t may not have started out as a grand design . . . [b]ut clearly the Department of Justice now recognizes that all these things in combination are having the intended effect of making lawyers less a part of the system, of driving a wedge between lawyers and clients, of making lawyers less able to represent their clients.

III. CONSTITUTIONAL ISSUES RAISED BY ATTORNEY-INFORMANTS

The use of criminal defense attorneys as informants against their clients implicates three separate constitutional considerations. First, and most obviously, use of attorney-informants undermines their clients’ Sixth Amendment

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123 Compare In re Tarkeltooh, 256 F. Supp. 683 (S.D.N.Y. 1966) (quashing subpoena of attorney in absence of a compelling need greater than the need for privacy and confidentiality) with In re Backiel, 906 F.2d 78 (3d Cir. 1990) (upholding subpoena of an attorney despite lack of showing of compelling need).
124 See Robinson, supra note 116, at 26 (describing IRS cash transaction reporting requirements).
125 See infra notes 133, 135-56 and accompanying text.
126 See supra notes 50-60 and accompanying text (describing the facts of the Marshant case).
127 See United States v. Monsanto, 491 U.S. 600, 611-14 (1989) (stating that forfeiture statute does not contain an exemption for property used to pay attorney).
128 See generally Stern & Hoffman, supra note 5.
129 See Kuntz, supra note 5, at 2 (“These are people you do not talk to unless you’d be happy telling the Feds the same thing.”) (quoting an anonymous Florida defense attorney).
130 See id.; see also Moushey, supra note 6, at A1.
131 Kuntz, supra note 5, at 22 (quoting Neal Sonnett, past president of the National Association of Criminal Defense Lawyers).
right to effective assistance of counsel. Second, this practice implicates the Fifth Amendment right to due process of law. Finally, use of lawyer-informants jeopardizes the attorney-client privilege, which is not a constitutional right in itself but is of constitutional dimension as it safeguards defendants’ rights under the Fifth and Sixth Amendments. This section will outline the broad parameters of each of these constitutional rights.

A. Sixth Amendment

The Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” In the landmark case of Strickland v. Washington, the Supreme Court recognized that the Sixth Amendment right to counsel necessarily implied the right to effective assistance of counsel. In Strickland, the Court also established a two-part test to determine whether a defendant’s right to effective assistance of counsel has been violated. First, a defendant must show that his attorney’s performance was significantly below professional norms. Second, he must demonstrate that the “deficient performance prejudiced the defense.” In this instance, prejudice is defined as a “reasonable probability” that the outcome of the defendant’s trial would have been different but for the unprofessional errors of his counsel.

In certain limited circumstances, however, prejudice is presumed under the Sixth Amendment. One of these areas is conflict of interest. Since the Sixth Amendment includes “the right to be represented by counsel whose loyalties are undivided,” representation by an attorney whose loyalties are divided is presumptively prejudicial. This was specifically recognized by the United States Supreme Court in Strickland, which stated that:

[When an actual conflict of interest exists,] counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to

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132 See U.S. Const. amend. VI; see also Strickland v. United States, 466 U.S. 668, 692-94 (1986) (stating that a defendant’s right to effective assistance of counsel is compromised when a defendant is prejudiced); Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (stating a conflict of interest adversely affecting a client’s lawyer’s performance violates the Sixth Amendment).
133 See U.S. Const. amend. V; Rochin v. California, 342 U.S. 165, 169 (1952) (stating that due process is violated when “the cannons of decency and fairness” are offended (citations omitted)).
134 See infra notes 171-84 and accompanying text.
135 U.S. Const. amend. VI.
137 See id. at 687-96.
138 See id. at 687.
139 See id. at 687, 690.
140 Id. at 687
141 Id. at 695; see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (explaining that “reasonable probability” is shown when confidence in a trial’s outcome is undermined).
142 United States v. Partin, 601 F.2d 1000, 1006 (9th Cir. 1979), cert. denied, 446 U.S. 964 (1980).
give rise to conflicts . . . it is reasonable for the criminal justice system to
maintain a fairly rigid rule of presumed prejudice for conflicts of interest.\footnote{Strickland, 466 U.S. at 692.}

Thus, in cases where an actual conflict of interest exists, a criminal defendant is required to prove only that the attorney was actively representing conflicting interests and that the conflict "adversely affected" specific instances of counsel’s performance.\footnote{Cuyler, 446 U.S. at 348-50; see also Freund v. Butterworth, 165 F.3d 839, 858-60 (11th Cir. 1999) (applying the Cuyler standard and finding that "adverse effect" required proof of (1) a "plausible" alternative strategy, (2) the fact that the strategy would have been reasonable, and (3) a link between the actual conflict and his lawyer's failure to employ the alternative strategy); Malonz v. Calderon, 167 F.3d 1221, 1222 (9th Cir. 1999) (staying execution due to existence of substantial issue under Cuyler).} In such cases, there is no need for the defendant to establish a reasonable probability that the outcome of the trial would have been different if no conflict of interest had existed.\footnote{See Freund, 165 F.3d at 858-60}

Courts have recognized that a conflict of interest may exist, not only between co-defendants, but between an attorney and his client. For instance, in United States v. Ellison,\footnote{798 F.2d 1102 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987).} the Seventh Circuit considered a case where the defendant sought to withdraw a guilty plea because his attorney persuaded him to forgo trial, despite the defendant's protestations of innocence, because he "did not want to make waves with the federal prosecutors with whom he would be working in the future."\footnote{Id. at 1105.}

The district court had held a hearing concerning the defendant's allegations, but did not appoint new counsel; instead, the same attorney continued to represent the defendant at the hearing, even though he also gave testimony adverse to his client's allegations.\footnote{See id.} The Seventh Circuit held that this amounted to a Sixth Amendment violation, because the defense counsel "acted as both counselor and witness for the prosecution"\footnote{Id. at 1107.} and thus fulfilled "inherently inconsistent" roles.\footnote{Id.} Moreover, the court held that since the defendant made allegations that would amount to malpractice on the part of the attorney if true, the attorney's interests were directly in opposition to those of his client at the hearing.\footnote{See id.; see also Mathis v. Hood, 937 F.2d 790, 796 (2d Cir. 1991) (finding actual conflict of interest in lawyer's representation of defendant during appeal where defendant filed a grievance against his attorney with disciplinary committee prior to appeal).} Therefore, where actual conflicts of interest exist between an attorney and his client, the rule of presumed prejudice is as applicable as where the conflict is between two clients represented by the same attorney.\footnote{See United States v. Soldevila-Lopez, 17 F.3d 480, 486 (1st Cir. 1994) (stating that it is "well settled" that an actual conflict may be shown where an attorney acted in his own interest).}

The Sixth Amendment may also be violated by government intrusion into the attorney-client relationship.\footnote{See United States v. Ofshe, 817 F.2d 1508, 1516 (11th Cir. 1987) (stating that the Fifth Amend-}
counsel standard, which focuses on the conduct of defense counsel, the non-
governmental intrusion standard focuses on the actions of the government. In
United States v. Morrison, \(^{155}\) the Supreme Court set forth a standard similar to
the Strickland test for ineffective assistance of counsel by which to determine
such claims. \(^{156}\) In order to establish a Sixth Amendment violation based upon
government intrusion into the attorney-client relationship, a defendant must
show that the government's actions violated the Sixth Amendment and that he
was actually prejudiced. \(^{157}\) At least one circuit has gone beyond Morrison to
adopt a per se rule that intentional intrusions into a defendant's attorney-client
relationship violate the Sixth Amendment and constitute reversible error. \(^{158}\)
This rule, however, has not been adopted by a majority of other circuits, \(^{159}\) al-
though a number of appellate and district courts have suggested that no
showing of prejudice is necessary in cases where the government intrudes
upon the attorney-client relationship deliberately and without legitimate pur-
pose. \(^{160}\)

B. Fifth Amendment

The Sixth Amendment right to counsel has additional limitations that im-
 pact upon a defendant's right to effective representation at certain stages of a
criminal proceeding. Most importantly, the Sixth Amendment right to coun-
sel attaches only upon the filing of formal criminal charges and ceases to op-
erate at the conclusion of a criminal proceeding. \(^{161}\) Accordingly, the Due Pro-
cess Clause of the Fifth Amendment provides a defendant's right to an
unimpaired relationship with his counsel at the investigatory stage of a case. \(^{162}\)

Due process of law is summarized as a constitutional guarantee of respect
for those "personal immunities which are . . . 'so rooted in the traditions and
conscience of our people as to be ranked as fundamental,'” \(^{163}\) Certain viola-
tions of a suspect's pre-arraignment right to counsel, such as failure to inform
him of his right to an attorney upon being taken into custody as well as before
interrogation, have been held to be per se violations of the Fifth Amend-
ment. \(^{164}\) In addition, the Fifth Amendment has been invoked in order to seek

\(^{156}\) See id. at 364-67.
\(^{157}\) See id. at 364-65.
\(^{158}\) See United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978).
\(^{159}\) See, e.g., United States v. Schwimmer, 924 F.2d 443, 447 (2d Cir. 1991) (requiring prejudice
even for intentional intrusion into attorney-client relationship); United States v. Steele, 727 F.2d 580,
586-87 (6th Cir. 1984) (same).
\(^{160}\) See, e.g., Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995) (establishing per se rule of
reversible error upon proof of intentional intrusion into attorney-client relationship where the state does
not have a legitimate law enforcement purpose for its intrusion).
\(^{162}\) See id.
\(^{163}\) Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Snyder v. Massachusetts, 291 U.S. 97,
105 (1934)).
dismissals of criminal cases based upon "outrageous government conduct" that violates a defendant's right to due process of law.

The outrageous government conduct defense was first suggested in 1952 in the case of *Rochin v. California*.

In his concurring opinion, Justice Douglas argued that a court may dismiss an indictment when the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. This concept of due process stems from the objective approach to entrapment cases, in which the government's over-involvement in criminal activity may violate a defendant's Fifth Amendment rights. However, the vagueness of the standard that the Supreme Court has outlined for this defense has meant that, despite frequent invocation of the defense of outrageous government conduct, convictions have rarely been reversed on this ground.

The Supreme Court has twice addressed the parameters of the outrageous government conduct defense, in *United States v. Russell* and *Hampton v. United States*. In both of these cases, the Court recognized the existence of the defense but urged that it be reserved for only those cases that most shocked the conscience of the court. As a result, this defense has often been denied even in cases where the government acts deceptively or where it proactively participates in a crime that it is investigating. Rather, the challenged conduct must be shocking, outrageous and clearly intolerable, such as when the government contacts a minor criminal and effectively provides him with the equipment, contacts and money necessary to become a major narcotics trafficker. Accordingly, due to the lack of clear standards and the Supreme Court's warning dictum in *Hampton*, the outrageous government conduct defense has become, for most purposes, a defense that exists only in theory.

**C. Attorney-Client Privilege**

Another protection of the attorney-client relationship is the evidentiary privilege that exists for confidential communications between an attorney and his client. This privilege belongs to the client, cannot be waived by the at-

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166 See id. at 177-78 (Douglas, J., concurring).
168 See United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993) ("The banner of outrageous misconduct is often raised but seldom saluted.").
171 See id. at 488-91.
172 See United States v. Orena, 145 F.3d 551, 561 (2d Cir. 1998) (upholding denial of motion to dismiss based on alleged "outrageous government conduct" where FBI agent secretly provided information to a government informant to assist him in criminal activities within an organized crime family).
174 See, e.g., United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).
175 The attorney-client privilege is the oldest of common-law privileges, existing prior to the estab-
torney, and survives even the death of the client. Accordingly, the attorney-client privilege is the most far-reaching of the rights that safeguard confidential attorney-client communications, extending to former as well as current clients. Thus, the primary weapon against attorneys who inform on former clients is not the direct protection of the Fifth or Sixth Amendments but the attorney-client privilege.

This privilege, which is not specifically mentioned in the Constitution, is, strictly speaking, an evidentiary privilege rather than a constitutional right. However, because the Sixth Amendment has been held to guarantee the privacy of communications between a criminal defendant and his counsel, the privilege—at least in criminal cases—safeguards a constitutional right. Thus, despite the protestations of many prosecutors—including former Independent Counsel Kenneth Starr—that the attorney-client privilege is not a constitutional right, a number of courts have held that this privilege is of constitutional dimension when invoked in the context of a criminal prosecution. Several commentators have also argued that "the sixth amendment right to counsel, when read together with the fifth amendment's protection against forced self-incrimination, makes the attorney-client privilege a constitutional imperative."

The attorney-client privilege, however, is subject to a number of exceptions, including the "crime-fraud" exception, which applies when the conversation between client and attorney is in furtherance of ongoing crime, fraud or

8 J. WIGMORE, EVIDENCE § 2292 (1961) (footnote omitted); see also In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036 (2d Cir. 1984) (using the Wigmore definition).
This exception, in the case of attorney-informants, has often swallowed the rule, because prosecutors have often regarded it as a green light to recruit attorneys to inform on their clients, even regarding matters on which the attorney is currently representing the client. As one commentator has stated, "[u]se of the crime/fraud exception by prosecutors . . . 'skyrocketed' [beginning in the mid-1980s]," assisted by federal courts' broad construction of the exception. Thus, the crime/fraud exception further weakens the protections of the attorney-client privilege, and creates an environment in which prosecutors may frequently claim that their use of attorney-informants is legitimate because the crime/fraud exception effectively negated the defendant's attorney-client privilege.

IV. THE COURTS' RESPONSE TO ATTORNEY-INFORMANTS

The federal courts have almost uniformly condemned the use of criminal defense attorneys as informants against their clients. At the same time, however, the judiciary has effectively condoned this conduct by refusing to sanction prosecutors and defense attorneys who engage in such behavior except in the most egregious of circumstances. This section details the manner in which the courts' focus on prejudice toward the defendant and the courts' refusal to apply ethical rules and conflict of interest standards has effectively placed a judicial imprimatur on the use of attorney-informants despite verbal condemnation of the practice.

A. Outrageous Government Conduct and the Attorney-Informant

Only two published decisions exist in which an indictment has been dismissed due to outrageous government conduct in utilizing an attorney as an informant, and the circumstances of these cases illustrate the difficulties in applying this defense to lawyer-informant situations. The first of these cases is the egregious violation of the attorney-client relationship which took place.

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184 See, e.g., United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984) (holding that the facilitation of "an ongoing criminal conspiracy" did not warrant strict confidentiality).

185 See David J. Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 N.C.L. REV. 443, 446 (1986) (concluding that "the exception has been abused and distorted, above all in the service of federal prosecutors, to the point where the attorney-client privilege has been seriously eroded"); Stern & Hoffman, supra note 5, at 1797 (stating that the crime-fraud exception "has substantially eroded the scope of attorney-client privilege").

186 Stern & Hoffman, supra note 5, at 1800-01 (describing the low hurdles set by courts which enable prosecutors to invoke crime-fraud exception on a frequent basis).

187 See id. at 1800-01.

188 See id. (stating that the crime-fraud exception has a "tendency . . . to swallow up the rule of attorney-client privilege altogether").

189 See supra notes 9-12 and accompanying text.

190 See United States v. Sabri, 973 F. Supp. 134, 147 (W.D.N.Y. 1996) (concluding "that the government's conduct as to Count II of the indictment is outrageous. . ."); United States v. Marshank, 777 F. Supp. 1507, 1524 (N.D. Cal. 1991) (dismissing the indictment because the government's conduct "was so outrageous that it shocked the universal sense of justice").
in *United States v. Marshank*. In *Marshank*, the court noted that evidence obtained through Marshank's counsel was "used against [him] at every turn" during a period of three years, that "the government's misconduct... was designed to and would give the prosecution an unfair advantage at trial," and that the federal prosecutors' conduct went far beyond "passive tolerance" of impropriety creating a "complete lack of respect for the constitutional rights of the defendant." Accordingly, based upon the totality of the circumstances, the court dismissed the indictment.

Similarly, in *United States v. Sabri*, the court granted partial dismissal of the indictment against the defendant on the grounds that "the government's manipulation of the attorney-client relationship... is offensive to the principles which underlie our criminal justice system." Specifically, the court gave great weight to the fact that the defense attorney, at the government's instigation, "used the [attorney-client] relationship to initiate communications with the defendant, exhort him to be frank and not hold back... and then directed the conversation to the topic of his previous comments about violence." In other words, the government proactively abused the trust between attorney and client not only to investigate a crime, but to create an additional crime. Noting that alternative means of investigation such as wiretaps and surveillance were available to the government, the court determined that the existence of such egregious circumstances mandated dismissal of the charges obtained through the use of the attorney-informant.

In other cases, however, the outrageous government conduct defense has not been successful. In the *Arteaga* case, for instance, the Fifth Circuit focused upon the conduct of the defendant, holding that "[a] defendant who actively participates in the crime may not avail himself of the defense." Thus, despite the fact that the outrageous government conduct defense focuses upon the behavior of the government rather than the defendant, the Fifth Circuit applied a standard of predisposition similar to the traditional entrapment de-

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191 See *Marshank*, 777 F. Supp at 1511. The facts of *Marshank* are described supra in notes 50-60 and accompanying text.
192 Id. at 1521, 1524 (citing United States v. Simpson, 813 F.2d 1462, 1468 (9th Cir. 1987) (noting that "the government's passive tolerance" here of a private informant's questionable conduct "[w]as less egregious" than the conscious direction of government agents typically present in outrageous conduct cases.).
193 See *Marshank*, 777 F. Supp. at 1524 (dismissing the indictment "[b]ecause the government's conduct was fundamentally unfair").
194 973 F. Supp. at 137. The facts of *Sabri* are fully set forth supra in notes 88-99 and accompanying text.
195 Id. at 147.
196 Id.
197 See id. The court determined, however, that dismissal of the first count of the indictment was not warranted, as this count stemmed from statements made by the defendant to his attorney prior to her involvement with the government. See id. at 146-47 (concluding that the government's conduct "as it relates to Count I is [not] outrageous or improper in any way."). Thus, the attorney's actions at that time are not attributable to the government and cannot be categorized as prosecutorial misconduct. Id. Moreover, the court found that the attorney's disclosure of these statements to the government was proper, as an attorney is allowed "to reveal the confidences of a client who intends to commit a crime." Id. at 144 (citing MODEL RULES OF PROFESSIONAL CONDUCT DR 4-101(c)(3) (1983)).
198 United States v. Arteaga, 807 F.2d 424, 427 (5th Cir. 1986).
Likewise, in United States v. Fortna, the Fifth Circuit dismissed James Harnage's outrageous government conduct claim on the ground that "[t]he government must often rely on those in close relation to the defendant to infiltrate criminal operations." Thus, the government's intrusion into a legally sanctioned relationship based upon trust cannot form the foundation of an outrageous government conduct defense, at least within the Fifth Circuit.

The difficulties with the outrageous government conduct defense are best demonstrated by the Third Circuit's decision in United States v. Voigt. In Voigt, the Third Circuit held that a defendant cannot establish outrageous government conduct "premised upon the deliberate intrusion into the attorney-client relationship" unless "the defendant can point to actual and substantial prejudice." Such prejudice can only be demonstrated when: (1) the government is objectively aware of an ongoing attorney-client relationship between the defendant and the informant; (2) the government deliberately intrudes into the attorney-client relationship; and (3) an "actual and substantial prejudice" analogous to that required under Strickland is created. Thus, the Third Circuit injected a requirement of prejudice towards the defendant into a defense that focuses primarily on the objective outrageousness of the government's conduct. In fact, under the Voigt standard, a defendant cannot obtain dismissal, no matter how outrageous the conduct of federal prosecutors, unless he can prove that his trial was affected by the government's behavior. This standard would make it virtually impossible to win pretrial dismissal based on government use of attorney-informants, and would render even posttrial claims difficult to prove due to the demanding harmless error standard used by federal courts.

See id. To support its conclusion, the Arteaga court cited Justice Rehnquist's plurality opinion in United States v. Hampton, 425 U.S. 484 (1976), which stated that a criminal defendant cannot win dismissal of an indictment due to government misconduct unless he was entrapped. See Arteaga, 807 F.2d at 426 (noting that "the due process clause forbids the government to act improperly even against culpable persons") (citing Hampton, 425 U.S. at 488-89). However, in Hampton, Justice Rehnquist spoke for only three Justices in his plurality opinion. Both Justice Powell's separate concurrence and Justice Brennan's dissent, which collectively spoke for five Justices, endorsed the proposition that the outrageous government conduct defense is available regardless of predisposition. See id. at 495 n.7 (Powell, J., concurring) (noting that police involvement that reaches "a demonstrable level of outrageousness" might bar conviction); id. at 497 (Brennan, J., dissenting) (supporting "a bar to conviction... where the conduct of law enforcement authorities is sufficiently offensive...""). The majority of the Hampton court thus recognized a defense based on objectively outrageous government conduct which is applicable regardless of the defendant's predisposition to commit the crimes with which he is charged. See also United States v. Luttrell, 889 F.2d 806, 811 (9th Cir. 1989) (noting that the outrageous government conduct defense does not depend upon lack of predisposition); State v. Lively, 921 P.2d 1035, 1048-49 (Wash. 1996) (reversing conviction on ground of outrageous government conduct despite earlier rejecting entrapment defense due to evidence of predisposition).

See Fed. R. Crim. Pro. 52(a) (defining harmless error as "[a]ny error, defect, irregularity or variance which does not affect substantial rights.").
B. The Sixth Amendment and the Attorney-Informant

Sixth Amendment arguments have likewise been substantially ineffective in combating prosecutorial use of attorney-informants. This is largely due to the fact that, except in cases involving actual conflict of interest, the defendant is required to demonstrate prejudice arising from the Sixth Amendment violation.\(^{206}\) Thus, in the seminal case *United States v. Ofshe*,\(^{207}\) the Eleventh Circuit declined to find reversible error because no evidence of prejudice resulting from taped conversations between Ofshe and his attorney was admitted at trial.\(^{208}\) Likewise, in *Voigt*, the Third Circuit declined to reverse despite its prior holding that deliberate intrusion into the attorney-client relationship was *per se* reversible error, because the intrusion was not aimed at the procurement of "confidential defense strategy."\(^{209}\) Again, only in *Marshank* was the government's intrusion into the attorney-client relationship found sufficient to constitute reversible error under the Sixth Amendment.\(^{210}\)

These rulings are deficient in several respects. First, the Ofshe court's focus on particularized prejudice is inapplicable in the context of an attorney-informant, as confidential information gained from defense attorneys can often lead prosecutors to additional valuable evidence. Thus, the court failed to consider that the information disclosed to the prosecutor by Ofshe's attorney might have led prosecutors to other incriminating evidence which was used at trial and which would not have been located but for the attorney's cooperation.

Second, decisions such as *Ofshe* and *Voigt* fail to take into account the possibility of conflict of interest, which does not require a showing of prejudice. In *Ofshe*, the defense attorney entered into a cooperation agreement with the government, agreeing to disclose information in return for immunity or leniency for his other clients.\(^{211}\) Thus, the attorney was representing his own interests, in addition to Ofshe's, during the pendency of Ofshe's criminal prosecution. Since those interests were inimical to those of Ofshe, a conflict of interest existed and prejudice should therefore have been presumed under the *Cuyler* standard.\(^{212}\) In fact, in any case where an attorney enters into a cooperation agreement with the government, he is arguably representing his

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206 See supra notes 133-56 and accompanying text.
207 817 F.2d 1508 (11th Cir. 1987).
208 See id. at 1515 (noting that "Ofshe suffered no prejudice as a result of the taped conversation.").
209 Voigt, 89 F.3d at 1071 (noting that "[t]he record in this case demonstrates that the government was scrupulous in its effort to avoid procuring confidential defense strategy.").
210 See *United States v. Marshank*, 777 F. Supp. 1507, 1525 (N.D. Cal. 1991) (holding that, "the government's collaboration with [the defendant's attorney] in the investigation, arrest and prosecution of the defendant . . . circumvented and diluted the protections guaranteed to the defendant by the Sixth Amendment right to counsel.").
211 See *Ofshe*, 817 F.2d at 1511 (noting that the defendant's attorney provided the government with information about "several former and present clients," including the defendant, in order to "diminish his own criminal responsibility").
own interests and should therefore be regarded as engaging in a conflict of interest *per se* with any client upon whom he is providing information to the government.\(^{213}\)

**C. The Attorney-Client Privilege and the Lawyer-Informant**

Invocation of the attorney-client privilege in cases involving lawyer-informants is also difficult, both because of the crime-fraud exception and the requirement that the information disclosed must relate to the matter for which the attorney was retained.\(^{214}\) Thus, in *Ofshe*, the defendant’s claim of attorney-client privilege was denied because the information collected by his lawyer was in furtherance of ongoing crime and was used in a different investigation from that for which he had retained counsel.\(^{215}\) Similarly, in *Arteaga*, an attorney was allowed to inform against a former client because the matters concerning which he provided information did not concern the case for which he had been previously retained.\(^{216}\) Only in the case of James Hamage did a court remand the issue of an attorney-informant for a hearing as to whether the attorney-client privilege had been violated, and only because issues of fact existed as to whether the communications recorded by his attorney were confidential.\(^{217}\)

Thus, the high bar set by the courts in all three of the areas commonly implicated by the use of attorney-informants creates a nearly insurmountable hurdle to the reversal of convictions based upon this unethical conduct. Accordingly, prosecutors are free to use defense attorneys as informants against their clients, secure in the knowledge that their conduct will not endanger the convictions they obtain and that the maximum sanction they face is an ineffectual verbal slap on the wrist from the judicial system. Thus, the courts’ tepid response to the problem of attorney-informants and their failure to pursue creative solutions has led to an environment in which “ratting” by defense attorneys is judicially tolerated or even tacitly encouraged.

**V. A Stronger Response to Attorney-Informants**

The widespread and growing intrusion into the relationship between criminal attorneys and their clients necessitates a strong and unequivocal response. In many respects, the courts have had difficulty formulating this response due to the fact that established constitutional and statutory doctrines

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\(^{213}\) *But see id.* at 629 (asserting that “[t]he Coyler standard mandates an actual conflict of interest resulting in the attorney’s adverse performance”).

\(^{214}\) *See Tremblay*, *supra* note 4, at 78.

\(^{215}\) *See Ofshe*, 817 F.2d at 1515.

\(^{216}\) United States v. Arteaga, 807 F.2d 424, 427 (5th Cir. 1986) (holding that “it is also not outrageous to use an informant who previously served the defendant as an attorney on commercial matters”).

\(^{217}\) United States v. Fortna, 796 F.2d 724, 742 (5th Cir. 1986) (withholding judgment on whether an indictment should be quashed because an attorney gave the government information he had learned “pursuant to the attorney-client relationship”).
are often inadequate to address the problem at hand. Thus, at least part of the response must come from the agencies which set the rules by which the criminal justice system operates—the legislature and professional disciplinary boards. However, it is also possible, within the current legal framework, for the courts to fashion a more effective response to the use of attorney-informants through creative use of established principles. This section will outline several means by which professional associations, legislatures and the courts may work together to formulate a comprehensive response in order to prevent the Sixth Amendment right to an effective criminal defense from being further undermined.

A. Expanding the Fifth Amendment to Address the Attorney-Informant Situation

Constitutional interpretation is within the unique province of the judiciary. Thus, it is within the power of the courts to reinterpret existing Fifth Amendment doctrines in order to more adequately address the growing practice of prosecutorial use of attorney-informants. This could be accomplished by one of two methods.

The first method would be to establish a category of Fifth Amendment violation, separate from the realm of outrageous government conduct, which is established when a prosecutor knowingly allows a defense attorney to inform on a client, former client or potential client. This has been done with regard to other situations involving a defendant’s right to counsel; for instance, the famous case of *Miranda v. Arizona* implemented a procedural rule to protect a suspect’s Fifth Amendment right to be informed of his right to counsel upon being taken into custody. Although a *Miranda* violation does not normally fall into the category of “outrageous government conduct,” it was felt by the Supreme Court to be sufficiently important to securing a defendant’s right to due process of law to be protected by judicial sanction. Since a client’s right to communicate with his attorney and receive effective representation is a similarly important aspect of the adversarial criminal justice system, it would make sense to hold that intrusion into this right by prosecu-

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218 See supra text accompanying notes 185-207.
219 See, e.g., Richard Klein, Legal Malpractice, Professional Responsibility and Representation of the Indigent Defendant, 61 Temp. L. Rev. 1171, 1174 (1988) (stating that legislatures of every state but California adopted the ABA Model Rules of Professional Responsibility soon after their promulgation). The sources of ethical rules may include professional associations such as the ABA, state legislatures, or disciplinary boards. See id.; see generally Mark Tuft, Trial Publicity—Before, During and After Trial, 537 PLI/Lit 7, *24 (1995) (describing how the California state legislature passed resolutions instructing the state bar association—which is normally responsible for enacting disciplinary rules—to enact a rule regulating trial publicity and sexual relations between attorneys and their clients).
220 See infra text accompanying notes 215-268.
221 See City of Boerne v. Flores, 521 U.S. 507, 524 (1997) (“The power to interpret the Constitution in a case or controversy remains in the Judiciary.”).
223 See id. at 474.
224 Id.
tors is a presumptive violation of the Fifth Amendment.225

This would, of course, require a change in existing law. Even within the framework of current law it is still possible to address the problem of attorney-informants through fuller and more expansive use of the outrageous government conduct defense. Since the Supreme Court has not set a clear standard concerning the threshold of outrageous government conduct,226 lower courts have considerable freedom, within the law as it currently exists, to determine that knowing prosecutorial intrusion into the attorney-client relationship violates this standard.227 At least two district courts have in fact done so,228 others, however, have been handicapped by their focus on predisposition and prejudice to the defendant rather than the conduct of government officials.229 If the courts were to apply the outrageous government conduct defense as it is intended to be applied—as a sanction for flagrant government misconduct regardless of the practical effect upon the defendant230—they would possess a much more powerful weapon with which to control prosecutorial abuse of the attorney-client relationship.231

225 See Stern & Hoffman, supra note 5, at 1825 (stating that “[t]he centrality of the attorney-client relationship in our criminal justice and adversary systems derives from both constitutional and common law sources.”); see also Meredith B. Halama, Loss of a Fundamental Right: The Sixth Amendment as a Mere “Prophylactic Rule”, 1998 U. ILL. L. REV. 1207, 1230-42 (1998) (noting that attorney-client communication is of fundamental importance to safeguarding Sixth Amendment rights).

226 See, e.g., Hampton v. United States, 425 U.S. 484, 487-90 (1975) (holding that the government did not violate a defendant's due process when the defendant was convicted of heroin distribution to government agents, heroin which was given to the defendant by a government informant).

227 See United States v. Marshank, 777 F. Supp. 1507, 1523 (N.D. Cal. 1991) (holding that the government's collaboration with the defendant's attorney while the defendant was being investigated and prosecuted violated the defendant's Sixth and Fifth Amendment rights); see also United States v. Sabri, 973 F.Supp. 134, 146-47 (W.D.N.Y. 1996) (dismissing an indictment due to the defendant's attorney recording conversations with her client and the government's abusive manipulation of the attorney-client relationship).

228 See id.

229 See United States v. Voigt, 89 F.3d 1050, 1070 (3d Cir. 1996) (noting that the court will not address the issue of outrageous government conduct unless the defendant makes a showing of prejudice).

230 See supra text accompanying note 195; see also Stephen A. Miller, The Case for Preserving the Outrageous Government Conduct Defense, 91 N.W.U. L REV. 305, 312-26 (1996) (arguing that the outrageous government conduct defense should properly focus upon the government's due process violations rather than the defendant's predisposition to commit the charged offense because otherwise it would simply duplicate the already-existing entrapment defense).

231 In the event that a court is concerned with the adverse impact on society which would result from the outright dismissal of the charges against a defendant accused of serious offenses, it could impose the lesser sanction of suppressing evidence found to have been obtained through outrageous government conduct. Although the Eighth Circuit in United States v. Shaw, 94 F.3d 438, 442 n.5 (8th Cir. 1996), noted that the ordinary remedy sought in outrageous government conduct cases was dismissal and questioned whether the remedy of suppression was appropriate, other courts have entertained motions to suppress under this doctrine. See United States v. Bouchard, 886 F. Supp. 111, 114 (D. Me. 1995) (evaluating motion to suppress evidence allegedly gained through outrageous government conduct). Moreover, the Supreme Court has stated that the "fruit of the poisonous tree" doctrine "excludes evidence obtained from or as a consequence of lawless official acts." Costello v. United States, 355 U.S. 265, 280 (1961). Accordingly, a court would be within its authority to sanction prosecutors by suppression of evidence gained through the use of an attorney-informant rather than dismissing the indictment outright. Of course, in cases which depend entirely upon illegally obtained evidence, suppression is tantamount to dismissal. See Sabri, 973 F. Supp. at 139 (considering motions to suppress evidence and dismiss indictment together, as evidence obtained from attorney constituted sole evidence in case).
B. Sixth Amendment

It is also possible to achieve greater control over the use of attorney-informants under current Sixth Amendment jurisprudence. This, as with possible Fifth Amendment solutions, may be accomplished in several ways. First, the courts may adopt the Third Circuit precedent of United States v. Levy, under which an intentional government intrusion into the attorney-client relationship constitutes reversible error even absent a showing of prejudice to the defendant. Moreover, other circuits should adopt the Levy doctrine without the gloss put upon it by the Third Circuit in Voigt, under which the concept of knowing intrusion is limited to attempts to discover defense strategy rather than attempts to obtain confidential information for use at trial.

Second, courts may enforce the Sixth Amendment through a more vigorous interpretation of the conflict of interest doctrine as outlined in Cuyler v. Sullivan. Common sense dictates that an attorney who is under investigation and is negotiating a plea or cooperation agreement with the government is representing his own interests. If this attorney is also providing information about a client, then his interest in defending himself against the investigation is directly at odds with the interest of his client. Detailed analysis is not necessary to demonstrate that it is difficult, if not impossible, for an attorney to adequately and vigorously represent a client about whom he is providing incriminating information. Accordingly, any such situation should be regarded as an actual conflict of interest, and continued representation of a client by an attorney-informant should thus constitute reversible error without a showing of prejudice. In fact, such a conflict of interest should be presumed whenever an attorney is used as an informant after the government learns of his confidential relationship with his client, regardless of whether the initial approach is made by the prosecutor or the defense attorney himself. Thus, courts would be able to provide an appropriate sanction for the use of attorney-informants without having to create a new Sixth Amendment right.

C. Attorney-Client Privilege

A more expansive reading of the traditional attorney-client privilege is also necessary in order to eliminate or curtail the use of attorney-informants. This is necessary because the “crime-fraud” exception to the privilege has

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232 577 F.2d 200 (3d Cir. 1978).
233 See id. at 210.
234 See Voigt, 89 F.3d at 1070.
235 446 U.S. 335 (1980).
236 See Peterson, supra note 212, at 629-30 (noting that in such situations, prejudice is presumed and does not have to be shown).
become an exception which swallows the rule in the case of prosecutorial intrusion into the attorney-client relationship. In many cases, prosecutors have read the crime-fraud exception as blanket permission to enlist attorneys as informants with regard to ongoing investigations or even to induce defense attorneys to solicit their clients to commit crimes.

The necessary solution is to restrict the crime-fraud exception to future crimes which are unrelated to any matter for which the attorney is currently retained. Although the interests of justice may be served when an attorney reports a client's intention to commit an unrelated offense, any future offense which is related to the matter for which counsel has been retained is too intertwined with the attorney's representation of the client to be a safe subject of disclosure. In this situation, there is great danger that, while ostensibly disclosing information about future criminal plans, the attorney will inadvertently or deliberately disclose information about past offenses for which he has been engaged to represent the client. Only if the crime-fraud exception is restricted to unrelated matters will the defendant's constitutionally derived right to communicate confidentially with his attorney be adequately safeguarded.

D. Supervisory Power of the Court

A fourth legal doctrine which may be utilized to control the problem of attorney-informants is the inherent supervisory power of the court. The supervisory power, which has been recognized by the Supreme Court, may be used in the sound discretion of the trial judge and is not dependent on the existence of reversible error under an established legal standard. Rather, the supervisory power may be used "(1) to remedy a violation of a statutory or constitutional right; (2) to preserve judicial integrity; and (3) to deter future illegal conduct." Specifically, the court cited two grounds in its invocation of the supervisory power to dismiss the indictment against

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237 See supra notes 184-188 and accompanying text.

238 See id.

239 See United States v. Sabri, 973 F. Supp. 134, 148 (W.D.N.Y. 1996) (describing the Court's supervisory power and noting that it is limited and intended to be used on rare occasions).

240 See, e.g., United States v. Hale, 422 U.S. 171, 180 n.7 (1975) ("Where ... evidentiary matter has grave constitutional overtones ... we feel justified in exercising this Court's supervisory control.") (citations omitted); Mallory v. United States, 354 U.S. 449, 455-56 (1957) (holding that a confession obtained through misconduct is not admissible); Mesarosh v. United States, 352 U.S. 1, 14 (1956) (finding that a court may use its supervisory power to reverse a conviction based on false evidence).


242 777 F. Supp. at 1529.
Marshank: "the need to remedy the violation of the defendant's constitutional rights and to deter future government misconduct." In addition, the court noted that "[j]udicial integrity is severely threatened when professional ethical and court rules such as those involved here are flouted by the government." Similarly, the Western District of New York in Sabri invoked the supervisory power of the court in granting partial dismissal of the indictment against the defendant. Citing Marshank, the court determined that "the government's manipulation of the attorney-client relationship, even those relationships which relate to civil matters, may have profound implications upon the nature of the attorney-client relationship and the integrity of the judicial process." Accordingly, the court found that use of the supervisory power was appropriate because "[t]here is no need to add to the challenges of our criminal justice system, or to increase the public's distrust, by making it permissible for lawyers to act in concert with the government to investigate their own clients." Moreover, while noting that invocation of the supervisory power ordinarily required prejudice to the defendant, the Sabri court held that such prejudice could consist merely of improper manipulation of the attorney-client relationship.

Thus, a court may use its supervisory power to condemn the practice of using attorney-informants even if the facts of a particular case do not support dismissal under an established rule of law. In addition, two judicial comments on the supervisory power render it especially applicable in cases where criminal attorneys are prevailed upon to inform on their clients. First, the Supreme Court has noted that punishment of improper conduct by federal attorneys is a proper use of the supervisory power. Second, in determining whether to exercise the supervisory power, the court may consider whether use of the supervisory power is necessary to maintain the integrity of the judicial process and to deter future improper conduct by the government.

243 Id. at 1529. The court specifically noted that defense attorney Ron Minkin, who had acted as a de facto agent of the government, had violated Rule 3-310 of the Rules of Professional Conduct of the State Bar of California, providing that "[a] member shall not concurrently represent clients whose interests conflict, except with their informed written consent." Id. at 1529. Moreover, the court noted that the Northern District of California had adopted the California state disciplinary rules as court rules, so that a violation of the rules of professional responsibility was also a violation of the rules of court. Id. at 1530.

244 See United States v. Sabri, 973 F. Supp. 134, 148 (W.D.N.Y. 1996) ("It is settled . . . that supervisory power to dismiss an indictment, although extremely limited, does exist.").

245 Id.

246 See id. The author cites Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988), reasoning that the government's conduct must be flagrant and prejudice the defendant in order to warrant use of the supervisory power.

247 See id. It should be noted that courts have also used their supervisory power to regulate the issuance of grand jury subpoenas to attorneys, an issue related to the use of attorney-informants. See Stern & Hoffman, supra note 5, at 1807-14 (stating that courts have used their supervisory power both to quash subpoenas on an ad hoc basis and to establish rules requiring prior judicial approval for issuing subpoenas to attorneys).

248 See United States v. Hale, 422 U.S. 171, 181 (1975) (invoking its supervisory power by reversing the trial court and granting defendant a new trial).
cise the power, "[c]ourts have looked to whether there is a pattern of similar
government misconduct, on the theory that such widespread misconduct in-
creases the threat to judicial integrity."\(^2\) Since numerous commentators have
noted a widespread and growing trend toward the use of attorney-
informants,\(^2\) the supervisory power is particularly appropriate to curtailment
of similar abuses in the future. Thus, increased use of the supervisory power
will afford courts a means, within current law, to create an appropriate sanc-
tion for prosecutorial misuse of the attorney-client relationship even where the
facts of a case cannot be made to fit within one of the recognized areas of re-
versible error.

E. Ethical Sanctions

The final manner in which the use of attorney-client communications may
be controlled is through the use of ethical sanctions.\(^2\) This is the area where
the legislature and disciplinary boards may contribute the most to a solution of
the lawyer-informant dilemma, as the creation and enforcement of ethical
rules is frequently within their exclusive province.\(^2\)

Ethical rules are not themselves constitutionally mandated, but often serve
as important safeguards of constitutional rights. As the Second Circuit stated in *United States v. Hammad:*\(^5\) "[t]he Constitution defines only the 'minimal historic safeguards' which defendants must receive rather than the outer bounds of those we may afford them. In other words, the Constitution prescribe[s] a floor below which protections may not fall, rather than a ceiling beyond which they may not rise."\(^2\) The Model Code of Professional Responsibility was described in *Hammad* as playing a role in this system by "[safeguard]ing the integrity of the profession and preserv[ing] public confidence in our system of justice."\(^2\)

The relationship between ethical rules and the Constitution can thus be
analogized to the traditional Jewish legal concept of "placing a fence around
the law."\(^2\) This concept, first articulated by the twelfth-century philosopher
Moses Maimonides,\(^2\) holds "that restraints and prohibitions should be in
place to prevent us from reaching, or at least impede our progress toward, the
point of absolute and damning transgression. There should at least be safety

\(^2\) See supra Part II.
\(^2\) See Sabri, 973 F. Supp. at 143-46 (holding that ethical violations by defense attorneys require
dismissing Count II of an indictment against a defendant); *Marshank,* 777 F. Supp. at 1529 (citing ethical
violations by defense attorney as basis for dismissing indictment).
\(^2\) See supra note 219 and accompanying text.
\(^2\) 858 F.2d 834 (2d Cir. 1988).
\(^2\) Id. at 839 (citation omitted).
\(^2\) Id.; see also Bruce A. Green, *Whose Rules of Conduct Should Govern Lawyers in Federal Court
and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 473 (1996) (discussing the
Hammad case).
\(^2\) See MOSES MAIMONIDES, *MISHNEH TORAH*, Sanhedrin 24:4, at 73 (outlining the concept of
placing a fence around the law by means of extralegal sanctions).
\(^2\) See id.
rails around the abyss.” In other words, zealous enforcement of ethical rules—which go beyond the minimum protections provided by the Constitution—can prevent even accidental unconstitutional conduct and can further serve to prevent prosecutors and defense attorneys from entering the gray areas of doubtful constitutionality. In keeping with this legal concept, federal courts have held that suppression of evidence may be appropriate, at least under certain circumstances, in cases where ethical rules are violated. Moreover, violation of an ethical rule might result in a direct sanction of an attorney, up to and including disbarment.

Three ethical rules are especially applicable to the problem of criminal defense attorneys who inform against their clients. First, Disciplinary Rule 1-102(A)(4) of the ABA Model Code of Professional Responsibility—the foundation of many state ethical codes—provides that a lawyer shall not “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” In addition, the Model Code provides that an attorney must inform his client prior to disclosing any confidential information. Finally, attorneys are required to report instances of unethical conduct by other attorneys.

The interplay between these rules creates obligations for both prosecutors and defense attorneys in potential lawyer-informant situations. Disciplinary Rules 1-102(A)(4) and 4-101(B)(3), when read together, preclude defense attorneys from misrepresenting their relationship with the government to their clients and from disclosing privileged information to the government without the consent of the client. Moreover, the obligation to report unethical conduct by other attorneys creates an obligation on the part of prosecutors to inform state disciplinary agencies of the activities of defense attorneys who seek

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261 See id.; see also 6 ENCYCLOPEDIA JUDAICA 40 (1971) (describing the system of dietary rules developed by rabbinical authorities to prevent deliberate or accidental transgression of the law of the Torah). In addition, the concept of “placing a fence around the law” has been explicitly endorsed by federal courts in connection with certain areas affecting the integrity of the judicial system. See Davis v. Xerox, 811 F.2d 1293, 1294-95 (9th Cir. 1987) (stating that the rule requiring judges to recuse themselves when they have even a slight pecuniary interest in the outcome of a case is designed to place a fence around the Constitution by eliminating all possible temptation for judges to rule in their own self-interest and to enhance the perceived integrity of the judicial system).
262 See United States v. Hammad, 858 F.2d 834, 840-42 (2d Cir. 1988) (stating that suppression of evidence is a permissible, although not a mandatory, consequence of the government’s violation of DR 7-104).
263 See supra notes 36-46 and accompanying text.
264 See, e.g., N.Y. COMP. CODES R. & REGS. tit. § 1200.3 (1999) (“A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”).
265 DR 1-102(A)(4).
266 See DR 4-101(B)(3).
267 See DR 1-103(A).
268 The defendant in Sabri claimed that the conduct of his attorney violated DR 4-101. See United States v. Sabri, 973 F. Supp. 134, 145 n.10 (W.D.N.Y. 1996). However, since the record was inadequate to determine the applicability of this rule, the court denied the defendant’s motion without prejudice to renew at a later time. Id. In addition, the Sabri court denied without prejudice the defendant’s motion to dismiss based on ABA Formal Opinion 337, which prohibits the recording of conversations by attorneys unless all participants are notified. Id.
to inform on their clients.

In the Sabri decision, the Western District of New York identified additional rules that might be applicable to cases involving attorney-informants. Specifically, the court noted that Disciplinary Rule 7-101(A)(3) "requires a lawyer to represent a client zealously and prohibits [her] from causing 'prejudice or damage' to [her] client" unless the client has made non-privileged disclosures indicating that she has perpetrated a crime or fraud. In its analysis, the court noted that "[t]o go beyond mere disclosure . . . and to use the attorney-client relationship to investigate the client" oversteps the bounds of permissible conduct under this rule and compromises the attorney's responsibility to represent her client zealously.

Moreover, the Sabri court gave "teeth" to this rule by holding that a violation thereof may result in suppression of evidence or even dismissal of an indictment. Reasoning that the disciplinary rules were "designed to safeguard the integrity of the profession and preserve public confidence in our system of justice[,"] the court found that use of attorney-informants could have profound negative effects on the integrity of the judicial system if left unsanctioned. Accordingly, the court suppressed the results of the defendant's conversation with his attorney that were recorded after she became a government informant.

In addition, the disciplinary rules may provide a more direct sanction against the use of attorney-informants, by subjecting prosecutors and defense attorneys who engage in unethical conduct to censure, suspension or disbarment. The disciplinary rules have been used effectively against at least one defense attorney, who was disbarred for his unethical behavior in informing

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229 See id. at 145-46.
230 Id. at 145 (quoting DR 7-101(A)(3); DR 7-102(B)).
231 Id. In addition, while not deciding the issue, the court noted that "a strong case can be made that the spirit, if not the letter, of DR 5-101(C), DR 5-102 and DR 5-105 may have been violated." Id. at 145 n.11. These rules provide that a lawyer shall not accept employment if it is obvious that he will be called as a witness adverse to his client, that he should withdraw if it becomes obvious that he will be called as such a witness at a later time, and that he shall not continue multiple employment if a client will be adversely affected. See id. While the Sabri court acknowledged that "the language of these provisions appears to restrict their application to situations in which a lawyer is representing a client as an advocate in front of a court or tribunal; or where a lawyer is representing two clients," it noted that "[i]n spirit . . . it seems that each of these provisions seeks to prohibit a lawyer from continuing to represent an individual once a conflict of interest between the lawyer and the client arises." Id. Thus, "[b]y continuing to represent the defendant, and by expressly using the attorney-client relationship to obtain further evidence to be used against the defendant in a criminal prosecution, [attorney] Crogan-Mazur may well have violated these provisions." Id.
232 See id. at 145-46 (stating that, despite lack of authority precisely on point, "suppression of evidence based upon a violation of DR 7-101 is consistent with the Second Circuit's rationale in Ham- mad . . . ").
233 Id. at 146 (stating that, if use of attorney-informants were allowed, the government might enlist an attorney for a business engaged in civil litigation with a competitor to investigate possible violations of antitrust laws or recruit an attorney representing a taxpayer in litigation against the IRS to investigate potential criminal tax evasion charges).
234 See id.
235 See Mullen v. Canfield, 105 F.2d 47, 48 (D.C. Cir. 1939) (stating that any court that has the power to admit attorneys to practice also has the inherent power to censure, suspend or disbar them for unprofessional conduct).
on his clients. Application of these ethical standards to prosecutors, however, is made more difficult by the Department of Justice’s “Thornburgh Rule,” which allows federal prosecutors to ignore the ethical rules of the states in which they practice. The Thornburgh Rule has, in practice, allowed federal prosecutors to collaborate in unethical conduct by defense attorneys without fear of sanction by state disciplinary authorities. This practice is especially disturbing given that, discipline for ethical violations is often the only meaningful direct sanction available against prosecutors, due to their far-ranging immunity from civil suits for damages due to unconstitutional conduct.

There are several methods to overcome this obstacle. First, numerous federal courts have adopted state disciplinary rules as local rules of court, to which federal prosecutors as well as defense attorneys are subject. A second and more comprehensive solution, however, is provided by the Citizens’ Protection Act of 1998.

This act, which was drafted to curb abuses by federal prosecutors, was passed by a wide bipartisan margin of 345-82 in the House of Representatives. In addition to abolishing the Thornburgh Rule, the Act created an independent board to oversee the ethics of federal prosecutors and to require the Justice Department’s Office of Professional Responsibility to investigate and punish ethical abuses by Assistant United States Attorneys. However, all these provisions other than abolition of the Thornburgh Rule were effectively nullified by the 1998 House appropriations bill, which contained no funding for the independent review board or for additional investigatory personnel within the Office of Professional Responsibility. Moreover, even though the abolition of the Thornburgh Rule remained intact, the Justice Department was given six months to come into compliance, and has used much of the intervening time to lobby for repeal of the Act.

Congress took a major step toward remedying prosecutorial intrusion into the attorney-client relationship by enacting the Citizens’ Protection Act. Even without the remaining provisions, the abolition of the Thornburgh Rule will restore much-needed honesty to the Justice Department’s conduct in criminal investigations. However, the legislature must act further to restore and fully fund an enhanced Office of Professional Responsibility and an independent

See supra notes 38-46 and accompanying text.
See supra notes 111-14 and accompanying text.
See Stern & Hoffman, supra note 5, at 1817 (stating that “enforcement of the applicable disciplinary rules provides one of the few mechanisms available to ensure that prosecutors live up to their professional duties”).
See id.
See id.
See id.
See id.
ethic review board. Both of these are ultimately necessary to safeguard the constitutionally protected attorney-client relationship—the first because it would create the possibility of meaningful and uniformly-applied sanctions for unethical conduct, and the second because it would apply a fresh perspective to a law enforcement agency that has become dominated by the perception that "whatever works is all right."

VI. CONCLUSION

In the past ten to fifteen years, the use of criminal defense attorneys as informants against their clients has become more and more widespread. This practice has its roots in several larger trends in the criminal justice system, including the increasing number of defense attorneys who are themselves under criminal investigation and the growing tendency of prosecutors to use high-pressure tactics and to view the defense bar as criminals rather than colleagues. Moreover, despite their verbal condemnation of this practice, the courts' weak response has had the effect of enabling prosecutors to use attorney-informants with immunity.

In order to curtail this problem, a comprehensive solution is necessary that involves judicial, ethical and criminal sanction. Many of the elements of this solution could be achieved by creative use of current law, such as the application of the Cuyler conflict of interest doctrine to attorney-informants. Other elements could be achieved by legal reforms similar to the abortive Citizens' Protection Act, which impose stern ethical obligations on prosecutors to discourage unethical conduct on the part of defense attorneys. Finally, still other elements could be achieved by judicial re-examination of such doctrines as the outrageous government conduct defense and the proper standard of prejudice applicable to claims of ineffective assistance of counsel.

While some of these reforms may be far-reaching, they are nevertheless vitally necessary to the maintenance of a vigorous criminal defense bar. The strength of the criminal defense bar is one of the fundamental foundations of the adversarial justice system, without which many or even most of the other rights afforded to the accused are meaningless. Accordingly, it is necessary for all parties involved in the criminal justice system—the courts, the legislature, law enforcement agencies and disciplinary boards—to act in order to ensure that the constitutional right to a vigorous and uncompromised defense is preserved.

256 In certain egregious circumstances, criminal sanction for obstruction of justice under 18 U.S.C. § 1503 may even be appropriate.

257 Prosecution or Persecution, supra note 109, at B2.

258 See supra notes 190-205 and accompanying text for a discussion of the outrageous government conduct defense.

259 See supra Part IV.

260 See, e.g., People v. White, 436 N.E.2d 507, 509-10 (1986) (noting that, since certain constitutional rights including due process of law and protection against self-incrimination are not self-executing, the right to counsel is necessary to safeguard their vitality); People v. Garofolo, 389 N.E.2d 123, 126 (1979) (same).