

## Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View

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The Model Rules of Professional Conduct, and their predecessor Disciplinary Rules, include prohibitions on direct ex parte contact between lawyers and those represented by other lawyers in the matter.<sup>1</sup> The text of Model Rules of Professional Conduct Rule 4.2 reads:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.<sup>2</sup>

A feature of these rules that has proven enormously controversial over the years, and one with great practical impact on plaintiffs' employment lawyers, is the extent to which the rule prohibits ex parte contact between lawyers for individual employee plaintiffs, on the one hand, and on the other hand, potential witnesses employed by corporations or other organizations that are in a posture adverse to those plaintiffs. Plaintiffs' lawyers naturally seek the broadest possible access to such witnesses, while management-side lawyers ordinarily seek to limit access absent their express consent. Over the years, this issue has spawned an extraordinary amount of litigation with widely disparate results in various jurisdictions.

This article analyzes the existing jurisprudence on point as it relates to current employee-witnesses and former employees in both the private and public sectors, focusing only on civil litigation.<sup>3</sup> It is

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1. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2004); cf. MODEL RULES OF PROF'L CONDUCT DR 7-104.

2. The term "or court order" was added to the existing text of Rule 4.2 by the American Bar Association as part of a set of 2002 amendments to the Model Rules, available at <http://www.abanet.org/cpr/e2k-rule42.html>. See discussion *infra*. In all other respects, the text of the Rule was unchanged.

3. This article does not address the question of whether Rule 4.2 applies to communications made by or at the behest of government attorneys in the course of criminal

written from the perspective of a lawyer for an employee seeking maximum access to prospective witnesses. The law affecting each category of witness is summarized by grouping jurisdictions according to the general category (permissive, restrictive, or intermediate) into which they fall. The article then evaluates the various approaches and proposes an analytical framework for considering the issues raised by this controversy.

At the outset, it should be noted that Rule 4.2 precludes communication with a witness the lawyer *knows* to be represented. The Model Rules define “knows” as “actual knowledge” rather than “reasonably knows or should know.”<sup>4</sup> Thus, a lawyer should not be faulted (or worse, sanctioned) for interviewing employees not yet known to come within the ambit of the rule’s prohibitions. The lawyer must, however, terminate the interview when the lawyer learns through inquiry or the witness’s statements that the employee falls into a prohibited category.<sup>5</sup>

## I. The Ethical Constraints on Talking to Current Employees of Corporate Opposing Party

### A. Permissive View

This view interprets ABA Model Rule of Professional Conduct Rule 4.2, and its predecessor, DR 7-104(A)(1) of the Model Code of Professional Responsibility, as prohibiting opposing counsel from communicating only with employees in the corporation’s “control group”—*i.e.*, the most senior corporate managers—without the corporate attorney’s consent.<sup>6</sup> This view holds that only the employees with the power to control the corporation may properly be equated with the corporation,

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investigations, a central and longstanding issue in discussions about the meaning and impact of the Rule. See COMMENTS FROM U.S. DEP’T OF JUSTICE, PROFESSIONAL RESPONSIBILITY ADVISORY OFFICE TO ETHICS 2000 COMMISSION (Mar. 13, 2001); *see also* Reporter’s Explanation of [2002] Changes to Model Rules, *available at* [www.abanet.org/cpr/e2k-rule42rem.html](http://www.abanet.org/cpr/e2k-rule42rem.html); MODEL RULES OF PROF’L CONDUCT 4.2, cmt. 5 (2004).

4. MODEL RULES OF PROF’L CONDUCT R. 1.0(f) Terminology (1995).

5. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (no bar to communicating with represented person absent actual knowledge of representation); *Gaylard v. Homemakers of Montgomery, Inc.*, 675 So. 2d 363, 367 (Ala. 1996) (no sanction where no litigation had commenced and no reason to believe that potential defendant had retained counsel).

Note that “knowledge” is even harder to infer under the 2002 version of the Model Rules. In February 2002, Comment [8] to Model Rule 4.2 was amended to limit the circumstances in which actual knowledge may be presumed. The amendment deleted the sentence: “Such an inference [of knowledge of representation] may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed.” MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 8 (2002), *available at* <http://www.abanet.org/cpr/e2k-rule42.html>.

6. N.J. R. PROF’L CONDUCT 1.13(a), 4.2 (prohibits contacts with “litigation control group,” defined as those with significant involvement in determination of corporation’s legal position); Alabama Opinion RO 94-11 (Sept. 22, 1994), *reprinted in* NAT’L REP. ON LEGAL ETHICS AND PROF’L RESPONSIBILITY (1995) at 17 (lawyer representing client in both a gender and age discrimination case, where client is named as a witness by defen-

based on the theory that any corporate action would not take place without their input, and thus only they are within the concept of a “party”<sup>7</sup> for purposes of the no-contact rule.<sup>8</sup> To avoid any risk of overreaching, an attorney contacting a witness who is outside of the control group is generally required to (1) identify him/herself; (2) inform the employee of the controversy at issue; and (3) inform the employee of the reason for the particular inquiry.<sup>9</sup>

## B. Intermediate Views

### 1. Model Rule 4.2 Comment [4] Test

Until February 2002, when the ABA’s House of Delegates approved changes to the Model Rule (discussed below), the official Comment [4] to ABA Model Rule of Professional Conduct Rule 4.2 (1995) (in effect in many jurisdictions) stated:

In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.<sup>10</sup>

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dant corporation in age discrimination case, may talk to client about age discrimination action so long as client is not in defendant’s control group); *Johnson v. Cadillac Plastic Group, Inc.*, 930 F. Supp. 1437, 1442 (D. Colo. 1996); *Bey v. Village of Arlington Heights*, 50 Fair Empl. Prac. Cas. (BNA) 1375 (N.D. Ill. Aug. 9, 1989); *Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc.*, 471 N.E.2d 554, 560–61 (Ill. Ct. App. 1984) (applying no-contact rule only to “top management persons who had the responsibility of making final decisions”); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116 (D. Mont. 1986); *In re PMD Enterprises Inc.*, 215 F. Supp. 2d 519, 526–27 (D.N.J.); *Andrews v. Goodyear Tire & Rubber Co.*, 191 F.R.D. 59, 76–78 (D.N.J. 2000); *Apple Corps Ltd. v. International Collectors Soc.*, 15 F. Supp. 2d 456, 473 (D.N.J. 1998) (applying litigation control group test); *Bougé v. Smith’s Mgmt. Corp.*, 132 F.R.D. 560, 567, 569–71 (D. Utah 1990); *Wright by Wright v. Group Health Hosp.*, 691 P.2d 564, 566–67 (Wash. 1984) (collecting authorities).

7. In August 1995, the ABA amended Model Rule 4.2 to substitute the word “person” for “party”.

8. *Fair Automotive Repair, Inc.*, 471 N.E.2d at 560–61.

9. *See, e.g.*, *Prudential Ins. Co. of America Sales Practices Litig.*, 911 F. Supp. 148, 152–53 n.5 (D.N.J. 1995).

10. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 4 (1995). Many jurisdictions have followed this approach (or a close variation). *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (Rule 4.2 does not allow a lawyer representing a corporation to enforce a blanket prohibition against speaking with corporate employees); State Bar of Mich. Standing Comm. on Prof. Law & Ethics, Op. No. RI-120, 1992 WL 510812 (Mar. 6, 1992); *Weibrecht v. So. Ill. Transfer, Inc.*, 241 F.3d 875, 881–82 (7th Cir. 2001), *amended*, No. 00-1563, 2001 U.S. App. LEXIS 5642 (7th Cir. Mar. 27, 2001) (district court did not abuse its discretion in applying “Model 4.2 comment” test); *In re Grievance Proceeding*, No. 3:01GP6, 2002 U.S. Dist. LEXIS 18417, at \*9–10 (D. Conn., July 19, 2002) (holding that attorney did not violate Rule 4.2 by ex parte contact with in-house lawyer of organization with outside counsel); *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 878–79 (N.D. Ill. 2002); *De La Fuente v. FPM Ipsen Heat Treating Inc.*, No. 02C50188, 2002 U.S. Dist. LEXIS 24040, at \*6–8 (N.D. Ill. Dec. 16, 2002); *Orlowski v. Dominick’s Finer Foods, Inc.*, 937 F. Supp. 723 (E.D. Ill. 1996); *Brown v. St. Joseph*

Under this view, an employee with the power to bind the corporation or make “admissions,” or whose acts or omissions can be imputed to the organization, is included in the definition of “person.”

Attorneys and courts have struggled for many years with the “admissions” language. Despite many states’ adoption of the text of Comment [4], there has been no consensus as to its meaning. Courts have differed most notably on whether to interpret “admissions” as having the same meaning in the Comment as it does in Federal Rule of Evidence 801(d)(2)(D), *i.e.*, as applying to most employees whenever they discuss matters within the scope of their employment. Such a view on the meaning of “admissions” has the effect of restricting sharply the universe of potential *ex parte* interviews. By contrast, the *Restatement (Third) of the Law Governing Lawyers (Restatement)* states emphatically that “admissions” in the Comment is not meant to import the meaning of that term from the hearsay rule, but rather is intended to refer only to the much narrower category of employees who may make incontrovertible “binding admissions” a somewhat archaic concept.<sup>11</sup> The former interpretation would be “contrary to the policies” of the Rule.<sup>12</sup> There have been other variations as well; for example, in *Weeks v. Independent Sch. Dist. No. I-89*,<sup>13</sup> the Tenth Circuit Court of Appeals interpreted Oklahoma’s rule to prohibit *ex parte* interviews only with those employees who have “speaking authority” sufficient to bind the

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County, 148 F.R.D. 246, 253–54 (N.D. Ind. 1993); *Shoney’s Inc. v. Lewis*, 875 S.W.2d 514, 515–16 (Ky. 1994); *In re Bilbe*, No. 2002-B-1740, 2003 La. LEXIS 305, at \*25–26 (La. Feb. 7, 2003); *Woodard v. Nabors Offshore Corp.*, No. 00-2461, 2001 U.S. Dist. LEXIS 177 (E.D. La. Jan. 4, 2001); *Paulson v. Plaintiff Trucking, Inc.*, 210 F.R.D. 654 (D. Minn. 2002); *Smith v. Kansas City So. Ry. Co.*, 87 S.W.3d 266 (Mo. App. 2002); *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 108–09 (M.D.N.C. 1993); *Insituform of N. Am. v. Midwest Pipelines*, 139 F.R.D. 622 (S.D. Ohio 1991); *Univ. Patents v. Kligman*, 737 F. Supp. 325, 328 (E.D. Pa. 1990); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1155–57 (D.S.D. 2001). *See also* *Triple A Machine Shop, Inc. v. State*, 261 Cal. Rptr. 493 (Cal. Ct. App. 1989); *Chancellor v. Boeing*, 678 F. Supp. 250, 253 (D. Kan. 1988); *Massa v. Eaton Corp.*, 109 F.R.D. 312, 313–15, 39 Fair Empl. Prac. Cas. (BNA) 1211 (W.D. Mich. 1985) (same result interpreting DR 7-104(A)(1)); *State ex rel. Pitts v. Roberts*, 857 S.W.2d 200 (Mo. 1993) (adopting comment 4 test); *Baisley v. Missisquoi Cemetery Assoc.*, 708 A.2d 924 (Vt. 1998) (rejecting blanket ban and permissive view, denying contact because employee would be source of party admission and low need for contact by plaintiff). National Labor Relations Board’s Guidelines Concerning Appropriate Contacts with Represented Parties, OM 02-36 (Feb. 15, 2002) (NLRB’s attorneys must contact and obtain consent from organization’s attorney before initiating contact with or interviewing a current supervisor or agent). Arizona and Iowa also currently have under consideration the adoption of variants of this approach. *See* [http://www.azbar.org/BOG\\_Redlined\\_Rule\\_Changes\\_120202.htm](http://www.azbar.org/BOG_Redlined_Rule_Changes_120202.htm) (Arizona) and <http://cartwright.drake.edu/gregory.sisk/IowaEthicsRulesIowaEthicsRulesDrafting.html> (Iowa).

11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100, cmt. e (2000).

12. *Compare* *Orlowski*, 937 F. Supp. at 730 (prohibition should be read narrowly to permit broad access to witnesses), *with In re: Air Crash Disaster near Roselawn*, 909 F. Supp. 1116, 1121 (N.D. Ill. 1995) (broad prohibition because “virtually every employee may conceivably make admissions binding on his or her employer”).

13. 230 F.3d 1201 (10th Cir. 2000).

corporation; however, in determining which employees “speak” for defendant, the court considered whether the individual’s statement could be deemed an admission in the sense of an exclusion from the hearsay rule.<sup>14</sup>

2. 2002 Changes to Model Rule 4.2 and Its Comments

In February 2002, the ABA’s House of Delegates adopted a series of changes to the existing Model Rules, largely responsive to proposals from a blue-ribbon panel known as the “Ethics 2000 Commission.”<sup>15</sup> These changes included revisions in Rule 4.2 and, notably, in its Comments, including Comment [4].<sup>16</sup> These changes generally had the effect of clarifying the propriety of broad access of an adversary’s attorneys to employee-witnesses. Much of the impetus behind the Comment [4] changes arose from the disarray in the existing body of case law, and particularly from the ABA’s view that the “admissions” language in Comment [4] had been misinterpreted in the line of cases that had interpreted it broadly.<sup>17</sup>

Thus, the ABA revised Comment [4] (now Comment [7]) to Rule 4.2 to prohibit communication only with

a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.<sup>18</sup>

The revised Comment pointedly deleted the existing language barring contact with persons “whose statement may constitute an admission

14. *Id.* at 1211.

15. The formal name of the Ethics 2000 Commission was the “Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000).”

16. The 2002 vote revised the text of Model Rule 4.2 as described in note 2, *supra*. The House of Delegates also added a Comment (now Comment [6]) to Rule 4.2 that states:

[a] lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

See MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 6 (2003).

17. See Ethics 2000 Commission Draft for Public Comment, Model Rule 4.2, Reporter’s Explanation of Changes (Feb. 21, 2000) (hereinafter *Reporter’s Feb. 2000 Explanation*).

18. The term “constituent” was adopted as a substitute for the phrase “agent or employee” appearing in the earlier version of the model rule so as to expressly include members of an organization’s governing board as well as employees. See Margaret Love, *The Revised ABA Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 441, 467–69 (Spring 2001). The term is further defined in Model Rule 1.13 (Organization as Client), Comment [1] as: “[o]fficers, directors, employees and shareholders” or their positional equivalents. MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 1 (2003).

on the part of the organization” and made other limiting changes. The ABA Reporter’s Observations noted:

The current Comment’s inclusion of all “persons having a managerial responsibility on behalf of the organization” has been criticized as vague and overly broad . . . In focusing on the constituent’s authority in the matter at issue and relationship with the organization’s lawyer, the Comment [now] provides clearer guidance than the broad general reference to managerial responsibility.

. . . [T]he Commission deleted the broad and potentially open-ended reference to any other person . . . whose statement may constitute an admission on the part of the organization. This reference has been read by some as prohibiting communication with any person whose testimony would be admissible against the organization as an exception to the hearsay rule.<sup>19</sup>

As the Reporter to the Ethics 2000 Commission had explained earlier in the course of the Commission’s deliberations, such a reading misinterpreted the original intent of the “admissions” language. The intent had never been to track the hearsay exclusion, but rather to preclude contact only with the far narrower set of employees authorized by some local evidence laws to make *binding* admissions against an organization. Conflating the hearsay exclusion with the ethical bar, as so many courts had done up until then, was described by the Reporter as creating “confusion,” and necessitated the remedy embodied in the Comment [7] rewrite.<sup>20</sup>

Most jurisdictions are currently reviewing the ABA’s 2002 changes to the Model Rules and Comments, and several have either adopted or proposed changes identical to or substantially the same as those in the new Comment [7].<sup>21</sup>

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19. Available at [www.abanet.org/cpr/e2k-rule42rem.html](http://www.abanet.org/cpr/e2k-rule42rem.html).

20. See Reporter’s Feb. 2000 Explanation, *supra* note 17.

21. *E.g.*, North Carolina has adopted, effective March 1, 2003, changes to its Rule and Comments that reflect in large measure the 2002 Model Rule 4.2 as it pertains to ex parte contact with current employees. See [http://ncbar.com/home/proposed\\_rules.asp](http://ncbar.com/home/proposed_rules.asp). The corresponding Comment to North Carolina’s Rule similarly deleted the restrictive language that would have prohibited contact with persons “whose statement may constitute an admission on the part of the organization.” *Id.* at cmt. 9. North Carolina’s Comment [9] adds that ex parte communications are also prohibited “with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter.” *Id.* Delaware’s Permanent Advisory Committee on the Delaware Lawyers’ Rules of Professional Conduct has issued a preliminary report that proposes a rule tracking the new Model Rule 4.2 and its Comments. Available at <http://courts.state.de.us/supreme/dlrpc.htm>. Louisiana’s Supreme Court is considering an amendment to that state’s Rule that essentially tracks the language of the new Model Rule 4.2. The language of the new Comment [7] of the Model Rule is included right in the text of Louisiana’s proposed rule. Available at <http://216.116.171.141/ethics2000/>. South Carolina’s House of Delegates has approved and presented to its Supreme Court a proposed rule and comments that are substantially the same as the new Model Rule 4.2. Available at <http://www.sbar.org>. Note that the Virgin Islands automatically updates its rules to the latest adopted version of the ABA Model Rules. Idaho’s State Bar Ethics 2000 Committee is in the process of taking

### 3. “Alter Ego” or “Managing/Speaking Agent” Test

Under this view, contact is allowed with anyone except with those who have the legal power to bind the corporation in the matter and/or those who are so closely identified with the interests of the corporation as to be indistinguishable from it, those who are responsible for implementing the advice of the corporation’s lawyer, or any member of the corporation whose own interests are directly at stake in the litigation. This is the position adopted by the *Restatement*, as well as numerous courts.<sup>22</sup> The purpose of this rule is to prevent opposing counsel from taking unfair advantage of a represented organizational entity in the absence of its attorney, but is not designed to protect the opposing corporation from all adverse disclosures.<sup>23</sup> Forbidding communications with those who can implement the advice of counsel is deemed sufficient to protect the corporation’s attorney-client privilege.<sup>24</sup> Communications

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testimony on whether and to what extent to amend the state’s rule and comments to the ABA’s Model. Updates of such review are available at <http://www2.state.id.us.isb/>. Montana’s State Bar Ethics Committee has issued a report to the Board of Trustees that recommends amending Montana’s Rule and Comments to conform to the ABA Ethics 2000 changes. Available at <http://montanabar.org/manuals/ethicsrulechanges/introduction.html>. See also Comments to Tennessee’s Rule 4.2, effective March 2003, available at <http://www.tba.org/ethics2002.html> (prohibiting ex parte contact with those who supervise or direct the organization’s lawyer concerning the matter, have authority to contractually obligate the organization with respect to the matter, or otherwise participate substantially in the determination of the organization’s position in the matter).

Although Massachusetts has not adopted the new Comment [7], it has recently substantially revised Comment [4] to reject the “admissions” construction. In June 2002, the Massachusetts Supreme Judicial Court adopted a new Comment [4], which reads:

In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of the rule.

MASS. R. OF PROF’L CONDUCT R. 4.2 cmt. 4 (2003); cf R. 3.4(f).

22. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 100 cmt. e (2000); Niesig v. Team I, 558 N.E.2d 1030, 1035–38 (1990); State v. CIBA-GEIGY Corp., 589 A.2d 180, 185–86 (N.J. Super. Ct. App. Div. 1991), *appeal dismissed*, 617 A.2d 1213 (1992) (but see subsequently adopted N.J. RULES OF PROF’L CONDUCT R. 1.13, 4.2 prohibiting contact only with “litigation control group”). See also *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992); *Shealy v. Laidlaw Bros., Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 1223 (D.S.C. Apr. 19, 1984); *Weider SportsEquip. Co. v. Fitness First, Inc.*, 912 F. Supp. 502, 509–10 (D. Utah 1996); *Strawser v. Exxon Co., U.S.A.*, 843 P.2d 613, 621–23 (Wyo. 1992); *Dent v. Kaufman*, 406 S.E.2d 68, 71–72 (W. Va. 1991). See also *Branham v. Norfolk & W. Ry.*, 151 F.R.D. 67, 69 (S.D. W. Va. 1993) (adopting *Neisig/Dent* test for Federal Employers Liability Act claims).

23. See *Curley v. Cumberland Farms*, 134 F.R.D. 77, 88 (D.N.J. 1991), *superseded by state rule amendments as recognized in Klier v. Sordono Skanska Const. Co.*, 766 A.2d 761, 768–69 (N.J. Super. Ct. App. Div. 2001) (incorporating control group test in text of rule as amended). See also *Wright by Wright*, 691 P.2d at 569.

24. *Branham*, 151 F.R.D. at 69 n.14.

with those whose statements can be admitted as party admissions under the rules of evidence are allowed because the nature and purpose of ethical rules are different from the nature and purpose of evidentiary rules.<sup>25</sup>

Courts have adopted this approach (or close variations) in several significant recent decisions. In March 2002, Massachusetts' highest court decided in *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College* that Rule 4.2 prohibits ex parte contact only with those employees "who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation."<sup>26</sup> The court vacated a lower court's ruling that appeared to prohibit nearly all ex parte contacts with an organization's employees. The court in *Messing, Rudavsky & Weliky* recognized that its interpretation of Rule 4.2 is "substantially the same"<sup>27</sup> as the "alter ego" or "managing/speaking agent" test, discussed above. While the court rejected the "control group" test, it also explicitly rejected the "Model Rule 4.2 Comment" test (*i.e.*, the pre-February 2002 version of that Comment) as "overly protective of the organization."<sup>28</sup>

In December 2002, the Supreme Court of Nevada also weighed in on the issue, adopting the "managing-speaking agent test" in *Palmer v. Pioneer Inn Associates*.<sup>29</sup> In doing so, the court specifically declined to adopt the ABA's pre-2002 Comment to Rule 4.2, with its "admissions" clause. However, it also declined to adopt the 2002 version of the Comment. Instead, it interpreted Nevada's rule to prohibit ex parte contacts with an employee who "can bind the organization with his or her statement."<sup>30</sup>

#### 4. Case-by-Case Balancing Tests

Some courts have declined to create or apply any general rule defining the categories of employees who may be contacted, instead applying a case-by-case, fact-specific balancing test in which the plaintiff's need to gather information informally is balanced against the defendant's need for effective representation. Results of this test gen-

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25. *Bougé*, 132 F.R.D. at 566–67. See discussion *infra*.

26. 764 N.E.2d 825, 833 (Mass. 2002).

27. *Id.*

28. *Id.* Comment [4] to *Massachusetts Rules of Professional Conduct* Rule 4.2 was subsequently amended to reflect the holding of the *Messing, Rudavsky & Weliky* court. See MASS. RULE OF PROF'L CONDUCT 4.2, *as amended*, 437 Mass. 1303 (2002). The general rule is similar in Oregon. Oregon State Bar Formal Ethics Opinion No. 1991-80, 1991 WL 279182; *Brown v. State of Oregon*, 173 F.R.D. 265, 267 (D. Or. 1997).

29. 59 P.3d 1237, 1248 (Nev. 2002).

30. *Id.*



erally favor broad access to witnesses for plaintiff counsel, while requiring procedural safeguards similar to those described above.<sup>31</sup>

### C. Restrictive View

A minority of courts have barred attorneys from interviewing current employees of a corporate defendant without consent of opposing counsel whenever the interview concerns matters within the scope of the employee's employment.<sup>32</sup> This view reflects the structure of Federal Rule of Evidence 801(d)(2)(D), which permits admission into evidence against a corporation of its employee's out-of-court statements that concern matters within the scope of the employee's employment. Therefore, according to this view, power to commit the organization can be vested in any corporate employee, not only those in the "control group."<sup>33</sup> The "control group" definition of "person" or "party" is considered too vague, such that inadvertent prohibited contact by counsel is possible. According to these courts, attorneys can best avoid violating Rule 4.2 by not communicating with a witness about a subject

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31. See, e.g., *NAACP v. State of Florida*, 122 F. Supp. 2d 1335, 1341 (M.D. Fla. 2000) (finding "no appropriate bright-line rule to follow . . . rather, the better analysis is to balance the competing interests: a plaintiff's need to conduct discovery, investigate, and gather information on an informal basis and the defendant's need to protect communications and for adequate and effective representation"); B.H. by *Monahan v. Johnson*, 128 F.R.D. 659, 661 (N.D. Ill. 1989) ("We will not specifically adopt one of these tests, but instead will make a determination based on the facts of the case before us."); *PPG Indus., Inc. v. BASF Corp.*, 134 F.R.D. 118, 122 (W.D. Pa. 1990) (balancing the interests defendant wants to protect against the purpose of the rule). This was also the approach taken by many Massachusetts federal courts prior to Massachusetts' adoption of its version of Rule 4.2 in 1998, and more recently, the decision in *Messing, Rudavsky & Weliky*, 764 N.E.2d 825, and the resulting rule change. See, e.g., *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697 (D. Mass. 1990) (on balance of competing interests, counsel allowed to interview all defendants' employees not named as defendants, whether management or not).

32. *Lewis v. CSX Transp., Inc.*, 202 F.R.D. 464 (W.D. Va. 2001) (prohibiting counsel for injured plaintiff in FELA suit from contacting nonmanagement employees who acquired knowledge of safety conditions in the course of their employment); *Tucker v. Norfolk & W. Ry.*, 849 F. Supp. 1096, 1098–99 (E.D. Va. 1994) (any communications in litigation regarding a condition of employment will seek knowledge acquired within scope of employment); *Queensbury v. Norfolk & W. Ry.*, 157 F.R.D. 21, 24–25 (E.D. Va. 1993) (contact with employees in Federal Employer's Liability Act action requires consent from defendant's attorney, but under FELA, attorney cannot lawfully withhold that consent). See also *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 442–43 (S.D.N.Y. 1995) (magistrate within discretion to prohibit contact with all current employees); *Toliver v. Sullivan Diag. Treatment Ctr.*, 818 F. Supp. 71 (S.D.N.Y. 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995); *Cagguila v. Wyeth Labs., Inc.*, 127 F.R.D. 653, 654–55 (E.D. Pa. 1989) (precluded use of interviewee's statement at trial because defendant's counsel not informed of ex parte interview in advance; however, no bar imposed to calling interviewee as witness); *Lang v. Reedy Creek Improvement Dist.*, 888 F. Supp. 1143 (M.D. Fla. 1995) (ex parte interviews with current employees of defendant permitted only with prior approval of court); *San Diego Bar Assoc. Op.* 1984-85.

33. *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 111 (M.D.N.C. 1993).

within the scope of the witness's employment without opposing counsel's consent.

## II. The Ethical Constraints on Talking to Former Employees of a Corporate Opposing Party

### A. Permissive View

Counsel may conduct ex parte interviews of the former employees of an adverse corporate party under Rule 4.2.<sup>34</sup> The language of the rule does not cover former employees. Also, no current attorney-client relationship exists, and therefore none is placed in jeopardy by means of contact by another attorney. Furthermore, a former employee's statements cannot bind the corporation and are not excluded from the hearsay rule as admissions. Many cases add the caveat that an attorney

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34. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2002) ("[c]onsent of the organization's lawyer is not required for communication with a former constituent"); ABA Formal Opinion 91-359 (Apr. 2, 1991); Supreme Court of Ohio, Board of Commissioners of Grievances and Discipline, Op. No. 96-1 (Feb. 2, 1996); *Continental Ins. Co. v. Super. Ct.*, 37 Cal. Rptr. 2d 843 (Cal. App. 1995) (interpreting analogous CAL. RULES OF PROF'L CONDUCT R. 2-100, questioning holding of *Bobele v. Super. Ct.*, 245 Cal. Rptr. 144 (Cal. Ct. App. 1988)); *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Co.*, 6 Cal. App. 4th 1256, 1261-64 (Cal. Ct. App. 1992); *Sequa Corp. v. Lititech*, 807 F. Supp. 653, 659-61 (D. Colo. 1992); *DuBois v. Gradco Sys., Inc.*, 136 F.R.D. 341, 344-45 (D. Conn. 1991) (citing, at note 4, Bar Association opinions reaching the same result from Illinois, Pennsylvania, Minnesota, Nassau County (NY), Virginia, Colorado, the City of New York, and Florida); *DiOssi v. Edison*, 583 A.2d 1343, 1345 (Del. Super. Ct. 1990); *H.B.A. Management v. Estate of Schwartz*, 693 So. 2d 541, 542 (Fla. 1997); *Lang v. Reedy Creek Improvement Dist.*, 888 F. Supp. 1143 (M.D. Fla. 1995) (ex parte interviews with former employees of defendant permitted with appropriate protective limitations); *In re Domestic Air Transp. Anti-Trust Litig.*, 141 F.R.D. 556, 561-62 (N.D. Ga. 1992); *P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729, 732-37 (Ind. App. 2002); *Brown v. St. Joseph County*, 148 F.R.D. 246, 251-53 (N.D. Ind. 1993); *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259, 261-63 (S.D. Iowa 1993); *Centennial Management Services, Inc. v. Axa Re Vie*, 193 F.R.D. 671, 683-84 (D. Kan. 2000); *Ramada Franchise Systems, Inc. v. Tresprop, Ltd.*, 75 F. Supp. 2d 1205 (D. Kan. 1999); *Humco, Inc. v. Noble*, 31 S.W.3d 916, 919-20 (Ky. 2000); *Intergen N.V. v. Grina*, No. 01-11774-REK, 2002 U.S. Dist. LEXIS 5512, at \*3 (D. Mass. March 29, 2002) (ruling that "no former employee has current 'speaking authority' for any corporation of which he was an employee formerly," thus finding that under *Messing, Rudavsky & Weliky*, 764 N.E.2d 825, contact with former employees was permitted); *Smith v. Kansas City So. Ry. Co.*, 87 S.W.3d 266, 271-72 (Mo. App. 2002) (ex parte contact permissible with former employees not expressly represented by own counsel or company counsel); *In re Tyco Int'l Ltd. Securities Litig.*, No. 00-MD-1335-B, 2001 U.S. Dist. LEXIS 819, at \*9 (D.N.H. Jan. 30, 2001); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 628 (S.D.N.Y. 1990); *Reynolds v. Ingram*, No. 5:98-CV-895-BO(2), 2000 U.S. Dist. LEXIS 7261, at \*5 (E.D.N.C. March 31, 2000); *Fulton*, 829 P.2d at 960; *United States v. Beiersdorf-Jobst, Inc.*, 1997 WL 640799, at \*2-4 (N.D. Ohio 1997); *Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 902-04 (E.D. Pa. 1991), *appeal dismissed*, 961 F.2d 207 (3d Cir. 1992); *Sherrod v. Furniture Center*, 769 F. Supp. 1021 (W.D. Tenn. 1991); *Shearson Lehman Bros., Inc. v. Wasatch Bank*, 139 F.R.D. 412, 418 (D. Utah 1991). See *Patriarca v. Center for Living & Working, Inc.*, 778 N.E.2d 877 (Mass. 2002) (noting that "the majority of courts that have decided this issue have concluded that former employees, for the most part, do not fall within the constraints of rule 4.2," but finding no need to decide the issue on facts presented). See also Mass. Bar Ass'n Ethics Opinion 02-03 (rule does not include former employees within its ambit).

must avoid inquiry into matters within the scope of the defendant's attorney-client privilege.<sup>35</sup>

This view has been expressly endorsed in the 2002 amendments to the ABA Model Rules. The 2002 version of Model Rule 4.2, Comment [7], now clearly states that "[c]onsent of the organization's lawyer is not required for communication with a former constituent." The Reporter's Observations noted that this sentence was added to clarify that consent of the organization's counsel is not necessary to communicate with former employees.<sup>36</sup> The Comment adds that "[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization," such as inquiries seeking to discover privileged communications.<sup>37</sup>

Several jurisdictions have adopted or proposed changes to their rules and/or comments that are identical or substantially similar to this aspect of Comment [7].<sup>38</sup>

### B. *Intermediate View*

Counsel may conduct ex parte interviews of former employees unless the person's act or omission may be imputed to the corporation, or

35. See, e.g., *Sanifil of Georgia, Inc. v. Roberts*, 502 S.E.2d 343, 345 (Ga. App. 1998); *Orlowski*, 937 F. Supp. at 727-28; *Larkin v. United States*, No. 01-0527, 2002 U.S. Dist. LEXIS 19219, at \*3 (E.D. La. Oct. 9, 2002); *Houck v. Hardee's Food Systems, Inc.*, No. 5:98-CV-373-BR(2), 1999 U.S. Dist. LEXIS 6856, at \*3 (E.D.N.C. Mar. 23, 1999); *Strawser*, 843 P.2d at 622. And see *FleetBoston Robertson Stephens, Inc. v. Innovex, Inc.*, 172 F. Supp. 2d 1190, 1195 (D. Minn. 2001) (no violation where plaintiff's counsel contacted defendant's former CEO, where counsel did not solicit any privileged information and CEO did not relate such information).

36. See Reporter's Observations regarding proposed changes to the Rule and Comments, available at [www.abanet.org/cpr/e2k-rule42rem.html](http://www.abanet.org/cpr/e2k-rule42rem.html).

37. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2003).

38. For example, North Carolina's 2003 changes to the Comments to Rule 4.2 adds that "[c]onsent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter." N.C. RULES OF PROF'L CONDUCT R. 4.2 cmt. 9, available at [http://ncbar.com/home/proposed\\_rules.asp](http://ncbar.com/home/proposed_rules.asp). Comment [4] to Tennessee's Rule 4.2, effective March 2003, provides that consent of the organization's lawyer is not required for communication with a former agent or employee, as long as counsel does not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization. See TENN. RULES OF PROF'L CONDUCT R. 4.2 (2003), available at <http://www.tba.org/ethics2002.html>. Delaware's Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct has issued a preliminary report that proposes a rule tracking the new Model Rule 4.2 and its Comments. DEL. LAWYER RULES OF PROF'L CONDUCT, available at <http://courts.state.de.us/supreme/dlrpc.htm>. South Carolina's House of Delegates has approved and presented to its Supreme Court a proposed Rule and Comments that are substantially the same as the new Model Rule 4.2. See S.C. RULES OF PROF'L CONDUCT R. 4.2 cmt. (2003), available at <http://www.scbarr.org>. Iowa's proposed Rule and Comments are not patterned on the new Model Rule. However, the proposed Comment [11] to Iowa's Rule 4.2 says that counsel may contact a former employee ex parte unless she or he participated as "principal decision maker" in the determination of the organization's legal position in the current matter. See IOWA RULES

in instances where the former employee has an ongoing agency or fiduciary relationship with the corporation.<sup>39</sup> Some authorities have added a restriction on ex parte communications where the statements of the former employee can be construed as a party admission under the rules of evidence.<sup>40</sup> Some hold that former employees who were within the “litigation control group” are presumptively represented by the organization even after the employment relationship ends, and ex parte contact is not allowed unless the former employee has disavowed that representation.<sup>41</sup> Others have restricted communications where there is a risk of disclosure of privileged information.<sup>42</sup> These courts

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OF PROF'L CONDUCT R. 4.2 (2003), available at <http://cartwright.drake.edu/gregory.sisk/IowaEthicsRulesDrafting.html>.

39. *Bobele*, 245 Cal. Rptr. at 147 (“control group” test used); *Valassis v. Samelson*, 143 F.R.D. 118, 123 (E.D. Mich. 1992); S.C. Bar Ethics Advisory Comm. Op. No. 92-31 (1992), reprinted in NAT'L REP. ON LEGAL ETHICS 52 (1993); *Lang v. Super. Ct.*, 826 P.2d 1228, 1232–33 (Ariz. App. 1992); *Amalgamated Clothing & Textile Workers Union v. Lichtenberg Co.*, 54 Fair Empl. Prac. Cas (BNA) 635 (S.D. Ga. 1991); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 39–40 (D. Mass. 1987); *Schwartz v. Camp Robin Hood*, No. 01-12032-RWZ, 2002 U.S. Dist. LEXIS 8342, at \*2–5 (D. Mass. May 8, 2002) (applying the same test enunciated in *Messing, Rudavsky & Weliky*, 764 N.E.2d 825, without distinguishing between present and former employees; recognizing difficulty in determining whether interviewees fit into restricted categories while plaintiff still developing legal theories; and allowing plaintiff's counsel to interview current and former employees on condition he make “detailed and complete notes of the interviews which he shall provide to counsel for defendant after the interviews have been concluded”).

40. *Browning v. AT&T Paradyne*, 838 F. Supp. 1564 (M.D. Fla. 1993) is one such example. The *Browning* opinion seems to suggest that former employees could make “admissions” simply by virtue of their access to privileged information during their erstwhile employment. *Id.* at 1567. But the court fails to explain how a former employee could make such an admission where no agency relationship exists.

41. *Klier v. Sordoni Skanska Constr. Co.*, 766 A.2d 761 (N.J. Super. Ct. App. Div. 2001).

42. See Mass. Bar Ass'n Formal Op. No. 02-03 (2002) (ex parte contact with former employees permitted absent employee's exposure to confidential information); Kan. Bar Ethics Advisory Serv. Op. No. 92-07 (Oct. 23, 1992), reprinted in NAT'L REPORTER ON LEGAL ETHICS 88 (1992); *Kaiser v. AT&T*, No. CIV 00-724, 2002 U.S. Dist. LEXIS 25768 (D. Ariz. Apr. 5, 2002); *NAACP*, 122 F. Supp. 2d 1335; *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651, 657–58 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995); *EEOC v. Dana Corp.*, 202 F. Supp. 2d 827, 830 (N.D. Ind. 2002) (no reason to restrict communications with former employees absent showing that potential confidential, classified, or privileged information could be disclosed); *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 753 (D. Md. 1997) (plaintiff's lawyer disqualified for ex parte contact with former employee of adverse party who had been extensively exposed to confidential client information), *aff'd on other grounds*, 141 F.3d 1162 (4th Cir. 1998); *Collier v. RAM Partners, Inc.*, 158 F. Supp. 2d 889, 893 (D. Md. 2001); *Camden v. Maryland*, 910 F. Supp. 1115, 1116 (D. Md. 1996); *Paulson v. Plaintifffield Trucking, Inc.*, 210 F.R.D. 654, 659 (D. Minn. 2002); *Stabilus v. Haynsworth, Baldwin Johnson & Greaves*, Civ. A. No. 91-6184, 1992 WL 68563, at \*2 (E.D. Pa. Mar. 31, 1992). See District of Columbia Bar Legal Ethics Committee Op. No. 287 (1999) (allowing ex parte communications with former employee, but lawyer may not solicit privileged information of the party opponent); *Rockland Trust Co. v. Computer Assocs. Int'l, Inc.*, No. 95-11683-DPW, 1999 U.S. Dist. LEXIS 2008, at \*17 n.7 (D. Mass. Feb. 19, 1999) (counsel did not violate Rule 4.2 by contacting former employee where defense counsel's assertions of employee's exposure to confidential information were conclusory and speculative).

hold further that if a former employee's acts can still be imputed to the corporation notwithstanding the end of the employment relationship, then the former employee should remain within the definition of "person" or "party."

### C. Restrictive View

A small minority of decisions have held that ex parte interviews of all former employees of a plaintiff corporation concerning a matter in litigation are *per se* violations of Rule 4.2.<sup>43</sup> These decisions reason that change in employment status does not preclude the employee's actions from being imputable to the employer.<sup>44</sup> Also, these courts hold that under Rule 4.2, both present and former employees can be considered "persons" represented by the corporate attorney.<sup>45</sup>

## III. Problems with the Restrictive and Intermediate Views on Contacting Current Corporate Employees

### A. Unworkability Issues

As noted, the restrictive view is predicated upon the clause of the former Comment [4] to Rule 4.2 that prohibits communications with those who might make "admissions" on behalf of the corporation, which courts have interpreted as a reference to Federal Rule of Evidence 801(d)(2)(D). That evidence rule excludes from the definition of hearsay "a statement by the party's agent or servant, concerning a matter within the scope of agency or employment, made during the existence of the relationship."<sup>46</sup> But how does an individual's attorney know what actions, observations, or factual information arise within the witness's "scope of employment" until the attorney has talked to the witness? How can it be determined in advance whether an employee can make "admissions" on the matters in question? Even after talking to the witness, lines are not always (or often) sufficiently clear to determine on which side of the line the witness's statements might theoretically fall. What if the witness observes discrimination or other wrongful conduct at the corporation but in another department? What if the witness hears admissions by the company president as to matters outside the witness's area of responsibility, while the witness and president are out to lunch? What if the witness is a union member and the union lawyer assents to the interview? Must the admissions in question be mere

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43. *Public Serv. Elec. & Gas. Co. v. Associated Elec. & Gas Ins. Serv., Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990), *superseded by state rule amendments as recognized in Klier*, 766 A.2d at 770 (incorporating control group test in text of rule as amended); *see supra* note 6. Note that the *Public Service* decision was rendered before ABA Formal Op. 91-359 (Apr. 2, 1991) (permissively interpreting Rule 4.2), *supra* note 34.

44. *Public Service*, 745 F. Supp. at 1042.

45. *Id.*

46. FED. R. EVID. 801(d)(2)(D).

evidentiary admissions, or attain the status of “binding” admissions, for the witness/declarant to be ruled off limits? Because the “scope of employment” and “admissions” tests are so vague, cautious attorneys are under pressure to avoid contacts with virtually all categories of corporate employees. Dealing with these issues appears far more confusing—and therefore perilous—than simply determining the membership of employees in the “control group.”

The restrictive view, and the restrictive interpretations of the “intermediate” view, also neglect to account for plaintiff’s counsel’s procedural obligations both prior to the initiation of an adversary proceeding and after the proceeding has begun.<sup>47</sup> Attorneys have a duty to conduct a “reasonable inquiry” prior to filing as whether their complaint’s “allegations and other factual contentions have evidentiary support.” Failure to conduct a thorough investigation puts the attorney at a very real risk of sanction should the attorney proceed with the lawsuit. Despite this reality, the nonpermissive views prevent attorneys from using a central tool for conducting preliminary investigations—witness interviews.<sup>48</sup>

## B. *Fairness Issues*

### 1. Biases Litigation Toward Corporate Party in Individual/Corporate Disputes

As the *Restatement* notes, the near-total embargo on communications with corporate employees imposed by nonpermissive readings of the Rule results in corporate litigants controlling the flow of virtually all relevant information. A plaintiff possesses no parallel advantage with regard to her own information: a plaintiff cannot instruct her witnesses that they are represented by her counsel regardless of their wishes and hence are barred from speaking with the corporate defendant’s attorneys. This sort of skewing of control of information flow toward one party in a dispute cannot be the proper function of ethical rules.<sup>49</sup>

Even if the applicable jurisdiction does not interpret its rule quite so restrictively, the practical effect of utilizing any nonpermissive interpretation of Model Rule 4.2 or DR 7-104(A)(1) is nevertheless *in ter-*

47. See, e.g., FED. R. CIV. P. 11.

48. See *Jorgensen v. Taco Bell Corp.*, 72 Fair Empl. Prac. Cas. (BNA) 815 (Cal. Ct. App. 1996) (plaintiff’s counsel has duty to investigate claims, and should not be disqualified for interviewing allegedly harassing employees seven months before suit was filed); *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 1990 WL 29199, at \*3–4 (D. Mass. 1990) (adversary system requires access to witnesses in order to perform traditional litigation functions of interviewing favorable witnesses and preparing them for trial).

49. See *Bougé*, 132 F.R.D. at 566–67 (rejecting Comment [4] as too broad, either as it relates to Rule 4.2 or as guidance for an interpretation of DR 7-104(A)(1), because it “restrict[s] legitimate inquiry and reinforce[s] structured economic power and authority and prevent[s] less costly means of access to the courts”).

*rorem*: the difficulties of line-drawing (especially in advance of the interview) and the possibility of sanctions for erroneous guesses are likely to persuade many plaintiffs' counsel to avoid any contact at all with opposing corporate party's employees as a precaution. Plaintiffs' counsel's informal discovery thus becomes sharply curtailed. Plaintiffs' counsel are forced either to give up their pursuit of critically important evidence or to pursue more inconvenient, expensive, and cumbersome discovery methods such as taking depositions (a method not even available before a case is filed). Plaintiffs' costs escalate. Moreover, plaintiffs' counsel's effectiveness is diminished, since it is commonplace among trial lawyers that witnesses whose testimony is vetted by, and is given in the presence of, company lawyers via traditional discovery means are far less likely to be forthcoming or to give testimony unencumbered by the company lawyer's influence.<sup>50</sup>

## 2. Disserves the Public Interest

In employment discrimination and other civil rights cases, a strong public interest supports enhancing the ability of the attorney to obtain testimony to further the civil rights goals of their clients.<sup>51</sup> Limiting coworkers' ability to support colleagues who are opposing sexual harassment or racial discrimination at work represents a step backwards for civil rights enforcement.<sup>52</sup>

## 3. Hampers the Search for Truth

Because a corporate employee may reasonably anticipate employer retaliation if he or she discloses facts unfavorable to the employer in the presence of corporate counsel, perjury is encouraged and witnesses are discouraged from coming forward. For example, if a corporate employee were to seek to report criminal conduct of a corporation (*e.g.*, hazardous waste dumping, defense procurement fraud, etc.), wouldn't many nonpermissive interpretations of the rule bar the Attorney General or the District Attorney from even speaking to the employee if the corporation had a lawyer responsible for the matter? In such a case, ethical proscriptions would collide with provisions of substantive law. See *United States v. Western Elec. Co.*, authorizing Department of Justice lawyers to freely contact present and former employees in criminal investigation of corporate defendant—to do otherwise “would

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50. See *Kaveny v. Murphy*, 97 F. Supp. 2d 88, 94–95 (D. Mass. 2000) and cases cited.

51. See, *e.g.*, *Morales v. Turman*, 59 F.R.D. 157, 159 (E.D. Tex. 1972) (“When important civil rights are in issue in complex litigation of widespread concern, a court must make every effort to enhance the fact-finding process available to counsel for both sides.”).

52. See *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996) (in many cases of discrimination, victims suffer in silence; EEOC must not be denied access to them or to witnesses to such discrimination). *Cf.* *NAACP v. Button*, 371 U.S. 415, 439–43 (1963) (state may not regulate practice of law so as to impinge upon individuals' rights to resort to courts for redress).

be an obvious prescription for frustrating investigations into wrongdoing.<sup>53</sup> See also *Astra U.S.A., Inc.*, holding that the EEOC's ability to investigate charges of employment discrimination is so important as to warrant the invalidation of provisions in a private settlement agreement that would preclude settling employees from communicating with EEOC staff.<sup>54</sup> The District Court of Massachusetts has discussed the difficulties plaintiffs face in gathering information regarding employment discrimination in *Siguel*, focusing in particular on the impediments created when the plaintiff cannot contact even his or her own witnesses prior to trial or deposition.<sup>55</sup>

#### 4. Undercuts Workers' Rights to Mutual Support

Numerous statutory schemes regulating the workplace expressly recognize that in many settings, employees logically identify their interests with one another (including with those coworkers who may be in litigation against the employer). To restrict employees from access to lawyers for their coworkers is inconsistent with the logic and structure of these laws, by forcing an inappropriate identification with the employer's legal interests upon potentially unwilling workers.<sup>56</sup> This conflict is most apparent where workers are unionized, but plays out in the structure of many other bodies of legal doctrine as well.<sup>57</sup> When workers' participation in coworkers' proceedings is protected by statute, discipline of lawyers under Rule 4.2 for soliciting that participation may be preempted.<sup>58</sup> But counsel recognizing this overriding effect of

53. 1990-1 Trade Cas. (CCH) ¶68, 939, 1990 WL 39129, at \*1 (D.D.C. 1990).

54. 94 F.3d at 743-45.

55. 52 Fair Empl. Prac. Cas. (BNA) 697, 1990 WL 29199. See *Kaveney*, 97 F. Supp. 2d at 89 ("[U]nlike plaintiffs outside the employment context, all the relevant action takes place in a setting controlled by the employer. While other plaintiffs can conduct an informal investigation to shape their theories—for example, interview the witnesses to the accident, talk to the participants, determine the strategy out of earshot of his opponents—this Plaintiff must stand at the employer's door and seek permission to enter.")

56. *EEOC v. Plumbers Local 189*, 311 F. Supp. 464, 466 (S.D. Ohio 1970) (presence of union and employer made conversations with employee coercive and thus statements made were not voluntary); *Beverly Health and Rehabilitation Serv.*, 332 NLRB No. 26, 2000 WL 1460043, at \*3-4, 170 L.R.R.M. (BNA) 1273 (2000) (company rule requiring employee cooperation in employer's investigation of unfair labor practice a clear violation of National Labor Relations Act).

57. See, e.g., 18 U.S.C. §§ 1513, 1514A (2000); 29 U.S.C. §§ 215(b), 411(a)(4) (1998); 29 U.S.C. §§ 623(d), 660(c) (1999); 42 U.S.C. §§ 2000e-3(a) (2003); MASS. GEN. LAWS ch.151B, § 4(4) (West 1996) (prohibiting retaliation for participating in investigations, proceedings, or litigation under, respectively, the Fair Labor Standards Act and the Equal Pay Act; the Age Discrimination in Employment Act; Title VII of the 1964 Civil Rights Act; the Landrum-Griffin Act; the Occupational Safety and Health Act; the Public Company Accounting Reform and Investor Protection Act; and the Massachusetts anti-discrimination law).

58. Cf. 42 U.S.C. §1985(2) (1994) (barring conspiracies to injure a person because of the person's participation in federal judicial proceedings); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-7 (1964).



the substantive law should not be forced to risk sanctions for supposed ethical violations restricting contact.

#### 5. Imposes Involuntary Attorney-Client Relationship

A broad interpretation of the Comment allows the employer to manufacture a sort of attorney-client relationship between corporate counsel and witness-employees in which the employee is obligated to accept “representation” from corporate counsel while ceding to the company’s lawyer the power to control the employee’s access to counsel representing coworkers. All this occurs even over the objections of witness-employees and notwithstanding their actual or potential adversity of interests with the employer. Thus the employer is, in essence, asserting its right to provide an attorney to represent employees who lack any concomitant obligation to accept the key fiduciary obligations that are imposed on all attorney-client relationships by the Rules of Professional Conduct. These include, *inter alia*, the obligation to allow the client to determine the scope and course of representation.<sup>59</sup>

The broad interpretation distorts the nature of the attorney-client privilege as well. It is well-established that the privilege is held by the client, not the attorney. However, in the manufactured attorney-client relationship the broad interpretation creates, it is the attorney, not the client, who enforces the privilege, even in cases where the employee whose communications are putatively being protected actively seeks to reveal information: a strange “privilege” indeed from the employee’s viewpoint.

The obligation to eschew unconsented conflicts of interest is particularly incompatible with a broad interpretation of the Comment, since representing both an employer and a witness-employee in these circumstances consistently with the rules would be virtually impossible.<sup>60</sup> Indeed, imposition of such a relationship is logically inconsistent

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59. See MODEL RULES OF PROF’L CONDUCT, Preamble and Scope cmt. 17 (“[m]ost of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services”); R. 1.2 (client determines objectives of representation, decides whether to accept settlement, must consent to limits on objectives of representation); R. 1.4 (attorney to keep client informed about status of case sufficient for client to make decisions regarding representation); R. 1.7 (obligation to avoid conflicts of interest); and R. 1.6 (obligation to protect attorney-client confidences).

60. *Cf.* MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (corporate attorney cannot ask an employee not to provide information to another party unless attorney has determined that the witness’s interests will not be harmed); R. 1.13 (organization’s attorney may only represent an employee within the bounds of Rule 1.7); R. 1.7 (attorney may undertake dual representation only if no adversity of interests, or, if adversity exists, attorney determines no negative effects on both clients and both clients consent).

See also *United States v. Western Elec. Co.*, 1990–1 Trade Cas. (CCH) ¶68,939 n.4, 1990 WL 39129, at \*1 n.4 (D.D.C. 1990) (company’s effort to assert that its counsel represents former employee witnesses in government investigation may violate ethical rules since company’s interests might conflict with those of witnesses). Note also that it has

with Comment [7] to Rule 4.2, which provides that the witness may retain her own private lawyer, who may freely authorize communications with the adverse party's lawyer regardless of the wishes of the company or its counsel. In short, the broad interpretation of the Comment would allow the employer to unilaterally impose a novel, limited form of attorney-client relationship on its employees, against those individuals' will and against their perceived or even actual interests, while serving the interests of the employer and the employer's attorneys (including their interest in suppressing evidence of discrimination).<sup>61</sup> Such a position is both illogical and unethical.<sup>62</sup>

### C. Logical Flaws

Nonpermissive interpretations of the rule lack persuasive intellectual support. One rationalization for such an approach is that the definition of the "client" within the scope of the ethical prohibition should be coextensive with the Supreme Court's expansive view of the "client" whose communications to a corporate attorney are protected by the attorney-client privilege.<sup>63</sup> This view presumes an equivalence between matters within the scope of an employee's employment, for purposes of the ethical rule, with matters subject to the privilege. Another common justification for a restrictive approach to access, as noted above, is the use of the term "admissions" within the text of Comment [4]. The argument runs that access should be barred to all employees whose statements would be allowed into evidence as non-hearsay vicarious "admissions" of the opposing corporate party under Federal Rule of Evidence 801(d)(2)(D).

First, as to the privilege issue, proponents of the restrictive view offer little logical or legal justification for equating the privilege standard with an ethical limit. In *Massa v. Eaton Corp.*,<sup>64</sup> for example, the court ruled that the "logic" of the Supreme Court decision in *Upjohn v. United States*<sup>65</sup> was to protect from disclosure attorney communications with those who could embroil the corporation in "legal difficulties"; hence, ex parte communications with management employees

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been ruled improper for the government to limit criminal defense counsel's ability to conduct informal interviews with government witnesses. See e.g. *IBM Corp. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975).

61. See *Brown v. St. Joseph County*, 148 F.R.D. 246, 251 (N.D. Ind. 1993) ("an attorney-client relationship cannot be created unilaterally or imposed upon the employees without their consent").

62. See *Patriarca v. Center for Living & Working, Inc.*, 778 N.E.2d 877, 880 (Mass. 2002) ("[a]n organization may not assert a preemptive and exclusive representation by the organization's lawyer of all current (or former) employees as a means to insulate them all from ex parte communication with the lawyers of potential adversary parties").

63. See, e.g., Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181, 1195 (1987).

64. 109 F.R.D. at 314.

65. 449 U.S. 383 (1981).

should be prohibited, since they could provide information “very damaging” to the defendant.

This justification lacks weight. Since the privilege covers only communications to an attorney and not the underlying facts disclosed,<sup>66</sup> there is no logical impediment to protecting any conversations an employee-witness may have with corporate counsel while also allowing opposing counsel to communicate with the employee regarding the underlying facts. In fact, in *Upjohn* itself, such a process was expressly sanctioned.<sup>67</sup>

The logic supporting the restrictive view is particularly weak given that it would perforce extend to bar such interviews even in cases where no privileged communications took place between corporate counsel and employee. As the court in *Brown*<sup>68</sup> aptly points out, “[r]egardless of how much [the corporation] may wish to provide its former and current employees with individual legal representation, an attorney-client relationship cannot be created unilaterally or imposed upon the employees without their consent.”<sup>69</sup>

Second, equating the scope of the ethical rule, the scope of the evidentiary privilege, and the scope of the hearsay exclusion erases the clear distinctions among the types of interests intended to be protected by each doctrine. The privilege protects the privacy of communications between attorneys and their actual clients (and their clients’ agents or employees who actually committed with original clients’ attorneys).<sup>70</sup> The exclusion from the hearsay rule for vicarious “admissions” by corporate employees limits the degree to which out-of-court statements with high indicia of trustworthiness (trustworthy because they are made by employees while engaged in the ordinary job duties to which the statements refer) can be kept from a jury.<sup>71</sup> These considerations have little in common with the purpose of the *ethical* rule, which is to present intrusion into an existing attorney-client relationship by the overreaching of a second attorney.<sup>72</sup> Each of these dramatically different

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66. *Id.* at 395–96.

67. *Id.* at 396 (“the [adverse party] Government was free to question the employees who communicated with [corporate] counsel”). See also, e.g., *Wright by Wright*, 691 P.2d at 566–67; *Porter*, 642 F. Supp. at 1118; *Hanntz v. Shipley, Inc.*, 766 F. Supp. 258, 270–71 (D.N.J. 1991) (distinguishing function of *Upjohn* rule from function of disciplinary rules), *abrogation recognized in In re Prudential Ins. Co. of America Sales Practices Litig.*, 911 F. Supp. 148, 151 n.2 (D.N.J. 1995); cf. *Lizotte v. New York City Health & Hosps. Corp.*, No. 85 Civ. 7548 (WK), 1990 U.S. Dist. LEXIS 2747 (S.D.N.Y. Mar. 13, 1990) (even disclosure to opponent of privileged information by interviewee does not waive corporation’s privilege, since disclosure not under employer’s control).

68. *Brown*, 148 F.R.D. 246.

69. *Id.* at 251 (citations omitted).

70. *Upjohn*, 449 U.S. at 395–96.

71. See MCCORMICK ON EVIDENCE, § 259 (5th ed. 1999).

72. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 1. See discussion of distinction between purpose of privilege and purpose of ethical rule in *State v. Ciba-Geigy Corp.*, 589 A.2d 180, 182 (N.J. Super. Ct. App. Div. 1991).

interests operates in a different conceptual framework, calling for line-drawing at very different analytical points. There is simply no reason (for example) to preclude a plaintiff's lawyer—on pain of disciplinary sanctions—from interviewing one of plaintiff's coworkers, who supports plaintiff's posture in the litigation and who has had no actual dealings with corporate counsel, simply (1) because the coworker's job happens to place her in a category that would, in theory, allow her out-of-court statement into evidence as an "admission" at trial or (2) because *if* corporate counsel had interviewed her himself, that interview (but not the underlying facts) would have been privileged. Extending the ability of corporate counsel to use ethics rules so as to limit employee speech in this fashion, based on the structure of unrelated evidence rules, has the practical effect of conjuring up a corporate counsel/employee "attorney-client" relationship extending far beyond the real-world boundaries of any such actual relationship. This the ethics rules should not do.

Third, using the evidence rule to restrict access to an organization's employees stands the purpose of the hearsay exception on its head. The admissions exception was adopted because employee statements about matters within the scope of employment are valuable evidence that courts determined should be admitted notwithstanding the hearsay rule.<sup>73</sup> Extending Rule 4.2 to bar contact with individuals who might utter such statements means that such statements will be made and hence will never be introduced as evidence. Thus, the *desirability* of these statements as trial evidence is used as grounds to *exclude* them: the extension of the admissions rule becomes a reason to contract, rather than to expand, a jury's access to evidence. In the end the ethical rule undercuts and cancels the intended truth-finding effect of the evidentiary admissions rule.

Fourth, proponents of a nonpermissive rule do not adequately analyze the complexities of the relationship between the Rule 801(d)(2)(D) standard and the ethical prohibition.<sup>74</sup> As noted, Rule 801(d)(2)(D) applies to statements made about matters within the "scope of . . . employment," but this formulation leaves totally unclear how "scope of employment" is to be defined. If Employee Doe's responsibilities are defined as "management," for example, virtually any corporate activity is arguably within Doe's responsibility. If, on the other hand, Doe's responsibilities are defined as "supervision of XYZ department," then is discrimination within the ABC department outside their scope? What

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73. See 4 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 420, at 267, 268 (2d ed. 1994) ("[s]tatements covered by FRE 801(d)(2)(D) are necessary because . . . they may provide the only means to get the actual knowledge of the declarant"). See also FED. R. EVID. 801(d)(2)(D), Advisory Committee Note (rule avoids "loss of valuable and helpful evidence"); 5 WEINSTEIN'S FEDERAL EVIDENCE § 801.33[1] (2d ed. 2001).

74. See, e.g., discussion in *Dent*, 406 S.E.2d 68.

if Doe discusses XYZ department discrimination with the manager of XYZ department and the *conversation* is within the scope of Doe's employment but the discrimination is not?

Fifth, there are alternative and less drastic means available to protect the attorney-client privilege. A simple and elegant solution would be to bar the use at trial of an employee's statements made to opposing counsel as admissions of the corporation.<sup>75</sup>

Sixth, nonpermissive standards are predicated on harms that do not really exist. The restrictive standard would bar lawyer-witness contact on the ground that such contact *might* uncover witness statements, which *might* meet all requirements of trial admissibility and *might* be offered by plaintiff into evidence and would then be admissible as non-hearsay statements, potentially injuring the corporation. But isn't this a fairly remote result? Wouldn't it require opposing counsel to doff the role of lawyer and testify in order to offer the employee's statements as admissions—an even more unlikely result? And in any event, isn't barring the *initial* lawyer-client contact in order to preclude that remote evidentiary possibility a logically inappropriate skewing of the weight to be afforded the evidence rule—and thus a classic case of the procedural tail wagging, or even toppling, the substantive dog?

Seventh, another objection to a permissive rule, that the lawyer might deceive or manipulate a witness into making a false or slanted statement, articulates a harm that does not follow from the *ex parte* nature of the interview. Rather, *any* witness interview bears the same risk, whether or not the witness is employed by an organization. If protection from manipulation of witnesses were indeed the purpose of the Rule, then all uncounseled witnesses would be off limits, regardless of whether they are employed by an organization. Thus, this objection provides no valid reason to forbid employee interviews while allowing interviews of others.

#### D. Proposed Rule

Plaintiff lawyers should call for a rule that would allow opposing counsel direct contact with any employee who is a possible witness without requiring notice to the employer's counsel, assuming that several conditions, designed to protect the only legitimate interests safeguarded by the rule, are met. The interviewing lawyer should fully disclose her affiliation and role in the process and avoid intrusion upon any existing attorney-client privilege. The interviewing lawyer should

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75. This approach was followed in *Lizotte*, No. 85 Civ. 7548, 1990 U.S. Dist. LEXIS 2747, at \*13–14; *B.H. by Monahan v. Johnson*, 128 F.R.D. 659, 663 (N.D. Ill. 1989); *Frey v. Dept. of Health and Human Serv.*, 106 F.R.D. 32, 37 (E.D.N.Y. 1985); *Orlowski*, 937 F. Supp. 723 (plaintiff's counsel may either communicate *ex parte* with lower-level managers or use statements from such employees with prior consent of corporation's counsel—but they may not do both).

not urge the witness to reject corporate counsel's advice, or to discharge counsel, nor should the lawyer seek to bargain with the witness for a settlement (or other concession) in the underlying dispute.

If such a rule seems unattainable, a second-best alternative is adoption of the "control group" test. Counsel may contact any employee who is not a member of the corporate control group, subject to the disclosures and limits stated in the preceding paragraph. Notification to opposing counsel would be required for the attorney to obtain stipulations or confidential corporate documents. If the employee has independent representation, the usual rule would apply and the attorney must first notify the employee's counsel.<sup>76</sup>

The public interest in obtaining testimony would no longer be frustrated by the employer's veto of virtually all informal communication. Some costs of legal representation would be mitigated by relaxed procedures for gathering evidence. As channels of communication widen, the balance of power between corporate parties and individual parties or witnesses would equalize. The corporation's interest would be protected by its ability to prevent access to privileged communications and its own free access to all employees for its own private interviews, while corporate employees' rights to free communication would also be preserved.<sup>77</sup>

#### **IV. Ethical Constraints on Communication with Employees of Governmental Opposing Party**

The First Amendment operates in several ways to affect attorney communications with government employees. First, government employees, like ordinary citizens, are protected from adverse state action for exercising their right to free speech. A government employer cannot retaliate against an employee who speaks out on a matter of public

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76. The Rule permits the witness's own attorney in the matter, if she has one, to grant permission to conduct an interview, regardless of the wishes of the organization's counsel. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2003) ("[i]f a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule").

77. Some corporate counsel have responded to such permissive formulations of the Rule by arguing that their clients can prevent broad access to employees by prohibiting any communications with opposing counsel. However, such a blanket prohibition would run afoul of Model Rule 3.4(f), which forbids an attorney from asking an employee not to provide information to another party unless the attorney has determined that the person's interests will not be harmed by such a request. MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (2003). This obviously requires an assessment of each witness's situation, including whether the witness's own interests would be aligned with those of her colleagues or those of the employer and whether those interests would be harmed by not communicating with her colleague's lawyer. Such an individualized assessment is improbable. If it were conducted, it is unlikely in the extreme that it could reasonably conclude that all corporate employees could be restricted from speaking to a plaintiff's attorney.

In addition, even assuming that an organization's attorney has reasonably reached such a conclusion, any action taken against a witness for violating the policy could well

concern (although speaking out on matters involving the internal operations of the employer is not protected).<sup>78</sup> Since much (though not all) litigation against the government involves matters of public concern, many government employees' communications with litigants will constitute protected speech.

Second, as citizens, both government employees and those engaged in litigation against the government have the right to freely "associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances" without undue intrusion by the government.<sup>79</sup> Litigation, particularly civil rights litigation, is an expression of these rights to free speech and association, and participation in it is a "fundamental right within the protection of the First Amendment."<sup>80</sup> Thus, if citizens may engage in such protected activities as demonstrating, filing petitions, and writing editorials, they should also be able to communicate through their lawyer directly with a government decision maker about the same issue.

#### A. *Permissive Rule*

Because the constitutional rights of both government employees and private parties suing the government are implicated, restrictions on communications between employees and opposing counsel tend to be narrowly construed in litigation against the government. Various grounds have been advanced for this result. Some courts have said that the First Amendment outweighs the interests of a governmental defendant in its own protection.<sup>81</sup> Others say that the government has an obligation to serve the public interest, which includes helping citizens redress wrongs created by government actions. This public interest outweighs the narrower interest that the government has in winning lawsuits.<sup>82</sup> Courts have also focused on the fact that protecting a public entity from adverse counsel is in direct conflict with the goal of broad access to witnesses—to allow uncovering and presenting all relevant evidence to the fact finder.<sup>83</sup>

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violate the antiretaliation laws protecting employees' rights to object to discriminatory or other illegal activities. See *supra* note 57 and accompanying text.

78. See *Pickering v. Board of Education*, 391 U.S. 563, 574–75 (1968); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 283–84 (1977); *Connick v. Meyers*, 461 U.S. 138, 142 (1983).

79. *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984); *Gilmore v. Montgomery*, 417 U.S. 556, 575 (1974) (forms of association not political in customary sense but social, legal or economic, also constitutionally protected).

80. *In re Primus*, 436 U.S. 412, 441 (1978); see *NAACP*, 371 U.S. at 428–30.

81. *Lizotte*, No. 85 Civ. 7548 (WK), 1990 U.S. Dist. LEXIS 2747; *Vega v. Bloomsburgh*, 427 F. Supp. 593, 595 (D. Mass. 1977); *Rodriguez v. Percell*, 391 F. Supp. 38, 42–43 (S.D.N.Y. 1975).

82. Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party,"* 61 MINN. L. REV. 1007, 1020 (1977); *Frey*, 106 F.R.D. at 37.

83. *Frey*, 106 F.R.D. at 35; *B.H. by Monahan*, 128 F.R.D. 659.

Most authorities characterize their approach as a “balancing test”: that is, rather than establishing a blanket rule in favor of contact by plaintiff’s counsel or government counsel with government employees, the majority of courts balance the burdens and dangers of informal interrogation in a given case against the degree to which the proposed questioning will aid in the search for truth or implicate constitutional rights. However, “balancing” has typically led to broad or unlimited access to government employees, even where those same employees would be off-limits under prevailing interpretations of Rule 4.2 were they working for a private employer.<sup>84</sup>

Use of a more liberal test in government cases has been buttressed by the changes to the Comments to Model Rule 4.2 adopted by the ABA in February 2002. These changes explicitly recognize the different rights and obligations that are implicated when a citizen wishes to speak with a government-employee witness. Specifically, Comment [5] states that “[c]ommunications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.”<sup>85</sup> As the ABA Reporter’s Observations noted, this language “alerts lawyers to the possibility that a citizen’s constitutional right to petition and the public policy of ensuring a citizen’s access to government decision makers may create an exception to this Rule.”<sup>86</sup> This explanation suggests that when a “balancing” approach is used, a plaintiff’s constitutional interests will almost always outweigh a government defendant’s interest in preventing the disclosure of adverse information. More, while the ABA’s changes do not take cognizance of, or incorporate, the First Amendment interests of government employees themselves, those interests further support the

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84. See CAL. RULES OF PROF’L. CONDUCT R. 2-100(C) (rule shall not prohibit communications with “public officer, board, committee, or body”), available at [www.calbar.ca.gov](http://www.calbar.ca.gov); Utah Ethics Advisory Op. 115 (May 10, 1993), indexed at Lawyers’ Man. Prof. Conduct (ABA/BNA) 1001:8501 (any contact under any circumstances, regardless of litigation matter, but attorney must observe requirements of MRPC 4.3); American Canoe Ass’n, Inc. v. City of St. Albans, 18 F. Supp. 2d 620, 621–22 (S.D. W. Va. 1998) (contact with government employees and managers permitted by Constitution and other laws governing citizen access to information and are thus authorized by law; access to attorney-client privileged information and work-product barred); New York State Ass’n for Retarded Children v. Carey, 706 F.2d 956, 960 n.5 (E.D.N.Y. 1983), cert. denied, 464 U.S. 915 (1983) (citing *Vega*, 427 F. Supp. 593 (D. Mass.1977) (government’s interest in own protection outweighed by First Amendment interest of employees)); *Lizotte*, No. 85 Civ. 7548 (WK), 1990 U.S. Dist. LEXIS 2747 at \*9–10 (risks to employer outweighed by constitutional magnitude of claims, First Amendment rights of employees, and need for access to information); *Frey*, 106 F.R.D. at 35 (questioning of Social Security Administration employees would aid plaintiff’s search for the truth and was paramount interest outweighing any burden or danger to defendant, but no access to “alter ego” employees including those who made decisions at issue); cf. *B.H. by Monahan*, 128 F.R.D. 659 (similar result to *Frey*, but court’s analysis does not analyze unique characteristics of government as defendant).

85. See <http://www.abanet.org/cpr/e2k-rule42.html>.

86. See <http://www.abanet.org/cpr/e2k-rule42rem.html>.



ABA's suggestion that an exception to Rule 4.2 for contacts with government employees should apply.

Several jurisdictions have adopted or proposed changes to their Rules and/or Comments that are identical or substantially similar to the new ABA Comments to Rule 4.2, as they pertain to contacting employees of a governmental opposing party.<sup>87</sup>

### B. *Intermediate Rule*

Ex parte communications are prohibited with government employees, officials, or agencies who have authority to bind the agency, who exercise control over litigation matters, or whose acts or omissions can be imputed to the government entity for purposes of establishing liability.<sup>88</sup> That result derives from the view that a governmental unit has

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87. For example, Comment [6] to Tennessee's Rule 4.2, effective March 2003, provides that communications authorized by law may include "communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official having the power to redress the client's grievances." TENN. RULES OF PROF'L CONDUCT R. 4.2 (2003), available at <http://www.tba.org/ethics2002.html>. Delaware's Permanent Advisory Committee on the DEL. LAW. RULES OF PROF'L CONDUCT has issued a preliminary report that proposes a Rule tracking the new Model Rule 4.2 and its Comments. See <http://courts.state.de.us/supreme/dlrpc.htm>. South Carolina's House of Delegates has approved and presented to its Supreme Court a proposed Rule and Comments that are substantially the same as the new Model Rule 4.2. See <http://www.sbar.org>. New Jersey's proposed Rule includes a Comment that agrees with Comment [5] to the new Model Rule 4.2. See [www.judiciary.state.nj.us/notices/n021211a.htm](http://www.judiciary.state.nj.us/notices/n021211a.htm). North Carolina's 2003 changes to its Rule include an addition that tracks the ABA's Model discussed above. N.C. RULES OF PROF'L CONDUCT 4.2 cmt. 5, (2003), available at [http://ncbar.com/home/proposed\\_rules.asp](http://ncbar.com/home/proposed_rules.asp). North Carolina has also added a provision to the text of its Rule allowing plaintiff's counsel in such cases to "communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter" if such communication is made in the course of official proceedings or if opposing counsel is provided sufficient notice of the communication. N.C. RULES OF PROF'L CONDUCT R. 4.2(b). Iowa's proposed Rule 4.2(e) includes in its text a provision similar to North Carolina's allowing contact with elected or appointed officials if made in the course of official proceedings or with proper notice to opposing counsel. See <http://cartwright.drake.edu/gregory.sisk/IowaEthicsRulesDrafting.html>.

88. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 101; Alaska Bar Ethics Comm. Op. 94-1 (Jan. 1, 1994), reprinted in 10 Lawyers' Man. Prof. Conduct (ABA/BNA) at 41; Texas State Bar Prof. Ethics Comm. Op. 492 (Feb. 24, 1994), indexed in Lawyers' Man. Prof. Conduct (ABA/BNA) 1001:8305; *Hammond v. Junction City*, No. 00-2146-JWL, 2002 U.S. Dist. LEXIS 4093, at \*20-22 (D. Kan. Jan. 23, 2002), appeal pending, (10th Cir. Case No. 02-3068) (disqualifying plaintiff's counsel in discrimination putative class action for ex parte discussions with defendant city's director of human relations, "an employee with managerial responsibilities and with 'speaking authority' so as to bind the City," even though he was seeking to hire plaintiff's firm to pursue his own discrimination claims against the defendant; rejecting argument that communications were "authorized by law" under Rule 4.2 in view of employee's status as potential class member); *Barcia v. Sitkin*, 865 F. Supp. 1015, 1033 (S.D.N.Y. 1994); *Carter-Herman v. City of Philadelphia*, 897 F. Supp. 899, 902 (E.D. Pa. 1995); N.Y. State Bar Assoc. Comm. Prof. Ethics Op. No. 652 (Aug. 27, 1993), 1993 WL 555952 (applies where an attorney is representing the agency in the particular matter at issue); Ohio Supreme Court Board of Comm. Op. 92-7 (Apr. 10, 1992), reprinted in Nat'l Rep. on Legal Ethics (1992) at 49

the same rights and responsibilities in a controversy as any other entity, so Rule 4.2 or DR 7-104(A)(1) should be applied similarly to governmental and private entities.<sup>89</sup> According to this view, the government employer's right to effective representation by counsel outweighs any potential threat to a citizen's right to petition the government.<sup>90</sup> Courts espousing this view hold that this balancing of interests presents no threat to First Amendment concerns, since government employees who fear reprisal for speaking in the presence of government counsel can hire their own attorneys to protect their interests.<sup>91</sup>

*C. Problems with Intermediate View as Applied to Government Employees*

While a government unit has a right to defend itself in litigation, the scope and nature of its discretion and responsibilities vis-à-vis its employees and the public have never been identical to those of a private entity. The laws defining those responsibilities spring from constitutional concerns for the protection of free speech, the right to petition the government for redress of grievances, the rights to associate, and due process rights to be free from arbitrary governmental actions. These constraints require a different legal standard to apply in a controversy involving a government agency.<sup>92</sup>

To state that a government unit has "the same rights and responsibilities in a controversy as a corporation or individual" is to sweep away decades of constitutional jurisprudence. The argument that the government's right to effective counsel outweighs a citizen's or employee's constitutional right to petition or associate similarly threatens the very rationale for holding state actors to a different and more rigorous standard of behavior than private actors.

Further, prohibiting contact between litigants and their government opponents would unfairly strip plaintiffs of rights that nonlitigant citizens have, simply by virtue of the plaintiffs' bringing a claim against the government. Unlike those of their fellow citizens, a litigant's rights of access and speech would be restricted because he or she has chosen to bring suit. Finally, prohibiting governmental employees from communicating with lawyers for adversaries of the government in litiga-

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(but agency is not empowered to give blanket instructions to all employees not to communicate). See also *In re Conduct of Spies*, 852 P.2d 831, 834 (Ore. 1993) (wrongful communication with commissioner of defendant county board of commissioners where attorney was informed that board was represented by counsel).

89. New York State Bar Assoc. Comm. Prof. Ethics Op. 652.

90. Alaska Bar Ethics Comm. Op. 94-1.

91. See *Barcia*, 865 F. Supp. at 1034.

92. See *Connick*, 461 U.S. at 142 (speech of government employees); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (immunity from antitrust liability based on right to petition); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (due process).

tion, regardless of those employees' views or wishes, would in many cases undercut their own First Amendment rights to express themselves on matters of public concern, as identified above.

Parties bringing suits against the government should have an unlimited right to speak informally with government officials or employees, subject to the proviso that they inform the employee-witnesses of their role in the case and of the fact of the litigation. Any government official so informed can decide for herself whether to refuse to speak with the party or refer the party to the government agency's lawyer. This protocol provides some protection for the government agency while restoring the balance that many jurisdictions have already crafted in favor of a citizen's rights of speech and access.

