IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,239

H.B.A. MANAGEMENT, INC., etc.,

Petitioner,

vs.

The Estate of MAY SCHWARTZ, etc.,

Respondent.
_____/

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF POSITION OF RESPONDENT

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I.
INTRODUCTION

This amicus curiae brief is filed on behalf of the Academy of Florida Trial Lawyers, in support of the position of the respondent, the Estate of May Schwartz. It will urge the Court to approve the decisions of the Third and Fourth Districts in ***Reynoso v. Greynolds Park Manor, Inc.,*** 659 So.2d 1156 (Fla. 3d DCA 1995), and ***Estate of Schwartz v. H.B.A. Management,*** 673 So.2d 116 (Fla. 4th DCA 1996). And it will urge the Court to disapprove the conflicting decision of the Second District in ***Barfuss v. Diversicare Corp. of America,*** 656 So.2d 486 (Fla. 2d DCA 1995).[1/] The case and the facts have been adequately stated by the parties and need not be supplemented here.

II.
SUMMARY OF THE ARGUMENT

Rule 4-4.2, Rules Regulating The Florida Bar, is patterned upon Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct. Both The Florida Bar and the American Bar Association have adopted formal ethics opinions stating that the Rule does not prohibit *ex parte* communications with unrepresented former employees of a corporate litigant. The ***overwhelming*** majority of courts which have considered the question -- including the highest courts of at least six states, two Florida District Courts of Appeal, and nearly 30 United States District Courts -- have reached the same conclusion, for a number of sound reasons.

The Second District's contrary conclusion in *Barfuss* is a lonely wave in a sea of contrary authority, based upon a misapplication of the principal decision upon which it relied. At issue in *Rentclub* was whether Rule 4.2 prohibited *ex parte* communications with the former chief financial officer of a corporate defendant, where the officer was

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[1/] The issue was presented to, but not decided by, the First District, in ***Boyd v. Pheo, Inc.,*** 664 So.2d 294 (Fla. 1st DCA 1995).

privy to both privileged information affecting the case and the defendant's legal strategy in substantially related cases. The court held that "privileged communications" present a "distinct problem" with respect to contact with former employees, and that the spirit of Rule 4.2 was violated by the contact. There is nothing in that very narrow holding to justify the *Barfuss* Court's far broader holding that it is unethical to communicate with non-managerial level, unrepresented former employees who are not privy to privileged matters. Neither is the Rule which we seek here inconsistent with *Rentclub*, because both of the formal ethics opinions upon which we rely, as well as the overwhelming majority rule, prohibit inquiry into privileged matters.

The three reasons argued in support of a contrary rule are insubstantial makeweights. While it is true that Rule 4.2 uses the word "party" and Rule 4-4.2 uses the word "person, " this word change has nothing to do with the issue presented here. The issue presented here derives exclusively from the ***Comment*** to Rule 4.2, which uses the word "person, " and the Comment to Rule 4-2.2 is identical. The decisional law construing the Comment to Rule 4.2 is therefore perfectly good authority for the meaning of the Comment to Rule 4-4.2. Moreover, the petitioner's argument is constructed entirely upon the Comment to the Rule, rather than the language of the Rule itself, and a Comment cannot appropriately be utilized to expand the Rule beyond what its plain language will allow. Rule 4-4.2 prohibits *ex parte* communications only "with a person a lawyer knows to be represented by another lawyer in the matter, " so it cannot fairly be construed to prohibit ***ex parte*** communications with ***unrepresented*** former employees of a corporate litigant.

The petitioner's second argument -- that *ex parte* contacts with former employees ought to be prohibited because lawyers can manipulate witnesses -- is no more substantial than the first. To begin with, we do not share the petitioner's cynicism concerning the

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ethics of Florida's lawyers; and the fact that there may be a few who might violate the numerous other ethical proscriptions by which they are bound is simply no reason to prohibit the many from practicing their profession in a perfectly ordinary way. In addition, the petitioner's argument contains no solution to the problem it posits; it simply shifts the problem from one side of the "vs." sign to the other -- since, if plaintiffs' counsel are prohibited from *ex parte* contact with former employees because they are considered to be represented by the corporate defendant's counsel, then the corporate defendant's counsel (whose ethics are presumably no better and no worse) will be permitted *ex parte* contact with the former employees.

Finally, the petitioner's attempt to analogize Rule 4-4.2 to §455.241(2), Fla. Stat., is badly misplaced. *Ex parte* communications with a plaintiffs treating physicians are prohibited by the statute, not (as the petitioner claims) to protect against "unethical gamesmanship" by attorneys, but because of the "privilege of confidentiality" which attaches to the physician-patient relationship. No such privilege attaches to the employer-employee relationship (and where a former employee is privy to privileged information, Rule 4-4.2 prevents inquiry into the privileged matters in any event, just as the statute does). In short, the fact that the statute prohibits *ex parte* communications where a "privilege of confidentiality" exists is simply no reason to prohibit *ex parte* communications where no such privilege exists, and the petitioner's third argument is therefore no argument at all.

Most respectfully, the petitioner and its amicus have offered no legitimate reasons for this Court to disagree with The Florida Bar, the American Bar Association, and the *overwhelming* majority of state and federal courts which have decided the question presented here -- and we respectfully urge the Court to announce its agreement with the plainly prevailing national view.

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III,
ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT RULE 4-4.2 DOES NOT PROHIBIT *EX PARTE* COMMUNICATIONS WITH FORMER EMPLOYEES OF A CORPORATE LITIGANT.

The issue presented here is whether Rule 4-4.2, Rules Regulating The Florida Bar, prohibits ***ex parte*** communications with former employees of a corporate litigant. Our argument will be in three parts. First, we will demonstrate that the district court's conclusion that the Rule does ***not*** prohibit such contacts finds ***overwhelming*** support in the law across the length and breadth of the nation, for good reason. Second, we will demonstrate that the Second District's contrary conclusion was based upon a misapplication of the decision upon which it principally relied. And finally, we will demonstrate that the several reasons which the petitioner and its amicus have advanced in support of a contrary conclusion provide no justification whatsoever for the expansive and largely unprecedented reading of the Rule which they seek.

A. The district court's conclusion finds *overwhelming* support across the nation.

The issue presented here turns on the meaning of Rule 4-4.2, which reads in pertinent part as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person a lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. . . .

On its face, this Rule only prohibits communications "with a person the lawyer knows to be represented by another lawyer in the matter." As a result, without more, the Rule plainly does not prohibit ***ex parte*** communications with unrepresented former employees of a corporate litigant.

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Because they are essentially identical, the Rule plainly derives from Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct, which (at the time Rule 4-4.2 was adopted) read in pertinent part as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. . . .

The only difference between the two Rules is that Rule 4-4.2 substitutes the word "person" for Rule 4.2's word "party" (as the current version of Rule 4.2 does). **The** petitioner correctly observes that most state rules patterned upon Rule 4.2 use the word "party," rather than the word "person"; and it seizes on this difference to suggest that, because of this word change, the Court can safely ignore the overwhelming authority against it position here. We respectfully disagree. The word change actually has nothing to do with the issue presented here. Whether the Rule prohibits communications with a person or with a party, the fact remains that the prohibition attaches only when the person or party is known "to be represented by another lawyer in the matter." As a result, without more, neither Rule 4-4.2 nor Rule 4.2 prohibits ***ex parte*** communications with unrepresented former employees of a corporate litigant.

The issue presented here derives solely from the ***Comment*** to Rule 4.2 -- a Comment necessitated by the fact that a corporation is a legal fiction. Without some further specification, Rule 4.2 was essentially meaningless where the party represented by counsel in the matter was a corporation. Read literally, it prohibited ***only ex parte*** communications with the legal fiction, which is an impossibility in any event, and did not prohibit ***ex parte*** communications with any of the real persons behind the corporation. It was therefore necessary to specify the particular agents of a represented corporate party with whom ***ex parte*** communications were prohibited.

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The result was the following Comment to Rule 4.2:

> In the case of an organization, this rule prohibits communications by a lawyer for one party 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. . . .

The Comment to Rule 4-4.2 is identical (so, the petitioner's protestations to the contrary notwithstanding, the decisions construing the Comment to Rule 4.2 are perfectly good authority for the meaning of the Comment to Rule 4-4.2). And because the obvious purpose of the Comment was simply to specify a limited universe of corporate agents with whom ***ex parte*** communications were prohibited when the fictional corporation was "represented by another lawyer in the matter, " there should have been no need for any extensive debate as to whether ***ex parte*** communications with ***unrepresented former*** employees of a corporate litigant, now no longer its agents, were prohibited.

Nevertheless, because the purpose of the Comment is only implicit, and because the Comment draws no explicit distinction between current and former employees, corporate litigants have frequently asserted what the petitioner and its amicus have asserted here -- that the Comment was intended to expand the language of the Rule to prohibit ***ex parte*** communications with persons who are no longer corporate agents, even when those former employees are ***not*** "represented by another lawyer in the matter," as the Rule itself plainly requires. It was to address this effort to enlarge the Rule that The Florida Bar clarified Rule 4-4.2 in Ethics Opinion 88-14 -- entitled "A Plaintiff's Attorney May Communicate with Former Managers and Former Employees of a Defendant Corporation Without Seeking and Obtaining Consent of Corporation's Attorney. "

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Citing to ethics opinions issued by various Bars in Alaska, Colorado, Illinois, California, Maryland, Massachusetts, Michigan, New York, Virginia, and Wisconsin -- as well as a decision of the Supreme Court of Washington -- the Bar concluded as follows:

> Rule 4-4.2 cannot reasonably be construed as requiring a lawyer to obtain permission of a corporate party's attorney in order to communicate with former managers or other former employees of the corporation unless such individuals have in fact consented to or requested representation by the corporation's attorney. A former manager or other employee who has not maintained ties to the corporation (as a litigation consultant, for example) is no longer part of the corporate entity and therefore is not subject to the control or authority of the corporation's attorney. In many cases it may be true that the interests of the former manager or employee are not allied with the interests of the corporation. In such cases the conflict of interests would preclude the corporation's attorney from actually representing the individual and therefore would preclude the corporation's attorney from controlling access to the individual. As the comment indicates with regard to current employees, if a former manager or former employee is represented in the matter by his personal attorney, permission of that attorney must be obtained for ex parte contacts, including contacts by the corporation's attorney.
>
> A former manager or employee is no longer in a position to speak for the corporation. Further, under both the federal and the Florida rules of evidence, statements that might be made by a former manager or other former employee during an ex parte interview would not be admissible against the corporation. Both Rule 801(d)(2)(D), Federal Rules of Evidence, and Section 90.803(18)(e), Florida Evidence Code, provide that a statement by an agent or servant of a party is admissible against the party if it concerns a matter within the scope of the agency or employment and is made during the existence of the agency or employment relationship.
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> . . . [I]t is ethically permissible for the inquiring attorney to

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> contact former managers and other former employees of the opposing party without obtaining permission from the corporation's attorney unless those former employees are in fact represented by the corporation's attorney. But as indicated by some of the ethics committees cited above, the attorney should not inquire into matters that are within the corporation's attorney-client privilege (e. g., asking a former manager to relate what he had told the corporation's attorney concerning the subject matter of the representation).

(A copy of Ethics Opinion 88-14 is included in the appendix to the *Reynoso* decision, as well as in the petitioner's appendix at tab 20.)

In 1991, the American Bar Association clarified its Model Rule 4.2 in ABA Formal Ethics Opinion 91-359 -- entitled "The Prohibition of Rule 4.2 with Respect to Contacts by A Lawyer with Employees of an Opposing Corporate Party Does Not Extend to Former Employees of that Party. " Citing to decisions of the Supreme Court of Washington and the Court of Appeals of New York, the ABA concluded as follows:

> While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers [sic], the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.
>
> Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

(A copy of ABA Formal Ethics Opinion 91-359 is included in the appendix to the

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Reynoso decision, as well as in petitioner's appendix at tab 17.) More recently, in ABA Formal Ethics Opinion 95-396, the American Bar Association clarified the Rule further, but it noted as follows in footnote 47 of the opinion: "It should be noted that Rule 4.2 does not prohibit contacts with former officers or employees of a represented corporation, even if they were in one of the categories with which communication was prohibited while they were employed. This Committee so concluded in ABA Formal Op. 91-359 (1991). " (A copy of Ethics Opinion 95-396 is included in the petitioner's appendix at tab 19.)

The highest courts of at least six states with rules patterned upon Model Rule 4.2 have reached essentially the same conclusion (and no such court has held otherwise): ***Wright v. Group Health Hospital,*** 103 Wash.2d 192, 691 P.2d 564, 50 A.L.R.4th 641 (1984); ***Niesig v. Team I, 76*** N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990); ***Fulton v. Lane,*** 829 P.2d 959 (Okla. 1992); ***Strawser v. Exxon Co., U.S.A., a division of Exxon Corp., 843*** P.2d 613 (Wyo. 1992); ***State ex rel. Charleston Area Medical Center v. Zakaib***, 190 W. Va. ***186, 437*** S.E.2d ***759*** (1993); ***In the Matter of Opinion 668 of the Advisory Committee on Professional Ethics, 134*** N.J. ***294, 633*** A.2d 959 (1993).

Other lower state courts have largely followed suit, including two Florida District Courts of Appeal. See, ***e. g., Reynoso v. Greynolds Park Manor, Inc., 659*** So.2d 1156 (Fla. 3d DCA 1995); ***Estate of Schwartz v. H.B.A. Management,*** 673 So.2d 116 (Fla. 4th DCA 1996); ***Continental Insurance Co. v. Superior Court,*** 32 Cal. App.4th 94, 37 Cal. Rptr.2d ***843*** (1995); ***Lang v. Superior Court,*** 170 Ariz. 602, 826 P.2d 1228 (Ariz. App. 1992); ***Monsanto Co. v. Aetna Casualty & Surety Co., 593*** A.2d 1013 (Del. Sup. Ct. 1990); ***DiOssi v. Edison, 583*** A.2d 1343 (Del. Sup. Ct. 1990); ***Bobele v. Superior Court,*** 199 Cal. App.3d 708, 245 Cal. Rptr. 144 (1988).

Numerous federal district courts have also reached essentially the same conclusion:

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Terra International, Inc. v. Mississippi Chemical Corp., 913 F. Supp. 1306 (N.D. Iowa 1996); ***Lang v. Reedy Creek Improvement District, 888*** F. Supp. 1143 (M.D. Fla. 1995); ***Aiken v. Business & Industry Health Group, Inc., 885*** F. Supp. 1474 (D. Kan. 1995); ***Browning v. AT & T Paradyne, 838*** F. Supp. 1564 (M.D. Fla. 1993); ***Toliver v. Sullivan Diagnostic Treatment Center,*** 818 F. Supp. 71 (S.D. N.Y. 1993), *aff'd*, ***22*** F.3d 1092 (2nd Cir. 1994), ***cert. denied,*** 115 S. Ct. 1103, 130 L. Ed.2d 1070 (1995); ***Sequa Corp. v. Lititech, Inc., 807*** F. Supp. ***653*** (D. Colo. 1992); ***Sherrod v. The Furniture Center, 769*** F. Supp. 102 1 (W .D. Term. 1991); ***Action Air Freight, Inc. v. Pilot Air Freight Corp., 769*** F. Supp. ***899*** (E.D. Pa. 1991), ***appeal dismissed,*** 961 F.2d 207 (3d Cir. 1992); ***Hanntz v. Shiley, Inc., a Division of Pfizer, Inc., 766*** F. Supp. 258 (D. N. J. 1991); ***University Patents, Inc. v. Kligman, 737*** F. Supp. ***325*** (E.D. Pa. 1990); ***Porter v. Arco Metals*** Co. , 642 F. Supp. 1116 (D . Mont. 1986); ***Cram v. Lamson & Sessions Co., Carlon Division,*** 148 F.R.D. ***259*** (S.D. Iowa 1993); ***Brown v. St. Joseph County,*** 148 F.R.D. 246 (N.D. Ind. 1993); ***Goff v. Wheaton Industries,*** 145 F.R.D. 351 (D. N.J. 1992); ***Valassis v. Samelson,*** 143 F.R.D. 118 (E.D. Mich. 1992); ***In Re Domestic Air Transportation Antitrust Litigation,*** 141 F.R.D. ***556*** (N.D. Ga. 1992); ***Shearson Lehman Brothers, Inc. v. Wasatch Bank,*** 139 F.R.D. 412 (D. Utah 1991); ***Dubois v. Gradco Systems, Inc.,*** 136 F.R.D. 341 (D. ***Conn.*** 1991); ***Curley v. Cumberland Farms, Inc.,*** 134 F.R.D. ***77*** (D. N.J. 1991); ***PPG Industries, Inc.*** v. ***BASF Corp.,*** 134 F.R.D. 118 (W.D. Pa. 1990); ***Polycast Technology Corp. v. Uniroyal, Inc.,*** 129 F.R.D. 621 (S.D.N.Y. 1990); ***Amarin Plastics, Inc. v. Maryland Cup Corp.,*** 116 F.R.D. 36 (D. Mass. 1987); ***Fu Investment Co., Ltd. v. Commissioner of Internal Revenue,*** 104 T. C. 408, 1995 WL 14155 (U.S. Tax Ct. 1995); ***Shamlin v. Commonweath Edison Co.,*** 1994 WL 148701 (U.S.N.D. Ill. 1994); ***Breedlove*** v. ***Tele-Trip*** Co., ***Inc.,*** 1992 WL 202147 (U.S.N.D. Ill. 1992); ***AAMCO Transmissions, Inc. v. Marino,*** 1991 WL 193502 (U.S.E.D. Pa. 1991);

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Siguel v. Trustees of Tufts College, 1990 WL 29 199 (U. S . D . Mass. 1990); ***Oak Industries v. Zeneth Industries,*** 1988 WL 79614 (U.S.N.D. Ill. 1988).[2/]

Most respectfully, ***the overwhelming*** majority rule is that rules patterned upon Model Rule 4.2 do ***not*** prohibit ***ex parte*** communications with unrepresented former employees of a corporate litigant. There are several rationales advanced in the decisional law for this conclusion, as well as a number of policy and practical considerations -- all of which we commend to the Court. In the interest of economy, we will not engage in a lengthy discussion of them here. Instead, we refer the Court to a recent decision which carefully collects and intelligently discusses nearly all of them, and which makes about as strong a case as we could hope to make for the ruling which ***we*** seek here: ***Cram v. Lamson & Sessions Co., Carlon Division,*** 148 F.R.D. 259 (S.D. Iowa 1993). A copy of the decision is included in the appendix to this brief for the convenience of the Court, and we incorporate it here as our principal argument on the merits. The decision is thorough, clear, and concise, and we encourage the Court to read it for the substance of our position.31 We have also included a copy of the ***Reynoso*** decision in the appendix, for the same purpose.

We would add one important thing. In recent years, in response to a perceived public clamor and in an effort to reduce the number of frivolous lawsuits, the legislature has enacted several statutes requiring that counsel thoroughly investigate the facts before

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[2/] Of all of these decisions, ***only three -- Curley, PPG Industries,*** and ***Amarin Plastics*** -- suggest that the limited exception urged by the petitioner here ***might*** be available in an appropriate case; however, none of them contains a holding to that effect. The few remaining decisions which provide some arguable support for the petitioner's position will be discussed in the next subsection of the brief.

[3/] The ***Cram*** decision was recently updated by its author in ***Terra International, Inc. v. Mississippi Chemical Corp.,*** 913 F. Supp. 1306 (N.D. Iowa 1996) -- a thoughtful decision which also deserves a careful reading here.

filing a lawsuit, and that counsel actually certify that such an investigation has been performed, at the risk of serious sanctions. See, e. g., §§766.203 and 766.206, Fla. Stat. (1993). See *also* Rule 11, Fed. R. Civ. P. One of those statutes, governing suits brought against nursing homes, is implicated by the instant case. See §400.023(4), Fla. Stat. (1993). Most respectfully, imposing a rule *prohibiting* ***ex*** *parte communications* with former employees of a corporate litigant (like a nursing home, as the petitioner urges here), directly subverts the public policy contained in these statutes and therefore has little to commend it:

> . . . First, if all ***ex parte*** communications with an opposing party's former employees are prohibited, counsel's attempts at engaging in informal discovery will be sharply curtailed. In most cases, counsel will not have informal access to witnesses with important knowledge of critical facts, Counsel will be unable to access the merits of a case inexpensively and quickly by contacting these witnesses. Instead, counsel will be forced to file a lawsuit and engage in time-consuming and expensive formal discovery. Indeed, prohibiting ***ex parte*** communications with an opposing party's former employees could result in nonmeritorious cases being filed that otherwise would not have been filed, in order to learn information through formal discovery whether to prosecute the particular case. Formal discovery, in turn, can create protracted and quarrelsome discovery disputes which consume finite judicial resources.
>
> Prohibiting ***ex parte*** communications could also result in potentially meritorious cases not being filed. Plaintiff's counsel would be deprived of a primary source of informal fact gathering to determine the merits of a case. If, however, counsel is permitted to contact former employees, counsel may be able to quickly determine whether the case is meritorious. Thus, allowing ***ex parte*** communications with former employees has the potential to reduce costly and expensive formal discovery. Moreover, it also has the potential of screening non-meritorious cases. Finally, allowing ***ex parte*** communications with former employees facilitates earlier settlement by expediting the flow of important factual infor-

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mation.

Cram v. Lamson & Sessions Co., Carlon Division, 148 F.R.D. ***259, 261-62*** (S.D. Iowa 1993). In light of the legislature's recent policy mandating thorough pre-trial investigation, we commend this sensible observation to the Court.

Incidentally, the sensibility of this observation is nicely illustrated by the facts in ***Reynoso.*** In that case, the defendant identified 60 former nursing home employees who had cared for the plaintiff's ward. The plaintiff wished to utilize the relatively inexpensive expedient of having an investigator contact and interview them to determine if they had any knowledge relevant to the case. Relying upon ***Barfuss***, the defendant insisted that process had to be served on each former employee, and that two sets of lawyers and a court reporter be assembled to conduct 60 separate formal depositions. Because the cost of the latter procedure would have been prohibitive, it is unlikely that the plaintiff would have been able to prosecute the case at all if the Third District had not disagreed with ***Barfuss***. Most respectfully, absent a very compelling reason for prohibiting ***ex parte*** contact with unrepresented former employees of a corporate litigant, Rule 4-4.2 plainly ought to be construed as narrowly as its language will allow.

B. The Second District's contrary conclusion was based upon a misapplication of the principal authority upon which it relied.

We turn now to the fly in the ointment -- ***Barfuss v. Diversicare Corp. of America,*** 656 So.2d 486 (Fla. 2d DCA 1995). Although acknowledging that "there is a split of decision across the nation on the propriety of ex parte contact with former employees" (but without disclosing that the "split" is ***overwhelmingly*** in favor of ***allowing*** such contact), the ***Barfuss*** Court chose to rest its holding on the decision of a single Florida trial judge, United States District Court Judge Elizabeth Kovachevich: ***Rent&b, Inc. v. Transamerica Rental Finance Corp.,*** 811 F. Supp. 651 (M.D. Fla. 1992), ***aff'd on***

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another ground, 43 F.3d 1439 (11 th Cir. 1995). In our judgment, *Rentclub* was poor authority for the prohibition imposed by the *Barfuss* Court, for two reasons.

First, *Rentclub* is highly fact-sensitive and involves a far narrower holding than the broad proscription attributed to it by ***the*** *Barfuss* Court. In *Rentclub*, a defendant sought the disqualification of plaintiff's counsel, because he had hired and paid a former managerial-level employee of the defendant -- who was in possession of confidential and privileged material relating to the litigation, and who had been involved in litigation substantially related to the case while an employee -- to be a fact witness in the case. Judge Kovachevich disqualified plaintiff's counsel for ***the principal*** reason that there was an "appearance of impropriety" in hiring someone privy to confidential and privileged information about the case, and in then ***paying*** him to be a ***fact*** witness (as opposed to a mere consultant).

Judge Kovachevich then addressed the question of whether plaintiff's counsel had also violated Rule 4.2 of the ABA's Model Rules. She did ***not*** hold (as the *Barfuss* Court apparently perceived) that the Rule was violated by any communication with any former employee who might have participated in the events underlying the lawsuit. Her holding was much narrower. She carefully explained that the general rule ***allowing*** such communications did not apply to the unique facts before her, for a rather compelling reason:

> Cases that follow the traditional interpretation of DR 7-104(A)(l), the precursor to Model Rule 4.2 -- which was not meant to include former employees within the definition of the corporate "party" -- do not involve the situation where a former employee was privy to the corporation's legal strategies after his employment had terminated or where a former employee had access to privileged information while employed. It has been held that "the problem of protecting privileged material is best dealt with on a case-by-case basis. And where there is a strong likelihood that a former employee

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> does possess such information, an appropriately tailored order can be issued." . . .
>
> Privileged communications present a distinct problem with respect to contact with former employees, thus *ex parte* contact should be barred to prevent disclosure of any inadvertent confidential communications. . . .

811 F. Supp. at 657.

Judge Rovachevich then concluded that, because the former employee had been the defendant's chief financial officer, and because he was privy to both privileged information affecting the case and the defendant's legal strategy in substantially related cases, plaintiff's counsel's communications with the former employee violated the spirit of Model Rule 4.2, requiring his disqualification. Most respectfully, there is nothing in that highly fact-sensitive, very narrow holding to justify the ***Barfuss*** Court's far broader holding that it is unethical to communicate with non-managerial level, unrepresented former employees of a nursing home simply because they may have been involved in the care and treatment of the plaintiff. It is also a certainty that Judge Kovachevich did not intend that ***Rentclub*** be applied in that fashion, because she later ***refused*** to extend ***Rentclub*** to bar communications with a former managerial-level employee who was not in possession of any privileged information affecting the lawsuit. See ***Browning v. AT & T Paradyne,*** 838 F. Supp. 1564 (N.D. Fla. 1993).[4/]

We are also constrained to note that, because it deals with the "distinct problem" of "privileged communications," ***Rentclub*** is not even inconsistent with the rule we seek here, because both of the ethics opinions with which we began our argument -- Florida

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[4/] ***Rentclub*** was recently followed in ***United States v. Florida Cities Water Co.,*** 1995 WL 340980 (U. S .M.D. Fla. 1995) -- but like ***Rentclub***, the ***ex parte*** contact sought was of managerial-level former employees in possession of privileged information. No such problem is presented in the instant case.

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Bar Ethics Opinion 88- 14 and ABA Formal Ethics Opinion 91-359 -- specifically state that the communications with former employees allowed by the Opinions do not extend to the solicitation of privileged information. ***See Reynoso v. Greynolds Park Manor, Inc.,*** 659 **So.2d** 1156, 1158 (Fla. 3d DCA 1995) ("We point out the caveats contained at the endofthe. . . opinions, reminding counsel that no inquiry can be made into any matters that are the subject of the attorney-client privilege"); ***Camden v. State of Maryland,*** 910 F. Supp. 1115, 1122 (S .D. Md. 1996) ("So long as privileged matters are respected, all other former employees remain fair game"). We should also note that the Eleventh Circuit's recent affirmance of *Rentclub* provides no support for *Barfuss*, because Judge Kovachevich's disqualification of plaintiff's counsel was affirmed on the sole ground that "the district court did not abuse its discretion in finding that there was the appearance of impropriety in the payment to [the former employee], " and the second ground upon which Judge Kovachevich had relied was not addressed. ***Rentclub, Inc. v. Transamerica Rental Finance Corp.,*** 43 F. 3d 1439 (1 lth Cir. 1995). For all of these reasons, the narrow holding of *Rentclub* was poor authority for the far broader holding of *Barfuss*.

There is a second reason why *Rentclub* was poor authority for the blanket prohibition imposed by the *Barfuss* Court. As authority for her conclusion in ***Rent&b,*** Judge Kovachevich relied principally upon ***Public Service Electric & Gas Co. v. Associated Electric & Gas Insurance Services, Ltd., 745*** F. Supp. 1037 (D. N. J. 1990) -- an early decision construing Model Rule 4.2 which was decided before the ABA ruled to the contrary in Formal Ethics Opinion 91-359. The law in New Jersey is now considerably different. In fact, there have been at least three subsequent decisions by other United States District Court judges sitting in New Jersey which have refused to follow ***Public Service Electric & Gas,*** and which have squarely held that communications with former employees of a corporate defendant are perfectly proper. See ***Curley v.***

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Cumberland Farms, Inc., 134 F.R.D. ***77*** (D. N.J. 1991); ***Hanntz v. Shiley, Inc., a division of Pfizer, Inc., 766*** F. Supp. ***258*** (D. N.J. 1991); ***Goff v. Wheaton Industries,*** 145 F.R.D. 351 (D. N.J. 1992).

The New Jersey state courts have also refused to follow ***Public Service Electric &*** Gas, and have held to the contrary. See, e. g., ***In Re Environmental Insurance Declaratory Judgment Actions***, ***252*** N.J. Super. 510, 600 A.2d 165 (N. J. Super. 1991); ***Neil S. Sullivan Associates, Ltd. v. Medco Containment Services, Inc.*** , 257 N. J. Super. 155, 607 A.2d 1386 (N.J. Super. 1992). ***Cf. State v. Ciba-Geigy Corp.,*** 247 N.J. Super. 314, 589 A.2d 180 (N.J. App. Div. 1991), ***appeal dismissed,*** 130 N.J. 585, 617 A.2d 12 13 (1992). And the question was recently put to rest by the New Jersey Supreme Court, which adopted an interim rule authorizing communications with former employees of a corporate party -- provided only that, if the former employee is one whose conduct, in and of itself, establishes the party's liability, a simple notice is provided to the corporate party in advance of the contact. ***In the Matter of Opinion 668 of the Advisory Committee on Professional Ethics,*** 134 N. J. 294, 633 A.2d 959 (1993). Finally, we note that even the petitioner has conceded that ***Public Service Electric*** & ***Gas*** "reached the wrong conclusion" (petitioner's brief, p. 31). In other words, ***Public Service Electric & Gas*** was extremely poor authority for Judge Kovachevich's decision in ***Rentclub*** -- and for this additional reason, ***Rentclub*** was therefore extremely poor authority for ***Barfuss***.

One other important point needs to be made before we turn to the petitioner's arguments. In ***Barfuss***, the Court held that it was improper to communicate ***exparte*** with former employees of a nursing home who had been involved in the care of the plaintiff, but "noted that there is no restriction on contact with former employees who were merely witnesses to the care of [the plaintiff]." 656 So.2d at 489 n. 5. We respectfully submit that this distinction will be difficult to draw in many cases, since a former employee

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involved in the care of the plaintiff may also have been a witness to mistreatment of the plaintiff by another employee. But more importantly, the distinction presents a yawning trap for attorneys in this state, since attorneys will rarely know before they contact the former employees whether they fall into the authorized category or the prohibited category, and the ethical violation will occur unpredictably the instant the former employee reveals that he or she was involved in, rather than a mere witness to, the care of the plaintiff. Given this unpredictable risk, the only safe way to comply with *Barfuss* is to have no ***ex parte*** contact at all with ***any*** former employees, even if such a contact might have been permissible -- and *Barfuss* therefore has the effect of closing many more doors than the one which it set out to secure. Most respectfully, the distinction which *Barfuss* draws between the two types of former employees is simply unworkable as a practical matter, and the distinction therefore deserves to be disavowed here,

In short and in sum, *Barfuss* is a lonely wave in a veritable sea of contrary authority, with neither precedent nor policy to support it. It is contrary to the plain language of Rule 4-4.2 of the Rules Regulating The Florida Bar; it is contrary to The Florida Bar's own interpretation of that Rule; and it is contrary to the ABA's interpretation of Model Rule 4.2, from which that Rule derives. *Barfuss* plainly ought to be disapproved.

C. The petitioner has provided no sound reason for a contrary conclusion.

Despite the fact that its position has been roundly and soundly rejected across the length and breadth of the nation, the petitioner and its amicus propose that *Barfuss* should be approved for essentially three reasons. First, they argue that Rule 4-4.2's use of the word "person" in lieu of Rule 4.2's word "party" renders suspect all of the prior decisional law on the subject. As should be clear by now, however, this word change

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has nothing to do with the issue presented here. The issue presented here derives exclusively from the ***Comment*** to Rule 4.2, which has always used the word "person" to describe the limited universe of agents of a corporate party, and the Comment to Rule 4-4.2 is identical. The decisional law construing the Comment to Rule 4.2 is therefore plainly relevant to the meaning of the Comment to Rule 4-4.2.

Just as importantly, it bears repeating that the petitioner's argument is constructed entirely upon the Comment to the Rule, rather than the language of the Rule itself. While a Comment to a Rule is certainly good authority for determining the meaning of a Rule, the meaning of the Rule must ultimately be constrained by the language of the Rule itself. A Comment cannot be utilized to expand the Rule beyond its plain language to make it mean something entirely different than it says. In this case, Rule 4-4.2 prohibits ***ex parte*** communications only "with a person a lawyer knows to be represented by another lawyer in the matter." Disregarding this language, and relying exclusively upon an ambiguity in its accompanying Comment, the petitioner would have the Court read the Rule to prohibit ***ex parte*** communications with ***unrepresented*** former employees, simply because they may have been involved in the care of the plaintiff during their prior employment. Most respectfully, such a construction of the Rule would be inconsistent with the language of the Rule itself, and therefore has little to commend it here. See ***Aiken v. Business & Industry Health Group, Inc.,*** 885 F. Supp. 1474 (D. Kan. 1995).

Second, the petitioner and its amicus argue that the Rule ought to be expanded to prohibit ***exparte*** communications with former employees because unrepresented witnesses are subject to, in the petitioner's words, "testimonial sculpting at the hands of an adversary's clever lawyer," "manipulative tactics, such as coaching the former employee on key facts under the guise of 'helping' him to remember," and any number of other unethical practices (petitioner's brief, pp. 33, 34). In effect, the petitioner has asked the

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Court to declare that the members of its Bar (and their investigators) are generally sleazy, and that unrepresented laypersons therefore ought to be protected from them unless there is another (equally sleazy?) lawyer in the room to deter unethical importuning. Actually, this is an argument for prohibiting ***all ex parte*** communications with any and all persons who might provide relevant information in the investigation of a lawsuit, so it provides no real justification for the much narrower prohibition which the petitioner seeks -- but it suffers from a number of more significant shortcomings as well.

To begin with, we do not share the petitioner's cynical opinion concerning the ethics of Florida's lawyers. Surely there are a few who deserve the petitioner's indecorous aspersions, but the overwhelming majority of them do not. And it makes no sense to prohibit all 55,000 of Florida's lawyers from going about the normal business of investigating their cases simply because a handful of them might manipulate a witness or two. Moreover, the unethical conduct which the petitioner posits as a reason for prohibiting ***ex parte*** contact is already proscribed by Rules 4-3.4, 4-4.1, 4-4.3, 4-4.4, and 4-8.4 (not to mention the criminal law proscribing the subornation of perjury) -- and the severe sanctions which attach to violations of those Rules ought to be quite enough to provide the necessary deterrence. Most respectfully, just as lawyers should not be prohibited from practicing law altogether simply because a handful of them may not practice it all that well, lawyers should not be overly restricted in investigating their cases just because a handful of them might occasionally violate the ethical rules governing those investigations.

More importantly still, the petitioner's argument contains no solution to the problem it posits; it simply shifts the problem from one side of the "vs. " sign to the other. In this case, for example, if plaintiff's counsel are prohibited by Rule 4-4.2 from ***ex parte*** contact with former employees of the defendant involved in the care of the

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plaintiff, it can only be because those employees are considered to be, in the language of the Rule itself, "represented by another lawyer in the matter" -- i. e., represented by the corporate defendant's attorney. But if the employee is considered to be "represented" by the corporate defendant's attorney for the purpose of barring ***ex parte*** contact by plaintiffs' counsel, then the corporate defendant's attorney is ***not*** prohibited by Rule 4-4.2 from communicating *ex parte* with the former employee. We do not believe that the ethics of the defense bar are any better (or worse) than the ethics of the plaintiffs' bar (and the distinction is irrelevant in any event, because Rule 4-4.2 applies to corporate plaintiffs as well as corporate defendants), so the problem of manipulation by ***ex parte*** contact will remain even if the Court were to adopt the petitioner's construction of the Rule. Most respectfully, for all of these reasons, the petitioner's cynical invocation of the possibility of unethical importuning of unrepresented witnesses provides no legitimate justification for the reading of Rule 4-4.2 which it seeks.

Third, and finally, the petitioner and its amicus argue that the legislature's recent amendments to §455.24 1(2), Fla. Stat. -- which now prohibits ***ex parte*** communications with a plaintiffs treating physicians -- supports their proposed reading of Rule 4-4.2. We entirely disagree. The petitioner is simply wrong that "[t]he primary purpose of the statute is to guard against the prejudice that would allegedly befall a plaintiff if a defense lawyer were allowed ex parte contact with the plaintiff's treating physicians" (petitioner's brief, p. 29). Neither did "the legislature implicitly recognize . . . in enacting section 455.241(2)" an "important purpose" in "protecting against unethical gamesmanship" (petitioner's brief, p. 30). Most respectfully, the petitioner has badly missed the point of the statute.

The statute was a reaction to *Coralluzzo* v. ***Fuss,*** 450 So.2d 858 (Fla. 1984), in which this Court declined to prohibit ***exparte*** communications with a plaintiff's treating

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physicians because there was "no general statutory privilege for the physician-patient relationship." *Acosta v.* ***Richter,*** 671 So.2d 149, 150 (Fla. 1996). "In 1988, however, the legislature amended section 455.241(2), ch. 88-208, $2, Laws of Fla., to provide for a physician-patient ***privilege of confidentiality*** by adding the following emphasized language . . . ." ***Id.*** at 150-51 (emphasis supplied). Most respectfully, it was this statutory "privilege of confidentiality" which the prohibition against ***exparte*** contact was designed to protect, not the "unethical gamesmanship" of defense lawyers -- and the Court will find no reference to the latter "purpose" in either the legislation or in ***Acosta.*** And it is that "privilege of confidentiality" which plainly distinguishes §455.241(2) from Rule 4-4.2, of course, so the statute cannot fairly be analogized to the Rule.

In fact, Rule 4-4.2 is already qualified in precisely the manner which §455.241(2) might suggest -- because, although it allows ***ex parte*** contact with former employees of a corporate litigant, the extensive gloss which accompanies it quite plainly prohibits the solicitation of privileged material:

> With respect to ***any*** unrepresented former employee, of course, the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer's counsel are protected by the privilege . . . .

ABA Formal Ethics Opinion 91-359. See Florida Bar Ethics Opinion 88- 14 ("[T]he attorney should not inquire into matters that are within the corporation's attorney-client privilege"); ***Reynoso v.*** *Greynolds* ***Park Manor, Inc.,*** 659 So.2d 1156, 1158 (Fla. 3d DCA 1995) ("We point out the caveats contained at the end of the . . . opinions, reminding counsel that no inquiry can be made into any matters that are the subject of the attorney-client privilege"). In addition, see the discussion of ***Rent&b, Inc. v.***

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Transamerica ***Rental Finance Corp.,*** 811 F. Supp. 651 (N.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995), in Part B of our argument, *supra*.

Most respectfully, the fact that §455.241(2) prohibits *ex parte* communications where a "privilege of confidentiality" exists is no reason to prohibit ***exparte*** communications with former employees of a corporate litigant where no such "privilege of confidentiality" exists -- and the petitioner's third argument is therefore no argument at all. Most respectfully, the petitioner and its amicus have offered no legitimate reasons for this Court to disagree with The Florida Bar, the American Bar Association, and the ***overwhelming*** majority of state and federal courts which have decided the question presented here -- and we respectfully urge the Court to announce its agreement with the plainly prevailing national view,

IV.
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that both ***Reynoso*** and the decision under review should be approved, and that ***Barfuss*** should be disapproved.

Respectfully submitted,

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Lisa CRAM, Plaintiff,

v.

The LAMSON & SESSIONS CO., CARLON DIVISION, an Ohio Corporation, Defendant.

No. 3-92-CV-10157.

United States District Court,
S.D. Iowa,
Davenport Division.

April 13, 1993.

In employment discrimination action, employee's counsel filed application for discovery seeking court permission to engage in ex parte communications with former employees of corporate defendant. The District Court, Bennett, United States Magistrate Judge, held that counsel could engage in ex parte communications with former employees of defendant without violating proscriptions against attorney communications with represented party.

So ordered.

1. Attorney and Client ⇐32(12)

Counsel representing employee in Title VII action could engage in ex parte communications with former employees of corporate defendant without violating proscription against attorney communications with represented party, even if statements of former employees could reveal facts giving rise to corporate liability. **ABA** Code of Prof.Resp., DR 7-104(A)(1); **ABA Rules of Prof.Conduct, Rule 42.**

2. Master and Servant ⇐302(1)

Under theory of respondeat superior, tortious conduct by employee which arises during scope of his **or** her employment may be imputed to employer.

3. Civil Rights ⇐145

Under Title VII, employer may be held liable for harassing actions of employee if management-level employees knew, or had reason to know, about abusive conduct. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Attorney and Client ⇐32(12)

Attorney communicating with former employees of **opposing** party may not inquire into privileged attorney-client communications, since any privilege existing between former employee and organization's counsel belongs to the **organization,** and can only be waived by the **organization.**

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Thomas J. Barnard of Duvin, Cahn & Barnard, Cleveland, OH, and Richard W. Farwell of Farwell & Bruhn, Clinton, LA, for defendant.

ORDER GRANTING APPLICATION FOR DISCOVERY

BENNETT, United States Magistrate Judge.

This employment discrimination **litigation** raises the recurring question **of** whether Plaintiff's counsel **may engage in *ex parte* communications with former employees of** Defendant without violating the proscription on attorney **communications contained in Iowa** Code of Professional Responsibility DR 7-104(A)(1) (1992).[1]

1. **DR 7-104(A)(1) is Iowa's verbatim adoption of Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility. DR 7-104(A)(1) states in pertinent part:**

> **During the course of his representation of a client a lawyer shall not [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.**

Because Plaintiffs counsel are licensed Iowa attorneys and subject to being sanctioned for violations of the Iowa Code of Professional Responsibility, the court shall assume for the purposes of this motion that DR 7-104(A)(1) is applicable here. DR 7-104(A)(1) is substantially identical to American Bar Association Model Rule of Professional Conduct 4.2 which provides:

> **In representing a client, a lawyer shall not communicate about the subject** of the representation **with a party the lawyer knows** to be **represented by** another **lawyer** in the matter.

I. INTRODUCTION AND BACKGROUND

This is a sexual harassment action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–17. Plaintiff Lisa Cram alleges she was sexually harassed by her immediate supervisor at Defendant's Carlon Division plant in Clinton, Iowa and ultimately fired in retaliation for filing a complaint about the harassment.

On November 17, 1992, Plaintiff's attorney wrote to Defendant's counsel to inquire whether Defendant would object to Plaintiffs counsel contacting and interviewing former employees of Carlon. Defendant's counsel responded that Defendant would not consent to such interviews and would seek sanctions if Plaintiffs counsel did so. As a result, Plaintiff's counsel filed an Application for Discovery on March 2, 1993 seeking court permission to engage in *ex parte* communications with former employees of the Defendant. Defendant failed to file a timely resistance to Plaintiff's motion. Local Rule 14(f) provides in pertinent part that "[i]f no resistance is filed the motion may be granted." A review of existing case law indicates that this issue is being raised with greater frequency. Therefore, the court will address the merits of this important and recurring issue, unfortunately without the benefit of full briefing by the parties.

II. ANALYSIS

A Rationale Underlying DR 7–104(A)(1)

The express language of DR 7–104(A)(1) clearly prohibits an attorney from discussing a case with a party who is not represented by counsel, unless the attorney has permission of counsel or is authorized by law to do so. When a party is represented by counsel, however, the rule does not define who is to be considered a represented party. Therefore, the question arises whether DR 7-104(A)(l) applies to former employees of the opposing party.

There are several rationales for the proscription of ex *parte* communication with parties represented by counsel. "First, '[i]t prevents unprincipled attorneys from exploiting the disparity in legal skills between attorney and lay people.' " *Polycast Technology Cm-p.* v. *Uniroyal,* Inc., 129 F.R.D. 621, 625 (S.D.N.Y.1990) (quoting *Papanicolaou v. Chase Manhattan Bank* 720 F.Supp. 1080, 1084 (S.D.N.Y.1989)); see *Valassis v. Samelson,* 143 F.R.D. 118, 120 (E.D.Mich.1992) (interpreting Model Rule 4.2); *Goff v. Wheaton Indus.,* 145 F.R.D. 351, 354 (D.N.J.1992) (interpreting Model Rule 4.2); *Hanntz v. Shiley,* Inc., 766 F.Supp. 258, 266 (D.N.J.1991) (interpreting Model Rule 4.2); *Curley v. Cumberland Farms, Inc.,* 134 F.R.D. 77, *87* (D.N.J.1991) (interpreting Model Rule 4.2). Second, the Rule "preserves the integrity of the attorney-client relationship" by preventing an attorney from coming between the opposing attorney and client. *Polycast,* 129 F.R.D. at 625; *Hanntz,* 766 F.Supp. at 265; *Papanicolaou,* *720* F.Supp. at 1084; see also *Curley,* 134 F.R.D. at 87. Third, the Rule prevents "the inadvertent disclosure of privileged information." *Polycast,* 129 F.R.D. at 625. Finally, the Rule advances dispute settlements by channeling communications between lawyers accustomed to the negotiation process. *Id.*

These policy considerations, however, have marginal relevance when the communication is between an attorney and a former employee of an organization. *Id; see Goff,* 145 F.R.D. at 356; *Hanntz,* 766 F.Supp. at 266. Because the former employee no longer works on the organization's behalf, the former employee will not be a party to settlement negotiations. *Polycast,* 129 F.R.D. at *625; see Hanntz, 766* F.Supp. at 265; *Goff,* 145 F.R.D. at 354. Furthermore, an attorney-client relationship between former employee and the employer's attorney is unlikely. Accordingly, the risk of jeopardizing an attorney-client relationship is substantially diminished. *Polycast,* 129 F.R.D. at 625; see *Hanntz, 766* F.Supp. at 265. The former employee, however, may have obtained privi-

unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Model Rules of Professional Conduct Rule 4.2 (1992). Because DR 7–104(A)(1) and Rule 4.2 are substantially identical, the court will consider discussion, comments and opinions concerning Rule 4.2 in its analysis of DR 7–104(A)(1).

(2)

leged information during employment which may affect the employer's potential liability. *Polycast*, 129 F.R.D. at 625-26. Thus, concerns of preventing the inadvertent disclosure of privileged information by the former employee are still present. Id. at 626."

In determining the appropriate resolution of this issue, the court is guided by substantial case law on this issue interpreting both DR 7-104(A)(1) and Model Rule 4.2.[3] These decisions are discussed in the following section.

B. *Case Law Regarding DR 7-104(A)(1) and Rule 4.2*

[1] *(i). D R 7-104(A)(1).* Courts h a v e uniformly held that DR 7-104(A)(1) does not generally prohibit *ex parte* communications with former employees of an opposing party. *See Sequa Corp. v. Lititech, Inc., 807* F.Supp. 653, 659-60 (D.Colo.1992); *In re Domestic Air Transp. Antitrust Litig.*. 141 F.R.D. 556, 561-62 (N.D.Ga.1992); *Polycast*, 129 F.R.D. at 628-29; *Sherrod v. Furniture Ctr., 769* F.Supp. 1021, 1022 (W.D.Tenn.1991); *Siguel v. Trustees of Tufts College. No.* 88-0626-Y, 1990 WL 29199, at ● 4 (D.Mass. Mar. 12, 1990); see *also Amarin Plastics Inc. v. Maryland Cup* Corp., 116 F.R.D. 36, 39-41 (D.Mass.1987) (noting in dictum that DR 7-104 does not apply to former employees absent a showing that former employees' acts or omissions could be imputed to employer); *Chancellor v.* Boeing Co., 678 F.Supp. 250, 253 (D.Kan.1988) (indicating in dictum that ex *parte* contact with former employees permissible absent showing that former employees' actions may be imputed to employer). The policy reasons for not including former employees within the definition of party are summarized *in Polycaat Technology Corp.*:

> First, any shift away from informal information gathering toward formal discovery increases costs and reduces judicial efficiency. Second, and more important, it would act as a deterrent to the disclosure of information. Former employees often have emotional or economic ties to their former employer and would sometimes be reluctant to come forward with potentially damaging information if they could only do in the presence of the corporation's attorney.

129 F.R.D. at 628 (citations omitted).

These policy considerations substantially impact the cost and delay of federal civil litigation, First, if all *ex parte* communications with an opposing party's former employees are prohibited, counsel's attempts at engaging in informal discovery will be sharply curtailed. In most cases, counsel will not have informal access to witnesses with important knowledge of critical facts. Counsel will be unable to access the merits of a case inexpensively and quickly by contacting these witnesses. Instead, counsel will be forced to file a lawsuit and engage in time-consuming and expensive formal discovery. Indeed, prohibiting ex *parte* communications with an opposing party's former employees could result in nonmeritorious cases being filed that otherwise would not have been filed, in order to learn information through formal discovery whether to prosecute the particular case. Formal discovery, in turn, can create protracted and quarrelsome discovery disputes which consume finite judicial resources.

Prohibiting ex *parte* communications could also result in potentially meritorious cases not being filed. Plaintiff's counsel would be deprived of a primary source of informal fact gathering to determine the merits of a case. If, however, counsel is permitted to contact former employees, counsel may be able to quickly determine whether the case is meritorious.[4] *Thus,* allowing ex *parte* communi-

2. Regardless of these concerns. "the traditional view has been that former employees are not encompassed within the term 'party' in DR 7-104[(A)(1)], and so may be contacted without notice to the corporation's attorney." *Polycast*, 129 F.R.D. at 626.

3. Forty states and the District of Columbia have adopted either the Model Rules or their equivalent. John E. Iole & John D. Goetz, Ethics *or Procedure? A Discovery-Based Approach to* Ex *Parte Contacts with Former Employees of a Corporate Adversary. 68* Notre Dame L.Rev. 81, n. 9 (1992).

4. *Even* if counsel concludes the case is meritorious and presses forward. the informal contact with former employees may result in less need for formal discovery because counsel will be in a better position to assess which former employees

cations with former employees has the potential to reduce costly and expensive formal discovery. Moreover, it also has the potential of screening non-meritorious cases, Finally, allowing *ex parte* communications with former employees facilitates earlier settlement by expediting the flow of important factual information,

A second consequence of prohibiting counsel from contacting former employees may be to foreclose discovery of pertinent material due to the former employee's fear and apprehension to communicate. Instead of having the initial contact between the former employee and counsel take place in informal and relaxed surroundings, such as the former employee's home, the exchange would likely occur under intense and formal proceedings. Furthermore, former employees may be hesitant to discuss matters openly in the presence of their former employer's attorney because of perceived economic and social consequences that could result from their actions. Thus, permitting contact with former employees furthers the laudable goal of early and inexpensive disclosure of factual information concerning the merits of a case.

Case law interpreting and policy reasons underlying DR 7-104(A)(1) clearly support the conclusion that DR 7-104(A)(1) does not bar counsel from having *ex parte* contact with a party's former employees. This is also true of DR 7-104(A)(1)'s sister rule, Model Rule 4.2, discussed below.

(ii). Model Rule ***4.2.*** Under the model de, the majority of courts have similarly held that Rule 42 does not apply to former employees and therefore does not restrict *ex parte* communications with *any* former employee. *Goff,* 145 F.R.D. at 354; *Valassis,* 143 F.R.D. at 122; *Action Air Freight, Inc. v. Pilot Air Freight* Corp., 769 F.Supp. 899, 904 (E.D.Pa.1991), *appeal dismissed,* 9 6 1 F.2d 207 (3rd Cir.1992); Shearson *Lehman Bros. v. Wasatch Bank 139* F.R.D. 412, 418 (D.Utah 1991); *Hanntz,* 766 F.Supp. at 263; *Dubois v. Gradaco Systems,* Inc., 136 F.R.D. 341, 345–47 (D.Conn.1991). Indeed, only one court has proscribed any *ex parte* communications with former employees. See ***Public Sew. Elec. & Gas Co. v. Associated Elm. &*** Gas ***Ins, Serv., Ltd.***, 745 F.Supp. 1037, 1039 (D.N.J.1990).[5]

A minority of courts have allowed *ex parte* communications with former employees subject to certain conditions. *Valassis v. Samelson,* 143 F.R.D. 118, 121 (E.D.Mich.1992). One court concluded that *ex parte* communications with former managerial employees may not be conducted if those employees had responsibilities concerning the subject matter of the litigation, see ***Porter v. Arco Metals*** Co., 642 F.Supp. 1116, 1118 (D.Mont.1986). Other courts have held that former managerial employees may be contacted if none of the information they provided would impute liability to the former employer. *Curley v. Cumberland Farms,* Inc., 134 F.R.D. 77, 82–33 (D.N.J.1991); ***University Patents, Inc. v. Kligman,*** 737 F.Supp. 325, 328 (E.D.Pa. 1990); ***PPG Indus., Inc. v. BASF Corp.***, 134 F.R.D. 118, 121 (W.D.Pa.1990); *Rentclub, Inc. v. Transamerica Rental Fin Corp.*, 811 F.Supp. 651, 66758 (M.D.Fla.1992); ***In re Home Shopping Network, Inc. Sec. Litig.,*** No, 87-248-CIV-T-13A, 1989 WL 201085, at ● l-2 (M.D.Fla. June 22, 1989). In reaching these decisions, the courts looked to the official Comment to Rule 42, which provides in pertinent part:

> In the case of an organization, this rule prohibits communications by a lawyer for one party 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

5. Although Defendant's counsel relies on *Public* Serv. *Elec. &* Gas Co.. this case is an anomaly among all reported cases on the issue of *ex parte* communications with former employees and it has not been followed by any other court. Indeed, *Public* Serv. *Elec. & Gas* has been pointedly criticized by two other decisions out of the New Jersey District. *See Curley v. Cumberland Farms,* Inc.. 134 F.R.D. 77, 80 (D.N.J.1991); *Hanntz,* 766 F.Supp. at 266–67. The only other cases interpreting Model Rule 4.2 as prohibiting *ex parte* contact with former employees. *American Protective* Ins. Co. v. *MGM* Grand *Hotel–Las Vegas, Nos. 83-2674, 83-2728* (9th Cir. Dec. 3, 1984), and *Sperber v. Mental Health Council, Inc., No. 82* Civ. 7428 (S.D.N.Y. Nov. 21. 1983), were subsequently vacated and withdrawn. *Curley, 134* F.R.D. at 86.

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> whose statement may constitute an admission on the part of the organization. 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 this rule.

Model Rules of Professional Conduct Rule 4.2 cmt. (1992).

The court concludes, however, that the interpretations of the Comment to Rule 4.2 in *Polycast*, 129 F.R.D. at 626, and *Hanntz*, 766 F.Supp. at 269 persuasively demonstrate that Model Rule 4.2 does not prohibit *ex parte* communications with former employees.

The Comment defines an organizational "party" as (1) "persons having a managerial responsibility[,]" (2) "any other person" whose act or omission may be imputed to the organization for purposes of liability or whose statements may constitute an admission by the corporation. *See Hanntz*, 766 F.Supp. at 266; *Valassis*, 143 F.R.D. at 122; see also *Curley*, 134 F.R.D. at 88 (construing Comment to address three situations: managerial, "other person," and admissions).

Relying on this Comment, some courts have construed Rule 4.2 to define "party" to include certain former employees. See e.g., *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 40 (D.Mass.1987); *Curby*, 134 F.R.D. at 88. Clearly, however, the first category of who may constitute a party is limited to current employees. *Polycast*, 129 F.R.D. at 626; see *Valassis*, 143 F.R.D. at 122. A former employee cannot be a "person having managerial responsibility," and 'it is a general rule of evidence that a statement of a *former* agent does *not* constitute an admission on the part of an organization." 2 G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 4.2:108, at 741 (1991 Supp.); *Valassis*, 143 F.R.D. at 122; *Hanntz*, 766 F.Supp. at 266; see *Fed R.Evid.* 801(d)(2)(D). Thus, under the first category, a former managerial employee cannot bind his or her former employer after the agency relationship has terminated. *Hanntz*, 766 F.Supp. at 26667; *Sherrod v. Furniture Ctr.*, 769 F.Supp. 1021, 1022 (W.D.Tenn.1991) ("Former corporate employees have no authority under law to bind the corporation by their current deeds and statements."); *see Anderson v. United States*, 417 U.S. 211, 218–19 n. 6, 94 S.Ct. 2253, 2259 n. 6, 41 L.Ed.2d 20 (1974). Likewise. under the second category, for a statement to constitute an admission on behalf of his or her employer, it must be "made during the existence of the relationship." *Fed R.Evid.* 801(d)(2)(D); see *Curley*, 134 F.R.D. at 92; see also *Valassis*, 143 F.R.D. at 122.

[2, 3] The second category's language referring to other persons acts being imputed to the employer is more problematic. Obviously, under the theory of respondeat superior, tortious conduct by an employee which arises during the scope of his or her employment may be imputed to the employer. See Restatement (Second) of Agency § 219 (1958).[6] Similarly, under Title VII, an employer may be held liable for the harassing actions of an employee if management-level employees knew, or have reason to know about the abusive conduct. See *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1015–16 (8th Cir.1988). Because acts of a former employee done during the employee's period of employment may be imputed to the employer, some courts have interpreted the second category to include both present and former employees. See *Valassis*, 143 F.R.D. at 122–23; *Curley*, 134 F.R.D. at 81. *But* see *Polycast*, 129 F.R.D. at 627 (impute language refers only to non-employees who act as agents for corporation).

The cases noted above interpreting the second category to include former employees presume that the category of "other persons" whose actions may be imputed to the employer is separate and distinct from a third classification, individuals whose statements may constitute admissions. This interpretation is *flawed. Hanntz* persuasively demonstrates:

> The structure of the sentence containing the term "other persons" suggests the "impute" language must be read in tandem

6. Generally, an employee's conduct which is criminal or malicious may not be imputed to an employer unless it was either directed or ratified by the employer. See Restatement (Second) of Torts § 909 (1977).

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with the admissions. Because the "admissions" language can only be interpreted to mean current employees, it may be reasoned that the "impute" language refers only to other current agents of the corporation who are not, strictly speaking, employees. The propriety of this reading of the "impute" language in the Comment is further supported by the fact it is more consistent with the other tests set forth in the Comment because the other tests are all, in essence, based on agency principles. If the imputation of liability is based on agency principles, then former employees would clearly not be covered by RPC 4.2 because former employees ordinarily are not agents of the corporation.

Id. at 269.

Second, as *Polycast* illustrates, the term "any other person" in all probability refers to non-employee agents of the party, and not former employees. *Polycast*, 129 F.R.D. at 627. In *Polycast*, the court noted that a draft of the Model Rule 4.2 Comment referred only to managerial employees, and made no reference to "other persons." *Id.* The court then explained:

Recognizing that this standard left exposed many vulnerable lower level employees, the ABA substituted the current comments. It retained the alter ego approach with respect to the first category dealing with managerial employees. It then extended the definition of "party" to include lower level persons involved in the transaction or event at issue . . . Although the comment refers to "any other person" from whose act corporate liability may be imputed rather than "any employee," this does not imply an intent to include former employees. More likely, it was designed to cover agent whose acts are attributable to an organization but who technically may not be employees.

Id *The* court went on to conclude that the Comments to Model Rule 4.2 "were not designed to make former employees adjuncts of the corporate 'party.' Rather, they were intended to ensure that current employees—whether participants or witnesses—would not be subject to interrogation by an adversary's attorney except through formal discovery." I d

The decisions construing Rule 42 as applicable to former managerial employees, with the exception of *Valassis* and *Rentclub, were* decided prior to the March 22, 1991, when the American Bar Association Committee on Ethics and Professional Responsibility ("the Committee") issued ABA Formal Opinion 91-359. In this opinion, the Committee concluded that neither Model Rule 4.2 nor its Comments extend to former employees.

The Committee stated in pertinent part:

While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 42 to cover some former corporate employers, [sic] the fact remains that the text of the Rule does not do so and the [C]omment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment., to expand its coverage to former employees by means of liberal interpretation.

Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 42, communicate about the subject of the rep resentation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

ABA Committee on Professional Ethics and Professional Responsibility, Formal Opinion 91–359 at 3 (1991).[7] Since its publication, several courts have adopted the conclusion reached in the opinion and have held that Model Rule 42 does not bar *ex parte* communication with former employees. See *Goff*,

7. Several state bar associations have addressed this issue and have unanimously held that under either Rule 4.2 or DR 7-104(A)(1) an attorney may conduct ex *parte* interviews with former employees of an opposing corporate party. *See Dubois v. Gradaco Systems, Inc.*, *136* F.R.D. 341. 345 n. 4 (D.Conn. 1991) (citing bar association **opinions of Illinois, Pennsylvania. Minnesota, Nassau County, Virginia, Massachusetts, Colorado, City of New York. and Florida).**

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145 F.R.D. at 354–55; *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. at 564; *Shearson Lehman Bros.*, Inc., 139 F.R.D. at 417.[8]

The court concludes that the reasons advanced in those decisions interpreting Model Rule 4.2 as not proscribing contact with former employees of an opponent to be persuasive. First, the underlying policies of Model Rule 4.2 are not served by extending its application to former employees. *Hanntz*, 766 F.Supp. at 265. Contacting former employees of an opponent will generally not impact upon the opponent's attorney client relationship. Id As noted in *Goff*, " 'restrict[ing] an attorney's ability to communicate with former employees strikes an unreasonable balance between protecting a relationship that does not exist and unduly restricting the need for litigants to have access to all relevant information . . . ' " *Goff*, 145 F.R.D. at 356 (quoting *Hanntz*, 766 F.2d at 270). Second, the term "any other person" in the Comment to Rule 4.2 was meant to refer to non-employee agents, not former employees. See *Polycast*, 129 F.R.D. at 627. Third, the "other persons" language and the admissions language found the Comment to Rule 4.2 must be read in conjunction. Reading in this manner, the imputation language relies upon the principles of agency. Because former employees do not constitute agents of an employer, the former employees are not covered under the imputation language. *Hanntz*, 766 F.Supp. at 269-70. Finally, any doubts about the meaning of the Comment's meaning were erased by Formal Opinion 91-359.

For the reasons set forth above, the court concludes that Model Rule 4.2 must be read as permitting ex *parte* communications with former employees of an opposing party. Because the language of Model Rule 4.2 is nearly identical to that found in its immediate predecessor, DR 7-104, the conclusion reached above lends further support to the proposition that DR 7-104 does not proscribe an attorney's *ex parte* communications with former employees of an opponent.

C. Attorney-Client Privilege

It must be noted that an attorney's *ex parte* communications with a former employee of a party may not go unchecked by ethical rules. This is especially true when a former employee continues to

> personify the organization even ***after*** they have terminated their employment relationship. An example would be a managerial level employee involved in the underlying transaction, who is also conferring with the organization's lawyer in marshalling the evidence on its behalf This kind of former employee is undoubtedly privy to privileged **information,** including work product, and an opposing lawyer is not entitled to reap a harvest of such information without a valid waiver by the organization....

2 Hazard & Hodes, *supra*, § 4.2:107 at 739. Even the ABA Committee in its **Formal Opinion on Rule** 42 stressed caution to an **attorney conducting ex *parte* communications with former employees concerning privileged information:**

> **With respect to any unrepresented former employee, of course, the potentially-communicating adversary attorney** must be careful not to seek to induce the **former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee** with his or her former employer's counsel are protected by the privilege....

ABA Formal **Opinion 91-359** at 3.

The purpose **of the attorney-client privilege is "to encourage full and frank communication between attorneys and** their

8. **Formal Opinion 91-359 is consistent with conclusions reached by commentators on the subject:**

> **The no-contact regime described in [Model Rule 4.2] does not address communications with *former* agents and employees, and technically there should be no bar, since former employees cannot bind the organization, and their statements cannot be introduced as admissions of the organization. Speaking with a former employee therefore does not do damage to the policy underlying Rule 4.2–undercutting or "end-running" an on-going lawyer-client relationship.**

2 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 4.2:107, at 739 (Supp.1991).

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clients. . and [the privilege] has been interpreted as preventing disclosure of privileged information by former employees." *Valassis*, 143 F.R.D. at 124. It may be argued that the attorney client privilege should prevent ex *parte* communications with former managerial employees when read into DR 7-104(A)(1). See *PPG*, 134 F.R.D. at 122-23. However, this argument is based not on the employee's former position in the company, but that employee's access to privileged information. Thus, the attorney-client privilege, not DR 7-104(A)(1), should constitute the basis for argument "against ex *parte* communications with former employees regardless of whether they were managerial." *Hanntz*, 766 F.Supp. at 270.

This court agrees with the reasoning of the *court in Hanntz:*

> **The attorney-client privilege cannot be** used to justify an **absolute proscription against ex *parte* communications with** former employees. Significantly, the **attorney-client privilege exists only** to the **extent attorney-client confidences are implicated. The attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts** by **those who communicated with** the attorney." . . . **[The attorney-client privilege] should restrict only what may be asked during *ex parte* communications.**

Hanntz, *766* **F.Supp. at 270-71 (quoting *Upjohn Co. v. United States*, *449* U.S. 383, 396,** 101 S.Ct. 677, 685, 66 L.Ed.2d 584 (1981)) (citations omitted).

[4] This court places no restrictions on ex *parte* communications with former employees, managerial or otherwise, of Defendant to **the extent that** no **attorney-client confidences are involved in such communications. Thus, an attorney communicating with the** former **employees of the opposing party may not** inquire **into privileged attorney-client communications because "[a]ny privilege existing between the former employee and the organization's counsel belongs to the organization, and can only be waived by the organization."** *Sequa* **Corp., 807 F.Supp. at 668. In the case at bar, no privileged information to which the** former **employees were privy has been identied. If Defendant can produce sufficient** evidence that privileged communications may be divulged by the former employee **during ex *parte* communications, a protective** order may be sought pursuant to **Federal** Rule **of** Civil Procedure 26(c) and **a** narrowly-tailored **court order excluding such privileged information** may be appropriate. See *Valassis*, 143 F.R.D. at 125; *Polycast*, 129 F.R.D. **at** 629; *Dubois*, 136 F.R.D. at 346.

III. CONCLUSION

In light of **overwhelming** case law and **commentary** on the subject supporting ex *parte* **communications with** former employees, this court is persuaded **that DR 7-104(A)(l) does not proscribe ex *parte* communications** with the Defendant's former employees. Even if the statements of a former employee may reveal facts which give rise **to corporate liability, this possibility does not implicate the purposes of DR 7-104(A)(1). See *Hanntz*, 766 F.Supp. at 260-70. The court further concludes that reading the rule otherwise unnecessarily constricts discovery under Federal Rule of Civil Procedure 26 without furthering the purpose *of* DR 7-104 and the concerns it seeks to address. Should the ex parts communications with Defendant's former employees raise concern that privileged communications will be divulged, Defendant may seek a protective order from the court to suppress any information which may be obtained in violation of the attorney-client privilege.**

IT IS SO ORDERED.

(8)

Walter REYNOSO, as Guardian of Cathleen Mangan, an Incompetent, Petitioner,

v.

GREYNOLDS PARK MANOR, INC., a Florida corporation, Respondent.

No. 95–1290.

District Court of Appeal of Florida, Third District.

Aug. 10, 1995.

Guardian of elderly incompetent brought action on behalf of incompetent against nursing home, alleging that incompetent suffered personal injury while in care of nursing home, in violation of statute and common law duty of care. The Circuit Court, Dade County, David Tobin, J., granted nursing home's motion for protective order precluding guardian from any ex parte contact with former nursing home employees. Guardian petitioned for writ of certiorari. On rehearing, the District Court of Appeal, Cope, J., held that Rule of Professional Conduct addressing communication with person represented by counsel does not prohibit direct contact with former employees of corporate defendant.

Petition granted.

Attorney and Client ⚿32(12)

Rule of Professional Conduct addressing communication with person represented by counsel does not prohibit direct contact with former employees of corporate defendant, though no inquiry can be made into matters that are subject of attorney-client privilege, and requirements of rule addressing unrepresented persons must be scrupulously observed. West's F.S.A. Bar Rules 4–4.2, 4-4.3.

Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin and Joel D. Eaton;

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Freidin & Hirsh and Jeffrey Stephen Hirsh, Miami, for petitioner,

Wicker, Smith, Tutan, O'Hara, McCoy, Graham, Lane & Ford and Shelley H. Leinicke, Fort Lauderdale, for respondent.

Before JORGENSON, COPE and GREEN, JJ.

On Rehearing Granted

COPE, Judge.

The court grants the petitioner's motion for rehearing, withdraws its previous disposition in this case, and substitutes the following opinion:

Walter Reynoso petitions for a writ of certiorari to quash a trial court order forbidding petitioner-plaintiff from conducting ex parte interviews with former employees of respondent-defendant Greynolds Park Manor, Inc. We grant the petition.

Plaintiff Reynoso is the guardian of an elderly incompetent, Cathleen Mangan. He has filed an action on her behalf against defendant Greynolds Park Manor, Inc., a nursing home. The lawsuit alleges that the ward suffered personal injury while in the care of defendant nursing home, in violation of section 400.022, Florida Statutes (1993), and the common law duty of care.

During discovery, plaintiff requested information regarding former nursing home employees who had cared for the ward during the time periods relevant to the lawsuit. The nursing home moved for a protective order to preclude the plaintiff from any ex parte contact with former nursing home employees. The motion for protective order was based on the Second District decision in *Barfuss v. Diversicare Corp. of America, 656* So.2d 486 (Fla. 2d DCA 1995). The *Barfuss* court interpreted Rule 44.2 of the Rules of Professional Conduct to preclude plaintiff's counsel from having any ex parte contact with former employees of a nursing home who had cared for and treated the plaintiff. Id. at 48'7-88.

The trial court in the present case concluded that it was obliged to follow *Barfuss* because *Barfuss* was directly on point and this court had not previously addressed the issue. *See Pardo* v. State, 596 So.2d 665, 666-67 (Fla.1992). Consequently the court granted the protective order.

By virtue of the protective order, plaintiffs counsel is precluded from contacting, or using an investigator to interview, the sixty former nursing home employees who previously cared for the ward. Instead plaintiff may only obtain discovery from those individuals by scheduling sixty depositions. Plaintiff has petitioned for a writ of certiorari,

The question presented here is whether Rule of Professional Conduct 4-4.2 prohibits plaintiffs counsel (or investigator) from making direct contact with former employees of a corporate defendant. Rule 4-4.2 provides:

> RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
>
> 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. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

We conclude that the proscription of Rule 4-4.2 does not extend to former corporate employees.

The question presented here has been thoroughly, and in our view correctly, analyzed in American Bar Association Formal Ethics Opinion 91-359, dated March 22, 1991, and Florida Bar Ethics Opinion 88-14, issued March 7, 1989. We adopt their reasoning and incorporate them in the Appendix to this opinion. In so holding we align ourselves with the great majority of the courts to have considered this issue,[1] although there is au-

1. Those reaching a similar conclusion include the highest courts of several states: *In re Opinion 668 of Advisory Committee on Professional Ethics, 134* N.J. 294, 633 A.2d 959

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thority to the contrary? We point out the caveats contained at the end of the American Bar Association and Florida Bar opinions, reminding counsel that no inquiry can be made into any matters that are the subject of the attorney-client privilege, and that the requirements of Rule 44.3, entitled "Dealing With Unrepresented Persons," must be scrupulously observed.

We certify that this decision is in direct conflict with the decision of the Second District Court of Appeal in *Barfuss*. Because the issue presented here affects numerous cases in litigation, as well as the scope of attorneys' ethical responsibilities under Rule 44.2, there is a need for an authoritative resolution by the Florida Supreme Court.

For the reasons stated, the petition for writ of certiorari is granted and the order prohibiting intervlews with former employees is quashed.

Certiorari granted; direct conflict certified.

(1993); *Niesig* v. Team Z, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990); *Fulton* P.2d *959* (Okla.1992): ***Wright v. Group Health Hosp.,*** 103 Wash.2d 192, 691 P.2d 564 (1984); State *ex* ref. ***Charleston*** Area ***Medical Ctr. v. Zakaib,*** 190 W.Va. 186, 437 S.E.2d 759 (1993); ***Strawser v. Exxon Co., U.S.A.,*** 843 P.2d 613 (Wyo.1992).

intermediate appellate courts of other states:

Lung v. Superior Court, 170 Arit. 602, 826 P.2d *1228* (App.1992); ***Continental Ins. Co. v. Superior Court,*** 32 Cal.App.4th 94, 37 Cal.Rptr.2d *843* (1995): ***Skirkanich v. Waterbury Hosp., No.*** 0100686. 1993 WL 480911 (Conn.Super.Ct. 1993); ***Carrier Corp. v. Home Ins. Co.,*** No. CV88-35 23 83 S, 1992 WL 32568 (Conn.Super.Ct.1992); ***DiOssi v. Edison, 583*** A.2d 1343 (Del.Super.Ct. 1990),

and numerous federal district courts:

Lang v. Reedy Creek Improvement District, No. 94-693, 1995 WL 392215 (M.D.Fla. Mar. 28, ***1995): Aiken*** v. Business *& Indus. Health* Group, Inc.. 885 F.Supp. 1474 (D.Kan.1995); ***Browning v. AT & T Paradyne,*** 838 F.Supp. 1564 (M.D.FIa.1993): ***Brown v. St. Joseph County,*** 148 F.R.D. 246 (N.D.Ind. 1993); ***Sequa Corp. v. Lititech, Inc.,*** 807 F.Supp. 653 (D.Colo. 1992); ***Goff v. Wheaton Industries.*** 145 F.R.D. 351 (D.N.J.1992); ***Valassis v. Samelson,*** 143 F.R.D. 118 (E.D.Mich.1992); ***In re Domestic Air Transp. Antitrust Litigation,*** 141 F.R.D. 556 (N.D.Ga.1992); ***Sherrod v. The Furniture Ctr.,*** 769 F.Supp. 1021 (W.D.Tenn. 1991); ***Action Air Freight, Inc. v. Pilot Air Freight Corp.. 769*** F.Supp. 899 (E.D.Pa.1991), ***appeal dismissed, 96*** 1 F.2d *207* (3d Cir. 1992); ***Hanntz v. Shiley,*** Inc., 766 F.Supp. 258 (D.N.J.1991); ***Shearson Lehman*** Bros., Inc. v. ***Wasatch Bank, 139*** F.R.D. 412 (D.Utah ***1991); Dubois v. Gradco Sys., Inc.,*** 136 F.R.D. 341 (D.Conn.1991); ***University Patents, Inc.*** v. *Kligman,* 737 F.Supp. 325 (E.D.Pa. 1990); ***Polycast Technology Corp.*** v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990).

No federal court of appeals has addressed this issue.

Finally, a number of state bar associations have reached the same conclusion. Most that have done so are collected in Florida Bar Ethics Opinion ***88-14,*** *supra.* ***See also Dubois v. Gradco Systems, Inc.,*** 136 F.R.D. at 345. By analogy see *Castillo-Plaza v.* Green, 655 So.2d 197 (Fla. 3d DCA 1995) (en banc).

2. Courts reaching a contrary conclusion or imposing some limitations on such contact include: ***United States v. Florida Cities Water Co., No.*** 93-281, 1995 WL 340980 (M.D.Fla. Apr. 25, 1995); ***Rentclub, Inc. v. Transamerica Rental Fin. Corp.,*** 811 F.Supp. 651 (M.D.Fla.1992), *aff'd,* ***43*** F.3d 1439 (1 1th Cir.1995); *Curley v. Cumberland* Farms, Inc., 134 F.R.D. 77 (D.N.J.1991); ***Public Sew. Elec. & Gas Co. v. Associated Elec. & Gas Sews.. Ltd.,*** 745 F.Supp. 1037 (D.N.J.1990); *PPG Indus., Inc. v. BASF* Corp.. 134 F.R.D. 118 (W.D.Pa.1990): ***Chancellor v. Boeing Co.,*** 678 F.Supp. 250 (D.Kan. ***1988); Amarin Plastics, Inc. v. Maryland Cup*** Corp., 116 F.R.D. 36 (D.Mass. 1987): ***Porter*** v. *Arco Metals* Co., 642 F.Supp. 1116 (D.Mont. 1986); *Bobele v. Superior Court,* 199 Cal.App.3d 708, 245 Cal.Rptr. 144 (1988).

APPENDIX

ABA/BNA Lawyers' Manual on Professional Conduct

ETHICS OPINIONS

ABA FORMAL OPINIONS

FORMAL OPINION 91-359

MARCH 22, 1991

Contact With Former Employee Of Adverse Corporate Party

The prohibition of Rub 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.

The Committee has been asked for its opinion whether a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without the consent of the corporation's lawyer, communicate about the subject of the

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representation with an unrepresented former employee of the corporate party.

The starting point of our inquiry is Model Rule of Professional Conduct 4.2, which states:

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

The rule is, for purposes of the issue under discussion, substantially identical to DR 7-104(A)(l), which states as follows:

> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The comment to Rule 4.2 makes clear that corporate parties are included within the meaning of "party" in that Rule, and is help ful in defining the contours of that rule as it applies to present employees of corporate parties:

> (1) This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non lawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

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> (2) In the case of an organization, this Rule prohibits communications by a lawyer for one party 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. 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 the purposes of this Rule. Compare Rule 3.4(f).
>
> (3) This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question,

. The rationale on which Rule 4.2 was formulated was identified in *Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564, 567 (1984).

> The purposes of the rule against ex parte communications with represented parties are "preserving the proper functioning of the legal system and shielding the adverse party from improper approaches." (Citing ABA Formal Opinion 108 (1934)).

The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law. As discussed at Law.Man.Prof.Conduct 71:302.

> . The rule against communicating with the opposing party without the consent of that party's lawyer does not admit of any exceptions for communications with "sophisticated" parties. Maru, 10861 (Fla. Bar Op. 76-21 (4/19/77)). See also *Waller* v. *Kotzen*, 567 F.Supp. 424 (E.D.Pa.1983) (plaintiff's counsel contacted insurance company directly, after insurer was represented by counsel); *Estate of Vafiades v. Sheppard Bus Service* [192 N.J.Super. 301], 469 A.2d 971 (N.J.Super.1983) (negotiations were conducted with insurance company for defendants).

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cf. Meat Price Investigators Assn. v. Iowa *Beef Processors,* 448 F.Supp. 1, 3 (S.D.Iowa 1977) (while leaving question of culpability of counsel's conduct to disciplinary authorities, court declined to disqualify counsel for interviewing an officer of an opposing party who was a "sophisticated businessman who was openly willing to share his knowledge of the beef industry with attorneys he knew to be plaintiffs counsel.") See also Code of Professional Responsibility EC 7-18:

> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. . . .
>
> The comment to Rule 4.2 limits those *present* corporate employees covered by this rule to:
>
> persons having a managerial responsibility on behalf of the organization, and . . . 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,

The inquiry as to present employees thus becomes whether the employee (a) has "a managerial responsibility" on behalf of the employer-corporation, or (b) is one whose act or admission in connection with the matter that is the subject of the potential communicating lawyer's representation may be imputed to the corporation, or (c) is one whose "statement may constitute an admission" by the corporation.

Whether an employee falls into any of these three categories is inevitably an issue affected by a host of factors, the exploration of none of which need detain us. These include at least the terms of the relevant statutory and common law of the state of the corporation's incorporation; applicable rules of evidence in the relevant jurisdiction: and

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relevant corporate documents affecting employees' duties and responsibilities.

At least insofar as the test of imputable act or omission is concerned all of these factors, in turn, would have to be applied within the context of "the matter in representation" to determine whether the acts or omissions of the employee can be imputed to the corporation with respect to that particular matter. That requires a determination of the scope of the subject matter of the potentially-communicating lawyer's representation.

The commentby defining three categories of unrepresented corporate employees with whom communication "concerning the matter in representation" is prohibited absent the consent of the corporation's counsel or authorization of law-clearly implies that communication with all other employees on "the matter in representation" is permissible without consent, subject only to such other rules and other law as may be applicable. (E.g., Rule 4.1, requiring truthfulness in statements to others and Rule 4.3, addressing a lawyer's dealings with unrepresented persons.)

Neither the Rule nor its comment purports to deal with former employees of a corporate party. Because an organizational party (as contrasted to an individual party) necessarily acts through others, however, the concerns reflected in the Comment to Rule 4.2 may survive the termination of the employment relationship.

(It is appropriate to note here that those addressed by the Comment are not denominated "employees" but "persons." The Rule presumably covers independent contractors whose relationship with the organization may have placed them in the factual position contemplated by the Comment. Because the issue this Opinion addresses deals expressly with former employees, we need not explore the ramifications of this expansive terminology.)

While Rule 4.2 does not purport by its terms to apply to former employees, courts confronting the issue have interpreted Rule 4.2 (as illuminated by its comment) and DR 7-104(A)(1) (which does not have such a com-

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ment or comparable discussion in any Ethical Consideration) in various ways.

Most recently, in an aside in a case dealing with current employees under DR 7-104(A)(1), the New York Court of Appeals noted its agreement with the Appellate Division that the rule applies "only to current employees, not to former employees." *Niesig v. Team I et al,* 76 N.Y.2d 363 [559 N.Y.S.2d 493], 558 N.E.2d 1030 (1990). See also *Wright by Wright v. Group Health* Hosp., 103 Wash.2d 192, 691 P.2d 564 (1984) (reasoning that former employees could not possibly speak for or bind the corporation, and therefore interpreting DR 7-104(A)(1) as not applying to them); and *Polycast Technology Corp. v. Uniroyal, Inc.,* 129 F.R.D. 621 (S.D.N.Y.1990) (holding that DR 7-104 does not bar contacts with former corporate employees, at least in absence of a showing that the employee possessed privileged information).

On the other hand, other courts have held that former employees are covered (it is usually phrased that they will be considered "parties" for ex *parte* contact purposes) under certain circumstances. Thus, Rule 4.2 has been held to bar ex parte contacts with former employees who, while employed, had "managerial responsibilities concerning the matter in litigation." *Porter v. Arco Metals,* 642 F.Supp. 1116, 1118 (D.Mont.1988 [1986]). In *Amarin Plastics v. Maryland Cup Corp.,* 116 F.R.D. 36 (D.Mass.1987) the Court, while recognizing the possible applicability of Rule 4.2 to former employees, declined to apply it on the facts of that case. It noted, however, the additional possibility that communications between a former employee and his former corporate employer's counsel may be privileged. *Id.,* at 41. See also *In re Coordinated Pre-Trial [Pretrial] Proceedings in Petroleum Products Antitrust Litigation,* 658 F.2d 1355, 1361 n. 7 (9th Cir.1981), *cert. denied, 455* U.S. 99 [990, 102 S.Ct. 1615, 71 L.Ed.2d 850] (1982) (noting that the rationale of *Upjohn v. United States, 449* U.S. 383 [101 S.Ct. 677, 66 L.Ed.2d 584] (1981), with respect to corporate attorney-client privilege applies to former as well as current corporate employees). In *Public Service Electric and Gas Company v. Associated Electric and Gas Ins. Services, Ltd,* 745 F.Supp. 1037 (D.N.J.1990) the court interpreted Rule 4.2 to cover all former employees.

Commentators on the subject of ex parte contacts with former employees have likewise urged application of the prohibition on contacts to at least some former corporate employees. See, e.g., Stahl, *Ex* Parte Interviews *with Enterprise Employees: A Post-Upjohn Analysis,* 44 Wash. & Lee L.Rev. 1181 at 1227 (1987), recommending a functional approach deeming

> any present or former employee who is identified with an enterprise, either for purposes of resolving disputed issues or effective representation of the enterprise, to be a party representative for discovery purposes. Any other rule would put enterprises at a distinct and unfair disadvantage and may effectively deny enterprises the full benefit of representation by counsel.. , .

See *also* Miller and Calfo, *Ex* Parte *Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?, 42* Bus. Law. 1053 at 1072-73 (1987):

> [C]ourt authorization or opposing counsel's consent to ex parte contact should be required if the former employee was highly-placed in the company (such as a former officer or director) or if the former employee's actions are precisely those sought to be imputed to the corporation.

While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.

Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without

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violating Model Rule 4.2, communicate about the subject of the representation with an 'unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

With respect to *any* unrepresented former employee, of course, the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer's counsel are protected by the privilege (a privilege not belonging to or for the benefit of the former employee, by the former employer). Such an attempt could violate Rule 4.4 (requiring respect for the rights of third persons).

The lawyer should also punctiliously comply with the requirements of Rule 4.3, which addresses a lawyer's dealings with unrepresented persons. That rule, insofar as pertinent here, requires that the lawyer contacting a former employee of an opposing corporate party make clear the nature of the lawyer's role in the matter giving occasion for the contact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party. See, ***e.g., Brown v. Peninsula Hospital Centers [Center],*** 64 A.D.2d 685, 407 N.Y.S.2d 586 (App.Div.1978) (attorneys for defendant hospita1 should have disclosed potential conflict of interest before talking to treating physician and producing him for deposition as hospital's representative); ABA Informal Opinion 908 (1966).

Florida Ear Committee on Professional Ethics

Opinion Number 88–14

March 7, 1989

A plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of corporation's attorney.

* * *

The inquiring attorney's law firm represents the plaintiffs in a civil action against a

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corporation. The attorneys wish to have ex parte interviews with former employees of the defendant corporation who were employed by the corporation during the period when the actions or decisions on which the suit is based occurred. The former employees may include some who had managerial responsibilities and some whose acts or omissions during their employment might be imputed to the corporation for purposes of civil liability. As is usually the case, the defendant corporation objects to ex parte contacts with its former employees.

The issue is whether Rule 4–4.2, Rules Regulating The Florida Bar, prescribes the plaintiffs' attorneys from contacting former managers and other former employees of the defendant corporation except with the permission of the corporation's attorneys. As regards former managers and other former employees who have not maintained any ties with the corporation-who are no longer part of the corporate entity-and who have not sought or consented to be represented in the matter by the corporation's attorneys, the answer must be in the negative.

Rule 4–4.2 is substantially the same as its predecessors in the Code of Professional Responsibility (DR 7–104(A)(1)) and the earlier Canons of Professional Ethics (Canon 9). (The American Bar Association's "code comparison" for Model Rule 4.2 states that the rule is "substantially identical" to DR 7–104(A)(1).)

The rule forbids a lawyer to communicate about the subject of the representation with a person the lawyer knows to be represented in the matter unless the lawyer obtains the permission of the person's counsel. The comment to the rule states that in the case of organizations (including corporations), the rule prohibits ex parte communications 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." The comment further states that if an agent or employee of the organization is represented by his or her own counsel in the

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matter, then it is the consent of that lawyer-not the organization's lawyer-that must be obtained.

Nothing in Rule 44.2 or the comment states whether the rule applies to communications with former managers and other former employees. To the extent that the comment implies that the rule does apply to these individuals, it is contrary to ethics committees' interpretation of the rule.

Rule 4–4.2 cannot reasonably be construed as requiring a lawyer to obtain permission of a corporate party's attorney in order to communicate with former managers or other former employees of the corporation unless such individuals have in fact consented to or requested representation by the corporation's attorney+ A former manager or other employee who has not maintained ties to the corporation (as a litigation consultant, for example) is no longer part of the corporate entity and therefore is not subject to the control or authority of the corporation's attorney. In many cases it may be true that the interests of the former manager or employee are not allied with the interests of the corporation. In such cases the conflict of interests would preclude the corporation's attorney from actually representing the individual and therefore would preclude the corporation's attorney from controlling access to the individual. As the comment indicates with regard to current employees, if a former manager or former employee is represented in the matter by his personal attorney, permission of that attorney must be obtained for ex parte contacts, including contacts by the corporation's attorney.

A former manager or employee is no longer in a position to speak for the corporation. Further, under both the federal and the Florida rules of evidence, statements that might be made by a former manager or other former employee during an ex parte interview would not be admissible against the corporation. Both Rule 801(d)(2)(D), Federal Rules of Evidence, and Section 90.803(18)(e), Florida Evidence Code, provide that a statement by an agent or servant of a party is admissible against the party if it concerns a matter within the scope of the

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agency or employment and is *made during the existence of the agency or employment relationship.*

This Committee has not previously had occasion to issue an opinion on the question of communicating with former managers and employees but, as indicated above, bar ethics committees in a number of states have done so. The clear consensus is that former managers and other former employees are not within the scope of the rule against ex parte contacts. Alaska Bar Opinion 88-3 (6/7/88) (Former employees are no longer part of corporate entity and no *longer* can act or speak on behalf of corporation; opposing lawyer therefore may contact former employees, including former members of corporation's control group who dealt with subject matter of litigation, but may not inquire into privileged communications); Colorado Bar Opinion 69 (Revised) (6/20/87) (Former employee cannot bind corporation as matter of law; lawyer may interview opposing party's former employees with regard to all matters except communications within corporation's attorney-client privilege); Illinois Bar Opinion 85-12 (4/4/86) (Former employees, including those who were part of corporation's control group, may be contacted without permission of corporate counsel; direct communications with former control group employees may elicit information adverse to corporation, but that direct contact no more deprives corporation of benefit of counsel than does direct communication with any potential witness); Los Angeles County, Calif., Bar Opinion 369 (11/23/77) (Although ethical dangers may be posed if rule prohibiting ex parte contacts is not extended to former controlling employees, no authority is found to support such extension); Maryland Bar Opinion 86–13 (8/30/85) (Lawyer may communicate with former employee of adverse corporate party if former employee is not represented by counsel).

Also, Massachusetts Bar Opinion 82-7 (6/23/82) (Lawyer may communicate with former employees of corporate defendant regarding matters within scope of their employment; former employees enjoy no current agency relationship that is being served by corporate counsel's representation)+

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Michigan Bar Opinion CI-597 (12/22/80) (Plaintiffs attorney may communicate with prospective witness, who is former employee of corporate defendant, on subject matter of representation if employee is unrepresented); New York City Bar Opinion 80-46 (Former employees are no longer part of corporate entity and may be contacted ex parte); New York County Bar Opinion 528 (1965) (Although direct communication with any current manager or employee of defendant corporation is improper, restriction does not apply to communications with former employees); Virginia Bar Opinion 533 (12/16/83) (Lawyer may communicate directly with former officers, directors and employees of adversary corporation on subject of pending litigation unless lawyer has reason to know those witnesses are represented by counsel); Wisconsin Bar Opinion E-82-10 (12/82) (Lawyer may contact former employee of opposing party to obtain material information even though former employee was managing agent, if former employee has severed all ties with corporation and therefore is not in position to commit corporation).

See Wright v. Group Health Hospital [103 Wash.2d 192], 691 P.2d 564 (Wash.1984). In *Wright,* the Washington Supreme Court ruled that because former employees cannot possibly speak for a defendant corporation, the rule against communicating with adverse parties does not apply. The court found no reason to distinguish between former employees who witnessed an event and those whose act or omission caused the event. The court said the purpose of the communication rule is not to protect a corporate party from revelation of prejudicial facts, but rather to preclude interviewing of employees who have authority to bind the corporation.

As stated above, it is ethically permissible for the inquiring attorney to contact former managers and other former employees of the opposing party without obtaining permission from the corporation's attorney unless those former employees are in fact represented by the corporation's attorney. But as indicated by some of the ethics committees cited above, the attorney should not inquire into matters that are within the corporation's attorney-

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client privilege (e.g., asking a former manager to relate what he had told the corporation's attorney concerning the subject matter of the representation).

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of August, 1996, to: Nancy W. Gregoire, Esq., Bunnell, Woulfe, Kirschbaum, Keller & McIntrye, P.A., 888 East Las Olas Blvd., 4th Floor, Fort Lauderdale, Fla. 33301; Jane Kreusler-Walsh, Esq., Jane Kreusler-Walsh, P.A., Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Fla. 33401; James B. McHugh, Esq., Wilkes and McHugh, Suite 601 Tampa Commons, One North Dale Mabry Highway, Tampa, Fla. 33609, Phillip D. Parrish, Esq., Stephens, Lynn, et al., 9130 South Dadeland Blvd., Penthouses 1 and 2, Miami, Fla. 33156-7823; and to Douglas J. Glaid, Esq., Attorney General's Office, 110 S.E. 6th Street, 10th Floor, Fort Lauderdale, Fla. 33301.

By: Joel D. Eaton
JOEL D. EATON