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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 88,239

H.B.A. MANAGEMENT, INC.,
authorized to operate
TAMARAC CONVALESCENT CENTER,

Petitioner,

v.

The Estate of MAY SCHWARTZ,
Deceased, by and through the
Personal Representative,
ALEX SCHWARTZ,

Respondent.
_______________________________/

On Discretionary Review of an Opinion of the District Court of Appeals of the State of Florida, Fourth District

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFACE

The petitioner/defendant seeks discretionary review based on the Fourth District Court of Appeal's certification of conflict with an opinion of the Second District Court of Appeal on the same issue. Petitioner, H.B.A. Management, Inc., authorized to operate Tamarac Convalescent Center, was the respondent in the Fourth District and the defendant in the trial court. Respondent, The Estate of May Schwartz, deceased, by and through the Personal Representative, Alex Schwartz, was the petitioner in the Fourth District and the plaintiff in the trial court. They are referred to herein as the plaintiff and the defendant.

The following symbols are used:

R - Record

A - Petitioner's Appendix

AA - Respondent's Appendix

STATEMENT OF THE CASE AND FACTS

The defendant's statement of the case and facts is essentially correct. The plaintiff has made the necessary clarifications and additions in the pertinent section of the argument.

SUMMARY OF ARGUMENT

Rule 4-4.2 prohibits ex-parte communications only "with a person the lawyer knows to be represented by another lawyer in the matter, ..." The Rule does not prohibit ex-parte communications with unrepresented former employees of a corporate litigant. Florida Bar Ethics Opinion 88-14 agrees as does the ABA and the overwhelming majority of courts throughout the country which have considered the issue. The First and Fourth District Courts of Appeal agree with the overwhelming majority positions.

The Second District's contrary opinion in Barfuss represents the minority view and an incorrect application of Rule 4-4.2, Ethics Opinion 88-14, and Formal Opinions 91-359 and 95-396. Communication with former employees does not violate the attorney-client relationship because former employees have no influence over the corporation's litigation strategy or decisions to settle. Since the former employee is not involved in the corporation's attorney-client relationship, ex-parte communications with that former employee cannot undermine that relationship. Rather, prohibiting ex-parte contact with former employees impedes the flow of information and increases the cost of litigation. While a former employee could possess and reveal information which could potentially result in liability being imposed on an organization, enlarging the scope of Rule 4-4.2 to preclude ex-parte contact with

former employees would hamper the broad discovery purposes contained in the Rules of Civil Procedure.

The Fourth and Third Districts properly quashed the orders which prohibited ex-parte communications with defendant's former employees. This Court should approve the Fourth District's opinion in Schwartz and disapprove the Second District's opinion in Barfuss.

ARGUMENT

RULE 4-4.2 DOES NOT PROHIBIT EX-PARTE COMMUNICATIONS WITH AN ADVERSE CORPORATE PARTY'S FORMER EMPLOYEE(S).

Three Florida district courts have considered this issue: Estate of Schwartz v. H.B.A. Manaaement. Inc., 673 So. 2d 116 (Fla. 4th DCA 1996); Reynoso v. Greynolds Park Manor, I , 659 So. 2d 1156 (Fla. 3d DCA 1995); Barfuss v. Diversicare Corp. of America, 656 so. 2d 486 (Fla. 2d DCA 1995). Their opinions are not "in irreconcilable disagreement." (Petitioner's Main Brief, p. 10).

The Third and Fourth Districts followed the overwhelming authority throughout the country and held that Rule 4-4.2 does not prohibit direct contact with the corporate defendant's former employees. Barfuss held to the contrary based upon Rentclub. Inc.

v. Transamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff'd, 43 F.3d 1439 (11th Cir. 1995). Barfuss is incorrect and contrary to Rule 4-4.2, the Florida Bar's interpretation of that Rule in Ethics Opinion 88-14 (March 7, 1989), the American Bar Association's (ABA) interpretation of Model Rule 4.2 in Formal Ethics Opinions 91-359 and 95-396, and the overwhelming majority of cases throughout the country which have considered the issue.

Rule 4-4.2. Ethics Opinion 88-14. Model Rule 4.7., And Formal Opinion 91-359

Rule 4-4.2 prohibits communications with persons represented by another lawyer:

> 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.

Its purpose is to prevent one lawyer from speaking directly with the client of another lawyer. The Rule was not enacted to protect corporations from disclosures by a former employee whose relationship with the corporation ceased when the employee left the corporation. The Rule was never intended to empower a corporation to prevent former employees from talking with lawyers or to prevent those lawyers from discovering potentially prejudicial facts.

Rule 4-4.2 permits ex-parte communications with former employees of an opposing former employer unless the former employer's counsel represents the former employee, which is not the case here or in most situations. Former employees who have neither sought nor consented to representation by the corporation's lawyer are simply not represented by the corporation's lawyer.

The former employee has no current attorney-client relationship to his employer's attorney that could be jeopardized by direct contact with him. See, e.g. Polycast Technology Corp. v. Uniroval, Jnc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990). As Hanntz v. Shiley, Inc., 766 F. Supp. 258, 265 (D.N.J. 1991), observed, "a former employee could certainly reveal factual matters which potentially could result in liability of the corporation [but the revelation] does not implicate the attorney-client privilege." Although a former employee can damage a corporation by revealing facts giving rise to the possibility, that possibility does not implicate the purposes of Model Rule 4.2. Hanntz v. Shiley, Inc., supra, 269-270. Model Rule 4.2 does not apply to communications with former employees of an organizational party who have no relationship with the organization.

Rule 4-4.2, its Comment, Ethics Opinion 88-14, and Florida substantive law contradict the defendant's incorrect presumption,

that a former employee whose conduct may be imputable against the corporation is represented by the corporation's lawyer. Ethics Opinion 88-14 unequivocally rejected the defendant's interpretation of Rule 4-4.2 and concluded that, "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." (A 20).

Ethics Opinion 88-14 analyzed Florida law, including whether the former employee continued to "speak for the corporation" and determined he did not:

> Rule 4-4.2 cannot reasonably be construed as requiring a lawyer to obtain permission of a corporate party's attornev 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 attornev. 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 cluding parte contacts, t in a c t s by the corporation's rnev.
>
> A former manager or employee is n longer in a position to speak for the corporation. ... (Emphasis added) (A 20, p. 2).

The conclusion reached in Ethics Opinion 88-14 comported with the majority of states and ethics' committees that had then considered the issue. Id.

Ethics Opinion 88-14 predated ABA Formal Opinion 91-359 (March 22, 1991), which interpreted Model Rule 4.2 and reached the same conclusion:

> 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 corporation employers, [sic] the fact remains that the text of the Rules doer, 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 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. (Emphasis added) (AA 2).

The phrase in the Comments to both Rules, "any other person whose act . . . may be imputed to the corporation," does not encompass former employees and reads most consistently if the imputed liability is based on agency principles. The two other tests for a represented party discussed in the Comments, persons whose managerial responsibilities or admissions bind the corporation, rely on this principle. Because former employees do not qualify as agents of the corporation and cannot bind the corporation, they do not fall within the Comments' imputation language. Hanntz v. Shiley, Inc., supra; Polycast Technology Corp. v. Uniroyal, Inc., supra.

Rule 4-4.2 and Model Rule 4.2 prohibit ex-parte communications only "with the person a lawyer knows to be represented by another lawyer in the matter." To adopt the defendant's construction, this Court must read the Rule to prohibit ex-parte communications with unrepresented former employees if they were involved in the plaintiff's care and treatment during their prior employment. This construction conflicts with the plain language of the Rule. Moreover, as plaintiff's amicus, the Academy of Florida Trial Lawyers, pointed out on page 18 of its brief, the ethical problem

allegedly presented by allowing plaintiff's lawyers ex-parte contact with former employees cuts both **ways.** If former employees are "represented" by the corporate defendant's attorney for the purpose of barring ex-parte contact by plaintiff's counsel, the corporate defendant's attorney is not prohibited by the Rule from communicating ex-parte with the former employees. Thus, as plaintiff's amicus stated, "the problem of manipulation by ex-parte contact will remain even if the Court were to adopt the petitioner's construction of the Rule."

Amended Model Rule 4.2 and Formal Opinion 95-396

Model Rule 4.2 differed slightly from Rule 4-4.2. Rule 4-4.2 substituted "person" for "party" and deleted the qualifying phrase "or as authorized by law to do so." Florida did not adopt the more expansive 'person" language in order to prohibit ex-parte communications with former employees of a corporate party, but "to avoid limitation to parties in litigation. This change also renders the Rule more consistent with the language of the Comment." See The Report of the Florida Bar Special Study Committee on the Model Rules of Professional Conduct (March 1984) (AA 3).

In August of 1995, the ABA amended Model Rule 4.2 and substituted "person" for "party." Amended Model Rule 4.2 is now identical to Rule 4-4.2, with the exception of the qualifying

phrase, "or as authorized by law to do so" (not pertinent to the issue here). Amended Model Rule 4.2 provides:

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

The purpose of the amendment was identical to Florida's adoption of 'person" rather than "party": to extend the scope beyond named parties to the litigation to any persons known to be represented by counsel with respect to the subject of the intended communication.[1]

The defendant contends that the 1995 amendment which substituted "person" for "party" renders prior ethics opinions and cases irrelevant. This argument ignores that the Florida Rule has not changed. Moreover, nothing in Formal Opinion 95-396 indicates that the Rule **was** amended with the intent to expand the attorney-client privilege to prohibit communications with former employees. In fact, Formal Opinion 95-396 specifically provides otherwise.

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[1]The American Law Institute (ALE) recently reviewed the amendment to Model Rule 4.2 and its purpose. The AL1 concluded revision was necessary to resolve the confusion in cases dealing with <u>current</u> employees of an adversarial corporation and whether the Rule extended beyond named parties to the litigation (AA 1, pp. 4, 6-7).

Formal Opinion 95-396 (July 28, 1995), interpreting Amended Model Rule 4.2, cited Formal Opinion 91-359 and reiterated in footnote 47 that:

> ... Rule 4.2 does not prohibit contacts with former officers and 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). (Emphasis added) (A 19, p. 20).

Amended Model Rule 4.2 still provides no basis for concluding that its prohibition extends to former employees of an opposing corporate party. As one court noted in discussing the recent amendment and its reaffirmation of Formal Opinion 91-359, "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." Seitel Geophysical. Inc. v. Greenhill Petroleum Corp., 1995 WL 686754 (E.D. La. Nov. 17, 1995).

The defendant and its amicus have presented 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 and ethics committees which have decided the

identical question presented here. Rule 4-4.2 and its Comment, like the Comment to Model Rule 4.2, have always used "person."

Barfuss Is Incorrect

Barfuss s incorrect and contrary to Rule 4-4.2, Ethics Opinion 88-14, and Formal Opinions 91-359 and 95-396. Nothing in Rentclub's fact-specific, narrow holding justified Barfuss' broader holding, that it is unethical to communicate with non-managerial level former employees of a nursing home simply because they may have been involved in the care and treatment of the plaintiff. Significantly, Rentclub ignored Ethics Opinion 88-14.

Rentclub was poor authority for the blanket prohibition Barfuss imposed for two reasons. First, Rentclub is fact-specific and involved a narrower holding than the broad proscription Barfuss attributed to it. In Rentclub, a defendant sought to disqualify plaintiff's counsel because he had hired and paid a former managerial level employee of the defendant, who possessed 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. The trial court disqualified plaintiff's counsel because there was an "appearance of impropriety" in hiring someone privy to confidential

and privileged information about the case and then paving him to be a "fact" witness as opposed to a consultant.

The trial court in Rentclub then addressed whether plaintiff's counsel had also violated Model Rule 4.2. The trial court did not hold the Rule was violated by any communication with any former employee who might have participated in the events underlying the lawsuit. Its holding was much narrower and explained that the general rule allowing such communications did not apply to these unique facts for the following reason:

> Cases that follow the traditional interpretation of DR 7-104(A)-(1), 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 does possess such information, an appropriately tailored order can be issued." . . .

Id., at 657. Because the Rentclub former employee had been the defendant's chief financial officer and was privy to confidential 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 and required his disqualification.

The second reason Rentclub does not support the blanket prohibition the trial court imposed is its primary reliance upon a New Jersey federal case, Public Service Elec. and Gas Co. v. Associated Elec. & Gas Ins. Services. Ltd., 745 F. Supp. 1037 (D.N.J. 1990). New Jersey law is now considerably different. Since Public Service, the New Jersey Supreme Court adopted an interim rule authorizing communications with former employees of a corporate party provided that, if the former employee is one whose conduct, in and of itself, establishes the party's liability, a simple notice must be provided to the corporate party in advance of the contact. Matter of Opinion 668 of Advisory Committee of Professional Ethics, 633 A.2d 959 (N.J. 1993); In re The Prudential Insurance Co. Of America Sales Practices Litigation, 911 F. Supp. 148 (D. N.J. 1995).

Moreover, Rentclub's interpretation of Model Rule 4.2 is not binding on this Court and does precisely what the Preamble to the Rules Regulating the Florida Bar says the Rules should not do, i.e. operate as a procedural weapon. The Florida Bar's Ethics

committee's interpretation of its own Rule has more precedential value that a federal trial court's interpretation.

Other Jurisdictions Overwhelmingly Permit Ex-Parte Contact with Former Employees

Barfuss represents the minority view among state and federal courts and ethics committees which have analyzed the issue. In fact, Public Service Elec. and Gas Co. v. Associated Elec. & Gas Ins. Services. Ltd., supra, is the only case which supports **a** blanket ban on ex-parte contacts with former employees under Model Rule 4.2. See Robert B. Fitzpatrick and Kathleen H. Kim, Ex Parte Communications With Current And Former Employees, C932 ALI-ABA 311, 316-32 (1994) (survey of current law); Waldman, Can We Talk? Communicating With Former Employees of an Adverse Party in Litigation, 68 Fla.B.J. 120 (Oct. 1994); Annot., 50 A.L.R.4th 652. The overwhelming majority of courts holds that Rules patterned after Model Rule 4.2 do not prohibit ex parte communications with unrepresented former employees of a corporate litigant.

The highest courts of at least six states have reached the same conclusion and no such court has held otherwise: Wright by Wright v. Group Health Hosp., 103 Wash.2d 192, 691 P.2d 564 (1984); [illegible]iq 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 Div. of Exxon Corp., 843 P.2d 613 (Wyo. 1992); , a e ex re . Charleston Area Medical Center v. Zakaib, 190 W. Va. 186, 437 S.E.2d 759 (1993); In the Matter of Opinion 668 of the Advisorv Committee on Professional Ethics, supra.

Other state's lower courts have largely followed suit: Reynoso v. Greynolds Park Manor, Inc., supra; Estate of Schwartz v. H.B.A. Manaaement, supra; Continental Ins. Co. v. Superior Court, 32 Cal. App.4th 94, 37 Cal. Rptr.2d 843 (1995); Lanq v. Superior Court, 170 Ariz. 602, 826 P.2d 1228 (Ariz. App. 1992); Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Sup. Ct. 1990); DiOssi v. Edison, 583 A.2d 1343 (Del. Super. 1990); Bobele v. Superior Court, 199 Cal. App.3d 708, 245 Cal. Rptr. 144 (1988).

Numerous federal district courts have reached essentially the same conclusion: Terra Intern., Inc. v. Mississippi Chemical Corp., 913 F. Supp. 1306 (N.D. Iowa 1996); Lang v. Reedy Creek Imp. Dist., 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. Hiwan Diagnostic Treatment Center, 818 F. Supp. 71 (S.D.N.Y. 1993), aff'd, 22 F.3d 1092 (2d 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. 1021 (W.D. Tenn. 1991); Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. 899 (E.D. Pa. 1991), app. dismissed, 961 F.2d 207 (3d Cir. 1992); Hanntz v. Shiley, Inc., a Division of Pfizer, Inc., supra; University Patents. Inc. v. Klisman, 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 Div., 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 Trans. Antitrust Litigation, 141 F.R.D. 556 (N.D. Ga. 1992); Shearson Lehman Bros., 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-, 116 F.R.D. 36 (D. Mass 1987); Fu Inv. Co., Ltd. v. C.I.R., 104 T.C. 408, 1995 WL 14155 (U.S. Tax. Ct. 1995); Shamlin v. Commonwealth 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);

Siguel v. Trustees of Tufts College, 1990 WL 29199 (U.S.D. Mass. 1990); Oak Industries v. Zeneth Industries, 1988 WL 79614 (U.S.N.D. Ill. 1988). Of the federal decisions, only three, Curley, PPG Industries and Amarin Plastics, suggest that the limited exception the defendant urges mışht apply in an appropriate case, but none of them holds to that effect.

Policy Reasons for Allowing Ex-Parte Contact With Former Employees[2]

Allowing ex-parte communications with former employees screens non-meritorious cases and facilitates earlier settlement by expediting the flow of important factual information. Requiring formal discovery would deter the disclosure of information, particularly since former employees often have emotional or economic ties to their former employer and might be reluctant to come forward with potentially damaging information if they can only do so in the presence of the corporation's attorney. See Cram v. Lamson & Sessions Co., Carlon Division, supra. While a former employee could possess and reveal information which could

[2]Pages 19-20 of the Academy's Amicus Brief responds to the defendant's contention that Section 455.241(2), Florida Statutes, which prohibits ex-parte communications with a plaintiff's treating physician, supports their interpretation of Rule 4-4.2. The plaintiff adopts and incorporates the Academy's response.

potentially result in liability being imposed on an organization, enlarging the scope of Rule 4-4.2 to preclude ex-parte contact with former employees would hamper the broad discovery purposes contained in the Rules of Civil Procedure.

As Formal Opinion 91-359 stated, Model Rule 4.2 should not be interpreted to inhibit discovery:

> [W]here, 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. . . . (A 17, p. 4).

The trial court's restriction prejudiced plaintiff's investigation and development of his case, required severe additional expense and conflicted with the policy objectives of Rule 4-4.2 and Ethics Opinion 88-14. The Fourth and Third Districts properly quashed the orders which prohibited ex-parte communications with defendant's former employees.

CONCLUSION

This Court should approve the Fourth District's opinion in Schwartz and disapprove the Second District's opinion in Barfuss.

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Employment Discrimination and Civil Rights Actions in Federal and State Courts
Cosponsored by California Continuing Education of the Bar with the cooperation of the Federal Judicial Center

*SOS ETHICAL CONFLICTS AND PROFESSIONAL CONSIDERATIONS: SELECTED ISSUES

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*507 I. Introduction

A. Scope of this Outline

Attorneys for employers and employees frequently encounter issues implicating ethical and professional considerations in employment discrimination litigation. By no means does this outline cover the myriad conflicts and other ethical issues that may arise during the course of litigating an employee's discrimination claim. It is intended to address selected issues (ex parte communications with current and former employees), problems in the area of joint representation (joint representation of employers and employees in employment discrimination litigation), or raise questions as to the effectiveness of fee shifting statutes (settlement negotiations involving resolution of plaintiff's claims and attorney's fees).

B. Ethics Rules

The framework for the law governing the conduct of attorneys consists of the ABA Model Rules of Professional Conduct (adopted by the ABA in 1983 to replace the Model Code of Professional Responsibility and adopted by the majority of states), the ABA Model Code of Professional Responsibility (adopted by the ABA in 1969 and still followed in the minority of jurisdictions), the opinions of ethics advisory committees of the ABA and the states, and the decisions of federal and state courts concerning professional conduct,

As a result of differing provisions in the Model Rules and the Model Code, as well as various analytical approaches taken by advisory committees and courts, it is essential to review the applicable body of law in the jurisdiction where the ethical issue arises. See Rand v. Monsanto Co., 926 F.2d 596, 601-03 (7th Cir. 1991), which contains a comprehensive survey of the ethical rules adopted by the federal district courts.

C. Federal Law Governs the Conduct of Attorneys in Federal Courts

In federal courts, the ethical standards that govern the conduct of attorneys are determined by federal law. In re Snyder, 472 U.S. 434, 645 n.6 (1985); Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993); United Transportation Local Unions 385 and 77 v. Metro North Commuter Railroad Co., 1995 U.S. Dist. LEXIS 15989, *17 (S.D.N.Y. Oct. 30, 1995); Miano v. AC&R Advertising Inc., 148 F.R.D. 68, 74 (S.D.N.Y. 1993); Application of Mosher, 25 F.3d 397, 400 (6th Cir. *508 1994); In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990); University Patents, Inc. v. Kligman, 737 F.Supp. 325, 327 (E.D.Pa. 1990). Where a federal court has adopted by local rule a state's ethical rules, the rules are applicable because the court "has chosen to require attorneys to follow its guidelines, and federal interpretation ...must therefore prevail." Polycast

Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990). Thus, even where a federal district court has adopted the ethical rules followed by the state in which it sits, the federal court is not bound by the state court's interpretation of the rules. Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1316 (3d Cir. 1993); Blasena v. Conrail, 898 F.Supp. 282, 283 n. 1 (D.NJ. 1995); Suggs v. Capital Cities/ABC, Inc., 54 Empl. Prac. Dec. ¶40,195 (S.D.N.Y. April 24, 1990); County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1407, 1413 (E.D.N.Y. 1989) aff'd, 907 F.2d 1295 (2d Cir. 1990); Figueroa-Olmo v. Westinghouse Elec. Corp., 616 F.Supp. 1445, 1449-50 (D.P.R. 1985); Black v. State of Missouri, 492 F.Supp. 848, 87475 (W.D. Mo. 1980); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359-1360 (2d Cir. 1975) (concurring opinion) ("[A] court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend, We should not abdicate our constitutional function of regulating the Bar to that extent.").

In view of this inherent power to govern the conduct of attorneys, the federal courts may choose to disregard a provision of a state code of ethics (even as adopted by local rule) where it conflicts with a federal rule of procedure. See Rand, 926 F.2d at 600-01 (held that DR 5-103(B) of the Model Code of Professional Responsibility, which had been adopted by local rule of the Northern District of Illinois, conflicted with Fed. R. Civ. P. 23 and could not be applied to class actions); County of Suffolk, 710 F.Supp. at 1413-15; Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) (the Supreme Court expressed a willingness to allow counsel to contact potential class members notwithstanding possible ethical problems arising from such communication).

II. Ex Parte Communications with Current and Former Employees of an Adversarial Party

A. Relevant Model Rules

1. ABA Model Rule of Professional Conduct 4.2, entitled "Communication with Person Represented by Counsel" [FNa1]

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

*509 2. Comment to Rule 4.2

[1 [FNaa1]] "This Rule does not prohibit communication with a person, or an employee or agent of such a person, 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 nonlawyer 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 or legal authorization for communicating with the a represented person 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."

[2] "Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, where there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] "This Rule also applies to communications with any person, whether or not a party to a formal adjudicative proceedings, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates."

[4] "In the case of an organization, this Rule prohibits communications by a lawyer for another person or

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entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization, 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. Compare Rule 3.4(f)."

[S] "The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom *510 communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious."

[6] "In the event the person with whom the lawyer communicates is now known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3."

CODE COMPARISON:

This Rule is substantially identical to DR 7-104(A)(1) except for the substitution of the term "person" for "party".

3. ABA Model Rule of Professional Conduct 3.4(f), entitled "Fairness to Opposing Party and Counsel

"A lawyer shall not . ..request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

4. Comment to Rule 3.4(f)

"Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2."

5. DR 7-104(A) of the ABA Mode! Code of Professional Responsibility, entitled "Communicating with One of Adverse Interest"

"(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,"

B. Policy Considerations

The purpose of the restriction against ex parte communications with represented parties is to preserve "the proper functioning of the legal system and [to shield] the adverse party from improper approaches." United Transportation Local Unions 385 and 77, et al. v. Metro-North Commuter Railroad Co., 1995 U.S. Dist.

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LEXIS *511 15989, *15 (S.D.N.Y. Oct. 30, 1995); Inorganic Coatings, Inc. v. Gregg Falberg, et al., 1995 US Dist. LEXIS 14511 (E.D. Pa. Oct. 3, 1995); Aiken v. Business and Industry Health Group, Inc., 885 F.Supp. 1474 (D. Kan. 1995); Wright by Wright v. Group Health Hospital, 691 P.2d 564, 576 (Wash. 1984); Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 82 (D.N.J. 1991), aff'd, 27 F.3d 556 (3d Cir. 1994); University Patents, Inc. v. Kligman, 737 F.Supp. 325, 326 (E.D.Pa. 1990). The restriction "prevents unprincipled attorneys from exploiting the disparity in legal skills between attorney and lay people." Papanicolaou v. Chase Manhattan Bank, NA., 720 F.Supp. 1080, 1084 (S.D.N.Y. 1989). In addition, it 'prevents a lawyer from circumventing opposing counsel to obtain unwise statements from the adversary party." Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990). "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." ABA Model Code of Professional Responsibility EC 7-18,

Plaintiffs' Perspective: Ex parte interviews are a less expensive means to obtain discovery than depositions and are an important tool in gathering information helpful to the evaluation and preparation of a case. Information gathered through ex parte communications may be protected by the work product privilege and allow the development of a case without the defendant becoming aware of the area of the plaintiffs counsel's investigation or inquiry that were not helpful.

Defendants' Perspective: Ex parte contacts with corporate employees pose a threat to the attorney-client privilege because the employee is generally not knowledgeable about the privilege and may not share the employer's interest in preserving the privilege. In order to protect the employer against possible overreaching or skillful interrogation by plaintiffs attorney and the possible imputation of the employee's statements to the corporation, it is necessary to have counsel for the employer present.

C. Contacts with Current Employees

Prior to the August 8, 1995 amendment to Model Rule 4.2, substituting the word "person" for "party", federal and state courts adopted a variety of approaches in determining whether ex parte interviews of current employees of an adversarial corporation should be permitted, More often than not, the approach taken by the courts turned on the interpretation given to the word "party" in pre-amendment Rule 4.2 and DR 7-104(A).

1. The Blanket Prohibition

Very few courts have held that ex parte contacts with all current employees are prohibited. See Mills Land and Water Co. v. Golden West Refming Co., 186 Cal. App.3d 116, 230 Cal. Rptr. 461 (Ct. App. 1986) (applied former Rule 7-103 of the California Rules of Professional Conduct and declared improper attorney's contacts with former employee but current director of a corporation where attorney failed to *512 seek leave of court to interview director without participation of corporation's counsel; the court based its decision on the grounds that the employee may be directly or indirectly prejudiced by the ex parte contact, the corporation has an interest in keeping information and knowledge garnered by an employee in the course of employment from release to an opponent in litigation without the protection and advice of counsel, the employee might be induced to make admissions or statements binding upon the corporation, and it is difficult to ascertain who is a member of the control group); Hewlett-Packard Co. v. Superior Court, 205 Cal.App.3d 43,252 Cal. Rptr. 14, 16 (Ct. App. 1988) (in an opinion subsequently withdrawn, held that Rule 7-103 of the California Rules of Professional Conduct prohibited contact with current employee). See also Cagguiia v, Wyeth Laboratories, Inc., 127 F.R.D. 653, 654 (E.D.Pa. 1989) (the court held that it was improper for the plaintiff's counsel to have contacted an employee of the defendant corporation without having given notice to opposing counsel of the intent to take a statement even though the employee did not have any managerial responsibility and his acts or omissions could not be imputed to the corporation nor could his statements constitute admissions on the part of the corporation).

2. The Control Group Test

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Under this test, ex parte communications are permitted with current employees except for those who are in the "control group" of the corporation. Employees in the "control group" are the "top management persons who had the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis of any final decision." Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc., 471 N.E.2d 554,560 (Ill.Ct.App. 1984); Bobele v. Superior Court, 199 Cal.App.3d 708, 245 Cal. Rptr. 144 (Ct. App. 1988) (applying former Rule 7-103 of the Rules of Professional Conduct of California, held that plaintiffs' counsel may not contact ex parte any current employees who are members of corporation's control group as that term is defined in Upjohn Co. v. United States, 449 U.S. 383 (1981)).

In ABA Formal Opinion 95-396, the Standing Committee on Professional Ethics promoted use of a broader definition of "control group." The committee stated that:

> the bar against [ex parte] communication covers not only the "control group" - those who manage or speak for the corporation - but in addition anyone "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."

(citing Comment, Rule 4.2). In other words, the committee reiterated, "if an employee cannot by statement, act or omission, bind the organization with respect to the particular matter, then that employee may ethically be contacted by opposing *513 counsel without the consent of in-house counsel." By utilizing a broader definition of "control group" in conjunction with language from the Comment to Rule 4.2, the committee effectively repudiated the control group test in favor of the managing speaking test.

3. The Managing-Speaking Test

Other courts have adhered to the language of the Comment to Rule 4.2 and prohibited ex parte contacts only with those employees who have managerial responsibility, whose acts or omissions in connection with the matter in litigation may be imputed to the corporation for purposes of civil or criminal liability, or whose statements may be an admission on part of the corporation. Coleman v. Amtrak, 1995 U.S. Dist. LEXIS 9370 (ED. Pa. June 28, 1995); Wright by Wright v, Group Health Hosp., 103 Wash.2d 192, 691 P.2d 564 (Wash. 1984); Shoney's, Inc. v. Lewis, 875 S.W.2d 514 (Ky. 1994); Tucker v. Norfolk & Western Ry. Co., 849 F.Supp. 1096 (E.D. Va. 1994); McCallum v, CSX Transportation, Inc., 149 F.R.D. 104 (M.D.N.L. 1993); State ex rel. Pitts v. Roberts, 857 S.W.2d 200 (Mo. 1993); Queensberry v. Norfolk and Western Ry. Co., 157 F.R.D. 21 (E.D. Va. 1993); Browning v. AT&T Paradyne, 838 F.Supp. 1564 (M.D. Fla. 1993); Chancellor v. Boeing Co., 678 F.Supp. 250 (D. Kan. 1988); Fulton v. The Honorable Donald Lane, 829 P.2d 959 (Okla. 1992); University Patents, Inc. v. Kligman, 737 F.Supp. 325 (E.D.Pa. 1990). In Triple A Machine Shop, Inc. v. State of California, 213 Cal.App.3d 131, 261 Cal. Rptr. 493 (Cal. App. 1989), the court held that California Rule of Professional Conduct 2-100 permitted opposing counsel to initiate contacts with present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability). As explained in ABA Formal Opinion 91-359:

> 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.

In Massa v. Eaton Corporation, 109 F.R.D. 312 (W.D. Mich. 1985), which extended the application of ex parte prohibition to communications with any managerial level employee of a corporate party, the court criticized the "control group" test applying the logic of Upjohn Co. v. United States, 449 U.S. 383 (1981).

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The Supreme Court, in Upjohn, had held that the "control group" test in the context of attorney-client privilege considerations was too narrow and concluded that communications between corporate counsel and employees of the corporation for the purpose of determining the potential civil or criminal liability of the corporation were *514 subject to the protection of the attorney-client privilege, The Massa court reasoned that the logic of Upjohn carried over to the circumstances involving ex parte contacts.

4. The Alter Ego Test

Under this test, which is very similar to the managing speaking test, "party" is defined to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes its liability, or employees implementing the advice of counsel. Other employees may be interviewed informally. Niesig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (Ct. App. 1990). In Niesig, the New York Court of Appeals explained that this test "would thus prohibit direct communication by adversary counsel 'with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation."' 559 N.Y.S.2d at 498 (citation omitted). This test permits all other employees, including employees who were merely witnesses to an event for which the corporate employer has been sued, to be interviewed. Id. at 498-99. See also Christy v. Pennsylvania Turnpike Commission, 157 F.R.D. 338, 340 n.3 (ED. Pa. 1994); Miano v. AC&R Advertising, Inc., 148 F.R.D. 68 (S.D.N.Y. 1993); Strawser v. Exxon Company, U.SA., 843 P.2d 613 (Wyo. 1992); State v. CIBA-GEIGY Corp., 247 N.J. Super. 314 (App. Div.), petition for certification granted, 126 NJ. 338 (1991) (and subsequently dismissed); Bouge v. Smith's Management Corp., 132 F.R.D. 560 (D. Utah 1990) (adopted the standard articulated in Niesig); Frey v. Department of Health and Human Services, 106 F.R.D. 32 (E.D.N.Y. 1985).

5. The Case by Case or Balancing Approach

Under this approach, there are no hard and fast rules to determine whether the interview will be allowed. Instead, on a case by case basis, the court inquires as to whether or not the subject matter of opposing counsel's inquiries to the employee is such that the employee's statements to opposing counsel are likely to be admissible against the corporation pursuant to Evid. R. 801(d)(2)(D) and whether it is necessary for the corporation to have counsel present to ensure effective representation. Mompoint v. Lotus Development Corporation, 110 F.R.D. 414 (D. Mass. 1986) (where plaintiff's counsel sought to interview corporation's female employees who allegedly reported that they were improperly pressured for sexual favors by plaintiff, court found balance tilted in favor of allowing plaintiff's counsel to interview the female employees because corporation presumably already had records regarding the complaints made by the female employees and plaintiffs counsel faced a considerably more difficult task in gathering evidence to prove that the reasons given for his termination were pretextual). See also Morrison v. Brandeis University, 125 F.R.D. 14 (D. Mass. 1989) (where plaintiffs attorney sought to interview non-party employees of university who served on committees that made recommendations on question of tenure, court again found the "search for truth" and effective preparation *515 for trial outweighed any need which counsel for university had to be present in order to ensure the university effective representation by counsel); Lizotte v. New York City Health and Hospitals Corporation, 1990 WL 267421 (S.D.N.Y. March 13, 1990) (court allowed contacts after balancing the need of the plaintiff and his expert for access to current employees against hospital's interest in avoiding disclosure of privileged information because court was satisfied that there was no danger that employees to be interviewed possessed such information).

6. ABA Formal Opinion 95-396: Amendment to Model Rule 4.2

In ABA Formal Opinion 95-396, the Standing Committee on Ethics and Professional Responsibility recognized that the word "party' as used in Rule 4.2 was ambiguous. To resolve this ambiguity the committee submitted a proposed amendment to Rule 4.2, which was recently adopted by the ABA House of Delegates, to

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substitute the word "person" for the word "party," Significantly, this amendment, paired with a corresponding amendment to the comment, extends the rule's scope beyond named parties to the litigation or proceeding to include any persons known to be represented by counsel with respect to the subject of the intended communication. In jurisdictions where the Model Rules as promulgated by the ABA govern, amended Rule 4.2 is already in effect. See, e.g., Ark Prof. Conduct Proc. § l(B) (1994) (adopting the Model Rules of Professional Conduct of the American Bar Association, as amended, as the standard of professional conduct of attorneys at law); USCS Ct.App. 11th Cir., R. l(A) (1995) (unless otherwise provided by a specific rule of the Court, attorneys practicing before the Court shall be governed by the American Bar Association Rules of Professional Conduct, and the Rules of Professional Conduct adopted by the highest court of the state(s) in which the attorney is admitted to practice to the extent that they do not conflict with the Model Rules in which case the Model Rules shall govern); USCS Claims Court Appx R III (B) (1995) (adopting the American Bar Association Model Rules of Professional Conduct, as amended from time to time by the association, except as otherwise provided by specific rule of the court); USCS Ct. App. Armed Forces R.15(a) (1995) (adopting the American Bar Association Model Rules of Professional Conduct as the rules of conduct for members of the Bar of this Court),

D. Contacts with Former Employees

1. Cases Allowing Ex Parte Communications With Former Employees

The ABA Standing Committee on Ethics and Professional Responsibility, in March 1991, stated that 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. The Committee stated that although persuasive policy arguments can and have been made for extending the ambit of Rule 4.2 to cover some former corporate employees, the language of the Rule itself gives no basis for concluding that such coverage was intended. In ABA Formal Opinion 95-396, the ● Sl6 Standing Committee on Professional Ethics. citing ABA Formal Opinion 91-359, reiterated that "Rule 4.2 does not apply to communications with a corporation's former officers and employees." In making such contacts, counsel should be careful not 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. Counsel should also comply with Rule 43, which requires that a lawyer contacting a former employee of an opposing corporate party make clear the nature of the lawyer's role in the matter necessitating the contact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party. [As to Rule 4.3, see discussion below].

The ABA Committee's interpretation of Rule 4.2 has been adopted by several courts that have considered it. See Aiken v. Business and Industry Health Group, 885 F.Supp. 1474 (D.Kan. 1995); Cathleen Mangen v, Greynolds Park Manor, Inc., 659 So.2d 1156 (Fla. Dist. Ct. App. 1995); Brown v. St. Joseph County, 148 F.R.D. 246 (ND, Ind. 1993) Cram v. Lamson & Sessions Co., Carlon Division, 148 F.R.D. 259 (S.D. Iowa 1993), aff'd, 49 F.3d 466 (8th Cir. 1995); Breedlove v. TeleTrip Company, Inc., 1992 U.S. Dist. LEXIS 12149 (N.D.Ill. Aug. 14, 1992); Valassis v. Samelson, 143 F.R.D. 118 (E.D. Mich. 1992); In re Domestic Air Transportation Antitrust Litigation, (N.D.Ga. 1992); Sherrod v. The Furniture Center, 769 F.Supp. 1021 (W.D. Tenn. 1991); Shearson Lehman Brothers, Inc. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991); Hanntz v. Shiley, Inc., 766 F.Supp. 258 (D.NJ. 1991); Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F.Supp. 899 (ED. Pa. 1991), appeal dismissed without opinion, 961 F.2d 207 (3d Cir. 1992); Dubois v. Gradco Systems, Inc., 136 F.R.D. 341 (D. Conn. 1991); Strawser v. Exxon Company USA, 843 P.2d 613 (Wyo. 1992); Neil S. Sullivan Associates, Ltd. v. Medco Containment Services, Inc., 257 NJ. Super. 155 (Law Div. 1992); In Re Environmental Insurance Declaratory Judgment Actions, 252 NJ. Super. 510 (Law Div. 1991).

Although not referring to ABA Opinion 91-359, a California court likewise concluded that it is proper for au attorney to communicate ex parte with a former member of a corporate adversary's control group under Rule 2-100 of California's Rules of Professional Conduct. Nalian Truck Lines, Inc. v. Nakano Warehouse &

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Transportation Corp., 6 Cal. App. 4th 1256, 8 Cal. Rptr. 2d 467 (1992) review denied, 1992 Cal. LEXIS 4234 (Cal. Aug. 20, 1992).

In allowing counsel to contact former employees, courts have attached certain conditions. See U.S. v. Florida Cities Water Co., 1995 U.S. Dist. LEXIS 7507 (M.D. Fla April 26, 1995)(ex parte contact should be barred to prevent disclosure of any inadvertent confidential communications where defendant has demonstrated an interest in protecting privileged information); Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, 1992 U.S. Dist. LEXIS 4980 (E.D. Pa. March 31, 1992) (since individual interviewed formerly was high level officer of company, counsel should have given opposing counsel notification of its intent to interview him); Curley v. *517 Cumberland Farms, Inc., 134 F.R.D. 77 (D.N.J. 1991) aff'd, 27 F.3d 556 (3d Cir. 1994) (informal contact allowed where former employees lacked managerial responsibility, were not the subject of imputed liability, and were incapable of making an admission binding upon the corporate employer); Erickson v. Winthrop Laboratories, 249 NJ. Super. 137 (Law Div. 1991) (followed Curley); Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990), aff'd., 1990 WL 180571 (S.D.N.Y. Nov, 15, 1990) (there is no ethical bar to communicating with former employee; the problem of protecting privileged material is best dealt with on a case-by-case basis); United States v. Western Electric Co., Inc., 1990-1 Trade Cases ¶ 68,939 (D.D.C. 1990) ("A former employee is not a 'party' for purposes of Rule 4.2 (or its predecessor, Disciplinary Rule 7-104) for he lacks the authority to bind the company."); PPG Industries, Inc. v. BASF Corp., 134 F.R.D. 118 (W.D. Pa. 1990) (looking at the "real life" fact that witness sought to be interviewed was a former employee of plaintiff and present employee of defendant, court allowed ex parte interview because witness's interests were aligned with defendant and because of importance of defendant's need to prepare for defense of action); Oak Industries v. Zenith Industries, 1988 WL 79614 (N.D.Ill. July 17, 1988) ("the plain meaning of the word "party, as used in DR 7-104 and Model Rule 4.2, does not include persons who are no longer associated with the employer at the time of the litigation"); Amarin Plastics, Inc. v. Maryland Cup Corporation, 116 F.R.D. 36 (D.Mass. 1987) (contact permitted provided that former employee does not have ongoing agency or fiduciary relationship with employer and communication between employer's counsel and former employee, about which plaintiff's counsel inquired, was not a communication of facts by a client to his attorney for the purpose of securing legal services); Siguel v. Trustees of Tufts College, 52 Fair Empl. Prac. Cas. (BNA) 697 (D. Mass. March 12, 1990) (the mere fact that a former employee is a prospective witness does not prevent ex parte contact; because a former employee enjoys no present, ongoing agency with the corporate relationship, his or her statements are not binding on the corporation under Evid. R. 801(d)(2)(D)); Porter v. Arco Metals Company, 642 F.Supp. 1116 (D.Mont. 1986) (ex parte contacts were not prohibited with former employees who did not have significant managerial responsibility in the matter in question); DiOssi v. Edison, 1990 WL 81976 (Del. Super. June 4, 1990) (ex parte contact allowed where former employees could not bind the corporation and had no attorney client relationship with the corporation's attorneys); Lang v. Superior Court of the State of Arizona, 826 P.2d 1228 (Ariz. 1992) (ex parte contact permitted unless the act or omission of the former employee gave rise to the underlying litigation or the former employee has an ongoing relationship with the former employer in connection with the litigation).

A number of ethics opinions construing Rule 4.2 have held that former employees are not within the scope of the rule against ex parte communications. ABA/BNA Lawyers' Manual on Professional Conduct, "Colorado Ethics Opinion 69 (Rev) (6/20/87)" 901:1901 (Oct. 25, 1989) (a lawyer may interview a former employee with regard to all matters except as to communications subject to the attorney-client privilege); Id., "Obligations to Third Persons," Vol. 5, No. 6 at 101-102 (Apr. 12, 1989), Florida Bar Professional Ethics Committee, Opinion 88-14 *518 (Mar. 7, 1989) (the clear consensus of ethics committees that have addressed the issue is that former managers and former employees are not within the scope of the rule against ex parte contacts); Id., "Alaska Ethics Opinion 88-3 (7/6/88)" at 901:1303 (Oct. 25, 1989) (former employees can no longer bind the corporation, so ex parte communications do not violate the rule against communications with an adverse party); Id., "Illinois Ethics Opinion 85-12 (4/4/86)" at 9013001 (Mar. 13, 1987) (by definition a former employee is no longer in a position to act or speak for the corporation; accordingly, a lawyer may directly communicate with a former employee without the corporation's consent without violating the code).

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2. Cases Prohibiting Ex Parte Communications with Former Employees

At least two courts have adopted a "bright line" test in cases involving former employees. See Public Service Electric and Gas Company v. Associated Electric & Gas Insurance Services, Ltd., 745 F.Supp. 1037, 1042 (D.N.J. 1990) (by prohibiting the contact, "the decided benefit of simplicity" is injected into this debate and such a decision "serves the overall objective of the ethical rules by providing clear guidance to the bar concerning what conduct is prohibited and what conduct is not"); Rentclub, Inc. v. Transamerica Rental Finance Corporation, 811 F.Supp. 651 (M.D. Fla. 1992), aff'd, 43 F.3d 1439 (11th Cir. 1995) ("ex parte contact should be barred to prevent disclosure of any inadvertent confidential communications').

Some courts have declared that former employees may be considered a "party" under certain circumstances, See, e.g., Porter v. Arco Metals Company, 642 F.Supp. 1116, 1118 (D. Mont. 1986) (former employees with managerial responsibilities concerning the matter in litigation may be considered parties subject to protection of Rule 4.2); Bobele v. Superior Court, 199 Cal.App.3d 708, 245 Cal. Rptr. 144 (Cal. Ct. App. 1988) (prohibition against ex parte contact does not extend to former employees of a corporation who were not members of the corporation's "control group" as that term is defined in Upjohn). See also South Carolina Bar Ethics Advisory Committee, Opinion 92-37 (Dec. 1992) (a plaintiffs lawyer may not contact former employees of the defendant corporation on an ex parte basis when acts or omissions of those individuals would be imputed to the corporation for liability purposes).

E. Ex Parte Communications by the Client

Ex parte communications by the client, not by the attorney, may result in a violation of ethics rules under certain circumstances. In Miano v. AC&R Advertising, Inc., 148 F.R.D. 68 (S.D.N.Y. 1993), an age discrimination case, the plaintiffs proposed to offer in evidence, for impeachment and admission purposes, tape-recorded conversations that the plaintiffs had with employees of defendant AC&R. AC&R moved to preclude the plaintiffs from using the tapes in evidence on the grounds, inter alia, that the tapes constituted ex parte communications with represented parties in violation of DR 7-104(A)(1) of the ABA and New York State Bar Association Codes of Professional Responsibility. The court denied the motion, *519 finding that AC&R was not represented at the time of the conversations and that evidence was tacking to prove that the plaintiffs attorney suggested, advised, or supervised the ex parte communications. Nevertheless, the court observed that "when an attorney actually requests or engineers a contact or action by another that would otherwise be prohibited by the disciplinary rules, he or she can be deemed to have 'caused' it and to have circumvented the rule. An attorney cannot legitimately delegate to another what he himself is prohibited from doing, nor may he use another as his alter ego,"

F. Special Committee Appointed By New Jersey Supreme Court

A Special Committee appointed by the New Jersey Supreme Court submitted a report and recommendation on ex parte communication with current and former corporate employees. See In the Matter of Opinion 668 of the Advisory Committee on Professional Ethics, 134 NJ. 294 (1993). In its report, the Committee maintained the existing akolute bar to ex parte communications with represented parties and developed the following approach to resolving the more complicated ethical issues raised by the Rule's application to interviews with organizational employees. The Committee recommended that the term "organization," as used in Rule 1.13, include corporate as well as non-corporate entities. The Committee further recommended that the term "organizational representation" be extended only to the "litigation control group." The litigation control group" would include current and former agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter, whether the matter was in litigation or not. Finally, the Committee defined "significant involvement" as more than merely providing factual information or data regarding the mater in question.

In addition, the New Jersey Committee recommended an amendment to Rule 4.2 requiring lawyers to use

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due diligence in ascertaining whether a person is represented. The Committee also recommended an amendment to RPC 4.3 requiring lawyers to tell unrepresented persons that they are not represented by the organization's counsel. To date, no action has been taken in regard to the New Jersey Committee's recommendations.

G. Guidelines for Communications with Current and Former Employees

1. ABA Model Rule of Professional Conduct 4.3, entitled "Dealing with Unrepresented Person"

"In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

- S20 2. Discussion of Guidelines

Rule 4.3 requires a lawyer contacting a former employee of an opposing corporate party to 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. ABA Formal Opinion 91-359 (March 1991). See also Dubois v. Gradco, 136 F.R.D. at 346 ("it goes without saying that, with respect to any unrepresented former employee, plaintiffs counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy"); Morrison v. Brandeis University, 125 F.R.D. 14, 19 (D. Mass. 1989) (plaintiffs counsel must disclose her capacity as counsel for plaintiff; any request by the person to be interviewed that the interview take place only in the presence of personal attorney or employer's attorney must be honored); Monsanto Company v. Aetna Casualty and Surety Company, 1990 WL 140056 (Del. Super. Sept. 10, 1990) (no interview of former employees allowed unless prescribed script used that described purpose of lawsuit, identified person conducting the interview, person to be interviewed not represented by counsel, and person to be interviewed consents to interview); In re Environmental Insurance Declaratory Judgment Actions, 252 NJ. Super. 510 (Law Div. 1991) (adopted Monsanto script).

Monsanto script:

1. I am a (private investigator--attorney) working on behalf of _____________. I want you to understand that _____________ and several other insurance companies have sued Monsanto Company. That suit is pending in Delaware Superior Court. The purpose of that lawsuit is to determine whether Monsanto's insurance companies will be required to reimburse Monsanto for any amounts of money Monsanto must pay as a result of alleged environmental property damage and personal injury caused by Monsanto. I have been engaged by ___________________ to investigate the issues involved in that lawsuit between Monsanto and its insurance companies.

2. Are you represented by an attorney in this litigation between Monsanto and its insurance companies?

If answer is "yes", end questioning.

If answer is "no", ask:

3. May I interview you at this time about the issues in this litigation?

If answer is "no", end questioning.

If answer is "yes", substance of interview may commence.

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● 521 H. Sanctions for Failure to Conduct Ex Parte Interviews Properly

Failure to conduct ex parte interviews in accordance with the rules in a particular jurisdiction may result in having the evidence obtained from the interview excluded from evidence, Inorganic Coatings, Inc., 1995 U.S. Dist. LEXIS 14511 *12-13 (E.D. Pa. October 3, 1995); Garrett v. National Railroad Passenger Corp., 1990 WL 122911 (E.D.Pa. Aug. 14, 1990); Cagguila v. Wyeth Laboratories, Inc., 127 F.R.D. 653, 654-55 (E.D.Pa. 1989); Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc., 440 F.2d 1216 (7th Cu. 1971), the disqualification of the attorney in the litigation, Inorganic Coatings, Inc., 1995 U.S. Dist. LEXIS 14511 ● 12-13 (E.D. Pa. October 3, 1995); American Protection Insurance Co. v. MGM Grand Hotel -- Las Vegas Inc., 2 Law. Man. Prof. Conduct 89 (D. Nev. 1986); Mills Land and Water v. Golden West Ref. Co., 230 Cal. Rptr. 461 (Cal. App. 1986), the revoking of pro hac vice status, National Union Fire Ins. Co. v. Stauffer Chemical Co., 1990 WL 161717 (Del. Super. Oct. 16, 1990) or other sanctions, Amarin Plastics, Inc. v. Maryland Cup Corporation, 116 F.R.D. 36, 42 (D. Mass. 1987); Monsanto Co. v. Aetna Cas. and Sur. Co., 1990 WL 200471 (Del. Super. Dec. 4, 1990).

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*522 Smith, Model Rule 42: Ethical Restrictions on Communications with Former Employees, 15 Employee Relations Law Journal 239-252 (1989);

Stahl, Ex Parte Interviews With Enterprise Employees: A Post-Upjohn Analysis, 44 Wash. & Lee L.Rev. 1181-1227 (1987); and

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iii. jOINT rEPRESENTATION OF eMPLOYERS AND sUPERVISORY eMPLOYEES in Employment Discrimination Litigation

A. Relevant Model Rules

1. ABA Model Rule of Professional Conduct 1.7, entitled "Conflict of Interest: General Rule"

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"(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

2. Comment to Rule 1.7

[4] "...The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.,.."

[5] "A client may consent to representation notwithstanding a conflict.... [W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

[7] "...Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' *523 testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question."

3. ABA Model Rule of Professional Conduct 1.13, entitled "Organization as Client"

"(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official other than the individual who is to be represented, or by the shareholders."

4. Comment to Rule 1.13

[8] "There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged,"

5. ABA Model Rule of Professional Conduct 1.16, Entitled "Declining or Terminating Representation"

"(a) . ..[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law[.]"

6. ABA Model Rule of Professional Conduct 2.1, entitled "Advisor"

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

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7. EC 5-15 of the ABA Model Code of Professional Responsibility

"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts **or** continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing ***524 interests; and** there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially...."

8. DR 5-105 of the ABA Model Code of Professional Responsibility, entitled "Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer"

"(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by hi representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

B. Discussion of the **Issue**

1. General Background

Joint representation of multiple defendants in employment discrimination litigation may give rise to a conflict of interest, Before undertaking such representation, the attorney must carefully analyze the facts of the specific case. This investigation may include the interview of the supervisory employee. The attorney should advise that employee at that point that he represents the company and that any privilege attaching to their conversation belongs to the company. In addition, the attorney must analyze the various claims **and defenses of** each party and make full and complete disclosure to the clients of the potential claims that might **be** made by one client against another, As part of this analysis, the attorney should consider whether one of the defendants may be best served by shifting blame to another defendant, whether the facts suggest that a common defense is appropriate, whether the supervisor-defendant was acting outside the scope of his employment, and whether the defendants may have possible cross-claims for indemnification or contribution. See Massachusetts Bar Association Committee on Professional Ethics Opinion No. 80-2 (in civil rights action, where city *525 attorney had concluded that city's defense included proving that police officer acted outside scope of his employment, joint representation was inappropriate). Once the joint representation is undertaken, the attorney should continuously evaluate whether that representation continues to be appropriate and so advise the clients. These issues are discussed in greater detail below.

2. Similarity of Interests

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The determining issue in the conflicts analysis is whether there is an adversity of interests between or among the co-defendants, generally an employer and supervisor, or whether there exists an inherent potential for conflict. This analysis is fact sensitive, but necessarily includes consideration of legal claims and defenses. As a genera1 rule, under federal law, employers are held liable for the discriminatory acts by their supervisory employees, provided that the acts complained of relate to the terms and conditions of employment. See, e.g., Vinson v. Tailor, 753 F.2d 141, 147-52 (D.C. Cir. 1985), affd, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) ("an employer is strictly liable for the actions of its supervisors...."); Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1971) ("Generally speaking, an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel,"); 29 C.F.R. § 1604.11(c). Accordingly, in these cases, the interests of the employer and supervisor are generally not adverse, and the joint representation is generally permissible.

3. Sexual Harassment Cases

Employment discrimination cases involving sexual harassment frequently present conflict of interest issues where individual supervisors are named as defendants along with the employer. While joint representation provides the employer and supervisor with an opportunity to present a united front at trial and minimizes attorneys fees, defenses available to the employer, such as any sexual harassment by the supervisor was unknown to it and engaged in without its consent or approval, may not be available to the supervisor. More important, these defenses may place the employer at odds with the supervisor and weaken the latter's defense. In addition, joint representation of an employer and a supervisor raises questions implicating the attorney-client privilege.

a. "Quid Pro Quo" Cases

Under federal law, there are two types of sexual harassment cases: (1) "quid pro quo" cases and (2) hostile environment cases. In "quid pro quo" cases, which involve sexual demands made in exchange for employment benefits, employers are generally held liable for acts of harassment committed by supervisors. Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1351 n.3 (4th Cir. 1995); Karibian v. Columbia University, 14 F.3d 773, 777 (2d Cir.), cert. denied, U.S._, 129 L.Ed.2d 824 (1994); Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) ("Title VII *526 demands that employers be held strictly liable for the discriminatory employment decisions of their supervisory personnel who are delegated the power to make such employment decisions"); Spencer v. Genera1 Elec. Co., 894 F.2d 651,658 (4th Cir. 1990); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989); Carrero v. New York City Housing Authority, 890 F.2d 569, 579 (2d Cir. 1989); Crimm v. Missouri Pac. R.R., Co., 750 F.2d 703,710 (8th Cir. 1984); Katz v. Dole, 709 F.2d 251,255 n.6 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) ("In [a quid pro quo] case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee.... Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority."); Bundy v. Jackson, 641 F.2d 934,943 (D.C. Cir. 1981); Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983, 993 (D.C.Cir. 1977); Splunge v. Shoney's, Inc., 874 F.Supp. 1258, 1270 (M.D. Ala. 1994). In "quid pro quo" cases, conflict issues regarding joint representation are thus not likely to arise as the interests of the employer and the supervisor are similar.

b. "Hostile Environment" Cases

In "hostile environment" cases, which involve work atmospheres so pervasively hostile as to create an abusive working environment for employees of one gender, the Supreme Court, in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), refused to hold an employer automatically liable for the acts of its supervisors: "Congress' decision to define "employer" to include any "agent" of an employer...evinces an intent to place some limits on the acts of employees for which employers under Title VII are to held responsible." The Court added that as to employer liability, agency principles should be consulted for guidance and that the *mere existence* of

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a grievance procedure and the employee's failure to invoke the procedure does not necessarily shield the employer from liability. See also Jeppsen v. Wunnicke, 611 F.Supp. 78, 83 (D. Alaska 1985) ("[E]mployer knowledge is not an element of [a hostile environment] Title VII sex discrimination case,"); see also Henson, 682 F.2d at 910 ("When a supervisor gratuitously insults an employee, he generally does so for his own reasons and by his own means, He thus acts outside the actual or apparent scope of the authority he possesses as a supervisor. His conduct cannot automatically be imputed to the employer...."). In Hicks v. Gates Rubber Company, 833 F.2d 1406, 1418 (10th Cir. 1987), the Tenth Circuit, applying § 219(2) of the Restatement of Agency, held that employer liability existed where (1) the employer was negligent or reckless and (2) where the employee purported to act or speak on behalf of the employer and there was reliance on apparent authority, or the employee was aided in accomplishing the wrongdoing by the existence of the agency relation. See also Karibian v. Columbia University, 14 F.3d 773, 779 (2d Cir.), cert. denied, -U.S.-, 129 L.Ed. 2d 824 (1994); Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 576 (10th Cir. 1990; Domm v. Jersey Printing Co., Inc., 871 F.Supp. 732, 738 (D.NJ. 1994)).

*527 The issue of employer liability in hostile environment cases thus frequently is determined by whether an employer, in response to complaints about harassment, has taken prompt remedial action against the supervisor, Swentek v. USAIR, Inc., 830 F.2d 552, 558-59 (4th Cir. 1987); Domhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987); Barrett v. Omaha National Bank, 726 F.2d 424, 427 (8th Cir. 1984); Keeny v. Wal-Mart Stores, Inc., 1994 U.S. Dist. LEXIS 15069, • 7 (W.D. Mich. Sept. 15, 1994); Saville v. Houston County Healthcare Authority, 852 F.Supp. 1512, 1527 (M.D. Ala. 1994); Ferguson v. E.I. DuPont de Nemours and Co., Inc., 560 F.Supp. 1172, 1199 (D. Del. 1983) ("employers should not be liable if they seek to alleviate or dispel hostile environments by methods such as strict and prompt remedial measures and strictly enforced and well-known company policies"). As a result, in hostile environment cases the interests of the employer and the supervisor may differ and create the potential for conflict.

C. The Conflict of Interest

1. "Quid Pro Quo" Cases

As a threshold matter in determining whether a potential conflict of interest exists, the parties must determine whether their interests are adverse. In "quid pro quo" cases, where the supervisor's liability may bind the employer, the interests of the supervisor and employee are consistent, and there is not likely to be a potential or actual conflict of interest. In such a situation, an attorney may represent the supervisor and employer. Similarly, where both the employer and the supervisor conclude that the plaintiffs claim is without merit, they may decide to have joint representation.

2. "Hostile Environment" Cases

The opportunity for an employer to shield itself from liability in a "hostile environment" case by prompt remedial action against the employee presents a potential conflict of interest, however. The attorney must advise the employer of this possible defense; when the attorney does so, and the employer takes prompt remedial action and disciplines a supervisor for a course of action inconsistent with the employer's policies, it is apparent that the attorney may not represent both the employer and the supervisor. The conflict between employer and supervisor may develop as a consequence of information obtained from the supervisor by the attorney. The attorney may learn from the supervisor, for example, of harassing behavior committed by the supervisor. The attorney then is faced with the obligation of maintaining the supervisor-client's confidences while at the same time he should be advising the employer-client to discipline the supervisor.

In sexual harassment claims arising under state law, the interests of the employer and supervisor may also differ, and the attorney cannot represent both. See O'Reilly v. Executone of Albany, Inc., 135 A.D.2d 999,522 N.Y.S.2d 724 (App. Div. 1987) (on motion of counsel for employer and supervisor to withdraw from *528 representation of supervisor, the court held that a conflict would arise where the employer offered its defense

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that even if the supervisor engaged in misconduct, it is not responsible because it had no notice of and did not acquiesce in the conduct, and it reversed the order of the trial court that had denied the withdrawal).

3. Other Employment Discrimination and Civil Rights Cases

Other types of employment discrimination and civil rights cases also provide fertile ground for potential conflicts of interest. This potential is particularly great where the plaintiff seeks to hold the employer vicariously liable for the discriminatory or tortious acts of its supervisors under theories of respondeat superior, or negligent retention, hiring or supervision. Under these circumstances, the liability of the employer turns on whether the employee was acting within the scope of his or her employment at the time of the alleged impropriety. See, e.g., Coleman v. Frierson et al., 607 F.Supp. 1566 (N.D.Ill. 1985) (since municipalities can be held liable under § 1983 for employees' actions taken pursuant to municipal policy, there is a need for sensitivity to the risk of conflict throughout the course of lawsuits involving joint representation of co-defendants in cases where towns, police departments and individual civil servants are sued for alleged civil rights violations); Smith v. City of New York, 611 F.Supp. 1080 (S.D.N.Y. 1985) (although diverse interests requiring disqualification can arise in civil rights actions against local governments and their employees where the local government denies that the officer was acting within the scope of his public employment, no such conflict exists where the local government and the officer agree that the officer was acting within the scope of his public employment); Lee v. Hutson, 600 F.Supp. 957 (N.D. Ga. 1984); Shadid v. Jackson, 521 F.Supp. 87 (E.D. Tex 1981) (where in civil rights action brought against city and police officer, it was in interest of individual police officer to contend that if the events alleged in fact occurred, he was acting within scope of his lawful, official duties, and, conversely, city might try to avoid liability by proving that police officer was acting without authority and outside scope of his employment, there was high potential for conflicting loyalties and city and police officer would be required to have separate counsel). In one such case where joint representation of co-defendants caused an individual police officer to forego a good faith immunity defense in order to shield the police department from liability, the court found that the police officer did not receive a fair trial, ordered the judgement vacated and remanded the entire action for a new trial. Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984).

Where the co-defendants agree that the individual employee was acting within the scope of his or her employment, the potential for conflict may be abrogated. Feng v. Sandrik, 636 F.Supp. 77 (N.D.Ill. 1986)(where in sex discrimination suit against university as well as individual officials and employees, university customarily indemnified and defended its employees when they are sued for acts done within the scope of their employment, conflicts of interest are unlikely); Smith v. City of New York, 611 F.Supp. 1080 (S.D.N.Y. 1985)(finding no differing interests between city and its police officers, barring corporation counsel's representation of officers on ● 529 counterclaims where city's position was that officers were acting within the scope of their public employment and in discharge of their duties).

D. Addressing the Conflict Situation

1. Consent

In situations at the commencement of the litigation where it appears that there may be a potential conflict of interest, the attorney may obtain the informed consent of the clients to engage the joint representation. Rule 1.7(a)(2) and DR 5-105(C); Blecher & Collins, P.C. v. Northwest Airlines, Inc., 858 F.Supp. 1442, 1451 (CD. Cal. 1994); Civil Service Commission v. Superior Court, 163 Cal.App.3d 70, 82, 209 Cal. Rptr. 159, 168 (1985) ("For the client's consent to be informed, the attorney must 'make a full disclosure of all facts and circumstances' relevant to the conflict, 'including the areas of potential conflict and the possibility and desirability of seeking independent legal advice,."'); Margulies v. Upchurch, 6% P.2d 1195, 1203-04 (Utah 1985) ("the attorney must not only inform both parties that he is undertaking to represent them, but must also explain the nature and implications of the conflict in enough detail so that the parties can understand why independent counsel may be desirable"); see also, Los Angeles County Bar Association Professional

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Responsibility and Ethics Committee, Formal Opinion 471 (12/21/92)(law firm may ask advance consent to represent both corporation and former employee whom corporation has agreed to defend in lawsuit brought against both of them and to withdraw from representation of employee should corporation assert cross-claim against employee). An attorney may not engage in multiple representation, however, where he or she cannot represent one of the parties competently even after having disclosed the potential conflict and obtained consent. In short, if an attorney cannot fulfill its basic duties to both clients, he or she may not ethically accept the representation of both clients.

Where an actual conflict manifests itself during the pendency of the litigation, the lawyer should withdraw from representation of at least one of the parties. Rule 1.16 ("[A] lawyer...shall withdraw from the representation of a client if...the representation will result in violation of the rules of professional conduct or other law"); In re Kuykendahl Place Associates, Ltd., 112 B.R. 847, 851 (SD. Tex. 1989) ("A lawyer should not continue multiple [representation] if the exercise of his independent professional judgment will be adversely affected by his representation of another client."), See Pennix v. Wmton, 61 Cal.App.2d 761, 143 P.2d 940 (1943) (held that where an attorney's representation of an insurance carrier conflicted with his representation of an individual defendant, the attorney was required to withdraw from representing the individual, but was permitted to continue his representation of the insurance company). The Comment to Rule 1.13 suggests that the attorney may continue representing the employer rather than the supervisor, The employer, if it chooses, may pay for the supervisor's separate counsel. But see Kyriazi v. Western Electric Co., 476 F.Supp. 335, 341 (D.N.J. 1981) (ordered that employer could not *530 indemnify employees for their wrongful conduct because to do so would permit the employer "to entirely circumvent the purpose of the punitive damages which have been awarded, and to pass on to its shareholders... the consequences of its employees -- which the Court has determined should be borne by them personally).

Consent to multiple representation where there is an actual conflict impairing the attorney's professional judgment and his duty of undivided loyalty is inappropriate. See Klemm v. Superior Court of Fresno County, 75 Cal.App.3d 893, 898, 142 Cal.Rptr. 509, 512 (Ct. App. 1977) ("[A] purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.") Thus, the attorney must inform the employer and the supervisor when joint representation is inappropriate they cannot consent to it. See Comment to Rule 1.7. (In O'Reilly, the attorney had to seek the judicial relief after the employee refused to obtain his own counsel once it became apparent during the litigation that a conflict existed).

Moreover, the attorney may be required to withdraw from the case altogether. Klemm, 75 Cal.App.3d at 899-900, 142 Cal.Rptr. at 513. In the situation where the attorney has obtained information from the supervisor subject to the attorney-client privilege that may result in the liability of the supervisor and the possible exculpation of the employer, the attorney should recommend that the employer and the supervisor retain separate counsel because the attorney cannot fulfill his obligation of rendering independent professional judgment.

Accordingly, at the outset of the representation, a letter should be sent to the corporate client and the individual client analyzing the potential for a conflict of interest. Although disclosure varies from case to case, the letter should explain the significance of the facts presented and the reasonably foreseeable adverse consequences to each of them, including (1) the potential that the corporation might conclude that it is not obligated to continue defending the employee and what might happen in that event; (2) the potential and circumstances under which the corporation and employee may pursue claims against each other and that the firm may be required to withdraw from representing the employee in that event; (3) the potential that the law firm may also be required to withdraw from representing the corporation (and that the firm may be disqualified from the representation by a court); (4) the circumstances under which the law may afford the

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employee the right to separate counsel paid for by the corporation; and (5) whether the corporation may have certain rights against the employee for contribution or reimbursement, The firm should avoid advising both clients on issues where their interests conflict as this places the firm in a position where it cannot exercise independent judgment on behalf of both clients. In such situations, it may be advisable to recommend that the clients seek independent counsel to render such advice.

*531 2. Indemnification

Potential conflicts of interest may also be abrogated, though not necessarily cured, where the corporate defendant has agreed to indemnify employees sued for actions taken within the scope of their employment. Feng v. Sandrik, 636 F.Supp. 77 (N.D.Ill. 1986) (conflict of interest unlikely where employer customarily indemnifies and defends employees sued for acts done within the scope of their employment); see also, Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Formal Opinion 471. (corporation agreed to defend and indemnify former employee if lawsuit was brought against employee for conduct within the scope of his employment, but excused itself of these obligations if employee was found to have engaged in wilful misconduct). Some state statutes, however, expressly limit corporate authority to indemnify their directors, officers and employees. See, e.g., N.J.S.A. 14A:3-5 {allowing corporations to indemnify directors, officers, and employees against expenses and liabilities in connection with any proceeding, other than a proceeding by or in the right of the corporation, arising out of hi or her role as a corporate agent so long as the director, officer or employee acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation, unless the director, officer or employee has been adjudged to be liable to the corporation). Likewise, in some instances, the courts limit the corporate defendants' ability to indemnify its directors, officers and employees on public policy grounds. Kyriazi v. Western Electric Co., 476 F.Supp. 335 (D.N.J. 1979) (employer prohibited from indemnifying employees for punitive damages). Accordingly, indemnification will only mitigate potential conflicts to the extent that it is permitted in the jurisdiction at issue. Of course, indemnification paired with informed consent will reduce the likelihood of potential conflict even further. See e.g., Feng v. Sandrik, 636 F.Supp. 77 (N.D.Ill. 1986).

E. Joint Defense Privilege

In those situations where the employer and supervisory employee retain separate counsel, they may cooperate in a joint defense and protect their communications from discovery provided that appropriate safeguards are implemented. The common defense doctrine exists where separate entities are engaged in the joint defense of a single lawsuit and the communication is "'part of an ongoing and joint effort to set up a common defense or strategy."' Matter of Bevill Bresler & Schulman Asset Management, 805 F.2d 120,126 (3d Cir. 1986), quoting Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir.), cert. den., 474 U.S. 946 (1985). Accord, Dome Petroleum v. Employers Mutual Liability Insurance Co., 131 F.R.D. 63, 67 (D.N.J. 1990). It applies even though the employer's and supervisory employee's interests are not completely aligned. United States v. Bay State Ambulance Hospital Rental Service, 874 F.2d 20 (1st Cir. 1989).

*532 To protect a communication disclosed in the common defense of a lawsuit, the party asserting the privilege must demonstrate three elements:

1. That the communication was made in a joint defense effort;

2. That it was designed to further that effort: and

3, That the privilege has not been waived.

Matter of Bevill, 805 F.2d at 126; In Re State Commission of Investigation, 226 NJ. Super. 461, 467 (App. Div.), certif. den. 113 NJ. 382 (1988).

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Courts focus on the client's expectation of confidentiality in order to preserve the joint defense privilege. The privilege is not absolute, however. It may be pierced by establishing:

1. A legitimate need to reach the evidence;

2. A showing of relevance and materiality; and

3. That a fair preponderance of the evidence, including reasonable inferences, demonstrates that the information cannot be secured from any less intrusive means.

Leonen v. Johns Manville, 135 F.R.D. 94,100 (D.NJ. 1990).

Of course, in the event that a lawsuit arises between the supervisory employee and the employer (for example, if the employer terminates the employment of the supervisory employee and the employee alleges wrongful discharge), the privilege is waived. In Re Sunrise Securities Litigation, 130 F.R.D. 560, 573 (E.D. Pa. 1989).

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*533 Lester, No Man is an Island: A Compendium of Legal Issues Confronting Attorneys When Individual Defendants are Named in an Employment Litigation Complaint, 20 Pac. L.J. 293-336 (1989);

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Tate, Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?, 23 Ind. L.Rev. 1-69 (1990).

IV. Settlement Negotiations Involving Resolution of Plaintiff's Claim and Amount of Attorney's Fees

A. Relevant Model Rules

1. ABA Model Rule of Professional Conduct 1.7, entitled "Conflict of Interest: General Rule"

"(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests...."

2. Comment to Rule 1.7

[1] "Loyalty is an essential element in the lawyer's relationship to a client...."

[6] "The lawyer's own interests should not be permitted to have [an] adverse effect on representation of a client...,"

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3. ABA Model Rule of Professional Conduct 2.1, entitled "Advisor"

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice...."

4. EC 5-1 of the ABA Model Code of Professional Responsibility

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

*534 5. EC 5-2 of the ABA Model Code of Professional Responsibility

"A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client."

B. Relevant Statutes

1. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, (the "Fees Act")

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 19% of this title, title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k)

"In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

C. Discussion of the Issue

As a result of the statutory provisions permitting the awarding of attorney's fees to prevailing plaintiffs attorneys, plaintiffs attorneys will undertake representation of clients who could not otherwise compensate them for their services. This, in fact, was Congress's intent in enacting the Fees Act. Where a plaintiff's attorney has agreed to accept a case for the statutory fee award, settlement discussions involving both the merits of the dispute and attorney's fees may present the attorney with an ethical dilemma, particularly in the absence of a well-drafted retainer agreement.

This dilemma may manifcst itself in a number of ways and depends, at least in part, on the fee agreement between the attorney and the client. First, the defendant's counsel may offer a lump sum settlement to the plaintiff. This lump sum includes an amount for plaintiffs damages as well as the attorney's fees; it is left up to the plaintiff and his or her attorney to determine who gets what. Second, the settlement offer may specify the amount being offered as relief to the plaintiff and the amount being offered as attorney's fees. In that situation, the defendant's counsel may *535 determine to make a settlement offer attractive to the attorney by making a generous offer as to the fees, but may couple it with a minimal offer to redress the plaintiffs claims. Alternatively, the defendant's counsel may provide the plaintiff with the relief that he or she seeks, but couple it with minimal compensation for the attorney. Third, the defendant's settlement offer may be contingent upon the waiver of part or all of the attorney's fees. In each of these instances, the interests of the attorney and the client differ.

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Advisory committees have recognized the conflict of interest problems that might develop in simultaneous negotiations of merits and fees, See Opinion No, 80-94, Committee on Professional & Judicial Ethics of the New York City Bar Assoc., 36 Record of N.Y.C.B.A. 507 (1981) (ruled that it was unethical for defense counsel to condition settlement on waiver of statutory fees under civil rights statutes); Opinion No. 147, District of Columbia Bar Legal Ethics Committee, reprinted in 113 The Daily Washington Law Reporter 389 (1985) (also held such demands to be unethical), See also Manual for Complex Litigation Second, § 23.24 (1985) ("Settlements that involve attorneys' fees present particularly troublesome questions of professional ethics.").

D. Resolving the Conflict between the Attorney and His Client

1. Class Actions

In Evans v. Jeff D., 475 U.S. 717 (1986), the Supreme Court resolved the conflict by holding that (1) the Fees Act does not prohibit all simultaneous negotiations of a defendant's liability on the merits and its liability for the plaintiff's attorney's fees and (2) a defendant may condition a settlement offer upon a waiver of attorney's fees, In Jeff D., a private, non-profit corporation that provided free legal services to qualified low income persons, sought to set aside a settlement in a class action suit that included a waiver of attorneys' fees. The plaintiffs' attorney argued that he had been forced to accept the settlement proposal because it was in the best interest of his client, but the district court enforced the stipulated waiver over that objection. The Court of Appeals for the Ninth Circuit reversed, noting that when an attorney's fees are negotiated as part of a class action settlement, a conflict exists between the class lawyer's interest in compensation and the class members' interest in relief. Although the Supreme Court recognized that there was a conflicting interest between the attorney and the class, it stated that no "ethical dilemma" existed because the class attorney had no ethical obligation to seek a statutory fee award, id. at 727-28; the attorney's only ethical duty was to serve his clients loyally and competently. Id. at 728 n. 14. The Court further explained that it is the prevailing party, not the attorney who is entitled to attorney's fees. Id. at 730 n. 19. See also In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990) ("There is . ..no bar in attempting to negotiate a settlement of attorney's fees along with the plaintiff's substantive claims in [a civil rights case].").

*536 Prior to the Supreme Court's opinion in Jeff D., some trial courts were permitted to insist upon settlement of the damages aspect of the case separately from the award of statutorily authorized attorney's fees. Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977) ("Only after court approval of the damage settlement should discussion and negotiation of appropriate compensation for attorneys begin."); see also Lisa F. v. Snider, 561 F.Supp. 724, 725-26 (N.D. Ind. 1983) ("private parties to litigation should not be allowed to demand the waiver of attorney fees as a condition to meaningful settlement negotiations on the merits"); Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (recognized that potential conflict between class counsel and class members where simultaneous negotiations involve injunctive relief); Obin v. District No, 9 of International Ass'n of Machinists and Aerospace Workers, 651 F.2d 574,582 n.10 (8th Cir. 1981) ("it is unrealistic to expect the parties 'to waive fees altogether,' and it is preferable to avoid any appearance of impropriety even if an agreement on fees may be 'easily accomplished.'"); Jones v. Orange Housing Authority, 559 F.Supp. 1379 (D.N.J. 1983) (attorney would have been acting improperly if attorney's fees discussed before settlement of merits); Lyon v. State of Arizona, 80 F.R.D. 665 (D. Ariz. 1980); Munoz v. Arizona State University, 80 F.R.D. 670 (D. Ariz. 1978); Regalado v. Johnson, 79 F.R.D. 447 (N.D.Ill. 1978) (improper for lawyer to inject question of attorney's fees into settlement discussions). As a result of Jeff D., the Prandini rule may no longer be invoked.

Even before Jeff D., however, some courts declined to follow the Prandini rule. See, e.g., Moore v. National Ass'n of Securities Dealers, Inc., 762 F.2d 1093 (D.C. Cir. 1985) (held that simultaneous negotiations of merits and fees/costs and waivers of fees and costs should not be prohibited per se; plaintiffs may voluntarily and on their own initiative offer a waiver or concession of possible claims for fees and costs in an effort to encourage settlement); Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985); Parker v, Anderson, 667 F.2d 1204, 1213 (5th Cir.),

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cert. denied, 459 U.S. 828 (1982).

2. Individual Civil Rights Actions

Jeff D. has been applied in individual civil rights cases to deny an application for fees made by an attorney following a settlement that included a waiver of attorney's fees, Willard v. City of Los Angeles, 803 F.2d 526, 527 (9th Cir. 1986) (the Fees Act "vests the right to attorney's fees in the 'prevailing party' rather than in his attorney"). See also Panola Land Buying Ass'n v. Clark, 844 F.2d 1506, 1509 (11th Cir. 1988) (dismissed attorney's motion to intervene to challenge settlement agreement that contained a waiver of attorney's fees denied because attorney had no "legally protectable" interest in the proceedings).

E. Options Available to Plaintiffs' Attorneys to Preserve Opportunity to Recover Fees

As a consequence of Jeff D., plaintiff's counsel should enter into a retainer agreement with the client that (1) provides that the client is ultimately responsible for *537 payment of fees and out-of-pocket expenses, (2) conditions representation on a nonwaiver of fees by the client or (3) assigns the client's interest in fees to the attorney.

Any settlement agreement should expressly incorporate the understanding between the parties as to attorney's fees to avoid a subsequent dispute as to whether attorney's fees have been waived. See Wakefield v. Mathews, 852 F.2d 482, 484 (9th Cir. 1988) ("Waiver of attorneys' fees should not be presumed from a silent record."); El Club Del Barrio, Inc. v. United Community Corporations, Inc., 735 F.2d 98 (3d Cir. 1984) (required that negotiated fee waivers be expressly contained in settlement agreement); Ashley v. Atlantic Richfield Company, 794 F.2d 128,139 (3d Cir. 1986) ("[W]here a defendant seeks to settle its total liability on a claim, it shall be incumbent upon the defendant to secure an express waiver of attorney's fees. Silence will not suffice.").

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FNa1. Amended August 8, 1995, American Bar Association House of Dclcgates, Chicago, Illinois, per report No. 100.

FNaa1. For ease of reference, the number in the bracket refers to the paragraph number of the Comment, which in the original text is not numbered. For example, paragraph 1 in this instance refers to the first paragraph of the Comment.

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Appendix Part 2

from: ABA Manual on Lawyer Conduct

pursuant to Rule 1.16(a),[15] unless it can obtain F's consent after consultation. ([15] In that event the firm must comply with Rule 1.16(d), which requires a lawyer to "take steps to the extent reasonably practicable" to protect the client's interests.)

The constraints of Rule 1.6 have the practical effect, however, of severely limiting the law firm in obtaining F's consent to continue the representation because, to do so, it would first need to obtain E's consent to reveal Developer E's interest in acquiring the parcel. In the Committee's opinion, however, Rule 1.6 does not prohibit the law firm from advising E that a problem has ariwn that may force the firm to withdraw from the representation and obtaining the consent of E to reveal E's interest in acquiring the parcel to a potential competitor. With that consent, the firm then may reveal to F that it already represents E and needs to be released from its duty to keep Pa interest in the parcel confidential. Practical considerations, such as the likelihood of F withholding consent in order to gain an advantage. must govern whether the law firm proceeds in this fashion, Although this mechanism may not be practicable in the factual context of *Case 3*, it may prove useful in other situations where confidentiality of the identity of competitors is not so yip&-cant"

The Committee also cautions that if the disclosures made to the law firm in *Case 1* and *Case 2* had been more extensive or sensitive or more necessary to use in adequately representing the existing client, withdrawal from the representations might be required. Withdrawal from representing Client *A* in *Case* I would be required, for instance, if B had revealed to the law firm information about the claim against A not already known that would have provided a defense to the lawsuit, such as limitations. Moreover, in *Case 2*, the mete disclosure of the nature of the matter in which Corporation D sought representation—a hostile takeover of Corporation C--might create so material a limitation on the representation of C that the law firm would be required to withdraw from the representation of C, unless D's interest in acquiring C already was known by C.

Formal Opinion 91-359
March 22. 1991

Contact With Former Employee Of Adverse Corporate Party

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.

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 akut the subject of the 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)(1), 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 repre-

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senting 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 helpful 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 patty. 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.
>
> (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, 576 (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 hag 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 discus& 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*, 469 A.2d 971 (N.J. Super. 1983) (negotiations were conducted with insurance company for defendants).

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

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plaintiff's 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 hy 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 employers 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 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 employer? 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 comment-by 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 --dearly 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 42 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 42 (as illuminated by its comment) and DR 7-1-4(A)(1) (which does not have such a comment or compa-

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rable 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 oi 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 363,558 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). 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 Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), *cert. denied*, 455 U.S. 99 (1982) (noting that the rationale of *Upjohn v. United States*, 449 U.S. 383 (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

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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 moans 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.

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 IO 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*, 64 A.D.2d 685.407 N.Y.S.2d 586 (App. Div. 1979) (attorneys for defendant hospital 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).

Formal Opinion 91-360
July 11. 1991

Prohibition of Partnerships with Nonlawyers: Extrajurisdictional Effect

A lawyer who is licensed both in a jurisdiction that prohibits partnerships with nonlawyers, as in Model Rule 5.4(b), and in a jurisdiction that permits lawyers to form partnerships with nonlawyers, but who practices only in the latter jurisdiction, should not be subject to the prohibition of the jurisdiction where the lawyer does not practice. On the other hand, if a lawyer licensed in two such jurisdictions is engaged in practice in the jurisdiction that prohibits such partnerships, the lawyer must adhere to the restrictions of that jurisdiction.

The ethical prohibition on a lawyer practicing law in partnership with a nonlawyer that is embodied in Rule 5.4(b) of the ABA Model Rules of Professional Conduct has until very recently been in force in every American jurisdiction.[1] This unanimity, however, was broken at the &ginning of 1991 when a different version of Rule 5.4(b), allowing lawyers to practice in partnership with nonlawyers in certain circumstances, came into affect in the District of Columbia.[2] In this Opinion we address the question of what ethical rule should govern when lawyers are partners in a law firm that, as permitted by the D.C. rule, includes nonlawyer partners, but are also members of the bar of another jurisdiction whose rules forbid such partnerships.

[1] The ABA's formal prohibitions against lawyer partnerships with nonlawyers date back to 1928, when Canon 33 was added to the Canons of Ethics. Canon 33 provided in pertinent part that "[p]artnerships between lawyers and msmkrs of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." Canon 34 prohibited

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Appendix Part 3

Report of the Special Study Committee on the Model Rules of Professional Conduct

The Florida Bar
Tallahassee, Florida 32301-8226

March 1984

THE FLORIDA BAR

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

March 13, 1984

TALLAHASSEE, FL 32301-8226
904/222-5286

William O. E. Henry, President
The Florida Bar
Tallahassee, Florida 32231

Re: Special Study Committee on the
Model Rules of Professional Conduct

Dear President Henry:

You have requested that our committee study the Model Rules of Professional Conduct adopted by the American Bar Association on August 2, 1983, and make a recommendation to the Board of Governors regarding their adoption in Florida in lieu of the Code of Professional Responsibility.

We have completed the requested study, and we recommend that the Model Rules of Professional Conduct, with certain amendments, be adopted in Florida.

We base our recommendation on the following observations:

1. The restatement format of the proposed Rules, which has already been approved in concept by The Board, provides (i) greater clarity, and therefore promotes greater understanding of professional standards; (ii) improved ease of access for the average practitioner having an occasional need to consult the Rules for guidance; and (iii) a more definite framework for disciplinary procedures.

2. The Model Rules provide needed guidance in many matters not addressed in the Code of Professional Responsibility.

3. The Model Rules reflect several years of conscientious effort by a respected commission of the ABA which solicited and accepted comment from all segments of the organized bar, as well as the deliberate review of the House of Delegates. As such, it is a remarkably broad based codification of the standards of our profession currently prevailing in this country.

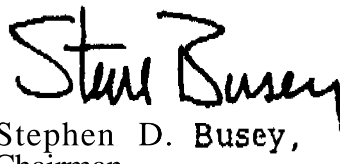
March 1.3, 1984
Page 2

Attached to this letter is the report of our committee, which contains the Model Rules in a form showing the changes recommended by the committee. The report also contains a study committee note for each rule which provides a reference to the comparable provision of the Code of Professional Responsibility and a brief statement of the reasoning of the committee for any recommended change in the rule or comment.

The recommended changes in the Rules and Comments arc the result of concerns expressed earlier by the Board of Governors regarding certain provisions of the Rules, as well as other concerns raised by the committee in the process of our study. We have recommended changes where we believed existing provisions of the Code of Professional Responsibility are clearly preferable, or where we believed the Rules were otherwise deficient. With few exceptions, we have limited recommended changes to matters we considered material and have resisted the temptation of general editing, mindful of the consideration of uniformity among states adopting the Model Rules.

Our committee intends to publish this report and to solicit comments from all segments of the Bar prior to making its final proposal to the Board of Governors. The committee would appreciate the Board's close review of this report together with any comment regarding the committee's recommendations.

Very truly yours,



Stephen D. Busey,
Chairman

SDB : kcM22

Attachments

RULE 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 ~~PARTY~~ PERSON THE LAWYER KNOWS TO BE REPRESENTED BY ANOTHER LAWYER IN THE MATTER, UNLESS THE LAWYER HAS THE CONSENT OF THE OTHER LAWYER, ~~OR IS AUTHORIZED BY LAW TO DO SO.~~

COMMENT:

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 nonlawyer 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,

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 purposes of this Rule. Compare Rule 3.4(f). 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.

STUDY COMMITTEE NOTE:

Rule 4.2, as modified by the Committee, is substantially similar to Florida's DR 7-104(A)(1). The Committee changed the word "party" to "person" so as to avoid limitation to parties in litigation. This change also renders the Rule more consistent with the language of the Comment.

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

IN DEALING ON BEHALF OF A CLIENT WITH A PERSON WHO IS NOT REPRESENTED BY COUNSEL, A LAWYER SHALL NOT STATE OR IMPLY THAT THE LAWYER IS DISINTERESTED. WHEN THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT THE UNREPRESENTED PERSON MISUNDERSTANDS THE LAWYER'S ROLE IN THE MATTER, THE LAWYER SHALL MAKE REASONABLE EFFORTS TO CORRECT THE MISUNDERSTANDING.

COMMENT:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel,

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail this 3rd day of October, 1996, to:

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By [signature]
JANE KREUSLER-WALSH
Florida Bar #272371