IN THE SUPREME COURT
STATE OF 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.

INITIAL BRIEF ON THE MERITS

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

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PREFACE

These proceedings are for review of an opinion of the Fourth District Court of Appeal that expressly conflicts with an opinion of the Second District Court of Appeal on the same issue.

Petitioner H.B.A. Management, Inc., will be referred to as "HBA."

Respondent The Estate of MAE SCHWARTZ, Deceased, by and through the Personal Representative, ALEX SCHWARTZ, will be referred to as the "Estate."

The record will be cited as "R. ___."

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STATEMENT OF THE CASE AND OF THE FACTS

A. Background of the Conflict

The issue before this Court is whether, and under what circumstances, a party may engage in ex parte communications with the ex-employees of an adverse corporate party. The issue, which arises in the context of Rule Regulating The Florida Bar 4-4.2 ("Rule 4-4.2") and its comment, reached this Court via a conflict between decisions of the Second and Fourth District Courts of Appeal.

In *Barfuss v. Diversicare Corporation of America*, 656 So. 2d 486,487 (Fla. 2d DCA 1995), the second district affirmed a trial court's imposition of a limited proscription against ex parte communication with the corporate defendant's ex-employees whose actions or inactions were at the core of the litigation. The court recognized the split in authority across the nation, analyzed the various positions on the issue, and concluded that the better-reasoned view was to interpret the rule and its comment to prevent contact with ex-employees whose conduct might impute liability to the corporation.

In this case, under a nearly identical factual and procedural scenario, the fourth district quashed the trial court's order protecting HBA's former employees from ex parte contact with the Estate. Relying on Florida Bar Ethics Opinion 88- 14 ("Florida Opinion 88- 14") and American Bar Association Formal Opinion 91-359 (March 22, 1991) ("ABA Opinion 91-359"), which interprets ("ABA") Bar Association Model Rule of Professional Conduct 4.2 ("RPC 4.2"), the court held that "nothing in the rule prevented counsel from speaking to the opposing party's former employee about the subject matter of a lawsuit, even where that employee's negligence could be imputed to the party." *Estate of Schwartz v. H.B.A. Management, Inc.*, 673 So. 2d 116, 119 (Fla. 4th DCA 1996).

B. Background of This Case

Following the death of Mae Schwartz, her Estate filed a Complaint against HBA alleging, among other things, violation of chapter 400, Florida Statutes (1992). (R. 2, Item A-2). The allegations potentially implicated various employees and ex-employees of HBA who had cared for and treated the decedent during the time she convalesced at Tamarac. On February 2, 1995, based on information it had received that a private investigator for the Estate was attempting to contact certain HBA employees and ex-employees, HBA filed a Motion to Prohibit Ex Parte Communications With Employees and Former Employees of H.B.A. Management, Inc. ("Motion"). (R. 2, Item A-9). The Estate's Memorandum in Opposition to Defendant's Motion to Prohibit Communication with Former Employees did not take a position contrary to HBA's request for a prohibition protecting its current employees, but argued that HBA was not entitled to any similar prohibition with respect to its ex-employees. (R. 2, Item A-10).

At the February 8, 1995 hearing on the Motion, the Estate acknowledged that it was not entitled to contact HBA's present employees but insisted the prohibition was improper as to its former employees. (R. 2, Item A- 1, p. 4). HBA agreed that a blanket prohibition on ex-employees might not be appropriate, but argued that under controlling law the Estate had no right to contact those HBA former employees who cared for or treated the decedent. (R. 2, Item A-l, pp. 5-6, 9). It based the distinction on the potential that the latter class of ex-employees' alleged liability might be imputed to HBA. In support of its position, HBA cited *Barfuss.*

The Estate responded that *Barfuss* was wrong in light of Florida Opinion 88- 14, which concluded that Rule 4-4.2 does not apply to former employees. The Estate also argued that even *Barfuss* allowed only a limited prohibition and required production of the names of the

ex-employee care-givers protected by the limited prohibition. (R. 2, Item A-1, pp. 5-8). The trial court concluded that it was bound by *Barfuss* in the absence of any contrary authority from its own district court and entered an order granting the Motion to that extent. (R. 2, Item A- 1, pp. 10-11). The court also ordered the Estate to turn over any notes or other documents reflecting ex-parte communications with HBA's current or past employees.

Schwartz then petitioned the Fourth District Court of Appeal for certiorari review of the Order. The fourth district held that the trial court had departed from the essential requirements of the law in limiting the Estate's contact with HBA's ex-employees, quashed the Order, and certified direct conflict with *Barfuss*. On the basis of the certified conflict, HBA then sought this Court's review.

QUESTION PRESENTED

Whether Rule Regulating The Florida Bar 4-4.2 permits a party to engage in ex-parte communications with an adverse corporate party's former employees whose conduct may be imputed to establish liability against the corporation?

SUMMARY OF ARGUMENT

The better-reasoned view is to construe Rule 4-4.2 to include within its protection corporate ex-employees whose liability may be imputed to the corporate defendant. The plain language of the Rule is expansive. Contrary to the positions asserted by courts adopting the various tests developed under the Rule and its analogs, the language is not limited to protection for a "control group," a "managing-speaking agent group," or corporate "alter egos." It was designed to protect a corporation from ex parte contacts with any person, whether current or ex-employee, agent, or independent contractor, whose potential liability for an act or omission is imputable to the corporation.

The defect in the analysis that excludes ex-employees is its failure to recognize that ex-employees, at the time liability-producing act or omission, was an employee of the corporation. Even after termination of that more formal relationship, there is still enough of an agency "relationship" to impute liability through the doctrine of respondeat superior. Since that lingering relationship is sufficient to trigger the corporation's liability, it should be sufficient to trigger the rule's protection for both ex-employee and ex-employer. Because the definition of "person represented by counsel" includes those persons whose liability may be imputed to the corporate ex-employer, they are by definition represented parties with whom ex parte contact is prohibited.

Weighed against the necessary protection afforded a potentially liable corporate defendant, none of the reasons given for excluding former employees from the reach of Rule 4-4.2 is compelling. Plaintiffs would remain free to conduct interviews, rather than depositions, if the cost factor is an imperative. The interviews, however, would be conducted in the presence of counsel authorized to protect the interests of the ex-employee and the corporate defendant. They would also remain free to conduct ex parte interviews of mere witnesses to the acts or omissions giving rise to

the corporation's potential liability; only those ex-employees in a respondeat superior relationship to the corporation would be protected by the Rule.

The whole thrust of modern litigation theory militates against the interpretation given Rule 4-4.2 by the fourth district. As the legislature implicitly recognized in limiting ex parte contact with treating physicians, section 455.241(2), Florida Statutes (1995), the risk and lure of ethical improprieties far outweighs the benefit of one-sided contact. The same reasoning that went into the statutory protection should direct this Court's interpretation of the Rule.

ARGUMENT

I. RULE 4-4.2 DOES NOT PERMIT EX-PARTE COMMUNICATIONS WITH AN ADVERSE CORPORATE PARTY'S FORMER EMPLOYEE WHOSE CONDUCT COULD BE IMPUTED TO ESTABLISH LIABILITY AGAINST THE CORPORATION.

A. Overview

This case involves the correct interpretation of Rule 4-4.2 and the comment to the rule. In pertinent part, Rule 4-4.2 states:

> 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.

The relevant portion of the comment provides:

> In the case of an organization, this rule prohibits communications by a lawyer for 1 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.

In *Barfuss*, 656 So. 2d at 487, the court held that the comment should be construed to extend the communication prohibition to former employees of a corporate defendant if their "act or omission , . . may be imputed to the organization for purposes of civil or criminal liability. . . ." In direct contrast, the *Schwartz* court held that there are no circumstances in which a former employee is within the proscriptions of the Rule simply because the corporate ex-employer has party status in the litigation. 673 So. 2d at 119. See *also Reynoso v. Greynolds Park Manor, Inc.*, 659 So. 2d 1156, 1157 (Fla. 3d DCA 1995) (also disagreeing with *Barfuss* and certifying conflict).

The *Barfuss* court correctly analyzed the Rule and the comment. The *Schwartz* and *Reynoso* courts erred. The decision in *Schwartz* should be quashed and this matter remanded

with directions to reinstate the trial court's order to the extent it afforded protection consistent with *Barfuss*.

B. The Trial Court's Order

Initially, the scope of the trial court's order in this matter should be clarified. Before the fourth district, the Estate argued that the trial court had imposed a "blanket restriction" on the Estate's ex-parte contact with HBA's former employees. (R 2, Item A-l, p. 5). That interpretation of the order is incorrect. The trial court imposed the same kind of limited restriction approved in *Barfuss*. (R. 2, Item A-l, pp. 10-11). Citing its own earlier decision in *Manor Care of Dunedin, Inc.* v. *Keiser*, 611 So. 2d 1305, 1308 (Fla. 2d DCA 1992), the *Bar-m* court specifically recognized that a blanket restriction was improper. *Id.* at 488. The limitation imposed by the *Bar-s* trial court and approved on certiorari review was that the plaintiff was prohibited from ex-parte communications with those ex-employees of the adverse corporate party who "cared for or treated the Plaintiff." *Id.* In a footnote, the *Barfuss* court clarified that its decision did not prohibit ex-parte contact with "former employees who were merely witnesses to the care of Barfuss." *Id.* at 489 n. 5.

While *the Schwartz* court recognized the distinction between the limited prohibition approved by *Barfuss* and an improper blanket ban, it nevertheless held that even the limited restriction of *Barfuss* is incorrect. *Schwartz, 673 So.* 2d at 119.

C. The Issue

Rule 4-4.2 prohibits communications directly between a lawyer and a "person the lawyer knows to be represented by another lawyer in the matter." The key to the prohibition is whether a "person" is represented by counsel. When the "person" is an individual, the test is relatively simple. However, when the "person" is a corporation or similar entity that functions only through individuals, the question becomes the extent of representation.

The comment to Rule 4-4.2 interprets the Rule in the context of corporations to include three classes:

- managerial employees;
- any other person whose acts or omissions in connection with the matter at issue may be imputed to the corporation for liability; and
- persons whose statements constitute admissions by the corporation.

Both the Rule and its comment were patterned after their counterpart provisions in the RPC 4.2. RPC 4.2, in turn, is nearly identical to its predecessor, DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility, except that the earlier disciplinary rule had no comment. Some authorities believe that addition of the comment suggests that the scope of RPC 4.2 is broader *than the* scope of DR 7-104(A)(1). E.g., *Shearson Lehman Brothers, Inc. v. Wasatch Bank,* 139 F.R.D. 412, 415-16 (D. Utah 1991).

There are two cautions against wholesale reliance on any cases construing RPC 4.2, DR 7-104(A)(1), or other states' versions of the ethical rule, to the extent the language of those rules is not identical to that of Rule 4-4.2.[1] First, Rule 4-4.2 prohibits communication with "a person" a lawyers knows to be represented. In contrast, until August 8, 1995, the relevant portion of RPC 4.2 stated:

> 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.

(Emphasis added). The American Bar Association has now revised RPC 4.2 effective August 8, 1995, to replace the word "party" with the word "person," so any opinion that

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[1] By 1992, 40 states and the District of Columbia had adopted either the ABA Model Rules or an equivalent. John E. Iole & John D. Goetz, *Ethics or Procedure: A Discovery-Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary,* 68 Notre Dame L. Rev. 8 l, n.9 (1992).

predates the change and is based on RPC 4.2's use of the word "party" is unreliable. Second, DR 7-104(A)(1) also uses the word "party" and, therefore, any cases applying the older rule are also suspect.

As the Estate has argued at every level and HBA acknowledges, most of the courts and ethics committees that have considered the inclusion of ex-employees in RPC 4.2, DR 7-104(A)(1), or the rules of other states, have decided that ex-employees, for one reason or another, are outside the scope of the protection. Without exception, however, the cases are decided in the context of the Rule's use of the word "party," ignore one or more of the three prongs of the comment to RPC 4.2, or simply adopt the conclusion of another case with no independent analysis. In addition, most if not all of the decisions and analyses predate the 1995 version of RPC 4.2 and are, therefore, questionable authority on the revised Rule.

In this case, HBA does not contend that either the first or third categories of the comment to Rule 4-4.2 applies to ex-employees. See, e.g., *Barfuss*, ***656 So.*** 2d at 488 n. 4. Whether the second category applies, however, has been the subject of heated national debate, extensive analysis, vigorous litigation, and voluminous written commentary. The three Florida district courts that have considered the issue are in irreconcilable disagreement. The issue is now before this Court for resolution.

D. Judicial Constructions

Since the 1980s, the controversy over the proper interpretation of rules similar to Rule 4-4.2 has focused in different directions and not necessarily on the distinction between current and former employees. However, a review of the questions with which the courts struggled, such as the types of corporate employees with whom ex parte contact was forbidden and the types of forbidden contact, is a necessary predicate to this Court's decision.

Initially, rules prohibiting communication with a represented party were interpreted to permit ex parte contact with all current employees of a corporate party. Courts and commentators then began to conclude that the rules were meaningless unless they provided protection for at least some corporate employees. Those cases reached differing results, which eventually were recognized as four discrete resolutions of the issue: the "blanket rule," the "balancing test," the "managing-speaking-agent test," and the "control group test."[2] Jerome N. Krulewitch, Comment, *Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest, 82 Nw.* U. L. Rev. 1274 (1988). Some courts recognize a fifth test, the "alter ego test," which is a variant of the "managing-speaking-agent test." *See, e.g., Brown v. St. Joseph County, 148* F.R.D. 246,253 (N.D. Ind. 1993). The two tests that have gained the widest acceptance are the "managing-speaking-agent test" and the "alter ego test." *Wright by Wright v. Group Health Hospital,* 691 P.2d 564, 567 (Wash. 1984); *Niesig v. Team I, 558* N.E.2d 1030 (N.Y. 1990).

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[2] The "blanket prohibition" has been rejected by nearly every jurisdiction, including the one that originally proposed it. *Compare Public Services Electric and Gas Company v. Associated Electric & Gas Insurance Services, Ltd. ("AEGIS'), 745* F. Supp. 1037 (D.N.J. 1990), and *Hanntz v. Shiley, Inc., a Division of Pfizer, Inc., 766* F. Supp. 258 (D.N.J. 1991). It will not be discussed here because HBA also believes the test is overly restrictive.

Between the mid-1980s and 1995, however, to the extent any court considered ex-employees in construing the rule, few courts held that ex-employees of any type were within the rule's protection. Many reached their decision based on use of the word "party" in DR 7-104(A)(1) and RPC 4.2. An analysis of the relevant cases, the rules they construe, and the tests they adopt, leads to the conclusion that none are dispositive with respect to this Court's construction of Rule 4-4.2, and many are simply wrong with respect to their own rules. This Court should not be persuaded by the "majority view." Acceptance of that view is not only inconsistent with the language of Rule 4-4.2, but it will lead to exactly the subversion of fair litigation practices that the Florida Rules of Professional Conduct were designed to prevent.

1. **The "Managing-Speaking-Agent Test"**

One of the two most widely accepted tests, the "managing-speaking-agent test," is not only ill-suited to any analysis of Florida's Rule 4-4.2 and its comment, it is also not particularly well-structured to encompass the comment to RPC 4.2. Authorship of the test is generally credited to the *court* in *Wright by Wright v. Group Health Hospital,* 691 P.2d 564, 567 (Wash. 1984). However, the test was developed before the adoption of RPC 4.2 or its comment; it only extends protection to current employees in managerial positions who speak for the corporation; and it fails entirely to recognize the second prong of the comment, the potential for imputed liability, even as to current employees at levels below management.

The question framed by the *Wright* court, in the context of a medical malpractice action, was: "Which of the corporate party's employees should be protected from approaches by adverse counsel?" After analyzing various interpretations of its state's version of DR 7-104(A)(1), the court concluded that the rule applied only to prohibit the plaintiff from contacting current employees who had "speaking authority" for the corporation. *Id.* at 569. The court specifically noted that it "found no reason to distinguish between employees who

. . . witnessed the event and those whose act or omission caused the event leading to the action. It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts." *Id.* As to former employees, using the same rationale, the court held that they were not protected since they could not "possibly speak for the corporation." *Id.; see also Sherrod v. Furniture Center,* 769 F. Supp. 1021, 1022 (W.D. Tenn. 1991) (citing *Wright* to hold that former employees are not covered because they cannot "bind the corporation); *Fulton* v. *Lane,* 829 P.2d 959,960 (Okla. 1992) (former employees not within rule because they "may not speak for or bind the corporation); *Massa v. Eaton Corporation,* 109 F.R.D. 312, 315 (W.D. Mich. 1985) (rule applies to communications with any managerial level employee of corporate party); *DiOssi v. Edison, 583* A.2d 1343, 1344-45 (Del. Super. Ct. 1990) (adopting *Wright* test and finding that ex-employees before it could not bind corporation).

In the context of Florida's Rule 4-4.2 and its comment, the *Wright* analysis stops short of even protecting those current employees on whom Florida courts do not disagree. See, e.g., *Reynoso,* 659 So. 2d at 1160 (citing ABA Opinion 91-359). Since Rule 4-4.2 and its comment extend protection, at the very least, to current corporate employees whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability, the managing-speaking-agent test is inconsistent with Florida law and irrelevant to this Court's decision.

2. The "Control Group Test"

Another test framed by courts outside Florida, the "control group test," is also irrelevant here. First, few courts have favored the test, which limits protection to only those senior management officials with the power to commit the corporation to certain policies. Second, the test is also inconsistent with the plain language of the comment to Rule 4-4.2.

The case most frequently associated with the test, although it has also been associated with the *Wright* "alter ego test," is *Porter v. Arco Metals Company, a Division of Atlantic Richfield Corporation,* 642 F. Supp. 1116 (D. Mont. 1986). Applying RPC 4.2 and citing *Upjohn Company v. United States*, 449 U.S. 383,395 (1981), the court held that neither RPC 4.2 nor the attorney-client privilege prohibited ex parte communications with current or prior employees "so long as plaintiff does not attempt to interview present or former employees with managerial responsibilities concerning the matter in litigation, and does not inquire into privileged areas of communication."[3] *Id.* at 1117-18. *Porter,* however, never mentioned imputed liability and, like *Wright,* drew no distinction between current and former employees. *See also Bobele v. Superior Court,* 245 Cal. Rptr. 144, 147 (Cal. Ct. App. 1988) (extending protection to former employees "who are still in the corporation's 'control group"'). *But see Continental Insurance Company v. Superior Court (Commercial Bldg. Maintenance* Co.), 37 Cal. Rptr. 2d 843, 857 (Cal. Ct. App. 1995) (new drafter's note specifies that rule does not apply to former employee).

The "control group test" is as inapplicable here as the "managing-speaking-agent test" because it fails to extend any protection to persons, whether current or former employees, whose actions or inactions may be imputed to the corporate party for purposes of liability.

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[3] In *Upjohn,* the Supreme Court rejected the "control group" test for attorney-client privilege and held that the privilege could extend to middle-level and even lower-level employees whose actions could "embroil the corporation in serious legal difficulties." *Id.* at 391.

3. The "Balancing Test"

The third test, also disfavored by the majority of courts, is generally associated with Massachusetts decisions. Under this test, each case is considered on an individual basis and the court balances the "plaintiffs need to gather information on an informal basis on the one hand and the defendant's need for effective representation on the other. . . ." *Siguel v. Trustees* of *Tufts* College, No. CIV.A.88-0626-Y, 1990 WL 29199 (D. Mass. Mar. 12, 1990) (citing *Morrison v. Brandeis University,* 125 F.R.D. 14, 18 (D. Mass. 1989); see *also Mompoint v. Lotus Development Corp.,* 110 F.R.D. 414,418 (D. Mass. 1986). Before the courts begin their balancing, however, they decide whether the rule extends any protection to the involved person. In making that decision, most of the court employ the "managing-speaking-agent test."

In *Siguel,* for instance, the court first held that DR 7-104(A)(1) applied to current employees, whether or not management, whose statements could bind the corporation. Then moving to the second prong of the test, the court concluded that the balancing favored ex parte communication. *Id.* at * 1-2. Finally, the court noted that although the second prong of the analysis would have led to the same conclusion for ex-employees, they were not within the rule in the first instance because they enjoyed no "present, ongoing agency relationship with the corporate party" that would make their statements binding on the corporation *Id.* at *4.

The balancing test is subject to several criticisms. See Stephen M. Sinaiko, *Ex Parte Communication and the Corporate Adversary: A New Approach, 66 N.Y.U.* L. Rev. 1456, 1490 (1991). First, judicial intervention is required each time a party wants to conduct ex parte interviews with employees of a corporate opponent. *Morrison,* 125 F.R.D. at 18 n.1 (improper for attorney to engage in ex parte communications with employees of corporate

adversary unless first obtaining court's permission). This consumes already limited judicial resources and subjects the balancing test to inefficiency and inconsistency. See *Siguel*, 1990 WL at *3. Furthermore, when judicial approval for ex parte communication is sought, the opposing counsel is alerted to the identities of employees with whom such contact is desired. The corporation's counsel's opportunity to contact those employees and request that they not talk to the plaintiffs counsel, greatly reduces the value of the ex parte communication. Sinaiko, *supra* at 1490.

While the balancing test is impractical and unworkable for a number of reasons, its primary defect, like the "managing-speaking-agent test" and the "control group test," is that it refuses to recognize any protection for even current employees whose acts or omissions could impute liability to the corporation.

4. **The "Alter Ego Test"**

The fourth test, and probably the most widely accepted, is also the one most consistent with the language of RPC 4.2 and its comment. Decisions under the test, however, are far from consistent on whether any former employees are protected by the rule. Although, as the Estate pointed out below, the inconsistency weighs heavily in favor of no protection, the cases finding no protection are questionable not only because of the recent revision to RPC 4.2 but also because they construe rules unlike Florida's Rule 4.2.

The case most closely associated with the test is *Niesig v. Team I, 558* N.E.2d 1030 (N.Y. 1990). The *Niesig* court rejected the blanket test, the control-group test, and various intermediate tests to adopt a definition of "party" that includes corporate employees "whose acts or omissions in the matter under inquiry are binding on the corporation . . . or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." 558 N.E.2d at 1035. However, the court also decided, without analysis, that New

York's version of DR 7-104(A)(1) applied only to current employees. *Id.* at 1032; see *also State ex rel. Charleston Area Medical Center v. Zakaib, 437* S.E.2d 759, 761-62 (W.Va. 1993) (rule protects only those present employees who have legal power to bind corporation or whose acts or omissions may be binding on or imputed to corporation). The *Niesig* test has gained wide acceptance as a broader variant of the *Wright* "managing-speaking-agent" test. *See Krulewitch, supra, NW.* U. L. Rev. at *1298; Sequa Corporation v. Lititech, Inc., 807* F. Supp. 653,667 (D. Colo. 1992) (adopting "alter ego test" generally but refusing to extend protection to ex-employees on basis of "managing-speaking-agent test"); *State v. CIBA-GEIGY Corporation,* 589 A.2d 180, 186 (N.J. Super. Ct. App. Div. 1991) (adopting *Niesig* "alter ego test").

Even before *Niesig,* however, the concept of the test existed. One of the earliest cases suggesting this test or its applicability for former employees is *Amarin Plastic, Inc. v. Maryland Cup Corporation,* 116 F.R.D. 36 (D. Mass. 1987), which was later withdrawn. Although the *Amarin* court's decision involved an ex-employee, the decision did not turn on that fact. Instead, the court analyzed whether the ex-employee's admissions could bind the corporation. "The mere fact that Shapiro may be a prospective witness, even a critical one, does not trigger the prohibitions of DR 7-104(A)(1)." *Id.* at 40. While *Amarin* appeared to agree with authorities holding that the former rule did not apply to former employees, it also recognized that the comment to the recently-promulgated RPC 4.2 included an "imputation" prong that was distinct from the "managing-speaking" and "'binding" prongs, and it left the door open for the defendant to show that the involved ex-employee fit within that protection. See *also Siguel,* 1990 WL 29199 at *4 (noting *Amarin's* distinction); *Chancellor v. Boeing Company,* 678 F. Supp. 250,253 (D. Kan. 1988) (corporate employee is party if any of three tests in comment are met; citing *Amarin;* later withdrawn).

Three Pennsylvania federal court decisions show that jurisdiction's adherence to the "alter ego test" but its lack of agreement on whether the test encompasses ex-employees. In *University Patents, Inc. v. Kligman, 737* F. Supp. 325, 328 (E.D. Pa. 1990), the court held that the rule forbade ex parte communications with current employees whose acts or omissions could impute liability to the organization, noted that the "prohibition does not appear generally to encompass former employees," but left open the question because there was no showing in the case before it of the "status or conduct of the former employees" before it. One year later, however, in *Action Air Freight, Inc. v. Pilot Air Freight Corp., 769* F. Supp. 899, 902-03 (E.D. Pa. 1991), the same court held that the phrase "any other person whose act . . . may be imputed to the corporation" imputed liability based only on the agency principle and, since "former employees do not qualify as agents of the corporation, they do not fall within the comment's imputation language." *Id.* at *904; see also Strawser v. Exxon Company, U.S.A., a Division of Exxon Corp.,* 843 P.2d 613, 614 (Wyo. 1992) (adopting "alter ego test" but refusing to extend coverage to ex-employees based on *Action Air* analysis); *Frey v. Department of Health and Human Services,* 106 F.R.D. 32, 35 (E.D.N.Y. 1985) (adopting early version of alter ego test but limiting it to those employees who can bind corporation).

In *PPG Industries, Inc. v. BASF Corporation,* 134 F.R.D. 118, 121 (W.D. Pa. 1990), in contrast, the court held that the "imputed liability" portion of the comment applies to "present or former employees of the corporate party."

The "alter ego test" is the most compelling of the tests applied to current employees. Its error as applied to ex-employees is not in the test itself, but in its reliance on the restrictive language of the former RPC 4.2 or its predecessor, DR 7.104(A)(1) and its refusal to give full meaning to the interpretive language of the comment. Similarly, most courts that

successfully reached the point of the "alter ego test" then faltered in their analysis of the "persons" covered by the test because of the use of the word "party" in the rules of every jurisdiction except Florida. For that reason, bar opinions and cases that pre-date the 1995 change in RPC 4.2 or rely on the interpretation of any rule except Rule 4-4.2 should be disregarded as questionable authority here.

5. The "Party" v. "Person" Distinction

The "'party" versus "person" distinction runs as a theme through most of the cases cited above that consider the ex-employee coverage issue. In 1990, for instance, a New York federal district court, analyzing that state's versions of both DR 7-104(A)(1) and RPC 4.2, held that a corporate "'party" may not be defined to include former employees because the "traditional interpretation of DR 7-104(A)(1) did not include former employees," the "text of Model Rule 4.2 did not deviate in substance," and the comments "do not clearly indicate a departure." *Polycast Technology Corporation* v. *Uniroyal, Inc.*, 129 F.R.D. 621, 627 (S.D.N.Y. 1990); *see also Dubois* v. *Gradco Systems, Inc.*, 136 F.R.D. 341, 343-45 (D. Conn. 199 1) (relying on *Polycast* to hold that ex-employees are not "parties" protected by the rule); *Cram v. Lamson & Sessions Co., Carlon Division,* 148 F.R.D. 259,261 n.2 (S.D. Iowa 1993) (citing *Polycast* for '"traditional view" that former employees not within term "party" in rule).

Despite its adherence to a narrow interpretation of the word "party," however, the *Polycast* court recognized that the ABA intended to expand the Rule's protection to employees such as a "truck driver whose involvement in an accident led to a lawsuit against his employer." *Polycast,* 129 F.R.D. at 627 (citing Hazard & Hodes, *The Law of Lawyering. A Handbook on the Model Rules of Professional Conduct* at 436 (Supp. 1988). It also accepted that "some former employees continue to personify the organization even after they

have terminated their employment relationship." *Id.* at 629 (citing Hazard & Hodes, *supra*, at 436).

In 1995, based on a "party versus person" analysis, a different panel of the same court that had authored *Chancellor, 678* F. Supp. at 250, revisited the ex-employee issue and found that no ex-employee could be within the protection of the rule. *Aiken v. Business and Industrial Health Group, Inc., 885* F. Supp. 1474 (D. Kan. 1995). The *Aiken* court's refusal to extend RPC 4.2 to former employees focused on the rule's use of the word "parties." The court concluded that the comment's "attempt[] to expand . . . the plain meaning of the term 'party' to include persons with no current employment relationship with the organizational party" was improper, *Id.* at 1478. While following ABA Opinion 91-359, the court acknowledged that even the ethics committee had not explained the inconsistency between RPC 4.2's use of the word "party" and the comment's use of the word "person." *Id.* at 1477 n.1. The court rejected a Kansas Bar Opinion adopting the more expansive protection implied by the comment as "placing too much emphasis upon the comment to the rule and too little upon the language of the rule itself." *Id.* at 1478 n.6.

In 1993, an Indiana federal district court also held, with little analysis, that former employees were outside the scope of that state's version of RPC 4.2 because a former employee "who no longer has any relationship with [a] corporation cannot be equated with that 'party."' *Brown v. St. Joseph County,* 148 F.R.D. 246,252 (N.D. Ind. 1993). A New Jersey district court opinion, *Hanntz v. Shiley, Inc. a Division of Prizer, Inc., 766* F. Supp. 258, 264-65 (D.N.J. 1991), also targeted the word "party" in reaching its conclusion that the "language of [RPC 4.2] suggests only parties are covered by the prohibition against ex parte communications because [RPC 4.2] by its terms is limited to parties." It explained that the comment contained only two, not three tests, because the "imputation" test was only part of

the "admissions" test. *Id.* at 266,269. It then held that a former employee could not be a "party" within the rule because a former employee can no longer bind the corporation. *Id.* at *269; see also Goff v. Wheaton Industries,* 145 F.R.D. 351,353 (D.N.J. 1992) (following *Hanntz;* commentary merely addresses which persons within corporation may be considered "parties" for purposes of rule).

In *Neil S. Sullivan Associates, Ltd. v. Medco Containment Services, Inc., 607* A.2d 1386, 1389 (N.J. Super. Ct. Law Div. 1992), the court similarly held that the explicit language of RPC 4.2 did not include former employees because it "only precludes contact with persons who are part of the litigation, not mere witnesses." However, before it allowed ex parte contact, it also found that the former employee was not a party and could say nothing that might be imputed to the corporation or constitute an admission against it. A Michigan district *court,* in *Valassis v. Samelson,* 143 F.R.D. 118, 122-23 (E.D. Mich.1992), explained that an ex-employee could not be a "party" within the protection of the rule because an ex-employee could not have an agency relationship with the corporate party "which could reasonably place him in the role of a party." Finally, a New Jersey court in *In re Environmental Insurance Declaratory Judgment Actions, 600* A.2d 165, 169-70 (N.J. Super. Ct. Law Div. 1991), catalogued the many courts before it that had focused on the party/person distinction, held that an ex-employee could not be a party because he was no longer associated with the employer, and refused to extend any protection under the rule.

At the far extreme of the "party versus person" controversy is the "plain language" construction discussed in *Ciba-Geigy,* 589 A.2d at 183-84. According to the *Ciba-Geigy* court, since the pre-1995 RPC 4.2 used the word "party," the "appropriate approach would be to hold that the word . . . means exactly what it says, the corporate entity named as a party in the litigation." After pointing out the defect in the rule's language, however, the court

then rejected the extremist approach it had outlined as having "no support" and as being "inconsistent with the purpose of the Rule as explained in the A.B.A. explanatory commentary." *Id.*

Because the cases focusing on the "party" versus "person" distinction take an overly restrictive view of the language of the comment based on the language of RPC 4.2, misinterpret the language of the rule, or are irrelevant in light of the distinguishable language of Rule 4-4.2 and recent changes to RPC 4.2, none of the cases is reliable authority for this Court in reaching its decision.

E. ABA Opinion 91-359 and Florida Opinion 88-14

Two of the bar ethics opinions that have heavily influenced courts, including those of this State, to decide against any protection for ex-employees whose acts may impute liability to the corporation are ABA Opinion 9 1-359 and Florida Opinion 88- 14. For instance, in *Reynoso*, 659 So. 2d at 1157-58, the court noted that it aligned itself with the "great majority of the courts to have considered this issue" in adopting the reasoning of the two Opinions. The fourth district in this case also explained its reliance on Florida Opinion 88-14. *Schwartz, 673 So.* 2d at 118. In *Lang v. Reedy Creek Improvement District, 888* F. Supp. 1143, 1146-47 (M.D. Fla. 1995), the court discussed both Opinions and the cases following them in refusing to extend Rule 4-4.2 to any ex-employees. Many other states have also restricted their states' rules to current employees on the basis of ABA Opinion 9 1-359. See, *e.g., In re Domestic Air Transportation Antitrust Litigation,* 141 F.R.D. 556, 561-62 (N.D. Ga. 1992) (finding ABA committee reasoning "persuasive"); *Shearson Lehman Brothers,* 139 F.R.D. at 4 17 (joining "the ranks" of those which have construed RPC 4.2 consistently with ABA Opinion 91-359).

As is apparent from the amount of litigation generated by the rule, the committee's rigid interpretation of Rule 4.2 has resulted in more questions than answers because of its failure to consider the underlying interests of the target party, the contacting party, or the former employee. See Iole and Goetz, *supra* at 90. For several reasons, neither ABA Opinion 91-359 nor Florida Opinion 88-14 should control the decision in this case. First, at the time ABA Opinion 91-359 was issued, RPC 4.2 prohibited only contact with a "party known to be represented by a lawyer in the matter." ABA Formal Op. 91-359 (emphasis added). Although the committee recognized that the "concerns reflected in the Comment to Rule 4.2 may survive the termination of the employment relationship" and "that those addressed by the Comment are not denominated "employees" but "persons," the Opinion nevertheless concluded that the comment to RPC 4.2 could not include former employees because "the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended." Based on the text of RPC 4.2, the committee refused to "expand its coverage to former employees by means of liberal interpretation" and opined that a lawyer could communicate about the subject of the representation with an unrepresented former employee of the corporate party "without the consent of the corporation's lawyer."

On July 28, 1995, however, the ABA issued another opinion, ABA Opinion 95-396, explaining that the rule covers any "person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." In the new Opinion, the committee cautioned that the rule should be broadly construed to serve its intended purpose, "'protecting not only parties to a negotiation and parties to formal adjudicative proceedings, but any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting." ABA Formal Op. 95-396 at 3 (emphasis added). It also specifically rejected the "control group"

test as overly restrictive and erroneously excluding "anyone 'whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability . . . .'" *Id.* at 7 (emphasis added).

While the committee apparently now recognizes that the rule's protection is broad, and while nothing in the text of the Opinion restricts the rule's coverage to current employees, a footnote reference to ABA Opinion 9 1-359 reiterates without any analysis the earlier conclusion that the pre- 1995 version of RPC 4.2 does not prohibit contacts with former officers or employees. *Id.* at 20 n. 47. Just as ABA Opinion 91-359 should no longer control, the footnote reliance in ABA Opinion 95-396 to the earlier Opinion's more restrictive interpretation of the rule should not govern this Court's decision.

Additional support for a more expansive construction of RPC 4.2 is provided by the Concurrence to ABA Opinion 95-396, which noted that the Opinion was an important one and designed to put to rest a ('series of misguided notions that have been asserted by those who seek to undermine the sanctity of the lawyer-client relationship embodied in the provisions" of RPC 4.2. *Id.* at 11. Responding to the Dissent, the Concurrence was explicit that RPC 4.2 was intended to protect an organization from ex parte contacts with "any person" whose act may be imputed to the organization. *Id.* at 1 1- 12. The Concurrence contains no suggestion that the protection is limited to present employees.

The Dissent's view also supports the conclusion suggested by HBA here. The Dissent argued that ABA Opinion 95-396 "provides counsel for organizations with even broader power to isolate potential adverse witnesses than presently exists under Rule 4.2." *Id.* at 12. It complained that the committee had no logical foundation to interpret the word "party" as "any person" and urged that the two had different meanings. *Id.* at 13. In stating its case, the Dissent catalogued those jurisdictions, including Florida and three others, that have

rejected the word "party" in favor of the broader "person." *Id.* at 14. "Those who want a more expansive protection have amended the rule. Amendment, not wish-fulfilling interpretation, is the way to pour the new wine of 'person' into the old bottle of 'party.'" *Id.* The Dissent concludes by noting that the committee had proposed changing RPC 4.2 to substitute "person" for "party" and that if the change was adopted, the Dissent would be moot.

On August 8, 1995, responding in part to the Dissent, the ABA adopted a new version of RPC 4.2. The new version substitutes the word "person" for "party." As the Dissent to ABA Opinion 95-396 recognized, all arguments regarding the restrictive impact of "party" or the inconsistency between the former rule and its comment, are now moot. There is no reason to refer to or rely on any case or opinion based on the restriction or the distinction. Under the newly adopted RPC 4.2, there are no cases skewing the construction in favor of a plaintiffs more invasive interpretation. Other than the footnote to ABA Opinion 95-396, there is no authority for, nor logic to, any interpretation of the phrase "any person" that would limit it to current employees of a corporation.

There is, in contrast, a great deal of logic in expanding the phrase to include ex-employees. As even the committee recognized, the purpose of RPC 4.2 was to prohibit ex parte contact with any person "whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting." ABA Formal Op. 95-396 at 3. A person who is potentially liable for an act or omission and whose potential liability may be imputed to his former corporate employer surely has interests "potentially distinct" from those of the plaintiff seeking to impose the liability.

Second, Florida Opinion 88-14 should not control. There, the Florida Bar Committee on Professional Ethics concluded that Rule 4-4.2 could not apply to former employees

because "[n]othing in Rule 4-4.2 or the comment states whether the rule applies" and to the extent that the "comment implies that the rules does apply," it was contrary to ethics committees' interpretation of the rule.[4] In part, the committee relied on opinions from other states' ethics committees that construed rules unlike Florida's; in part, the committee relied on Wright, 691 P.2d at 567. In *Wright,* however, the court refused even to extend protection to current employees outside the "managing-speaking-agent test" group and specifically found that there was no distinction between a witness and an employee whose acts could impute liability to the corporation. *Id.* The *Wright* approach is squarely rejected in Florida and, to the extent Florida Opinion 88-14 relies on a *Wright* analysis, it, too, must and may be rejected. *See, e.g., In re Advisory Opinion to the Governor,* 509 So. 2d 292, 301 (Fla. 1987) (opinions expressed in advisory opinions not binding); *Krivanek v. Take Back Tampa Political Committee,* 625 So. 2d 840, 844 (Fla. 1993) (advisory opinions, although not binding precedent, are persuasive authority); *Florida League of Cities v. Smith, 607 So.* 2d 397,399 n.3 (Fla. 1992) (restating settled law that advisory opinions are not binding judicial precedents); *Palm Beach County v. Hudspeth,* 540 So. 2d 147, 152 (Fla. 4th DCA 1989) (opinions of the Attorney General are persuasive, not binding authority on courts).

F. The Proper Interpretation of Florida's Rule 4-4.2

While HBA is aware of the authority against it, it believes that the language of Florida's rule, coupled with Florida's enlightened approach to fair litigation practices, mandates a conclusion different from that reached by other states with other rules. The language of the rule itself supports the conclusion; the comment supports the conclusion; the

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[4] Although the committee suggested that former employees who have "maintained ties" to the corporate party may be protected from ex parte contact, the Opinion has been construed as placing no inhibitions on ex parte contact.

reasons behind the ethical rules support the conclusion; and no prejudice results to the party seeking ex parte communication.

First, Florida is one of only four states with the word "person" in place of the word "party" in its rule. As the Dissent to ABA Opinion 95-396 recognized, "person" is a universe of which "party" is a subset. Therefore, the language of the rule itself suggests a different interpretation of its inclusions and exclusions. Again as the Dissent recognized, there is no reason to conclude that the judges of this state "engage[d] in futile gestures of rule-making." ABA Formal Op. 95-396 at 16.

Moreover, while the language of the rule does not explicitly include ex-employees, it does not explicitly exclude them either. To the extent the language of the rule is not dispositive, rules of construction well-accepted in this state require that the words of the rule be given their plain English meaning. *Nicoll* v. Baker, 668 So. 2d 989, 990-91 (Fla. 1996); ***Holly*** v. ***Auld,*** 450 So. 2d 217, 219 (Fla. 1984); see ***also Ohralik v. Ohio State Bar*** *Ass'n*, 436 U.S. 447, 463 n.20 (1978) (finding ABA and state ethics opinions are persuasive, not binding authority). The plain English meaning of the word "person" cannot be restricted to current employees or current independent contractors of a corporate party. If the drafters of the rule had intended to use those words, the law presumes they would have. See, e.g., ***Lang*** v. *Superiro* ***Court,*** 826 P.2d 1228, 1232 (Ariz. Ct. App. 1992) ("person" suggests broader interpretation than "employee"). The only condition on the protection of the rule is that the "person" be represented by counsel.

In the context of an organization, however, there is no way to tell if a "person" is represented by counsel without analyzing the comment. As so many authorities have explained, the comment is no more constrained in its scope than the rule. It provides descriptions of three classes who are within the rule's protection. Even those authorities who

disagree on the interpretation of the second class agree that the first and third classes are limited to current employees. ***See, e.g.,*** *Barfuss*, ***656 So.*** 2d at 488 n. 4. The second class, however, is not limited by its language to current employees. Those cases and opinions that find a limitation do so by returning to the 'party" language of the rule, or by concluding that there is no "agency" relationship between a former employee and the former employer, or by opining that a former employee cannot "bind" a former employer.

All those reasonings are result-oriented. Each breaks down into a circular mantra: Not an agent because not an employee; not a party because not an agent; not within the scope of the rule because not a party. The defect in the analysis is in failing to realize that the ex-employee, at the time of the commission or omission, was an employee of the corporation. And, if the employee's act or omission at that time is capable of now imputing liability to the organization, then the employee was an agent of the corporation for that purpose and still has that much of an agency "relationship" with the corporation through the doctrine of respondeat superior. Since that lingering relationship is sufficient to trigger the corporation's liability, it should be sufficient to trigger the rule's protection for both ex-employee and ex-employer.

The opposite conclusion leads to the result that there is no ethical impropriety in leaving the corporation no means of protecting itself or, potentially, its ex-employee from a warping of the employee's factual rendition of the subject of the litigation by a more sophisticated--or less ethical--lawyer trained in using words to his own advantage. To suggest, as some authorities do, that the rule was not designed to offer protection to non-parties such as ex-employees is circular reasoning. There are at least two recognized purposes for the rule: (1) the preservation of the integrity of the lawyer-client relationship by prohibiting contact, absent consent or legal authorization, with the represented party; and

(2) the recognition that without such a bar the professionally trained lawyer may, in many cases, be able to win, or in the extreme case, coerce damaging confessions from the unshielded layman. *PSE&G*, 745 F. Supp. at 1039. The first reason is simply the result of extending the rule to an ex-employee whose conduct may impute liability to the ex-employer; the ex-employee is only a non- "party" for representation purposes if the rule is not extended. Thus, the rule's extension to that class of ex-employees and the rule's purpose in protecting persons represented by counsel are in a cause-and-effect relationship. Any other conclusion returns to the party-person circle.

In the context of health care providers, the Florida legislature has come to a conclusion similar to that HBA urges here. Section 455.24 1(2), Florida Statutes (1995), provides:

> Except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, information disclosed to a heath care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

The primary purpose of the statute is to guard against the prejudice that would allegedly befall a plaintiff if a defense lawyer were allowed ex parte contact with the plaintiffs treating physicians. *Acosta v. Richter*, 671 So. 2d 149, 156 (Fla. 1996) (disapproving of *Johnson v. Mount Sinai Medical Center, Inc.*, 6 15 So. 2d 2 15 (Fla. 2d DCA 1993), and *Castillo-Plaza* v. *Green*, 655 So. 2d 197 (Fla. 3d DCA 1995)). Given the legal history of the physician-patient relationship in Florida, the *Acosta* court held that section 455.24 1(2) created a physician-patient privilege where none existed before, and provided an explicit but limited scheme for the disclosure of personal medical information. *Acosta*, 671 So. 2d at 154 (referencing an historical review of confidential and privileged information). Interpreted

correctly, Rule 4-4.2 provides a similar protection for a potentially less sophisticated group of interviewees--ex-employees at all levels of a corporate structure.

As the legislature implicitly recognized in enacting section 455.241(2), an important purpose of the rule is its ability to protect against unethical gamesmanship. If the rule is construed, as HBA suggests it should be, in such a way that an ex-employee who may impute liability to the corporation is also protected by the corporation's counsel, or even separate counsel provided by the corporation, until he declares he wants no such protection, then both the corporation and the ex-employee, represented "parties" within the scope of the rule, are shielded against factual manipulation that cannot be cured retrospectively by the rules of evidence.

For instance, employee A and ex-employee B are jointly responsible for evening warehouse protection. Employee A, within the protection of the rule, is accused of some act for which the corporate employer would be held liable. Ex-Employee B is accused of participating in the identical act. An ex parte interview with ex-employee B, a high-school dropout, convinces him that A will benefit from the corporate respondent superior protection while B will not, and that B's involvement was different than A's. Not only has B's testimony been tainted, but A's contrary testimony will now be suspect. Whether or not either employee has confidential information to divulge is not the point. The point is that the series of safeguards incorporated into the ethical rules to protect against just such an outcome has now been eroded to the point of extinction and the corporation has lost any ability to protect itself during the interview. Several courts that have rejected the imaginary current employment line describe a situation where two "persons," only one of whom is still employed, did the same acts for the same employer in the same way on the same day. Based on the alleged negligence of the "person," a plaintiff attempts to impute liability to the

corporation The still-employed "person" is protected, as is the corporate employer; the ex-employee driver is not, and the corporate ex-employer is denied the protection afforded by the rule.

Courts that have accepted the irrational distinction have done so on the basis that the rule governs ethics, not procedure or evidentiary admissibility. That misses the point. If the rule is designed to protect against unethical conferencing, badgering, overreaching, and twisting, so that litigation proceeds in a fair and open atmosphere, it should apply whether the ex parte communication is with the current employee or the former. The courts that focus on the employee's status at the time of the communication rather than at the time of the liability-imputing conduct miss the point that the rule is to protect the corporation, which by any analysis is a represented party. The comment simply extends the corporation's protection to certain classes whose acts, decisions, or words are the equivalent of those of the corporation. While two of the extensions are realistically limited to current employees, because the comment recognizes that the relationship to the corporation is only by virtue of current employment, the third class necessarily includes both current and former employees because the relationship that forms the link between the corporation's potential liability and the employee's act is in the past.

For instance, while the court in *PSE&G*, 745 F. Supp. at 1039-40, reached the wrong conclusion in prohibiting all ex parte contact with former employees, it correctly adopted the reasoning and analysis of *Polycast*, 129 F.R.D. at *62* 1, and *Amarin,* 116 F.R.D. at 36, in holding that there was nothing in the text of the comment that limited its applicability to current employees and that limitation to current employees would "overlap" the "imputed liability" prong of the comment with the other two. The court found indistinguishable the harmful impact of ex parte communications with a former-employee truck driver and a

current-employee truck driver, questioned any construction of the rule that led to a different outcome, and suggested that a correct interpretation of the rule is that its protection is of the "organization's interest in the individual's acts, omissions or transactions regardless of their particular employment status. . . . The principle that must be emphasized is that the harm caused by the imputable act is the same whether the witness is a present or former employee." Id. at 1041. The *PSE&G* court rejected *Niesig,* 558 N.E.2d at 1030, because the opinion neither addressed the official comment nor offered any other analytical support for its refusal to extend the rule's protection to ex-employees. *Id.* at 1040.

As opposed to the limited protection suggested by HBA, however, the *PSE&G* court imposed a "blanket ban" on all ex parte contact with former employees because it believed a bright-line test was necessary. In *Curley v. Cumberland Farms, Inc.,* 134 F.R.D. 77, 8 1-82 (D.N.J. 1991), another New Jersey federal district judge rejected the bright-line test of *PS&G* as overbroad and not created by RPC 4.2. While the *Curley* court accepted that the rule applied to ex-employees whose acts or omissions could be imputed to the corporate defendant, it held that the defendant had not met its burden of "coming forward with a basis to include [its] ex-employees within the parameters of [the rule] based on fact, not hypotheticals." *Id.* at 82. Despite its conclusion, the court required that the plaintiff provide the corporate defendant with copies of any notes made or statements obtained during the interviews. *See also Erickson v. Winthrop Laboratories,* 592 A.2d 33, 36 (N.J. Super. 1991) (adopting *Curley* test for ex-employees). In *In re Opinion 668 of Advisory Committee on Professional Ethics,* 134 N.J. 294, 633 A.2d 959 (N.J. 1993), the court also approved a limitation on ex parte contact with former employees and adopted temporary guidelines extending the rule to the "control group" and employees or ex-employees "whose conduct . . . establishes the organization's liability.' *Id.* at 303, 633 A.2d 964.

The United States District Court for the Middle District of Florida has also adopted a broader interpretation of the rule, recognizing that the "purpose behind the ethical rule would better be served through the extension of the definition of 'party' to include former employees." *Rentclub, Inc. v. Transamerica Rental Finance Corp.,* 811 F. Supp. 65 1,658 (M.D. Fla. 1992), *aff'd,* 43 F.3d 1439 (1 lth Cir. 1995). The *Rentclub* court explained that even an ex-employee retains a connection to the corporation sufficient to trigger the rule if his conduct exposes the corporation to potential liability. *Rentclub, 8* 11 F. Supp. at 658. In two other decisions, the same court declined to abandon its construction of the rule. *Browning v. AT&T Paradyne, 838* F. Supp. 1564, 1567 (M.D. Fla. 1993) ("[T]his Court. . . continues to hold that a 'party' . . . includes former managerial employees . . . if their "actions could be imputed to the corporation."' In *United States v. Florida Cities Water Company, No. 93-28* l-CIV-FTM-2 1, 1995 WL 340980, (M.D. Fla. Apr. 26, 1995), the court cited *Rentclub* in explaining that a "former employee may be considered a 'party' for purposes of Model Rule 4.2."

In support of the contrary interpretation of the rule urged by the Estate and adopted by the majority, various courts have pointed to the prejudice and expense to a plaintiff in developing its case if it is precluded from ex parte contacts with former employees. See, e.g., *Hanntz,* 766 F. Supp. at 270 (noting that any restriction would unduly restrict access to all relevant information). On analysis, each of the reasons pales in comparison to the prejudice done to the corporate defendant whose ex-employee is exposed to testimonial sculpting at the hands of an adversary's clever lawyer. The ethical rules are crafted to protect against ethical improprieties while assuming they will occur in the absence of the protections. For instance, if all lawyers could be trusted to engage in ethical, objective, factfmding ex parte contacts with represented parties, there would be no need for the prohibition in RPC 4.2.

While the bench and bar might hope for a finer ethic, the mere existence of the prohibition suggests the fallacy of the presumption and the vainness of the hope. To then extend the protection to only those persons who are current employees, while engaging in the futile expectation that ex-employees are not just as likely to need the protection, is naive in the extreme.

Moreover, disillusioned former employees pose a potential threat to an organization. Former employees often are disgruntled and anxious to seek revenge against their former employer. S. Blake Parrish, ***Public Service Electric & Gas Co. v. Associated Electric & Gas Insurance Services, Ltd. : An Expansive View of Rule 4.2 and Ex Parte Contacts with Former Employees,*** 199 1 Utah L. Rev. 647, 670 (199 1). Those former employees are all too eager to divulge privileged materials, strategize the adversary, or provide information on acts or omissions that may be imputed to the former employer. A construction of the rule that fosters such destruction actually creates a fertile environment for exactly the abuse it is designed to prevent. ***Id.***

Even where a former employee maintains a neutral or positive attitude regarding the former employer, however, the frailties of the human memory, paired with the passage of time, render the individual fair game for manipulative tactics, such as coaching the former employee on key facts under the guise of "helping" him to remember. Susan J. Becker, ***Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints,*** 51 Md. L. Rev. 239, 273 (1992). If the corporate ex-employer's counsel is not present during the contact, the one-sided development enhances the risk that the former employee, with only sketchy information about an event, will nevertheless attempt to describe it. Iole and Goetz, ***supra*** at 122. The presence of a representative of the former employer provides protection against the former employee's

reliance on hearsay, opinion, or outright speculation. In this way, the target party at least has the opportunity to test information that falls outside the former employee's sphere of responsibility or assumes the existence of inaccurate or contested facts.

One of the reasons frequently given for construing the rule as HBA suggests is that former employees are among the class of those who can impute liability to the corporate defendant. See Lawrence Weiss and Adam A. Reeves, *The Ex Parte Explosion: When Do Communications With Corporate Employees Result in Ethical Misconduct?, 3* 1 *No.* 1 Judge's J. 26 (Winter 1992); see *also* South Carolina Ethics Opinion 94-25 (Nov. 1994) (concluding a lawyer may not contact former corporation employees whose actions are alleged to be negligent regarding the current matter); Kansas Bar Opinion 92-7 (Oct. 23, 1992) (allowing ex parte interviews of former employee unless former employee's act or omission in connection with the matter can be imputed to corporation); Kansas Bar Opinion E-382 (July 1995); New Jersey Bar Opinion 668 (Nov. 2, 1992) (forbidding ex parte communications with former employee if their acts or omissions in matter in issue are imputed to the corporation for liability purposes).

While some authorities have suggested that the real purpose of the rule's "imputed liability" language was simply to include current agents and independent contractors who are outside the definitions of the other two subsections, there is no logical basis for that construction. See, e.g., *Goff*, 145 F.R.D. at 354; *Action Air Freight, Inc., 769* F. Supp. at 903; *Dubois,* 136 F.R.D. at 345-46. In fact, given the body of Florida law that limits a corporation's liability for many of the acts of independent contractors and agents, that construction of the rule is illogically over-restrictive. *See, e.g., Carrasquillo v. Holiday Carpet Sew,,* Inc. , 6 15 So. 2d 862, 863 (Fla. 3d DCA 1993); *Fisherman 's Paradise, Inc.*

v. Greenfield, 417 So. 2d 306, 307 (Fla. 3d DCA 1982); ***Van Ness v. Independent Construction Co., 392 So.*** 2d 1017, 1019 (Fla. 5th DCA 1981).

A more sensible construction, and one that comports with common English usage, is to include within the scope of the imputation prong any person whose conduct may impute liability to the corporation. The language of the rule refers to "any other person" with no temporal limitation. Like "any other person," a corporation has a right not to impute liability to itself without counsel being present. Unlike a natural "person, " though, a corporation's components--its agents, employees, and independent contractors--constantly change. Because it is comprised of different personnel, the corporation as it existed at the time of the act giving rise to the alleged liability is different from the one that eventually participates in the adjudication of that liability. The question of the corporation's potential liability frequently focuses on those persons who were employed by the corporation at the time of ***the*** act at issue. See ***e.g. State ex rel. Pitts v. Roberts, 857*** S. W.2d 200, 202 (MO. 1993) (acts or omissions of 2 employees of defendant corporation are the subject of plaintiff's claim and so impute liability); ***see, e.g., Alachua General Hospital, Inc. v. Stewart,*** 649 So. 2d 357, 358 (Fla. 1st DCA 1995) (holding that any negligence on part of physicians, or any information possessed by these physicians concerning patient's condition can be imputed to hospital). To protect the corporation from ex parte contacts with current independent contractors, while denying it protection from the same contacts with ex-employees, draws an artificial timeline between the two groups that finds no support in the language of the rule or its comment.

Second, the rule's extension will not result in an explosion of litigation costs or other prejudice to a party seeking to develop the factual foundation of a cause of action. Courts have suggested a myriad of ways in which the rule could be used to allow informal discovery

to continue while affording protection for the ex-employer. For instance, the *Rentclub* court, quoting 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), suggested that at least ex parte contact with a former employee whose actions may impute liability to the corporate should be authorized by the court or consented to by opposing counsel. *Id.*

Other courts have imposed an obligation on the party making the ex parte contact to notify the corporation's counsel and give him or her the opportunity to be present, *Florida Cities Water,* 1995 WL 340980 at *3. In *Curley,* 134 F.R.D. at 94-95, the court instructed the plaintiffs counsel to maintain notes of the ex parte contacts with former employees, memorialize all statements taken, provide and supply all notes and statements to the corporate defense counsel within seven days of demand.

Nevertheless, as the *Ciba-Geigy* court concluded, if the rule "deters some ex parte civil discovery, there is no great social or policy sacrifice," for it will "promote other types of discovery, such as by deposition upon notice to the adversary." 589 A.2d at 185. The *PSE&G* court also opined that prompt use of the discovery process will ultimately produce less "procedural haggling and thus may be, in the long run, more cost efficient. 745 F. Supp. at 1043.

No matter which path this Court takes, however, the main question is not whether the party seeking the ex parte communication will be prejudiced in developing ex parte information; the main question is whether it is ethical to allow ex parte communications with exactly those persons in the best position to inadvertently or inaccurately cement the corporate defendant's liability while depriving the corporate defendant of the opportunity to protect itself,

G. Implementing HBA's Interpretation of the Rule

The fundamental error of the *PSE&G* court's analysis, and the reason its "blanket prohibition" has been uniformly rejected, is the conclusion that any implementation of the protection afforded former employees must result in a blanket ban on ex parte communication. 745 F. Supp. at 1037. A more logical approach, and one designed to recognize a plaintiffs need for liberal discovery, is to place the burden of showing the potential for imputed liability on the ex-employer seeking the rule's protection. A plaintiff would remain free to conduct ex parte communications with ex-employee witnesses but would be precluded from contacting that class of ex-employees whose liability may be imputed to the corporation unless the corporate employer is present or consents to the ex-parte contact.

Implementation of the rule would require, first, that the plaintiff advise the defendant of those ex-employees it intends to contact and identifies, insofar as possible, those ex-employees whom it believes may impute liability to the corporation. Neither the plaintiff nor the defendant would then be permitted to contact any of the ex-employees until the defendant has identified which it believes are within the scope of Rule 4-4.2. If the plaintiff and defendant agree, the plaintiffs contact with the protected ex-employees would be limited to formal discovery, or informal discovery in the presence of defense counsel. If the plaintiff and defendant cannot agree, then the defendant would be obligated to seek the court's protection within a reasonable time and neither counsel would be permitted to contact those ex-employees during the interim period.

If the defendant carries its burden, the trial court would have the discretion to limit the plaintiffs contact to informal interviews in the presence of defense counsel or formal discovery. In that way, the ex-employee's information would be available to both parties and

subject to traditional evidentiary protections. Any violation of the guidelines of Rule 4-4.2 or court orders respecting discovery would also be subject to grievance procedures.

The construction of Rule 4-4.2 suggested by HBA is designed to acknowledge and protect the needs of all parties to the litigation. It allows a plaintiff the freedom to develop its case without undue expense while protecting the defendant from undue prejudice; it implements the public policy of open litigation while recognizing the need for ex parte contact; and it creates an atmosphere in which the ethical guidelines are best assured of fulfilling their goals. HBA urges the Court to find in its favor.

CONCLUSION

For the foregoing reasons, Petitioner H.B.A. Management, Inc., respectfully requests that this Court quash the decision of the Fourth District Court of Appeal, adopt the reasoning and result of the Second District Court of Appeal in *Barfuss v. Diversicare Corporation of America, 656 So.* 2d 486 (Fla. 2d DCA 1995), and remand this matter to the district court for proceedings consistent with the opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to Philip D. Parrish, Esq., Stephens, Lynn, et al., 9130 South Dadeland Boulevard, PH 1 and 2, Miami, Florida 33 156-7823, Douglas J. Glaid, Esq., 110 Tower, 10th Floor, 110 S.E. 6th Street, Fort Lauderdale, Florida 3330 1, Jane Kreusler-Walsh, Esq., Jane Kreusler-Walsh, P.A., Suite 503 Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401, Joel D. Eaton, Esq., 800 City National Bank, 25 West Flagler Street, Miami, Florida 33130-1720, and to James B. McHugh, Esq., Wilkes and McHugh, Suite 60 1 Tampa Commons, One North Dale Mabry Highway, Tampa, Florida 33609, this 8 day of August, 1996.

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