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Understanding New Hampshire's Rule 4.2 as Applied to Corporate Litigants: An Explanation and Suggestions for Improvement

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I. INTRODUCTION

Consider this scenario: an attorney represents a client in litigation against a corporation. The attorney gets a call from an employee of that corporation and the employee says, "everything in your complaint is absolutely correct." However excited the attorney is to speak with this person, the Rules of Professional Conduct constrain whom the attorney can talk to if a corporation is involved in the pending litigation. In New Hampshire, any attorney can quickly find that Rule 4.2 prohibits contact with a represented party.[1] But is this corporate employee a represented party? Even after reading the comment to the rule and the sparse interpretive case law available in New Hampshire, the attorney would be unable to discern whether it is proper to speak with this person, who could possibly make or break his or her case.

Uncertainty of the rule's scope breeds remarkable consequences. Speaking with this corporate employee could give the attorney access to valuable information – information that may be otherwise unavailable. A determination of improper contact, however, could disqualify the attorney as counsel in the pending matter, which could cause extreme hardship on the client. With such dire consequences for violation of the rule, it is frustrating that New Hampshire's Rule 4.2 is so difficult to apply.

New Hampshire's Rule 4.2 is unworkably vague. The New Hampshire Supreme Court provides little direction as to who is a party under the rule when a corporation is a litigant.[2] Currently, New Hampshire is in the proc-

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1. N.H. R. Prof. Conduct 4.2. The text of the rule 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."

2. This is of course, no fault of the New Hampshire Supreme Court. The problem lies not in multiple cases with unclear guidance, but rather, very few cases which do not cover the multitude of issues that arise from the application of the rule to a corporate litigant.

ess of reviewing all of its Rules of Professional Conduct.[3] A new Rule 4.2 could take over two years for the New Hampshire Supreme Court to formally adopt. In the interim, New Hampshire practitioners are left with a Rule 4.2, which does not make sense and is difficult to apply.

Courts throughout the country use various tests to define who is a party under Rule 4.2 when a corporation is involved in litigation. The New Hampshire Supreme Court, however, has yet to adopt a specific test. This has a chilling effect on contact with employees and/or former employees of a corporation involved in litigation. New Hampshire's Rule 4.2 needs to be more clearly defined for practitioners so they can benefit from proper ex parte contact without fear of being disciplined. Furthermore, the rule's scope should be narrowly tailored to fulfill its purpose to protect the attorney-client relationship. In this sense, application of the rule to a corporation should be similar to application of the rule to individuals.

This article clarifies New Hampshire's Rule 4.2 in relation to corporate litigants and establishes a few basic concepts gleaned by reviewing different jurisdictional interpretations of the rule. This article begins with background information regarding Rule 4.2 followed by a brief explanation of both the 2001 version of the ABA Model Rule 4.2 and the New Hampshire Rule 4.2.[4] In particular, this article focuses on the difference between the comments of each rule. Next, this article surveys tests other jurisdictions have formulated to interpret the scope of Rule 4.2 as applied to corporate litigants and analyzes the likelihood of the New Hampshire Supreme Court adopting each test. This article then examines the 2003 version of the ABA Model Rule 4.2 and explains the origin of the rule and the scope of this rule when applied to a corporate litigant. The author then proposes a rule for New Hampshire that is easy to apply and narrowly tailored to fulfill its purpose. This article concludes that New Hampshire should adopt

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3. *See* NH Sup. Ct. Rule 51. Rule 51 governs the procedure of revision of Court rules which provides for appointment of an Advisory Committee on Rules which could be made from the Committee on Professional Conduct and the New Hampshire Bar Association's Committee on Evidence and Ethics. "All such committees shall channel recommended changes through the Advisory Committee on Rules and shall serve as its sub-committees for specific areas of rule-making." NH Sup. Ct. Rule 51(B)(2).

4. This article will only focus on the application of the rule in the civil context and specifically within this context when a corporation is a litigant. For a general overview of the rule's application in the criminal context *see* Peter A. Joy & Kevin McMunigal, *Anti-Contact Rule in Criminal Investigations*, 16 Crim. Just. 44 (Winter 2002). Basically, conduct in the criminal context such as police interrogation or covert interrogation is permitted under Rule 4.2 or its equivalent in the Model Code as conduct which is "authorized by law." *See also State v. Smart*, 622 A.2d 1197 (N.H. 1993); *U.S. v. Hammad*, 858 F.2d 834 (2d Cir. 1988).

this modified version of the 2003 Model ABA Rule, which clarifies who is covered under the ambit of the rule when applied to corporate litigants.[5]

II. BACKGROUND

Before turning to the substantive issues regarding Rule 4.2, also known as the no-contact rule, it is important to understand why the rule exists. The rule provides a framework for deciding what corporate employees are subject to the prohibitions in the rule. When the rule is extended too far informal discovery and other important features of ex parte contact are shut off. In addition, although adherence to the Rule of Professional Conduct is something to which all attorneys should strive, it is important to note what the consequences are for a violation. Since New Hampshire lacks a developed body of case law on the issue, an examination of discipline in other jurisdictions helps illustrate the full range of discipline that could result from a violation of the no-contact rule.

A. *Purposes of the No-Contact Rule*

The no-contact rule exists to ensure fairness during litigation.[6] The rule protects clients' interests and makes sure that an unscrupulous opposing attorney does not take advantage of the client. The rule seeks to protect the attorney-client relationship by preventing unfair questioning by opposing counsel that could harm a client's interests.[7] Further, the rule strives to "prevent[ ] unprincipled attorneys from exploiting the disparity in legal skills between attorney[s] and lay people."[8] Some courts have also found that the rule encourages settlement by "channeling communications between lawyers accustomed to the negotiation process."[9] In the corporate context, the no-contact rule also protects the organization against disclo-

5. In this article the term "no-contact rule" is used as a general term referring to any version of Rule 4.2 or its equivalent in the Model Code. "NH Rule" refers to the current New Hampshire Rule 4.2. Each version of the ABA Model Rule (2001 or 2003) is designated as such where necessary.

6. *See Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990) (finding that DR 7-104(A)(1) "fundamentally embodies principles of fairness"); *Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984) (en banc) (finding that the reason for the rule is to prevent represented parties from being taken advantage of).

7. *Messing v. Pres. & Fellows of Harvard College*, 764 N.E.2d 825, 830 (Mass. 2002); *Wright* 691 P.2d at 567 (finding that the presence of the party's attorney "theoretically neutralizes" contact from an opposing attorney).

8. *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (quoting *Papanicolaou v. Chase Manhattan Bank*, 720 F.Supp. 1080, 1084 (S.D.N.Y. 1989)).

9. *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259, 260 (S.D. Iowa 1993) (citing *Polycast Tech. Corp.*, 129 F.R.D. at 625).

sure of information that could be detrimental to the corporation as an admission under evidentiary rules.[10]

B. *Why Ex Parte Contact Is Important*

Ex parte contact, generally, is any one-sided contact that is "from one party only, usually without notice to or argument from the adverse party."[11] In referring to ex parte contact in the context of Rule 4.2, this article contemplates the situation where an attorney in a matter seeks to contact an individual connected with a corporation without notifying the corporation's attorney either by way of deposition notice or by informal consent.

There are several reasons why an attorney may not want to notify the opposing corporate counsel before interviewing a person. The most obvious is the importance of informal discovery, which can limit discovery expenses.[12] Furthermore, informal discovery also allows the attorney to evaluate information without preserving evidence that could prove unfavorable.[13] The New York Court of Appeals noted the importance of ex parte contact, stating that:

> Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the- record private efforts to learn and assemble, rather than perpetuate, information.[14]

In addition to the practical advantages of ex parte contact, informal contact is also beneficial when the person with information in a pending matter does not feel comfortable speaking in the presence of corporate counsel.[15] The fear of contact with a corporation's counsel is felt even

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10. Sherman L. Cohen, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 Geo. J. Leg. Ethics 739, 771 (1997) (quoting Catherine L. Schaefer, *A Suggested Interpretation of Vermont's DR 7-401(A)(1): The Employment Attorney's Perspective on Contacting Employees of an Adverse Business Organization*, 18 Vt. L. Rev. 95, 98 1993).

11. *Black's Law Dictionary* 597 (Bryan A. Garner ed., 7th ed., West 1999).

12. *See Cram*, 148 F.R.D. at 261 (finding that resort to purely formal discovery could create increased discovery disputes which would consume judicial resources); *Polycast Tech. Corp.*, 129 F.R.D. 621, 628 (S.D.N.Y. 1990) (finding that any shift away from informal discovery increases costs and reduces judicial efficiency); *Restatement (Third) of Law Governing Law.* § 100 (2000) (finding that requiring conversations through counsel is "often more expensive, delayed and inconvenient than direct communication.).

13. Theodore Y. Blumoff, Margaret Z. Johns & Edward J. Imwinkelried, *Pretrial Discovery: The Development of Professional Judgment* 39 (Michie Co. 1993).

14. *Niesig*, 558 N.E.2d at 1034.

15. *Polycast Tech. Corp.*, 129 F.R.D. at 628 (finding that former employees with ties to the corporation may not come forward with damaging information if they knew they would have to do so with the corporation's counsel present); Robert J. Lynn, CLE Presentation, *Contact with Represented Parties*

more by an individual still employed by the corporation for fear of losing his or her job. The Restatement (Third) of Law Governing Lawyers cautions that "employees may be unwilling to speak as freely or candidly at a deposition in the presence of the lawyers for their employer as in an informal, pretrial interview."[16] Important information may never be brought to light if an employee is too fearful to submit to formal deposition and the only way to access this information is through an informal interview. Informal discovery is also essential for an attorney considering the merits of filing a lawsuit.[17]

C. *Consequences for Violation of Rule 4.2*

The New Hampshire Supreme Court has inherent and statutory power under RSA 311:8 to supervise the conduct of attorneys for the protection of the public and the maintenance of public confidence in the bar as a whole.[18] The oath taken by an attorney upon admittance to the New Hampshire State Bar, as well as the New Hampshire Rules of Professional Conduct, "provide[s] concrete ethical guides by which an attorney can set his conduct. Any violation thereof which tends to bring reproach on the legal profession can be ground for disciplinary action" by the New Hampshire Supreme Court.[19]

Generally, violations of Rule 4.2 are handled on an individualized case-by-case basis by the court presiding over the matter.[20] "Each case must be determined on its own facts and circumstances and a disciplinary measure adopted which is warranted thereby and designed to accomplish the ends sought by it."[21] Although some jurisdictions suppress evidence obtained by improper contact with an individual,[22] New Hampshire does

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(April 15, 1999) (copy located at the Franklin Pierce Law Center Law Library) (noting examples where employees may be unwilling to discuss information in the presence of corporate counsel, such as claims of racial sexual, and age discrimination).

16. *Restatement (Third) of Law Governing Law.* §100 (2000).

17. *Cram*, 148 F.R.D. at 262 (finding that prohibiting ex parte communication with an opposing party's former employees could encourage the filing of non-meritorious claims for the sole purpose of being able to use formal discovery to build a case).

18. *In re Mussman's Case*, 286 A.2d 614, 620 (N.H. 1971); *In re Harrington's Case*, 123 A.2d 396 (N.H. 1956).

19. *In re Mussman's Case*, 286 A.2d at 620.

20. *Id.*

21. *Id.*

22. *See Insituform of N. Am., Inc. v. Midwest Pipeliners, Inc.*, 139 F.R.D. 622 (S.D. Ohio 1991) (holding that federal courts, applying the disciplinary rule adopted by the state's highest court, could allow suppression of evidence since the more drastic remedy of attorney disqualification was available to the judge); *Hammad*, 858 F.2d at 842 (rejecting the government's argument to "remove suppression from the arsenal of remedies available to district judges confronted with ethical violations" and reasoning that district court judges will use discretion in determining whether to suppress evidence resulting

not provide suppression of evidence as a remedy when there is a finding of improper ex parte contact.[23]

In *State v. Decker*, the New Hampshire Supreme Court refused to suppress the defendant's confession because of an attorney's alleged improper contact.[24] In *Decker*, the defendant waived a right to counsel at a meeting with the police.[25] The defendant alleged that the prosecutor violated Rule 4.2 and that, because of the violation, his confession should be suppressed.[26] The New Hampshire Supreme Court declined to rule on whether there had been a violation of Rule 4.2. Instead, the Court focused on the remedies for a violation of Rule 4.2 and concluded that there would be no suppression of the confession since the New Hampshire Rules of Professional Conduct are aimed at policing the conduct of attorneys, not at creating substantive rights on behalf of third parties.[27]

It is unlikely that in New Hampshire, a violation of New Hampshire Rule 4.2 would result in suppression of the evidence obtained from that improper conduct. Although Judge Lynn has noted that Rule 4.2 does not differentiate between the civil and the criminal context, some cases have suggested that there should be a difference in how the rule is applied in the civil and criminal context.[28] The differences between civil and criminal evidentiary procedures may very well justify a difference in remedies of a violation of Rule 4.2. The *Decker* Court declined to extend the substantive rights of a defendant to include the benefit of evidence suppression because criminal procedure is governed largely by Constitutional principles that protect a defendant's right to counsel. The civil arena, however, does not share these same protections. Rule 4.2 is the only protection against improper contact by the opposing counsel.[29]

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from an ethical violation given that suppression of evidence "imposes a barrier between the finder of fact and the discovery of truth.").

23. *State v. Decker*, 641 A.2d 226 (N.H. 1994).

24. *Id.* at 228.

25. *Id*.

26. *Id*. at 229.

27. *Id*. at 230. In *State v. Decker*, the New Hampshire Supreme Court quoted from the Michigan Supreme Court Majority opinion in *People v. Green* which reasoned that the Code of Professional Responsibility did not confer constitutional or statutory rights on individuals but instead were designed to regulate the conduct of attorneys. The Court in *Green* also noted that the admissibility of evidence was governed by constitutional principles and that the "[c]odes of professional conduct play no part in such decisions." *People v. Green*, 274 N.W.2d 448, 454 (Mich. 1979).

28. *See* Lynn, *supra* n. 15 (noting that although the rule does not differentiate between the criminal and civil context, case law has created different tests depending on the context of the underlying matter. Judge Lynn advises that although some courts differentiate between the civil and criminal arena in applying the rule, criminal cases interpreting Rule 4.2 may nevertheless be applicable in civil cases.).

29. Note, however, that Rule 4.2 does not prohibit the parties directly from speaking with one another. Thus, it is only the opposing person's attorney that cannot contact them without permission from their own attorney.

Disbarment, the most extreme disciplinary measure, was imposed by the New Hampshire Supreme Court in *In Re Mussman's Case*.[30] Mussman represented the husband in a divorce case. In addition to assisting in the fraudulent transfer of corporate assets, Mussman contacted the wife, who he knew was represented by counsel.[31] Not only did Mussman improperly contact the wife; he also made her sign a letter terminating the representation of her attorney that he then had his secretary send out immediately.[32] Mussman then induced the wife to sign a stipulation which gave her no support or alimony.[33] The wife testified that although she did want a resolution of the divorce, she did not think she had a choice whether to sign the stipulation.[34]

The New Hampshire Supreme Court did not specify whether it was the fraudulent transfer of property or the improper contact with the wife that justified the disbarment of Mussman. Since the Court included this conduct in the opinion sanctioning disbarment, it likely influenced the decision to disbar Mussman. Although it is unlikely that disbarment would result from improper contact with a represented party as prohibited in the New Hampshire rule, it is likely to be considered in conjunction with other violations to contribute to the determination of sanctions.

State v. Decker and *In Re Mussman's Case* are the only two disciplinary action cases decided by the New Hampshire Supreme Court that discuss the sanctions possible for a violation of the New Hamphire's Rule 4.2. In other jurisdictions there are several other consequences for violation of the no-contact rule. One of the most common forms of discipline is disqualification of the attorney who made the improper contact.[35] Other disciplinary measures include return of document or notes obtained by the improper to opposing counsel[36] and monetary sanctions.[37]

In addition to these consequences, the attorney could also subject himself to civil liability in a malpractice claim against him if the improper con-

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30. 286 A.2d 614 (1971) (interpreting the code DR 7-104(A), then in effect in New Hampshire).
31. *Id*. at 618.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Insituform* 139 F.R.D. at 624 (finding that "the inherent power of federal courts to consider the ethical conduct of attorneys appearing before them and to sanction such conduct, including disqualifying the attorney, has long been recognized."); *see also* Preamble, ABA M. R. Prof. Conduct (2003)(violation of the Rules of Professional Conduct does not require disqualification of the attorney, but this may be a remedy based on the discretion of the presiding court.).
36. *Pitts v. Roberts*, 857 S.W.2d 200, 202 (Mo. 1993) (en banc).
37. *Harlan v. Lewis*, 982 F.2d 1255, 1260 (8th Cir. 1993) (holding that imposition of a $5,000 sanction in medical malpractice suit against defense counsel for unauthorized ex parte communications with physician was not abuse of discretion, even though court had inherent power to impose more severe sanctions such as striking defendants' answer or excluding testimony).

tact and discipline on the attorney materially impacts the client's case.[38] Furthermore, attorneys in a class action suit may be disqualified, even if that is not the sanction imposed, if the court sees the ethical violation as affecting the attorney's ability to represent the class.[39]

III. RULE 4.2 – THE NO-CONTACT RULE

The 2001 version of the American Bar Association Model Rule 4.2 prohibits attorneys from contacting represented parties in a lawsuit:

> 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.[40]

The rule limits who a lawyer can talk to while involved in litigation. First, the limitation only affects a lawyer who represents a client. Second, the rule applies only to communications about the subject of the representation.[41] Third, the rule only prohibits contact with a party the lawyer knows is represented by another lawyer.[42] Thus, if a person is unrepresented then the lawyer may properly contact that person.[43]

While the no-contact rule is easily applied in the context of individuals, it can be difficult to identify the people who are party to a suit when a corporation is involved in litigation.[44] It is unquestionable that the rule applies to corporations which, just as individuals, are "served by the rule's

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38. Preamble, ABA M. R. Prof. Conduct (2003) (although a violation of the Rule of Professional Conduct do not prove a malpractice action in itself, a malpractice action may result if the client's suffers as a result of the attorney's conduct. A violation of the Rules of Professional Conduct "may be evidence of [a] breach of the applicable standard of conduct.").

39. *See* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* vol. 3, ch. 15 § 15.01, 15-4 (McGraw-Hill 1992) (noting that in class action litigation courts have used corrective measures such as substitution of counsel to avoid delays in the litigation). The application of the rule to class members is beyond the scope of this article. The rule does not reference application to class members in a class action lawsuit. *See Restatement (Third) of Law Governing Law.* § 99 (1998) cmt. 1 (The Restatement indicates that "once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients."

40. ABA M. R. Prof. Conduct 4.2 (2001).

41. *Id*. at cmt. [1].

42. *Id*. at cmt. [5].

43. A lawyer's conduct with respect to an unrepresented person is governed by Rule 4.3 which provides that the lawyer "shall not state or imply that the lawyer is disinterested," and that if there is any confusion as to whom the lawyer represents, this should be made clear to the unrepresented party. ABA M.R. Prof. Conduct 4.3 (2001).

44. *Messing*, 764 N.E.2d at 830; *Niesig*, 558 N.E.2d at 1033.

fundamental principles of fairness."[45] Thus, the difficulty is not in determining *whether* the rule applies to corporations, but rather, *to whom* within the corporation the rule applies.[46] As the New York Court of Appeals reasoned, "unless some employees [of a corporation] are also considered parties, corporations are effectively read out of the rule."[47] The key question, thus, is what corporate employees are covered under the rule? "As a matter of substance, a Rule designed to protect the organization's client-lawyer relationship should only apply to persons who are legally privy to that relationship."[48]

The 2001 version of the ABA Model Rule and its comments attempt to define the scope of the rule. Rules and comments that are similar, however, have sparked significant differences in the interpretation of the scope of the rule by different jurisdictions.[49] Determining how far the rule extends to employees of a corporation is a jurisdictional policy choice: the broader the definition of "person" as applied to corporations, the more protection afforded to corporations and the less leeway given to access potentially important information.[50] Most jurisdictions, including New Hampshire, have adopted a rule similar to the 2001 version of the ABA Model Rule. Except for New Hampshire, most states have also adopted the comments accompanying the 2001 version of the ABA Rule.

Comment four of the 2001 version of the ABA Rule identifies three categories of persons as parties under Rule 4.2 when a corporation is involved in litigation:

> [1] persons having managerial responsibility on behalf of the organization
>
> and with any other person,
>
> [2] whose act or omission in connection with that matter may be imputed to the
>
> organization[,] . . . or

45. *Niesig*, 558 N.E.2d at 1033.
46. *Id.*
47. *Id.*
48. Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part I)*, 70 Tenn. L. Rev. 121, 156 (2002) (In this three-part article Carl Pierce, an Associate Reporter for the ABA Ethics 2000 Commission, details the remarks he presented at the April 2002 symposium on the American Bar Association's Revised Model Rules of Professional Conduct.); *see also* Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part II)*, 70 Tenn. L. Rev. 321 (2003); Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part III)*, 70 Tenn. L. Rev. 643 (2003).
49. *See infra*, Section V.
50. *Niesig*, 558 N.E.2d at 1033.

> [3] whose statement may constitute an admission on the part of the organization.[51]

Many states base their interpretation of who is a party under the rule on comment four of the ABA Rule.[52]

IV. THE NEW HAMPSHIRE RULE 4.2

A. *"Party" and the Current New Hampshire Rule*

Most other jurisdictions have concluded that the distinction between the words "party" or "person" does not affect the overall interpretation of Rule 4.2.[53] New Hampshire, however, does draw a distinction between person and party. In *State v. Smart*, the New Hampshire Supreme Court seemed to suggest that the word party was restricted to named parties in litigation by stating that "[a]lthough the [Rules] [do] not define these terms, the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting."[54] The effect of specifying the limit of the word party in the rule indicates a restrictive view of how the rule should be applied. This, combined with the holding in Decker against evidentiary suppression, seems to indicate that New Hampshire interprets Rule 4.2 narrowly and does not wish to extend the reach of the rule very far.

B. *The Comment to the New Hampshire Rule*

Despite the similarity in the language of the NH Rule and the 2001 version of the ABA Rule, the interpretation of the NH Rule could be dramatically different than other jurisdictions because of differences in the New Hampshire comment to the rule.[55] The comment to the NH Rule states:

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51. ABA M. R. Prof. Conduct 4.2; *see generally* Samuel R. Miller & Angelo J. Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is it Ethical?*, 42 Bus. Law. 1053, 1055 (1987).

52. *See infra*, Section V.

53. *See e.g. Messing,*, 764 N.E.2d 825.

54. 622 A.2d at 1214 (brackets in original).

55. Note that "the New Hampshire Supreme Court has not adopted the ABA Model Code Comments, the New Hampshire Comments, or the Committee Notes to Decisions, all of which are included in some hard-copy versions of the Rules. The Comments and Notes have not yet been updated to match the amended Rules." New Hampshire Bar Association Ethics Committee, *Ethics Opinions & Practical Ethics Articles*, *A Note about Ethics Materials*, http://www.nhbar.org/about2.asp?SectID=13&CatID=52&SID=IOBJFOIPP298UJ8XMVC8WFCWMZBIGWB3MAHNYI7EHDRUKSLK9M (last updated Mar. 25, 2004). Thus, as with most rules, comments do not have the force of law and rather are

> The New Hampshire Committee has modified the official comment to Rule 4.2 by eliminating the following language from the comment thoughts by the ABA in August of 1983: "This rule prohibits communications by a lawyer . . . with any 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."[56]

Thus, the only persons remaining as parties in a corporate context in New Hampshire, when compared with comment four of the 2001 version of the ABA Rule, are those having managerial responsibility on behalf of the organization.[57] The remainder of only one category of persons, however, certainly does not clarify who in a corporation is covered under the ambit of the rule. In fact, the reference to those having managerial responsibility is just as ambiguous as the other categories of persons excluded in the New Hampshire comment to the rule.[58]

The comment to the NH Rule also gives an example of the scope of the rule:

> [T]he New Hampshire Committee decided to adopt the comments originally proposed by the Kutak Commission in May of 1981. Using the example of taking a statement from the driver of a Titanic Oil gasoline truck involved in an accident, the committee felt there was nothing improper or unethical for plaintiff's counsel to take a statement from the driver even though counsel knew that Titanic Oil was represented by retained counsel.[59]

Although this example purports to clarify the scope of the rule, the example falls short of a clear scope since there are numerous applications of the rule to many different types of corporate employees.[60]

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only guidelines as to how the rule should be applied. In New Hampshire, the comments to the Rules of Professional Conduct may not even be updated to match the current version of the rule so their use may be of even less valuable.

56. N.H. R. Prof. Conduct 4.2.

57. *See supra*, Section III.

58. Cohen, *supra* n. 10, at 771 (Noting that "having managerial responsibility" category of persons in the comment to the ABA Model Rule 4.2 is a broad concept which can extend to any corporate employee who supervise others or could also be limited to corporate employees who would fall into the control group of the organization.) The Control Group Test is discussed in the next section.

59. NH Rule Prof. Conduct 4.2; note also that the comments are not binding and merely explain the main text of the rule.

60. *See infra*, Section V.

The New Hampshire Supreme Court has not yet interpreted the effect of the excluded comment. It is possible that the exclusion could render cases interpreting the 2001 version of the ABA Rule with the full comment inapplicable to New Hampshire. Thus, without knowing for certain what employees are parties under the NH Rule, ex parte contact with *any* managerial employee – current or former – could potentially expose a New Hampshire attorney to a professional conduct violation or other adverse consequence. Other jurisdictions, however, have defined the type of employee to whom the no-contact rule extends.

V. JURISDICTIONAL INTERPRETATIONS OF RULE 4.2[61]

The text and comments of the 2001 version of the ABA Model Rule have sparked a significant amount of tests interpreting the scope of the rule applied to the corporate litigant. Each jurisdictional test considers the text of the rule, the comments to the rule and the purpose of the rule. While New Hampshire does not have the same comment as most states, the text of the rule, the part that is binding, is substantially similar to the rules in force in other jurisdictions.

A. *The Control Group Test*

The control group test is the narrowest jurisdictional interpretation of the rule. The control group test refers to those employees who control the actions of the company - the "top management persons who ha[ve] the responsibility of making final decisions."[62] Although the control group test "better serves the policy of promoting open access to relevant information" the rule is under-inclusive in that it ignores the fact that non-management employees can bind the corporation.[63] Thus, the purpose of protecting a litigant from unfair reach by attorneys is not served. Furthermore, by singling out only one category of corporate employees, the control group test does not come close to making the rule's application to corporations proximate to the application of the rule to individuals.

Since the comment to the current NH Rule includes only the first class of persons from the comments of the 2001 version of the ABA Rule (man-

61. The relevant Mode Code, DR-7-104(A)(1), is substantially similar to Mode Rule 4.2. Therefore, an analysis of the differences between the rules is unnecessary. *See e.g.* Cohen, *supra* n. 10, at 771(finding the Model Rule "almost identical to that of DR 7-104(A)(1)").

62. *Fair Automotive Repair, Inc. v. Car-X Ser. Sys., Inc.*, 471 N.E.2d 554, 560 (Ill. App. 2d Dist. 1984).

63. *Niesig*, 558 N.E.2d at 1035.

aging agents of a corporation), this is most likely the rule to be adopted by the New Hampshire Supreme Court if the Court were to interpret the current rule. New Hampshire Superior Court Judge Lynn stated that "the commentary to the New Hampshire Rule 4.2 strongly suggests that the drafters of our rule intended to adopt the control group test."[64]

B. *The Blanket Test*

On the other end of the spectrum is the blanket test. The blanket test includes all employees of a corporation as a party under Rule 4.2. The biggest advantage of this rule is that it is clear and easy to apply.[65] Proponents of this test also reason that because the attorney-client privilege potentially extends to all employees of a corporation, so too does the no-contact rule.[66] This approach has been criticized as being too broad.[67] *Upjohn Company v. United States* supports limitation of the privilege rule. Justice Rehnquist noted in *Upjohn* that "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[68] Thus, the privilege rules do not necessarily govern contact with an employee of a corporate adversary – only the *communication* between the corporate attorney and its client. In other words, the underlying factual information is always up for grabs.[69]

Further, it is not mandatory that a state's rules regarding privilege parallel its no-contact rule.[70] In addition, one key difference between the privilege rules and the no-contact rule which weighs against the amalgamation of the two rules is the fact that the attorney-client privilege can always be waived by the client, whereas the no-contact rule can never be waived by the client of a lawyer seeking ex parte contact.[71] Therefore, basing interpretation of the no-contact rule on a state's privilege rules is ill advised.

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64. Lynn, *supra* n. 15. Although the current rule seems to indicate that the intention was for the control group test, this does not mean that this should be the rule that is adopted upon revision of the rules. *See infra*, Section VII, C.

65. *Niesig*, 558 N.E.2d at 1034 (noting that under the blanket rule, an attorney need never worry about whether contact with an employee of a corporate adversary is proper or not).

66. *See e.g. Niesig*, 558 N.E.2d at 1033.

67. *Id*. at 1034 (finding that the blanket test, though easy to apply, "exacts a high price in terms of other values" and is not essential to achieve the purpose of the rule).

68. 449 U.S. 383, 395 (1981).

69. *See* Lynn, *supra* n. 15 (finding that the attorney-client privilege does not "immunize from disclosure" any factual information that a client may have).

70. *See* Cohen, *supra* n. 10 (noting that the Restatement of Law Governing Lawyers § 100 states that a broad privilege rule does not require a complete ban on contact with entity employees).

71. N.H.R. Evid. 502(b), (c) (Attorney-Client Privilege can be waived by a client); Lynn, *supra* n. 15 (quoting *United States v. Lopez*, 4 F. 3d 1455, 1462 (9th Cir. 1993) which finds that since the no-contact rule deals with the duties of the lawyer and not the rights of a client, the rule cannot be waived

Based on the example in the comment to the NH Rule, it is unlikely that the New Hampshire Supreme Court would adopt the blanket rule. The comment's example states that it would not be improper to contact an employee truck driver of a corporation involved in an accident even if the lawyer knew that the corporation was represented. The blanket rule would not allow such contact.

C. *Alter Ego or Imputation of the Action or Niesig Test*

Rejecting the control group test as too narrow and the blanket rule as too broad, the New York Court of Appeals adopted its own rule for the application of the no-contact rule in *Niesig v. Team I*.[72] In *Niesig,* the New York Court of Appeals defined "party" to a lawsuit under the no-contact rule as those "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 of its liability, or employees implementing the advice of counsel."[73]

The *Niesig* Court determined that its test directly furthers the interests protected by the rule.[74] It crafted a rule that defined the boundaries of a "party" under the no-contact rule. First, the *Niesig* Court addressed its concern of improper admissions on behalf of the corporation by including employees who have the power to bind the corporation.[75] The *Niesig* Court considered these employees the alter egos of the corporation: "employees who are so closely identified with the interests of the corporate party as to be indistinguishable from it."[76] Second, the Court addressed the concern of protecting the attorney-client privilege by including employees who are responsible for effectuating the advice of counsel as a party.[77] Third, the Court also included as a party under the no-contact rule "any member of the organization whose own interests are directly at stake in a representation."[78] The rule as interpreted by the *Niesig* Court allows access to employees who are merely witnesses of the subject of the litigation. The *Niesig* Court notes that this test strikes the proper balance between

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by the client. Judge Lynn also notes that under the no-contact rule, only the attorney representing a client can authorize another attorney to speak with his client in his absence. This comports with one of the purposes of the rule – to prevent interference with the attorney-client relationship. If an attorney consents to the contact with his client, then presumably, there will be no interference with the attorney-client relationship.).

72. 558 N.E.2d 1030 (N.Y. 1990).
73. 558 N.E.2d at 1035.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

protection of the corporation and access to information, and also notes that the test should prove clear in application.[79]

D. *Binding Admissions or Managing/Speaking Test*

Similar to the control group test, the binding admissions test concludes that employees who have the power to bind the corporation by their statements are parties under the no-contact rule. In *Wright v. Group Health Hospital*, the Washington Supreme Court held that employees of the defendant hospital were covered under the rule if "they ha[d] managing authority sufficient to give them the right to speak for, and bind, the corporation."[80] Under this test, managerial employees are covered by the rule but employees who participate in the subject of the litigation or have significant information are not covered. Because this test excludes corporate employees who participate in the subject matter of the litigation, this rule is criticized as being too narrow.[81]

E. *Balancing Test*

Some jurisdictions have attempted to promote fairness by creating a balancing test in interpreting the no-contact rule.[82] These jurisdictions weigh the interest of the corporate defendant to keep privileged information private against the need of plaintiff's counsel to discover relevant information; the subject matter of the ex parte interview is also considered.[83] Proponents of this test reason that interests of informal discovery and protection of the corporation can only be effectively weighed on a case-by-case basis with attention to the particular facts of the case.[84]

VI. FORMER EMPLOYEES AND RULE 4.2

The New Hampshire Supreme Court has not had occasion to decide whether former employees of a corporate party are subject to Rule 4.2. Most other jurisdictions, however, conclude that Rule 4.2 does not apply to

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79. *Id*. at 1036.
80. 691 P.2d at 569.
81. Sophie Hager Hume, *Niesig v. Team I: Permitting Ex Parte Communication with Corporate Employees*, 57 Brook. L. Rev. 953, 983 (1991).
82. *Morrison v. Brandeis U.*, 125 F.R.D. 14 (D. Mass. 1989); *Monahan v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989); *see generally*, Merrick T. Rossein, *Employment Discrimination Law and Litigation* § 14.51.
83. *See* Miller, *supra* n. 51, at 1069-70.
84. *Morrison*, 125 F.R.D. at 18.

former employees of a corporate party.[85] Further, Judge Lynn noted that the current trend is that the no-contact rule does not apply to former employees of a corporate adversary.[86] The *Wright* Court held that former employees cannot bind the corporation so the no-contact rule does not apply to any former employee.[87] Similarly, the *Niesig* Court also decided the no-contact rule did not apply to former employees of a corporate adversary.[88] In addition, the ABA Committee on Ethics and Professional Responsibility issued a formal opinion stating 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."[89] The committee reasoned that neither the rule nor its comments provide a basis to expand the rule to former employees and thus, the rule should not be extended to include former employees.[90] Further, the Restatement refers to only current employees or agents of a represented organization in its definition of a represented non-client.[91] In *Porter v. Arco Metals Company*, however, the court held that ex parte contact is prohibited with current *and* former employees with managerial responsibilities concerning the litigation.[92]

The current NH Rule 4.2 does not specifically state in either the text of the rule or its comment that an attorney may contact a former corporate employee without permission from corporate counsel or by formal deposition. Nonetheless, it is probably safe to assume that such conduct is proper based on the overwhelming majority of opinion that contact with former employees of a corporate adversary is proper under the no-contact rule. There is nothing in the text or comment to the current NH Rule to suggest otherwise.

An attorney cannot, however, discuss any and all matters with a former employee of a corporate adversary during an ex parte interview. In *In re*

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85. *Cram*, 148 F.R.D. at 262 (noting that courts generally find that attorneys are not prohibited from contacting former employees of a corporate adversary by the no-contact rule); *See also* Miller, *supra* n. 51, at 1072; Bernard H. Dempsey, Jr., *New Developments in the Law: Ex Parte Communications with Former Employees of a Corporate Defendant*, 71 Fla. B.J. 10 (1997) (explaining the case, *H.B.A. Management, Inc. v. Estate of Schwartz* 693 So. 2d 541 (Fla. 1997) which defined in Florida that attorneys are not prohibited from contacting ex parte even former managerial employees of a corporate defendant and which agreed with the Florida Bar Ethics Committee Opinion that stated "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").

86. Lynn, *supra* n. 15.

87. 691 P.2d at 569.

88. 558 N.E.2d at 1032.

89. *ABA Comm. on Ethics and Prof. Resp., Formal Op*. 91-359 (1991).

90. *Id*.

91. *Restatement (Third) of Law Governing Law.* § 100.

92. 642 F.Supp. 1116, 1118 (D. Mont. 1986).

Home Shopping Network, Inc. Securities Litigation the defendant corporation expressed concern that an ex parte interview with former employees could inadvertently allow the plaintiff access to attorney-client or trade-secret information.[93] The corporate counsel did not claim that the plaintiff's attorney would intentionally seek privileged information but rather claimed that this information may inadvertently be disclosed during the interview if corporate counsel was not present at the interview.[94] The court, relying on *Porter* and *Upjohn*, concluded that a protective order denying ex parte contact was unnecessary to prevent disclosure. As a cautionary measure, the court ordered the plaintiff's attorney to disclose certain information to the former employee, in writing if the interview was in person or orally if the interview was by telephone.[95] The disclosure follows:

> a. The attorney/client privilege belongs to HSN and may not be waived by the employee. Former employees of HSN are prohibited from discussing any attorney/client communications belonging to HSN. This includes any privileged communications or contacts the former employee has had with any attorney for HSN, including anyone in HSN's legal department. You are reminded not to disclose such information.
>
> b. As a former employee of HSN you may have executed a confidentiality agreement with HSN regarding its trade secrets and you may be bound to the terms set forth in that agreement. [96]

The court further ordered that "plaintiffs' counsel was not entitled to inquire into any attorney- client privileged communications" and cautioned that the attorney should immediately cease discussion of this information if it became apparent that privileged information was offered by the former employee.[97]

Although New Hampshire courts do not consider this case binding precedent, New Hampshire attorneys, should be concerned. It is prudent for any attorney to be cautious when questioning a former employee of a corporate adversary to ensure that she is not discussing privileged information or interfering with a contractual obligation.

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93. 1989 WL 201085 at *1 (M.D. Fla. June 22, 1989).
94. *Id.* at n. 2.
95. *Id.* at *1.
96. *Id*. at **1-2.
97. *Id*. at *2.

VII. THE 2003 VERSION OF THE ABA MODEL RULE 4.2[98]

Currently, no state has adopted the 2003 version of the ABA Model Rule 4.2. This should change as courts review and revise their rules because the new rule and its comments clarify many areas of uncertainty. The 2003 version of the ABA Model Rule and its comments basically adopt the *Niesig* test and the *Restatement (Third) of the Law Governing Lawyers* regarding the scope of the rule.[99]

A. *The Changes to the Text of the Rule*

The text of the rule is not drastically changed. The main text of the 2003 version of the ABA Model Rule 4.2differs from the current Model Rule by allowing an attorney to obtain a court order to speak with a represented person.[100] A new comment explains the reasoning for this addition:

> A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.[101]

Inclusion of the optional court order is positive, but does not solve every problem associated with the rule because the scope of the rule remains unclear. Thus, many of the benefits from ex parte contact are not fostered. In other words, allowance of a court order may help an attorney avoid a violation of the rule, but it does not encourage low-cost informal discovery nor does it protect a current employee's identity from his employer.

B. *Changes to the Comments of the Rule*

The comments to the 2003 version of the ABA Model Rule 4.2 did change, especially comment seven dealing with contact with a represented organization.[102] The reporter's notes indicate that the change was in response to criticism that the former comment was too vague and over-

98. *See generally* Pierce, *supra* n. 48 (Parts I, II, and III).
99. *See supra*, Section V, C.
100. ABA M. R. Prof. Conduct 4.2 (2003) (Reporter's notes).
101. ABA M. R. Prof. Conduct 4.2, cmt. 6.
102. ABA M. R. Prof. Conduct 4.2, cmt. 7.

broad.[103] The new comment clarifies who is a party under the new rule. Comment seven states that the rule prohibits communication:

> With a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent.[104]

There are three key differences between comment seven of the 2003 version of the ABA Model Rule and comment four of the 2001 version of the ABA Model Rule. First, comment seven uses the word constituent. Second, comment seven includes a category for employees who regularly consult with the organization's lawyer. Third, comment seven expressly excludes former employees from the scope of the rule. Each of these changes clarifies the scope of the rule as applied to a corporate litigant.

The use of the word constituent refers to those people who have a legal relationship with the organization and thus incorporates the majority view that former employees are not covered under the scope of the rule.[105] Constituent is also used in Model Rule 1.13 and refers to corporate directors, officers, employees, shareholders.[106] Thus, use of the term constituent provides attorneys with more meaningful guidance as to what types of employees are covered under the rule.

Inclusion of employees who consult regularly with the organization's lawyer is an improvement and "replaces the broad and ambiguous reference in Comment [4] to 'persons having managerial responsibility on behalf of the organization."[107] Inclusion of this category of employees is important because it includes those employees who resemble the traditional client in the attorney-client relationship. As discussed in *Niesig*, inclusion of these employees is essential to achieve the purpose of the rule to protect the attorney-client relationship.[108]

Finally, the explicit statement in comment seven of the 2003 version of the ABA Model Rule that former constituents are not covered under the rule is a definite improvement from comment four of the 2001 version of

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103. ABA M. R. Prof. Conduct 4.2 (Reporter's notes); *see also* Pierce (Part I), *supra* n. 48, at 153 (finding that comment seven is especially important since "most of the controversy surrounding the no-contact rule relates to its application to represented organizations").

104. ABA M. R. Prof. Conduct 4.2, cmt. 7.

105. Pierce (Part I), *supra* n. 48, at 155.

106. ABA M.R. Prof. Conduct 1.13.

107. Pierce (Part I), *supra* n. 48, at 156.

108. *See supra*, Section V, C.

the ABA Model Rule. Exclusion of former employees from the scope of the rule is consistent with the majority view of courts that have had occasion to interpret the rule with respect to former employees, with the Restatement's position, and with the ABA's Formal Opinion.[109]

C. *Proposed Rule for New Hampshire*

New Hampshire needs a Rule 4.2 that incorporates comment seven of the 2003 version of the ABA Model Rule into the text of the rule and includes key tenants of similar rules that have been analyzed by courts throughout the country. As shown, the current text of the no-contact rule is susceptible to many interpretations. Susceptibility to several interpretations is not negative if the jurisdiction in which an attorney practices has sufficient case law to clarify the scope of the rule. In jurisdictions like New Hampshire, however, the Court provides no clear guidance for practitioners to apply the rule. This is unsettling because the lack of guidance either causes attorneys to be overly-cautious, or it causes an unsuspecting attorney to violate the rule out of ignorance. In either circumstance, the vagueness of the current rule constrains an attorney's ability to efficiently advocate for his or her client.

The scope of the current Rule 4.2 is not clear. Since New Hampshire is reviewing its Rules of Professional Conduct, it should take a serious look at Rule 4.2. In so doing, the New Hampshire Supreme Court should note the troubling issue of the rule's scope, which is deeply imbedded in the rule and is difficult to interpret by attorneys. Although ambiguity in rules is sometimes favorable to afford the court adequate leeway to decide cases on an individualized basis, such a goal is not proper when applied to ethical rules that shape the conduct of a state's bar. The rules provide the framework for the ethical practice of law.[110] The Rules of Professional Conduct are intended to guide lawyers' conduct. If those rules are themselves ambiguous or difficult to apply, then the purposes of the rules are not met.

When New Hampshire revises its ethical rules, the New Hampshire Supreme Court should adopt a no-contact rule that is easy for attorneys to understand and apply. The text of the rule should explicitly advise New Hampshire attorneys of the intricacies of the rules that have been debated and analyzed by courts throughout the country. With a clear rule in hand, New Hampshire attorneys can vigorously advocate for their clients while also respecting the Rules of Professional Conduct.

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109. *See supra*, Section VI.
110. Preamble, ABA M. R. Prof. Conduct (2003).

Merely adopting the 2003 version of the ABA Model Rule and its comments, however, is not enough to provide clear guidance about its scope for attorneys. While the comments are much improved from the 2001 version of the ABA Model Rule,[111] a comment is not afforded the same weight as the text of the rule itself. Thus, although comment seven of the 2003 version of ABA Rule 4.2 is a good step, adopting the comment does not go far enough. In order to clarify the rule for practitioners, the intricacies imbedded in the rule's scope need to be addressed in the text of the rule itself.[112] "The primary reason for considering such a change is that the application of the Rule to represented organizations is such an important and frequently recurring issue that it should be addressed both more authoritatively and more visibly."[113] Only then can practitioners understand the rule and thus, can conform to it.

Therefore, the following is a proposition for New Hampshire's Rule 4.2 which incorporates comment seven of the 2003 version of the ABA Model Rule into the text of the Rule and includes key tenants of the rule that have been analyzed by courts throughout the country:

> (a) 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:
>
> 1. the lawyer has the consent of the other lawyer; or
>
> 2. is authorized to do so by law; or
>
> 3. the lawyer has obtained a court order permitting contact with the desired person.
>
> (b) In the case of a represented organization, an attorney shall not communicate about the subject of the representation with the following constituents of that organization:
>
> 1. Current employees or agents of the organization who supervise, direct or regularly consult with the organization's lawyer; or
>
> 2. Current employees or agents of the organization who have authority to obligate the organization regarding the matter; or

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111. Comment seven makes it much more clear who an attorney may or may not contact in a corporation.

112. *See* Pierce (Part I), *supra* n. 48, at 153 (noting that when states look at the 2003 rule, states should consider whether the comment regarding represented organizations should be addressed in the text of the rule instead).

113. *Id*.

> 3. Current employees or agents whose acts regarding the matter could impute the organization for purposes of civil or criminal liability.[114]

This rule addresses every concern that has been litigated in other jurisdictions in a way that is clear and easy to apply without much need for judicial interpretation. Further, the rule considers the types of corporate employees involved in a corporation and only includes those corporate employees whose connection with the litigation or corporation make application of the rule to the represented corporation most like application of the rule to the represented individual.

First, reference to only current employees or agents of an organization in the rule reflects the majority rule in other jurisdictions interpreting the 2001 version of the ABA Model Rule and Model Code.[115] This is a bright line rule that attorneys can easily apply and is not overbroad since the consensus among jurisdictions is that the purpose of the rule is not served by inclusion of former employees or agents of a corporation.

Second, by clearly identifying those employees or agents that fall under the ambit of the rule, the above rule makes it easy for an attorney to decide whether contact with a particular person within the corporation is proper.[116] The three categories of corporate constituents, taken directly from comment seven of the 2003 version of the ABA Model Rule, list only those people that the goals of the rule were designed to protect in a corporation. Inclusion of only these three categories of persons strikes the proper balance between protection of the corporation and disclosure of relevant information. As discussed in *Niesig*, only those employees of a corporate litigant who are so intertwined with the corporation should be covered by the rule since the primary purpose of the rule is to protect the

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114. *See also id*. at 154 (Carl Pierce suggests a similar rule that does not include reference to only current employees. In New Hampshire, there is no case law that holds that former employees are not included under the scope of the rule. For this reason, inclusion of only current employees is important in the text of the rule to clarify for practitioners that the category of former employees is not included under the scope of the rule. Another option is to state in the comment to the rule that former employees are not included under the scope of the rule. Carl Pierce's proposed rule also differs from the proposed rule here in that his proposed rule refers to "constituents of the organization" whereas the rule proposed in this article references "employees or agents of the organization." The main reason why I propose use of "employees or agents of the organization" is to provide clarity to practitioners. Since New Hampshire lacks case law to define what a constituent of an organization means, reference to "employees or agents" is more readily understandable by practitioners.).

115. *See supra,* Section VI.

116. *Restatement (Third) of Law Governing Law.* § 100; Pierce *supra* n. 48, at 156 (Part I) (finding that the Ethics 2000 Commission intended that agents of a corporation should also be considered under Rule 4.2).

attorney-client relationship.[117] Thus, those corporate employees who regularly consult with the corporation's attorney would be covered under the rule since they are part of the attorney-client relationship. Such employees or agents "clearly personify the organization for the purposes of the no-contact rule."[118] This category of covered corporate employees may have differing levels of responsibility in the corporation. Comment c of the Restatement provides an example:

> [A] corporate vice president dealing with a patent counsel on a patent challenge, a corporate clerk assigned to collect documents for the lawyer, or a production employee providing expert information to the lawyer about a mechanical process that is in issue. On the other hand, agents and others (including managerial employees) who are not within the definition . . . may be contacted without consent regardless of their position in the organization.[119]

The Restatement also provides an illustration of how the effect of regular consultation with the corporation's counsel renders that employee off-limits with regard to the no-contact rule:

> Manager heads the transportation department of Corporation, which is defending against a claim for personal injuries by Plaintiff. Plaintiff, represented by Lawyer A, seeks damages resulting from a traffic accident allegedly caused by Corporation's negligence in hiring Driver who had a bad driving record. Lawyer A knows that Corporation is represented by Lawyer B in defending against the claim. Manager has power to authorize settlement of the matter with Plaintiff on behalf of Corporation. Lawyer A may not contact Manager except with the consent of Lawyer B . . . .[120]

Thus, employees who carry out the advice of the corporate attorney are also most like the traditional client and should be clearly identified in the rule as people who should not be contacted if the organization is represented by counsel.

Current employees or agents of the organization who have authority to obligate the organization regarding the matter are akin to the individual client because corporations are legal entities that can only act through indi-

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117. *See supra*, Section V, C.
118. Pierce *supra* n. 48, at 157 (Part I).
119. *Restatement (Third) of Law Governing Law.* § 100 illus. 1.
120. *Id*. (The Restatement also notes that if the manager was not authorized to settle the case and was not responsible for the hiring of the driver, then contact would be not be improper.).

viduals.[121] These corporate individuals are individuals who could bind the corporation in an evidentiary sense. Including these employees is important because it allows application of the rule in a manner as close as possible to that of the traditional attorney-client relationship involving an attorney and an individual person. Obviously, an attorney cannot contact a represented individual litigant ex parte who could make a statement that could harm that individual's case. Inclusion of those corporate employees that could similarly bind the corporation allows the same application and protection of principles when a corporation is a litigant.[122]

Current employees or agents whose acts regarding the matter could impute the organization for purposes of civil or criminal liability should be included in the rule because "the organization's need for legal representation arises because of the constituent's conduct."[123] The Restatement indicates that this category of persons should be included in the rule because absent the corporate link, the individual would be directly named as a party to the litigation.[124] Since corporations act only through individuals, when an individual acts for the corporation, that person should be considered under the scope of the rule.

In the Restatement's example, Attorney A's contact with the driver of the vehicle would be improper.[125] This comports with the policy of applying the rule to corporations as close as possible to applying the rule to individuals. Thus, when individuals act on behalf of the corporation, this is as close as the individual client acting on his own behalf. Thus, this person is not merely a witness to the underlying litigation but instead was the actor (or person acted upon) giving rise to the litigation.[126]

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121. *See supra*, Section V, D. One of the main criticisms of the binding admissions test was that it only applied to managerial employees who could bind the corporation. By broadening the definition to include any employee who would bind the corporation in an evidentiary sense regarding the legal matter, the criticism that the rule is too narrow is addressed. The rule is not overbroad either since it only includes employees who could bind the company with regard to the matter; thus the overbreadth criticism of the blanket rule is also addressed. *See supra*, Section V, B.

122. *Restatement (Third) of Law Governing Law.* § 100 (The Restatement does not provide an example of how this is applied: however, the Restatement notes that "such a person is analogous to a person who possesses power to settle." Thus, if the individual's admission would bind the company, as would an agreement to settle the litigation, then ex parte contact with this individual is improper.).

123. Pierce *supra* n. 48, at 168 (Part I).

124. *Restatement (Third) of Law Governing Law.* § 100.

125. *See supra* n. 109 (The Restatement also notes that if Lawyer A wanted to contact the mechanic of the vehicle, this contact would also be improper if the mechanic was an employee of the corporation).

126. Note also that the individual whose act is imputed on the organization may retain his own counsel if his interests conflict with the interests of the corporation such that the corporation's attorney could not also represent the individual under Rule 1.13. If this individual retained his own attorney, consent to talk to this individual would need to be obtained from the individual's attorney and consent from company's attorney would be unnecessary.

VIII. CONCLUSION

New Hampshire's no-contact rule is currently too vague to give New Hampshire attorneys any meaningful guidance. Although the comment purports to define the scope of the rule, the comment does not address the many different tests that have developed in application of the no-contact rule to the corporate litigant. Also, the comment is not binding and thus attorneys cannot be sure that contacting any employee of a corporate litigant would be proper under the rule.

The benefits of ex parte contact are substantial. Ex parte contact allows for discovery of information that may not be gained otherwise or at the very least, allows an inexpensive means to discover relevant information. The consequences of improper ex parte contact are significant enough that attorneys are deterred from making contact for fear of doing so improperly. This combination of the importance of ex parte contact and the negative consequences for improper contact warrant a no-contact rule that is clear and easy for the New Hampshire attorney to understand. The purpose of the rule similarly requires that the rule be clear to attorneys. A rule that is vague and shields valuable information does not serve the rule's purpose. The rule is meant to protect the attorney-client relationship, not as a barrier to the discovery process. Yet, when the rule is vague, this is exactly what happens.

Other jurisdictions have had an opportunity to define the rule so that its application is clear. New Hampshire has not had this opportunity so application of the rule here remains uncertain. The tests applied in other jurisdictions, however, clarify certain aspects of the rule. Employees of a corporation that can bind the company are akin to individual clients who can harm his or her case by speaking with the opposing counsel. This should be the same for the corporate litigant who deserves no better nor no worse protection by the rule. Employees who regularly consult with the corporate attorney should similarly be considered under the scope of the rule since they are most like an individual consulting with his or her attorney.

The 2003 version of the ABA Model Rule and comment seven strike a fair balance of interests to the corporate litigant by only including those employees who maintain the roles traditionally held by a client in the attorney-client relationship. The 2003 version of the ABA Model Rule does not go far enough because this explanation of the scope of the rule as applied to the corporate litigant is only in a comment to the rule. As evidenced by the many different tests in other jurisdictions, the text of the rule is not clear on its face and thus needs to be clarified by including the comment in the text of the rule. This is especially necessary in New Hamp-

shire where there is no formal adoption of one of the tests applied in other jurisdictions.

Given the above considerations, the New Hampshire Supreme Court should adopt the 2003 version of the ABA Model Rule as modified above. The scope of the rule should not exceed the limited purpose to protect the attorney-client relationship. To shield the corporation from any contact or to allow too much contact would defeat the purpose of the rule. The rule adopted by the New Hampshire Supreme Court should be narrowly tailored to only protect the attorney-client relationship and should also consider the attorneys' need for clear guidance.