

COMMENT

Ethical Limitations on Investigating Employment Discrimination Claims: The Prohibition on Ex Parte Contact with a Defendant's Employees

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INTRODUCTION

A female marketing manager for a Fortune 500 corporation asks an attorney to represent her in an employment discrimination action¹ against her employer. The corporation recently failed to promote her to district manager, promoting instead a less senior male. The client believes the corporation based its decision on her gender. In anticipation of filing suit,² the attor-

¹ This hypothetical employment discrimination action is analyzed as a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988). Title VII prohibits discrimination in employment on the basis of race, sex, or national origin. *Id.* § 2000e-2(a)(1). See generally *infra* notes 78-86 and accompanying text (discussing state and federal statutes prohibiting discrimination in employment).

² Before filing suit, a Title VII plaintiff must first file a timely charge with the Equal Employment Opportunity Commission (EEOC) or an authorized state agency. 42 U.S.C. § 2000e-5(e). Upon the filing of the charge, Title VII requires the EEOC to serve notice on the employer, conduct an investigation, and determine whether there is reasonable cause to believe discrimination has occurred. *Id.* § 2000e-5(b). If the EEOC determines that reasonable cause does not exist, it must dismiss the charge and allow the charging party to file suit. *Id.* § 2000e-5(f)(1). In addition, the charging party has an absolute right to obtain EEOC authorization to sue 180 days after filing the charge. The EEOC must issue a right-to-sue letter whether or not it has completed the administrative process. *Id.* § 2000e-5; 29 C.F.R. § 1601.28(a)(1)-(2) (1990). EEOC regulations allow issuance of the right-to-sue notice before 180 days if the EEOC determines that it will likely be unable to complete the administrative process within this period. 29 C.F.R. § 1601.28(a)(2) (1990).

The EEOC in fact rarely completes the administrative process within 180 days. M. ROSSEIN, *EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION* 12-

ney begins an investigation into her new client's case.³ The attorney believes that other female managers in the corporation may have experienced similar discrimination, and contacts a number of them by telephone. Although uncovering evidence of a widespread discriminatory practice could be crucial to her client's case, the attorney's attempts to do so here may constitute unethical conduct. In this hypothetical situation, the attorney may have violated Rule 4.2 of the American Bar Association Model Rules of Professional Conduct.⁴

Rule 4.2 prohibits *ex parte* communications⁵ with represented adverse parties.⁶ The rule's primary purpose is to protect parties from improper approaches by opposing counsel.⁷ When a case involves individual parties, the meaning of "party" is plain — it refers to the individuals themselves, not to their families, agents, or employees.⁸ When the party is an organizational entity such as

21 (1990). Moreover, its role enforcing Title VII enforcement is limited. In fiscal years 1986 through 1988, for example, the EEOC received a total of 138,168 Title VII charges. *See* 401 Lab. L. Rep. (CCH) 24 (Oct. 15, 1990) (reprinting EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMBINED ANNUAL REPORT FOR FISCAL YEARS 1986-88). During these years charging parties in 114,296 cases were left to seek vindication of their Title VII rights through court action after the EEOC closed their cases. *See id.* (reporting that in fiscal years 1986-88 EEOC made 73,036 no cause determinations, 38,973 administrative closures, and 2,287 unsuccessful conciliations). One employment law treatise concludes that the administrative process is seldom of effective use to discrimination victims. M. ROSSEIN, *supra*, at 12-22.

³ Under Rule 11 of the Federal Rules of Civil Procedure, an attorney who signs a complaint certifies that it is "well grounded in fact." FED. R. CIV. P. 11. This language, added in 1983, imposes an affirmative duty on attorneys to investigate the facts upon which a complaint is based before filing it with a federal court. *See* FED. R. CIV. P. 11, advisory committee's note to 1983 amendment. While a plaintiff's attorney has access to EEOC investigation files, in most cases EEOC investigation is either nonexistent or of little value. *See infra* note 116 and accompanying text (discussing EEOC investigations).

⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1989).

⁵ "Ex parte" means "[o]n one side only" or "by or for one party." BLACK'S LAW DICTIONARY 576 (6th ed. 1990). This Comment defines *ex parte* communication in the context of an organizational party as communication between the organization's employee and opposing counsel without the presence or consent of the organization's attorney.

⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1989).

⁷ *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934); *infra* notes 29-32 and accompanying text.

⁸ *See* Niesig v. Team I, 76 N.Y.2d 363, 370, 558 N.E.2d 1030, 1033, 559

a corporation,⁹ however, the question of meaning becomes more difficult: which of the organization's employees are to be treated as "parties" for purposes of the ethical rule? The above hypothetical thus illustrates a common ethical dilemma attorneys face when investigating a potential claim against an organization.

This dilemma arises with great frequency when the claim concerns employment discrimination. Since employment discrimination occurs in the workplace,¹⁰ fellow employees will be a plaintiff's major witnesses and will possess information crucial to her case.¹¹ A plaintiff's attorney would prefer to interview these employees informally. Because their employer is a party, however, the ethical rule may significantly limit an attorney's informal access to them.¹² The attorney must therefore take care to determine which of the defendant's employees must be treated as "parties." Failure to do so before contacting them may expose her to sanctions should a disciplinary body or court later find that her conduct violated the ethical rule.¹³

N.Y.S.2d 493, 496 (1990); *see also* S. GILLERS & N. DORSEN, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 433-34 (2d ed. 1989).

⁹ This Comment employs the terms "organization," "organizational entity," and "organizational party" to indicate an entity that disperses authority to act for the entity among a number of individuals. *See* Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party,"* 61 MINN. L. REV. 1007, 1009 n.7 (1977). The terms include corporations and corporate parties. Other commentators have used terms such as "multiperson entity," "institutional party," or "associational enterprise." *See, e.g.,* Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181 (1987); Note, *supra*.

¹⁰ *See infra* notes 83-96 and accompanying text.

¹¹ *See* Frey v. Department of Health & Human Servs., 106 F.R.D. 32, 36 (E.D.N.Y. 1985).

¹² *See infra* notes 131-95 and accompanying text (discussing interpretations of ethical rule that substantially limit access).

¹³ Sanctions for improper ex parte contact can be severe. *See, e.g.,* Mitton v. State Bar, 71 Cal. 2d 525, 455 P.2d 753, 78 Cal. Rptr. 649 (1969) (upholding attorney's three-month suspension from legal practice); Chronometrics, Inc. v. Sysgen, Inc., 110 Cal. App. 3d 597, 168 Cal. Rptr. 196 (1980) (disqualifying counsel). The more typical sanction is to exclude from evidence any statements obtained through the improper contact. *See, e.g.,* Garrett v. National R.R. Passenger Corp., No. 89-8326 (E.D. Pa. Aug. 6, 1990) (LEXIS, Genfed library, Dist file); University Patents, Inc. v. Kligman, 737 F. Supp. 325 (E.D. Pa. 1990); Peat, Marwick, Mitchell & Co. v. Superior Court, 200 Cal. App. 3d 272, 245 Cal. Rptr. 873 (1988); Monsanto Co. v. Aetna Casualty & Surety Co., C.A. No. 88C-JA-118 (Del. Super. Ct. Sept. 10, 1990) (LEXIS, States library, Del file).

Unfortunately, little unanimity of opinion exists to guide an attorney in determining which employees of an organizational defendant she may contact *ex parte*.¹⁴ Courts, commentators, and bar associations have employed a wide variety of approaches in applying Rule 4.2 to an organizational party. The broadest of these approaches classifies all employees as parties.¹⁵ The narrowest classifies as parties only the highest ranking employees with authority to make decisions concerning the litigation on behalf of the organization.¹⁶ Between these two extremes lie various methods of drawing a "party" line within the ranks of the organization.¹⁷ Moreover, one approach dispenses altogether with fixed formulas and determines on a case-by-case basis which employees are parties for purposes of the rule.¹⁸

This Comment examines the ethical rule in the context of an employment discrimination lawsuit, where the need for informal employee contact is critical. The Comment then recommends an approach that attempts to balance the rule's protective purposes with a plaintiff's practical need for *ex parte* access to witnesses. Part I analyzes the ethical rule and its underlying rationale.¹⁹ Part II examines the policies that conflict with the rule when one party is an organization, both in litigation generally and in employment discrimination actions in particular.²⁰ Part III describes and analyzes the principal methods that authorities have advocated for determining the scope of the ethical rule as applied to an organizational party.²¹ The focus in Part III is on courts' interpretations of the ethical rule and on the effects of each interpretation in employment discrimination litigation.²² Finally, Part IV proposes

¹⁴ Indeed, one court has characterized this question as "[o]ne of the most hotly-debated issues surrounding the [ethical rule]." *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 698 (D. Mass. 1990).

¹⁵ See *infra* notes 175-207 and accompanying text (discussing blanket prohibition on *ex parte* contact with employees).

¹⁶ See *infra* notes 208-21 and accompanying text (discussing control group test).

¹⁷ See *infra* notes 129-74 and accompanying text (discussing Comment to Rule 4.2); notes 222-66 and accompanying text (discussing "managing speaking agent" and "alter ego" tests).

¹⁸ See *infra* notes 267-95 and accompanying text.

¹⁹ See *infra* notes 24-46 and accompanying text.

²⁰ See *infra* notes 47-126 and accompanying text.

²¹ See *infra* notes 127-295 and accompanying text.

²² The cases discussed in this Comment involve collateral disputes in litigation over proposed or past *ex parte* contact with an organizational party's employees. Courts decide such issues pursuant to their inherent

a solution to applying the ethical rule to organizations which retains the protections the rule was designed to provide, while eliminating the roadblocks to the discovery of relevant evidence that the rule often imposes unnecessarily.²³

I. THE ETHICAL RULE AND ITS UNDERLYING RATIONALE

Rule 4.2, as well as its predecessors, prohibits an attorney from communicating directly with a represented party unless the attorney first obtains permission from the party's legal counsel.²⁴

powers to regulate attorney conduct. Courts have an obligation to supervise the conduct of attorneys and the authority to "remedy litigation practices which raise ethical concerns or may constitute ethical violations." *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 329 (E.D. Pa. 1990) (citations omitted); see *Dunton v. County of Suffolk*, 729 F.2d 903, 909 (2d Cir. 1984) (noting court's continuing obligation to supervise members of bar); *Musicus v. Westinghouse Electrical Corp.*, 621 F.2d 742, 744 (5th Cir. 1980) (per curiam) (noting court's obligation to take measures against unethical conduct in proceedings before it). This includes the authority to impose sanctions for ethical violations. See *supra* note 13 (discussing typical sanctions imposed for improper ex parte contact).

²³ See *infra* notes 296-333 and accompanying text.

²⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1989). 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.

Id.

Rule 4.2 is "substantially identical" to its predecessor, DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility. Rule 4.2 Model Code comparison. DR 7-104(A) provides:

During the course of his representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A) (1981). Because of this substantial similarity, and because as of this writing a majority of the states have adopted the Model Rules, this Comment will refer to all versions of the ethical rule governing ex parte contact with adverse parties as "Rule 4.2" or "the ethical rule," unless referring to a specific version of the rule.

Although the ethical rule is of relatively recent invention,²⁵ it is today one of the most important and widely recognized of all ethical precepts.²⁶ The proscription on ex parte contact with represented parties has become a "basic tenet of the adversary model,"²⁷ designed to promote legal sportsmanship and

²⁵ Prior to the adoption by American Bar Association of the original Canons of Professional Ethics in 1908, states applied the prohibition only to ex parte settlement negotiations. Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 685 (1979) (citing Committee on Code of Professional Ethics, *Report*, 31 A.B.A. REP. 676, 706 (1907) (describing previous codes)). In other situations, states required only that attorneys provide advance notice of ex parte communication to adversary counsel. *Id.* The rule's original purposes were self-serving ones: to prevent parties from negotiating unfavorable settlements that could jeopardize the attorney's contingent fee, Note, *supra* note 9, at 1010, and to prevent attorneys from stealing their opponents' clients, H. DRINKER, LEGAL ETHICS 190 (1953).

The Canons of Professional Ethics, adopted by the American Bar Association in 1908, signalled general acceptance of the attorney's absolute control over ex parte communications with the client. Leubsdorf, *supra*, at 685. Canon 9 expanded the ethical rule to apply to all communication regarding the subject of controversy: "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should only deal with counsel." CANONS OF PROFESSIONAL ETHICS Canon 9 (1908).

The expanded rule rested on a broadened rationale. Prohibiting all ex parte communication would "preserve the proper functioning of the legal profession," a euphemistic reference to preserving the attorney's right to recover an optimal contingent fee. See Note, *supra* note 9, at 1010 (interpreting early ethics opinions). An absolute prohibition would also protect parties from improper approaches by adversary counsel. See *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 196, 691 P.2d 564, 567 (1984) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934)). Modern authorities no longer cite the rule's original self-serving purposes, concentrating instead on its protective purposes. See *infra* notes 29-38 and accompanying text.

Yet even Canon 9 was not applied initially to shield employees of an organizational party from ex parte contact. *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 626 (S.D.N.Y. 1990) (citing Leubsdorf, *supra*, at 694-95). Eventually bar associations and courts began to extend the scope of Canon 9 to include certain of a party's employees, reasoning that only then does the rule have any "meaning with respect to a corporate party." *Id.*

²⁶ *Niesig v. Team I*, 149 A.D.2d 94, 108, 545 N.Y.S.2d 153, 161 (1989), *modified*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990).

²⁷ Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1177 (1987).

fairness.²⁸

Broadly stated, the purpose of the ethical rule is to foster and protect the integrity of the attorney-client relationship by preventing the intrusion of adversary counsel.²⁹ First, it seeks to protect parties against unprincipled attorneys. It does so by preventing situations in which opposing counsel could take advantage of a represented party because of the party's lack of legal skill.³⁰ The presence of the party's own attorney theoretically ensures that adversary counsel will not pressure the party into uttering damaging statements, making ill-advised disclosures, concluding improvident settlements, or giving unwarranted concessions.³¹

Second, the ethical rule protects a party's right to effective representation of counsel.³² This policy addresses the concern that, even without overreaching on the part of adversary counsel, a

The adversary model envisions each party represented by legal counsel, with counsel exercising complete control over client communications with other parties. *Id.* The ABA Model Code of Professional Responsibility cites the rule's importance in the adversary system as well:

The legal system in its broadest sense *functions best when persons in need of legal advice or assistance are represented by their own counsel.* For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer . . . unless he has the consent of the lawyer for that person.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (emphasis added). One commentator, however, has criticized the rule for conferring upon a lawyer complete control over client communications with adverse parties. Leubsdorf, *supra* note 25, at 683.

²⁸ See Note, *supra* note 9, at 1012; *cf.* Uviller, *supra* note 27, at 1176.

²⁹ Bougé v. Smith's Management Corp., 132 F.R.D. 560, 567 (D. Utah 1990).

³⁰ See Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990); Niesig v. Team I, 76 N.Y.2d 363, 370, 558 N.E.2d 1030, 1032-33, 559 N.Y.S.2d 493, 495-96 (1990); Wright v. Group Health Hosp., 103 Wash. 2d 192, 197, 691 P.2d 564, 567 (1984); Kurlantzick, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 145-46 (1977). It is one of several ways in which the ethical rules seek to discourage overreaching by attorneys. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 and comment (governing attorney conduct with unrepresented persons); *id.* Rule 7.3 and comment (regulating attorney contact with prospective clients).

³¹ Niesig v. Team I, 76 N.Y.2d at 370, 558 N.E.2d at 1032-33, 559 N.Y.S.2d at 495-96.

³² Committee on Professional Ethics, New York City Bar Association, Op. 80-46, 6 (1982), *cited in* Comment, *Ex Parte Communications with Corporate*

party might make ill-chosen and prejudicial statements without her attorney's advice.³³ The presence of the party's legal representative enables the party to present her statements in the most favorable light³⁴ and prevents her from inadvertently making damaging admissions.³⁵ A third, closely related purpose of the ethical rule is to protect the attorney-client privilege.³⁶ The danger in ex parte contact is that a client may unwittingly reveal privileged communications, thereby waiving the privilege as to those communications and exposing and compromising her attorney's tactics.³⁷ The common theme of these three policies is the danger that without the presence of legal counsel, a party may damage her own interests by saying the wrong thing.³⁸

Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest, 82 NW. U.L. REV. 1274, 1277 & n.16 (1988).

³³ *Abeles v. State Bar*, 9 Cal. 3d 603, 510 P.2d 719, 108 Cal. Rptr. 359 (1973). In *Abeles*, adversary counsel contacted a partner in the defendant firm and persuaded the partner to sign an affidavit repudiating allegations in the complaint. The court held the attorney's conduct unethical. *Id.*

³⁴ Comment, *supra* note 32, at 1277. An attorney who is present to monitor and advise the client can clarify ambiguous statements, correct inaccuracies, and put statements into context, thereby presenting the optimal reflection of the client's position *Mitton v. State Bar*, 71 Cal. 2d 525, 534, 455 P.2d 753, 758, 78 Cal. Rptr. 649, 654 (1969). See also Comment, *supra* note 32, at 1278.

³⁵ *Abeles v. State Bar*, 9 Cal. 3d 603, 510 P.2d 719, 108 Cal. Rptr. 359; 2 G. HAZARD & W. HODES, *THE LAW OF LAWYERING* § 4.2:101 (2d ed. 1990).

³⁶ *Mitton v. State Bar*, 71 Cal. 2d 525, 534, 455 P.2d 753, 758, 78 Cal. Rptr. 649, 654 (1969); *Mills Land & Water Co. v. Golden West Ref. Co.*, 186 Cal. App. 3d 116, 128-29, 230 Cal. Rptr. 461, 467-68 (1986); *Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc.*, 128 Ill. App. 3d 763, 471 N.E.2d 554 (1984); *Los Angeles County Bar Association, Formal Op.* 410 (1983).

³⁷ *Miniat, Inc. v. Globe Life Ins., No. 84-C-8781* (N.D. Ill. Mar. 20, 1989) (LEXIS, Genfed library, Courts file); 2 G. HAZARD & W. HODES, *supra* note 35, § 4.2:101.

³⁸ For example, the party may make a statement admissible over hearsay objections as an admission of a party opponent. See FED. R. EVID. 801(d)(2) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) his own statement . . . , or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment."). The party may reveal damaging information which she is not compelled to reveal outside of formal discovery. See Note, *supra* note 9, at 1012-13. The party may create misunderstanding through ambiguous or inaccurate statements, or damage her case by making a statement out of context. See Comment, *supra* note 32, at 1278. Finally, the party may reveal privileged communications. See Kurlantzik, *supra* note 30, at 145.

Certainly, organizational parties such as corporations are as much entitled to the rule's protections as are individual parties.³⁹ Like individuals, organizations have a right to effective legal representation and a strong interest in protecting confidential communications.⁴⁰ They also have legitimate concerns that their employees not be coerced or abused by adversary counsel.⁴¹ In many ways an organization cannot be separated from the persons who comprise it. The organization acts and speaks primarily through its directors and employees.⁴² Similarly, an organization's liability typically stems from the acts and omissions of its directors and employees.⁴³ When a legal dispute arises and the organization obtains legal representation, the organization pursues, settles, or defends the lawsuit through certain of its directors and employees.⁴⁴

Therefore, in order that the rule retain some meaning with respect to an organizational entity, at least some of the organization's employees must be considered parties and protected from *ex parte* contact.⁴⁵ Yet the more broadly one defines "party" in the interests of fairness to the organization, the greater the cost becomes to its adversary's right of informal access to facts and witnesses.⁴⁶

³⁹ *Niesig v. Team I*, 76 N.Y.2d 363, 371, 558 N.E.2d 1030, 1033, 559 N.Y.S.2d 493, 496 (1990).

⁴⁰ *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560 (D. Utah 1990). The court in *Bougé* stated that "corporate and associational organizations are entitled to the full protection of the advice and confidences of counsel." *Id.* at 565. The scope of the ethical rule should not be interpreted to dilute "legitimate lawyer client relationships" or to allow breach of "relationships and communications properly within the scope of lawyer/client protection." *Id.*

⁴¹ *See id.*

⁴² *Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037, 1039 (D.N.J. 1990); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 comment.

⁴³ *See Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498; *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (defining "party" to include persons whose acts or omissions give rise to organizational party's liability).

⁴⁴ *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 comment.

⁴⁵ *See Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 626 (S.D.N.Y. 1990); *Niesig*, 76 N.Y.2d at 371, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496 (1990). *Contra* Leubsdorf, *supra* note 25, at 708 (expressing view that "opposing counsel should be free to contact directly any employee, high or low, who is a possible witness without notice to the employer's counsel").

⁴⁶ *Niesig*, 76 N.Y.2d at 371, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496.

II. CONFLICTING POLICY CONSIDERATIONS

Rule 4.2 protects the integrity of the attorney-client relationship and furthers fair play in the adversarial context. It serves these purposes for individuals and organizations alike. Yet when one of the parties is an organization, the protective purposes of Rule 4.2 come into conflict with other important policies. In many lawsuits, important witnesses to the events from which the dispute arises are found among the ranks of the organization's employees.⁴⁷ Barring informal contact with employees creates a tension with the policy of assuring free access to witnesses, a policy designed to further the discovery and presentation of relevant evidence in litigation.⁴⁸ This is particularly true in an employment discrimination action, which concerns events and practices in the workplace.⁴⁹ When the organization is the defendant in such a suit, federal policies of uncovering and remedying discrimination in the workplace are implicated as well. Finally, precluding informal access to employees of an organizational party can conflict with the duty to conduct a factual investigation before commencing litigation, which is imposed on attorneys by Rule 11 of the Federal Rules of Civil Procedure.⁵⁰

A. Accessibility of Witnesses

Applied to an organizational party, Rule 4.2 can limit an attorney's access not only to those employees whose role in the litigation is analogous to that of individual parties,⁵¹ but also to employees who are potential witnesses.⁵² When it does so, the rule comes into direct conflict with the time-honored policy of free and informal access to witnesses.⁵³ The policy of free witness

⁴⁷ Note, *supra* note 9, at 1014.

⁴⁸ *Id.* at 1013.

⁴⁹ See *infra* notes 83-96 and accompanying text.

⁵⁰ See *supra* note 3, *infra* notes 109-10 and accompanying text (discussing investigation requirements of Rule 11).

⁵¹ These employees include, for example, employees from whose acts or omissions the organization's liability has arisen, see *infra* notes 148-49 and accompanying text, and employees whose responsibility includes directing the course of the litigation, see *infra* notes 209-10 and accompanying text.

⁵² One commentator has termed these employees "fortuitous witnesses." Stahl, *supra* note 9, at 1211-12 & n.103.

⁵³ *International Business Machs. Corp. v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975); see, e.g., *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966) (criminal defendant denied fair trial when prosecutor prohibits witnesses from speaking to defense counsel); *Frey v. Department of Health & Human*

access for all parties, like the policy of shielding parties from ex parte contact, plays an important role in the adversary system.⁵⁴ Witness accessibility serves the overriding function of trial, the search for truth.⁵⁵ It is crucial to uncovering and presenting all relevant evidence.⁵⁶ Indeed, an attorney's ability to prepare adequately for trial often hinges on the extent of informal access to potential witnesses.⁵⁷ Thus, a party's right to effective assistance of counsel can be impaired by unwarranted limits on such access.⁵⁸

When informal access is unavailable, a party must resort to formal discovery devices, such as depositions.⁵⁹ Although several

Servs., 106 F.R.D. 32 (E.D.N.Y. 1985) (lack of informal access to defendant's employees impairs right to fair trial in employment discrimination action); *Coppolino v. Helpern*, 266 F. Supp. 930, 935 (S.D.N.Y. 1967) (quoting from ABA Canons of Professional and Judicial Ethics, Canon 39 (1947) (a "lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal case without the consent of opposing counsel").

⁵⁴ *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 699-700 (D. Mass. 1990); *cf.* *Coppolino v. Helpern*, 266 F. Supp. at 935 (stating that "constitutional notions of fair play and due process dictate that [criminal] defense counsel be free from obstruction" in interviewing potential prosecution witnesses).

⁵⁵ *See Coppolino*, 266 F. Supp. at 935-36 (referring to trial, whether civil or criminal, as "quest for the truth").

⁵⁶ *See Frey v. Department of Health and Human Servs.*, 106 F.R.D. at 36.

⁵⁷ *Lizotte v. New York City Health & Hosps. Corp.*, No. 85 Civ. 7548 (WK), slip op. at 11 (S.D.N.Y. Mar. 13, 1990) (LEXIS, Genfed library, Dist file); *see Edelstein*, 526 F.2d at 42 (concluding lack of informal access to opponent's witnesses infringed upon ability to prepare case for trial); *Siguel*, 52 Fair Empl. Prac. Cas. at 699 (stating informal access necessary to performance of "traditional litigation functions of interviewing favorable witnesses and preparing them for trial"); *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19 (D. Mass. 1989). In *Morrison*, the plaintiff alleged that she had been denied tenure on the basis of her sex, religion, and ancestry, in violation of Title VII and 42 U.S.C. § 1981. She sought to interview ex parte certain university employees who had voted in favor of granting her tenure. In allowing her such access, the court noted that these employees had evidence favorable to the plaintiff and that therefore the plaintiff would likely call them as witnesses at trial. Unless the plaintiff could interview them outside of the presence of the university's attorney in advance of formal deposition or trial, however, her "ability to prepare her case in the traditional manner is substantially circumscribed." *Id.*

⁵⁸ *See Edelstein*, 526 F.2d at 42; *Coppolino*, 266 F. Supp. at 936.

⁵⁹ *See, e.g., Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037, 1043 (D.N.J. 1990); Comment, *supra* note 32, at 1279. Yet until legal action is formally commenced, depositions, like other

commentators have proclaimed depositions to be an adequate substitute for informal interviews,⁶⁰ most courts and commentators considering the question have recognized the unique and valuable function of these interviews in the adversary system.⁶¹ The informal interview provides a conducive setting in which to explore a potential witness's knowledge, memory, and opinion.⁶² Informal interviews promote candor⁶³ since witnesses are often

formal discovery devices, are unavailable under the Federal Rules. *See infra* note 114 and accompanying text.

⁶⁰ *See Public Serv. Elec. & Gas*, 745 F. Supp. at 1043; *Niesig v. Team I*, 149 A.D.2d 94, 106-07, 545 N.Y.S.2d 153, 159-60 (1989), *modified*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990). Significantly, the courts' pronouncements on the unimportance of *ex parte* interviews in these cases are open to question, particularly as applied to employment discrimination actions. In *Public Service Electric & Gas*, both parties were corporations, and the court found that "there is nothing particularly onerous" in requiring a corporate party resort to depositions of its opponents witnesses. 745 F. Supp. at 1043. Where the party seeking *ex parte* access is an individual, however, depositions can be onerous. *See infra* notes 99-100 and accompanying text. In *Niesig*, the appellate division declared that *ex parte* interviews, being "one-sided, inquisitorial procedures" are less effective in promoting the "search for truth" than adversarial depositions. 149 A.D.2d at 107, 545 N.Y.S.2d at 160. On appeal, the New York Court of Appeals rejected this characterization, declaring that formal depositions "are no substitute" for informal interviews. 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

⁶¹ *See infra* notes 62-71 and accompanying text.

⁶² *International Business Machs. v. Edelstein*, 526 F.2d at 41. The *Edelstein* court wrote:

[T]here is little relation between [an interview and a deposition]. [In an interview, a] lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion—frequently in light of information counsel may have developed from other sources.

Id. Carolyn Langenkamp, a practitioner in employment law, has emphasized the usefulness of informal contact where a witness' memory is concerned. When a witness is interviewed initially, her memory of specific details may be spotty. In Langenkamp's experience, however, the witness often will spontaneously recall important details in later follow-up conversations. Interview with Carolyn Langenkamp, Esq., in Davis, California (Nov. 27, 1990).

⁶³ *Lizotte v. New York City Health & Hosp. Corp.*, No. 85 Civ. 7548 (WK), slip op. at 10-11 (S.D.N.Y. Mar. 13, 1990) (LEXIS, Genfed library, Dist file). In *Lizotte*, the plaintiffs alleged that the defendant's psychiatric emergency room practices had denied them equal protection under the fourteenth amendment. The court ruled it proper that plaintiffs' counsel

more willing to discuss a matter informally.⁶⁴ On the other hand, the adversarial context of a deposition, with opposing counsel in attendance and a court reporter recording the witness' words verbatim, inhibits the free flow of information.⁶⁵

This difference reflects the difference in purpose between interviews and depositions: informal interviews are information-gathering tools while depositions are information-perpetuating devices.⁶⁶ An attorney typically decides to depose a nonparty witness only after conducting a preliminary interview with that witness.⁶⁷ As a prelude to formal discovery, interviews indicate the areas in which the financial and legal resources necessary for formal discovery can be put to use most efficiently.

Informal discovery is necessary to the smooth and efficient

and expert consultant have informal contact with defendant's emergency room employees during a proposed tour of the emergency room:

Plaintiffs' expert must depend upon staff members to supply him with the intimate details of the operations of the emergency rooms, including very specific recounting of the details of treatment or failures to treat. Candor on such matters is obviously likely to be enhanced by ex parte interviews.

Id.

⁶⁴ *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560, 565 (D. Utah 1990).

⁶⁵ *Edelstein*, 526 F.2d at 41; *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19 (D. Mass. 1989) (noting that presence of opposing counsel has tendency "to inhibit the free and open discussion which an attorney seeks to achieve at such interviews").

⁶⁶ *Edelstein*, 526 F.2d at 41 n.4 (noting that purpose of deposition is to perpetuate testimony and commit witness to specific representation of facts); *Mompoin v. Lotus Development Corp.*, 110 F.R.D. 414, 419 (D. Mass. 1986) (Citing *Edelstein*); *Niesig v. Team I*, 76 N.Y.2d 363, 372, 558 N.E.2d 1030, 1034, 559 N.Y.S.2d 493, 497 (1990) (noting that informal interviews are "off-the-record private efforts to learn and assemble, rather than perpetuate, information"). In *Mompoin*, an employment discrimination case, the court found that plaintiff's need for informal access was acute because of the difference between informal interviews and depositions:

In contrast to the pretrial interview with prospective witnesses, a deposition serves an entirely different purpose, which is to perpetuate testimony, the have it available for use at the trial, or to have the witness committed to a specific representation of such facts as he might present. A desire to depose formally would arise normally after a preliminary interview might have caused counsel to decide to take a deposition.

Id. at 419 (quoting *Edelstein*, 526 F.2d at 41 n.4).

⁶⁷ *Edelstein*, 526 F.2d at 41 n.4; see *Lizotte*, slip op. at 13-14.

working of our judicial system. Formal discovery is cumbersome and expensive,⁶⁸ and the overuse of devices such as depositions inhibits the flow of litigation, adds to its complexity, and increases its costs.⁶⁹ In an era when courts are seeking to streamline litigation,⁷⁰ appropriate use of informal discovery assumes heightened importance.⁷¹

The policy favoring free access to witnesses increases in importance when one party is an organization.⁷² Organizational parties often have exclusive possession of much of the information necessary for trial preparation, and statements of employees can be essential to its adversary's case.⁷³ Thus, if the adversarial process is to function fairly and effectively, the ethical rule must operate without significantly impairing a party's ability to gather evidence informally.⁷⁴

B. Title VII

This Comment focuses on the effect of Rule 4.2 in employment discrimination litigation. It does so because a workable method for determining which of an organization's employees are "parties" ideally should be flexible enough to apply in all disputes — from disputes arising from events occurring exclusively within an organization to those that concern events largely outside of the organization. Employment discrimination actions exemplify the former extreme, for they challenge conduct in an organization's workplace. When on-the-job conduct is at issue, access to other employees who may be witnesses assumes great importance for a

⁶⁸ See, e.g., *Bougé*, 132 F.R.D. at 565.

⁶⁹ *Id.*; see also *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 627 (S.D.N.Y. 1990) (citing cases); cf. *Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037, 1043 (D.N.J. 1990) (noting increased need for depositions increases costs and time of litigation, but finding this alternative preferable to needless litigation over propriety of informal interviews).

⁷⁰ *Bougé*, 132 F.R.D. at 565 n.12. The court noted that "[s]implification of litigation is an important concern for federal courts today." *Id.* (citing *Report of the Federal Courts Study Committee*, Apr. 2, 1990, ch. 5, and statement of Justices Stewart and Rehnquist in dissent from amendments to Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980)).

⁷¹ *Bougé*, 132 F.R.D. at 570 (stating federal courts should support informal interviews as a cost-efficient alternative to formal discovery).

⁷² See Note, *supra* note 9, at 1014.

⁷³ *Id.*

⁷⁴ See *id.*; Comment, *supra* note 32, at 1283-85.

plaintiff.⁷⁵ Yet under the ethical rule informal access can be problematic. An employment discrimination suit thus provides a striking example of a situation in which the need for free access to employees as witnesses comes into direct conflict with the protective policies of Rule 4.2.⁷⁶ Not surprisingly, a substantial proportion of the court decisions interpreting the application of the ethical rule to an organizational party involve employment disputes.⁷⁷

Employees are protected from discriminatory conduct in the

⁷⁵ *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 252 (D. Kan. 1988) (noting that in employment discrimination cases plaintiff's interest in access to employees increases in significance).

⁷⁶ See *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985). This conflict often works to the advantage of the organization. See Martin, *Dispositive Motions in Federal Employment Discrimination Cases*, in *EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS* 771, 780-82 (ALI/ABA Comm. on Continuing Prof. Educ. 1989).

⁷⁷ Nearly half (16 out of 35) of the cases located in research for this Comment that interpret the scope of the ethical rule involve disputes over employment: *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560 (D. Utah 1990) (seeking overtime compensation under FLSA and alleging wrongful termination); *Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842 (S.D.N.Y. 1990) (alleging race discrimination in promotion); *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697 (D. Mass. 1990) (alleging discrimination in violation of Title VII and breach of employment contract); *Cagguila v. Wyeth Laboratories*, 127 F.R.D. 653 (E.D. Pa. 1989) (alleging age discrimination in employment); *Morrison v. Brandeis Univ.*, 125 F.R.D. 14 (D. Mass. 1989) (alleging sex, religion, and ancestry discrimination in tenure denial); *Blakely v. Nestle Food Corp.*, 50 Fair Empl. Prac. Cas. (BNA) 789 (S.D. Tex. 1989) (alleging employment discrimination); *Chancellor v. Boeing Co.*, 678 F. Supp. 250 (D. Kan. 1988) (alleging unlawful denial of promotion); *Mompoin v. Lotus Dev. Corp.*, 110 F.R.D. 414 (D. Mass. 1986) (alleging race and national origin discrimination in promotion denial); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116 (D. Mont. 1986) (alleging retaliatory demotion in violation of Title VII); *Frey*, 106 F.R.D. 32 (alleging gender discrimination); *Massa v. Eaton Corp.*, 109 F.R.D. 312 (W.D. Mich. 1985) (alleging breach of employment contract and age discrimination); *Shealy v. Laidlaw Bros. Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 1223 (D.S.C. 1984) (alleging age discrimination); *Sperber v. Mental Health Center*, No. 82-C-7428, slip op. (S.D.N.Y. Nov. 21, 1982), *withdrawn* (alleging wrongful discharge); *Sobel v. Yeshiva Univ.*, 52 Fair Empl. Prac. Cas. (BNA) 1840 (S.D.N.Y. 1981) (alleging sex discrimination); *Hewlett-Packard Co. v. Superior Court*, 205 Cal. App. 3d 43, 252 Cal. Rptr. 14 (1988), *rev. denied, ordered depublished* (alleging defamatory employee evaluation); *Bobele v. Superior Court*, 199

workplace by a variety of state and federal statutes.⁷⁸ Title VII,

Cal. App. 3d 708, 245 Cal. Rptr. 144 (1988) (alleging sex and age discrimination in termination).

Other court decisions interpreting the ethical rule have arisen in widely divergent areas of law: *New York State Ass'n of Retarded Children v. Carey*, 706 F.2d 956 (2d Cir. 1983) (enforcing consent judgment regarding care of mentally retarded patients in suit under 42 U.S.C. § 1983); *Meat Price Investigators Ass'n v. Spencer Foods, Inc.* 572 F.2d 163 (8th Cir. 1978) (alleging antitrust violations); *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975) (alleging trademark infringement); *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037 (D.N.J. 1990) (alleging liability for toxic clean-up); *Garrett v. National R.R. Passenger Corp.*, No. 89-8326 (E.D. Pa. Aug. 14, 1990) (LEXIS, Genfed library, Dist file) (asserting FELA claim for personal injuries); *University Patents, Inc. v. Kligman*, 737 F. Supp. 325 (E.D. Pa. 1990) (seeking recovery of royalties for developing and licensing of skin product); *Lizotte v. New York City Health & Hosps. Corp.*, No. 85 Civ. 7548 (WK) (S.D.N.Y. Mar. 13, 1990) (LEXIS, Genfed library, Dist file) (alleging hospital emergency room practices violated equal protection clause); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990) (alleging misrepresentation in sale of company); *B.H. v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989) (alleging fourteenth amendment and state law violations arising out of placement of foster children); *In re Investigation of FMC Corp.*, 430 F. Supp. 1108 (S.D. W. Va. 1977) (involving criminal investigation); *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977) (seeking Medicaid implementation); *Triple A Mach. Shop, Inc. v. State*, 213 Cal. App. 3d 131, 261 Cal. Rptr. 493 (1989) (alleging violations of environmental law); *Mills Land & Water Co. v. Golden West Ref. Co.*, 186 Cal. App. 3d 116, 230 Cal. Rptr. 461 (1986) (alleging breach of commercial lease); *Monsanto Co. v. Aetna Casualty & Surety, C.A. No. 88C-JA-118* (Del. Super. Ct. Sept. 10, 1990) (LEXIS, States library, Del file) (alleging liability for clean-up of toxic sites); *DiOssi v. Edison, C.A. No. 85C-JN-65* (Del. Super. Ct. June 4, 1990) (LEXIS, States library, Del file) (alleging negligence in serving alcohol to minor); *Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc.*, 128 Ill. App. 3d 763, 471 N.E.2d 554 (1984) (alleging tortious interference with business relations); *Platt v. New Irvington Hotel, Inc.*, 85 N.J. Super. 330, 204 A.2d 709 (App. Div. 1964) (alleging loss of personal property); *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990) (alleging negligent personal injury); *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 691 P.2d 564 (1984) (alleging medical malpractice).

⁷⁸ See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1988) (prohibiting sex discrimination in payment of wages for equal work); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988) (prohibiting discrimination in employment on basis of age); Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988) (prohibiting race discrimination in making and enforcing contracts); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988) (prohibiting discrimination in employment on basis of race, color, religion, sex, or national origin); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101-108, 104 Stat. 327

the most comprehensive of the federal statutes, embodies the strong federal policy against discriminatory conduct in the workplace.⁷⁹ It prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.⁸⁰ Under Title VII it is unlawful to discriminate against applicants in hiring as well as against those already on the payroll "with respect to . . . compensation, terms, conditions, or privileges of employment."⁸¹ Courts have interpreted these prohibitions to apply to employer decisions concerning promotion,⁸² partnership,⁸³ layoff,⁸⁴ and discharge.⁸⁵ Title VII also prohibits sexual harassment on the job as a form of sex discrimination.⁸⁶

The principal problem individual plaintiffs face in establishing a Title VII violation is proving that an employer acted with a discriminatory purpose.⁸⁷ Discriminatory purpose can be estab-

(reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 267) (prohibiting discrimination in employment on the basis of handicap); California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12940-12948 (West 1980) (prohibiting discrimination in employment on basis of race, physical handicap or condition, marital status, or age); Minnesota Human Rights Act, MINN. STAT ANN. § 363.03 subdiv. 1 (West. Supp. 1991) (prohibiting discrimination in employment on basis of race, sex, national origin, religion, marital status, disability, age, or status with respect to public assistance); New York Human Rights Law, N.Y. EXEC. LAW § 296 (McKinney 1982 & Supp. 1991) (prohibiting discrimination in employment on basis of age, race, creed, color, national origin, sex, disability, or marital status).

⁷⁹ McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Frey v. Department of Health & Human Servs., 106 F.R.D. at 36.

⁸⁰ 42 U.S.C. § 2000e-2(a)(1) (1988).

⁸¹ *Id.*

⁸² *E.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Benzes v. Illinois Dep't of Mental Health & Dev. Disabilities, 810 F.2d 146 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987); Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984); Frey, 106 F.R.D. 32.

⁸³ *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Hishon v. King & Spalding, 467 U.S. 69 (1984).

⁸⁴ *E.g.*, Tye v. Board of Educ. Polaris Joint Vocational School Dist., 811 F.2d 315 (6th Cir.), *cert. denied*, 484 U.S. 924 (1987).

⁸⁵ *E.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983); Mompoin v. Lotus Devel. Corp., 110 F.R.D. 414 (D. Mass. 1986).

⁸⁶ 29 C.F.R. § 1604.11(a) (1989); *see, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

⁸⁷ Discriminatory intent is an essential element of proving a Title VII violation in a disparate treatment case. International Bhd. of Teamsters v.

lished either by direct or circumstantial evidence.⁸⁸ Direct evidence includes, for example, discriminatory statements by those in charge of making employment decisions.⁸⁹ Examples of circumstantial evidence include comparative evidence of more favorable treatment of other employees,⁹⁰ evidence of discrimination against other employees,⁹¹ statistical evidence,⁹² and evidence of an employer's attitude toward civil rights.⁹³ While the

United States, 431 U.S. 324, 335 & n.15 (1977). Disparate treatment occurs when an employer overtly treats an employee less favorably than others based on race, color, religion, sex, or national origin. *Id.* In contrast, in a disparate impact case, which challenges facially neutral employer policies and practices that perpetuate past discrimination, discriminatory intent need not be shown. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971). Disparate impact cases are typically established through use of statistical evidence. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Hazelwood School Dist v. United States*, 433 U.S. 299 (1977).

⁸⁸ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 270-71 (1989) (O'Connor, J., concurring); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 870 (11th Cir. 1985).

⁸⁹ *Miles v. M.N.C. Corp.*, 750 F.2d at 870. Thus, racist slurs constitute direct evidence of discrimination. *Id.* Statements revealing sexual stereotyping also constitute direct evidence of discrimination. *Price Waterhouse*, 490 U.S. at 272-73 (O'Connor, J., concurring).

⁹⁰ *See, e.g., Miles v. M.N.C. Corp.*, 750 F.2d at 871-72. Comparative evidence that nonminority employees in positions similar to a plaintiff's were treated more favorably than the plaintiff constitutes circumstantial evidence that the employer acted with discriminatory intent. *Id.*

⁹¹ *See, e.g., Allen v. County of Montgomery*, 788 F.2d 1485 (11th Cir. 1986) (holding evidence of prior incidents of discrimination admissible to prove discriminatory intent); *Phillips v. Smalley Maint. Servs.*, 711 F.2d 1524 (11th Cir. 1983) (upholding admission of former employee's testimony regarding treatment similar to plaintiff's to establish employer's intent, motive, and plan); *Scaramuzzo v. Glenmore Distilleries Co.*, 501 F. Supp. 727 (N.D. Ill. 1980) (admitting evidence of employer's prior discriminatory conduct).

⁹² Statistical evidence comparing, for example, the racial or gender composition of the pool of qualified applicants with those actually hired or promoted is an "appropriate" method for demonstrating intentional discrimination. *Miles v. M.N.C. Corp.*, 750 F.2d at 872. Because it demonstrates an employer's actions in reference to a group, such statistical evidence provides "a background against which to assess [a plaintiff's] individual claim." *Id.* at 873.

⁹³ A plaintiff can establish a "corporate state of mind" of discriminatory animus by showing, for example, that personnel not involved in a challenged employment decision harbored racially or sexually stereotypical views. *See Estes v. Dick Smith Ford, Inc.* 856 F.2d 1097, 1104 (8th Cir.

two types of evidence differ in terms of their effect on the plaintiff's burden of proof,⁹⁴ they share an important feature: both are under the employer's control.⁹⁵

Employment discrimination occurs in the workplace, and a defendant's employees are often the only witnesses with knowledge of the employer's conduct, practices, and other relevant

1988); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597-98 (1st Cir. 1987); *see also* J. W. FRIEDMAN & G. M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 101 (Supp. 1989). This evidence supports an inference that those officials who did make the challenged decision were motivated by discriminatory animus as well. *Id.* (citing *Conway v. Electro-Switch Corp.* at 597-98); *see also* *Mullen v. Princess Ann Volunteer Fire, Inc.*, 853 F.2d 1130 (4th Cir. 1988) (ruling exclusion of evidence of racial slur improper because probative of discriminatory outlook); *FED. R. EVID.* 404(b) (providing for admissibility of evidence of other wrongs or acts to prove motive or intent).

⁹⁴ A plaintiff who is able to present direct evidence of discriminatory animus substantially improves her chances of prevailing. The effect of direct evidence is to shift the burden of persuasion to the employer to demonstrate that in the absence of discriminatory motive it would have made the same decision. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989) (plurality opinion); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 869 (11th Cir. 1985). In the absence of direct evidence, a plaintiff faces a more difficult task. *See Price Waterhouse*, 490 U.S. 228; *Thompkins v. Morris Brown College*, 752 F.2d 558, 562-63 (11th Cir. 1985); *Miles v. M.N.C. Corp.*, 750 F.2d 867. A plaintiff who has only circumstantial evidence of discriminatory animus bears the burden of persuading the trier of fact that the employer's justification for its action is pretextual, and "unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

⁹⁵ Direct evidence of discrimination is especially "hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). It is either unavailable altogether or under the sole control of the employer. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979). While circumstantial evidence to prove pretext is more likely to exist, here again the employer controls nearly all such evidence. *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 699 (D. Mass. 1990); *Mompoint v. Lotus Development Corp.*, 110 F.R.D. 414, 419 (D. Mass. 1986). One employment law practitioner has noted the strategic importance of this fact:

The single biggest advantage an employer has in employment discrimination litigation is control over . . . the facts, i.e., witnesses and documents. By contrast to the typical commercial litigation, in an employment case the defense . . . generally controls almost all, if not all, the [documents and] witnesses other than the plaintiff.

Martin, *supra* note 76, at 780.

facts.⁹⁶ If informal access to these crucial witnesses is blocked, investigation and case preparation may be rendered impossible. Before institution of formal action, depositions and other formal discovery devices are unavailable.⁹⁷ Even when available after commencement of suit, the deposition is an inappropriate and unsatisfactory method for investigation and evidence gathering.⁹⁸ An individual plaintiff usually cannot afford the large numbers of depositions needed to contact all potential witnesses to ascertain simply whether they have useful information.⁹⁹ While this is true of individual parties in general, it is less of a concern when the opponent is also an individual, since the number of depositions that may be required to gather information from "parties" will be limited. When the opponent is an organization blocking *ex parte* access to large numbers of its employees, however, the number of depositions required to gather relevant information renders this method of fact gathering impracticable.

Permitting a corporate party to barricade most if not all of a plaintiff's potential witnesses from interviews may frustrate a Title VII plaintiff's right to a fair trial.¹⁰⁰ A broad reading of the

⁹⁶ See *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985); *Martin*, *supra* note 76, at 780-81.

⁹⁷ See *infra* note 114 and accompanying text.

⁹⁸ See *supra* notes 59-71 and accompanying text. An employee may be even more constrained in the presence of the employer's attorney at a deposition for fear of reprisal, despite Title VII's anti-retaliation provision. See 42 U.S.C. § 2000e-3(a). While this fear may be present in informal interviews as well, it can often be overcome with a promise of confidentiality. See generally M. ROSSEIN, *supra* note 2, § 15.4(4) (describing options for dealing with employees' fear of reprisal to gain information for case preparation).

⁹⁹ In employment discrimination litigation, the plaintiff's financial resources for pursuing a claim are typically limited. See, e.g., *Frey*, 106 F.R.D. at 36.

¹⁰⁰ See *id.* The court in *Frey* noted:

The [defendant] is a vast machinery encompassing many organizational departments and thousands of employees. . . . [I]t is essential to plaintiff's ability to fully prepare and present her case that [defendant's] employees be informally contacted

. . . .

. . . [T]o permit [the defendant] to barricade huge numbers of potential witnesses from interviews except through costly discovery procedures [would] frustrate the right of an individual plaintiff with limited resources to a fair trial

Id.; see also *International Business Machs. v. Edelstein*, 526 F.2d 37 (2d Cir.

rule would allow this result, and increase significantly the difficulties in preparing a plaintiff's case. This result contradicts Title VII's broad remedial policies because it deters victims of discrimination from pursuing their legal remedies.¹⁰¹

On the other hand, organizational defendants face heightened dangers in a Title VII action from uncounseled statements made by their employees in informal interviews.¹⁰² In a Title VII action, inconsistencies in a defendant's story can be sufficient to support a judgment for the plaintiff, even absent direct evidence of unlawful discrimination.¹⁰³ Thus, innocent misstatements by a defendant's employees — whether due to lack of care in choice of words, to incorrect recollection, or to misinformation — can be fatal to an employer's defense.¹⁰⁴

C. Rule 11

Lack of informal access to employees who are potential witnesses or sources of relevant information may also increase an attorney's exposure to sanctions under Rule 11 of the Federal Rules of Civil Procedure.¹⁰⁵ Rule 11 requires that an attorney investigate both the facts and the law before filing any paper, including the complaint.¹⁰⁶ Without informal access to the client's fellow employees, however, an attorney in an employment discrimination action may find this duty difficult to fulfill.¹⁰⁷ In

1975) (invalidating court order forbidding witness interviews without presence of opposing counsel because order impaired party's right to fair trial); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966) (holding that prosecutor's advice to witnesses not to speak with defendant's attorney denied defendant fair trial).

¹⁰¹ *Frey*, 106 F.R.D. at 36; *see also* *Shealy v. Laidlaw Bros.*, 34 Fair Empl. Prac. Cas. (BNA) 1223, 1225 n.1 (D.S.C. 1984) (noting that informal discovery in form of ex parte interviews serves remedial purposes of the Age Discrimination in Employment Act).

¹⁰² *See* *Martin*, *supra* note 76, at 787.

¹⁰³ *Id.* Changes in an employer's explanation for a challenged decision will always justify a finding of pretext in a Title VII action. J.W. FRIEDMAN & G.M. STRICKLER, *supra* note 93, at 59; *see also* *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101 (8th Cir. 1988) (holding changed explanation for termination might persuade trier of fact that employer was not telling truth); *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 21 (7th Cir. 1987) (holding inconsistencies in defendant's testimony could have led jury to disbelieve it).

¹⁰⁴ *Martin*, *supra* note 76, at 787.

¹⁰⁵ FED. R. CIV. P. 11.

¹⁰⁶ *Id.*

¹⁰⁷ *See supra* notes 75, 96-99 and accompanying text (describing need for

addition, evidence suggests that courts may be particularly ready to find Rule 11 violations in employment discrimination and other civil rights suits.¹⁰⁸ These factors contribute to the necessity of informal employee access in employment discrimination suits, and argue for a narrow reading of the ethical rule.

Rule 11 imposes an affirmative duty on attorneys to make "reasonable inquiry" into the facts and law of the case before filing pleadings or other papers.¹⁰⁹ If an attorney fails to do so, the rule mandates sanctions.¹¹⁰ Since its amendment in 1983, the rule has spawned an "avalanche of 'satellite litigation.'" ¹¹¹ Defense counsel in particular routinely use Rule 11 motions in order to force plaintiffs to justify the factual and legal underpinnings of their suits.¹¹² It is therefore incumbent upon all attorneys to conduct thorough prelitigation investigations and continue to investigate throughout the litigation process.

As discussed earlier, a characteristic of employment discrimination suits is that virtually all the evidence is under the employer's

access to employees to uncover facts crucial to employment discrimination case); see also Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 197 (1988). Professor Vairo notes the difficulties employment discrimination plaintiffs face satisfying Rule 11 since the information underlying the claim is often in the defendant's hands. *Id.*

¹⁰⁸ See *infra* notes 118-20 and accompanying text.

¹⁰⁹ FED. R. CIV. P. 11. The rule provides:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law

Id.

¹¹⁰ *Id.* The language of the rule is mandatory:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id. (emphasis added).

¹¹¹ See, e.g., Vairo, *supra* note 107, at 195.

¹¹² *Id.* Professor Vairo notes that the rule "appears to permit litigants to challenge their opponents' papers not on the actual merits of the case but rather merely on the sufficiency of factual or legal support thought to be available to an attorney at the time the papers were signed." *Id.* at 196.

control.¹¹³ Conducting a prelitigation investigation in these cases is therefore highly problematic. Until legal action is commenced, depositions and other formal discovery devices are generally unavailable.¹¹⁴ An attorney contemplating an employment discrimination action does have access to investigative files compiled by the EEOC or state agency as part of the administrative process.¹¹⁵ In the great majority of cases, however, the agency's investigation is either nonexistent or seriously inadequate.¹¹⁶ This resource is therefore likely to be of limited value in complying with Rule 11. Accordingly, an attorney will find the duty imposed by Rule 11 difficult if not impossible to fulfill without informal access to her client's fellow employees. Since the ethical

¹¹³ See *supra* note 95 and accompanying text; *cf.* Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 496-98 (1989) (stating civil rights litigants are rarely able to obtain the information necessary for factual preparation of complaints from corporate or governmental opponents).

¹¹⁴ See FED R. CIV. P. 32(a) (depositions); *id.* 33(a) (interrogatories); *id.* 34(b) (production of documents and things); *id.* 35(a) (physical and mental examinations); *id.* (36)(a) (requests for admissions). The Federal Rules do provide for depositions before commencement of action where there is a need to perpetuate testimony. *Id.* 27. In order to take a deposition under Rule 27, the attorney must move for a court order, which is granted only if the court "is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice." *Id.* As investigative devices, prelitigation depositions are of relatively little use, since a plaintiff must have some idea of the testimony involved and convince the courts of its unavailability at trial in order to make the showing required. Accordingly, precomplaint depositions under Rule 27 are a relatively unused tactic. See A. RUZICHO, L. JACOBS & L. THRASHER, *EMPLOYMENT DISCRIMINATION LITIGATION* § 701, at 272 (1989).

¹¹⁵ See 29 C.F.R. § 1601.22 (1990); *supra* note 2.

¹¹⁶ The EEOC closes its files, whether or not it has begun or completed its investigation, upon the charging party's request for a right-to-sue letter, when 180 days have passed since the filing of the charge, or when the agency determines it cannot complete administrative process before 180 days elapse. 42 U.S.C. § 2000e-5; 29 C.F.R. § 1601.28(a)(2) (1990). The EEOC rarely completes its process within 180 days. M. ROSSEIN, *supra* note 2, § 12.5(1) at 12-21 (citing UNITED STATES GENERAL ACCOUNTING OFFICE, *EQUAL EMPLOYMENT OPPORTUNITY: EEOC AND STATE AGENCIES DID NOT FULLY INVESTIGATE DISCRIMINATION CHARGES 14* (1988) [hereafter GAO EEO REPORT]). In those cases the EEOC does investigate, the investigations are "slow," "poor," and often "seriously deficient." *Id.* at 12-22 & n.95 (citing GAO EEO REPORT). This is true of many, if not most, state agencies as well. *Id.* at 12-21 n.95 (citing R. KRAUS, *STATE CIVIL RIGHTS AGENCIES: THE UNFULFILLED PROMISE* (1986)).

rule applies in threatened as well as pending litigation,¹¹⁷ it may limit informal access for prelitigation investigation.

It is doubtful whether courts take these factors into account in determining if a plaintiff's attorney has made a "reasonable inquiry."¹¹⁸ Indeed, it appears that the federal courts have enforced Rule 11 more vigorously in "disfavored" litigation such as civil rights and employment discrimination suits.¹¹⁹ Attorneys in these cases find themselves in a double bind: they cannot get meaningful access to information before litigation, and they face sanctions if they litigate without the information.¹²⁰ The more broadly the ethical rule is read — and the more it precludes informal prelitigation access to a defendant's employees — the more this situation is exacerbated.

As the above discussion shows, there are several important interests that conflict with Rule 4.2's protective purposes. A

¹¹⁷ See *People v. Sharp*, 150 Cal. App. 3d 13, 18, 197 Cal. Rptr. 436, 439 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (1989) (stating that rule applies to any represented person "whether or not a party to a formal proceeding").

¹¹⁸ See Tobias, *supra* note 113, at 493. Professor Tobias found that "judges have rigorously enforced against civil rights plaintiffs . . . rule 11's requirement that there be reasonable pre-filing investigation into the facts. . . . even though much information important to stating a claim . . . seemed to be in the defendants' possession and available only through discovery" *Id.*

¹¹⁹ Vairo, *supra* note 107, at 200. Professor Vairo conducted a study of the reported Rule 11 decisions between August 1, 1983 and December 15, 1987. Civil rights and employment discrimination cases were the subject of 28.1% of the cases in which sanctions were requested. *Id.* Plaintiffs were the target in 86.4% of these civil rights and employment discrimination cases, and were sanctioned 71.5% of the time. *Id.* In other types of litigation, plaintiffs were the targets 78% of the time, and were sanctioned only 54.2% of the time. *Id.* at 201. While Vairo found it "difficult to generalize" about the meaning of these statistics, she found the increased Rule 11 activity in employment discrimination and other disfavored litigation "extremely troubling." *Id.*

Other studies have yielded similar results, leading numerous commentators to call for changes in Rule 11 enforcement in "disfavored" litigation. See, e.g., LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331, 352-57 (1988); Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground in Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 404-05 (1990); Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1338-43 (1986); Tobias, *supra* note 113.

¹²⁰ See *Johnson v. United States*, 788 F.2d 845, 856 (2d Cir.) (Pratt, J., dissenting), *cert. denied*, 479 U.S. 914 (1986).

determination of the scope of the ethical rule's application to an organizational party must balance both the rule's protective purposes¹²¹ and the conflicting policy of free accessibility of witnesses.¹²² When the organizational party is a defendant in an employment discrimination suit, witness accessibility is crucial both to a plaintiff's case¹²³ and to her attorney's duties under Rule 11.¹²⁴ At the same time witness accessibility may also endanger a defendant's interests.¹²⁵ An equitable approach to classifying which employees are "parties" under the ethical rule should serve the interests of plaintiffs and defendants alike. Whether such an approach is possible is unclear, for interpreters of the ethical rule have yet to agree on an ideal formulation.¹²⁶

III. METHODS OF DEFINING "PARTY" WITHIN AN ORGANIZATION

Courts, bar associations, and commentators have formulated a variety of tests for determining which employees of an organizational party should be treated as parties for purposes of Rule 4.2.¹²⁷ There is little unanimity of opinion, however, leading one court to conclude after reviewing this area of law that the boundaries of the ethical rule are "presently [in a] confused state."¹²⁸

A. *The Comment to Rule 4.2*

The drafters of the Model Rules of Professional Conduct provided a guide to interpreting the ethical rule in a comment to Rule 4.2 (the Comment).¹²⁹ The Comment explains and illustrates how the rule applies to organizational parties.¹³⁰ It identifies three categories of employees that an attorney should treat as parties for purposes of the rule: (1) employees with managerial

¹²¹ See *supra* notes 24-46 and accompanying text.

¹²² See *supra* notes 51-74 and accompanying text.

¹²³ See *supra* notes 75-101 and accompanying text.

¹²⁴ See *supra* notes 105-20 and accompanying text.

¹²⁵ See *supra* notes 102-04 and accompanying text.

¹²⁶ See *infra* notes 127-298 and accompanying text.

¹²⁷ See *infra* notes 129-285 and accompanying text.

¹²⁸ *Siguel v. Board of Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 701 (D. Mass 1990).

¹²⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (1989).

¹³⁰ The drafters of the Model Rules cautioned that while "[t]he Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . [and is] intended as [a] guide[] to interpretation, . . . the text of each Rule is authoritative." *Id.* Scope.

responsibility; (2) employees whose acts or omissions concerning the subject of the representation may be imputed to the organization for liability purposes; and (3) employees whose statements may constitute admissions on the part of the organization.¹³¹

Most of the states that have adopted the Model Rules have adopted the Comment as well.¹³² While some courts faced with interpreting the ethical rule's scope as applied to an organizational party cite the Comment as support for their decisions,¹³³ few embrace the Comment's categories wholeheartedly.¹³⁴

¹³¹ *Id.* Rule 4.2 comment.

¹³² *See, e.g.*, DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (1985); PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (1988); TEXAS DISCIPLINARY RULES OF CONDUCT Rule 4.02 (1988). California recently adopted the California Rules of Professional Conduct, which differ in some ways from both the older Model Code and the more recent Model Rules. California's equivalent of Model Rule 4.2, Rule 2-100, incorporates the Comment into the rule itself:

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes: (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-100 (1989).

¹³³ *E.g.*, *Garrett v. National R.R. Passenger Corp.*, No. 89-8326 (E.D. Pa. Aug. 16, 1990) (LEXIS, Genfed library, Dist file); *University Patents, Inc. v. Kligman*, 737 F. Supp. 325 (E.D. Pa. 1990); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990); *Cagguila v. Wyeth Laboratories Inc.*, 127 F.R.D. 653 (E.D. Pa. 1989); *DiOssi v. Edison*, No. 85C-JN-65 (Del. Super. Ct. June 4, 1990) (LEXIS, States library, Del file).

¹³⁴ *See generally infra* notes 175-295 and accompanying text (discussing approaches that do not correspond to Comment's approach). One court observed that courts need not accept the Comment's construction of the ethical rule if it would be "contrary to good practice." *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560, 564 (D. Utah 1990) In general, when courts are called upon to evaluate the ethical conduct of attorneys in a particular lawsuit, they are not bound by the ethical rules in the same way as they are by statutes or rules of court. Instead, using the rules as guidelines,

Courts more commonly look to the Comment as a departure point in their analyses.¹³⁵ The following sections examine and analyze each of the Comment's categories.

1. Employees with Managerial Responsibility

The Comment to Rule 4.2 carves out a large segment of corporate employees and classifies them as parties for purposes of the ethical rule: those employees who have "managerial responsibility."¹³⁶ Theoretically, courts adopting this criterion would prohibit *ex parte* contact with all management employees.¹³⁷ In many cases, however, courts have sought to narrow this category further.

One case that applies the criterion literally is *Massa v. Eaton*,¹³⁸ an employment discrimination action. In *Massa*, the court held that all management employees are "parties" for purposes of the ethical rule, reasoning that allowing any manager to be interviewed *ex parte* would endanger the employer's interests.¹³⁹ The

courts examine all the interests at stake, those of lawyers and nonlawyers alike. *Polycast Technology Corp.*, 129 F.R.D. at 625; *Sobel v. Yeshiva Univ.*, 52 Fair Empl. Prac. Cas. (BNA) 1840 (S.D.N.Y. 1981); *Niesig v. Team I*, 76 N.Y.2d 363, 369, 558 N.E.2d 1030, 1032, 559 N.Y.S.2d 493, 495 (1990); *cf.* *Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842, 1843 (S.D.N.Y. 1990) (stating court's role in enforcing ethical standards is limited to remedying conduct threatening to taint litigation; concluding that *ex parte* contact with opponent's employees would taint trial if improper).

¹³⁵ See, e.g., *Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Serv.*, 745 F. Supp. 1037 (D.N.J. 1990) (interpreting Comment criteria to block contact with all present and former employees); *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560 (D. Utah 1990) (rejecting Comment's criteria as overly broad); *Polycast Technology Corp.*, 129 F.R.D. 621 (citing Comment although neither Model Rules nor Comment adopted in jurisdiction); *B.H. v. Johnson*, 128 F.R.D. 659, 661 & nn.2-3 (N.D. Ill. 1989) (citing Comment for persuasive value but rejecting criteria as overly broad); *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990) (same). The Comment's criteria fail to provide clear guidance; one commentator has noted that among the various formulations for interpreting the ethical rule its "language is probably the foggiest of all." *Wyeth, Talking to the Other Side's Employees and Ex-Employees*, 15 LITIGATION, Summer 1989, at 8, 10.

¹³⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment.

¹³⁷ *Massa v. Eaton*, 109 F.R.D. 312 (W.D. Mich. 1985); *Shealy v. Laidlaw Bros., Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 1223 (D.S.C. 1984).

¹³⁸ 109 F.R.D. 312.

¹³⁹ *Id.* at 315. The plaintiff in *Massa*, a manager himself, conducted informal discovery by interviewing other management employees about his

court rejected less restrictive approaches that classify as parties only those managers in the organization's "control group"¹⁴⁰ or only managers authorized to make "binding admissions."¹⁴¹ Declaring all management employees off limits to adversary counsel, the court reasoned, would give attorneys and courts maximum certainty and predictability about what constitutes ethical and unethical conduct.¹⁴²

A bright line test that classifies all management employees as parties appears to have the advantage of predictability.¹⁴³ Yet it also has the drawback of limiting access to many middle and lower level managers whose responsibilities are unconnected with the subject of the litigation and who may be important as witnesses or possess relevant information. For example, a plaintiff in an employment discrimination suit who is herself a management employee would be unable to contact her peers for information about their own experiences.¹⁴⁴ Although this information might provide important evidence,¹⁴⁵ the "managerial responsibilities"

employer's management structure and policies to gain information to support his allegations of age discrimination. *Id.* at 313. The defendant employer sought a protective order, alleging that by allowing the client to conduct ex parte interviews with other management employees, the attorney had violated the ethical rule. *Id.* The court agreed. It noted that the information the plaintiff gained from "conversations with his old acquaintances" could be damaging to the employer's interests, since the allegations in the lawsuit dealt with management structure and policies. *Id.* at 314.

¹⁴⁰ *Id.* at 313. See generally notes 208-21 and accompanying text (discussing control group standard).

¹⁴¹ *Massa*, 109 F.R.D. at 313-14.

¹⁴² *Id.* at 315.

¹⁴³ Theoretically, determining which employees are management employees should be straightforward. This may not be the case in practice, however. In one recent California case, *Triple A Mach. Shop v. State*, 213 Cal. App. 3d 131, 261 Cal. Rptr. 493 (1989), the court applied California's new Rule 2-100, which prohibits ex parte contact with "managing agents." See *supra* note 132. The court ruled that ex parte contact with the assistant facilities manager about storage and disposal of toxic substances at the corporation's facility did not violate the ethical rule. *Triple A Mach. Shop*, 213 Cal. App. 3d at 140, 261 Cal. Rptr. at 499.

¹⁴⁴ The court in *Sobel v. Yeshiva Univ.*, 52 Fair Empl. Prac. at Cas. (BNA) 1840 (S.D.N.Y. 1981), rejected just such a result, calling it "absurd." *Id.* at 1841.

¹⁴⁵ A plaintiff attempting to establish discriminatory animus can do so with circumstantial evidence, such as comparative evidence of treatment of

criterion would limit contact with these sources of information and potential witnesses to costly post-complaint depositions.

Perhaps because of this inherent inequity, many courts have narrowed the managerial responsibility category. For example, some have interpreted the category to contain only those employees whose managerial responsibilities relate to the matter in question.¹⁴⁶ Others have interpreted the criterion as including only "managing agents," an even narrower category of employees whose deposition testimony may be admitted at trial under the Federal Rules of Civil Procedure.¹⁴⁷

2. Employees Whose Acts Give Rise to the Organization's Liability

The Comment to Rule 4.2 also uses an imputed action criterion to define "parties." The Comment states that a "person whose act or omission in connection with the [lawsuit's subject] matter may be imputed to the organization for purposes of civil or criminal liability" qualifies as a "party" under the rule.¹⁴⁸ In a Title VII discrimination suit, for example, these are the employees who made the discriminatory decisions or carried out discriminatory actions.¹⁴⁹

other employees in similar positions, and evidence of similar acts of discrimination. See *supra* notes 87-93 and accompanying text.

¹⁴⁶ *E.g.*, *Porter v. Arco Metals*, 642 F. Supp. 1116, 1118 (D. Mont. 1986) (requiring "significant managerial responsibility in the matter in question"). At least one state has added this proviso in adopting the Comment to Rule 4.2. See TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 4.02 comment (1988). The Texas rule's comment defines as parties "persons having managerial responsibility on behalf of the organization *that relates to the subject of the representation.*" *Id.* (emphasis added).

¹⁴⁷ FED. R. CIV. P. 32(a)(2). The construction given to "management agent" is more restrictive than "management employee." It connotes an employee with the sufficient authority to commit the employer through her statements. See *Sobel v. Yeshiva Univ.*, 52 Fair Empl. Prac. Cas. at 1841. Indeed, one draft version of comment to Model Rule 4.2 used just this terminology. See *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 627 (S.D.N.Y. 1990) (quoting text of Comment to Model Rule 4.2, Proposed Final Draft (1981) as prohibiting *ex parte* contact with "managing agents of a party that is a corporation or organization, for such persons speak for the organization"). See *generally infra* notes 222-46 and accompanying text (discussing "managing speaking agent" approach).

¹⁴⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment.

¹⁴⁹ *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 35 (E.D.N.Y. 1985). In Title VII actions, employers are generally held strictly

Courts advocating this criterion¹⁵⁰ have not articulated its rationale at any length. Opportunities for doing so do not arise with great frequency, since plaintiffs often join as defendants the employees whose acts created the employer's liability.¹⁵¹ The imputed action approach appears to rest on the close resemblance between employees who have embroiled their employer in a legal dispute and individual parties who have embroiled themselves.

Other courts, however, have rejected the imputed action criterion,¹⁵² reasoning that the rule's purpose is not to protect a corporate party from the revelation of prejudicial facts.¹⁵³ Nevertheless, fairness seems to dictate employing this criterion. To promote effective representation, the employer's attorney should be present to ensure that the employee's statements about

and vicariously liable for the discriminatory acts of their employees when the acts are within the scope of the employees' apparent authority. *North v. Madison Area Ass'n for Retarded Citizens-Developmental Centers Corp.*, 844 F.2d 401, 407 (7th Cir. 1988); see *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *Flanagan v. Aaron E. Henry Community Health Serv. Center*, 876 F.2d 1231, 1234-35 (5th Cir. 1989).

¹⁵⁰ See *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv.*, 745 F. Supp. 1037 (D.N.J. 1990); *Polycast Technology Corp. v. Uniroyal*, 129 F.R.D. at 626-27; *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988); *Amarin Plastics, Inc., v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987); *Frey v. Department of Health and Human Servs.*, 106 F.R.D. at 37 n.2; *Sperber v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, No. 82-C-7428, slip op. (S.D.N.Y. Nov. 21, 1983), *vacated and withdrawn* (Dec. 13, 1983).

¹⁵¹ See *Frey*, 106 F.R.D. at 35.

¹⁵² See *Sobel v. Yeshiva Univ.*, 52 Fair Empl. Prac. Cas. (BNA) 1840 (S.D.N.Y. 1981) (rejecting argument that contact be barred because employees may have been responsible for discriminatory acts and finding that this possibility argued for informal contact as efficient investigation technique); *Fair Automotive Repair, Inc. v. Car-X Serv. Sys.*, 128 Ill. App. 3d 763, 471 N.E.2d 554 (1984) (allowing ex parte contact with employees whose statements disparaged plaintiff and gave rise to employer's liability for interference with business relations); *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 200, 691 P.2d 564, 569 (1984) (allowing contact with nurses involved in plaintiff's care; finding no reason to distinguish between employees who had witnessed event and employees whose acts or omissions gave rise to hospital's liability for medical malpractice); cf. *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19 (D. Mass. 1989) (allowing employment discrimination plaintiff to interview ex parte fellow professors involved in decision to deny her tenure).

¹⁵³ *Wright v. Group Health Hosp.*, 103 Wash. 2d at 200-01, 691 P.2d at 569.

her actions do not prejudice the interests of the legally responsible entity.¹⁵⁴ Extending the protections of the ethical rule to both employee and employer in this situation seems to further its underlying purposes of fairness and effective representation.

3. Employees Whose Statements May Constitute Admissions by the Organization

The Comment to Rule 4.2 states that the prohibition on *ex parte* contact applies to any employee of an organizational party "whose statement may constitute an admission on the part of the organization."¹⁵⁵ This vicarious admissions criterion seeks to further the ethical rule's purpose of protecting parties from inadvertently making uncounseled statements that the adversary may later use to the parties' detriment. It extends this protection to an organization by blocking access to employees who may make statements admissible into evidence over hearsay objections as admissions of a party opponent.¹⁵⁶ Admissions of a party opponent are considered among the most persuasive forms of evidence.¹⁵⁷ As a result, an organization has a strong interest in preventing employees making such statements to adversary counsel. The issue is to what extent the ethical rule legitimately protects this interest.

The vicarious admissions criterion follows from the evidentiary rules governing imputation of an employee's statement to an employer.¹⁵⁸ These rules vary by jurisdiction. In jurisdictions that follow the traditional common law rule, an employee's admissions will be imputed to the employer only if the employee

¹⁵⁴ See Miller & Calfo, *Ex parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 BUS. LAW. 1053, 1069 (1987); see also *supra* notes 30-38 and accompanying text.

¹⁵⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment.

¹⁵⁶ While the Comment does not specifically refer to evidentiary standards governing hearsay admissions by employees of an organization, most authorities assume this to be its import. See, e.g., *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 328 (E.D. Pa. 1990); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 627 (S.D.N.Y. 1990); *B.H. v. Johnson*, 128 F.R.D. 659, 662 (N.D. Ill. 1989); *Wright v. Group Health Hosp.*, 103 Wash. 2d at 200-01, 691 P.2d at 569.

¹⁵⁷ R. J. CARLSON & E. J. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE* § 7.2, at 106 (1989). The authors observe that "among experienced trial attorneys . . . many, if not most, would concur that an admission by the party-opponent is probably the most convincing evidence." *Id.*

¹⁵⁸ See *supra* note 156.

had authority to speak on the employer's behalf.¹⁵⁹ These jurisdictions interpret the common law rule restrictively, typically imputing to the employer only the statements of high-ranking executives and spokespersons.¹⁶⁰ On the other hand, federal courts and jurisdictions that follow the Federal Rules of Evidence employ a broader standard: an employee's admission is attributable to the employer if it concerns a subject within the scope of the employee's duties and if the employee made the statement while working for the employer.¹⁶¹

¹⁵⁹ See, e.g., CAL. EVID. CODE § 1222 (West 1966) ("Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement."); N.J. RULES OF EVID. 63(8)(a) (1969) ("A statement is admissible against a party (a) if it was made by a person authorized by the party to make a statement or statements concerning the subject matter of the statement.").

¹⁶⁰ MCCORMICK ON EVIDENCE § 267, at 788 (E. Cleary 3d ed. 1984). The treatise states: "[T]he statements of an agent *employed to give information* (a so-called 'speaking agent') may be received as an employer's admissions, regardless of want of authority to act otherwise. . . ." *Id.* (emphasis added).

See, e.g., *Gelinas v. New England Power Co.*, 359 Mass. 119, 268 N.E.2d 336 (1971) (holding statement by alleged employee on behalf of employer inadmissible in absence of evidence of authority or identity as defendant's employee); *Georges v. American Export Lines, Inc.*, 77 A.D.2d 26, 432 N.Y.S.2d 165 (1980) (noting when agent's responsibilities include making statements on principal's behalf, agent's statements admissible against principal); *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wash. 2d 153, 422 P.2d 496 (1967) (holding inadmissible statements by maintenance manager for commercial fishing company because he lacked speaking authority); *Griffiths v. Big Bear Stores, Inc.*, 55 Wash. 2d 243, 347 P.2d 532 (1959) (holding store manager's statement concerning customer's injury in store admissible over hearsay objections because of authority to speak for employer).

¹⁶¹ FED. R. EVID. 801(d)(2)(D). Rule 801(d) provides in relevant part:

(d) *Statements which are not hearsay.* A statement is not hearsay if . . . (2) *Admission by party-opponent.* The statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship

Id. The broad scope of admissibility under Rule 801(d)(2)(D) rests on the "view that an agent or servant who speaks on any matter within the scope of his agency or employment during the existence of that relationship, is unlikely to make statements damaging to his principal or employer unless

Thus, applying the vicarious admissions criterion produces two very different results depending on the applicable evidentiary standard. In jurisdictions following the common law rule, the prohibition on ex parte contact applies to high-ranking executives and to corporate spokespersons, since only employees at this level are "authorized" to make statements on their employer's behalf.¹⁶² In jurisdictions following the Federal Rules, however, the prohibition on ex parte contact extends to all employees communicating about subjects within the scope of their employment, since these statements can be imputed to the employer.¹⁶³

those statements are true." *B.H. v. Johnson*, 128 F.R.D. 659, 662 (N.D. Ill. 1989) (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1172 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982)).

Approximately 30 states have adopted vicarious admissions rules with text substantially identical to Federal Rule 801(d)(2)(D). See G. JOSEPH, S. SALZBURY & TRIAL EVIDENCE COMMITTEE OF THE ABA SECTION OF LITIGATION, *EVIDENCE IN AMERICA* § 56.2, at 4, § 56.4, at 27-47 (1987) (setting forth text of state evidentiary rules following Rule 801(d)).

¹⁶² One court interpreting the ethical rule in a jurisdiction following the common law rules of evidence, observed that using the vicarious admissions test would give ex parte access to all employees. The court reasoned it would be inconceivable for a corporate party to confer on any employee the authority to make ex parte statements to adversary counsel. *Niesig v. Team I*, 149 A.D.2d 94, 104-05, 545 N.Y.S.2d 153, 158 (1989), *modified*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990). This interpretation echoes the explanation for the broad scope of the federal rule given by the Advisory Committee on the Proposed Rules of Evidence:

The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment.

FED. R. EVID. 801 advisory committee's note (to subdivision (d)(2)(D)).

¹⁶³ See *Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037, 1042 (D.N.J. 1990). Before the promulgation of the Model Rules and the Comment's vicarious admission criterion, several bar associations had interpreted the ethical rule to bar ex parte contact with all employees of an organizational party when the interview concerned matters within the scope of their employment, a standard coterminous with the scope of Federal Rule of Evidence 801(d)(2)(D). Committee on Professional Ethics, Association of the Bar of the City of New York, Opinion No. 80-46 (1982); Committee on Professional Ethics, Massachusetts Bar Association, Formal Opinion No. 82-7 (1982). This approach, the "scope of

Because the scope of the ethical rule may depend on whether the plaintiff files suit in state or federal court, the vicarious admissions criterion can yield inconsistent results within the same state.

This inconsistency is but one of the flaws of the vicarious admissions criterion. In jurisdictions following federal evidentiary standards, "[i]t leaves few if any employees outside the reach of the ethical rule."¹⁶⁴ Thus, it bars contact not only with employees whose acts or omissions created their employer's liability, but may also apply to employees who were simply witnesses to such conduct.¹⁶⁵ Giving the ethical rule such a broad scope means that formal discovery must be used to interview most if not all employees. The result is that plaintiffs are substantially limited in prelitigation investigation. In addition, litigation becomes more cumbersome, time-consuming, and expensive. The impact on employment discrimination plaintiffs is particularly detrimental, since their need for access to other employees is acute and their resources typically limited. Many will be deterred from pursuing litigation;¹⁶⁶ those who are not will face substantial difficulty in preparing their cases, endangering their right to a fair trial.¹⁶⁷

Whether these consequences are justified by legitimate policy objectives is doubtful. The organization does obtain maximum protection under the vicarious admissions criterion. One court, however, has found this level of protection far in excess of ethical requirements and tantamount to an unjustified privilege.¹⁶⁸ Fur-

employment test," is substantially similar to the vicarious admissions criterion espoused by the Comment to Rule 4.2. *See generally* Comment, *supra* note 32, at 1290-94 (analyzing and criticizing scope of employment test). At least one state court has rejected using such a standard, given the more restrictive common law evidentiary rule in effect in the jurisdiction. *See Niesig v. Team I*, 76 N.Y.2d 363, 374, 558 N.E.2d 1030, 1035, 559 N.Y.S.2d 493, 498 (1990).

¹⁶⁴ *B.H. v. Johnson*, 128 F.R.D. 659, 661 (N.D. Ill. 1989).

¹⁶⁵ *See Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 627 (S.D.N.Y. 1990). *But see Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842, 1845 (S.D.N.Y. 1990) (interpreting federal evidentiary standard to preclude admission of employee statements that concern events observed if observation not part of job duties).

¹⁶⁶ *See Niesig v. Team I*, 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

¹⁶⁷ *See Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985).

¹⁶⁸ *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560, 566 (D. Utah 1990). Any ethical concept that restricts employees from speaking and

ther, the value of any admissions gained in *ex parte* interviews is limited in several respects. First, they are not conclusive and may be contradicted or explained.¹⁶⁹ Second, the further the employee is from the upper executive echelons of the organization, the less persuasive such statements become.¹⁷⁰ Therefore, excluding contact only with those employees whose statements might be truly prejudicial — upper level management — strikes a more appropriate balance between the organization's interests and its opponent's right to witness access.¹⁷¹ Several courts have devised alternative ways to protect organizations from the potential prejudice of admissions by their employees: rather than prohibit the *ex parte* contacts, they have conditioned the contacts on the nonadmissibility of any hearsay statements gained as a result.¹⁷²

In sum, only the Comment's second category, which includes employees whose actions may be imputed to the organization, is free from concern. It makes sense, if only because these employees most resemble individual parties. The Comment's first category, which includes all managers within the rule's protection, arguably offers a predictable standard. However, it does so at the expense of witness availability, since the Comment makes no dis-

curtails access to evidence, the court noted, "must be premised on a very special justification." *Id.* In this court's view, the vicarious admissions criterion has no such justification, since it "does not protect the public interest or relate to avoiding the corruption of the legal profession." *Id.* at 567. Instead, it serves almost exclusively the organization's interests by restricting legitimate inquiry and reinforcing "structured economic power and authority." *Id.*

¹⁶⁹ McCORMICK ON EVIDENCE, *supra* note 160, § 262, at 776. Admissions by employees of a party opponent are evidential admissions, not judicial admissions, and are on a lower and less conclusive level than a party's admissions in pleadings and stipulations. *Id.*

¹⁷⁰ See Comment, *supra* note 32, at 1302. The comment's author draws an example: "A statement made by Exxon's president, for example, will have more probative value than a statement made by a janitor at Exxon." *Id.*

¹⁷¹ This approach resembles the "managing speaking agent" test, discussed *infra* notes 222-51 and accompanying text.

¹⁷² See *B.H. v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989) (finding condition "an intelligent reconciliation" of evidentiary and ethical rules); *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 37-38 (E.D.N.Y. 1985). *But see Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 18 (D. Mass. 1989) (criticizing exclusion of *ex parte* admissions as unsatisfactory solution to dilemma).

inction between managers whose responsibilities relate to the legal controversy and those who are merely witnesses. The Comment's third category, which includes employees whose statements can constitute admissions, furthers the rule's purpose of preventing situations in which opposing counsel can improperly obtain prejudicial statements. Yet its criterion for accomplishing this leads to inconsistent results and can unnecessarily limit prelitigation investigation and informal discovery. Taken together, the three Comment criteria encompass nearly all employees of an organizational party.¹⁷³ Indeed, recent cases that have banned all informal contact cite the Comment for support.¹⁷⁴

B. Blanket Prohibition on Ex Parte Contact

One solution to the dilemma of how to apply the ethical rule to an organization is simply to define all employees as parties. This blanket approach prohibits all ex parte contact with an organizational party's employees. A number of opinions have advocated a blanket prohibition,¹⁷⁵ although later cases have called into question the continuing vitality of this interpretation.¹⁷⁶ Recently,

¹⁷³ See *B.H. v. Johnson*, 128 F.R.D. at 661.

¹⁷⁴ See *infra* note 177 and accompanying text.

¹⁷⁵ *Hewlett-Packard Co. v. Superior Court*, 205 Cal. App. 3d 43, 252 Cal. Rptr. 14 (1988), *rev. denied, ordered depublished*; *Bobele v. Superior Court*, 199 Cal. App. 3d 708, 245 Cal. Rptr. 144 (1988); *Mills Land & Water Co. v. Golden West Ref. Co.*, 186 Cal. App. 3d 116, 230 Cal. Rptr. 461 (1986); *Niesig v. Team I*, 149 A.D.2d 94, 545 N.Y.S.2d 153 (1989), *modified*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990); Ethics Comm., San Diego Bar Ass'n, Op. 1984-5 (1984) (interpreting ethical rule to prohibit ex parte communications about subjects within scope of employment with all employees); Committee on Legal Ethics, Los Angeles County Bar Ass'n, Formal Op. 410 (1983) (same); Committee on Professional Ethics, New York City Bar Ass'n Op. 80-46 (1982) (same); Committee on Professional Ethics, Massachusetts Bar Ass'n, Formal Op. 82-7 (1982), *reprinted in* 67 MASS. L. REV. 208 (1982) (same). See generally *Miller & Calfo, supra* note 154, at 1071-73 (proposing adoption of blanket prohibition on communications with all current employees concerning matters within scope of employment).

¹⁷⁶ See *Niesig v. Team I*, 76 N.Y.2d 363, 375 & n.6, 558 N.E.2d 1030, 1036 & n.6, 559 N.Y.S.2d 493, 499 & n.6 (1990) (rejecting blanket prohibition in favor of narrow "alter ego" criteria); compare *Triple A Machine Shop v. State*, 213 Cal. App. 3d 131, 261 Cal. Rptr. 493 (1989) (interpreting current California rule to allow contact with defendant's facilities manager) with *Hewlett-Packard Co.*, 205 Cal. App. 3d 43, 252 Cal. Rptr. 14, *review denied, ordered depublished* (interpreting current California rule to require blanket prohibition) and *Bobele v. Superior Court*, 199 Cal. App.

however, this straightforward approach has gained at least two adherents among the federal district courts, which found a total ban necessary to ensure protection of employees included in the categories of the Comment to Rule 4.2.¹⁷⁷

A blanket prohibition on ex parte contact with all employees provides maximum protection to an organization's interests.¹⁷⁸ It

3d 708, 245 Cal. Rptr. 144 (1988) (interpreting previous California rule to require blanket prohibition) and *Mills Land & Water Co.*, 186 Cal. App. 3d 116, 230 Cal. Rptr. 461 (1986) (same). See generally *infra* notes 202-07 and accompanying text (discussing retreat from blanket prohibition).

¹⁷⁷ *Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037 (D.N.J. 1990); *Cagguila v. Wyeth Laboratories, Inc.*, 127 F.R.D. 653 (E.D. Pa. 1989). Both cases relied on the Comment to Rule 4.2 in reaching their result. In *Public Service Electric & Gas*, the court focused on the Comment's hypothetical language, which prohibits ex parte contact with any employee "whose act or omission in connection with [the] matter *may be imputed* to the organization for purposes of civil or criminal liability on whose statement *may constitute an admission* on the part of the organization." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (1989) (emphasis added). The court asserted that the Comment bars contact with any employee whose act or testimony might possibly be imputed to the organization. *Public Serv. Elec. & Gas*, 745 F. Supp. at 1042. This possibility applies to all employees before they are questioned by adversary counsel, since their testimony until then remains unknown and theoretical. *Id.* The court declined to place "ethical faith" in the ability of attorneys to stop the questioning when an employee reveals information indicating that she comes within the ambit of the rule's protection. Instead, the court preferred to hold all employees "off limits" for informal discovery because they "may" say something that might be imputed to their employer. *Id.*

In *Cagguila*, an age discrimination case, the court ruled that adversary counsel must notify the organization in advance of contact with any of its employees. The court was unclear which of the Comment's categories applied to the employee in question, but seemed convinced that adversary counsel would use the employee's statement as evidence that the employer had treated younger employees more favorably. *Cagguila*, 127 F.R.D. at 654. The "rule's import," however, was that employees "whose conduct involves the matter in representation should not be the object of ex parte communications." *Id.* Adversary counsel therefore should have known that his informal contact with the employee raised a "potentially serious problem," and because an "uncertain area of ethical conduct" was involved, should have given advance notice to the employer's attorney. *Id.* The court prohibited the admission into evidence of any statements obtained in the improper contact. *Id.* at 654-55.

¹⁷⁸ See *Mills Land & Water Co.*, 186 Cal. App. 3d at 129-30, 230 Cal. Rptr. at 468 (noting organization has interest in preventing release of information learned in course of employment without advice and protection of counsel); *Miller & Calfo*, *supra* note 154 at 1071-73. Interestingly, a blanket prohibition is also justified as protecting the employee's interest as well:

virtually eliminates opportunities for overreaching by adversary counsel.¹⁷⁹ A total ban forecloses the possibility that employees might make statements admissible against the organization or divulge liability-creating information about their acts or omissions.¹⁸⁰

It also guards against the revelation of information protected by attorney-client privilege.¹⁸¹ The scope of the attorney-client privilege in the corporate context has expanded in many jurisdictions following the Supreme Court's decision in *Upjohn Co. v. United States*.¹⁸² Under *Upjohn*, any employee who has spoken with the employer's attorney may be privy to privileged information.¹⁸³ Since every employee is potentially privy to confidential information, the employer gains optimal protection from breach of the privilege when all employees are shielded from ex parte contact.¹⁸⁴

The greatest appeal of the blanket prohibition is its simplicity

contact with the employer's adversary might endanger the employee's job. Committee on Legal Ethics, Los Angeles County Bar Ass'n, Formal Op. 410 (1983).

¹⁷⁹ *Public Serv. Elec. & Gas*, 745 F. Supp. at 1042.

¹⁸⁰ *See id.* Under the law of agency and federal evidentiary rules an employee's ability to damage an employer's interest in these ways is not dependent on her rank in the organization. *See generally supra* notes 159, 161 and accompanying text (discussing federal rules regarding employee admissions). Therefore, the blanket prohibition, which bars access to employees high and low, provides maximum protection to an organization.

¹⁸¹ *See Cagguila*, 127 F.R.D. at 654 n.2 (finding protection of attorney-client privilege a persuasive reason for blanket prohibition).

¹⁸² 449 U.S. 383 (1981). In *Upjohn* the court held that the privilege applies not only to an attorney's communications with the corporate "control group," but also to communications with any corporate employee concerning the subject of the litigation. *Id.* at 392-97.

¹⁸³ *Id.* The *Upjohn* decision appears to have been an impetus to the formulation of the blanket prohibition. *See generally Stahl, supra* note 9, at 1199-1218 (discussing ethics opinions in wake of *Upjohn*). The expanded scope of the attorney-client privilege suggested that the scope of protection for employees who might divulge privileged materials should be expanded as well. Shortly after *Upjohn*, the Los Angeles County Bar Association rethought a prior opinion that ex parte contact with nonmanagement employees was proper. In 1983 it issued a formal opinion espousing a blanket prohibition. Committee on Legal Ethics, Los Angeles County Bar Ass'n, Formal Op. 410 (1983).

¹⁸⁴ *See Miller & Calfo, supra* note 154, at 1071. Lower level employees may in fact be more likely to divulge privileged information than those in the organization's upper echelons. A recent survey found that these employees tend to be unaware of the doctrine of attorney-client privilege.

and predictability.¹⁸⁵ Any approach other than a total ban requires attorneys to make before-the-fact determinations of which employees are covered by the rule.¹⁸⁶ An attorney who makes a faulty judgment call exposes herself to discipline or sanctions. Defining all employees as parties draws a clear and unequivocal line that attorneys can apply without the necessity of seeking judicial interpretation.¹⁸⁷ This approach thus promotes judicial efficiency by keeping such collateral disputes out of court.¹⁸⁸ If the primary objective of the ethical rules is to provide clear guidance about standards of attorney conduct, this interpretation of Rule 4.2 best achieves that goal.¹⁸⁹

The price of simplicity and predictability, however, may be too high in terms of other values.¹⁹⁰ By sacrificing access to informal discovery, the blanket prohibition eliminates a source of information vital to the efficient functioning of the justice system, and to the prompt resolution of legal disputes.¹⁹¹ By requiring costly

Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 236 table 1, 266 (1989).

¹⁸⁵ Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs. 745 F. Supp. 1037, 1042-43 (D.N.J. 1990); Niesig v. Team I, 76 N.Y.2d 363, 372, 558 N.E.2d 1030, 1034, 559 N.Y.S.2d 493, 497 (1990). In *Niesig*, the New York Court of Appeals rejected the lower court's blanket ban on informal employee contact. It acknowledged that such a ban does have a "single indisputable advantage . . . it is clear. No lawyer need ever risk disqualification or discipline because of uncertainty as to which employees are covered by the rule and which are not." *Id.*

¹⁸⁶ See *Mills Land & Water Co. v. Golden West Refining Co.*, 186 Cal. App. 3d 116, 230 Cal. Rptr. 461, 468 (1986) (noting difficulty of ascertaining which employees are members of corporate control group); *Niesig v. Team I*, 149 A.D.2d 94, 105-06, 545 N.Y.S.2d 153, 159 (1989) (same), *modified*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990). Indeed, the two most recent decisions advocating the blanket prohibition appear to do so out of frustration with engaging in the type of detailed analysis the Comment appears to demand. See *supra* note 177. These courts may agree with the conclusion that the Comment contemplates "few if any employees outside the reach of [the rule]," *B.H. v. Johnson*, 128 F.R.D. 659, 661 (N.D. Ill. 1989) (declining to follow Comment), and simply find it more efficient to include all employees within the rule's ambit.

¹⁸⁷ See *Niesig v. Team I*, 149 A.D.2d at 108, 545 N.Y.S.2d at 160.

¹⁸⁸ Comment, *supra* note 32, at 1294 & n.123.

¹⁸⁹ See *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037, 1042-43 (D.N.J. 1990).

¹⁹⁰ *Niesig v. Team I*, 76 N.Y.2d 363, 372, 558 N.E.2d 1030, 1034, 559 N.Y.2d 493, 497 (1990).

¹⁹¹ *Id.* In *Niesig*, the court noted that "informal discovery . . . may serve both the litigants and the entire justice system by uncovering relevant facts,

formal depositions, it imposes an undue burden on the opposing party's ability to investigate and present evidence, and deters litigants with limited resources.¹⁹² The blanket prohibition is especially injurious to employment discrimination plaintiffs, whose cases depend almost exclusively on information and witnesses under the employer's control.¹⁹³ Deprived of all informal access, these plaintiffs are substantially if not entirely deprived of their right of access to witnesses.¹⁹⁴ This result heightens their risk of Rule 11 sanctions and violates their entitlement to a fair trial.¹⁹⁵

The high price exacted by the blanket prohibition may be unnecessary as well. The organizational party by its nature is possessed of significant protection against inappropriately prejudicial contacts with its employees.¹⁹⁶ The organization has ready access to its own employees, giving its attorney the "earliest and best opportunity to gather the facts, to elicit information from employees, and to counsel and prepare them so that they will not make the feared improvident disclosures that engendered the rule."¹⁹⁷

Further, defining the scope of the ethical rule to coincide with that of the attorney-client privilege — including potentially all employees — is unnecessary to protect against revelation of privileged information.¹⁹⁸ The attorney-client privilege applies only to confidential communications; it does not protect disclosure of underlying factual information.¹⁹⁹ Accordingly, an attorney inter-

thus promoting the expeditious resolution of disputes." *Id.* See generally *supra* notes 54-73 and accompanying text (discussing importance of informal discovery).

¹⁹² See generally *supra* notes 59-70 (discussing burdens of formal discovery).

¹⁹³ See *supra* notes 95-96 and accompanying text.

¹⁹⁴ *E.g.*, *Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842 (S.D.N.Y. 1990) (rejecting blanket ban because information necessary to establish discrimination in hands of defendant's employees).

¹⁹⁵ *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985) (rejecting blanket prohibition in Title VII sex discrimination case); see *supra* notes 87-101 and accompanying text (discussing importance of informal access to discrimination plaintiffs).

¹⁹⁶ *Niesig v. Team I*, 76 N.Y.2d 363, 372-73, 558 N.E.2d 1030, 1034, 559 N.Y.S.2d 493, 497 (1990).

¹⁹⁷ *Id.* at 373, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

¹⁹⁸ *Id.* at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

¹⁹⁹ *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)); *Sobel v. Yeshiva University*, 52 Fair Empl. Prac. Cas. (BNA) 1840, 1841 (S.D.N.Y. 1990) (same); *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 195, 691 P.2d 564, 566 (1984) (same).

viewing an adversary's employees is simply precluded from asking them about the substance of their communications with the employer's counsel.²⁰⁰ Thus, an employee who is a party for purposes of the privilege because of communications with the employer's attorney, need not be a party for purposes of the ethical rule.²⁰¹

Recognizing its inherent inequities, most jurisdictions have declined to adopt a blanket prohibition on all ex parte contact with employees.²⁰² Apart from two recent federal district decisions,²⁰³ this approach has received little approval. For example, the New York Court of Appeals has lately rejected the total ban imposed by a lower court.²⁰⁴ California at one time embraced the blanket prohibition,²⁰⁵ but has since abandoned it.²⁰⁶ Further

²⁰⁰ *Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842, 1845 (S.D.N.Y. 1990). In *Suggs*, the court noted that the Supreme Court's decision in *Upjohn* contemplates this very method of protecting the privilege, since *Upjohn* permitted interviews of corporate employees as to underlying facts within their knowledge while precluding inquiry into communications with corporate counsel. *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)).

²⁰¹ *Niesig v. Team I*, 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

²⁰² See *Suggs*, 52 Fair Empl. Prac. Cas. at 1844-45 (listing judicial and bar opinions allowing varying degrees of informal contact).

²⁰³ *Public Serv. Elec. & Gas v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037 (D.N.J. 1990); *Cagguila v. Wyeth Laboratories, Inc.*, 127 F.R.D. 653 (E.D. Pa. 1989).

²⁰⁴ *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), *modifying* 149 A.D.2d 94, 545 N.Y.S.2d 153 (1989).

²⁰⁵ See *Bobele v. Superior Court*, 199 Cal. App. 3d 708, 245 Cal. Rptr. 144 (1988); *Mills Land & Water v. Golden West Ref. Co.*, 186 Cal. App. 3d 116, 230 Cal. Rptr. 461 (1986); Ethics Comm., San Diego Bar Ass'n, Op. 1984-5 (1984); Committee on Legal Ethics, Los Angeles County Bar Ass'n, Formal Op. 410 (1983).

²⁰⁶ In 1989 the California State Bar adopted the amended California Rules of Professional Conduct, substantially incorporating the guidelines contained in the Comment to Rule 4.2. See *supra* note 132 (discussing California's version of ethical rule). In amending the California Rules of Professional Conduct, the California Bar Association rejected a proposed draft expressly barring ex parte contact with all employees of a party. The draft under consideration would have amended the rule to read:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, or with an employee of such party, unless the member has the consent of the other lawyer.

judicial interpretations of California's recently adopted version of the ethical rule have likewise rejected this approach.²⁰⁷

In sum, a blanket prohibition on ex parte contact provides maximum protection to an organization's interests. It does so, however, at the unjustified expense of accessibility to evidence, and therefore does not enjoy widespread acceptance. In an effort to more fairly balance the interests of the organization and its adversary's need for free access to witnesses, courts have found it necessary to formulate other criteria for defining parties in the organizational context.

C. The Control Group Test

At the opposite end of the spectrum from the blanket prohibition is the highly permissive control group test. This approach allows ex parte communications with all employees except members of the corporate "control group."²⁰⁸ The control group concept, first articulated in the context of the attorney-client privilege, defines the control group as that group of employees responsible for directing an organization's actions in response to legal advice.²⁰⁹ In the context of the ethical rule, the control

Discussion Draft: Proposed Amendments to the Rules of Professional Conduct (Aug. 1986), *quoted in* Miller & Calfo, *supra* note 154, at 1061 n.36 (emphasis added).

²⁰⁷ Shortly before the effective date of the new California Rules of Professional Conduct, the California Supreme Court ordered depublished an October 1988 appellate decision barring ex parte contact with all employees, thereby denying it any precedential value. *See* Hewlett-Packard Co. v. Superior Court, 205 Cal. App. 3d 43, 252 Cal. Rptr. 14 (1988), *rev. denied, ordered depublished*. *See generally* Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984) (explaining California Supreme Court's practice of depublishing opinions considered to be incorrect in some significant way to avoid risk of misleading bench and bar). Soon after the adoption of the California Rules of Professional Conduct, a California appellate court interpreted the new ethical rule governing ex parte communications. In *Triple A Mach. Shop, Inc. v. State*, 213 Cal. App. 3d 131, 261 Cal. Rptr. 493 (1989), the court held that government attorneys' conduct in contacting the defendant's assistant facilities manager was not improper. *Id.* at 499.

²⁰⁸ *Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc.*, 128 Ill. App. 3d 763, 471 N.E.2d 554 (1984); Committee on Legal Ethics, Los Angeles County Bar Ass'n, Op. 369 (1977); Arizona State Bar Ass'n, Op. 203 (1966), *digested in* O. MARU, 1970 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 127 (1972); Idaho State Bar Ass'n, Op. 21 (1960), *digested in* O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 105 (1970).

²⁰⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981).

group also includes top management employees who have final decisionmaking authority and those who play indispensable advisory roles to final decisionmakers.²¹⁰

The most recent adoption of the control group standard appears in a 1984 decision of an Illinois appellate court,²¹¹ which reasoned that a broader test would bar too much relevant information from the fact finding process.²¹² The control group test thus places optimum value on the availability of witnesses and the discovery of the relevant evidence they possess.²¹³ Providing broad access to employees reduces the costs of discovery, enhances the pool of discoverable information, and furthers an attorney's ability to uncover facts essential to the client's case.²¹⁴ As a result, it decreases the need for formal discovery measures, such as depositions,²¹⁵ and furthers judicial efficiency by shortening the discovery stage of litigation.²¹⁶

The control group test has not gained widespread acceptance, however.²¹⁷ It has fallen into disfavor along with the Supreme

²¹⁰ *Fair Automotive*, 128 Ill. App. 3d at 771, 471 N.E.2d at 560; see also *In re FMC Corp.*, 430 F. Supp. 1108 (S.D.W. Va. 1977) (interpreting ethical rule to prohibit ex parte communication only with corporate president, board chair, and certain plant managers).

²¹¹ *Fair Automotive*, 128 Ill. App. 3d at 771, 471 N.E.2d at 561. In *Fair Automotive*, the plaintiff muffler shop had sent investigators to a rival shop to obtain evidence that the rival's employees were making defamatory statements about plaintiff's business. *Id.* at 766, 471 N.E.2d at 557. The employees made disparaging statements about plaintiff to the investigators, and plaintiff sued for tortious interference with its business. *Id.* The court upheld the propriety of this contact under the ethical rule. *Id.* at 771, 471 N.E.2d at 561. The holding in *Fair Automotive* appears to rest on the scope of attorney-client privilege in Illinois, which uses a control group standard. See *id.* at 771, 471 N.E.2d at 560-61.

²¹² *Id.* at 771, 471 N.E.2d at 560-61.

²¹³ See *Niesig v. Team I*, 76 N.Y.2d 363, 377, 558 N.E.2d 1030, 1037, 559 N.Y.S.2d 493, 500 (1990) (Bellacosa, J., concurring). Judge Bellacosa advocated the control group standard because it allows "the maximum number of informal interviews among persons with relevant information," thus serving the ultimate goal of litigation, "[d]iscovery of the truth and relevant proofs." *Id.*; see also Comment, *supra* note 32, at 1288 (discussing values served by control group standard).

²¹⁴ Comment, *supra* note 32, at 1288; see *supra* notes 55-74 and accompanying text.

²¹⁵ Comment, *supra* note 32, at 1288.

²¹⁶ *Id.*

²¹⁷ Courts that have expressly rejected the control group standard include: *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 16-17 (D. Mass. 1989);

Court's rejection of the control group standard in the context of attorney-client privilege.²¹⁸ Authorities fault the control group standard for being unduly permissive.²¹⁹ Because it shields from ex parte contact only a few executives at the top of the corporate pyramid, the control group test deprives organizations of virtually all of the ethical rule's benefits.²²⁰ The test is also unpredictable, because there are no clearly established guidelines for determining which management employees belong in the control group.²²¹

D. Further Refinements: The "Managing Speaking Agent" and "Alter Ego" Tests

Two closely related tests for determining which employees should be shielded by the ethical rule adopt formulations that

Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988); Massa v. Eaton Corp., 109 F.R.D. 312, 313-14 (W.D. Mich. 1985); Triple A Mach. Shop v. State, 213 Cal. App. 3d 131, 139-40, 261 Cal. Rptr. 493, 498 (1989); Mills Land & Water Co. v. Golden West Ref. Co., 186 Cal. App. 3d 116, 129, 230 Cal. Rptr. 461, 468 (1986); Niesig v. Team I, 76 N.Y.2d 363, 373, 558 N.E.2d 1030, 1034-35, 559 N.Y.S.2d 493, 497-98 (1990).

²¹⁸ *Upjohn Co. v. United States*, 449 U.S. 383 (1981); see *supra* note 183 and accompanying text. See generally Stahl, *supra* note 9 (analyzing *Upjohn's* implications for application of ethical rule to organizations).

²¹⁹ See, e.g., Massa, 109 F.R.D. at 313; Comment, *supra* note 32, at 1288-90.

²²⁰ Niesig, 76 N.Y.2d at 373, 558 N.E.2d at 1034-35, 559 N.Y.S.2d at 497-98 (quoting Comment, *supra* note 32, at 1288). All employees outside the control group — from middle level managers on down the corporate hierarchy — would be vulnerable to improper advances by adversary counsel. See generally Comment, *supra* note 32, at 1287-90 (analyzing and criticizing control group test).

²²¹ *Upjohn*, 449 U.S. at 393; Massa, 109 F.R.D. 312; Niesig v. Team I, 149 A.D.2d 94, 104-05, 545 N.Y.S.2d 153, 158-59 (1989), modified, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990). In *Upjohn*, the Supreme Court noted that use of the control group standard in determining the scope of the attorney-client privilege leads to unpredictable results. *Upjohn*, 449 U.S. at 393. The Court cited several cases in which courts had come to widely divergent interpretations of who belonged in the corporate control group. *Id.* (comparing *Congoleum Indus., Inc. v. GAF Corp.*, 49 F.R.D. 82, 84-85 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3rd Cir. 1973) (defining control group to include only division and corporate vice presidents, and not directors of research and vice president for production and research) with *Hogan v. Zletz*, 43 F.R.D. 308, 315-16 (N.D. Okla. 1967), *aff'd in part sub nom.* *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968) (determining control group includes managers and assistant managers of patent division and research and development department)).

encompass fewer employees than either the Comment to Rule 4.2 or the blanket prohibition, but shield more employees than the outmoded control group test. Their adherents claim to have found a more satisfactory balance between the policies of promoting open access to relevant information and protecting parties from prejudicial contact with adversary counsel.

1. The "Managing Speaking Agent" Test

One well-established and widely cited approach to applying the ethical rule in the organizational context is the "managing speaking agent" test.²²² This approach evaluates the propriety of ex parte contact by determining whether the employees contacted "have managing authority sufficient to give them the right to speak for, and bind, the corporation."²²³ It is similar to, but at the same time narrower than, several of the criteria adopted by the Comment to Rule 4.2. In contrast to the managerial responsibility criterion, it does not include all managers.²²⁴ Unlike the vague vicarious admissions criterion, it specifically adopts the

²²² See *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988); *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 35-36 (E.D.N.Y. 1985); *Shealy v. Laidlaw Bros., Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 1223 (D.S.C. 1984); *Sobel v. Yeshiva Univ.*, 52 Fair Empl. Prac. Cas. (BNA) 1840 (S.D.N.Y. 1981); *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 691 P.2d 564 (1984). Bar associations adopting this approach include: ABA Comm. on Professional Ethics and Grievances, Informal Op. 1410 (1978); Alabama State Bar Ass'n, Ethics Op. No. RO-83-81 (1983) (copy on file with U.C. Davis Law Review); Colorado Bar Ass'n Op. No. 69 (1985), reprinted in NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, CO:Opinions:11 (1985); State Bar of Georgia, Formal Advisory Op. No. 87-6 (87-R2) (1989), reprinted in NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, GA:Opinions:16 (1989); Professional Ethics Comm., Board of Overseers, Bar of State of Maine, Op. No. 94 (1989) (copy on file with U.C. Davis Law Review); Professional Guidance Comm., Philadelphia Bar Ass'n, Guidance Inquiry No. 88-30 (1988) (copy on file with U.C. Davis Law Review); Standing Comm. on Legal Ethics, Virginia State Bar, Legal Ethics Op. No. 905 (1987) (copy on file with U.C. Davis Law Review). See generally LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 71:314 (1984) (concluding ABA's current approach is "managing speaking agent" test); Comment *supra* note 32, at 1297-1304 (proposing adoption of "managing speaking agent" test).

²²³ *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 201, 691 P.2d 564, 569 (1984).

²²⁴ For example, it does not bar contact with managers whose responsibilities are unrelated to the controversy at issue. See *id.* at 202, 691 P.2d at 570 (noting that managing speaking agents are those with the

common law requirement that the employee be authorized to speak for the organization, and looks to principles of agency to make this determination.²²⁵ Finally, it excludes from the ethical rule's protection other employees whose acts or omissions have given rise to the organization's liability.²²⁶

The classic articulation of the managing speaking agent test appears in *Wright v. Group Health Hospital*,²²⁷ a 1984 Washington Supreme Court decision. The *Wright* court noted that the managing speaking agent test, which blocks access only to employees with the power to bind the organization, represents the American Bar Association's current approach.²²⁸ Thus, it allowed informal contact both with employees who had witnessed the events at issue and with employees who may have caused the events leading to the employee's liability.²²⁹ The purpose of the ethical rule, the court noted, is not to "protect a corporate party from the rev-

strongest interest in the dispute, who speak and act on the organization's behalf, citing Note, *supra* note 9, at 1017).

²²⁵ While the managing speaking agent test has its origins in the common law vicarious admissions standard, it has also been adopted or cited with approval in jurisdictions following the broader federal standard. These courts in effect reject the Comment's vicarious admissions criterion. See, e.g., *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560, 566-67 (D. Utah 1990); *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 37 (E.D.N.Y. 1985). See generally Comment, *supra* note 32, at 1297-1304 (advocating managing speaking agent test for use in all jurisdictions).

²²⁶ *Wright*, 103 Wash. 2d at 200, 691 P.2d at 569.

²²⁷ *Id.* In *Wright*, a medical malpractice action, the defendant hospital had produced in discovery the names, addresses, and telephone numbers of the nurses involved in the plaintiff's medical care. *Id.* at 194, 691 P.2d at 566. It provided the information, however, with the proviso that the plaintiff treat the nurses as parties and refrain from contacting them ex parte. *Id.* In response, the plaintiff sought a protective order authorizing ex parte interviews with any nonmanagerial hospital employee. *Id.* The trial court denied the plaintiff's motion, and the appellate court reversed the lower court. *Id.* In affirming the appellate court's decision, the Washington Supreme Court held that employees should be considered parties for purposes of the ethical rule only if "they have managing authority sufficient to give them the right to speak for, and bind, the corporation." *Id.* at 201, 691 P.2d at 569.

²²⁸ *Id.* at 198-99, 691 P.2d at 568 (citing LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 71-314 (1984)).

²²⁹ *Id.* at 201, 691 P.2d at 569. Thus, the court declined to adopt the imputation of action criterion espoused by the Comment to Rule 4.2. *Id.*; see also *supra* notes 148-54 and accompanying text (discussing imputed action criterion).

elation of prejudicial facts.”²³⁰ Rather, its sole purpose is to shield corporate employees with sufficient authority to bind the corporation from improper advances by adversary counsel.²³¹

The managing speaking agent test promotes greater accessibility to witnesses than does the Comment to Rule 4.2. In an employment discrimination case, this can be particularly vital to a plaintiff’s ability to vindicate her rights. The managing speaking agent test would allow informal contact with many employees who may be important potential witnesses: similarly situated employees who have also experienced discrimination or who have been more favorably treated; employees with direct knowledge of the organization’s actual practices because of their status as employees and not because of their duty to carry out those practices; and other employees with access to relevant facts who are not in positions of authority regarding the subject matter of the litigation.²³²

One court advocating the managing speaking agent test in an employment discrimination case asserted that a broader reading of the ethical rule, which would decrease informal access, would be inconsistent with congressional policy.²³³ “Title VII,” the court wrote, “embodies the strong national policy against employment discrimination [and] Congress could not have intended to disadvantage plaintiffs in the preparation of their cases.”²³⁴ The court concluded that the managing speaking agent test strikes the correct balance between parties’ competing interests, particularly in employment discrimination actions.²³⁵ In such cases, the plaintiff’s need for information in the exclusive possession of the organization, which is too expensive and impractical to collect through formal discovery, outweighs the organization’s need to protect itself.²³⁶

²³⁰ *Wright*, 103 Wash. 2d at 200, 691 P.2d at 569.

²³¹ *Id.* The court concluded that this approach strikes the proper balance between the need to protect the organizational party from the dangers of direct dealing with adversary counsel and the need to preserve accessibility to employee witnesses. *Id.* at 200, 691 P.2d at 569.

²³² *See Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 36 & n.1 (E.D.N.Y. 1985).

²³³ *Id.* at 36.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*; *accord Bougé v. Smith’s Management Corp.*, 132 F.R.D. 560 (D. Utah 1990). In *Bougé* the plaintiff made a claim for overtime compensation under the Fair Labor Standards Act. The court granted informal access to

At the same time, the test does promote the rule's legitimate protective purposes by shielding from informal contact those management employees whose statements regarding the controversy would actually be binding on the organization. It thus allows the organization's counsel to present an employee's binding statements in the light most favorable to the organization²³⁷ and prevent ill-chosen statements that could commit the organization to an unfavorable version of the facts.²³⁸

One drawback to the managing speaking agent test is its lack of predictability.²³⁹ It does not draw a bright line around the corps of managerial employees as does the Comment.²⁴⁰ Rather, the test shields a certain type of management employee, managing speaking agents. Definitional problems thus arise.²⁴¹ The test as articulated in *Wright* defines these employees as managers whose duties are related to the subject of the controversy and who have authority to make statements and bind the employer with refer-

nonmanagement employees, citing with approval the managing speaking agent test. *Id.* at 570. To block such access, the court reasoned, would be inappropriate, because it would "give a distinct economic advantage to the corporate structure and protect the corporate interest during litigation from cheaper discovery alternatives that a cost-conscious plaintiff, with limited assets, may wish to employ." *Id.* at 562. This result, the court asserted, was not a legitimate ethical goal, but rather served only to "reinforce structured economic power and authority and prevent less costly means of access to the courts." *Id.* at 566.

²³⁷ See New York City Bar Association Comm. on Professional Ethics, *supra* note 32, at 7.

²³⁸ See *supra* notes 31-35 and accompanying text.

²³⁹ See *Niesig v. Team I*, 149 A.D.2d 94, 104, 545 N.Y.S.2d 153, 158 (1989) (rejecting test), *modified*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990) (approving test); *Miller & Calfo*, *supra* note 154, at 1071.

²⁴⁰ See *supra* notes 136-37 and accompanying text.

²⁴¹ For example, the author of an influential student comment offers the following definition of a managing speaking agent:

A managing speaking agent is: "[O]ne who, as to the particular subject matter of the litigation, (1) acts with superior authority and is invested with general control to exercise his discretion on behalf of his principal on an overall or partial basis (as distinguished from a mere employee who does only what he is told to do, has no discretion about what he can and cannot do, and is responsible to an immediate superior who has control of his acts); and (2) can be expected to identify himself with the interests of his principal rather than those of the other party."

Comment, *supra* note 32, at 1299 (quoting *Hodgins v. Oles*, 8 Wash. App. 279, 282, 505 P.2d 825, 828 (1973)).

ence to the matter at issue.²⁴² Yet other courts adopting the test have variously interpreted it to apply to all managers,²⁴³ or only those managers whose depositions may be compelled under the Federal Rules of Civil Procedure,²⁴⁴ whose hearsay admissions are admissible under the evidentiary rules,²⁴⁵ or whose interests are identical to the employer's.²⁴⁶

Even accepting the *Wright* definition at face value does not fully allay predictability concerns. An attorney wishing to interview ex parte any managerial employee must first determine the scope of the employee's duties and whether they confer on the employee sufficient authority to speak for and bind the corporation. To do so, the attorney must make a number of unilateral judgments concerning the adversary's employees. The opportunities for dispute in this process are plentiful, pointing toward increased collateral litigation over the propriety of ex parte contacts carried out under this standard. In answer to this criticism, several authorities have pointed to the managing speaking agent test's well-litigated foundation in agency and evidence law.²⁴⁷ They argue that extensive case law exists to guide parties in resolving outside of court disputes over which managers the rule shields in a given case.²⁴⁸

A second drawback of the managing speaking agent test is that

²⁴² See *Wright v. Group Health Hospital*, 103 Wash. 2d 192, 200-01, 691 P.2d 564, 569 (1984); see also *Bougé v. Smith's Management*, 132 F.R.D. at 560, 568-69 (D. Utah 1990) (discussing *Wright*).

²⁴³ See *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988); see also Comment, *supra* note 32, at 1299-1300 (asserting that under management speaking agent test ethical rule applies to entire management structure).

²⁴⁴ See *Shealy v. Laidlaw*, 34 Fair Empl. Prac. Cas. (BNA) 1223, 1225 (D.S.C. 1984); *Sobel v. Yeshiva Univ.*, 52 Fair Empl. Prac. Cas. (BNA) 1840, 1841 (S.D.N.Y. 1981).

²⁴⁵ *Chancellor v. Boeing*, 678 F. Supp. at 253; cf. *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 17 (D. Mass. 1989) (characterizing *Chancellor's* statement of managing speaking agent test as significant expansion of *Wright's* formulation).

²⁴⁶ See *Shealy v. Laidlaw*, 34 Fair Empl. Prac. Cas. at 1225 (defining managing agent as "a person whose employer's interests are . . . so close to his own and to his heart that he could be depended upon in all events to carry out his employer's direction"). *Shealy's* idea here may be closer to the alter ego definition of employee parties discussed *infra* in text accompanying notes 253-64.

²⁴⁷ See *Chancellor*, 678 F. Supp. at 254; *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 201, 691 P.2d 564, 569 (1984); Comment, *supra* note 32, at 1303.

²⁴⁸ See *Niesig v. Team I*, 76 N.Y.2d 363, 375 & nn.5-6; 558 N.E.2d 1030,

it excludes from the rule's protection nonmanagement employees whose acts have given rise to the organization's liability.²⁴⁹ It denies organizations the protections conferred on individual parties against ill-chosen and uncounseled statements by leaving vulnerable to ex parte contact the very individuals whose actions are in dispute.²⁵⁰ When the connection of the employee to the organization's liability is so close, the ethical rule should prevent the adversary from contacting the employee ex parte.²⁵¹ The failure of the test to account for these employees denies an organization an important benefit of the ethical rule.

2. The "Alter Ego" Test

The "alter ego" test is an alternative formulation that while closely related to the managing speaking agent test, answers some of its shortcomings and attempts a clearer definition.²⁵² It focuses on whether the employee's ability to bind the organization, either because of the authority of the employee's position or because of the employee's relationship to the litigation, establishes her as an "alter ego" of the organization.²⁵³

The most recent and authoritative statement of the alter ego

1036 & nn.5-6, 559 N.Y.S.2d 493, 499 & nn.5-6 (1990) (listing cases and bar opinions); Comment, *supra* note 32, at 1303.

²⁴⁹ One court adopting the "managing speaking agent" test did not find this a concern because of the probability that such employees would be joined as individual parties. See *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 35 (E.D.N.Y. 1985).

²⁵⁰ See *Sperber v. Washington Heights-West Harlem-Inwood Mental Health Center*, No. 82 Civ. 7428 (CBM), slip op. (S.D.N.Y. Nov. 21, 1983) (LEXIS, Genfed library, Dist file), *vacated and withdrawn*. The *Sperber* court noted the importance of protecting these employees from ex parte contact: "Even if [the employees'] statements . . . cannot be treated as admissions by the organization, their actions and motives are . . . precisely those which plaintiff seeks to impute to the organization." *Id.*

²⁵¹ See *Miller & Calfo*, *supra* note 154, at 1068 n.68, 1069 (discussing *Sperber* and influence of withdrawn opinions).

²⁵² See *Niesig v. Team I*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498; *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560, 569-70 (D. Utah 1990); *McKitty v. Board of Educ., Nyack School Dist.*, 53 Fair Empl. Prac. Cas. (BNA) 358, 360-61 (S.D.N.Y. 1987).

²⁵³ See *McKitty*, 53 Fair Empl. Prac. Cas. at 360-61. *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 35 (E.D.N.Y. 1985) (defining alter egos as employees who can bind organization "to a decision or settle controversies on its behalf"); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978) (defining alter egos as employees who "could commit the corporation because of their authority as corporate

test comes from the New York Court of Appeals in the 1990 case *Niesig v. Team I*.²⁵⁴ In *Niesig* the court adopted a multipart inquiry that incorporates “the most desirable elements of the other approaches” for interpreting the ethical rule.²⁵⁵ First, “party” includes employees with “speaking authority” for the organization.²⁵⁶ Second, it includes those employees whose acts or omissions may be imputed to the organization for purposes of liability.²⁵⁷ Third, it includes employees responsible for actually implementing the advice of counsel.²⁵⁸ These categories embrace those employees who most resemble individual parties with reference to the dispute at issue — the “alter egos” of the organization. In order to avoid any confusion of its narrow multipart test with the Comment’s categories, the court took pains to make clear that the definition of party it is adopting “is not derived from the Official Comment to ABA Model rule 4.2.”²⁵⁹

It is difficult to fault the carefully tailored criteria of *Niesig*’s alter ego test.²⁶⁰ In answer to anticipated objections that the test

officers or employees or for some other reason the law cloaks them with authority”).

²⁵⁴ 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), *modifying* 149 A.D.2d 94, 545 N.Y.S.2d 153 (1989). *Niesig* is a personal injury case in which the plaintiff’s counsel wished to interview the defendant’s employees who had witnessed the accident. The Appellate Division had read the ethical rule as imposing a blanket prohibition on all employee contact. 149 A.D.2d at 104-08, 545 N.Y.S.2d at 158-60. The Court of Appeals reversed this prohibition and permitted interviews of employee witnesses. 76 N.Y.2d at 375 n.6, 558 N.E.2d at 1036 n.6, 559 N.Y.S.2d at 499 n.6.

²⁵⁵ *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d 1034, 559 N.Y.S.2d at 498.

²⁵⁶ *Id.* This criterion matches the managing speaking agent test. *See supra* notes 222-38 and accompanying text (discussing managing speaking agent test).

²⁵⁷ *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498. These employees, the court found, were “so closely identified with the interests of the corporate party as to be indistinguishable from it.” *Id.* This criterion matches the imputed liability criterion of the Comment. *See supra* notes 148-54 and accompanying text.

²⁵⁸ *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498 (citing *Polycast Technology Corp. v. Uniroyal Inc.*, 129 F.R.D. 621, 628-29 (S.D.N.Y. 1990)). This criterion incorporates the rationale behind the control group test, *supra* notes 208-16 and accompanying text, and also addresses concerns about protecting the attorney-client privilege. *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

²⁵⁹ *Niesig*, 76 N.Y.2d at 375 n.6, 558 N.E.2d at 1036 n.6, 559 N.Y.S.2d at 499 n.6.

²⁶⁰ The only subsequent opinion to analyze *Niesig* endorsed it

would be too difficult to apply, the court noted its origins in agency and evidence law. Specifically with regard to its speaking authority prong, the court pointed to the overwhelming adoption of the managing speaking agent test by courts and bar associations.²⁶¹ It is "a clear test," the court asserted, "that will become even clearer in practice."²⁶² A concurring judge, while agreeing with the result, found the alter ego test overly restrictive of informal discovery, and almost certain to prolong and complicate litigation with disputes over its scope.²⁶³

Yet the majority in *Niesig* realized that inequities might arise in specific cases, and noted that its decision simply resolved the conflicting policy goals in the limited context of the case before it.²⁶⁴ In this regard it acknowledged the contribution of submissions by various amici curiae to the court's "comprehension of the broad potential impact of the issue presented."²⁶⁵ Several of these submissions were from organizations concerned about the impact of the decision on employment discrimination actions.²⁶⁶ Implied in the court's acknowledgment was a recognition that any formulaic approach may have shortcomings and that courts may need to engage in case-specific analysis to do justice.

wholeheartedly, after an exhaustive and sometimes scathing discussion of the inequities the ethical rule can wreak when used by a corporation as a defensive tactic in litigation. *Bougé v. Smith's Management*, 132 F.R.D. 560 (D. Utah 1990). The *Bougé* court concluded that in *Niesig*, "the New York Court of Appeals has struck the proper balance of fairness, support for legitimate ethical considerations . . . clarity of application and rationality in common sense terms for informal discovery." *Id.* at 570.

²⁶¹ *Niesig*, 76 N.Y.2d at 375 n.5, 558 N.E.2d at 1036 n.5, 559 N.Y.S.2d at 499 n.5 (listing opinions adopting "similar test").

²⁶² *Id.* at 373, 558 N.E.2d at 1034, 559 N.Y.S.2d at 487.

²⁶³ *Id.* at 377, 558 N.E.2d at 1037, 559 N.Y.S.2d at 500 (Bellacosa, J., concurring) (advocating control group test).

²⁶⁴ *Id.* at 376, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499.

²⁶⁵ *Id.* at 375-76, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499.

²⁶⁶ Joining the lawsuit as friends of the court were numerous organizations concerned with the impact of the court's decision on civil rights and employment litigation, including the NAACP Legal Defense and Educational Fund, the National Organization for Women, the Committee on Civil Rights of New York City Bar Association, New York State United Teachers, and the Civil Service Employees Association. *See id.* at 365, 558 N.E.2d at 1031, 559 N.Y.S.2d at 494; *New York Court Clarifies ABA Disciplinary Rule on Lawyer's Contact with Employees of a Corporation*, DAILY LAB. REP., July 19, 1990, at A-11 to A-12.

E. Case-by-Case Balancing

The *Niesig* court's allusion to the possibility of injustice in particular cases echoes the concern of a growing number of courts that reject all formulas for determining which employees are shielded by the ethical rule. These courts have determined that "tests that purport to strike a universal balance" in fact do not "adequately meet the needs of either party."²⁶⁷ These courts therefore balance the interests of the parties involved on a case-by-case basis to avoid both unnecessary impediments to informal discovery²⁶⁸ and inadequate protection of an organization's interests.²⁶⁹ The balancing process weighs, with reference to the facts and circumstances of the particular case, one party's need for informal discovery against the other's need for effective legal representation.²⁷⁰

Several common threads run through these decisions. They have arisen only in federal court, where the federal evidentiary rules allow admission of out-of-court statements made by employees that concern matters within the scope of employment.²⁷¹ Using admissibility of such statements as a criterion for defining "party" can, and often does, preclude access to a substantial proportion of an organization's employees.²⁷² Further, these cases

²⁶⁷ *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 18 (D. Mass. 1989).

²⁶⁸ For example, application of the Comment's approach would result in blocking *ex parte* access to all managers, even those who may be merely witnesses and without authority to speak for or bind the corporation in the matter at hand. *See generally supra* notes 143-46 and accompanying text (criticizing Comment).

²⁶⁹ Application of the managing speaking agent test would allow *ex parte* access to lower echelon employees whose acts or omissions may have given rise to the organization's liability. *See generally supra* notes 249-51 and accompanying text (criticizing managing speaking agent test). On the other hand, the control group test would leave so many employees exposed to *ex parte* contact that the organization is denied the protections of the ethical rule. *See generally supra* notes 219-21 and accompanying text (criticizing control group test).

²⁷⁰ *See, e.g.*, *New York Ass'n of Retarded Children v. Carey*, 706 F.2d 956, 960-61 (2d Cir. 1983); *Lizotte v. New York City Health & Hospitals Corp.*, No. 85 Civ. 7548 (WK) (S.D.N.Y. Mar. 13, 1990) (LEXIS, Genfed library, Dist file); *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 699 (D. Mass. 1990); *Morrison v. Brandeis Univ.*, 125 F.R.D. at 18; *Mompont v. Lotus Devel. Corp.*, 110 F.R.D. 414, 418-19 (D. Mass. 1986).

²⁷¹ FED. R. EVID. 801(d)(2)(D).

²⁷² For example, in *Polycast Technology Corp. v. Uniroyal, Inc.*, 129

all involve “disfavored” litigation — civil rights and employment discrimination suits — in which plaintiffs seek informal access to employees of defendant organizations.²⁷³ The question raised by this pattern is whether universal formulas for ex parte access are appropriate in actions that, like employment discrimination suits, involve federally guaranteed individual rights and in which the organization controls most, if not all, of the evidence a plaintiff needs to vindicate those rights.

A typical balancing case is *Morrison v. Brandeis University*.²⁷⁴ Morrison, a university professor, alleged that Brandeis had denied her tenure on the basis of her sex, religion, and ancestry in violation of Title VII and section 1981.²⁷⁵ Morrison sought court approval for ex parte interviews of various Brandeis faculty members who served on committees that had made recommendations concerning her tenure.²⁷⁶ Citing the inability of universal formulas to adequately accommodate particular parties’ competing needs for informal access to information and effective legal representation, the court analyzed these needs under the facts and circumstances of the case before it.²⁷⁷

Morrison’s need for informal contact with her fellow professors, the court determined, was substantial.²⁷⁸ The central issue in a trial would be whether Brandeis’ asserted reasons for its deci-

F.R.D. 621 (S.D.N.Y. 1990), the court interpreted the admissions criterion to shield from informal contact not only those employees who participated in the conduct at issue, but also those who were merely witnesses. *Id.* at 627-28.

²⁷³ *Carey*, 706 F.2d 956 (alleging violation of 42 U.S.C. § 1983); *Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842 (S.D.N.Y. 1990) (alleging race discrimination in promotion); *Lizotte*, No. 85 Civ. 7548 WK (alleging equal protection clause violations); *Siguel*, 52 Fair Empl. Prac. Cases 697 (alleging age discrimination in employment); *B.H. v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989) (alleging fourteenth amendment violations); *Morrison*, 125 F.R.D. 14 (alleging sex, religion, and ancestry discrimination in violation of Title VII and 42 U.S.C. § 1981); *Mompoint*, 110 F.R.D. 414 (alleging race discrimination under Title VII); *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977) (seeking Medicaid implementation). Research for this Comment disclosed no cases outside of civil rights and employment discrimination that engage in case-by-case balancing.

²⁷⁴ 125 F.R.D. 14 (D. Mass. 1989).

²⁷⁵ *Id.* at 15.

²⁷⁶ *Id.* The faculty members Morrison sought to interview were not named as parties in the suit. *Id.*

²⁷⁷ *Id.* at 18.

²⁷⁸ *Id.* at 19.

sion were a pretext for unlawful discrimination.²⁷⁹ Evidence on this issue that might be favorable to Morrison was for the most part unknown to her and in the possession of those who participated in the decisionmaking process.²⁸⁰ Morrison's need for the information thus established, the court turned to her need to obtain it through *ex parte* interviews. It found this need equally pressing, noting that the presence of the university's attorney would inhibit information gathering and interfere with Morrison's right to prepare favorable witnesses for trial.²⁸¹

The court then analyzed the university's interests in preventing *ex parte* access to the committee members. It acknowledged that the statements of professors who had participated in the decision might be admissible against the university over hearsay objections.²⁸² Yet this fact, standing alone, would not deny the university effective representation. In the court's opinion, the university had "more than sufficient ability to defend itself": it very likely had the advice of counsel throughout the decisionmaking process and no doubt had made a "meticulous written record" of the nondiscriminatory reasons supporting its decision.²⁸³

The court concluded that Morrison's needs and "those interests which serve the search for truth and the effective preparation for trial" outweighed the university's need for its attorney to be present at the interviews to guarantee effective legal representation.²⁸⁴ The court granted Morrison's motion, ordering informal access to faculty members but imposing protective guidelines on the conduct of the interviews.²⁸⁵

Under any of the formulaic approaches — including the managing speaking agent and alter ego tests — Morrison would not have been allowed access to information vital to her case.²⁸⁶ This

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* (citing Leubsdorf, *supra* note 25, at 708).

²⁸⁵ *Id.* at 19-20. The guidelines were designed to protect the interests of both the university and the individuals sought for interviews. The court required Morrison's attorney to disclose her identity and the purpose of the interview, and to respect any individual's choice declining to be interviewed or requesting to have counsel present. *Id.* The court also required the university to assure the individuals that if they consented to be interviewed it would not retaliate in any way. *Id.* at 200.

²⁸⁶ Given the participation of the professors in the decisionmaking

result demonstrates the potential value of the case-by-case approach in employment discrimination actions. It allows a court to take into consideration a party's particular information needs. These needs are substantial for employment discrimination plaintiffs, whose cases often depend on informal access to fellow employees. A court can also factor into the equation the policies a particular party seeks to vindicate. For example, courts generally recognize that the policies underlying constitutional and employment discrimination claims are factors "militating in favor of particularly liberal discovery."²⁸⁷ Similarly, these policies weigh in a plaintiff's favor where informal discovery is concerned.²⁸⁸ In addition, the court can account for the "varying degrees of need" for the presence of counsel to assure effective representation,²⁸⁹ and tailor its order to accordingly.²⁹⁰

The principal drawback to case-by-case balancing is that a court must perform the balancing.²⁹¹ It is a standard for courts alone

process, even if their votes and sympathies were for Morrison, they would likely be classified as agents with the power to bind the university with their statements.

²⁸⁷ See *Lizotte v. New York City Health & Hosps. Corp.*, No. 85 Civ. 7548 (WK), slip op. at 10 (S.D.N.Y. Mar. 13, 1990) (LEXIS, Genfed library, Dist file) (equal protection claim under 42 U.S.C. § 1983); *Trevino v. Celanese Corp.*, 701 F.2d 397, 405-06 (5th Cir. 1983) (Title VII) *Burke v. New York City Police Dep't*, 115 F.R.D. 220, 224 (S.D.N.Y. 1987) (Title VII and 42 U.S.C. § 1983).

²⁸⁸ See *Lizotte*, slip op. at 10.

²⁸⁹ *Mompont v. Lotus Devel. Corp.*, 110 F.R.D. 414, 419 (D. Mass. 1986).

²⁹⁰ In *Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842 (S.D.N.Y. 1990), an employment discrimination case, the court recognized the defendant's legitimate interests in preventing its employees from making uncounseled binding admissions and in preventing disclosure of privileged attorney-client communications. *Id.* at 1845. The court sought to accommodate both these interests and the plaintiff's acute need for informal contact. Accordingly, it allowed plaintiff's counsel free access to defendant's employees, but ordered counsel to refrain from any inquiry into matters within the employees' scope of employment that related to the lawsuit or into their communications with defendant's counsel. *Id.* Finally, the court ordered the plaintiff to give defendant 72 hours advance notice of any ex parte contacts to allow defendant time to seek protective orders in appropriate cases. *Id.* at 1847.

²⁹¹ Indeed, even courts that resort to case-by-case balancing explicitly disapprove of an attorney doing so by unilaterally deciding what contacts are permissible. See *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 18 n.1 (D. Mass. 1989); cf. *University Patents v. Kligman*, 737 F. Supp. 325, 329 (E.D.

and is wholly unsatisfactory as an ethical guideline for attorneys.²⁹² An attorney must still consult the text of the ethical rule and the interpretations given the rule in the relevant jurisdiction to determine which employees she may interview *ex parte* without express court authorization.²⁹³ Moreover, the balancing test's requirement of court involvement in issues collateral to the litigation can be faulted as an inefficient use of judicial resources.²⁹⁴ Yet there is precedent for individualized determinations of collateral issues: in *Upjohn*, the Supreme Court advocated a case-by-case approach for determining when the attorney-client privilege applies to employees of party.²⁹⁵

Nevertheless, the case-by-case approach has not attracted a following outside of employment discrimination and civil rights cases. Applied by courts in these cases, however, the approach promises relief from unjust formal discovery requirements in appropriate circumstances.

IV. PROPOSED APPROACH

As is evident from the preceding discussion, the sheer variety of methods for determining which employees of an organizational party may be contacted informally introduces considerable uncertainty into the investigative process. Only concrete guidelines can ameliorate this uncertainty. The present guidelines provided by the drafters of Rule 4.2's Comment have proven unsatisfactory because of their failure to command the allegiance of courts.²⁹⁶ Therefore, this Comment first proposes an amendment to narrow these categories. The result is a more equitable balance between the need for informal discovery and the need for protection against overreaching by adversary counsel.

Second, this Comment recognizes that the present state of the law is confused, and that attorneys must practice in this murky ethical context. This Comment therefore proposes a number of procedures for informally contacting an organization's employees. These procedures are designed minimize opportunities for

Pa. 1990) (condemning attorney for making *ex parte* contact with opponent's employees in face of doubts about propriety under ethical rule).

²⁹² Comment, *supra* note 32, at 1296.

²⁹³ See *Morrison*, 125 F.R.D. at 18 n.1.

²⁹⁴ Comment, *supra* note 32, at 1297.

²⁹⁵ See *B.H. v. Johnson*, 128 F.R.D. 659, 661 (N.D. Ill. 1989) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981)).

²⁹⁶ See *supra* notes 134-35, 152-54, 164, 222-62 and accompanying text.

unethical behavior and overreaching, thereby protecting the organizational party and minimizing the risk of sanctions. In instances where the applicability of the ethical rule is uncertain, the attorney should attempt informal resolution with the organization's counsel or obtain court authorization.

Finally, any universal formula, while providing a degree of certainty to practitioners, may prove inequitable in particular cases — either because it leaves an organization too little protection or because it closes off avenues of discovery vital to a party's claim. In employment discrimination litigation, where the plaintiff's need for informal access is so critical to vindicating rights guaranteed by federal law, inequitable application of a mechanical rule becomes more likely. In such cases, therefore, this Comment proposes that when parties seek court approval of informal contacts, courts engage in case-by-case balancing of the interests involved. The result would be individually tailored informal discovery orders that more equitably accommodate the interests of the parties.

A. Amendment of the Comment to Rule 4.2

Any standard for applying the ethical rule to an organizational party should attempt to closely approximate its application to an individual party. To give an organization more protection than is necessary to advance the purposes of the rule is unfair both to its adversary and to the judicial system.²⁹⁷ To give an organization less protection than individuals receive is unfair to the organization's right to effective representation of counsel. Distinguishing witnesses from parties should be the cornerstone of a workable approach for applying the ethical rule to organizations.

Parties are those employees whose interests in the controversy are so aligned with the organization's interests that they might be considered the organization's "alter egos" — employees analogous to individual parties for purposes of the litigation.²⁹⁸ These

²⁹⁷ Professor Wolfram cautions that while the ethical rule is "meant to prevent lawyers from taking unfair advantage and to protect against intrusions into the confidential attorney-client relationship," it is "not meant to protect others whose interests might be impaired by factual information willingly shared by the contacted employee." C. WOLFRAM, *MODERN LEGAL ETHICS* § 11.6.2 (1986).

²⁹⁸ See *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 35 (E.D.N.Y. 1985); *Niesig v. Team I*, 76 N.Y.2d 363, 374, 558 N.E.2d, 1030, 1035, 559 N.Y.S.2d 493, 498 (1990).

employees include the managerial employees at the top of the organization's hierarchy — the control group²⁹⁹ — and any other employees through whom the organization makes decisions in response to the legal advice it receives.³⁰⁰ They are also the employees most likely to have authority to settle the lawsuit.³⁰¹ "Parties" also includes those middle and lower level managers whose responsibilities bear a substantial relationship to the litigation.³⁰² These are the individuals most likely to possess speaking authority on behalf of the organization because of their day-to-day responsibility for implementing the policies and practices at issue in the lawsuit.³⁰³ Finally, "parties" should include those employees who by their acts or omissions have embroiled the organization in the legal controversy.³⁰⁴ These employees are so analogous to individual parties, by virtue of their liability-creating actions, that *ex parte* contact would be highly prejudicial to the organizational party's interests.³⁰⁵

Witnesses, on the other hand, are all other employees who, because of their eyes and ears — not because of their job duties — may possess information relevant to the litigation.³⁰⁶ This cat-

²⁹⁹ See *supra* notes 208-16 and accompanying text.

³⁰⁰ Members of the control group, for example, typically participate in settlement discussions in deciding the course of litigation and in case preparation.

³⁰¹ See *McKitty v. Board of Educ., Nyack School Dist.*, 53 Fair Empl. Prac. Cas. (BNA) 358, 359 (S.D.N.Y. 1987); *Frey*, 106 F.R.D. at 35; ABA Committee on Professional Responsibility, Informal Op. 1410 (1978).

³⁰² See *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986); *Mompont v. Lotus Dev. Corp.*, 110 F.R.D. 414, 417 (D. Mass. 1986).

³⁰³ This proposal specifically adopts, not the federal evidentiary standard for admission of statements of a party's employees, but rather the common law standard requiring authority to speak on the employer's behalf. Since referring to an evidentiary standard is ambiguous given the different evidentiary rules in effect, the test should be tied to an employee's authority to speak under principles of agency law. See generally RESTATEMENT SECOND OF AGENCY, §§ 284-291 (1958) (governing agents' authority to make statements on behalf of principal).

³⁰⁴ See *supra* notes 148-54 and accompanying text.

³⁰⁵ *Miller & Calfo*, *supra* note 154, at 1068-69. A leading commentator in legal ethics has described the notion of the alter ego to include: "officials . . . who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in the representation." C. WOLFRAM, *supra* note 297, § 11.6.2.

³⁰⁶ See *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964). *Chadbourne*, a case interpreting scope of the

egory of employees includes middle and lower level management personnel below the control group whose responsibilities are unrelated to the subject of the litigation. In addition, it includes all other employees, except those whose actions have given rise to the organization's liability.

The American Bar Association should amend the Comment to Rule 4.2 to reflect more accurately the difference between employees who are witnesses and those who are alter egos of the organization. What follows is a suggestion for such an amendment.

In the case of an organization, this Rule prohibits communication by a lawyer for one party concerning the matter in representation with the following persons:

- (1) Persons who are managing agents of the organization and whose responsibilities on behalf of the organization are substantially related to the matter in controversy;³⁰⁷
- (2) Persons who acts or omissions in connection with that

attorney-client privilege in California, distinguishes between witnesses and parties as follows:

When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter his status or make his statement subject to the attorney-client privilege . . .

. . . Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer

Id. at 737, 388 P.2d at 709, 36 Cal. Rptr. at 477.

³⁰⁷ The term "managing agent" corresponds to the same term as used in Rule 32(a)(2) of the Federal Rules of Civil Procedure to identify employees of an organization whose deposition testimony may be compelled by an adversary. A substantial body of case law exists in which courts have identified which employees are managing agents. One court explained that, based on this body of law, the "paramount test" for determining whether an employee is a managing agent is "whether a witness is expected to identify himself with the interests of his principal rather than those of the other party." *Boston Diagnostics Dev. Corp. v. Kollsman Mfg. Co.*, 123 F.R.D. 415, 416 (D. Mass. 1988). In addition, managing agents are those employees who are "invested by the corporation with general powers to exercise . . . discretion and judgment in dealing with corporate matters." *Id.* at 416; WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2145 (1986) (citing cases). Obviously, then, "managing agent" is a much

matter may be imputed to the organization for purposes of civil or criminal liability;³⁰⁸ and
 (3) Persons *who have sufficient authority to speak for and to legally bind the organization with regard to the matter in controversy under principles of agency law.*³⁰⁹

This model corresponds to the alter ego test most recently adopted by the New York Court of Appeals in *Niesig v. Team I*.³¹⁰ The model's breadth in allowing access to an optimal number of employees serves the policy of free accessibility of witnesses that is so basic a feature of the adversary system.³¹¹ On the other hand, the model is narrowly tailored to protect those employees most identified with the organization's interests in the particular lawsuit. It negates the potential dangers of an attorney taking unfair advantage in informal interviews by barring contact with those with speaking authority for the organization and those whose interests in the litigation are indistinguishable from the interests of the organization.³¹²

narrower subcategory of management employees than the Comment's "persons with managerial responsibility."

³⁰⁸ This category is identical to the Comment's imputed action criterion. MODEL RULE OF PROFESSIONAL CONDUCT Rule 4.2 comment (1989).

³⁰⁹ This criterion specifically references agency law in order to avoid any confusion with the broader standard for vicarious admissions by employees under the Federal Rules of Evidence. The traditional agency law standard is identical to the common law evidentiary standard. 1 M. GRAHAM, MODERN STATE AND FEDERAL EVIDENCE 161 (1989). Under this standard, an employer is held responsible only for the statements of its speaking agents — those who are authorized by the employer, "either explicitly or implicitly through the nature of the work being performed, to speak on a particular subject." P. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 395 (1987). The speaking agent standard draws "a clear distinction between the authority to speak and the authority to act." *Id.* (citing *Rudzinski v. Warner Theatres, Inc.*, 16 Wis. 2d 241, 114 N.W.2d 466 (1962)). Only those employees with speaking authority have the potential to legally bind the organization. In contrast, while the Federal Rules of Evidence allow admission of any employee's statement about matters within the scope of employment, these statements are not legally binding in a conclusive sense. *See supra* notes 169-70 (describing evidentiary effect of employee admissions under federal rules).

³¹⁰ 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990); *see generally supra* notes 253-62 and accompanying text (discussing alter ego standard).

³¹¹ *See supra* notes 53-58 and accompanying text.

³¹² *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

B. Measures to Further the Protective Purposes of the Ethical Rule in Ex Parte Interviews

Any formulation short of a blanket prohibition will require attorneys to apply criteria and make judgments about the scope of informal contact allowed. Areas of uncertainty are inherent in this process and mistakes will be made, no matter what criteria are involved. Despite this, the dangers that the ethical rule was designed to ameliorate can be avoided in ways that do not cut off informal access to information and witnesses.

1. Procedures for Informal Contact

Attorneys should conduct ex parte interviews, even with employees clearly not covered by the ethical rule, according to specific guidelines designed to negate any opportunity for, or appearance of, overreaching.³¹³ Even when ex parte contact is permitted under the ethical rules, an attorney can be sanctioned for unethical behavior in conducting them.³¹⁴ Indeed, many cases approving informal contact have at the same time required that it be conducted in accordance with guidelines similar to those proposed below.³¹⁵ In other cases courts have cited attorneys' failure to adhere to similar guidelines as support for determinations that the informal contacts were unethical.³¹⁶

First, at the outset in any ex parte communication the attorney should disclose her identity, her capacity as counsel for the organization's adversary in the dispute, and the purpose of the proposed interview.³¹⁷ The attorney should make it clear that the

³¹³ See, e.g., *Monsanto Co. v. Aetna Casualty & Surety*, C.A. No. 88C-JA-118 (Del. Super. Ct. Sept. 10, 1990) (LEXIS, States library, Del file) (observing that Rule 4.3 requires open dealing with nonrepresented employees); *Sobel v. Yeshiva Univ.*, 52 Fair Empl. Prac. Cas. 1840 (S.D.N.Y. 1982) (noting attorney must behave ethically in informal interviews allowed by ethical rule).

³¹⁴ See *Sobel*, 52 Fair Empl. Prac. Cas. at 1841 & n.4.

³¹⁵ See, e.g., *Monsanto*, slip op. at 9-13 (citing guidelines and listing cases imposing them). In *Monsanto*, the court asserted that Rule 4.3 of the Model Rules of Professional Conduct, when read in conjunction with Rule 4.2, requires that the interviewer disclose not only her identity but also the respective positions of the parties to the dispute. *Id.*, slip op. at 9.

³¹⁶ See, e.g., *Upjohn Co. v. Aetna Casualty & Surety*, File No. 4:88 CV 124, slip op. at 2 (W.D. Mich. July 13, 1990) (LEXIS, States library, Mich file); *University Patents v. Kligman*, 737 F. Supp. 325, 328 (E.D. Pa. 1990).

³¹⁷ *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cases (BNA) 697, 702 (D. Mass. 1990); *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19-20

employee's submission to an interview is voluntary and that the employee may choose to have a legal representative present, either her own or the organization's.³¹⁸

Second, the attorney must determine whether or not the employee is individually represented by counsel in the matter.³¹⁹ If this is the case, the employee is considered a "represented party" and the ethical rule precludes informal contact.³²⁰

Third, in conducting the interview the attorney must take care not to subvert any of the purposes the ethical rule was designed to achieve. The attorney must diligently refrain from asking the employee about any communications with the organization's counsel.³²¹ If at any point the interview reveals that the employee is one whom the ethical rule would define as a party, the attorney should immediately conclude the interview.³²²

2. Use of Admissions Gained Through Informal Contact

Under the alter ego approach advocated above, many employees whose statements may be admissible as vicarious admissions in jurisdictions following the Federal Rules of Evidence will be available for ex parte contact. In order that the party using informal discovery not gain an unfair advantage, any statement gained in this way should be excluded from evidence.³²³ This is a solution a number of courts have adopted in lieu of precluding contacts with employees that might prejudice the organization.³²⁴ The logic behind this solution is that if any employee is not

(D. Mass. 1989); *Monsanto*, slip op. at 2; cf. Michigan Professional and Judicial Ethics Committee, Informal Op. No. 597 (imposing similar disclosure requirements on ex parte communications with former employees).

³¹⁸ *Siguel*, 52 Fair Empl. Prac. Cas. (BNA) at 702; *Morrison*, 125 F.R.D. at 20.

³¹⁹ See *Upjohn Co. v. Aetna Casualty*, File No. 4:88 CV 124, slip op. at 2.

³²⁰ MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1989).

³²¹ See *Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842, 1847-48 (S.D.N.Y. 1990).

³²² For example, the attorney should immediately end the interview if a management employee reveals that her position is substantially related to the controversy or that she is involved in the preparation of the organization's case.

³²³ See *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 329 (E.D. Pa. 1990). The employee of course may be called as a witness and her statements on the stand admitted into evidence.

³²⁴ See, e.g., *Garrett v. National R.R. Passenger Corp.*, Civil Action No. 89-8326, slip op. at 4 (E.D. Pa. Aug. 14, 1990) (LEXIS, Genfed library, Dist

treated as a party for purposes of the ethical rule, neither should she be treated as a party for evidentiary purposes.³²⁵ Together with the procedural safeguards detailed above, this furthers the organization's interest in preventing employees from making uncounseled admissions, yet preserves its opponent's access to relevant information.

3. Procedures When Applicability of Ethical Rule Is Uncertain

Courts have expressed strong disapproval of attorneys who make unilateral judgments about the propriety of ex parte contact in uncertain cases, without either notifying adversary counsel or obtaining court authorization in advance.³²⁶ Therefore, where substantial uncertainty exists as to whether the employee sought for informal contact is a party, attorneys should first attempt informal resolution of the matter with the organization's attorney, or failing this, seek court approval of the proposed contacts. In doing so, an attorney will give up the element of surprise over the organization, but will have fully satisfied her ethical obligations.³²⁷

file); *University Patents*, 737 F. Supp. at 329; *Frey v. Department of Health & Human Servs.*, 106 F.R.D. 32, 38 (E.D.N.Y. 1985).

³²⁵ See *Frey*, 106 F.R.D. at 38. In *Frey*, the court noted that the plaintiff seeking informal interviews "cannot have it both ways." If the employees are parties they cannot be interviewed; if they can be interviewed they are not parties, and their statements do not constitute admissions. *Id.*

³²⁶ See, e.g., *University Patents*, 737 F. Supp. at 329; Stahl, *supra* note 9, at 1226 n.144 (discussing Ninth Circuit opinion, subsequently withdrawn on other grounds, rejecting notion that counsel may unilaterally resolve ambiguities about employee's status). In *University Patents* the court distinguished between conduct an attorney believes is clearly proper and conduct whose propriety an attorney "knows is in doubt." 737 F. Supp. at 329. Where the propriety of the contact is uncertain, the court stated that a prudent, ethical attorney should give notice to opposing counsel. *Id.* (citing *Cagguila v. Wyeth Laboratories*, 127 F.R.D. 653, 654 (E.D. Pa. 1989)); see also *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975) (disapproving of attorney's failure to conduct ex parte interviews in open manner); *In re Investigation of FMC Corp.*, 430 F. Supp. 1108, 1111 (S.D.W. Va. 1977) (holding notice procedures sufficient to protect corporation from unethical conduct during ex parte interviews).

³²⁷ Stahl, *supra* note 9, at 1226 n.144.

*C. Application of the Ethical Rule in Employment
Discrimination Litigation*

When a court is asked by a party to litigation to interpret the scope of the ethical rule, it has an opportunity to do justice among the parties involved. Courts have discretion to approve informal contacts that otherwise might be either arguably or clearly inappropriate.³²⁸ The formulation of clear standards of ethical conduct is properly the province of state and national bar associations, who draft and interpret the ethical rules, and the states' high courts, who are charged with adopting and ultimately enforcing them through disciplinary proceedings.³²⁹ Courts considering the ethical rules in the context of litigation, on the other hand, have a different charge: they must ensure that unethical conduct does not taint or adversely affect the litigation.³³⁰

Courts in this context need not apply ethical rules literally; they have latitude to tailor informal discovery orders taking into account the particular interests of the parties involved.³³¹ This Comment argues that courts should take the opportunity in

³²⁸ Rule 4.2 provides that a lawyer shall not communicate about the subject of the controversy with represented parties, "unless the lawyer . . . is authorized by law to do so." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1989). A court order allowing such contact constitutes authorization of law. See *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19-20 (D. Mass. 1989) (approving ex parte contacts that would be otherwise improper under state bar association's interpretation of ethical rule).

³²⁹ The Model Rules state that while "[u]ltimate authority over the legal profession is vested largely in the courts," the "legal profession is largely self-governing." MODEL RULES OF PROFESSIONAL CONDUCT Preamble: A Lawyer's Responsibilities (1989).

³³⁰ See *Suggs v. Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842 (S.D.N.Y. 1990); *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080, 1083-84 (S.D.N.Y. 1989).

³³¹ See *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990); *Niesig v. Team I*, 76 N.Y.2d 363, 369-70, 558 N.E.2d 1030, 1032, 559 N.Y.S.2d 493, 495 (1990). In *Polycast*, the court declared: "[A] court need not treat the Canons of Professional Responsibility as it would a statute . . . when we find an area of uncertainty . . . we must use our judicial process to make our own decision in the interests of justice to all concerned." *Polycast*, 129 F.R.D. at 625 (quoting *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1359-60 (2d Cir. 1975) (Gurfein, J., concurring)). Similarly, the New York Court of Appeals asserted that it "need not read the rules literally or seek to effectuate the intent of the drafters" because when ethical rules are raised in the context of litigation, the interests of nonlawyers are implicated as well. *Niesig*, 76 N.Y.2d at 369-70, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495.

appropriate cases to do justice among the parties by engaging in a case-by-case balancing of their interests. In employment discrimination cases this approach is particularly appropriate because of the plaintiff's inability to vindicate federal rights without information that is under the defendant organization's control.³³²

Case-by-case balancing is flawed in one respect: it consumes judicial resources on issues collateral to the substantive dispute.³³³ Yet courts are confronted with these collateral ethical issues primarily because the ethical rule as presently formulated lacks clarity and because the Official Comment's categories lack persuasive justification. Until these problems are solved, litigants will continue to call on courts for guidance; when they do, courts should fully explore the legitimate needs of the litigants rather than mechanically apply a universal formula.

CONCLUSION

The ethical prohibition on *ex parte* contact with a represented party presents problems when one of the parties is an organization. In this situation, the rule conflicts with policies favoring free access to evidence and witnesses, and with the duty to conduct a reasonable investigation of the facts. The best approach to applying the rule to an organizational party begins from the premise that access to witnesses must be preserved, and accordingly distinguishes between employees who are parties and employees who are witnesses. Party employees are those employees so identified with the interests of the organization in the dispute as to be the organization's alter egos — whether because of the relationship of their positions to the dispute at issue or because of the relationship of their conduct to the organization's liability. The alter ego approach is narrowly tailored and seeks to further both the protective purposes of the ethical rule and the policies encouraging discovery of relevant evidence. In addition, procedural safeguards governing the conduct of *ex parte* contacts with employees serve to guide an attorney in applying the ethical rule and protect an organizational party when adversary counsel con-

³³² As the discussion of the balancing approach above noted, this approach has gained an increasing number of adherents among courts faced with applying the ethical rule in employment discrimination and civil rights actions. *See supra* note 273 and accompanying text.

³³³ *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 700 (D. Mass. 1990).

tacts its employees. When questions or inequities in applying the ethical rule arise, as they are wont to do in employment discrimination actions, courts should take the opportunity to examine the interests of the parties on a case-by-case basis. This solution, while comprised of many recommendations, represents an optimal resolution of the tensions involved in applying the ethical rule to an organizational party without unduly compromising either the rule's policy underpinnings or the rights of the organization's adversary.

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