

Ex Parte Communications with Employees of a Business Enterprise: The Need for a Bright Line Test

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courts as unconstitutional.

Brian N. Corrigan & Eileen Cotter Donovan

EX PARTE COMMUNICATIONS WITH EMPLOYEES OF A BUSINESS ENTERPRISE: THE NEED FOR A BRIGHT LINE TEST

INTRODUCTION: THE EXISTING PROBLEM

X.X.X., Inc. is a hypothetical company incorporated and legally doing business in State A. X.X.X., Inc. has a typical corporate structure, consisting of directors, senior and junior executives, managers, workers and an office support staff, with a normal turnover of personnel occurring in all positions. In its course of business X.X.X., Inc. becomes embroiled in a legal dispute with P. Litigation commences and the discovery process begins. P's attorney plans to contact present and former employees of X.X.X., Inc. to conduct informal ex parte¹ communications. Counsel for

¹ See BLACK'S LAW DICTIONARY 576 (6th ed. 1990). Ex parte is defined as "[o]n one side only." *Id.* Communication is defined as "the sharing of knowledge by one with another." *Id.* at 279. The term ex parte communication/contact is used to describe contacts made between one counsel and witness/parties for the opposing side without the opposing counsel's knowledge and/or presence. See generally *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (use of "ex parte communication" consistent with above description and sets minimum standard which must be followed when dealing with employees of business enterprise); *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv. Ltd.*, 745 F. Supp. 1037, 1039 (D.N.J. 1990) (ruling upon motion to prohibit ex parte communication with former employees); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 628 (S.D.N.Y. 1990) (no ethical bar against ex parte communications with former employees); *Niesig v. Team I*, 76 N.Y.2d 363, 368, 558 N.E.2d 1030, 1031-32, 559 N.Y.S.2d 493, 494 (1990) (denying employer's ability to prevent ex parte communications with low-level and former employees); *Stahl, Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181, 1182 (1987) (analyzing theories on protecting employees from ex parte interviews).

X.X.X., Inc. objects to this process, claiming it constitutes a violation of ethical standards² and the attorney client privilege.³ Will the interview be allowed? If allowed, will any restrictions be

² See Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823, 877 (1986) (State of Washington's Rules of Professional Conduct's focus on ethical responsibilities of lawyers conducting ex parte interviews with corporate employees); Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683, 708 (1979) (criticizing as unethical allowance of contacts, and interviews of employees of opposing party by adverse counsel without notice to opposing counsel); Miller & Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is it Ethical?*, 42 BUS. LAW. 1053, 1053 (1987) (tactical advantage of ex parte contacts with current and former employees and ethical issues raised where rules not clear); Stahl, *supra* note 1, at 1182 (noting sound policy why ethical restrictions on ex parte interviews with past and present employees should be coextensive with attorney client privilege); Stevens, *Wyoming Rules of Professional Conduct: A Comparative Analysis*, 23 LAND & WATER L. REV. 463, 507-08 (1988) (how Wyoming Rules of Professional Conduct regulate ethical conduct of lawyers when communicating with unrepresented persons); Comment, *Ex Parte Communication with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest*, 82 NW. U.L. REV. 1274, 1275 (1988) [hereinafter Comment, *Ex Parte Communication*] (impact of Model Code's and Model Rules of Professional Responsibility's requirement of consent of opposing counsel before ex parte contact with adverse client permissible); Comment, *Ethics of Conducting Ex Parte Interviews*, 3 ST. JOHN'S J. LEGAL COMMENT. 234, 235 (1988) [hereinafter Comment, *Ethics*] (risks of ethical violations when conducting ex parte interviews with employees of corporate adversary); *infra* note 5 (text of professional conduct rule against communication with person represented by attorney).

³ See *Upjohn*, 449 U.S. at 389. "The attorney-client privilege is the oldest of the privileges for confidential communications known to Common Law." *Id.* (citing 8 J. Wigmore, *Evidence* §2290 (McNaughton rev. 1961)). The Supreme Court in *Upjohn* further stated that

[The attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends on the lawyer's being fully informed by the client.

Id.

The privilege rests on the need for lawyers to know all that relates to the client's reasons for seeking representation in order to properly and fully represent the client. *Id.* However, the Court noted that the privilege does not offer a clear definition of who is protected when the client is "an artificial creature of the law, and not an individual . . . [however] [t]his Court has assumed that the privilege applies when the client is a corporation." *Id.* at 389-90 (citing *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915)). See Stahl, *supra* note 1, at 1182-83. The author observed that:

[There are] those who argue that the privilege interferes with the search for truth and those who believe that the privilege is a necessary prerequisite to complete freedom of consultation between a lawyer and a client . . . [P]ractitioners and scholars have long argued, and no doubt will continue to argue over the policy considerations which underlie the existence and scope of the attorney-client privilege, especially as applied to corporations.

Id. See also Miller & Calfo, *supra* note 2, at 1053-55 (violations of attorney-client privilege possible where rules on ex parte communications unclear).

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placed on P's attorney concerning whom he can interview or the extent of the questioning?

Presently, it is impossible to answer these questions with any degree of certainty.⁴ Since ethical rules proscribe that parties represented by counsel may not be contacted *ex parte*,⁵ the central issue becomes which, if any, employees of a corporation may be considered a "party" to an action.⁶ Courts currently employ four

⁴ See *PSE&G*, 745 F. Supp. at 1039 (rule limiting *ex parte* communications easily applied where adverse party is individual, but difficult where adverse party is corporation); *Polycast*, 129 F.R.D. at 626-27 (court notes divergent views on whether current or former employees of corporations are protected by rule prohibiting *ex parte* communications with adverse party); *Niesig*, 76 N.Y.2d at 370, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496 (difficult defining scope of rule limiting *ex parte* communications where adverse party is corporation); *Wright by Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 197, 691 P.2d 564, 567 (1984) (conflicting policies as to whether corporate party's employee should be considered "party"). See generally *Miller & Calfo*, *supra* note 2, at 1053 (ethical rules regulating *ex parte* contacts with current and former employees of corporate adversary lack clarity); *Stahl*, *supra* note 1, at 1185-87 (various theories used by courts when determining extent of allowing *ex parte* interviews with adverse corporation's employees); Comment, *Ex Parte Communications*, *supra* note 2, at 1275-76 (same); Comment, *Ethics*, *supra* note 2, at 735-36 (courts use four tests when determining who may not be interviewed).

⁵ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1981). The disciplinary rule originally adopted in 1908 states:

DR 7-104 Communicating With One Of Adverse Interest

(A) During the course of his representation of a client a lawyer shall not:

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

Id. The American Bar Association interpreted this rule in conjunction with Canon 9, which provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," and stated that the Code "does not allow a communication with an opposing party, without the consent of his counsel, though the purpose merely be to investigate the facts." ABA Comm. on Ethics and Professional Responsibility Informal Op. 187 (1938).

RULE 4.2 OF THE MODEL RULES OF PROFESSIONAL CONDUCT which was enacted to replace The Model Code of Professional Responsibility, states:

Rule 4.2 Communication With Persons Represented by Counsel

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.

MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.2 (1983). The Model Code Comparison contained under Rule 4.2 states that "[t]his Rule is substantially identical to DR 7-104(A)(1)." *Id.* (Model Code Comparison).

⁶ See *Stahl*, *supra* note 1, at 1184. The Commentator states:

The ethical obligations imposed by the Code of Professional Responsibility, which governs lawyers' conduct in a majority of jurisdictions, have created at best confusion and uncertainty, and at worst conflicting obligations, when counsel for a party to pending or prospective litigation wishes to interview the employees of an adverse party DR 7-104(A)(1) provides that a lawyer shall not "communicate on the

theories to determine when an employee is considered a "party" for the purposes of ex parte communications when dealing with a business enterprise:

- 1) Allowing ex parte communications between opposing counsel and current low-level employees, and all former employees;⁷
- 2) Allowing ex parte communications between opposing counsel and all former employees;⁸
- 3) Allowing ex parte communications between opposing counsel and former employees who do not possess privileged information on the litigated issue; and⁹

subject of the representation with a party he knows to be represented" by counsel without the "prior consent of the lawyer representing such other party." Unfortunately, the Code does not define the term "party". As a consequence, these vague injunctions may effectively put a lawyer in an ethical dilemma when faced with an opportunity to conduct an ex parte interview of another party's employee. . . .

Id. See also *Niesig v. Team 1*, 76 N.Y.2d 363, 370-71, 558 N.E.2d 1030, 1033, 559 N.Y.S.2d 493, 496 (1990) (problem applying DR 7-104(A)(1) to corporations given Code's failure to define "party").

⁷ See, e.g., *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 561 (D. Utah 1990) (rule prohibiting communication with represented party does not apply to ex parte interviews with low level employees); *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 328 (E.D. Pa. 1990) (rule prohibiting ex parte communications meant to apply only to employees who could bind company); *Suggs v. Capital Cities/ABC, Inc.*, No. 86 c. 2774 (S.D.N.Y. April 24, 1990) (Westlaw, Allfeds library) (opposing counsel only precluded from speaking to employees on matters within scope of their employment); *Lizotte v. New York City Health and Hosp. Corp.*, No. 85 c. 7548 (S.D.N.Y. March 13, 1990) (Westlaw, Allfeds library) (opposing counsel may communicate with employee once he is fully advised and informed of rights); *Mompoin v. Lotus Dev. Corp.*, 110 F.R.D. 414, 418 (D. Mass 1986) (ex parte communication with current employees allowed if need to gather information is greater than organization's interest in effective counsel); *Frey v. Department of Health & Human Serv.*, 106 F.R.D. 32, 35-36 (E.D.N.Y. 1985) (prohibits ex parte contacts with high level managerial employees only); *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498 (rule prohibiting communications directly with party known to have counsel only includes employees whose acts or omissions can bind corporation); *Wright by Wright*, 103 Wash. 2d at 201, 691 P.2d at 569 (employee considered "party" if has sufficient legal authority to bind corporation). See generally *Leubsdorf*, *supra* note 2, at 708 (proposing unlimited communications directly with any employee without notice to employer); Comment, *Ex Parte Communication*, *supra* note 2, at 1298 (adopts theory similar to *Wright*).

⁸ See, e.g., *DiOssi v. Edison*, 583 A.2d 1343, 1345 (Del. Super. Ct. 1990) (rule prohibiting ex parte communications does not apply to former employees); *Monsanto Co. v. AETNA Casualty and Sur. Co.*, 593 A.2d 1013, 1020 (Del. Super. Ct. 1990) (ex parte contacts with former employees permitted where full disclosure of situation is made); *National Union Fire Ins. Co. v. Stauffer Chem. Co.*, No. 87C-SE-11 (Del. Super. Ct. July 20, 1990) (Westlaw, DE-CS library) (same). See also *Miller & Calfo, Ex Parte Contact*, *supra* note 2, at 1071 (ex parte contacts with current employees of corporate adversary should require opposing counsel's consent).

⁹ See, e.g., *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 82 (D.N.J. 1991) (allowing ex parte contacts with former employees except those with whom communication would violate ethical rules); *Polycast Technologies Co. v. Uniroyal, Inc.*, 129 F.R.D. 621, 629

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4) Allowing ex parte communications between opposing counsel and any party who was not employed at any time by the employer.¹⁰

I. DEALING WITH CURRENT EMPLOYEES

It is submitted that ex parte communications between counsel and the current employees of an adversary should be prohibited. The foundation for this restriction lies in the law of agency, specifically the treatment of current employees as agents of their employers.¹¹ It is further submitted that there are important corollaries of an agency relationship which are ignored by allowing counsel to contact current employees of an adversary. One consequence of such a relationship is that an agent owes a duty to the company to follow all reasonable company directives.¹² Second, an agent has a duty to act in the best interests of the company.¹³ Finally, acts or statements of an agent may be attributed to the company.¹⁴ It is proposed that when read in conjunction with the ethi-

(S.D.N.Y. 1990) (ex parte communications with former employees allowed except when employee possesses privileged information); *American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc.*, Nos. CV-LV-82-26 HDM, CV-LV-82-96 HDM (D. Nev. March 11, 1986) (Westlaw, Allfeds library) (same as *Curley*).

¹⁰ See, e.g., *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv., Ltd.*, 745 F. Supp. 1037, 1042 (D.N.J. 1990) (both present and former employees considered represented by corporate attorney thereby prohibiting all ex parte communications); *American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc.*, 765 F.2d 925, 926 (9th Cir. 1985) (barring ex parte communications with former employees) (withdrawn and vacated). See also *Sperber v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, No. 82 c. 7428 (S.D.N.Y. Nov. 21, 1983) (LEXIS, Genfed library) (use of term "any other person" in Model 1 Rule that prohibits ex parte communication in broad enough to cover former employees); *Stahl*, *supra* note 1, at 1225 (arriving at same conclusion as *PSE&G*). Cf. *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988) (ex parte communications not allowed with any employee, former or current, who was involved in issue in controversy); *Amarin Plastics v. Maryland Cup Corp.*, 116 F.R.D. 36, 40 (D. Mass. 1987) (prohibits ex parte communications with any former employee who is shown able to impute liability to company).

¹¹ See RESTATEMENT (SECOND) OF AGENCY § 1 (1958). According to the Restatement, an "agent" is defined as a person whom, by consent, acts on behalf of another party, the "principal," in a fiduciary relationship, and is subject to control of that party. *Id.*

¹² See *id.* (agent must obey principal's orders).

¹³ See *id.* (agent is under continuous subjection to will of principal).

¹⁴ See *id.* at § 286. Restatement § 286 provides that:

In an action between the principal and a third person, statements of an agent to a third person are admissible in evidence against the principal to prove the truth of facts asserted in them as though made by the principal, if the agent was authorized to make the statement or was authorized to make, on the principal's behalf, any

cal precepts espoused by the American Bar Association in the Model Code of Professional Responsibility, Disciplinary Rule 7-104(A)(1),¹⁶ the Model Rules of Professional Conduct, Rules 3.4(f)(1)¹⁶ and 4.2,¹⁷ and the Supreme Court's decision in *Upjohn Co. v. United States*,¹⁸ these principles clearly support and require the prohibition of ex parte communications with current employees.

II. DEALING WITH FORMER EMPLOYEES: THE PROBLEM

It appears that opposing counsel's desire to conduct informal ex parte interviews with former employees does not conflict with agency law since an agency relationship no longer exists between the employee and its former corporate employer.¹⁹ Neither the ethical rules nor the Supreme Court has specifically addressed how former employees should be treated during discovery.²⁰ This

statements concerning the subject matter.

Id.

¹⁶ See *supra* note 5 (text of DR 7-104(A)(1)).

¹⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(f)(1) (1983). Section (f)(1) states that, "A lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or another agent of a client." *Id.* Comment 4 to Rule 3.4 says that "[p]aragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client." *Id.* at comment 4.

¹⁷ See *supra* note 5 (text of Rule 4.2). See also *Cagguila v. Wyeth Laboratories, Inc.*, 127 F.R.D. 653, 654-55 (E.D. Pa. 1989) (ex parte statements taken from current employee not admissible under Rule 4.2).

¹⁸ 449 U.S. 383 (1981). The Court found that all current employees possess the ability to bind the corporation, and ex parte communications with employees who can, in fact, bind the company should not be permitted. *Id.* at 391. The Court stated that:

Middle-level and indeed lower level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Id. Therefore, the Court extended the attorney-client privilege to communications within the duties of the employee. *Id.* at 395. This corresponds with the purpose of the attorney-client privilege which, in a corporate setting, is to encourage communication of relevant information between the corporate counsel and the employee. *Id.* at 392.

¹⁹ See *supra* notes 11-14 and corresponding text (parameters of agency relationships).

²⁰ Compare MODEL RULES OF PROFESSIONAL CONDUCT (1983) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981). Neither the Model Rules nor the Model Code directly address how an attorney is to treat former employees or agents of an organization. *Id.* Moreover, the Court's most recent decision on ex parte communication, *Upjohn Co. v. United States*, does not address treatment of former employees during discovery. *Upjohn*, 449 U.S.

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lack of guidance has led to the dissection of the existing ethical rules²¹ and Supreme Court interpretations,²² and has resulted in semantical arguments based on certain terms contained in these materials.²³ The result has been that individual judges have applied their own standard for these rules,²⁴ producing inconsistency within jurisdictions.²⁵ This disparity can produce deleterious effects for an attorney, who in good faith may breach, by acts of commission or omission, ethical standards²⁶ based on prior decisions within a single judicial district. Such situations are not only vexatious, but can have a detrimental effect on the disposition of a case.²⁷ In addressing such inconsistency, the Supreme Court has stated that, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."²⁸ It is submitted that a uniform approach must be adopted which conforms to the standards of ethics and certainty.

at 383.

²¹ See *supra* notes 5 & 16 and corresponding text (listing relevant ethical rules).

²² See *supra* note 18 and corresponding text (*Upjohn* is only Supreme Court case dealing with ex parte communications between opposing counsel and corporate employees).

²³ See *supra* notes 7-10 and *infra* notes 29-62 and corresponding text (discussion of competing theories set forth by courts).

²⁴ See *supra* notes 7-10 and corresponding text (reviewing divergent standards applied by judges).

²⁵ Compare *Sperber v. Washington Heights-West Harlem-Inwood Mental Council, Inc.*, No. 82 c. 7428 (S.D.N.Y. Nov. 21, 1983) (LEXIS, Genfed library) with *Suggs v. Capital Cities/ABC, Inc.*, No. 86 c. 2774 (S.D.N.Y. April 24, 1990) (Westlaw, Allfeds library) and *Polycast Technologies Co. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990). All three cases were heard in the United States District Court for the Southern District of New York, but three distinctly different interpretations were employed in dealing with the nearly identical issue of the extent to which ex parte communications may be allowed. *Id.* Compare *Curly v. Cumberland Farms, Inc.*, 134 F.R.D. 77 (D.N.J. 1991) with *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv. Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990). The magistrate in *Curley* expressly declined to follow the standard set by *PSE&G. Curley*, 134 F.R.D. at 82.

²⁶ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). The Model Rules state that an attorney must provide competent representation with all the skill, thoroughness and preparation which may be reasonably necessary. *Id.* Therefore, it is submitted that attorneys who conduct ex parte interviews when not allowed or who fail to conduct interviews if allowed are breaching this ethical responsibility to their clients.

²⁷ See, e.g., *National Union Fire Ins. Co. v. Stauffer Chem. Co.*, No. 87C-SE-11 (Del. Super. Ct. July 20, 1990) (Westlaw, DE-CS library). Here, a motion appealing a decision where attorneys were disciplined for conducting ex parte interviews was reviewed. *Id.* Although the appeal was granted, this led to a delay in the disposition of the case and uncertainty as to the availability of the attorneys to work on the case. *Id.*

²⁸ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

III. DEALING WITH FORMER EMPLOYEES: THE OPTIONS

Courts and legal academicians are divided among the three theories on how to deal with an adversary's desire to contact a corporation's former employees.²⁹ Before suggesting or adopting any particular theory, it is first necessary to make a critical analysis of each.

A. *Allowing Ex Parte Communications with all Former Employees*

There are several attractive qualities to this theory. The most important aspect is its easy implementation: the only parties permitted to be contacted are former employees of the company. Proponents of this option may point to the official comment of Rule 4.2 of the Model Rules of Professional Conduct which states that "any person whose act or omission . . . may be IMPUTED to the organization," to describe with whom *ex parte* communications are prohibited.³⁰ It follows that since former employees can no longer bind the company, *ex parte* interviews with them should be allowed.³¹ Although it can be contended that the Model Rules should have no effect in jurisdictions where the older Model Code is still applicable, such a view is incorrect because Model Rule 4.2

²⁹ See *supra* notes 8-10 and accompanying text (discussion of theories and illustrative cases).

³⁰ MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Scope and Terminology (1983) (emphasis in original). The comments are the official interpretations of the Model Rules, and although "the text of each Rule is authoritative, . . . the comments are intended to guide the interpretation [of the Rules]." *Id.* Therefore, it is submitted that the phrase, "any person whose act or omission . . . may be imputed to the organization," is the official, and only attempt to define party. See *id.* at Rule 4.2 at comment. See also Comment, *Ex Parte Communication*, *supra* note 2, at 1275 (noting ambiguity in term "party" in corporate setting).

³¹ 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). The New York Court of Appeals employs a test restricting *ex parte* communications in which it defines impute in the context of an "employee whose acts or omissions in the matter under inquiry are binding on the corporation . . . or IMPUTED to the corporation for the purposes of its liability." *Id.* (emphasis added). The court states that the application of its standard will prohibit *ex parte* contacts only "with those 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 representation." *Id.* See also *Defendant's Affidavit of Geoffrey C. Hazard, Jr., Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv. Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990). Professor Hazard states that "persons who are not relatives or present employees are 'fair game.'" *Id.*

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has been recognized as “substantially identical to DR 7-104(A)(1),” and thus should be given great interpretive weight.³² Another attraction to this theory is that it would allow non-attorney investigators to conduct the ex parte interview, since it is not a formal deposition, and thereby, would apparently reduce the legal fees of the client.³³ Facially, this theory offers easy implementation and a cost efficient standard; however, it is submitted that this theory also possesses several significant deficiencies.

Initially, the term “bind” is not a recognized interpretation for the word “impute.”³⁴ Since this theory is based on the assumption that such a recognition exists, it is, therefore, erroneous at its core.

Additionally, allowing ex parte contact with former employees fails to take into account the fact that former employees may still possess confidential information, even though they can no longer impute liability to the corporation.³⁵ Such information is beyond

³² See *supra* note 5 (showing model code comparison). See also Polycast Technologies Co. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (appropriate to use Rule 4.2 to determine scope of DR 7-104(A)(1)); Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988) (court adopts official comment to Rule 4.2 as portion of its definition of “party” as used in DR 7-104(A)(1)); Amarin Plastics v. Maryland Cup Co., 116 F.R.D. 36, 39-40 (D. Mass. 1987) (employs comment of Rule 4.2 upon finding no significant difference between Rule 4.2 and DR 7-104(A)(1)).

³³ *C.f.* PSE&G 745 F. Supp. at 1043. The court claims that “[i]n the context of litigation involving an organization, the importance of the informal interview is greatly exaggerated, particularly when its use threatens to produce needless and costly procedural litigation.” *Id.*

³⁴ See BLACK’S LAW DICTIONARY 758 (6th ed. 1990). Impute is defined as “to attribute vicariously.” *Id.* See also PSE&G, 745 F. Supp. at 1042 (defines impute as “[t]o credit to a person or a cause” (quoting Webster’s New Collegiate Dictionary 578 (3d ed. 1975))); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 963 (2d ed. 1987) (defining impute as “to attribute or ascribe”). See generally Niesig, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498. (New York Court of Appeals includes word “impute” in standard restricting ex parte communications but only applies word “bind” in its interpretation of standard).

³⁵ See PSE&G, 745 F. Supp. at 1042 (“The change in employment status does not effect the nature of [a person’s] actions vis-a-vis whether they are imputable to the employer.”); Miller & Calfo, *supra* note 2, at 1072 (“The interest of the corporation in protecting information — especially privileged information — acquired by an employee during the course of employment from disclosure to an opponent in litigation remains after the employee leaves the corporation.”); Stahl, *supra* note 1, at 1220 (“The comment [to Rule 4.2] does not distinguish between those whose agency or employment relationship continues at the time of discovery, but instead focuses on the existence of the relationship at the time of the events in question”) (emphasis added); Reply Affidavit of Geoffrey C. Hazard, Jr., National Union Fire Ins. Co. v. Stauffer Chem. Co., No. 87C-SE-11 (Del. Super. Ct. Oct 23, 1990) (Westlaw, DE-CS library) (“A former employee may not reveal attorney-client confidences

the scope of an adversary's discovery rights,³⁶ and is only likely to be revealed when the enterprise's counsel is not present.³⁷

Furthermore, although a decrease in the monetary aspect of conducting an interview itself seems likely, this is not the case when viewing at the entire judicial picture. By not using the deposition process, the cost of the required court reporter is saved, and the attorney may employ a non-attorney investigator to gather the desired information at a lower cost.³⁸ The problem, however, is that the investigators, though not attorneys, are under the same ethical guidelines as the attorneys who hire them.³⁹ They must make certain to introduce themselves properly and that the subject knows and understands their relationship to the case.⁴⁰ Any misrepresentation or misunderstanding caused by the investigator can lead to pretrial motions for protective orders and suppression, just as if the employing attorney had made the remark.⁴¹ There-

he may have acquired during employment, or other information the law prohibits him from divulging . . .'). *C.f.* *Mills Land & Water Co. v. Golden West Ref. Co.*, 186 Cal. App. 3d 116, 128, 230 Cal. Rptr. 461, 468 (1987) (court notes that purpose behind Cal. Rule 7-103, which is similar to Rule 4.2, includes prevention of information and knowledge acquired by employee during employment from being released to adversary without advice of counsel after employment).

³⁶ See FED. R. CIV. P. 26(b) (party may generally obtain discovery of any relevant matter which is not privileged); N.Y. CIV. PRAC. L. & R. 3101(b) (McKinney 1991) (same).

³⁷ See *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). The Court recognized that an attorney's advice is frequently most significant to individuals who cannot bind the corporation. *Id.* Therefore, limiting ex parte communications to a small group of employees frustrates the purpose of the attorney-client privilege, which is to encourage communications between the corporate counsel and the employees. *Id.*

³⁸ See *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 82-83 (D.N.J. 1991) (supporting claim of lowered cost).

³⁹ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3(b) (1983). This rule states that with respect to nonlawyer personnel that are retained by or associated with the lawyer, the lawyer "must make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." *Id.* It is further provided in rule 5.3(c) that the lawyer may be responsible for any conduct of the nonlawyer that would be considered a violation of those obligations. *Id.* at 5.3(c).

⁴⁰ See *id.* at 4.3. This rule states as follows:

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

Id.; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a) (1983) (attorney's duty not to misrepresent or mislead others when representing client, includes failures to disclose to third parties).

⁴¹ See *supra* notes 38-40 and corresponding text (pretrial motions and non-attorney

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fore, it is submitted that the chances of a non-attorney investigator violating the demanding legal rules governing ethical conduct for attorneys, are higher than an attorney violating them, which may ultimately lead to increased costs due to suppression motions.

Finally, if an adverse party gains, or is perceived to have gained confidential information, the likely outcome will be extended pre-trial litigation, seeking either a protective order⁴² or suppression of all evidence that may have been discovered through the ex parte contact.⁴³ These motions lead to increased expenses for the client who must pay the costs and expenses of the preclusion motions, as well as a burdening of the already overloaded courts with unnecessary litigation.⁴⁴ This situation may lead to inevitable delays in bringing the case to trial or settlement, which may call into question, the attorney's compliance with the ethical rule requiring attorneys to expedite litigation.⁴⁵

Some judges have recognized these deficiencies, and have attempted to cure them by requiring the issuance of a "miranda letter."⁴⁶ Such a letter typically explains the positions of the parties, the issues involved in the lawsuit and the ability of the interviewee

responsibility).

⁴² Compare FED. R. CIV. P. 26(c) with N.Y. CIV. PRAC. L. & R. 3103 (McKinney 1991). Both rules allow a party to seek a protective order from discovery. *Id.* The court may order, *inter alia*, that discovery sought not be allowed at all, only be allowed under specified terms and conditions, be permitted by an alternative method, or be allowed completely. *Id.*

⁴³ See *id.* The moving party may be granted relief in the form of a suspension of the disclosure which is pending the application for the protective order, or suppression of any evidence which may have been properly obtained. *Id.* *Cf.* Cagguila v. Wyeth Laboratories, Inc., 127 F.R.D. 653, 654-55 (E.D. Pa. 1989) (violation of rule against ex parte contacts with employee made all such evidence gained inadmissible); Monsanto Co. v. AETNA, Casualty and Sur. Co., 593 A.2d 1013, 1020 (Del. Super. Ct. 1990) (any evidence obtained as result of ex parte communications with former employees of adversary not admissible at trial); National Union Fire Ins. Co. v. Stauffer Chem. Co., No. 87C-SE-11 (Del. Super. Ct. Oct. 23, 1990) (Westlaw, DE-CS library) (same).

⁴⁴ See, e.g., National Union, No. 87C-SE-11 (motions seeking protective orders from and suppression of evidence gained through ex parte interviews, requests for rehearing of motions, rehearings of the motions and appeals of decisions of judge on motions); *supra* note 30 (court in PSE&G supports this position).

⁴⁵ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983). This rule states that, "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." *Id.*

⁴⁶ See National Union, No. 87C-SE-11 ("Miranda" type warning letter to former employees); Monsanto, 593 A.2d at 1021 (ex parte contacts permitted where "miranda letter" issued).

to contact the counsel of its former employer, if it so desires.⁴⁷ The problem with miranda letters is that they appear "to induce the prospective witness to refuse to give information voluntarily."⁴⁸ Such behavior toward a former employee is considered a violation of Model Rule 3.4(f)(1), which prohibits an attorney from requesting a person, other than a client, to refrain from volunteering information to another party unless the person is a relative, employee, or another agent of the client.⁴⁹

B. Allowing Ex Parte Communications with Some Former Employees

This theory attempts to cure the deficiencies of the theory by not allowing ex parte communications with former employees who possess confidential information.⁵⁰ By distinguishing between different former employees, it is submitted that this theory lacks the simplicity of implementation possessed by its less restrictive counterpart. However, this theory shares the benefits and inadequacies of the previously discussed theory,⁵¹ as well as presenting additional problems.

While this theory appears to address and resolve the problem concerning the possession of confidential information by former employees, in effect, it fails.⁵² Since every corporate structure is different, it is suggested that there is no easy method of discovering who possesses confidential information. Where a lawyer overextends discovery to include confidential information, pretrial liti-

⁴⁷ See, e.g., *supra* note 46 (discussing letters permitted by court, which include description of parties and address and phone number of former employer's counsel).

⁴⁸ Defendant's Affidavit of Geoffrey C. Hazard, Jr., Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv. Ltd., 745 F. Supp. 1037 (D.N.J. 1990).

⁴⁹ See Reply Affidavit of Geoffrey C. Hazard, Jr., *National Union*, No. 87C-SE-11 (Del. Super. Ct. Oct. 23, 1990) (Westlaw, DE-CS library). Professor Hazard, in explaining the reason that a "miranda letter" should be considered unethical, states that, "a present employee can be lawfully requested not to talk to opposing counsel. If the same request were made of a former employee, it would constitute a violation of Rule 3.4, as an interference with the other side's opportunity to gather evidence." *Id.*; see also *supra* note 16 (text of Rule 3.4(f)(1)).

⁵⁰ See *supra* notes 35-37 and corresponding text (theories and problems dealing with former employees possessing privileged information).

⁵¹ See *supra* notes 30-49 and corresponding text (theory's benefits and deficiencies).

⁵² See *supra* note 35 and corresponding text (theory's problems with former employees possessing privileged information).

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gation once again may become necessary.⁵³ If an attorney underextends the scope of discovery, the attorney is not acting in the best interests of the client.⁵⁴ It is submitted that the only certain method to determine which former employees possess confidential information is by either mutual consent of the parties to the litigation or determination by the court. Therefore, it is further submitted that this option does not serve as a solution, but merely shifts the responsibility of determining whether or not the interviewee possesses confidential information from the corporation's counsel to the adverse attorney.

C. Not Allowing Ex Parte Communications with Any Former Employee: The Bright Line Test

This theory is an ethical standard which is simplistic in theory and practice. It provides a clear standard, in which no guess-work is required by attorneys in determining with whom they are permitted to speak to informally,⁵⁵ thus eliminating the result of undesirable pretrial litigation. It is submitted that such a bright line test properly defines the word "impute," as used in the comment to Model Rule 4.2, to mean to credit or attribute to a person.⁵⁶ This standard recognizes that both current and former employees can contribute toward corporate liability,⁵⁷ and that "it is impossible to tell whether an individual's acts or omissions may be imputed until that individual has testified to those acts."⁵⁸ It is proposed that this test would also eliminate any conflict with ethical rules that would be created by the informal interview process,

⁵³ See *supra* notes 41-44 and corresponding text (creation of pretrial litigation when former employee with privileged information is contacted ex parte).

⁵⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983) (lawyer shall provide competent representation with all skill, thoroughness and preparation which may be reasonably necessary).

⁵⁵ See *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv. Ltd.*, 745 F. Supp. 1037, 1042 (D.N.J. 1990). The court states that the confusion in this area illustrates the need for a "bright line test" whereby all ex parte contacts with former employees would be prohibited. *Id.*

⁵⁶ See *PSE&G*, 745 F. Supp. at 1040 ("impute" means "[t]o credit to a person or cause"); *supra* notes 30-32, 34 and corresponding text (discussing term "impute").

⁵⁷ See *supra* note 35 and corresponding text (lack of correlation between employment status and possession of privileged information).

⁵⁸ *PSE&G*, 745 F. Supp. at 1042.

such as misrepresentations and misunderstandings,⁵⁹ since the opposing attorney would have to clear with the corporate counsel, any contact intended to be had with the former employee.

Opposition to this theory is based on the premise that such a broad prohibition on ex parte communications offers the corporate enterprise too much protection.⁶⁰ Another concern is the rise in cost due to the increased use of the formal deposition, although this cost is partially offset by the reduction in the necessity for costly pretrial motion practice.⁶¹ The perception of increased cost must also be tempered by the preservation of judicial economy, which a bright line test promotes.⁶²

IV. PROPOSED SOLUTION: ADOPTION OF THE "BRIGHT LINE" TEST

It is submitted that the only theory concerning the permissibility of ex parte communications with employees of a corporate enterprise that meets the standards of ethics and certainty is the bright line test. The contention that this theory is overly restrictive is unfounded, since there is no restriction on the type of information which may be exchanged, only the manner in which such an exchange may be accomplished.⁶³ Also, it should be recognized that the deposition is a much superior form of evidence as compared to the ex parte interview.⁶⁴ It is further suggested that this theory provides an easily implemented criterion which eliminates the need for pretrial litigation, while complying with all the relevant ethical rules.

It is troublesome that opponents of this theory base their argument on a perceived increase in financial costs caused by requiring depositions, when ethical standards; not financial costs, are what are truly under consideration. Methods and procedures by which

⁵⁹ See *infra* notes 1-54 and accompanying text (difficulties with informal interviews).

⁶⁰ See, e.g., *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 89 (D.N.J. 1991) (*PSE&G* standard too broad).

⁶¹ See *supra* notes 41-44 and corresponding text (costliness of pretrial litigation).

⁶² See *id.*

⁶³ See *PSE&G*, 745 F. Supp. at 1043 (court notes that same information is exchanged in deposition, except with safety net in place).

⁶⁴ See *id.* The court states: "[depositions are a] far more reliable and ethically sound procedure than the informal methods It is also true that the deposition process is the best method of developing clear factual records and protecting the rights of all parties without unduly favoring or prejudicing either side." *Id.*

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the law is practiced should evolve from ethical standards; ethical standards should not be established to accommodate these methods or procedures. The deposition is a legal procedure; it is suggested that if the costs of using the deposition are too exorbitant, then methods employed in obtaining depositions should be reformed. The ethical rule concerning ex parte contacts, however, should not suffer.

CONCLUSION

In considering the available options, it has been proposed that the bright line test is clearly the best standard by which to measure the permissive extent of ex parte interviews with former employees. This standard satisfies all ethical precepts, enhances judicial economy and alleviates inconsistencies in application, thereby making the litigation process much less troublesome for both attorney and client.

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