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Disciplinary Rule 7-104(A)(1): New York Court of Appeals Fashions "Alter Ego" Test to Determine Whether Corporate Employees Are Shielded from Ex Parte Communications

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law enforcement officers to detect the contents of a residence in a manner that would not be considered a search.[41] Given the destructive impact that drugs have on modern society and the investigative ingenuity, nonintrusiveness, and effectiveness that the canine-sniff technique represents, it is suggested that the *Dunn* court erred when it failed to consider the nature and character of the canine-sniff procedure in reasoning that a search had occurred. As a result of the holding in *Dunn*, it seems that "as between cops and crooks, the [New York Court of Appeals] gave [crooks] the upper hand."[42]

Mark A. Varrichio, Jr.

CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rule 7-104(A)(1): New York Court of Appeals fashions "alter ego" test to determine whether corporate employees are shielded from ex parte *communications*

Disciplinary Rule 7-104(A)(1) of the *New York Lawyer's Code of Professional Responsibility* makes it unethical for attorneys to engage in *ex parte* communications with a "party" known to be represented by counsel, absent the consent of that party's counsel.[1] The scope of the term "party" is not clear when a corporation is

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[41] *See Dunn*, 77 N.Y.2d at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392. Under the *Dunn* court's approach, it is apparent that anything located in a private residence that is detected by means of a supersensitive detection device is deserving of New York State constitutional protection against unreasonable search and seizure. *See id.*

[42] Loewy, *supra* note 3, at 331. Professor Loewy, in reference to the Supreme Court's decision in *Place*, suggests that the Court gave the police the upper hand in fighting crime by concluding that the use of the canine-sniff technique did not constitute a search. *See id.* It is suggested that as a result of the New York Court of Appeals' decision in *Dunn*, the police are at a severe disadvantage in attempting to thwart the efforts of crafty drug dealers.

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[1] N.Y. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-104(A)(1) (1990). DR 7-104(A) provides in part:

> During the course of the representation of a client a lawyer shall not:
> 1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Id.

The rule was derived from Canon 9 of the *American Bar Association Canons of Professional Ethics*, which was superseded by the *American Bar Association Model Code of Professional Responsibility* in 1970. *See* Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 685 (1979).

the party in the legal action.[2] Since the corporate party is a faceless entity that may operate only through its employees,[3] it is necessary to determine which employees are "parties" under the disciplinary rule.[4] This determination entails a balancing of the need to protect "parties" from inadvertent disclosures of privileged information, extracted by shrewd opposing counsel, against the need for unburdened access to relevant information.[5] In light of these com-

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[2] *See* Wright v. Group Health Hosp., 103 Wash. 2d 192, 197, 691 P.2d 564, 567 (1984) (en banc) (considering scope of term "party").

For the purposes of this Survey, it is assumed that the employees of the corporate party are not named parties in the suit.

[3] *See* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 144-47 (1983) (corporation is fictional entity).

[4] *See Wright*, 103 Wash. 2d at 198, 691 P.2d at 568. A corporation can be protected from unscrupulous adverse counsel only by protecting the employees through whom it speaks. *See* Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 626 (S.D.N.Y. 1990).

[5] *See* Miller & Calfo, *Ex parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 BUS. LAW. 1053, 1055 (1987) (discussing competing interests).

The primary justification for the disciplinary rule is its effect of diminishing the likelihood that an opposing attorney will take unfair advantage of a represented layperson. *See* Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 145-46 (1977). "[T]he presence of the party's attorney theoretically neutralizes the contact [with the layperson]." *Wright*, 103 Wash. 2d at 197, 691 P.2d at 567. This justification contemplates a situation in which an attorney indicates to an unwary opposing party that the latter's case is weak, but that a sum of money will be advanced if the party signs a release form. *See* Kurlantzik, *supra*, at 138.

Justifications for the rule also include protecting a party from inadvertently disclosing privileged information and minimizing the possibility of conflict between an attorney's duty to represent his client vigorously and his duty to refrain from overreaching with respect to an unprotected party. *See id.* at 145-46, 152. Opponents of the disciplinary rule criticize it as a source of unnecessary inconvenience and cost since it barricades potential witnesses from informal interviews and necessitates costly discovery procedures. *See* Leubsdorf, *supra* note 1, at 687. Further, the increased costs "may well frustrate the right of [a party] with limited resources to a fair trial and deter other litigants from pursuing their legal remedies." *See* Frey v. Department of Health & Human Servs., 106 F.R.D. 32, 36 (E.D.N.Y. 1985) (citation omitted). The disciplinary rule also has been said to prevent free dissemination of relevant information and thus to act as an obstacle to the truth finding process. *See* Comment, Ex Parte *Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications With One of Adverse Interest*, 82 NW. U.L. REV. 1274, 1278-80 (1988); *see also* Hickman v. Taylor, 329 U.S. 495, 511 (1947). "Proper preparation of a client's case demands that [the attorney] assemble information, sift what [the attorney] considers relevant from the irrelevant . . . without undue and needless interference." *Id. But see* Kurlantzik, *supra*, at 146. "Though truth is one of the prime objectives of [our legal] system, our society is not . . . willing to pay an unlimited price for it in other moral values." *Id.* However, *ex parte* interviews "are an efficient and inexpensive way of determining who does or does not have relevant information and, therefore, who should be deposed." Bey v. Arlington Heights, No. 88 C 5479, at 1 (N.D. Ill. Aug. 29, 1989) (LEXIS, Genfed library, Dist file). "[T]hey [also] provide information counsel may need . . . to conduct meaningful dis-

peting interests, courts have labored to develop an unequivocal definition of "party" for use in the corporate setting.[6] Although no one definition has achieved universal acceptance,[7] four commonly posited formulations are the "blanket rule,"[8] the "control group" test,[9] the "scope-of-employment" test,[10] and the "case-by-case bal-

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covery." *Id.*

[6] Miller & Calfo, *supra* note 5, at 1053. "[C]ourts, bar associations, and commentators have struggled with the issue [of] whether a corporate party's employee should be considered a 'party'." *Wright*, 103 Wash. 2d at 198, 691 P.2d at 568.

[7] *See* Morrison v. Brandeis Univ., 125 F.R.D. 14, 18 (D. Mass. 1989) ("none of the tests succeeds in striking a balance which accommodates . . . competing needs in every case"); Miller & Calfo, *supra* note 5, at 1053. "Despite the importance of this issue in the everyday of corporate litigation, the ethical rules regulating ex parte contacts with employees . . . are not clear." *Id.*; *see also* Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-*Upjohn *Analysis*, 44 WASH. & LEE L. REV. 1181, 1184 (1987) (disciplinary rule is "at best ambiguous" and "at worst conflicting").

[8] *See* Miller & Calfo, *supra* note 5, at 1071 (advocating blanket rule). This "bright line test" protects all current employees of a corporation. *Id.* The blanket rule approach prohibits all *ex parte* contacts with current employees, resulting in a broad definition of the term "party." *Id.* at 1060; *see also* Mills Land & Water Co. v. Golden West Ref. Co., 186 Cal. App. 3d 116, 127-28, 230 Cal. Rptr. 461, 467 (1986) ("no ex parte contact is permissible absent a court order permitting it"). *But see* CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-100 (West Supp. 1990) (new disciplinary rule permits attorneys to conduct *ex parte* interviews with certain corporate employees). The main benefit of the blanket rule is that it facilitates an attorney's determination of who can and cannot be informally interviewed. *See* Miller & Calfo, *supra* note 5, at 1061. This protects a corporate party's interests and avoids possible future disciplinary actions. *Id.* at 1071. *But see supra* note 5 (citing sources criticizing disciplinary rule). However, "no court has held it improper to contact any and all employees of an opposing party." Wyeth, *Talking to the Other Side's Employees and Ex-Employees*, 15 LITIG. J. SEC. LITIG. A.B.A. 8, 10 (No. 4 1989).

[9] *See* Comment, *supra* note 5, at 1286. The control group test substantially reduces the scope of the disciplinary rule by protecting only those employees that "have sufficient decision-making or advisory responsibilities within the [corporation]." *See* Fair Automotive Repair, Inc. v. Car-X Serv. Sys., 128 Ill. App. 3d 763, 771, 471 N.E.2d 554, 561 (1984). In other words, *ex parte* interviews with upper-echelon employees, such as executive officers, are impermissible, while contacts with middle and low-level managers are left unprotected. *See* Comment, *supra* note 5, at 1286. Although the test permits a greater amount of relevant information to be discovered informally, it has been criticized severely for defeating the purposes of the disciplinary rule as applied to corporations. *See, e.g.*, *Morrison*, 125 F.R.D. at 16-17 (problem with test is that statements made by any agents of corporation within scope of their employment are admissible against corporation); Massa v. Eaton Corp., 109 F.R.D. 312, 313-14 (W.D. Mich. 1985) (same); *see also* Comment, *supra* note 5, at 1288 & n.86 (enumerating problems with control group standard).

[10] The scope-of-employment test also is referred to as the binding-admissions or managing-speaking test. *See, e.g.*, Chancellor v. Boeing Co., 678 F. Supp. 250, 253-54 (D. Kan. 1988) (applying managing-speaking test to protect corporate employees with managerial responsibilities, those whose acts or omissions are connected with current legal matter or those whose statements may constitute binding admissions against corporation); *In re* Industrial Gas Antitrust Litig., No. 80 C 3479, slip op. at 4 (N.D. Ill. Nov. 25, 1985) (same); Miller & Calfo, *supra* note 5, at 1056-60 (critique of binding-admissions test). The test rep-

ancing" test.[11] Recently, the New York Court of Appeals in *Niesig v. Team I*,[12] rejected the existing tests and fashioned the so-called "alter ego" test to determine whether corporate employees are shielded from *ex parte* communications.[13]

In *Niesig*, a personal injury action, the plaintiff moved for permission to have his attorney conduct *ex parte* interviews with the corporate defendant's employees,[14] who were considered possible

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resents a compromise between the blanket rule and the control group test. Comment, *supra* note 5, at 1290-91. It protects corporate-managerial employees "who have the legal authority to 'bind' the corporation in a legal evidentiary sense." Wright v. Group Health Hosp., 103 Wash. 2d 192, 200-01, 691 P.2d 564, 569-70 (1984) (en banc). That is, employees with managerial responsibilities whose statements may constitute binding admissions against the corporation may not be interviewed *ex parte*. *See Wright*, *id.* at 200, 691 P.2d at 569. Critics consider the test "too expansive . . . [because] [i]t leaves few, if any, employees outside the reach of DR 7-104." Monahan v. Johnson, 128 F.R.D. 659, 661 (N.D. Ill. 1989); *see also*, Comment, *supra* note 5, at 1293-94 (outlining shortcomings of scope-of-employment test). The test is criticized also for its failure to consider the capacity of low level employees to make binding admissions against the corporation. *See* Miller & Calfo, *supra* note 5, at 1056-60.

[11] *See Monahan*, 128 F.R.D. at 661. Rather than attempt to concoct a universal test, courts adopting the case-by-case balancing test determine on a case-by-case basis whether an employee is a "party." *Id.* The test entails balancing the risks of informal *ex parte* interviewing against the benefits that such interviewing will provide by bringing to light important information. *Id.*; *see also* Siguel v. Trustees of Tufts College, No. 88-0626-Y, at 8 (D. Mass. Mar. 12, 1990) (LEXIS, Genfed library, Dist file) (describing test as balancing need to speak informally against need to ensure effective representation); Frey v. Department of Health & Human Servs., 106 F.R.D. 32, 36 (E.D.N.Y. 1985) (applying case-by-case balancing test approved in New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 961 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983)). The test has been criticized for not providing a clear standard for attorneys to determine their ethical boundaries and for creating a risk that similarly situated employees will be treated differently. *See Siguel*, No. 88-0626-Y, at 13.

[12] 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990).

[13] *See id.* at 373-76, 558 N.E.2d at 1034-36, 559 N.Y.S.2d at 497-99; *see also infra* note 27 and accompanying text (defining alter ego test).

Several courts have used the term "alter ego" to describe a test that is in essence the control group test. *See* University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990) (alter ego test permits *ex parte* interviews with "managerial employees"). In *Frey*, 106 F.R.D. at 35, the District Court for the Eastern District of New York utilized the term "alter ego" to describe "individuals who can bind [the corporation] to a decision or settle controversies on its behalf." *See Monahan*, 128 F.R.D. at 663 (applying alter ego test announced in *Frey*). The court of appeals' alter ego test in *Niesig* appears to be a distinct formulation.

[14] *Niesig*, 76 N.Y.2d at 386, 558 N.E.2d at 1031, 559 N.Y.S.2d at 494. The plaintiff alleged that he was injured when he fell from scaffolding at a construction site while employed by the third-party corporate defendant. *Id.* The plaintiff brought a suit against the general contractor of the project and the property owner, asserting causes of action based on § 240 of the New York Labor Law. *Id.* Subsequently, the defendants brought a third-party action against the plaintiff's corporate employer. *Id.*

witnesses to the accident in which the plaintiff was injured.[15] The New York State Supreme Court, Nassau County, in determining whether these employees fell under the protective shroud of Disciplinary Rule 7-104(A)(1),[16] held that neither the current nor the former employees of the corporate defendant could be interviewed *ex parte*.[17] The Appellate Division, Second Department, applying the blanket rule, modified the lower court decision, holding that the disciplinary rule only applies to current employees.[18]

Writing for the court of appeals, Judge Kaye rejected the blanket rule[19] because it slows the course of dispute resolution[20] and results in unnecessary costs.[21] The court also rejected the con-

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[15] Niesig v. Team I, 149 A.D.2d 94, 98, 545 N.Y.S.2d 153, 155 (2d Dep't 1989), *modified*, 76 N.Y.2d 363, 369, 558 N.E.2d 1030, 1032, 559 N.Y.S.2d 493, 495 (1990). "[P]laintiff's attorney averred that a former employee of [the corporate defendant] had testified at a deposition that several [corporate] employees had been present at the site on the day of the accident." *Id.*

[16] *See id.* The plaintiff asserted that since these employees were neither "managerial nor controlling employees," *ex parte* interviews were permissible under DR 7-104(A)(1). *Niesig*, 76 N.Y.2d at 368, 558 N.E.2d at 1031, 559 N.Y.S.2d at 494. In opposition to the plaintiff's motion, the corporate defendant urged that the disciplinary rule should bar *ex parte* interviews with all employees. *Id.*

[17] *See Niesig*, 149 A.D.2d at 98, 545 N.Y.S.2d at 155 ("denied that branch of the plaintiff's motion which was for authorization for . . . ex parte interviews of nonmanagerial employees").

[18] *Id.* at 106, 545 N.Y.S.2d at 159; *see also* Cagguila v. Wyeth Laboratories, Inc., 127 F.R.D. 653, 654 n.2 (E.D. Pa. 1989) (calling appellate division's rationale in *Niesig* a "very well articulated and persuasive one"); *supra* note 8 and accompanying text (discussing blanket rule). The appellate division's decision was clearly based on Upjohn Co. v. United States, 449 U.S. 383 (1981), which held that the attorney-client privilege may be applied to all of a corporation's employees. *Id.* at 396-97; *see also Niesig*, 149 A.D.2d at 101, 545 N.Y.S.2d at 156 ("*Upjohn* case defines the scope of the common-law attorney-client privledge, which has been adopted in New York"). *But see* Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 444 (1982) ("Court [in *Upjohn*] purported to decide little more than that the communications in the case before it were protected by the privilege"). The appellate division rationalized that a corporate employee protected under *Upjohn* is necessarily a "party" under DR 7-104(A)(1). *See Niesig*, 149 A.D.2d at 101, 545 N.Y.S.2d at 157.

[19] *See Niesig*, 76 N.Y.2d at 372-73, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497. The appellate division's decision was modified rather than reversed because the court of appeals agreed that only current employees, not former employees, fall within the purview of DR 7-104(A)(1). *Id.* at 369, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495. The plaintiff's motion to allow the *ex parte* interviews was granted. *Id.*

[20] *See id.* at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497. Under the blanket rule informal channels of discovery in the corporate context would be virtually nonexistent. *Id.*

[21] *Id.* ("[c]ostly formal depositions . . . may deter litigants with limited resources"). Furthermore, the court of appeals was not persuaded by the appellate division's contention that a "party" protected by the attorney-client privilege necessarily should be protected by the disciplinary rule. *See id.* at 371-72, 558 N.E.2d at 1033-34, 559 N.Y.S.2d at 497. The

trol group test since it "all but nullifies the benefits of the disciplinary rule"[22] in the corporate context and the case-by-case balancing test since it gives "too little guidance, or otherwise seem[s] unworkable."[23] In an effort to "best balance[] the competing policy interests"[24] and to "incorporate[] the most desirable elements of the other approaches,"[25] the court of appeals fashioned the alter ego test.[26] Pursuant to this test, "employees whose acts or omissions in the matter under inquiry are binding on . . . or imputed to the corporation . . ., or employees implementing the advice of counsel," are "parties" under the disciplinary rule.[27]

In a lone concurrence, Judge Bellacosa vigorously opposed the adoption of the alter ego test.[28] He agreed with the court's rejection of the blanket test, but urged the adoption of the control group test instead.[29] The latter, he argued, "better balances the respective interests by allowing the maximum number of informal interviews among persons with potentially relevant information, while safeguarding the attorney protections afforded the men and

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court of appeals considered the attorney-client privilege and the disciplinary rule distinct because they serve different purposes and promote different policies. *Id.*

First, the attorney-client privilege extends only to communications, not to the "underlying factual information . . . which is in issue here." *Id.* at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497; *see also Upjohn*, 449 U.S. at 395 (privilege protects only communications, not facts). *But see* G. HAZZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 437 (1985) (employee covered by privilege under *Upjohn* should be "party" under ethical rules). Second, the purpose of the attorney-client privilege is to encourage open communication between client and attorney; that is not the purpose of the disciplinary rule. *Niesig*, 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497. "The purpose of the disciplinary rule . . . is to protect the corporation so its agents who have the authority to prejudice the entity's interest are not unethically influenced by adverse counsel." Wright v. Group Health Hosp., 103 Wash. 2d 192, 201-02, 691 P.2d 564, 570 (1984) (en banc).

[22] *Niesig*, 76 N.Y.2d at 373, 558 N.E.2d at 1035, 559 N.Y.S.2d at 497-98.

[23] *Id.* at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

[24] *Id.*; *see also* Miller & Calfo, *supra* note 5, at 1055-56 (discussing competing policy concerns).

[25] *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498. The Court of Appeals noted that since the alter ego test is similar to tests adopted in other jurisdictions, the alter ego test should be workable. *See id.* at 375 & nn.5-6, 558 N.E.2d at 1036 & nn.5-6, 559 N.Y.S.2d at 499 & nn.5-6.

[26] *Id.* at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

[27] *Id.*

[28] *Id.* at 376, 558 N.E.2d at 1036-37, 559 N.Y.S.2d at 499-500 (Bellacosa, J., concurring). Judge Bellacosa concurred because he agreed with the majority's grant of the plaintiff's motion to allow the *ex parte* interviews. *Id.*

[29] *Id.* at 376-77, 558 N.E.2d at 1037, 559 N.Y.S.2d at 500 (Bellacosa, J., concurring).

women whose protection may well be of paramount concern."[30] Judge Bellacosa posited that the alter ego test would "function almost identically with the rejected [blanket rule] . . . [because both tests] severely limit access to parties with relevant information."[31] Furthermore, he expressed concern that the determination of which employees are "parties" under the alter ego test would "prolong pretrial discovery and allow the shield of DR 7-104(A)(1) to be fashioned into a sword."[32]

Notwithstanding these shortcomings, the *Niesig* court's alter ego test is a bold attempt to resolve the conflict surrounding the definition of the term "party" with respect to corporate employees.[33] Unfortunately, the alter ego test will probably prove to be as unworkable as the previously established tests since it is merely an amalgamation of those tests.[34]

The first prong of the alter ego test,[35] which seeks to extinguish the "potential unfair advantage of extracting concessions and admissions from [employees] who will bind the corporation,"[36] is

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[30] *Id.* at 376, 558 N.E.2d at 1037, 559 N.Y.S.2d at 500 (Bellacosa, J., concurring).

[31] *Id.* at 376-77, 558 N.E.2d at 1036-37, 559 N.Y.S.2d at 500 (Bellacosa, J., concurring). Judge Bellacosa commented that the alter ego test contains language similar to that "found in the Official Comment to ABA Model rule 4.2." *Id. But cf. id.* at 375 n.6, 558 N.E.2d at 1036 n.6, 559 N.Y.S.2d at 499 n.6 (alter ego test not derived from rule 4.2 comment).

The comment to ABA Model Rule 4.2 indicates that the term "party" includes "persons having a managerial responsibility on behalf of the organization, and any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (1990). Judge Bellacosa quotes one commentator who noted that "[t]his language is probably the foggiest of all." *Niesig*, 76 N.Y.2d at 377, 588 N.E.2d at 1036, 559 N.Y.S.2d at 499 (Bellacosa, J., concurring) (quoting Wyeth, *supra* note 8, at 10).

[32] *Niesig*, 76 N.Y.2d at 376, 558 N.E.2d at 1037, 559 N.Y.S.2d at 500 (Bellacosa, J., concurring).

[33] *See* Bouge v. Smith's Mgm't Corp., 132 F.R.D. 560, 570 (D. Utah 1990) ("convinced [*Niesig* court] has struck the proper balance of fairness, support for legitimate ethical considerations . . . and clarity of application and rationality in common sense terms for informal discovery"); State v. CIBA-GEIGY Corp., 247 N.J. Super. 314, 324-26, 589 A.2d 180, 184-85 (App. Div. 1991) (adopting *Niesig* interpretation of disciplinary rule in criminal case), *appeal granted*, 1991 Lexis 694 (N.J. June 27, 1991).

[34] *See supra* note 25 and accompanying text; *infra* notes 35-43 and accompanying text.

[35] *See Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498 (first prong deals with employees who have legal power to bind or impute liability to corporation).

[36] *Id.* It is assumed that the court of appeals' use of the term "bind" was meant in an evidentiary sense. The hearsay statement of an employer's agent is admissible against the employer in New York only if the making of the statement is an activity within the scope of the agent's authority. Kelley v. Diesel Constr. Div. of Carl A. Morse, Inc., 35 N.Y.2d 1, 8, 315 N.E.2d 751, 754-55, 358 N.Y.S.2d 685, 690 (1974); *see also* FED. R. EVID. 801(d)(2)(D) (employee statement concerning matters within scope of employment admissible as em-

similar, if not identical, to the scope-of-employment test.[37] The latter defines corporate employees as "parties" when the information being sought concerns matters within the scope of their employment.[38] Although the scope-of-employment test has a substantial following,[39] it forces attorneys to speculate about whether prospective interviewees have the capacity to bind their corporate employer, and thus fails to create clear standards against which attorneys may gauge their ethical behavior.[40]

The second prong of the alter ego test,[41] which attempts to alleviate concerns about protection of the attorney-client privilege,[42] may result in pulling every current employee within the scope of the disciplinary rule. This conclusion is premised on the fact that virtually every current employee could be held out as "implementing the advice of counsel." Perhaps Judge Bellacosa was correct in suggesting that the alter ego test will function like the overbroad blanket rule.[43]

In light of the weaknesses of the alter ego test,[44] the confusion concerning the definition of the term "party" is likely to continue so that attorneys will be unable to conduct *ex parte* interviews of corporate employees without fear of violating the disciplinary rule. A recent line of cases may suggest a solution.[45] In *Lizotte v. New*

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ployer admission).

[37] *See supra* note 10 and accompanying text. *But see* N.Y.L.J., Jul. 18, 1990, at 2, col. 6 (letter to the Editor) (court of appeals made clear in *Niesig* that applicability of alter ego test was not confined to upper-echelon employees).

[38] *See Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

[39] *See, e.g.*, Wright v. Group Health Hosp., 103 Wash. 2d 192, 202-03, 691 P.2d 564, 569-70 (1984) (en banc) (discussing and applying management-speaking test).

[40] *See* Mills Land & Water Co. v. Golden West Ref. Co., 186 Cal. App. 3d 116, 129, 230 Cal. Rptr. 461, 468 (1986). "[O]pposing counsel cannot know in advance what will develop during the interview. Thus, the unilateral decision [of whether to interview *ex parte*] is based on *expectations* or *predictions*." *Id.* at 129-30, 230 Cal. Rptr. at 468 (emphasis in original). *But see* Comment, *supra* note 5, at 1297-1304 (test is certain and predictable).

[41] *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498 (second prong deals with employees responsible for effectuating advice of counsel).

[42] *See id.* It is curious that the Court of Appeals provided such protection in light of its perception of the attorney-client privilege and the disciplinary rule as distinct creatures. *See supra* note 21. It is suggested that while these concepts seem distinct in terms of policy and purpose, they both seek to further the attorney-client relationship, and thus should be treated as counterparts. *See* Massa v. Eaton Corp., 109 F.R.D. 312, 314 (W.D. Mich. 1985) ("logic of *Upjohn* is easily carried over to DR 7-104"); Miller & Calfo, *supra* note 5, at 1060-67 (same); Stahl, *supra* note 7, at 1182 (same).

[43] *See supra* note 31 and accompanying text.

[44] *See supra* notes 34-43 and accompanying text.

[45] *See* Miller Oil Co. v. Smith Indus., No. 1:88 CV 785, at 11 (W.D. Mich. Dec. 13, 1990)

York City Health & Hospital Corp.[46] and *Suggs v. Capital Cities/ABC, Inc.*,[47] the District Court for the Southern District of New York adopted a case-by-case balancing test[48] and, more importantly, provided a set of mandatory guidelines for attorneys to follow before and during all *ex parte* interviews.[49] These guidelines, which, *inter alia*, provide for disclosure to the prospective interviewee of the adverse attorney's representative capacity and of the purpose of the interview,[50] reduce or even eliminate the potential for overreaching by opposing counsel. Since the underlying purpose of the disciplinary rule is to prevent such overreaching,[51] it is suggested that by shifting the focus from *whom* an attorney can interview *ex parte* to *how* an attorney must conduct such interviews, the evil that the disciplinary rule seeks to prevent may be eliminated without requiring resort to inadequate tests for determining which corporate employees are "parties."

While the *Niesig* court briefly mentioned such guidelines, it did so without elaboration.[52] Ideally, guidelines for *ex parte* interviews should be sufficiently detailed to provide attorneys with meaningful standards of behavior. Furthermore, the guidelines should emphasize the need for interviewees to be well informed

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(LEXIS, Genfed library, Dist file) (applying guidelines for permissible *ex parte* communications set forth in Upjohn Co. v. Aetna Casualty & Surety Co., No. 4:88 CV 124, at 2 (W.D. Mich. July 13, 1990) (LEXIS, Genfed library, Dist file)); Siguel v. Trustees of Tufts College, No. 88-0626-Y, at 19-20 (D. Mass. Mar. 12, 1990) (LEXIS, Genfed library, Dist file) (adopting case-by-case method of determining who is a party and implementing guidelines established in *Morrison v. Brandeis Univ.*); Morrison v. Brandeis Univ., 125 F.R.D. 14, 19-21 (D. Mass. 1989) (holding that courts must analyze interest and needs of parties on basis of facts and circumstances of each case and setting forth detailed guidelines); Monsanto Co. v. Aetna Casualty & Surety Co., No. 88C-JA-118, at 10-11 (Super. Ct. Del. Sept. 10, 1990) (LEXIS, States library, Del. file) (setting forth detailed script for attorneys to follow in conducting *ex parte* interviews).

[46] No. 85 Civ. 7548 (S.D.N.Y. Mar. 13, 1990) (LEXIS, Genfed library, Dist file).

[47] No. 86 Civ. 2774 (S.D.N.Y. Apr. 24, 1990) (LEXIS, Genfed library, Dist file).

[48] *Id.* at 20; *Lizotte*, No. 85 Civ. 7548, at 9. The district court rejected the blanket rule that was adopted by the appellate division in *Niesig* in favor of a case-by-case balancing approach; this decision was published prior to the court of appeals decision. *Suggs*, No. 86 Civ. 2774, at 20; *Lizotte*, No. 85 Civ. 7548, at 8-9.

[49] *See, e.g.*, *Suggs*, No. 86 Civ. 2774, at 24 (setting forth guidelines); *Lizotte*, No. 85 Civ. 7548, at 15-16 (same); *Siguel*, No. 88-0626-Y, at 19-20 (same); *Monsanto*, No. 88C-JA-118, at 10-11 (same).

[50] *Suggs*, No. 86 Civ. 2774, at 24.

[51] *See supra* note 5 and accompanying text.

[52] *See Niesig*, 76 N.Y.2d at 376, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499. "[I]t is of course assumed that attorneys would make their identity and interest known to interviewees and comport themselves ethically." *Id.*

about the prospective interviewing thereby reducing the possibility of interviewees being duped by cunning interviewers. Thus, upon the initial contact with interviewees, interviewers should "disclose [their] representative capacity"[53] and "specify the purpose of the contact."[54] Interviewees also should be informed of their rights "to refuse to be interviewed" and "to have their own counsel present."[55] Similarly, the guidelines should proscribe certain types of inquiries. If interviewers are prohibited from inquiring into "any matters observed in the course of the employee's performance of his or her duty" to the corporation,[56] then the possibility that the employee will make binding admissions against the corporation would be reduced. In addition, guidelines that prohibit questions concerning any communication between the employee and the corporation's counsel regarding the action[57] would minimize the chance that the attorney-client privilege will be violated.

In summary, the alter ego test seems destined to defeat the expectations of the court of appeals and the bar at large since it is simply an amalgamation of problematic tests. Implementing detailed guidelines to effectuate the underlying purposes of the disciplinary rule instead of concocting tests to determine the status of employees as "parties" would minimize the potential for overreaching, while allowing attorneys to conduct *ex parte* interviews with confidence rather than with fear of violating the disciplinary rule.

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DOMESTIC RELATIONS LAW

Domestic Relations Law § 111(1)(e): Requirement that unwed parents "live together" as condition to father's right of consent in adoption of nonmarital child held unconstitutional

Prior to 1980, section 111 of the New York Domestic Relations Law ("DRL") allowed an unwed mother to place her child up for

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[53] *Suggs*, No. 86 Civ. 2774, at 24.

[54] *Id.*

[55] University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990) (paraphrasing *Suggs* guidelines).

[56] *Suggs*, No. 86 Civ. 2774, at 24.

[57] *See id.*