

## THE JONATHON B. CHASE PAPER

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### A SUGGESTED INTERPRETATION OF VERMONT'S DR 7-104(A)(1): THE EMPLOYMENT ATTORNEYS' PERSPECTIVE ON CONTACTING EMPLOYEES OF AN ADVERSE BUSINESS ORGANIZATION

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Jane Doe, a former woodworker at a small furniture making company in northern Vermont, was terminated from her job eleven months after she began working for the furniture maker. Prior to her discharge, all reviews of her work and her progress had been positive. Jane Doe had never been disciplined in any way prior to her termination, and she was not given a reason for her discharge.

Jane Doe claimed that while at the furniture making company, she was subjected to a hostile work environment, verbal and physical harassment, humiliation, and discrimination on an almost daily basis by her co-workers and supervisors.

Doe's attorney planned to file suit against the furniture making company for failing to provide Jane Doe with a workplace free from harassment and discrimination based on gender under the Vermont Fair Employment Practices Act.<sup>1</sup> Before filing suit, Doe's attorney hired an investigator to speak with co-workers and other non-managerial employees about Doe's work experiences. Shortly after the investigator began making inquiries, however, the furniture maker's attorney notified Doe's attorney of his

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\* See *Dedication*, 13 Vt. L. Rev. 1 (1988) (biographical sketch of Dean Chase).

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1. VT. STAT. ANN. tit. 21, §§ 495-497 (1987 & Supp. 1993).

position that Vermont Code of Professional Responsibility DR 7-104(A)(1) prohibits communication by Doe's attorney with *any* of the furniture maker's employees without his permission.

How should Doe's attorney respond?

Vermont's ethical provision for attorney communication with parties of adverse interest, DR 7-104(A)(1) ("the Rule"), states:

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.<sup>2</sup>

However, the Rule is unclear about who is covered by the term "party" when the opposing party is a business organization,<sup>3</sup> rather than an individual.

To provide the reader with background information, this paper will first examine the purposes of the Rule. Second, this paper will address the Rule's ambiguity as it applies to business organizations and why, in Vermont, this ambiguity is especially problematic. Third, this paper will discuss the plaintiff's employment attorneys' particular concerns about the Rule, as it inhibits access to informal discovery. Fourth, this paper will discuss how the Rule may conflict with attorneys' obligations under Rule 11 of the Federal and Vermont Rules of Civil Procedure.<sup>4</sup> Fifth, this

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2. VERMONT CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1986 & Supp. 1993). The text of Vermont's DR 7-104 is identical to the Model Code's DR 7-104, and it is almost identical to the text of Model Rule of Professional Conduct 4.2, which 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." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). Throughout this paper, the sources used may analyze either DR 7-104(a)(1) or Rule 4.2. In either case, because the language of the two rules is very similar, the analysis applies to both.

3. The terms "business organization" and "business," as used in this paper, mean every type of business organization, including, but not limited to, sole proprietorships, partnerships, limited partnerships, and corporations. This paper addresses business organizations as employers.

4. FED. R. CIV. P. 11; VT. R. CIV. P. 11. Both rules require that the signature of an attorney or party constitute a voucher by the signer that the signer has read the pleading, motion, or other paper, and that it is well grounded in fact to the best of the signer's knowledge, information, and belief formed after reasonable inquiry. Accordingly, attorneys

paper will discuss how other jurisdictions have found that former employees are not covered by the Rule. Then, sixth, this paper will discuss the four different approaches that American courts are now taking with regard to how the Rule limits contact with current employees. This paper concludes with the recommendation that Vermont adopt one of these tests, the alter-ego test, because it balances the needs of all parties without unduly burdening the judicial system.

### I. PURPOSES OF DR 7-104(A)(1)

The Rule serves several important policy objectives. First, it protects the represented party from being contacted by opposing attorneys and being taken advantage of by them.<sup>5</sup> The Rule protects represented parties from ex parte approach by opposing counsel because trained attorneys are perceived as having the education, skills, and understanding of the legal system to take advantage of the less knowledgeable lay persons.<sup>6</sup> The Ethical Consideration which complements the Rule offers further explanation:

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 pursuant to law or rule of court or unless he has the consent of the lawyer for that person.<sup>7</sup>

Not only does the Rule ensure that represented parties are not directly approached by opposing attorneys, it also helps preserve

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are required to have personal knowledge of a factual basis for any document they submit to court.

5. ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934); *Ex rel. Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984) ("In more recent years, however, the purpose of the rule has been said to shield the represented client from improper approaches.").

6. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991). ("The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law.").

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1983).

the proper functioning of the legal profession by prohibiting attorneys from unfairly approaching the opposing party when the opposing party does not have the benefit of the presence of her counsel.<sup>8</sup> Thus, in theory at least, the requirement that the opposing party's counsel either be present or waive the right to be present neutralizes the danger of an attorney taking advantage of less knowledgeable lay persons.<sup>9</sup>

Second, the Rule protects the client's right to effective counsel by helping prevent the unintentional disclosure of privileged and important information.<sup>10</sup> Opposing counsel, because of her expertise, might fashion questions to elicit discussions which might be harmful to the client's case.<sup>11</sup> The client may unintentionally reveal information which is both privileged and damaging to her own case. The Rule safeguards a client against revealing information which may be privileged and crucial to the strategy of her case and to the client's attorney's effective representation of her.

Third, and perhaps more important than the Rule's function of protecting the client's right to effective counsel, the Rule safeguards against the disclosure of information which could be used against the business organization as an admission under either the Vermont or the federal rules regarding evidentiary admissions.<sup>12</sup> The danger of a client's disclosure of information

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8. *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 568 (D. Utah 1990) ("The official historical purposes of the rule and its predecessor Canon 9 were two-fold: preserving the proper functioning of the legal system and shielding the adverse party from improper approaches.").

9. *Ex rel. Wright*, 691 P.2d at 567. The *Wright* court postulated additional reasons for the Rule including preventing attorneys from "stealing clients," and prohibiting attorney contact with adverse clients to prevent represented clients from agreeing to unreasonably low settlement figures. See also *In re Envtl. Ins. Declaratory Judgment Actions*, 600 A.2d 165, 168 (N.J. Super. Ct. Law Div. 1991).

10. *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 627 (S.D.N.Y. 1990).

11. Jerome N. Krulwich, 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, 1281 (1988) ("A shrewd attorney could easily obliterate the confidences of the other side through informal interviews by simply asking the right questions.").

12. Compare VT. R. EVID. 801(d)(2)(D) with FED. R. EVID. 801(d)(2)(D). The Vermont rule states: "A statement is not hearsay if [t]he statement is offered against a party and is 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." VT. R. EVID. 801(d)(2)(D). The federal rule similarly states: "A statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the

which could assist the opposing attorney in pursuing her case against the employer, is one of the main reasons attorneys advise their clients not to speak to opposing counsel without their attorneys' presence.<sup>13</sup> From the employer's point of view, the most important purpose of the Rule is to prevent employees from making admissions because such statements may be introduced as admissions against the employer.

Yet, it is important to point out that the Rule's purpose is *not* to shield the business from discovery obligations which might include revealing harmful facts. As one court has noted: "It is *not* the purpose of the [R]ule to protect a corporate party from the revelation of prejudicial facts."<sup>14</sup> Thus, the Rule was not designed to be used offensively to preclude plaintiffs from discovering facts which could be harmful to the business.

## II. AMBIGUITY OF DR 7-104(A)(1) AS IT APPLIES TO BUSINESS ORGANIZATIONS

While the purposes of the Rule may be clear, its application when the opposing party is a business organization is less certain. The language of the Rule does not offer interpretive assistance. It merely prohibits an attorney's communication with the opposing represented "party."<sup>15</sup> In addition, the accompanying Ethical Consideration provides no further guidance.<sup>16</sup>

In Vermont, the ambiguous application of the Rule to business organizations is exacerbated by the Vermont Bar Association Ethical Committee's failure to address the issue. Moreover, there is very little Vermont case law regarding the Rule to provide guidance to practitioners. A ruling in one Superior Court case interpreted the Rule's use of the word "party" as it applies to business organizations,<sup>17</sup> and a recent Vermont

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relationship." FED. R. EVID. 801(d)(2)(D).

13. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 4.2:101 (2d ed. 1990 & Supp. 1992).

14. *Ex rel. Wright*, 691 P.2d at 569 (emphasis added).

15. VERMONT CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1986 & Supp. 1993).

16. See *supra* note 7 and accompanying text.

17. *Ballard v. University of Vt.*, No. s 229-91 CnC, (ruling on motion for protective order) (Chittenden Super. Ct. July 30, 1991).

Supreme Court case also addressed the scope of Rule.<sup>18</sup> Yet, the Vermont Supreme Court's decision highlights the need for a clearer interpretation of how the Rule applies to business organizations in Vermont.

In *In re Illuzzi*, Vermont State Senator Illuzzi appealed a Vermont Professional Conduct Board conclusion that by contacting an adverse party's insurance adjuster, he had violated three provisions of Vermont's Code of Professional Responsibility.<sup>19</sup> The court remanded the case holding that Mr. Illuzzi had been denied a fair hearing because the Professional Conduct Board had failed to follow its own procedures.<sup>20</sup> The court also addressed Mr. Illuzzi's claim that the Rule should not be applied to prohibit contact between the plaintiffs' attorneys and insurance claims adjusters.<sup>21</sup> The court dismissed Mr. Illuzzi's argument. "[W]e have no trouble concluding that the definition of 'parties' under the [R]ule is not restricted to named parties in a lawsuit. The language of the [R]ule suggests no limitation on the word 'party.'"<sup>22</sup>

The court's interpretation is problematic because the court did not indicate where it would draw the line in determining who is encompassed within the definition of party and who falls outside of this definition. The Vermont Supreme Court is undoubtedly correct that the term party should not be limited to the named parties in a lawsuit. However, this definition, if read broadly, could possibly proscribe *ex parte* contacts with *all* of a business's employees and former employees. While no courts have adopted such a restrictive interpretation, this is the definition endorsed by two regional bar associations.<sup>23</sup> Such an interpretation would destroy plaintiff's attorneys' efforts to conduct informal *ex parte* interviews with employees, which would limit the amount of information available to the attorney without considerable expense. This interpretation would also threaten to put the attorney in the position of failing to comply with Civil Rule of

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18. *In re Illuzzi*, 3 Vt. L. Wk. 333, 616 A.2d 233 (1992).

19. *Id.* at 333, 616 A.2d at 234.

20. *Id.*

21. *Id.* at 334, 616 A.2d at 235.

22. *Id.* at 334, 616 A.2d at 236.

23. Nassau County Bar Ass'n Comm. on Ethics, Op. No. 2 (1989); Los Angeles County Bar Ass'n Ethics Comm., Formal Op. No. 410 (1983); see also *infra* note 105 and accompanying text.

Procedure 11 which requires an attorney to investigate adequately her case to assure that her pleadings are well founded.<sup>24</sup> Because of the uncertain ramifications of the *In re Illuzzi* decision, Vermont's legal community needs clarification, from both the Vermont Supreme Court and the Vermont Bar Association Ethical Committee, on how the Rule affects the propriety of ex parte contacts by an attorney opposing a represented business organization.

### III. EMPLOYMENT ATTORNEY'S UNIQUE CONCERNS

In clarifying the definition of party when the party is a business organization, the Vermont Supreme Court and the Vermont Bar Association Ethics Committee should give special attention to the unique circumstances of employment cases. These cases, in particular, illustrate the need for an interpretation of the Rule which allows for unrestricted ex parte access to former employees and considerable ex parte access to present employees.

Unlike many other areas of the law, in employment litigation the employer controls nearly all of the evidence the plaintiff needs for her case.<sup>25</sup> The employer has possession of the employee's personnel file, employee handbook, and other important documents.<sup>26</sup> More importantly, the employer has some degree of authority or control over the plaintiff's co-employees who could be called as witnesses.<sup>27</sup> Further, the plaintiff will almost always have fewer economic resources than the employer or former

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24. See *infra* notes 41-66 and accompanying text.

25. *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697, 699 (D. Mass. 1990). In this employment discrimination case, the court stated:

From Siguel's perspective, Tufts controls access to nearly all the information and evidence he needs to present his case. Nearly all the major witnesses are current or former Tufts employees. Most of the relevant documents are in Tufts' possession. In short, Tufts has control over most of the information Siguel needs for case preparation.

*Id.*

26. *Niesig v. Team I*, 558 N.E.2d 1030, 1034 (N.Y. 1990). The New York Court of Appeals stated:

[The corporate party] has possession of its own information and unique access to its documents and employees; the corporation's lawyer thus has 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.

*Id.*

27. *Id.*

employer. This makes retaining an attorney and paying attorney's fees during litigation very difficult for the plaintiff, who often is either unemployed, or employed at lower wages, while she pursues her claim against her former employer.<sup>28</sup> The economic disparity between the parties also may be exploited by the employer or former employer, who may try to delay or expand discovery.

One court recognized the importance of the economic disparity inherent in employment cases in *Bouge v. Smith's Management Corp.*, an employment case involving an alleged violation of the Fair Labor Standards Act.<sup>29</sup> In this case, the court acknowledged this disparity in the parties' resources, stating: "To accept the defendant's position is to 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."<sup>30</sup> While having fewer resources rarely justifies special treatment by the judicial system, this factor should be taken into account when the employer also possesses most of the information necessary for the plaintiff's case.<sup>31</sup>

Additionally, in employment cases, the employer maintains authority over most of the witnesses by virtue of the employer's control over its employees' job security, work environment, and future prospects. Therefore, corporate counsel could inhibit co-employees from speaking with the plaintiff's counsel.<sup>32</sup> Naturally, chilling open communication between the plaintiff's counsel and these potential witnesses could be disastrous to the plaintiff's case because the plaintiff's counsel may not have the opportunity to confirm theories of the case and find witnesses willing to testify.<sup>33</sup>

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28. *Id.* (acknowledging situation of litigants with "limited resources"); *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 565 (D. Utah 1990) ("[I]t must be recognized that contemporary litigation is costly and often the 'little guy,' plaintiff or defendant is at a distinct disadvantage in the process.")

29. *Bouge*, 132 F.R.D. at 560.

30. *Id.* at 562-63 (citation omitted).

31. *Id.* at 563; *Niesig*, 558 N.E.2d at 1034.

32. *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19 (D. Mass. 1989); *Mompoin v. Lotus Dev. Corp.*, 110 F.R.D. 414, 419 (D. Mass. 1986); *Bouge*, 132 F.R.D. at 565.

33. *Morrison*, 125 F.R.D. at 19 ("I particularly note the tendency which the presence of opposing counsel has to inhibit the free and open discussion which an attorney seeks to achieve at such interviews." (citing *Mompoin*, 110 F.R.D. at 419)).

Co-employees' information regarding the circumstances of the plaintiff's discrimination, unlawful termination, or other discriminatory treatment may be invaluable for the plaintiff's attorney.<sup>34</sup> A co-employee, however, may not be entirely forthcoming if he believes his discussions could affect his career or harm his position at work. This creates a situation where otherwise willing witnesses will become adverse in order to protect their job security. The presence of the employer's attorney could easily dissuade an otherwise willing co-employee from speaking openly with the plaintiff's counsel.<sup>35</sup>

Finally, in employment cases, the plaintiff often must demonstrate a pattern of treatment, which often can only be shown through witnesses' accounts. One court has recognized that "in certain types of litigation against a corporation a pattern of treatment of employees may be critical to proof of a claim."<sup>36</sup> Employment discrimination cases fall within this category of litigation. For example, in order to impute liability to the furniture making company in the fact pattern above, Jane Doe's attorney would have to demonstrate that a hostile work environment existed.<sup>37</sup> To prove that this type of environment existed, the plaintiff's attorney would need to speak directly with Jane Doe's co-employees, because their accounts of the working environment would be crucial to proving Doe's claim. Resolution of this threshold issue is entirely fact dependent. If access to co-employees were curtailed, Doe's attorney could not evaluate whether the case had sufficient merit to bring a cause of action against the furniture making company.

Lawyers representing employers involved in employment-related litigation also have particular concerns. Foremost among these concerns is the need to restrict access to all employees who can bind the employer under either the Federal or Vermont Rules of Evidence. Vermont Rule of Evidence 801(d)(2)(D) tracks the language of Federal Rule of Evidence 801(d)(2)(D) and provides: "[A] statement is not hearsay if [t]he statement is offered against a party and is a statement by his agent or servant concerning a

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34. See *supra* notes 25-27 and accompanying text.

35. *Bouge*, 132 F.R.D. at 565 ("[W]itnesses may be more willing to discuss a matter informally than in the adversarial context of formal discovery."); *Morrison*, 125 F.R.D. at 19.

36. *Bouge*, 132 F.R.D. at 565.

37. See generally VT. STAT. ANN. tit. 21, § 495h (Supp. 1993).

matter within the scope of his agency or employment, made during the existence of the relationship."<sup>38</sup> Lawyers representing employers do not want their employees to speak to opposing counsel about any lawsuit for fear that they may impute liability to their employer.

Lawyers representing employers also need assurance that employees will not be manipulated by the plaintiff's attorney. There is a danger that co-employees may be enticed into unknowingly revealing privileged information.<sup>39</sup> Because facts can be viewed in many different ways, there is also a danger that co-employees' versions of the facts and their testimonies might be manipulated by the plaintiff's attorney to show the plaintiff's case in the most advantageous way.

Finally, to prevent the revelation of potentially harmful information, lawyers representing employers have a legitimate need to find out what their clients' employees are saying to opposing counsel.<sup>40</sup> In addition, employers' attorneys generally want a chance to frame facts in the light least favorable to the plaintiff.

#### IV. THE CONFLICTING OBLIGATIONS OF RULE 11 AND DR 7-104(A)(1)

Civil Procedure Rule 11's requirement that attorneys adequately investigate to assure that their pleadings are well-grounded in fact<sup>41</sup> is at odds with DR 7-104(A)(1)'s inhibition of access to information.<sup>42</sup> In 1983, Rule 11 was amended to deter more

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38. VT. R. EVID. 801(d)(2)(D); see also FED. R. EVID. 801(d)(2)(D).

39. *Bouge*, 132 F.R.D. at 565 ("[C]orporate and associational organizations are entitled to the full protection of the advice and confidences of counsel.")

40. *Bouge*, 132 F.R.D. at 565 ("[C]orporate and other associational enterprises have a need to protect legitimate internal communication and corporate organizations have the same concerns as any other party, that persons in such organizations who have information relevant to litigation should not be coerced or abused.")

41. Both the Vermont and Federal Rule of Civil Procedure 11 state: "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, . . . 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 . . ." VT. R. CIV. P. 11; FED. R. CIV. P. 11.

42. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991). The Committee comments that "the effect of [Rule 4.2] is to inhibit the acquisition of information . . ." *Id.*; see also VERMONT CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1986 & Supp. 1993).

effectively attorneys' abuses of the judicial system, such as filing frivolous claims or defenses without legal or factual basis.<sup>43</sup> The amendments impose an affirmative duty to inquire into the relevant facts and law before filing any pleading.<sup>44</sup> Prior to filing any pleading, an attorney must investigate adequately assertions made in that pleading. If an attorney fails to investigate, or does so inadequately, she may be sanctioned.<sup>45</sup> Federal Rule of Civil Procedure 11 provides: "[sanctions] 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."<sup>46</sup>

While the policy behind Rule 11 is to encourage investigation, DR 7-104(A)(1) has the opposite effect. As discussed in section I, DR 7-104(A)(1)'s purposes include protecting lay persons from opposing attorneys' improper or unethical ex parte contact, protecting the attorney-client relationship, and preventing unintentional disclosure of privileged information.<sup>47</sup> But as pointed out by the ABA Committee on Ethics and Professional Responsibility, the effect of these safeguards is to limit attorneys as they conduct discovery.<sup>48</sup>

In daily practice, the plaintiffs' employment attorneys must meet the conflicting requirements of both Rule 11 and of DR 7-104(A)(1). While the standard imposed by Rule 11 must be met by all attorneys, it has more of an impact on the plaintiffs' employment lawyers<sup>49</sup> because the elements of employment claims are difficult to identify and substantiate.<sup>50</sup> The Rule 11 standard is also more burdensome for the plaintiffs' employment

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43. FED. R. CIV. P. 11 advisory committee's note.

44. *Id.* ("The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule.")

45. VT. R. CIV. P. 11; FED. R. CIV. P. 11.

46. FED. R. CIV. P. 11; see also VT. R. CIV. P. 11.

47. See *supra* notes 5-14 and accompanying text.

48. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991).

49. Phyllis T. Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 295 (1992) ("As Professor Burbank has pointed out, 'no group of lawyers . . . [is] more concerned about the impact of amended Rule 11 on their clients and their practice than lawyers who specialize in plaintiff's civil rights (including employment discrimination) law.'" (footnote omitted)).

50. Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 496-97 (1988-89) ("These concepts [regarding the extension of Title VII law] are at the cutting edge of legal development, which means that they are difficult to conceptualize and substantiate . . . [and] once formulated, look non-traditional and even implausible . . .").

attorneys because the defense attorneys frequently respond to an employment discrimination complaint with a Rule 11 motion for sanctions,<sup>51</sup> and because motions for sanctions are disproportionately granted in employment discrimination cases.<sup>52</sup> In order to comply with Rule 11 requirements, the role of informal ex parte interviews with employees is crucial.

The purpose of the ex parte interview is much different than that of the deposition, a formal discovery process in which attorneys for both parties appear. In the informal ex parte interview, the attorney seeks to gather and confirm information to use in developing the case. The deposition, in contrast, is a formalized and more expensive discovery procedure.<sup>53</sup> For a deposition, a court reporter must be present and the witness must take an oath affirming that he will tell the truth under penalty of perjury.<sup>54</sup> The main purpose of the deposition is to elicit testimony that commits a witness to a particular position which can be used at trial to support the attorney's position or to impeach the opposition.<sup>55</sup> As the Second Circuit Court of

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51. Baumann et al., *supra* note 49, at 291 ("Defendants now reflexively use Rule 11 motions in response to the filing of civil rights claims.").

52. *Id.* at 295. ("Although the statistics vary, the commentators agree that a greater proportion of Rule 11 sanctions has [sic] been brought in civil rights cases than in other categories of federal civil litigation. Moreover, many more sanctions have been granted against plaintiffs than defendants."). Another commentator stated:

[T]he reported cases suggest that amended Rule 11 is being used disproportionately against plaintiffs, particularly in certain types of litigation such as civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by small companies.

. . . Civil rights and employment discrimination cases are the subject of 28.1% of Rule 11 cases [from the statistics gleaned from the survey of all reported cases when the article was written].

Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988).

53. For example, in the fact pattern presented at the beginning of this paper, Jane Doe's deposition costs for deposing four of her co-employees would have totaled \$8,617.00 (\$6,650.00 in attorney's fees; \$265.00 in court reporter's fees; \$13.00 for postage; and \$1,689.00 in translation fees). Based on estimates from author's experience.

54. See VT. R. CIV. P. 28(a); FED. R. CIV. P. 28(a). The wording of the rules is very similar. "[D]epositions shall be taken before a justice of the peace or notary public or a person appointed by the court. A person so appointed has power to administer oaths and take testimony." VT. R. CIV. P. 28(a). "[D]epositions shall be taken before an officer authorized to administer oaths . . . . A person so appointed has power to administer oaths and take testimony." FED. R. CIV. P. 28(a).

55. *International Business Mchs. Corp. v. Edelstein*, 526 F.2d 37, 41 n.4 (2d Cir. 1975) ("In contrast to the pre-trial interview with prospective witnesses, a deposition serves an entirely different purpose, which is to perpetuate testimony, to have it available for use or confrontation at the trial, or to have the witness committed to a specific

Appeals pointed out in *International Business Machines v. Edelstein*, typically, an attorney decides to formally depose a witness only after she has informally interviewed the witness to determine how the witness's testimony will affect her case.<sup>56</sup>

Ex parte interviews play a unique role in the discovery process.<sup>57</sup> They provide the attorney the opportunity to speak informally with adverse witnesses and other potential witnesses to get an accurate picture of the facts of the case.<sup>58</sup> As an advocate, it is important for the attorney to obtain a balanced picture of the events at issue,<sup>59</sup> since it is her obligation to present the facts to the fact finder in an accurate, yet persuasive, manner.<sup>60</sup> Restrictions on whom an attorney may interview curtail her ability to ascertain the "truth" about a particular situation and thwart the attorney's overarching duty to develop an accurate picture of the facts.<sup>61</sup>

Informal interviews also help the attorney learn additional facts and aid her in developing additional theories of the case.<sup>62</sup> Informal interviews help the attorney determine what information the witness may have that is relevant to the case, and they assist the attorney in learning more about the witness's knowledge of the facts of the case.<sup>63</sup> Finally, in contrast to depositions, informal ex parte interviews provide a low-cost mechanism for

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representation of such facts as he might present.").

56. *Id.* ("A desire to depose formally would arise normally after preliminary interviews might have caused counsel to decide to take a deposition.").

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

58. See *Krulewitch*, *supra* note 11, at 1278.

59. See FED. R. CIV. P. 11; VT. R. CIV. P. 11.

60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1983) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . ." (footnotes omitted)).

61. *Krulewitch*, *supra* note 11, at 1278-79 ("Because the attorney as advocate is obliged to search out the truth and then present that truth to the court in the most favorable light to her client, any rule that limits the attorney's access to the truth necessarily contravenes a basic aim of our legal system." (footnote omitted)).

62. *Niesig v. Team I*, 558 N.E.2d 1030, 1034 (N.Y. 1990) ("Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions."); see *Mompont v. Lotus Dev. Corp.*, 110 F.R.D. 414, 419 (D. Mass. 1986).

63. *Edelstein*, 526 F.2d at 41 ("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.").

investigation of cases.<sup>64</sup>

As discussed in section III, employment attorneys face unique obstacles in their practices. These obstacles include finding information from employers who possess nearly all of the evidence the plaintiffs need for their cases; overcoming the inhibiting effect of the employers' economic control over employees who are potential witnesses; and, for pattern and practice cases, needing to show a repeatedly illegal practice by the employer. Given these particular barriers, it is critical to have the opportunity to informally meet with potential witnesses.<sup>65</sup> They may be the only source of information, other than written documentation, available to the plaintiff without the substantial expense associated with formal depositions.<sup>66</sup> Prohibiting *ex parte* contact with those employees not directly involved in the offense at issue could compromise the judicial system's goal of accurately presenting the facts.

#### V. FORMER EMPLOYEES ARE NOT COVERED BY DR 7-104(A)(1)'S PROHIBITION ON EX PARTE CONTACTS IN THE MAJORITY OF OTHER JURISDICTIONS

*Ex parte* contacts with former employees are almost universally permitted. The majority position among commentators, bar associations, and courts is appropriate, given the language of the Rule.<sup>67</sup> Because a former employee is no longer represented by his former employer's attorney, he does not fall within the definition of party. In addition, while "party" may contemplate more than the named party in a lawsuit or other legal matter,<sup>68</sup>

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64. *Frey*, 106 F.R.D. at 36.

65. *Id.* In *Frey*, an employment discrimination case, the Federal District Court for the Eastern District of New York allowed the plaintiff's attorney to informally interview employees who could not bind the corporation in the evidentiary sense. *Id.* The court stated: "In this case it is essential to plaintiff's ability to fully prepare and present her case that [defendant's] employees who are potential witnesses be informally contacted so that she may ascertain whether their testimony may be helpful in her case." *Id.*

66. *Frey*, 106 F.R.D. at 36 ("[T]o permit [the defendant corporation] to barricade huge numbers of potential witnesses from interviews except through costly discovery procedures, may well frustrate the right of an individual plaintiff with limited resources to a fair trial and deter other litigants from pursuing their legal remedies." (citations omitted)).

67. See *supra* note 2 and accompanying text (providing the language of the Rule).

68. *In re Illuzzi*, 3 Vt. L. Wk. 333, 334, 616 A.2d 233, 236 (1992) ("[W]e have no trouble concluding that the definition of 'parties' under the rule is not restricted to named parties in a lawsuit.").

most courts and commentators agree it should not encompass former associates of that entity.<sup>69</sup> Former associates should not be considered parties because they cannot bind their employer and their statements cannot be introduced as admissions of the employer.<sup>70</sup> Thus, ex parte interviews with former employees will not unfairly jeopardize a defendant's case.

In 1991, the American Bar Association issued Formal Opinion No. 359, which specifically addressed ex parte contact with former employees under Rule 4.2 of the Model Rules of Professional Conduct.<sup>71</sup> In its opinion, the ABA Committee rejected the minority position that ex parte communications with former employees should be limited in some circumstances.<sup>72</sup> The ABA Committee pointed out that the effect of DR 7-104(A)(1) and Rule 4.2 is to curtail the amount of information available to attorneys.<sup>73</sup> Because this curtailment is at odds with the policy of encouraging discovery, the Committee refused to further diminish access to relevant information, given the lack of express language in the Rule.<sup>74</sup> The ABA Committee's interpretation affirmed the

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69. *Valassis v. Samelson*, 143 F.R.D. 118, 121 n.2 (E.D. Mich. 1992) ("[E]very decision after the promulgation of the ABA's Formal Opinion in March 1991 has adopted the majority position" that Rule 4.2 does not apply to any former employee.); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556 (N.D. Ga. 1992); *Shearson Lehman Bros. v. Wasatch Bank*, 139 F.R.D. 412 (D. Utah 1991); *Action Air Freight v. Pilot Air Freight Corp.*, 769 F. Supp. 899 (E.D. Pa. 1991); *HAZARD & HODES*, *supra* note 13, § 4.2:107.

70. *HAZARD & HODES*, *supra* note 13, § 4.2:107 ("The no-contact regime described in the preceding section does not address communications with former agents and employees, and technically there should be no bar, since former employees cannot bind the organization, and their statements cannot be introduced as admissions of the organization.")

71. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991). While the issue the ABA Committee addressed focused on Rule 4.2, the ABA Committee used both Rule 4.2 and DR 7-104(A)(1) in its analysis. *Id.* For this reason, the ABA Committee's opinion should have the same effect in Model Rules jurisdictions as in Model Code jurisdictions.

72. *Id.* at 5. The ABA Committee considered and rejected a ban on ex parte contacts with all former employees including former employees who were highly placed in the company, such as former directors or officers. *Id.*

73. *Id.* at 6.

[T]he fact remains that the text of the Rule [Rule 4.2] does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its comment, to expand its coverage to former employees by means of liberal interpretation.

*Id.*

74. *Id.*

opinions of the state bar associations that have also addressed this issue.<sup>75</sup>

The case law also holds that *ex parte* communications with former employees of a business organization are permissible. In *Siguel v. Trustees of Tufts College*, the court explained that the Rule simply does not apply to *ex parte* interviews with former employees because former employees enjoy no present, ongoing agency relationship with the corporate party which could make their statements legally binding against the corporation.<sup>76</sup> Similarly, in *Action Air Freight v. Pilot Air Freight Corp.*, the court reasoned that because former managers or other lower-level employees no longer have an agency relationship with the corporate party, their admissions cannot bind the corporation.<sup>77</sup>

In two cases, however, the Federal District Court for the District of New Jersey did not permit unrestricted *ex parte* access to former employees. This court, however, addressed the issue of *ex parte* contacts with former employees before the ABA Committee on Ethics and Professional Responsibility issued its 1991 opinion on the matter. In the first case, *Public Service Electric & Gas Co. v. Associated Electric & Gas Insurance Services Ltd.*, the federal court put forth the most restrictive rule regarding *ex parte* contact with former employees by prohibiting *all* such contact.<sup>78</sup> In reaching its conclusion on the scope of New Jersey's Disciplinary Rule 4.2, the court relied on the commentary to Model Rule 4.2,<sup>79</sup> which states:

In the case of an organization, this Rule prohibits

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75. See New York City Inquiry Ref. No. 46 (1980); Massachusetts Bar Ass'n Op. 7 (1982); Florida St. Bar Ass'n Ethics Op. 14 (1989); Oregon St. Bar Ass'n Ethics Op. 80 (1991).

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

77. *Air Action Freight*, 769 F. Supp. at 903; see also *Hanantz v. Shiley, Inc.*, 766 F. Supp. 258, 271 (D.N.J. 1991) (acknowledging that a former employee could reveal facts which could result in liability of the corporate party, but holding nonetheless that *ex parte* communications with former employees are permissible given that attorney-client confidences of the corporation are not part of the discussions); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. at 561; *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992); *Shearson Lehman Bros.*, 139 F.R.D. at 418; *In re Env'tl. Ins. Declaratory Judgment Actions*, 600 A.2d 165, 169-71 (N.J. Super. Ct. Law Div. 1991).

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

79. *Id.* at 1040-42.

communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability.<sup>80</sup>

The federal court's reliance on this commentary, which was later expressly rejected by the ABA, makes it a more distinct aberration from the majority rule.<sup>81</sup>

A later decision from the same federal court placed some restrictions on ex parte communications with former employees, but the court declined to adopt the approach it previously took in *Public Service Electric & Gas Co.*<sup>82</sup> In *Curley v. Cumberland Farms*, the court allowed ex parte communications with former employees unless the employer could show that the former employee could impute liability to the corporation.<sup>83</sup> The *Curley* court failed to address the rules of evidence, however, which only permit an admission by an employee or agent to be used against the employer where it is made during the course of the relationship with the employer.<sup>84</sup>

In theory, the *Curley* decision restricts ex parte contacts with former employees. The court's test, however, is impossible to employ, because the ability to use a former employee's admission against the corporation ends when the agency relationship is extinguished.<sup>85</sup> Thus, the test's effect is to pose no barriers to ex

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80. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983).

81. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991). One year after *Public Service Electric & Gas Co. v. Associated Electric & Gas Insurance Services Ltd.*, the ABA Committee on Ethics and Professional Responsibility rejected the court's interpretation of Rule 4.2's comment. *Id.* at 6.

82. *Curley v. Cumberland Farms*, 134 F.R.D. 77, 80 (D.N.J. 1991) (affirming the magistrate's opinion that Rule 4.2 does not create a bright-line test prohibiting all ex parte contacts with former employees of a corporate party).

83. *Id.* at 82.

84. See HAZARD & HODES, *supra* note 13, § 4.2:107.

85. *Id.*

The situation of lower level and un-involved former employees is different; they are properly analyzed as "free" witnesses, who may be interviewed by a lawyer opposing the organization. . . . [F]or intermediate and higher level former employees, it would seem that they should be allowed to decide for themselves whether they still are so attached to the organization as to refuse to give statements except in the presence of the organization's lawyer.

*Id.* (footnote omitted).

parte communications with former employees.

The Vermont Supreme Court and the Vermont Bar Association Ethics Committee should adopt the majority position and allow unrestricted ex parte contact with former employees. Because an employer is only liable for admissions made by its current agents or employees, the majority position is the fairest interpretation of the Rule. The language of the Rule says nothing about former associates of the opposing party. Most cases which have addressed the issue directly, and the recent formal opinion by the ABA Committee on Ethics and Professional Responsibility, however, support the position of unrestricted ex parte contact with former employees. Adoption of the majority provision will provide the plaintiffs' attorneys a better opportunity to assess accurately the viability of their cases within the requirements of Rule 11 without compromising the defendant business organizations' risk of imputed liability.

#### VI. DR 7-104(A)(1)'S LIMITATIONS ON EX PARTE CONTACTS WITH PRESENT EMPLOYEES

While courts, bar associations, and commentators take two approaches toward ex parte contact with former employees, there are four primary approaches to the issue of whether or not ex parte contacts with present employees are permissible. These are the control group test,<sup>86</sup> the blanket ban,<sup>87</sup> the balancing test,<sup>88</sup> and the alter-ego test.<sup>89</sup> The alter-ego test, quickly being

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86. *Fair Automotive Repair v. Car-X Serv. Sys.*, 471 N.E.2d 554, 560 (Ill. App. Ct. 1984).

With regard to a corporation, the attorney-client privilege is applicable only to those employees within the [employer's] 'control group,' which is defined as those top management persons who had the responsibility of making the final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without [input from those advisors.]

*Id.*

87. *Nassau County Bar Ass'n Comm. on Ethics*, Op. No. 2 (1989); *Los Angeles County Bar Ass'n Ethics Comm.*, Formal Op. No. 410 (1983). The blanket test, advocated by these two regional bar associations, prohibits ex parte contact with *all* of a corporation's employees.

88. *Mompont v. Lotus Dev. Corp.*, 10 F.R.D. 414, 418-19 (D. Mass. 1986). The court used a three-part balancing test. First, the court considered whether employees' statements could be admissible against the corporation pursuant to Federal Rule of Evidence 801(d)(2)(D). After resolving this threshold issue, the court next considered the need, in this case, for the corporation to have its counsel present in order to have effective

adopted by courts and bar associations nationwide, is used most commonly to determine which current employees may be contacted without violating the Rule.<sup>90</sup> The other three tests are used less frequently and are losing ground quickly to the alter-ego approach.

This section will discuss and critique each of the four tests used to determine when *ex parte* contacts with current employees are permissible under the Rule. This section will conclude with a recommendation that the Vermont Supreme Court and the Vermont Bar Association Ethics Committee adopt the alter-ego test. This test best accommodates the plaintiff's need for access to information in the employer's possession, while still protecting the defendant's ability to rely on counsel by shielding employees from improper approaches.<sup>91</sup>

#### A. Control Group Test

The control group test allows for the most contact with employees. According to the only court to use this test, the Appellate Court of Illinois, the Rule prohibits contact with those employees within the employer's control group.<sup>92</sup> The control group consists of top management officials responsible for making the final decisions, presumably in matters of administration and management, and those employees on whom the top management would ordinarily rely for advice and input before making management decisions.<sup>93</sup>

In *Fair Automotive Repair Corp. v. Car-X Service Systems*, the plaintiff, a direct business competitor of the defendant, hired investigators to go to the defendant's business to gather information to prove that the defendant's employees were making

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representation. Finally, the court considered the needs of the plaintiff's attorney in order to prove the alleged cause of action. *Id.*

89. *Niesig v. Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990). The alter-ego test defines "party" as including: 1) "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation;" or 2) parties who may impute liability to the corporation; or 3) employees who act at the instruction or advice of corporate counsel. *Id.*

90. Stephen M. Sinaiko, Note, *Ex Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U. L. REV. 1456, 1482 (1991).

91. *Frey v. Department of Health and Human Servs.*, 106 F.R.D 32, 36-38 (E.D.N.Y. 1985).

92. *Fair Automotive Repair v. Car-X Serv. Sys.*, 471 N.E.2d 554, 560 (Ill. App. Ct. 1984).

93. *Id.*

disparaging comments about the plaintiff's products and service.<sup>94</sup> These investigators, pretending to be customers, made comments on the plaintiff's lower prices and superior service.<sup>95</sup> The defendant's employees responded to the investigator/customers' comments with disparaging comments about the plaintiff's business.<sup>96</sup>

The *Fair Automotive* court, adopting the control group test, concluded that the investigators' actions did not violate the Rule because none of their contacts were with members of the defendant's control group.<sup>97</sup> The court was persuaded by a prior Illinois Supreme Court decision which adopted the control group test in the area of attorney-client privilege.<sup>98</sup> The court applied the rationale regarding attorney-client privilege to the definition of "parties" under the Rule. As with attorney-client privilege matters, "the policy of encouraging full and frank consultations between a client and a legal advisor and the policy of maximizing the amount of relevant factual material which is subject to discovery" must be balanced.<sup>99</sup> The Appellate Court of Illinois stated that if a narrower test than the control group test were used, the goals of the Rule could be nullified for corporate and other business organizations.<sup>100</sup> Yet, the court noted, if a broader test were used, and ex parte contact were prohibited with employees both within and outside of the control group, "too much relevant information would be barred from the fact-finding process."<sup>101</sup>

While the control group test provides the most access to current employees and opens many barriers to discovery, the

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94. *Id.* at 557.

95. *Id.*

96. *Id.*

97. *Id.* at 561.

98. *Id.* at 560-61 (discussing *Consolidated Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982)).

99. *Id.* at 560-61.

Our supreme court in *Consolidation Coal* adopted the "control group" test in the area of attorney-client privilege after balancing the policy of encouraging full and frank consultations between a client and a legal advisor and the policy of maximizing the amount of relevant factual material which is subject to discovery. That same logic should apply to the concept of "party" for Rule 7-104.

*Id.* (citations omitted).

100. *Id.* at 561.

101. *Id.*

control group test goes too far in opening the door to imputed liability. Under Federal Rule of Evidence 801(d)(2)(D), the statements made by these employees, so long as they refer to matters within the scope of their employment, may be imputed to the employer.<sup>102</sup> Under the control group test an attorney may conceivably conduct ex parte interviews with the employees who may be directly responsible for the lawsuit, provided they are not in the control group.<sup>103</sup>

In weighing the competing needs of providing the plaintiffs access to information and protecting defendants from binding admissions made by employees, the control group test clearly tips the scale in favor of the plaintiffs, since under it, all but the most highly-placed employees may be approached and interviewed ex parte. While the control group test best serves the interests of the plaintiff, it does so at an unreasonable cost to the employer.<sup>104</sup>

For example, if the control group test were permitted in the hypothetical situation presented above, Jane Doe's attorney would be able to conduct ex parte interviews with any of Doe's non-managerial co-employees, including co-employees whose acts could form the basis of Doe's allegation that her employer violated the Vermont Fair Employment Practices Act. It is not likely that these employees would agree to speak to Doe's attorney, because of the employer's control over its employees' job security, career advancement, and work environment. There is a risk, however, that they might do so, and they might also make admissions

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102. *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 16-17 (D. Mass. 1989); FED. R. EVID. 801(d)(2)(D).

103. *Morrison*, at 16-17 (rejecting the narrow control group for failing to acknowledge that Federal Rule of Evidence 801(d)(2)(D) "permits the admission by a party-opponent against a party of a 'statement made by that party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship'" (citing FED. R. EVID. 801(d)(2)(D))).

104. *Id.* at 17.

One can envision a factual situation in which an agent or servant who is not a member of the "control group" but who, as a result of his employment and within the scope of his employment, had far greater knowledge and involvement in a situation which might result in liability to his corporate employer such that "effective representation" for the corporation would require that that employee be considered a "party" as the term is used in DR 7-104(A)(1). Under the "control group" test, the employee would not be a party for purposes of DR 7-104(A)(1) unless the definition of the term "managing agent" could be stretched to cover him.

*Id.*

which could be imputed to the furniture making company. This risk unfairly disadvantages the furniture making company. The appropriate interpretation of the Rule's definition of business organization must take into account the concerns of businesses while assuring reasonable access to relevant witnesses.

### B. Blanket Ban

A second approach to defining the Rule's application to employees is the blanket ban. The blanket ban, advocated by two regional bar associations, prohibits ex parte contact with *all* of a corporation's employees.<sup>105</sup> An indisputable advantage of the blanket ban is that it may be administered very easily.<sup>106</sup>

Advocates of the blanket ban rely on *Upjohn Co. v. United States*, which said that "[c]onsistent with the underlying purposes of the attorney-client privilege, these communications [between Upjohn's corporate counsel and employees not in the company's upper echelon] must be protected against compelled disclosure."<sup>107</sup> Advocates of the blanket ban argue that because the attorney-client privilege exists, an attorney-client relationship for purposes of the Rule also exists.<sup>108</sup>

This approach is the extreme opposite of the control group standard because it prohibits ex parte contact with *all* employees of an adversary corporation.<sup>109</sup> This approach has been criticized broadly. One court rejected the blanket ban, pointing out that the effect of the blanket test is to "require a plaintiff to employ expensive deposition or other formal discovery."<sup>110</sup> This court noted that "[t]he cost of [discovery] may be prohibitive and contrary to efforts to reduce the costs which the burden of formal

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105. Nassau County Bar Ass'n Comm. on Ethics, Op. No. 2 (1989); Los Angeles County Bar Ass'n Ethics Comm., Formal Op. No. 410 (1983).

106. *Niesig v. Team I*, 558 N.E.2d 1030, 1034 (N.Y. 1990) ("The single indisputable advantage of a blanket preclusion—as with every absolute rule—is that it is clear.")

107. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

108. See *Niesig*, 558 N.E.2d at 1034.

109. *Id.* ("Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions.")

110. *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 562 (D. Utah 1990) (citing Walter E. Oberer, *Trial by Ambush or Avalanche, The Discovery Debacle*, 1987 Mo. J. DISP. RESOL. 1; Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17 (1987)); see also *Niesig*, 558 N.E.2d at 1033 (criticizing the blanket ban as being too broad).

discovery places on litigants, counsel and the courts."<sup>111</sup>

A second court considered and rejected this approach, reasoning that the blanket ban "closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."<sup>112</sup> The court criticized the defendant's argument, based on *Upjohn*, that the existence of an attorney-client privilege also meant the existence of an attorney-client relationship for purposes of the Rule.<sup>113</sup> In disposing of the defendant's claim that the *Upjohn* rationale applies to the Rule's definition of "party," the court reasoned that *Upjohn*'s attorney-client privilege rule protects only the disclosure of attorney-client communications, not the disclosure of the facts by those who communicated with the attorney.<sup>114</sup> Thus, this court concluded, the logic for the existence of the blanket test is faulty.

Moreover, protecting employers from *all ex parte* contacts with *all* of its employees comes at too high of a price to the plaintiff. Under the blanket ban approach, the plaintiff's attorney could be prohibited from conducting *ex parte* interviews with all potential witnesses if every witness were also an employee. For example, in Jane Doe's case, her attorney would not be able to conduct *ex parte* interviews with any of the furniture maker's employees. If Doe's attorney decided to file suit based on her account alone, the furniture maker's attorney would be able to respond with a Rule 11 motion for sanctions.<sup>115</sup> In a blanket ban jurisdiction, Doe's attorney would have to depose formally her co-employees in order to gain some idea as to how these employees will testify at trial. The plaintiff's avenues of discovery are blocked to such an extent that efforts to obtain an accurate picture of the facts of the case become both prohibitively costly

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111. *Bouge*, 132 F.R.D. at 562.

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

113. *Id.*

114. The court stated:

*Upjohn*, however, addresses an entirely different subject, with policy objectives that have little relation to the question whether a corporate employee should be considered a "party" for purposes of the disciplinary rule. First, the privilege applies only to *confidential communications* with counsel, it does not immunize the underlying factual information—which is the issue here—from disclosure to an adversary.

*Id.* (citations omitted).

115. See *supra* notes 41-66 and accompanying text.

and unfair in blanket ban jurisdictions.<sup>116</sup>

### C. Balancing Test

A third approach, the balancing test, has been adopted by the Federal District Court of Massachusetts in an attempt to reconcile the problems with both the control group test<sup>117</sup> and the alter-ego test.<sup>118</sup> In *Morrison v. Brandeis University*, the court criticized these tests as being "either too restrictive in view of the extent to which employees' statements may be admissible against the corporation pursuant to Rule 801(d)(2)(D), F.R.Evid., or they are too broad in defining a 'party' to be any employee whose statement *may* be admissible against the corporation under that rule."<sup>119</sup>

In *Mompoint v. Lotus Development Corp.*, a wrongful discharge case, the court used a three-part balancing test to determine that the plaintiff should be allowed access to certain employees of the defendant.<sup>120</sup> First, the court considered whether the statements of these employees could be admissible against the corporation during trial pursuant to Federal Rule of Evidence 801(d)(2)(D).<sup>121</sup> The court recognized that imputation of an admission by an employee depends on whether or not the statements made to opposing counsel concern a matter within the scope of the employee's employment, and concluded that the statements would be admissible pursuant to 801(d)(2)(D) in the instant case.<sup>122</sup> After resolving this threshold issue, the court considered the need for the corporation to have its counsel present in order to protect the corporation from imputed liability, and

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116. *Niesig*, 558 N.E.2d at 1033.

117. See *supra* notes 92-104 and accompanying text.

118. See *infra* notes 140-57 and accompanying text.

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

120. *Mompoint v. Lotus Dev. Corp.*, 110 F.R.D. 414, 419 (D. Mass. 1986) ("Thus, in striking a balance in the instant case, I find that the balance tilts in favor of allowing plaintiff's counsel to interview the female employees out of the presence of Lotus' counsel.").

121. *Id.* at 418.

122. *Id.* ("In my opinion, the employee's statements on this subject matter are likely to be found to concern a matter within the scope of the employee's employment and thus likely to be admissible against the corporation pursuant to Rule 801(d)(2)(D)").

thus, provide the corporation with effective representation.<sup>123</sup> Finally, the court considered the plaintiff's attorney's need to speak with the co-employees out of the presence of corporate counsel to prove its case.<sup>124</sup>

The *Mompoin* court decided that the Rule did not prohibit the plaintiff's attorney from conducting ex parte interviews with female co-employees who were alleged victims of sexual harassment by the plaintiff,<sup>125</sup> since the purpose of the interviews was to show that the plaintiff did not harass these female co-employees. The court noted that the information gained from the interviews would be used at trial to demonstrate that the defendant's stated reason for discharging the plaintiff was pretextual.<sup>126</sup>

The *Mompoin* court reasoned that the defendant could use its own records of complaints by female employees to overcome any harmful evidence resulting from interviews.<sup>127</sup> In contrast, the court reasoned, the plaintiff's counsel had "a considerably more difficult task in gathering evidence to prove that the reasons given for the termination were pretextual."<sup>128</sup> After weighing the competing needs of the plaintiff and the defendant, the court concluded that despite the potential admissibility of statements by the defendant's female employees, the plaintiff's need for access to these individuals was more compelling than the defendant's need to have corporate counsel present at these informal interviews.<sup>129</sup>

The Massachusetts Federal District Court has continued to use this balancing test for questions concerning ex parte contact with current employees.<sup>130</sup> In later cases, however, the court added procedural safeguards to protect the interests of the

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123. *Id.* ("I cannot subscribe to the view that the corporation's right to 'effective representation' requires an absolute prohibition in all instances against interviews with corporate employees concerning matters within the scope of the employees' employment.").

124. *Id.* at 419.

125. *Id.*

126. *Id.* at 418.

127. *Id.* at 418-19.

128. *Id.* at 419. ("One avenue of investigation would surely be to try to prove that the female employees did not complain to Lotus, or if they did, the content of their complaints varied substantially from what Lotus claims.").

129. *Id.*

130. See *Morrison*, 125 F.R.D. at 14; *Siguel v. Trustees of Tufts College*, 52 Fair Empl. Prac. Cas. (BNA) 697 (D. Mass. 1990); *Bruce v. Silber*, 52 Fair Empl. Prac. Cas. (BNA) 785 (D. Mass. 1989).

corporation and the individual employees. In *Morrison v. Brandeis University*, the court applied its balancing test and determined that the plaintiff, who claimed that she was denied tenure for discriminatory reasons, had a more compelling need for access to those who had made the decision to deny her tenure than had the university for prohibiting ex parte access.<sup>131</sup> In balancing the parties' competing interests, the court gave significant weight to the fact that regardless of what interviewed employees might say, the university should have a written record of the decision-making process to rebut any harmful statements.<sup>132</sup> The court concluded its balancing test by stating: "[I]n the circumstances of this case, the needs of the plaintiff and those interests which serve the search for truth and the effective preparation for trial outweigh any need which counsel for Brandeis has to be present at the interviews in order to afford Brandeis 'effective representation' by counsel."<sup>133</sup>

As a safeguard for the corporation and the individual employees, however, the court required that the plaintiff's attorney: 1) inform a potential interviewee of the purpose of the interview; 2) inform the potential interviewee that participation in the interview would be voluntary; and 3) inform the potential interviewee that any request to have his personal or the corporation's attorney present would be honored.<sup>134</sup> Furthermore, the court required the university to inform all potential interviewees that the plaintiff's counsel had been given full authority to conduct ex parte interviews, subject to the three safeguards above.<sup>135</sup>

The balancing test provides the fairest option for determining when ex parte communications with current employees should be allowed since it takes into account the particular circumstances of each case individually. The balancing test also demonstrates a sensitivity to the unique nature of employment discrimination cases, where the employer is likely to control most of the written evidence a plaintiff needs, as well as most of the potential witnesses.<sup>136</sup>

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131. *Morrison*, 125 F.R.D. at 19.

132. *Id.*

133. *Id.*

134. *Id.* at 19-20.

135. *Id.* at 20.

136. See *supra* notes 127-33 and accompanying text.

The balancing test is an inefficient use of judicial resources, however, because it must be applied on a case by case basis.<sup>137</sup> Therefore, it fails to provide adequate guidance to practicing attorneys who are regularly faced with these issues.<sup>138</sup> This lack of guidance could mean that the attorney would be forced to reveal case theories and strategies to opposing counsel. This would be harmful to her case because she would not clearly understand when *ex parte* communications would be prohibited.<sup>139</sup> For example, in Jane Doe's situation, her attorney would have to petition the court for permission to conduct *ex parte* interviews prior to filing suit. They would have to divulge their theories of the case and defend their reasons for requesting *ex parte* access to the furniture maker's employees. The drawbacks of the inefficiency and unfairness to the plaintiff in the balancing test outweigh the test's overall benefits.

#### D. Alter-Ego Test

The final test, the alter-ego test, was enunciated by the New York Court of Appeals in *Niesig v. Team I*.<sup>140</sup> In crafting its new test, the court defined party as including: 1) corporate parties whose acts or omissions in the matter under inquiry are binding on the corporation; or 2) parties who may impute liability to the corporation; or 3) employees who act at the instruction or advice of corporate counsel.<sup>141</sup> According to the court of appeals, the third category of protected employees was added because "[c]oncern for the protection of the attorney-client privilege prompts us also to include in the definition of 'party' the corporate employees responsible for actually effectuating the advice of

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137. Sinaiko, *supra* note 90, at 1490 ("Large amounts of 'satellite litigation' consume scarce judicial resources and subject the balancing test to obvious charges of inefficiency.").

138. See *Niesig v. Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990) (rejecting the balancing test because it gives "too little guidance").

139. Sinaiko, *supra* note 90, at 1490.

140. *Niesig*, 558 N.E.2d at 1030.

141. *Id.* at 1035. A minority variation on the alter-ego test, advanced by the Massachusetts Bar Association and the New York City Bar Association, is the scope of employment test. Under this test, which is based on evidentiary rules regarding admissions, the Rule applies to all employees of a corporation when they are interviewed about matters within the scope of their employment. While this test differs from the alter-ego test in form, it has the same effect in substance. Both tests prohibit *ex parte* communications with an employee when those communications result in an admission against a corporation.

counsel in the matter."<sup>142</sup> Presumably, the court added this category of protected employees out of concern that these employees might inadvertently reveal harmful information if they spoke directly with an opposing attorney. The alter-ego test permits direct access to all employees who fall outside the definition of party; this includes those employees who were merely witnesses to an event for which the employer is being sued.<sup>143</sup>

In *Niesig*, the plaintiff, who had fallen and injured himself while performing construction work for the defendant, petitioned the court for permission to conduct ex parte interviews with his co-employees.<sup>144</sup> Applying the alter-ego test, the court of appeals concluded that the Rule did not prohibit informal ex parte interviews of the defendant's employees who had merely witnessed the plaintiff's accident since they could not impute liability to the defendant.<sup>145</sup>

While the *Niesig* definition of parties may not have been revolutionary,<sup>146</sup> this decision provides an excellent approach to the dilemma presented by the ambiguity of the Rule. Following the *Niesig* court's rationale, the ABA Committee on Ethics and Professional Responsibility,<sup>147</sup> the Supreme Court of Wyoming,<sup>148</sup> the Supreme Court of Oregon,<sup>149</sup> and the Superior Court of New Jersey<sup>150</sup> each adopted the alter-ego test.

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

143. *Id.* at 1035-36.

144. *Id.* at 1031.

145. *Id.* at 1032.

146. *Id.* Indeed, the *Niesig* court points out that a similar test had been overwhelmingly adopted by courts and bar associations throughout the country. See, e.g., *Bey v. Village of Arlington Heights*, 50 Fair Empl. Prac. Cas. (BNA) 1375 (N.D. Ill. 1989); *Frey v. Department of Health and Human Servs.*, 106 F.R.D. 32 (E.D.N.Y. 1985); *Ex rel. Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984); ABA Comm. on Ethics and Professional Responsibility, Informal Op. No. 1410 (1978); Alabama State Bar Ass'n Ethics Op. No. RO-83-81 (1983); Committee on Ethics, Colorado Bar Ass'n, Op. No. 69 (1985); Bar of Ga., Formal Advisory Op. No. 87-6 (87-R2), issued by the Supreme Court July 12, 1989; Professional Ethics Comm., Board of Overseers, Bar of State of Me., Op. No. 94 (1989); Committee on Professional and Judicial Ethics, State Bar of Mich., Op. No. CI-526 (1980); Committee on Legal Ethics and Professional Conduct, Ohio State Bar Ass'n, Op. No. 81-5 (1985); Professional Guidance Comm., Philadelphia Bar Ass'n, Guidance Inquiry No. 88-30 (1988); State Bar of Tex., Op. No. 342 (1968), printed in 23 BAYLOR L. REV. 877 (1972); Standing Comm. on Legal Ethics, Virginia State Bar, Legal Ethics Op. No. 905 (1987).

147. ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 359 (1991).

148. *Strawser v. Exxon*, 843 P.2d 613 (Wyo. 1992).

149. *Fulton v. Lane*, 829 P.2d 959 (Or. 1992).

150. *New Jersey v. CIBA-GEIGY Corp.*, 589 A.2d 180 (N.J. Super. Ct. App. Div. 1991).

The *Niesig* court correctly claimed that this test fairly balances the competing needs of the parties by permitting direct access to all employees who do not have the capacity to bind the corporation, including employees who were merely witnesses. Also, the test can be applied easily.<sup>151</sup> Furthermore, because the alter-ego test is firmly rooted in both the law of agency and the law of evidence, it should be easily understood by attorneys who must apply this test in their practice.<sup>152</sup>

Advocates for more restricted access to a corporation's employees may argue that this test unfairly exposes the corporation to liability. In *Frey v. Department of Health and Human Services*, however, another case which employed the alter-ego test, the Federal District Court for the Eastern District of New York imposed a safeguard to assure maximum fairness to both parties.<sup>153</sup> In this case, the court refused to permit any ex parte statements made by the defendant's employees to be used as admissions against the employer.<sup>154</sup>

Courts, bar associations, and commentators favoring use of the alter-ego test recognize that the purpose of the Rule is not to shield the corporate party from divulgence of harmful facts, but to preclude interviewing those corporate employees who may bind the company in a legal evidentiary sense.<sup>155</sup> As one court accurately observed, a flexible interpretation of parties advances the policy of keeping the testimony of employee witnesses freely accessible to both parties.<sup>156</sup> By restricting the definition of parties to those employees who can bind the employer in the evidentiary sense, the alter-ego test best balances the policy of

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151. *Niesig*, 558 N.E.2d at 1036 ("[T]his test should also become relatively clear in application.").

152. *Id.* (The alter-ego test "is rooted in developed concepts of the law of evidence and the law of agency, thereby minimizing the uncertainty facing lawyers about to embark on employee interviews.").

153. *Frey*, 106 F.R.D. at 32.

154. *Id.* at 38 ("Plaintiff's counsel who argues that the employees' statements may be admissions usable in court against the [defendant] SSA cannot have it both ways since the employees will not be deemed by this court to be non-parties for purposes of DR 7-104(A)(1) but 'parties' for purposes of Fed.R.Evid.801(d)(2)(D).") (citations omitted).

155. See *Ex rel. Wright*, 691 P.2d at 569 ("It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts. . . . Rather, the rule's function is to preclude the interviewing of those corporate employees who have the authority to bind the corporation.").

156. *Id.* (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 117 (1934)); see also *Frey*, 106 F.R.D. at 36.

encouraging accessibility of information available in discovery and the policy of protecting corporations against liability based on their employees' admissions. Finally, though the alter-ego test and the balancing test are similar because they both take into account the plaintiff's and the employer's competing interests, the alter-ego test is easily administered and will not unduly burden attorneys or the court system.<sup>157</sup>

For example, Jane Doe's attorney would be permitted to conduct ex parte interviews with any of the furniture maker's employees who could not impute liability to their employer. Doe's attorney would be able to evaluate accurately her case and the furniture maker's interest in minimizing exposure to liability. The alter-ego test accommodates both the plaintiff's need for information possessed by the employer and the protection of the employer from uncounseled disclosure by its employees.

#### CONCLUSION

For the plaintiff's employment attorney who, almost by definition, opposes business organizations, problems are created by the ambiguity of DR 7-104(A)(1). The Rule offers the practitioners no guidance about whom they may or may not contact directly when the opposing party is a business organization rather than an individual. In Vermont, the problem is particularly serious because the Vermont Bar Association Ethics Committee has never addressed the issue and, moreover, there is very little Vermont case law that interprets the disciplinary rule.<sup>158</sup>

The frequency with which attorneys in Vermont must consider this issue mandates clarification of the Rule, particularly after the Vermont Supreme Court decision *In re Illuzzi*.<sup>159</sup> This case addressed the scope of DR 7-104(A)(1) as it applies to opposing parties, but failed to communicate how it would limit the application of the disciplinary rule when the party is a business organization with employees. Vermont's attorneys need a clearer interpretation of the Rule, so that they may pursue avenues of

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157. *Ballard v. University of Vt.*, No. s 229-91 CnC (ruling on motion for protective order) (Chittenden Super. Ct. July 30, 1991). In this pre-*Illuzzi* sex discrimination case, the Chittenden Superior Court addressed the scope of the Rule as it applies to an adversary corporation. After carefully considering each of the aforementioned tests, the court adopted the *Niesig* alter-ego test.

158. See *supra* notes 17-22 and accompanying text.

159. *In re Illuzzi*, 3 Vt. L. Wk. 333, 616 A.2d 233 (1992).

discovery as zealously as possible without violating disciplinary or procedural rules. The Vermont Supreme Court may not have intended their discussion of the Rule in the *Illuzzi* decision to preclude all ex parte contacts with both former and present employees of an adversary business organization. The language of the decision, however, permits such an interpretation and leaves Vermont's practicing attorneys unsure about which employees they may contact ex parte and which employees they are prohibited from contacting directly. For this reason, both the Vermont Supreme Court and the Vermont Bar Association Ethics Committee should clarify their definitions of the Rule's prohibition on ex parte contact with a represented party when the party is a business organization.

The definition of party should not include former employees of a business organization, as these individuals can no longer bind their former employer in the evidentiary sense. This position is supported by the American Bar Association, state bar associations, the majority of courts, and many commentators.<sup>160</sup> Each of these authorities recognizes that because liability for the former employee's admissions cannot be imputed to the employer/business organization, limitations on ex parte communications with former employees unfairly restrict the opposing attorney's access to relevant and necessary information regarding the case. The Vermont Supreme Court and Vermont Bar Association Ethics Committee should also recognize this sound rationale, and they should interpret the Rule as permitting ex parte unrestricted access to former employees.

The Vermont Supreme Court and Vermont Bar Association Ethics Committee should also interpret the Rule as permitting limited ex parte access to current employees of an adversary business organization. There are four tests which are used by courts and bar associations across the country to determine who is covered by the term party when the opposing party is a business organization: the alter-ego test, the control group test, the blanket ban, and the balancing test. The alter-ego test permits an opposing attorney to directly contact all present employees, except those whose acts or omissions on the issues of the case will impute liability to the business, employees who may impute liability to the business, and employees who act at the

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160. See *supra* notes 67-85 and accompanying text.

instruction of corporate counsel.<sup>161</sup> The control group test allows ex parte contact with all employees who are not in the company's "control group," which includes top management employees who make the company's most important decisions.<sup>162</sup> Because the control group test would permit direct contact with even those employees who are allegedly at fault, so long as they are not in the control group, this test takes the most permissive approach to ex parte contacts. The opposite extreme is the blanket ban, which prohibits direct contact with all of a business's employees.<sup>163</sup> Finally, the balancing test evaluates the needs of both parties in each case individually, taking into account: 1) whether particular employees' statements could be used as admissions by the business at trial, pursuant to state or federal rules regarding evidentiary admissions; 2) the business's need to have its counsel present when the plaintiff's attorney meets with employees; and 3) the needs of the plaintiff's attorney to conduct ex parte interviews with employees.<sup>164</sup>

The alter-ego test most fairly balances the competing needs of both parties, since it permits ex parte access with those present employees who may not impute liability to their employer. This test, unlike the control group test, allows business organizations to protect themselves from their employees' damaging admissions. The alter-ego test, unlike the blanket ban, also permits the plaintiff's counsel to contact employees outside the possibly inhibiting presence of their employer's counsel. Finally, this test is the most predictable and easily administered. As such, it will not unduly burden the court's resources, making it a better choice than the balancing test.

In sum, the alter-ego test provides the fairest and most workable test for determining who falls within the Rule's definition of party. Therefore, the alter-ego test should be adopted by both the Vermont Supreme Court and the Vermont Bar Association Ethics Committee.

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161. See *supra* notes 140-57 and accompanying text.

162. See *supra* notes 92-104 and accompanying text.

163. See *supra* notes 105-16 and accompanying text.

164. See *supra* notes 117-39 and accompanying text.