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Fall 9-1-1987

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### Recommended Citation

Louis A. Stahl, *Ex Parte Interviews With Enterprise Employees: A Post-Upjohn Analysis*, 44 Wash. & Lee L. Rev. 1181 (1987).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol44/iss4/4>

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# EX PARTE INTERVIEWS WITH ENTERPRISE EMPLOYEES: A POST-*UPJOHN* ANALYSIS

LOUIS A. STAHL\*

Law is a deep science; its boundaries, like space, seem to recede as we advance: and though there may be as much of certainty in it as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. Its acquisition is more than the labor of a life, and after all can be with none the subject of an unshaken confidence. . . . Hoffman's Fifty Resolutions in Regard to Professional Department, No. XXXIV (1836).<sup>1</sup>

## I. PARTIES AND WITNESSES: THE HISTORICAL FAILURE TO PROPERLY CHARACTERIZE ENTERPRISE EMPLOYEES

When a party represented by counsel is an individual, adverse counsel will normally have no difficulty applying the ethical prohibition against communicating with such a party without the consent of that party's attorney. However, difficult ethical issues can and do arise when one of the parties is a corporation or other enterprise which acts through employees or agents.

The traditional rules of professional conduct have been that an attorney may contact any former employee of an enterprise<sup>2</sup> and those current

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1. DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* (2d ed. 1836), reproduced in *DRINKER, LEGAL ETHICS* at 338 (1953).

2. The term "enterprise" is used as an all-inclusive term that encompasses any organization or entity that acts through employees or agents, including corporations, partnerships, joint ventures and other forms of association, as well as sole proprietorships. The concepts and principles discussed in this article generally will have application to any kind of employment or agency relationship, without regard to the formal label that might be attached to the relationship. *See, e.g.,* *Abeles v. State Bar*, 9 Cal.3d 603, 510 P.2d 719, 108 Cal. Rptr. 359 (1973) (business partners); Massachusetts Bar Association Opinion 82-7 ("If the employee of a corporation may be a 'party' for purposes of DR 7-107(A)(1), there seems to be no special reason why an employee of a sole proprietorship who has power to commit the sole proprietorship ought not to be able to be considered a 'party' as well.") *See also* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.13 comment (1983).

employees who cannot "speak for" or "commit" the employer.<sup>3</sup> These rules are of doubtful validity after the U.S. Supreme Court's decision in *Upjohn Co. v. United States*,<sup>4</sup> the adoption of the Model Rules of Evidence by the federal courts<sup>5</sup> and a number of state courts, and the adoption by the American Bar Association and a growing number of states of the new Model Rules of Professional Conduct.<sup>6</sup> Moreover, there are sound policy reasons why the ethical restrictions on a lawyer's ability to conduct ex parte interviews with past and present enterprise employees ought to be co-extensive with the parameters of the attorney-client privilege as defined by *Upjohn* and the burdens imposed upon an enterprise by the law of agency and the rules of evidence. In other words, to the extent that a past or present employee of an enterprise may have conversations with the enterprise's attorney which are protected by the attorney-client privilege, and/or the acts of past or present employees may give rise to liability on the part of the enterprise and/or their statements while employed may constitute an admission by the enterprise, such employees should not be subject to ex parte interviews by opposing counsel but should be subject to discovery only through the processes which must be utilized in the case of a party opponent.

#### A. THE ATTORNEY/CLIENT PRIVILEGE: AN EVOLVING CONCEPT

The attorney-client privilege is the oldest privilege known to the common law.<sup>7</sup> The attorney-client privilege has been expanded and contracted over the centuries as the battle raged between those who argue that the privilege interferes with the search for truth and those who believe that the privilege is a necessary prerequisite to complete freedom of consultation between a lawyer and a client, with the ultimate objectives being the proper represen-

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3. The ABA/BNA Lawyer's Manual on Professional Conduct summarizes the traditional rule.

When the adverse party is a corporation, questions arise concerning which officers and employees can be interviewed without the consent of the corporation's counsel. Various rules of thumb have been formulated to guide attorneys. These guides are based on the distinction between officers and directors with power to bind the corporation and employees lacking such power to bind. The former tend to be considered parties while the latter are considered witnesses, who may be interviewed without the permission of the corporation or its counsel.

ABA/BNA Lawyer's Manual on Professional Conduct, 71:313-71:314 (1984).

4. 449 U.S. 383 (1981).

5. The Model Rules of Evidence were adopted by the federal courts in 1975. See Rules of Evidence Act, Pub. L. No. 93-595, § 1, 88 Stat. 1929 (1975); Federal Criminal Code and Rules, p. 205 *et seq.* (West 1987 ed.). See also 1974 U.S. Code Cong. & Admin. News, 7051 (tracing legislative history of Federal Rules of Evidence).

6. The Model Rules of Professional Conduct were adopted by the American Bar Association in 1983. ABA/BNA Lawyer's Manual on Professional Conduct, 01:101. As of August, 1986, seventeen states had adopted the new rules or a variant. *Id.* at 01:3.

7. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2290 at 542 (McNaughton revised ed. 1961). See also Sexton, *A Post Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U.L. REV. 443, 445 (1982).

tation of the client and the protection of the client's legal rights.<sup>8</sup>

Although practitioners and scholars have long argued, and no doubt will continue to argue over the policy considerations which underlie the existence and scope of the attorney-client privilege, especially as applied to corporations, after *Upjohn* those arguments are in a sense academic.<sup>9</sup> In *Upjohn*, the United States Supreme Court has chosen the policies which it believes should be given priority and which it wishes to advance.<sup>10</sup> If we assume that the Court will be reasonably consistent during the foreseeable future, any currently viable analysis of the scope of the attorney-client privilege as applied to an enterprise must proceed from the assumptions incorporated in the Supreme Court's decision in *Upjohn*. For the same reason, any discussion of corollary or related doctrines, such as the definition of a party for discovery purposes, must proceed from the same assumptions; in other words, if one accepts the premise that mid- and even low- level enterprise employees may have conversations with counsel for the enterprise that are protected by the attorney-client privilege, and such employees are treated as "parties" or "party representatives" for that purpose, logical consistency would seem to require that all such enterprise employees also be treated as parties or party representatives for discovery purposes. Likewise, to the extent that employees may bind the enterprise by their acts or statements, on the theory that such acts or statements are those of a "party," consistency and fairness require that discovery of such party conduct and admissions be conducted not ex parte but with the safeguards which attach to discovery directed at any party opponent.

#### B. THE TRADITIONAL RULE GOVERNING DISCOVERY FROM ENTERPRISE EMPLOYEES

For years the standard treatise on lawyers' professional conduct was Drinker's *Legal Ethics*, published in 1953. Drinker noted that many of the legal profession's ethical principles are based on what had once been the leading text on the subject, Judge Sharswood's *Professional Ethics*, which was first published in 1854 "when law was practiced in a very different world from that in which we now live."<sup>11</sup> The world in which we now live and in which law is practiced is, of course, quite different from the world in which Professor Drinker wrote. While many of the ethical rules governing the practice of law seemed to have changed little over the years, in some cases that may be due more to a failure to periodically reexamine such rules in light of changing conditions than to the continuing validity of the rules

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8. See Sexton, *supra* note 7, at 445, *et seq.* (discussing historical development of attorney-client privilege).

9. See Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279 (1984) (discussing rationale for attorney-client privilege and reasons corporations are entitled to same protections as natural persons).

10. See *infra* text accompanying note 40 *et seq.*

11. DRINKER, *supra* note 1, at ix.

themselves. The principles governing communications with parties and witnesses illustrate the way in which lawyers sometimes elevate vague concepts to the level of a "rule" and then apply the rule over the years without any real analysis of its propriety and with little consideration of its utility in resolving practical problems.

The ethical obligations imposed by the Code of Professional Responsibility, which governs lawyers' conduct in a majority of jurisdictions<sup>12</sup>, have created at best confusion and uncertainty, and at worst conflicting obligations, when counsel for a party to pending or prospective litigation wishes to interview the employees of an adverse party.<sup>13</sup> On the one hand, Canon 7 of the Code of Professional Responsibility obligates a lawyer to represent his client zealously. On the other, DR 7-104(A)(1) provides that a lawyer shall not "communicate on the subject of the representation with a party he knows to be represented" by counsel without the "prior consent of the lawyer representing such other party." Unfortunately, the Code does not define the term "party." As a consequence, these vague injunctions may effectively put a lawyer in an ethical dilemma when faced with an opportunity to conduct an ex parte interview of another party's employee; is the employee to be treated as a "party" or "party representative" who cannot be interviewed ex parte, or is the employee a mere witness who can be interviewed by an adverse party without notice to or the permission of counsel for the enterprise? Canon 9 only adds to the ambiguity of the situation by providing that a lawyer "should avoid even the appearance of professional impropriety." While everyone would agree that lawyers should avoid the appearance of impropriety, such vagaries are rarely of much assistance when one is required to choose a specific course of conduct from conflicting alternatives, each of which may involve impropriety.<sup>14</sup>

It makes little sense to lay down rules that are at best ambiguous and at worst conflicting, and then impose sanctions on a lawyer whose reasonable

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12. ABA/BNA Lawyers Manual on Professional Conduct, p. 1:301.

13. A number of commentators have criticized the vagueness and ambiguity of various provisions of the Code of Professional Responsibility. See, e.g., Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEVE. ST. L. REV. 571 (1981); Panel Discussion, 35 U. MIAMI L. REV. 669 (1981). One author has called the "conflicting duties" created by the Code of Professional Responsibility "a fundamental flaw." Walter, *An Overview of the Model Rules of Professional Conduct*, 24 WASHBURN L. J. 443, 450 (1985).

14. The uncertainty associated with application of the attorney-client privilege and work product doctrine also may present an ethical dilemma for counsel. As the Supreme Court noted in *Upjohn*, "the first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Upjohn*, 449 U.S. at 390-391 (citing ABA Code of Professional Responsibility, Ethical Consideration 4-1). However, in gathering background information an attorney must carefully weigh the possibility that his or her investigation will in effect create evidence that will become available to the opposition. In other words, the diligent attorney's effort to comply with the requirements of EC 4-1 may injure the client if it is later determined that the fruits of counsel's efforts are not protected. See Weinschel, *Corporate Employee Interviews & the Attorney-Client Privilege*, 12 B. C. INDUS. & COM. L. REV. 873 (1970) (discussing some of the problems facing enterprise counsel who wishes to interview its employees).

and good faith analysis of a fact specific problem happens to be different than that of a court or disciplinary authority. That is especially true when one considers that a lawyer is often forced to make difficult judgments with little time for research or extended analysis, while courts and disciplinary authorities are usually afforded the luxury of a retrospective analysis and whatever research and period of contemplation they require.

Defining parties and witnesses for discovery purposes is an undertaking that deserves and requires more careful analysis than it has received from most courts and bar associations. A fair resolution may be critical to the party litigants and, of equal importance, understandable and practical guidelines are vital to the lawyers who must attempt to implement them. The penalty paid by both attorney and client for an improper contact with a witness later determined to be a party can be severe—disqualification of counsel. As one court noted, “[A]n order granting disqualification seriously disrupts the progress of the litigation and decisively sullies the reputation of the affected attorney.”<sup>15</sup>

The courts and ethics committees of a number of bar associations for years sought to resolve this ethical dilemma by the formulation of a rule which turned on an often subjective effort to determine which employees were sufficiently identified with an enterprise so as to be its “alter ego.”<sup>16</sup> The specific tests which were adopted to measure the sufficiency of the employee’s identification with the enterprise took several forms. Some authorities articulated the test in terms of whether the individual was a “management level employee.”<sup>17</sup> Other authorities asked whether the em-

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15. *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022, 1025, n.13 (D.C. Cir. 1976).

16. *See Frey v. Dept. of Health and Human Services*, 106 F.R.D. 32, 35 (E.D.N.Y. 1985). In *Frey*, an employment discrimination action, the court concluded that the term “party” in DR 7-104 encompassed those employees who were the defendant’s alter ego, and that at least those high level managerial employees who participated in the decision not to promote the plaintiff fell within that category. *See also* Virginia Bar Assoc. Opinion No. 530 (1983) (during pending litigation, lawyer may communicate with employee of adverse party provided that employee does not occupy position with authority to commit organization to specific courses of action that would lead one to believe employee is corporation’s alter ego).

17. *See* New York City Bar Association Opinion 613 (1942), in which it was held that, under Canon 39 of the Canons of Professional Ethics, “only managing employees represent the corporation for the purpose of examination of the corporation before trial.” *See also* In re F.M.C. Corp., 430 F. Supp. 1108, 1110 (S.D. W. Va. 1977). In *In re F.M.C.* the court held that the prohibition against ex parte communications with corporate employees is limited to managing employees, in that case the president, board chairman and resident plant managers. The implied rationale of such opinions is that only the highest level employees of a corporation have the authority to bind a corporation by what they say. This assumption is unrealistic. *See infra* notes 131 *et seq.* and accompanying text.

Generally, bar associations have interpreted DR 7-104 so as to include management level and executive personnel within the definition of a “party” when dealing with enterprises. Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government “Party,”* 61 MINN. L. REV. 1007, 1016 n.36, 1017 n.39, and 1018 n.42 (1977) (discussion of several representative state court ethics opinions dealing with this issue).

ployee "could commit the corporation because of their authority."<sup>18</sup> Yet others sought to determine whether the employee "could commit the corporation in the particular situation."<sup>19</sup> These tests did little, if anything, to

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18. See ABA Informal Opinion 1410 (1978). In ABA Informal Opinion 1410, the American Bar Association attempted to identify those employees of a corporation who would be treated as parties and, therefore, would not be subject to ex parte interviews.

If the officers and employees that you propose to interview *could commit the corporation because of their authority* as corporate officers or employees or for some other reason the law cloaks them with authority, then they, as the alter egos of the corporation, are parties for the purposes of DR 7-104(A)(1). *The right of a corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the corporation.* Where an officer or employee can *commit the corporation*, opposing counsel must view the officer or employee as an integral component of the corporation itself and therefore within the concept of a "party" for the purposes of the Code.

(Emphasis supplied.)

ABA Informal Opinion 1410 is vague and does not define such phrases as "could commit the corporation because of their authority" or "for some other reason the law cloaks them with authority." In other words, the opinion can be read as narrowly or as broadly as one might be inclined; nevertheless, the opinion is of interest because it not only recognizes that adequate representation by counsel requires that certain employees be treated as "parties," it also recognizes that the corporation's right to counsel must prevail over an opposing party's right to conduct ex parte interviews with certain corporate employees. Likewise, the opinion is important because it expressly recognizes that, to the extent an employee may be deemed to speak for the corporation in some relevant sense, the employee must be deemed the alter ego of the corporation and, therefore, a party or party representative for purposes of DR 7-104(A)(1).

Although ABA Informal Opinion 1410 appears to be consistent with the pre-Upjohn consensus on the issue, a minority of bar associations took a broader view. For example, in Texas Bar Association Opinion No. 342 (1968), it was held that:

[A]n attorney is precluded from communicating with either officers or directors of a corporation or any employees whose acts or omissions are the subject of controversy and for which the corporation may be liable.

See Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party," supra* note 17.

19. In often cited ABA Informal Opinion No. 1377 (1977), dealing with the right of counsel to interview a governmental entity's building marshal, the American Bar Association applied a variant of the alter ego theory. Typically, the ABA's opinion turned on the resolution of a factual question: Could the building marshal "commit the municipal corporation in the particular situation because of his authority as a corporate officer or as some other legally invested authority"; if so, he was the "alter ego of the corporation," and therefore "a party for purposes of DR 7-104(A)(1)." The ABA also concluded that "the right of the municipal corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the municipal corporation."

The opinion is illustrative of how bar association opinions on this issue raised more questions than they answered. An attorney would have to somehow resolve a mixed question of fact and law to determine whether the marshal "could commit the municipal corporation in the particular situation." Interestingly enough, none of the opinions appear to speak to the most obvious question any attorney would have: by what standard is this determination to be made. The ethics opinions do not focus on whether the fact that the employee's conduct might be imputed to the corporation and/or the fact his or her statements might be deemed party admissions are the kind of "commitments" or "other legally invested authority" referred to.

Like so many other opinions on the subject, ABA Informal Opinion 1377 also ignored the fact that whether a particular employee could in some fashion "commit" the enterprise is often

eliminate the inherent ambiguity in the Code or to provide practical guidance to the lawyer who had to make a choice between his duty to pursue every legitimate source of available information and his duty not to communicate with anyone who could be considered to be an adverse party.<sup>20</sup>

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a difficult question of law that is anything but free from doubt. Left with questions of fact and law which had to be resolved before the opinion would have any practical value, what was the lawyer to do? He could hardly call the building marshal and ask whether he could commit for his employer. A phone call to opposition counsel would have in all probability eliminated the possibility of an ex parte interview. In short, as a practical matter, the alter ego rule and its various formulations were of little practical assistance to members of the bar. *See* Michigan Informal Opinion CI-526 (1980) (term "party" in DR 7-104(A)(1) includes "only those officers or employees of the defendant municipal corporation who have the power to commit the municipal corporation in a particular action"); Virginia Bar Association Opinion 459 (1984) (holding that it is ethically improper for attorney to communicate with any employee of adverse corporation who "could commit the corporation to certain courses of action, as its alter ego").

20. The lack of guidance provided by many bar association opinions on this subject is illustrated by a recent opinion of the Alaska Bar Association (No. 84-11) (1984) which, after extended discussion of the facts and applicable law, concluded:

Whether an employee of an entity may reasonably be thought of as representing that entity in matters relating to the matter in controversy is a determination that must be made based on the facts and circumstances of each particular situation.

The Alaska Bar Association determined that the Juneau teleconference manager for the state Legislative Affairs Agency, a party to pending litigation, could be interviewed ex parte by adverse counsel even though certain statements allegedly made by that individual were the subject of the pending litigation. In its answer to the plaintiff's complaint, the state had denied that such statements accurately reflected its policies and procedures. Although the opinion does not say, this appears to have been a question of fact to be resolved by a jury; the legal effect of the statements was presumably for the court. In any event, the alleged statements appeared to be important to both parties' cases. However, when the test applied to the propriety of ex parte interviews is whether the employee "may reasonably be thought of as representing the entity in matters related to the matter in controversy," the propriety of the contact depends upon the resolution of questions of fact and law which are often the subject of the underlying litigation, questions which must be determined not by the attorneys involved but by a neutral court and unbiased jury. *See* Alaska Ethics Opinions 71-1 and 84-11.

One of the potential abuses inherent in this situation is that the attorney who wishes to conduct an ex parte interview must take the position that the employee to be interviewed does not represent or speak for the entity in the matter which is the subject of litigation, but the attorney may then argue to the jury that the statements elicited during an ex parte interview constitute either an admission by the employer or, as a minimum, are the best evidence of the employer's actual policies and practices. The problem may be compounded by the skilled advocate's ability in such a situation to take an employee's statement out of context or otherwise distort it.

Also illustrative is Maryland State Bar Opinion 83-4. In response to a question that itself evidences the uncertainty that exists in this area ("may an attorney, after a litigation begins question, outside of the discovery process, an employee of a corporate entity, in an attempt to gather information that might be relevant, material, or important to the issues in litigation"), the committee gave an equally vague response.

The relevant factor to be considered is whether or not the potential witness shares a certain degree of identity with the corporate entity. Clearly officers, directors or managing agents of a corporation share that identity. To the extent that either past or present employees share that identity with the corporate entity, then direct communications with such individuals would be prohibited by the rules set forth in DR 7-



Moreover, even in those cases in which one of the forms of the alter ego test could be applied to a particular employee with relative confidence and certainty, the alter ego test was inherently inadequate because it often permitted adverse counsel to communicate directly with persons whose functions within the corporation and/or whose involvement in and knowledge of the subject matter of litigation were such that their acts or statements were effectively those of the enterprise and might well be outcome determinative.<sup>21</sup> These are the very individuals with whom it is critical that enterprise counsel be free to communicate subject to the protection of the attorney-client privilege if the enterprise is to be effectively represented. In other words, even though such employees may be so-called "low-level" or "mid-level" personnel who do not meet any of the traditional alter ego tests, it is these employees who are really the alter egos of the enterprise in the most important sense for purposes of asserting and protecting its rights. It is the thought processes, conduct, words and ability of these employees to communicate with enterprise counsel that will determine the employer's success or failure under the rules which govern our adversary system.

That the rules governing ex parte contacts by adverse counsel with these employees have historically been the product of inadequate analysis is perhaps best evidenced by the fact that, as late as 1953, the issue received only the most cursory treatment in Drinker's *Legal Ethics*. Although Drinker includes a short discussion of the "duty not to negotiate with one represented by counsel,"<sup>22</sup> the material is rudimentary at best. Drinker's discussion is based on Canon 9 of the old Canons of Professional Ethics, which barred any form of communication "on a subject of controversy with a party represented by counsel." Canon 9 in turn appears to have been based on one of Hoffman's Fifty Resolutions in Regard to Professional Department.<sup>23</sup> Hoffman's Resolution XLIII reads as follows:

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104(A)(1).

Unfortunately, the answer given seems to be typical of the kind of response lawyers have received to requests for guidance in this particular area.

21. *E.g.*, Missouri Informal Opinion No. 6 (1980). The question posed in Missouri Informal Opinion No. 6 was whether, in a suit against a mass transit system as a result of an accident, plaintiff's counsel could conduct an ex parte interview with the driver involved when the driver was not a party defendant. The Missouri Bar concluded that such contact was not unethical "if there has been no lawsuit filed. In fact, even if a lawsuit is filed, it is not unethical for that driver to be interviewed unless the driver is named as a party defendant and counsel for plaintiff has notice that the driver is represented by counsel in that litigation." The Missouri Bar committee stated that, when a corporate party is sued, only officers and members of the board of directors cannot be contacted by adverse counsel. Some other states have also allowed ex parte interviews with employees whose acts were the basis of the corporation's alleged liability. *See* Los Angeles Bar Association, Opinions, No. 234, *reprinted in* 31 L.A. BAR BULL. 267 (1956); New York City Bar Association Opinion No. 331 (1935); North Carolina Bar Association Opinion No. 97 (1952) (cited in 61 MINN. L. REV. at 1018, n.42).

22. DRINKER, *supra* at 201-03.

23. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1836), *reproduced in* DRINKER'S LEGAL ETHICS, 338 Appendix E.

I will never enter into any conversation with my opponent's client relative to his claim or defense, except with the consent and in the presence of his counsel.<sup>24</sup>

The extent to which Hoffman and presumably other lawyers of his day were concerned about the possibility of overreaching in the course of an interview with an adverse party is illustrated by Resolution XLIV, which prohibited verbal contacts with parties not represented by counsel and mandated that when the attorney's

client's interests demand that I should still commune with [an unrepresented party], *it shall be done in writing only, and no verbal response will be received.* And if such person be unable to commune in writing, I will either delay the matter until he employs counsel, or take down in writing his reply in the presence of others, so that if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation.<sup>25</sup>

In other words, lawyers in the early part of the nineteenth century appeared to be acutely sensitive to the possibility of inadvertent (or conscious) overreaching when dealing with an adverse party and were under an ethical obligation to go to great lengths to avoid any kind of unfair advantage or impropriety.

Even as late as 1953, Drinker seemed somewhat uncertain about the propriety of interviews with employees of a corporation, although he concluded that "Canon 9 probably precludes interviews of managing employees of a corporation having authority to bind it."<sup>26</sup> The only authority cited by Drinker for that proposition is an opinion by the Bar of New York City.<sup>27</sup> Nevertheless, it appears that the underlying rationales for both Hoffman's Resolution XLIII and old Canon 9 were to prevent one party to the litigation from obtaining an unfair advantage over the other and to assure each party the effective representation of counsel. As Drinker noted:

The "wise and beneficent" aim of the Canon has been said to be to "preserve the proper functioning of the legal profession as well as to shield the adverse party from improper approaches."<sup>28</sup>

Although Drinker does not even cite it in his discussion of the issue, it is important to note that Canon 39 of the then applicable Canons of Professional Ethics provided as follows:

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24. DRINKER, *supra* note 22, at 201.

25. Quoted in DRINKER, *supra* note 22, at 349 (emphasis supplied).

26. *Id.* at 201.

27. *See id.* (citing Opinion No. 830 by Bar of New York City).

28. *Id.* at 202.

A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial or on the witness stand.<sup>29</sup>

Canon 39 was not intended or construed as authority for the right to contact a witness who was also a party. In fact, as Drinker noted, "Canon 9 precludes the interviewing of the other party despite the fact that he will be a witness, and despite his willingness to be interviewed."<sup>30</sup>In other words, the division between parties and witnesses was apparently believed to be fairly clear-cut in the days when the Canons of Professional Ethics were operative.<sup>31</sup> Drinker made only passing reference to the question of who is a "party" for the purposes of applying the rule against communicating with an adverse party; the single example which he gave us suggests that the question was whether an individual was sufficiently "identified with" a party so as to make it improper for adverse counsel to interview that person.<sup>32</sup> The question was the right one; when dealing with enterprise employees, it was the answer given to that question which has proven to be inadequate.

For the next thirty years, an employee's "identification with" an enterprise would turn in large part (if not exclusively) on his formal authority within the enterprise; authority would be measured by the employee's position or supposed ability to "speak for" or "commit" the enterprise. However, the employee's position was often irrelevant (a management level employee might know nothing about the controversy and/or have little or no actual authority with respect to the matter), and the measure of the perceived ability of an employee to "speak for" or "commit" the enterprise was either artificially limited to high level officers or directors, or difficult

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29. *Id.* at 323. The original Canons of Professional Ethics were first adopted in 1908. *Id.* at xi. Canon 39 was not included in the canons as originally adopted. *Id.* Canon 39 was added in 1928, when it provided as follows:

Compensation demanded or received by any witness in excess of statutory allowances should be disclosed to the court and adverse counsel.

If the ascertainment of truth requires that a lawyer should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.

In 1937, Canon 39 was amended to read as quoted in the text. *Id.* at 323, n.13.

30. *Id.* at 201.

31. In an early opinion, the ABA held that a witness who is also a party must be treated as a party. See ABA Committee on Professional Ethics, Opinions, No. 187 (1938).

32. In Drinker's example, "a mother is so far identified with her minor child that it is improper for the insurance company to be allowed to interview her where the child is represented by counsel." DRINKER, *supra* note 22, at 202.

to apply because of the questions of fact and law that had to first be resolved—questions about which lawyers could easily disagree.<sup>33</sup>

## II. THE ATTORNEY-CLIENT PRIVILEGE APPLIED TO CORPORATIONS: THE FOUNDATION FOR A NEW DEFINITION OF A "PARTY"

Although the United States Supreme Court had upheld a corporation's assertion of the attorney-client privilege in the early years of the 20th Century,<sup>34</sup> some question continued to exist with respect to the applicability of the attorney-client privilege to corporations.<sup>35</sup> As late as 1962, a federal district court held that the attorney-client privilege, like the Fifth Amendment privilege against self-incrimination, was unavailable to corporations.<sup>36</sup> However, the Seventh Circuit reversed and the United States Supreme Court denied certiorari.<sup>37</sup> At about the same time, the federal court sitting in the Eastern District of Pennsylvania upheld the availability of the privilege to corporations; the Third Circuit denied a petition for mandamus and the United States Supreme Court again denied certiorari.<sup>38</sup>

If there was any lingering doubt about the availability of the attorney-client privilege to corporations, it was finally resolved by the United States Supreme Court's decision in *Upjohn*. In that case, the Supreme Court not only upheld the availability of the attorney-client privilege to corporations, it discussed the policy considerations underlying the application of the privilege to such entities; the Court then broadly defined the scope of the privilege because it concluded those policy considerations required it to do so.

The essential question presented in *Upjohn* was which of a corporation's employees' conversations with corporate counsel may be subject to the attorney-client privilege. The Sixth Circuit had held that the attorney-client privilege did not apply "to the extent that the communications [with counsel] were made by officers and agents [of the corporation] not responsible for directing Upjohn's actions in response to legal advice . . . for the simple

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33. An ambiguous rule of ethical conduct may be worse than no rule. The scrupulous lawyer will often refrain from acting for the benefit of his client if the proposed action involves the possibility of improper conduct; the unscrupulous can rationalize taking whatever course seems most advantageous. As one observer has noted, "In the real world, hortatory rules of conduct perceived as being discretionary almost inevitably yield to the law of self-interest. . . ." Patterson, *On Teaching Legal Ethics*, THE MATTHEW BENDER LAW SCHOOL REPORTER, Fall 1982 at 1, quoted in Riger, *The Model Rules and Corporate Practice—New Ethics for a Competitive Era*, 17 CONN. L. REV. 729, 742, n.52 (1985).

34. *United States v. Louisville & N.R.R.*, 236 U.S. 318 (1915).

35. Sexton, *supra* note 7, at 447.

36. *Radiant Burners, Inc. v. American Gas Ass'n.*, 209 F. Supp. 321 (N.D. Ill.), *rev'd*, 320 F.2d 314 (7th Cir. 1962), *cert. denied*, 375 U.S. 929 (1963).

37. *Id.*

38. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa.), *mandamus denied sub. nom.*, *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). See also Sexton, *supra* note 7, at 447-48.

reason that the communications were not the 'client's.'<sup>39</sup> In other words, the Sixth Circuit had adopted and applied a "control group" test to determine which employees would be deemed to be party representatives for purposes of the privilege.

The United States Supreme Court reversed. The Court first discussed the policy considerations underlying the privilege.

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 63 L. Ed.2d 186, 100 S. Ct. 906 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403, 48 L. Ed.2d 39, 96 S. Ct. 1569 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys."<sup>40</sup>

The control group test which had been applied by the Sixth Circuit in *Upjohn* was very similar in concept to the rule which has been applied in an effort to determine which employees of an enterprise may be interviewed ex parte by adverse counsel. The Supreme Court explained the reasoning of the Court of Appeals:

[S]ince the client was an inanimate entity . . . "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole."<sup>41</sup>

The Supreme Court expressly rejected that reasoning because "such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and

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39. *United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (6th Cir. 1979).

40. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

41. *Id.* at 390. The Court also referred to the "similar conceptual approach" adopted by the District Court in *City of Philadelphia v. Westinghouse Elec. Corp.*, where the court held that if the employee communicating with counsel "of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply." *Id.* (emphasis in original). See *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

informed advice.”<sup>42</sup> The Court’s analysis turned on the scope which it concluded must be given to the attorney-client privilege in order to permit effective representation of the enterprise by counsel.

In the case of the individual client the provider of information and the person who acts on the lawyer’s advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—“officers and agents . . . responsible for directing [the company’s] actions in response to legal advice”—who will possess the information needed by the corporation’s lawyers. *Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.*<sup>43</sup>

The Court continued:

The attorney’s advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation’s policy. *See, e.g., Duplan Corp. v. Deering Millikin, Inc.*, 397 F. Supp. 1146, 1164 (S.C. 1974) (“After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it”).<sup>44</sup>

Finally, the Court concluded that:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a “sub-

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42. *Upjohn*, 449 U.S. at 390. The ABA Code of Professional Responsibility requires that a “lawyer . . . be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-1 (1969). The Model Rules of Professional Conduct impose the same obligation upon an attorney. *See* MODEL RULES OF PROFESSIONAL CONDUCT at Rule 1-1 (1983). The *Upjohn* court inferred that the control group test runs counter to the ethical obligations imposed by EC 4-1. *Upjohn*, 449 U.S. at 390-91.

43. *Upjohn*, 449 U.S. at 391 (emphasis added).

44. *Id.* at 392.

stantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability.<sup>45</sup>

The *Upjohn* decision is important for a number of reasons. First, the Court expressly recognized that the protections afforded by the attorney-client privilege are necessary to the effective representation by counsel. Second, the Supreme Court recognized that it is the nature of the communication with counsel, and not the rank, position or status of the employee who is a party to the communication, that is critical in determining the applicability of the attorney-client privilege.<sup>46</sup> *Upjohn* expands the potential applicability of the attorney-client privilege to include all employees who, by virtue of their employment, have knowledge of relevant facts.<sup>47</sup> *Upjohn* rejected the control group's narrow focus on the position or decision-making authority of the employee and instead adopted a functional test grounded in the underlying purpose of the attorney-client privilege, i.e., to facilitate a full and frank exchange of information and advice between the attorney and client. *Upjohn* recognized the reality that in this day and age many of the operative events which allegedly give rise to enterprise liability, or which form the basis for an enterprise's defense, are uniquely within the knowledge of lower or mid-level employees. As a practical matter, proper representation of the enterprise is only possible when counsel for the enterprise is able to engage in candid and uninhibited conversation with such employees. The *Upjohn* rationale would be frustrated if courts were

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45. *Id.* at 393.

46. Other courts had earlier held that the privilege may extend to communications by lower level employees. *See, e.g.*, In Re Ampicillin Antitrust Litig., 1 F.R.D. 377 (D.C.C. 1978). The *Ampicillin* court held that the privilege extends to communications by lower level employees relating to their employment duties when the communications are reasonably necessary to the decision making process concerning a problem with respect to which legal advice has been sought, provided the communications were made with the intention of keeping them confidential and were relevant to the advice sought. ("Unless corporate personnel on a fairly low level can speak to attorneys in confidence, the enforcement of the federal antitrust laws is likely to be adversely affected.") *Ampicillin*, 1 F.R.D. at 387. *See also* S.E.C. v. Texas Int'l Airlines, Fed. Sec. L. Rep. (CCH) 96,945 (D.C.C. 1979). The rule adopted by the ABA Model Rules of Professional Conduct is consistent with *Upjohn*. *See* Comment to Rule 1.13 ("When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6") (emphasis added).

47. Some courts have held that the privilege applies to communications by any employee when the communication relates to a request for legal advice. *See, e.g.*, In Re LTV Securities Litigation, 89 F.R.D. 595, 599-603 (N.D. Tex. 1981); Securities & Exch. Comm'n v. Gulf and Western Indus., Inc., 518 F. Supp. 675, 681 n.9 (D.C.C. 1981); In Re Westinghouse Elec. Corp. Uranium Contracts Litigation, 76 F.R.D. 47, 56-57 (W.D. Pa. 1977); United States v. Aluminum Co. of Am., 193 F. Supp. 251, 252 (N.D. N.Y. 1960); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 795 (D. Del. 1954); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). *See also* Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 MICH. L. REV. 665 (1983) (well reasoned article arguing that attorney-client privilege should protect communications of all employees with corporate counsel).

to allow the attorney for an opponent to interview such an employee on an ex parte basis and possibly persuade the employee to sign a statement or affidavit which is incomplete or which takes events out of context, and then use the employee's statement as a party admission. Even more serious is the possibility that such an ex parte interview would result in disclosure of protected communications which have occurred between enterprise counsel and the employee. If, as *Upjohn* holds, these conversations may be protected by the attorney-client privilege, the policy considerations which form the underpinnings of the Supreme Court's decision suggest that such conversations should also be protected from ex parte discovery. Third, the Court recognized that the policy objectives underlying the privilege can be achieved only if the enterprise's employees and its counsel in fact communicate; equally important, the Court acknowledged that if an employee and counsel cannot communicate with confidence that their discussions will remain confidential, the probability such communications will occur will be reduced and the policy considerations supporting the privilege will not be served. In other words, the Court recognized that the predictability of confidentiality is essential to achieving the goals which the privilege seeks to foster, including effective representation of all parties by counsel. These goals—predictability, confidentiality and, ultimately, effective representation—would also be advanced by a prohibition on ex parte interviews with employees who may be party representatives for purposes of applying the privilege.

The Supreme Court responded to those who argue that rejection of the control group test and broader application of the attorney-client privilege in the case of a corporation would "entail severe burdens on discovery and create a broad 'zone of silence' over corporate affairs":<sup>48</sup>

Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.<sup>49</sup>

While the *Upjohn* court also discussed the work product doctrine, its analysis of that rule is not directly relevant to the ethical issues presented by ex parte contacts with employees of an adverse enterprise.<sup>50</sup> This is

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

49. *Id.* See Saltzburg, *supra* note 9 at 282-285 (discussion of the proposition that the attorney-client privilege does not protect information that is relevant and unprivileged but only protects information that otherwise might not exist).

50. See Note, *Attorney-Client Privilege and Work Product Doctrine—Application in the Corporate Context*, 28 WAYNE L. REV. 1577 (1982) [hereinafter Note, *Attorney-Client Privilege*] (discussing work product doctrine as applied in *Upjohn*); see also Note, *Upjohn Co. v. United States: Death Knell for the Control Group Test and a Plea for a Policy-Oriented Standard to Corporate Discovery*, 31 SYRACUSE L. REV. 1043 (1980) [hereinafter Note, *Death Knell*].



because any effort to obtain an attorney's work product will almost invariably involve counsel and, if the matter cannot be resolved between the attorneys for the parties, a judicial determination will be sought. Stated differently, there is little, if any, danger of an ex parte effort to invade work product. However, it is worth noting that the rationale for both the work product doctrine and the attorney-client privilege are essentially the same.<sup>51</sup>

The policies of the attorney-client privilege are similar to those that underlie the work product immunity doctrine. The attorney-client privilege also guarantees the effectiveness of the adversary system by insuring that an attorney is fully advised of all facts surrounding a legal controversy. The attorney is fully advised because the attorney-client privilege encourages the free flow of information from client to attorney by insuring that the client's communications will not be susceptible to disclosure.<sup>52</sup>

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[T]he underlying rationale of both theories—the efficacy of trial preparation and the adversary system—is the same.<sup>53</sup>

The attorney-client privilege and the work product doctrine, like the rule protecting parties from ex parte communications by adverse counsel, are procedures adopted to further a common objective—the effective representation by counsel.<sup>54</sup> If, in the case of corporations, the way in which modern enterprises function should shape the parameters of the attorney-client privilege and work product doctrine, the same realities should be reflected in the ethical constraints placed on discovery from an enterprise.

Although the *Upjohn* court was not asked to and did not decide the collateral issue under discussion here, that is, which employees of a corporate party or enterprise are to be deemed “party representatives” for purposes of allowing adverse counsel to conduct ex parte interviews,<sup>55</sup> the policy

51. See Note, *Death Knell*, *supra* note 50, at 1051 (discussing policies underlying work product doctrine and attorney-client privilege).

52. *Id.* at 1057.

53. *Id.* at 1061.

54. See *In Re Grand Jury Subpoena (John Doe, Inc.)*, 599 F.2d 504 (2d Cir. 1979). The similarity between the rationales underlying the attorney-client privilege and the work product doctrine is illustrated by the Second Circuit's decision, in which the court's focus was not on the status of the employee communicating with counsel but on the type of communication involved. The Second Circuit stated:

The issue is not whether a particular employee comes within the ambit of the attorney-client privilege, but whether the communication with the corporate attorney by the employee is in furtherance of the attorney's duty to investigate the facts in order to advise the corporate client in anticipation of litigation.

*Id.* at 510. See also *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc).

55. In *Upjohn*, the court did note that “here the Government was free to question the employees who communicated with Thomas (Upjohn's vice-president, secretary and general counsel) and outside counsel. Upjohn has provided the IRS with a list of such employees, and

considerations upon which the Court based its decision logically apply to this secondary issue as well. In other words, if for all of the reasons stated in *Upjohn*<sup>56</sup> a particular employee is deemed to be a party representative for purposes of communicating with enterprise counsel, the same policy considerations require that the employee also be treated as a party representative for purposes of evaluating the propriety of ex parte contacts by adverse counsel. Any other rule would permit counsel to unilaterally deal with those who are, for all practical purposes, the adverse party.

The need for predictably secure communications with counsel also suggests that adverse counsel ought not be permitted to engage in ex parte contacts with enterprise employees who may have participated in privileged communications; a rule which permits such ex parte contacts carries with it the very real danger that privileged communications will be invaded and can only reduce the quantity and quality of the communications which *Upjohn* seeks to encourage.<sup>57</sup>

As other commentators have noted, the often inconsistent and uncertain application of the attorney-client privilege and work product doctrine diminishes the utility of both and undermines the policy considerations which support them. In the process, our adversarial system of justice is also weakened.<sup>58</sup>

Corporate counsel is required to anticipate whether and to what extent a court will grant either a work product or a privilege claim. The uncertainty in the either/or test makes pleading and discovery needlessly protracted and expensive. Practitioners are unable to marshal their resources effectively, and the efficacy of the adversary system is weakened.<sup>59</sup>

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the IRS has already interviewed some 25 of them." *Upjohn*, 449 U.S. at 396. Whether such interviews were conducted on an ex parte basis the court does not say; in other words, whether the government had a right to conduct ex parte interviews was neither raised by the parties nor decided by the court. As the court stated, the government was undoubtedly free to question employees who communicated with counsel in order to discover non-privileged, relevant information. The issue is whether such questioning should be conducted under the circumstances applicable to parties. One of the issues which *Upjohn* left open was whether the premises which the court adopted not only support application of the attorney-client privilege to the employees' communications with counsel but also require, as a practical matter, that ex parte interviews with the employees be prohibited.

56. See Comment, *Upjohn v. United States: A Functional Expansion of the Attorney-Corporate Client Privilege*, 67 IOWA L. REV. 161 (1981) (extended analysis of *Upjohn*). Obviously, *Upjohn* "greatly increase(s) the number of corporate employees whose communications with counsel are protected by the attorney-client privilege." *Id.* at 175.

57. See *In Re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981). In *In Re LTV*, the court noted that it is critical to the effective representation by counsel that the client be able to communicate in confidence with the attorney and that the confidential nature of the communication be predictable. *Id.* at 602.

58. See Note, *Death Knell*, *supra* note 50, at 1085.

59. *Id.* at 1087.

In other words, to the extent enterprise employees do not feel free to communicate with counsel<sup>60</sup> and/or counsel is inhibited in inquiring of and advising the employees of an enterprise, the effectiveness of representation by counsel is inevitably reduced. When denied the effective representation of counsel, the enterprise may be prejudiced in asserting its legitimate interests and protecting its legal rights.

There are two ways an element of greater certainty can be introduced into the equation. One would be by adopting and then uniformly applying a bright line test for both the attorney-client privilege and work product doctrine.<sup>61</sup> The probability that the courts will do so in the reasonably foreseeable future seems remote.<sup>62</sup> The other is by recognizing that the effective representation of an enterprise by counsel requires a prohibition

60. An attorney has an ethical obligation to advise the client if their communications are not privileged or if there may be some question with respect to the status of the communication. See ABA Code of Professional Responsibility EC 4-4 ("A lawyer owes an obligation to advise a client of the attorney-client privilege.")

61. See Saltzburg, *supra* note 9, at 280. Professor Saltzburg argues that the Supreme Court's decision in *Upjohn* "left lower federal courts with little to guide them in their determinations of the scope of corporate privilege." As Professor Saltzburg notes:

No matter what scope the attorney-client privilege is ultimately afforded, it is clear that it is intended to assure clients that the information they communicate to their attorneys in confidence will not be disclosed to others. The less certain the scope of the privilege, the less reliance clients can place upon it. An ill-defined attorney-client privilege thus complicates the lawyer-client relationship and frustrates the very goal such a privilege is intended to achieve—to facilitate attorney-client communications. There is, therefore, a need for a clear rule of corporate privilege.

*Id.* at 281. Other commentators have argued that the elements of a rule which can be applied with a reasonable degree of certainty can be discerned from a careful reading of *Upjohn*. See Note, *Attorney-Client Privilege*, *supra* note 50, at 1591.

62. In *Upjohn*, the Supreme Court held that privilege issues must be decided on a case-by-case basis. See *Upjohn*, 449 U.S. at 396. As a result, uncertainty regarding application of the privilege will probably continue, effectively undermining one of the essential purposes of the privilege. See, e.g., Note, *The Corporation's Attorney-Client Gamble: Privileged Communications or Discovery Prone Disclosures*, 6 NOVA. L.J. 617, 625 (1982). Since enterprise employees will be uncertain if communications with counsel can be forcibly disclosed, essential information may not be provided to enterprise counsel. Moreover, large corporations operating on a nationwide basis may be burdened with several different rules defining the privilege. Note, *Corporate Attorney-Client Privilege: The Confusion Remains After Upjohn*, 17 N. ENG. L. REV. 925, 950-951 (1981-82). Not only might the rule applied vary from state to state, but whether the litigation is filed in a state or federal court could be critical to whether a particular communication is protected. See Note, *Beyond Upjohn: Achieving Certainty By Expanding the Scope of the Corporate Attorney-Client Privilege*, 50 FORDHAM L. REV. 1182, 1189-1198 (1982) (arguing that the attorney-client privilege should protect communications with all of the corporation's employees); Note, *Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 MICH. L. REV. 665, 673 n.21 (1983) (discussing lack of uniformity among state and federal courts that apply *Upjohn*). If the matter happens to be pending in federal court because of diversity jurisdiction, most federal courts would probably apply the applicable state rule governing the attorney-client privilege. See Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 434 n.30 (1970) (discussing many possibilities that must be considered when seeking to determine which law of privilege will be applied to a particular communication).

against ex parte communications with employees who may be deemed to be party representatives for other purposes.<sup>63</sup> Such a rule would not prevent discovery of an employee's knowledge of operative events, but would help assure, for example, that communications with counsel which are privileged will remain privileged; the fact that an employee's discussions with counsel are more predictably secure should enhance the probability that such communications will occur. The increased communications which should result will not only enhance the ability of the enterprise to receive effective representation, it will increase the probability that the entity will abide by the requirements of the law, both of which are socially desirable goals.<sup>64</sup> While the fact that the courts have been unable or unwilling to articulate a "bright line" test for either the attorney-client privilege or the work product rule gives rise to a great deal of uncertainty regarding the application of either the rule or the privilege in specific circumstances, this "inherent lack of predictability in the discovery arena"<sup>65</sup> itself provides an additional reason for clearly distinguishing between party representatives and mere witnesses when considering the propriety of ex parte discovery directed to enterprise employees.

### III. THE EMERGENCE OF A NEW RULE OF PROFESSIONAL CONDUCT

Serious analysis and reconsideration of the alter ego rule which had been applied to discovery from employee witnesses appears to have started with an opinion of the New York City Bar Association shortly after *Upjohn* was decided. The problem presented was a particularly difficult one for the plaintiff because the matter in controversy was the subject of an arbitration proceeding and, therefore, the usual discovery procedures were not available to the parties.<sup>66</sup> Nevertheless, in an opinion that represents a logical extension of the United States Supreme Court's analysis and conclusions in *Upjohn*, New York City's Bar concluded in its Opinion 80-46 that "DR 7-104(A)(1) of the Code of Professional Responsibility forbids communication on the subject matter of the representation with the present employees of an adversary corporation on matters within the scope of the employees' employment, absent the consent of the corporation's counsel."<sup>67</sup> The Bar Association expressly overruled its prior opinion to the contrary.<sup>68</sup>

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63. An employee may be deemed to be a party representative for any one or more of several reasons, including application of the attorney-client privilege. See *infra* text accompanying note 128 *et seq.*

64. If, as the Supreme Court recognized in *Upjohn*, "the interests and administration of justice" require that clients be able to communicate freely with counsel, any rule which inhibits or reduces the probability of such communication runs counter to the "broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389.

65. Note, *Death Knell*, *supra* note 50, at 1046 n.6.

66. New York City Bar Association Inquiry Reference No. 80-46 (1982) [hereinafter "Opinion 80-46"].

67. *Id.*

68. See New York City Bar Assoc., Opinion 613 (1942).

In the situation which gave rise to Opinion 80-46, an individual was seeking to recover damages from a corporation for a loss allegedly caused by the defendant. The specific issue presented was whether the plaintiff or his attorneys could "interview present and former employees of the corporation to find out precisely how the loss occurred." There was obviously a compelling need to conduct such interviews if it could be done ethically; the matters about which counsel wished to inquire went to the heart of the client's case and no other means of obtaining such information was available. The New York City Bar Association summarized the ethical problem confronting counsel:

DR 7-104(A)(1) does not define the term "party." This omission presents difficulties of interpretation where the party involved is a legal entity, such as a corporation, instead of an individual. We must assume, of course, that the rule is intended to apply to corporate parties. But a lawyer cannot communicate with an abstract corporate entity; rather, the lawyer must communicate, if at all, with individual directors, officers or employees through which the corporation acts. The question before us then is whether all or some of these individuals should be viewed as components of the corporation itself and therefore "parties" for purposes of DR 7-104(A)(1).<sup>69</sup>

The committee then noted that although the ethics committees of other jurisdictions, as well as New York City's own, had addressed the question in the past, for the most part all of the prior opinions were unsatisfactory precedents.

With one exception, the opinions provide unsatisfactory precedents since few of the opinions construe the term "party" for purposes of DR 7-104(A)(1) in light of the interests reflected in that provision. Moreover, the opinions are in sharp disagreement with one another.<sup>70</sup>

While the committee agreed with the established rule that employees with the power to "commit" a corporation "in the particular situation" must be viewed as alter egos of the corporation, the committee concluded that concept "addresses only part of the interest that DR-7-104(A)(1) seeks to address: the right to effective representation."<sup>71</sup> The committee reasoned that the term "party" must be construed in a manner that will assure "effective representation for a corporate party":

We believe that the principal interest reflected in DR 7-104(A)(1) is the party's right to effective representation of counsel. We see

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69. Opinion 80-46, *supra* note 66.

70. *Id.* The New York City Bar Association noted that not only the ethics committees, but also the courts and commentators are divided on the scope and application of DR 7-104(A) when dealing with a corporate party.

71. *Id.*

no distinction between corporate and individual parties in this regard. To provide his client effective assistance of counsel on matters in litigation, the corporate attorney must control to some extent the information passing from the corporation, through its employees, to its adversary. Indeed it is often proper for a lawyer to advise the client that he should not talk at all. A party has a right to refuse to volunteer information.

Even where the lawyer would not advise silence, interviews of corporate employees of an adverse party without the knowledge and consent of the lawyer for the corporate party may also undermine the right to effective representation of counsel since the lawyer may be required to supervise the manner in which information is elicited to prevent his client from making statements which, through ambiguous use of language, may not accurately or fairly reflect the client's position. We do not mean to suggest, of course, that an attorney is entitled to alter or shade the facts under the guise of zealous representation. But it is an acknowledged aspect of effective representation that the attorney aids his client both to avoid procedural pitfalls and to present truthful statements in the most favorable manner. As one commentator has suggested, the difference between the knowledge and skill of a lawyer and that of the adverse lay party justifies some limitations on the ability of an attorney to communicate directly with lay persons. "The layman, when he makes a statement, is—unlike the lawyer—unaware of the technical, procedural and evidentiary framework in which he is, in fact, operating." Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 Conn. B.J. 136, 139 (1977).<sup>72</sup>

In analyzing the requirements of effective representation by counsel, the Bar Association of the City of New York focused not on the need for free and candid discussion between an attorney and client, as the Supreme Court did in *Upjohn*, but on another aspect of effective representation, the need for an attorney to maintain the ability to present his client's case in the most favorable light possible—arguably not as lofty a goal or one as worthy of protection as that upon which the Supreme Court rested its decision—but nevertheless, a critical component of the client's proper representation by counsel.<sup>73</sup> Protection of a client's right to effective represen-

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72. *Id.* Other authorities have recognized that the prohibition against direct contact between a lawyer and an adverse party is designed to prevent lawyers from gaining an unfair advantage by eliciting admissions against interest or the disclosure of harmful information. See Opinion 162, Arizona Bar Association (1964) (prohibition against contact between a lawyer and adverse party to prevent lawyers from gaining unfair advantage).

73. See *Mitton v. State Bar of California*, 71 Cal.2d 525, 455 P.2d 753, 78 Cal. Rptr. 649 (1969). In *Mitton*, the California Supreme Court recognized the importance of this aspect of representation by counsel:

The rule was designed to permit an attorney to function adequately in his proper role

tation is, of course, a broader concept than the attorney-client privilege, which is but one of the means by which our system of justice helps assure effective representation and thereby protects the rights of all parties.

The concept of effective representation is also inextricably intertwined with the obligations and burdens which the law, including the law of agency and evidence, imposes on parties. Thus, the New York City Bar Association elected to ground its opinion and conclusions on the "rules of evidence and agency law [which] attach special significance to the acts or statements of an employee made within the scope of his employment."<sup>74</sup> The committee pointed to the fact that an employee's statements might be admissible against the corporation as an admission of a party opponent and that, in any event, any statement by an employee of a corporation may well be given "special weight" by a judge or jury.

The employee's out-of-court statements which would otherwise be treated as hearsay, are admissible against the corporation as "admissions," pursuant to the Federal Rules of Evidence, if the statements are made by the employee about matters within the scope of his employment. Furthermore, since the finder of fact may attach special weight to such statements by an employee of the corporation, its counsel should be accorded knowledge of and control over access to these statements.<sup>75</sup>

The Bar Association expressly rejected the use of the control group test for purposes of defining a party under DR 7-104.

We reject this alternative, however, because such a rule, in our view, would be difficult to administer and would require the adverse attorney to make a judgment with respect to which adversary employees are within the "control group" that he is not competent to make. Moreover, limiting the ban against communication to the "control group" of a corporation fails to recognize the realities of modern corporate operations and is at odds with the developments in the law in the areas that we have just discussed.

Thus, it is no longer true that only managing employees or employees within the "control group" are regarded as representatives of the corporation for purposes of speaking in its behalf. Pursuant to the evidentiary rule, for example, it is the subject matter of the employee's conduct or communication—i.e., whether

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and to prevent the opposing attorney from impeding his performance in such role. *If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist.* Consequently, before any direct communication is made with the opposing party, consent of the opposing attorney is required.

78 Cal. Rptr. at 654 (emphasis added).

74. Opinion 80-46, *supra* note 66.

75. *Id.*

the conduct or statement is within the employee's scope of employment—rather than control group concepts, that is determinative in defining the corporate party. Accordingly, with respect to a particular transaction that is litigated, the power to “commit” the corporation could be vested in the most ministerial employee.<sup>76</sup>

The New York City Bar Association concluded that the interests of an enterprise as a client can be adequately protected only by applying the prohibition of DR 7-104 to all of the current employees who opposition counsel seeks to question with respect to “acts within the scope of their employment.”

On balance, then, the Committee believes that the interests protected by applying DR 7-104 to all present corporate employees sought to be questioned concerning acts within the scope of their employment outweigh the interests that would be advanced if DR 7-104 were limited to corporate officers and directors. As Professor Leubsdorf points out:

“If it is desirable to protect the corporation from being outwitted by opposing counsel, this can only be done by protecting the employees through whom it speaks. If the rule were limited to managing agents with power to bind the corporation to a settlement, it would not achieve its declared purpose of protecting clients against dangers sweeping far beyond improvident settlement.”

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“The high executives who are protected by the rule against opposing counsel are the employees most able to protect themselves and their employer, if necessary by calling in counsel. The employees least likely to be wary and with the least access to good advice are left exposed to prowling attorneys.”<sup>77</sup>

However, the Bar Association of the City of New York was unwilling to expand the ban on ex parte interviews to all of an enterprise's employees or to its former employees.<sup>78</sup> The Bar first concluded that ex parte interviews

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76. *Id. Cf. Fair Automotive Repairs, Inc. v. Car-X Serv. Sys.*, 128 Ill. App.3d 763, 471 N.E.2d 554, 561 (Ill. App. 1984) (applying the “control group” test to Rule 7-104).

77. Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683 at 695-96. Although these comments are cited by the New York City Bar Association as support for its conclusions, Leubsdorf's view is that “opposing counsel should be free to contact directly any employee, high or low, who is a possible witness without notice to the employer's counsel.” *Id.* at 708.

78. *See Upjohn Co. v. United States*, 449 U.S. 383, 402-403 (Burger, C.J., concurring). Although the majority in *Upjohn* declined to decide whether former employees may fall within the scope of the attorney-client privilege, Chief Justice Burger, in his concurring opinion, stated that “[t]he Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of



of current enterprise employees should be permitted under DR 7-104(A)(1) "concerning their knowledge of factual matters outside the scope of their employment." The committee offered as an example the situation in which an employee happens to observe an incident at work "over which he had neither responsibility nor authority such as an accident at the site of his employer." In other words, in those limited circumstances, the employee is merely a fortuitous witness<sup>79</sup> to an occurrence in which he was not involved and over which he has no control, responsibility or authority. In no agency or evidentiary sense is such an employee the alter ego of the corporation, although it should be noted that the mere fact of his employment by a corporate defendant may cause the court or jury to give any testimony which is adverse to his employer greater weight than it might otherwise receive, one of the reasons the New York City Bar Association was willing to treat other employees as "parties" for discovery purposes. Nevertheless, when one attempts to balance the interests involved, it would seem that neither the policy considerations which underlie the privilege nor the requirements of effective representation by counsel suggest that ex parte contacts with such employees should be deemed unethical. In other words, the right to free access to strictly factual witnesses who are not party representatives for any purpose arguably predominates over the enterprise's interest in avoiding distortion of testimony by a witness who also happens to be its employee. The balance would tip the other way, in favor of the enterprise, if the witness' testimony were to go beyond what he observed or be legally binding on the employer; for example, testimony that the conduct observed was violative of company policies and procedures would only be permissible if such policies and procedures were within the employee's knowledge and responsibility as an employee. If these prerequisites were satisfied, the testimony would arguably constitute an admission by a party, thereby bringing into play the considerations which led the New York City Bar Association to conclude ex parte contacts would be improper.<sup>80</sup>

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the management with an attorney regarding conduct or proposed conduct within the scope of employment." *Id.* (emphasis added). See also *In Re Coordinated Pre-trial Proceedings*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (holding that conversations with former employees may be protected by the attorney-client privilege), and *Porter v. Arco Metals*, 642 F. Supp. 1116, 1118 (D. Mont. 1986) (holding that term "party" included those "present or former employees with managerial responsibilities concerning the matter in litigation").

79. See *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (conversations that "fortuitous witness" has with enterprise counsel would not be protected by attorney-client privilege); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam* by an equally divided court, 400 U.S. 348 (1971). In *Harper & Row Publishers*, the Seventh Circuit stated that the attorney-client privilege does not protect "the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses. . . ." *Id.* at 491. See generally Note, *Beyond Upjohn: Achieving Certainty by Expanding the Scope of the Corporate Attorney-Client Privilege*, 50 *FORDHAM L. REV.* 1182, 1206-07 (1982) (discussing the fortuitous witness exception to the attorney-client privilege).

80. Inasmuch as the theoretical justification for allowing ex parte contact with a fortuitous

The more difficult analytical problem arises from the fact that the committee also interpreted DR 7-104(A)(1) to permit interviews of former enterprise employees. The committee simply concluded, without any real analysis, that "former employees are no longer part of the corporate client entity. Moreover, under Rule 801(d)(2)(D), Federal Rules of Evidence, statements of former employees would not be an admission since the employer-employee relationship has ended."<sup>81</sup> The committee did not even consider whether and, if so, to what extent communications between counsel for the enterprise and former employees might be protected by the attorney-client privilege.<sup>82</sup> Likewise, the committee did not consider the fact that the

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witness is that he or she is not a party or its representative, it might be improper and unethical for adverse counsel to argue or suggest to the finder of fact that such a witness' testimony is entitled to greater or special weight because of the employment relationship. See *Frey v. Dept. of Health and Human Servs.*, 106 F.R.D. 32 (E.D.N.Y. 1985). In *Frey*, the District Court for the Eastern District of New York rejected the argument that plaintiff's counsel should be permitted to interview a government agency's employees because their statements might be admissions usable in court against the government. *Id.* at 38. The *Frey* court stated that plaintiff's counsel "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, but 'parties' for purposes of Federal Rules of Evidence 801(d)(2)(D). Suffice it to say that the SSA employees who may be reached by ex parte contact are not considered agents of the SSA with authority to 'bind' the agency under DR 7-104, or capable of making admissions on behalf of the SSA under the Federal Rules of Evidence." *Id.* Although the court applied the "managing authority" test to define the types of government employees with whom plaintiff would be permitted ex parte contact, the court also held that those persons who "could make admissions on behalf of the SSA" would be excluded from ex parte contact. *Id.*, cf. *Mompoin v. Lotus Development Corp.*, 110 F.R.D. 414 (D. Mass. 1986). See generally Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government Party*, 61 MINN. L. REV. 1007 (1977) (discussing DR 7-104 as it applies to a government party).

As in the case of the alter ego rule, any rule which permits ex parte contacts with some employees of an enterprise will inevitably allow a degree of ambiguity and uncertainty to exist, with all of the attendant difficulties and ethical dilemmas for counsel. For example, the Bar Association of the City of New York concluded that DR 7-104(A)(1) may prohibit a lawyer or anyone acting on his behalf from even listening to a voluntary disclosure by an employee of an adverse party even when the employee has initiated the contact. See Opinion 80-46, *supra* note 66. Opinion 80-46 further cautioned that in the case of those enterprise employees who may be interviewed ex parte, certain disclosures must be made. See DR 1-102(A)(4) and New York City Opinion 80-519(A). "The interviewer should disclose to the employee (1) who the interviewer represents; (2) the fact that the information is sought in connection with litigation; (3) a description of the dispute; and (4) the fact that any disclosure is voluntary." See also *Frey*, 106 F.R.D. at 38; cf. *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975).

81. Opinion 80-46, *supra* note 66.

82. See *Upjohn*, 449 U.S. at 402-03 (Burger, C.J., concurring). As then Chief Justice Burger suggested in his concurring opinion in *Upjohn*, the logic of the Supreme Court's opinion in that case suggests that extension of the protection of the attorney-client privilege to communications with former employees is entirely appropriate under certain circumstances.

The Ninth Circuit has held that conversations between counsel for a corporation and the corporation's former employees may be protected by the attorney-client privilege even though the attorneys do not represent the former employees. See *In Re Coordinated Pretrial Proceedings*, 658 F.2d 1355, 1361, n.7 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982). The Ninth

enterprise continues to be exposed to potential liability when the subject of controversy arises out of or relates to conduct or statements by a former employee during the course of employment. As a practical matter, just as in the case of a current employee, effective representation of the enterprise requires that its attorney be free to communicate with such a former employee subject to the protection of the attorney-client privilege and that discovery be obtained from the former employee with enterprise counsel present. If ex parte contacts by adverse counsel are improper in the case of a current employee whose conduct or statements while employed might be deemed to be a party admission, or might give rise to liability on the part of the enterprise, the fortuity that the employment relationship has subsequently terminated is irrelevant to the continuing need for and the requirements of effective representation.<sup>83</sup>

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Circuit in *Pretrial Proceedings* based its conclusion on the *Upjohn* rationale:

*Upjohn* reversed the Third Circuit's "control group" test for the scope of the attorney-client privilege in the corporate context. It held that information concerning potential violations transmitted by *Upjohn's* current employees to corporate counsel was privileged.

Although *Upjohn* was specifically limited to current employees, 101 S.Ct. at 685, n. 3, the same rationale applies to the ex-employees (and current employees) involved in this case. *Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties.* See *id.* at 683. *Again, the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves.* Although no findings were made, it is clear that at least some of the conversations referred to by the district court were made to counsel for the companies in order to secure legal advice for the company. The orientation sessions undoubtedly provided information which will be used by corporate counsel in advising the companies how to handle the pending lawsuit.

*Id.* (emphasis supplied).

83. Several commentators have made the same point. See Glekel, *Upjohn's Effect on Application of Attorney-Client Privilege and of Work Product Doctrine*, N.Y.U. L.J., Feb. 24, 1981, at 1, col. 2.

Former employees are just as likely as present employees to possess information needed by the corporation's lawyers to adequately advise the corporate client concerning matters which arose during the term of their former employment. Moreover, the termination of their employment does not terminate the corporation's liability for any misdeed they may have committed during their employment.

See also Pitt, "The *Upjohn* Decision: To Thine Own Self Be True," *Legal Times of Washington*, Jan. 25, 1981, at 20, col. 1. The author notes that "it seems analytically untenable the same as communications between current employees and counsel for purposes of the attorney-client privilege. Information sought from a former employee almost invariably will be limited to matters within the scope of the former employee's employment and will be utilized for exactly the same purposes as information sought from existing employees." *Id.* at 21, col. 4.

If a former employee may be treated as a "party" or "party representative" for purposes of the attorney-client privilege, and if the acts or statements while employed of a former employee may be treated as those of a "party," consistency and fairness suggest the former employee also be treated as a party for discovery purposes. See *Porter v. Arco Metals*, 642 F. Supp. 116 (D. Mont. 1986).

The opinion of the New York City Bar Association was soon followed by a similar opinion by the Massachusetts Bar Association's Committee on Professional Ethics. In its Opinion No. 82-7, the Massachusetts Committee concluded that "a lawyer may not interview current employees of a corporate defendant without the consent of opposing counsel under DR 7-104(A)(1) when the proposed interview concerns matters within the scope of the employees' employment but may interview current employees about other matters."<sup>84</sup> The Massachusetts committee approved the rationale of the New York City Bar's Opinion 80-46 and stated:

Although there are countervailing interests in the desire of the adverse party to obtain evidence, these considerations have already been weighed in the formulation of the rule, which specifically subordinates this need to the need to protect a lay party from unsupervised communications with its opponent's counsel.<sup>85</sup>

However, like the New York City Bar, the Massachusetts Bar also concluded that the rationale for DR 7-104(A)(1), that is, the need for effective representation by counsel, requires only that the rule be applied to present and not to former employees. "The reason is that former employees enjoy no present agency relationship that is being served by the representation of corporate counsel."<sup>86</sup> Like New York City, Massachusetts ignored the logical consequences of its own holding when it brushed aside the fact that an enterprise's liability or defense, and the need for representation, may arise out of a past agency relationship; under those circumstances, the fact that the agency relationship has terminated will usually be irrelevant to enterprise liability. The need for enterprise counsel to communicate freely with those whose conduct or statements during the course of an agency relationship may give rise to liability is no less critical in a situation when the relationship has subsequently terminated than when the relationship continues.<sup>87</sup> To make the protection of the attorney-client privilege or the possibility of effective representation by counsel turn on whether the agency relationship continues—an essentially irrelevant fact—rather than on the existence of the relationship at the time of the operative events—the relevant fact—is to exalt form over substance.<sup>88</sup>

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84. Massachusetts Comm. on Professional Ethics, Opinion 82-7 (1982).

85. *Id.*

86. *Id.*

87. *In Re Coordinated Pretrial Proceedings*, 658 F.2d 1355, 1361 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982).

88. The opinion incorrectly focuses on the need of the former employee for effective representation when, in the circumstances presented, it was the enterprise which required representation and was being represented by counsel. It goes without saying that, if the employee requires personal representation by counsel, enterprise counsel may provide such representation only when the interests of the entity and the individual do not conflict. If an actual or potential conflict exists, each should have separate counsel. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7 and accompanying comment.

It is interesting to note that the Massachusetts Bar Association also attempted to justify its conclusion with respect to former employees by pointing to Rule 801(2)(D) of the Rules of Evidence, but like New York failed to take into account or explain how its distinction between present and former employees can be justified when the potential for enterprise liability arises out of acts or statements of an employee during the existence of the relationship. The Massachusetts Bar Association reasoned as follows:

Support for the notion that effective representation of counsel is the touchstone for interpreting DR 7-104(A)(1) is derived from the fact that all who have considered the matter appear to agree that the prohibition of the rule applies only to present, not former, employees of the corporation. The reason is that former employees enjoy no present agency relationship that is being served by the representation of corporate counsel. Even more important, the position we are adopting is also in accord with the law of evidence as exemplified in Federal Rule 801(d)(2)(D), which recognizes an exception to the hearsay rule as to "a statement by his agent or servant concerning the matter within the scope of his agency or employment, made during the existence of the relationship." This rule binds the corporation with respect to admissions by employees far beyond the "control group" of the corporation. Thus, for example, in litigation arising out of motor vehicle accidents it is not uncommon that the corporate defendant has only his agent involved, the driver, who will usually not be a management employee. Rule 801(d)(2)(D) permits the driver's admissions about the accident to be introduced against the defendant corporation, and it seems quite in line with the consequences to the corporation to include the driver within the group to be covered by the prohibition of DR 7-104(A)(1).<sup>89</sup>

Because the Massachusetts Bar Association made no effort to explain how the underlying rationale for its interpretation of DR 7-104(A)(1) (the effective representation of counsel) is served by making the ability of enterprise counsel to effectively represent his or her client turn on whether the actors whose conduct may give rise to liability are still employed, its analysis is incomplete and, to that extent, unsatisfactory.

Shortly after the New York City and Massachusetts Bar Associations issued their opinions, the Ethics Committee of the Los Angeles County Bar Association was asked to reconsider the propriety of *ex parte* contacts by opposing counsel (or counsel's investigator) with the employees of a corporation which is a party to litigation when the information sought from the employee relates to the subject of controversy.<sup>90</sup> More specifically, the committee was asked to pass upon the propriety of such *ex parte* contacts

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89. Massachusetts Comm. on Professional Ethics, Opinion 82-7 (1982).

90. Los Angeles County Bar Assoc., Formal Opinion 410 (1983).

when the employees are not members of the so-called control group. In an earlier informal opinion,<sup>91</sup> the committee had approved such ex parte contacts. The issue presented was whether ex parte contacts with non-control group employees was still proper after the U.S. Supreme Court's decision in *Upjohn*. In its prior informal opinion, the committee had held that ex parte interviews with "non-management" employees were proper;<sup>92</sup> in a subsequent formal opinion, the committee had found that the relevant test was the extent to which the enterprise's employees are "closely identified with management of the company."<sup>93</sup>

The committee concluded that *Upjohn* provided additional guidance on the issue:

Although *Upjohn* is not controlling, it is certainly instructive as to whether or not the control group test should be rejected in determining which employees constitute the "corporate party." Its reasoning may be logically extended to ex parte contacts with a corporate party's employee by opposing counsel for at least four reasons.

First, the corporate employee may be prejudiced either directly or indirectly by the ex parte contact. Second, the corporation has an interest in seeing that information or knowledge learned by an employee in the course of the employee's employment is not released to a party with an interest inimical to the corporate employer without the protection and advice of counsel. Third, due to the difficulty of ascertaining whether an employee is acting within the scope of his or her employment, a corporate employee might be induced by opposing counsel into making admissions or statements that are binding upon the corporation. Fourth, due to the difficulty in ascertaining who is a control group member, opposing counsel might contact a party whom he believes is not a control group member, only to find out later that the person contacted was a control group member, thereby rendering the contact improper.<sup>94</sup>

Based on its analysis of the policy considerations approved in *Upjohn*, the Los Angeles committee opted for a broader rule than New York City or Massachusetts:

*The rule prohibiting ex parte contacts should be extended to all employees of a corporate party because opposing counsel could cause a lay employee to divulge information such as legal advice of corporate counsel, trade secrets, or information considered attorneys' work product. If that is possible, corporate counsel is placed*

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91. Los Angeles County Bar Assoc., Informal Opinion 1976-1 (1976).

92. *Id.*

93. Los Angeles County Bar Assoc., Formal Opinion 369 (1977).

94. Los Angeles County Bar Assoc., Formal Opinion 410.

at a severe disadvantage because he or she will not be able to give confidential advice to non-control group employees without the assurance that such information and advice would not be disclosed during an ex parte contact with opposing counsel. This is precisely the issue that Justice Rehnquist addressed in his opinion in *Upjohn* when he stated, "the attorney and client must be able to predict with some degree of certainty whether certain discussions will be protected." 449 U.S. at 393.

Forbidding ex parte contacts by opposing counsel with the non-control group employees of a corporate party furthers the ends enunciated by Justice Rehnquist by assuring the corporation and its counsel that privileged information will not be inadvertently disclosed to opposing counsel through that counsel's superior training and skill. This furthers the policy of promoting frankness and candor between corporate employees and corporate counsel. See ABA Code of Professional Responsibility, Ethical Consideration 4-1; *United States v. Nobles*, 422 U.S. 225, 236-240; *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); F.R.C.P. 26(6)(3). This is especially true in light of the fact that many communications between corporate counsel and non-control group employees involve attempts to encourage faithful compliance with the law. *Upjohn v. United States*, *supra*, at 392.<sup>95</sup>

Thus, while the New York City and Massachusetts Bar Associations were willing to allow ex parte contacts with current employees with respect to matters *outside* the scope of their employment, the Los Angeles Bar Association's opinion suggests that even those limited contacts should be prohibited. The Opinion's rationale for the broader prohibition is that "the corporate employee may be prejudiced either directly or indirectly by the ex parte contact."<sup>96</sup> The Los Angeles Bar was concerned that any statement that causes injury to the corporation may in turn injure the employee by either "endangering the employee's source of income or by jeopardizing the employee's position at the corporation."<sup>97</sup> The committee, therefore, rejected the argument that no harm can come from ex parte contacts limited to matters outside the scope of employment.

This reasoning is flawed for the practical reason that it is difficult for an attorney or the employee to draw precisely the line between what is and what is not within the scope of the employee's employment. Moreover, even though the attorney might scrupulously avoid asking questions or soliciting information within the employee's scope of employment, the employee might nevertheless volunteer

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95. *Id.*

96. *Id.*

97. *Id.*

damaging or privileged information for which the opposing counsel had not asked which is within the scope of the employee's employment thereby binding the corporation. Certainly, no lay employee, especially an unsophisticated one, would be able to tell whether his or her statements are within the scope of his or her employment.<sup>98</sup>

Finally, the committee concluded that a "bright line" rule serves the interests of both sides to a controversy:

[I]t is best to draw a clear and unequivocal line—opposing counsel should not have ex parte contacts concerning a subject of controversy with the employees of a corporate party to the controversy. This promotes the confidentiality of corporate counsel's advice and insures opposing counsel that he or she is not making potentially improper contacts with the opposing party.<sup>99</sup>

In view of the potentially serious consequences for both a client and attorney if the attorney inadvertently makes an improper contact with an adverse party or receives information from an employee that is improper,<sup>100</sup> an unambiguous rule which prohibits ex parte contacts with all enterprise employees has some appeal<sup>101</sup> but may run afoul of the United States Supreme Court's holding in *Hickman v. Taylor*.<sup>102</sup> Recognition of the

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98. *Id.*

99. *Id.* The opinion was based on California's version of the ABA Code of Professional Responsibility; California has not yet adopted the Model Rules of Professional Conduct. Opinion 410 was followed by the San Diego Bar Association's Ethics Committee in its Opinion 1984-5. See ABA/BNA Lawyer's Manual, p. 555; *Massa v. Eaton Corp.*, 109 F.R.D. 312 (W.D. Mich. 1985) (citing both opinions with approval).

100. The sanctions which may be imposed upon an attorney and a client for an improper contact with an adverse party can be severe. See, e.g., *Mitton v. State Bar of California*, 71 Cal.2d 525, 455 P.2d 753, 78 Cal. Rptr. 649 (1969) (3 month suspension); *Crane v. State Bar of Calif.*, 30 Cal.3d 117, 635 P.2d 163, 177 Cal. Rptr. 670 (1981) (one year suspension); *Shelton v. Hess*, 599 F. Supp. 905 (S.D. Tex. 1984) (disqualification of counsel). Furthermore, any information obtained as a result of an ex parte contact may be deemed inadmissible at trial. See *Chronometrics, Inc. v. Sysgen, Inc.*, 110 Cal. App.3d 597, 168 Cal. Rptr. 196 (1980). The fact that contact with a represented party is "well intended but misguided" is not a defense. *Mitton*, 71 Cal.2d at 534, 455 P.2d at 758, 78 Cal. Rptr. at 654; cf. *Complaint of Korea Shipping Corp.*, 621 F. Supp. 164 (D. Alaska 1985).

101. In a related context, a number of commentators have urged the adoption of a bright line test when applying the attorney-client privilege. See Note, *Beyond Upjohn: Achieving Certainty by Expanding the Scope of the Corporate Attorney-Client Privilege*, 50 *FORDHAM L. REV.* 1182, 1184-85 n.12. The author argues that "to better serve the theoretical underpinnings of the attorney-client privilege, the scope of the corporate attorney-client privilege should be expanded to encompass the communications of all a corporation's employees." *Id.* at 1185.

102. 329 U.S. 495 (1947). In *Hickman*, the court treated the partnership's employees as mere witnesses and held that their statements to the defendant's attorney were therefore not protected by the attorney-client privilege. The *Hickman* court's distinction between witnesses and employees is arguably dictum. See *Hickman*, 329 U.S. at 508; see also Note, *Death Knell*, *supra* note 50, at 1069 n.125. The author argues that the *Hickman* court failed to recognize that the crew members were speaking to the partnership's attorney as its employees. *Id.* at 1062-63 n.97. In any event, *Upjohn* extended the protection of the privilege to discussions with certain enterprise employees; however, counsel's conversations with those employees who are merely fortuitous witnesses probably remain subject to discovery.



fortuitous witness exception, discussed *supra*, harmonizes the general rule proposed with *Hickman*.<sup>103</sup>

There is another consideration which must be factored into any rule adopted. Generally, an attorney has a right to conduct an ex parte interview with a non-party fact witness subject only to the witness' willingness to be interviewed. In *International Business Machines Corp. v. Edelstein*,<sup>104</sup> the trial court had entered an order restricting counsel for IBM's right to conduct ex parte interviews with the government's witnesses. The Second Circuit reversed and held that the trial court's order constituted an infringement upon the constitutional right to effective counsel.

We believe that the restrictions on interviewing set by the trial judge exceeded his authority. They not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made.<sup>105</sup>

The rationale of *International Business Machines Corp. v. Edelstein* points up the critical nature of the issues involved; both sides' right to effective counsel must be taken into account when attempting to distinguish parties or party representatives from mere witnesses. The failure to draw the line at the right point, or the failure to provide reasonably clear guidelines to counsel, may unfairly disadvantage one party or the other and, in the process, deny that party full and effective representation of counsel.

Litigation which arose out of the MGM Grand Hotel fire in Las Vegas, Nevada in November of 1980 both illustrates the serious difficulties which counsel for an adverse party can encounter in attempting to conduct ex parte interviews with individuals associated with an enterprise and provides us with relatively rare insight into the current thinking of one appellate court on these issues.<sup>106</sup> The lawsuit arose out of a dispute between the

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103. The fortuitous witness exception is consistent with the ABA Committee on Professional Ethics' longstanding rule. "An attorney for the plaintiff may properly interview employees of the defendant who are witnesses to the incident upon which the suit is based so long as no deception is practiced and the employees are informed that the person interviewing them is the attorney for the plaintiff." ABA Committee on Professional Ethics, Opinions, No. 117 (1934). Opinion 117 was decided under old Canon 39, but its reasoning is equally applicable to subsequent versions of the Rules of Professional Responsibility. See ABA Code of Professional Responsibility DR 1-102(A)(4) (prohibiting lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation").

104. *International Business Mach. Corp. v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975).

105. *Id.*

106. See *American Protection Insurance Co. v. MGM Grand Hotel*, 748 F.2d 1293 (9th Cir. 1984) (all facts originated from this opinion). In April of 1985, the Ninth Circuit ordered its opinion withdrawn from publication without explanation. Shortly thereafter, the United States Supreme Court decided *Richardson-Merrell, Inc. v. Koller* and held that orders disqualifying counsel in civil cases are not collateral orders subject to appeal as final judgments

MGM Grand and several of its insurers with respect to the amount of the insurable loss suffered by the hotel. George Morris was MGM's vice-president in charge of rebuilding the hotel. The Court of Appeals for the Ninth Circuit summarized Mr. Morris' responsibilities.

Part of his job involved working with MGM's chief executive officer and MGM's lawyers who were negotiating with the insurance companies for payment of the loss, and analyzing the construction costs and developing litigation positions.

Although Morris resigned as vice-president of MGM in April 1982, he signed a consulting agreement with MGM that required him to continue to supervise construction and to assist in litigation. In such capacity, he continued to work with the MGM lawyers in preparation for litigation and was privy to confidential information regarding the litigation. His consulting duties included such sensitive tasks as helping to draft interrogatories, assisting counsel at depositions, and advising generally on the conduct of the case. In answer to an interrogatory, MGM designated Morris as its only expert witness.<sup>107</sup>

Morris subsequently became unhappy with his relationship with MGM and hired separate counsel to represent him to negotiate a possible employment agreement with one of the hotel's insurers.<sup>108</sup> Morris' individual attorney then initiated contact with one of the attorneys for the insurance company, and the insurer's attorney subsequently met with Morris and his attorney as requested. According to the Ninth Circuit:

At this time Morris assured Cozen [the insurer's attorney] that he was represented by separate counsel, but also disclosed that he was still employed by MGM. Notwithstanding Cozen's expressed concern that he must avoid ethical violations, he proceeded to discuss many matters regarding the litigation, including the theories of opposing counsel.<sup>109</sup>

As a result of Cozen's discussions with Morris, the trial court ordered Cozen and his law firm disqualified from further representation of the

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within the meaning of 28 U.S. Code § 1291. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 424 (1985). The Ninth Circuit then dismissed the appeal from the trial court's disqualification order. *American Protection Ins. Co. v. MGM Grand Hotel*, 765 F.2d 925 (9th Cir. 1985). Although the opinion was withdrawn from publication, presumably on a procedural point, and, therefore, is not precedent, the court's reasoning is nevertheless instructive, and prudent attorneys will not ignore the court's analysis. Because the opinion has been withdrawn from publication, all citations are to the Ninth Circuit's slip opinion unless otherwise indicated [hereinafter "slip opinion"]. The District Court's opinion, which is consistent with the Ninth Circuit's analysis, can be found on LEXIS, Genfed Library, Dist. File (D. Nev. Dec. 8, 1983).

107. Slip Op. at 2, 3.

108. *Id.* at 3.

109. *Id.* at 3-4.

insurance company, even though Cozen's firm had conducted (or attended) more than 200 depositions, had reviewed more than 1,000,000 documents, had expended over 15,000 hours on the matter and its contacts occurred less than two months before the case had been scheduled to go to trial.<sup>110</sup>

The Court of Appeals affirmed the district court's order of disqualification.

The focus of the district court's and this court's concern is Cozen's participation in a scheme to secure confidential information from MGM—some of which MGM had a right to protect under the attorney-client privilege and other information which George Morris as a confidential employee had a legal duty not to divulge.<sup>111</sup>

The court's affirmance was based in part on its analysis and extension of the *Upjohn* rationale.

Cozen's contacting Morris after learning Morris' identity and the nature of the discussions between the two demonstrate Cozen's improper conduct in engaging in a knowing and willing receipt of attorney-client confidences that MGM was entitled to protect under Disciplinary Rule 4-101(B). ABA *Model Code of Professional Responsibility* DR 4-101(B) (1969). (Footnote omitted.) Communications between a corporation's counsel and the corporation's employees in preparation for litigation are protected by the attorney-client privilege. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The corporation may claim this privilege and such communications are immune from discovery. See *In re Coordinated Pretrial Proceedings*, 658 F.2d at 1361. *A fortiori* such communications may not be the subject of *ex parte* contacts, for a corollary of the attorneys' duty not to reveal confidences of a client is the duty not to seek to cause another to do so. See *Model Code of Professional Responsibility* DR 4-101(D); DR 7-104; EC 4-1; EC 4-6.<sup>112</sup>

110. Appellant's Brief at 4, *American Protection Ins. Co. v. MGM Grand Hotel*, Nos. 83-2674 and 83-2728. It should be noted that the district court made an express finding that Cozen's conduct did not involve any intentional wrongdoing. See the District Court's opinion, *American Protection Ins. Co. v. MGM Grand Hotel*, No. CIV-LV-82-26, Slip Op. at 6 (D. Nev. Dec. 8, 1983).

111. According to the Ninth Circuit, "George Morris wore many hats. Morris was a litigation consultant to MGM, a former corporate officer of MGM, a fact witness, a trial expert designated as such by MGM under Federal Rule of Civil Procedure 26(b)(4)(A), and a non-testifying expert designated under Federal Rule of Civil Procedure 26(b)(4)(B)." *Id.* at 10.

112. *Id.* at 11-12. The ethical issues in *MGM Hotel* were decided under the ABA Model Code of Professional Responsibility (1969) and its amendments. Rule 4-101 of the Model Code provides:

DR 4-101

Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the

In other words, the Ninth Circuit held that it was ethically improper for adverse counsel to participate in *ex parte* contacts with an employee who had communications with enterprise counsel that were protected by the attorney-client privilege;<sup>113</sup> the fact that the employee was represented by his personal attorney was irrelevant, as was the fact the contact was initiated by the employee's attorney.<sup>114</sup>

The court held that counsel acted improperly when they became parties to a breach of their opponent's employee's obligation of confidentiality.

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disclosure of which would be embarrassing or would be likely to be detrimental to the client.

The Ninth Circuit in *MGM Hotel* concluded that it is unethical for an attorney to even talk with or "negotiate" with an employee of an adverse party who is in possession of information protected by the attorney-client privilege. *MGM Hotel*, Slip Op. at 16-17 ("the mere act of negotiating was unethical").

113. For years ethics opinions have ignored the relevance of the attorney-client privilege to the propriety of *ex parte* contacts with enterprise employees. See Tennessee Bar Assoc. Opinion 83-F-46(b); cf. Virginia Bar Assoc. Op. 459 (1982). ("It may be appropriate to express the issue in terms of those as to whom the attorney-client privilege would be available," suggesting that the inquiring attorney consider the application of *Upjohn*). U.S. District Court Judge Weinstein noted in *United States v. Jamil* that the prohibition against *ex parte* contacts with a party represented by counsel has several purposes: "The rule is crafted to protect a client from squandering a possible claim or defense and to insure against disclosure of privileged information." *United States v. Jamil*, 546 F. Supp. 646, 654 (E.D.N.Y. 1982).

114. The Ninth Circuit's analysis in *MGM Hotel* is of interest:

Cozen also violated DR 7-104(A)(1) which prohibits *ex parte* contacts with a party known to be represented by counsel. Cozen contacted Morris while Morris was still employed by MGM. Though MGM was represented by counsel Cozen made no attempt to contact MGM's counsel prior to or even after his meetings with Morris. INA argues that this rule is not applicable because Morris was separately represented by counsel. Its argument fails because Bongiovanni's representation was for the purposes of negotiating a contract for Morris, not for the purposes of representing or protecting MGM's interests. Disciplinary Rule 7-104 states that a lawyer shall not "[c]ommunicate 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. . . ." *Model Code of Professional Responsibility* DR 7-104. Cozen did not secure the permission of MGM's attorney, who was Morris's attorney for the purposes of that matter. Morris was not separately named in the lawsuit and was a party only in the sense of his employment and former employment by MGM. Given our conclusion that *ex parte* contacts are prohibited with such persons, it follows that MGM's counsel is the one who must, and the only one who can, protect MGM's confidences.

Slip Op. at p. 21, note 11. The result would probably be the same under the Model Rules of Professional Conduct. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.2 Comment (1983). The Comment to Rule 4.2 allows counsel to interview an employee who is subject to the Rule without enterprise counsel's consent in one circumstance. *Id.* The comment provides:

If an agent or employee of the organization is represented *in the matter* by his or her own counsel, the consent of that counsel to a communication will be sufficient for purposes of this rule. (Emphasis added.)

Cf. *Meat Price Investigators v. Iowa Beef Processors*, 448 F. Supp. 1 (S.D. Iowa, 1977), *aff'd on appeal*, 572 F.2d 163 (8th Cir. 1978).

Moreover, Cozen and his firm violated other ethical obligations when they induced or participated in the breach of their opponent's employee's obligations of confidentiality. George Morris was a confidential employee of MGM. Although he was not a lawyer himself, and was not bound by the lawyer's ethical rules, this is not to say that he did not have legal obligations of fidelity to his employer or that Cozen, as a lawyer, did not have ethical obligations with regard to contacting him. In *Los Angeles County Bar Association Formal Opinion No. 410* (March 14, 1983), the ethics committee addressed these obligations and advised that it was not proper for counsel or its investigator to contact *ex parte* an employee of a corporation that is a party to a suit knowing that the information sought relates to a subject of controversy. The committee engaged in a careful and thorough analysis of *Upjohn* and said that it applied to such a situation in order to "promote frankness and candor between corporate employees and corporate counsel." The committee cited as an additional reason the fact that such employees have the authority to bind the corporation by making admissions about acts or facts within the scope of their employment. *See* Fed. R. Evid. 801(d)(2). Although the committee's broad condemnation went to all employee *ex parte* contacts, we need only decide there that contact with Morris, a confidential and highly placed employee of MGM, is clearly prohibited.<sup>115</sup>

Of particular interest, the Ninth Circuit stated that even if Morris could be fairly categorized as a former employee, that would not change its analysis.

We are not persuaded by appellants' argument that Morris was fair game for *ex parte* discovery because his consulting contract specifically negated his authority to bind MGM. When Morris made his contact with Cozen, he was a former confidential employee, a confidential consultant and a member of MGM's litigating team for this case. (Footnote omitted.) Even had Morris resigned before

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115. Slip opinion at 12. As the Ninth Circuit in *MGM Hotel* explained:

The main policy behind the *Upjohn* rule and the *L.A. County Bar Opinion* is to protect a client's confidences. Cozen was prohibited from contacting Morris as an MGM employee; similar conduct has subjected counsel to discipline. *See Mahoning County Bar Association v. Ruffalo*, 199 N.E.2d 396, 401 (Ohio) (attorney disbarred for paying employee of party opponent to prepare suit against employer), *cert. denied*, 379 U.S. 931 (1964) (discussed in *In re Ruffalo*, 390 U.S. 544, 547 [1968]); *see also Esser v. A.H. Robins Co.*, 537 F. Supp. 197 (D. Minn. 1982) (law firm disqualified for hiring employee of party opponent's insurer to investigate case); New York Bar Association Opinion No. 503 (February 1, 1979) (a "lawyer [can] not undertake to cause another's employee to divulge information protected by Canon 4").

Slip opinion at 22, n.12.

making contact with Cozen, our analysis would not be altered. (Footnote omitted.)<sup>116</sup>

The MGM Hotel panel affirmed the reasoning of its earlier decision, *In re Coordinated Pretrial Proceedings*, in which the Ninth Circuit had refused to draw a distinction between current employees and former employees:

In *In re Coordinated Pretrial Proceedings*, we held that the *Upjohn* rationale applied to ex-employees as well:

Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties. . . . Again, the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves. 658 F.2d at 1361 n.7 (citation omitted). Matters that Morris discussed with corporate counsel before he left MGM were privileged, and Cozen should not have sought to invade that privilege.<sup>117</sup>

In the MGM Hotel case, the Ninth Circuit did acknowledge that the contacts by the attorney for the insurance company with Morris might have been appropriate if, but only if, "Morris in fact brought to Cozen evidence of on-going fraud on the part of MGM."<sup>118</sup> However, the Ninth Circuit concluded that Morris had no evidence of past fraud let alone evidence of a continuing or future fraud.<sup>119</sup>

The court also summarily rejected the argument that because Morris was a fact witness, the adverse party had a constitutional right to interview him *ex parte*. The court pointed out that the adverse parties had a right to take his deposition to obtain "all properly discoverable information within his knowledge or control."<sup>120</sup>

Although the facts of the case were somewhat unusual, the principle on which the MGM Hotel case was decided is well established. Other courts

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116. Slip opinion at 12-13. *Cf.* Wisconsin Bar Assoc. Op. E-82-10 (1982) (holding that even a "former managing agent" of a corporation can be contacted by counsel for adverse party). The committee did caution that in conducting such an interview "the attorney should first apprise the former employee that he or she may have a continuing duty to the corporation not to reveal any confidential information which he or she may have acquired during the course of his or her employment by the corporation." Wisconsin Bar Assoc. Op. E-82-10 (1982).

117. Slip opinion at 23, n.13.

118. *Id.* at 13.

119. *Id.* The Ninth Circuit in MGM Hotel held that to invoke the crime or fraud exception, "the party seeking disclosure . . . must make out a prima facie case that the attorney was retained in order to promote intended continuing criminal or fraudulent activity." *Id.*

120. *Id.* at 14. *See also* *Upjohn*, 449 U.S. at 396.

have recognized that an improper contact with an adverse party strikes at the foundation of our adversary system because it interferes with the ability of an attorney to effectively represent the client. For example, in *Mitton v. State Bar*, the California Supreme Court noted the critical interests involved and imposed a three month suspension on an attorney who claimed that his contact with an adverse party was the result of an innocent mistake.

Rule 12 of the Rules of Professional Conduct reads in pertinent part: "A member of the state bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel." *This rule is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice* and was designed to prevent acts such as those engaged in here by petitioner. It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intentioned but misguided.

*The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role.* If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist. Consequently, before any direct communication is made with the opposing party, consent of the opposing attorney is required.<sup>121</sup>

#### IV. THE MODEL RULES OF PROFESSIONAL CONDUCT: AN EXPANDED DEFINITION OF A PARTY FOR DISCOVERY PURPOSES

After much criticism of the ethical ambiguities and dilemmas created by varying interpretations of the Model Code of Professional Responsibility,<sup>122</sup> the ABA House of Delegates adopted the Model Rules of Professional

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121. *Mitton v. State Bar of Calif.*, 71 Cal.2d 525, 534, 455 P.2d 753, 758, 78 Cal. Rptr. 649, 654 (1969) (emphasis added). The cases have identified at least four policy reasons for the rule prohibiting ex parte contacts with a party represented by counsel: (1) to prevent an attorney from taking unfair advantage of one who is represented by counsel, *In re Atwell*, 232 Mo. App. 186, 115 S.W.2d 527 (1938); (2) to prevent a party from inadvertently making statements that could prejudice his case at trial, *Abeles v. State Bar*, 9 Cal.3d 603, 510 P.2d 719, 108 Cal. Rptr. 359 (1973); (3) to prevent distortion of a party's testimony, *Mitton v. State Bar of Calif.*, *supra*; and (4) to prevent an inadvertent or intentional invasion of the attorney-client privilege, *American Protection Ins. Co. v. MGM Grand Hotel*, *supra*.

122. See Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEVE. ST. L. REV. 571, 572 (1981). In arguing for the adoption of the Rules of Professional Conduct, Professor Hazard characterized the Code of Professional Responsibility as "disastrous." *Id.* According to Hazard, the Code "has come to contain two potential rules governing the same

Conduct in 1983.<sup>123</sup>

As late as 1981, when the proposed final draft of the Model Rules of Professional Conduct was circulated by the American Bar Association's Commission on Evaluation of Professional Standards, the comment to Rule 4.2<sup>124</sup> adopted an alter ego approach rather than a functional approach<sup>125</sup> to ex parte contacts with an adverse party. The draft comment provided in relevant part:

This rule prohibits communication concerning the matter in representation by a lawyer for one party with managing agents of a party that is a corporation or organization, for such persons speak for the organization. It does not prohibit communication with lower echelon employees who are not representatives of the organization. Whether a specific employee is a representative of a client can depend on the circumstances, particularly whether the employee has significant managerial responsibility in the matter in question.<sup>126</sup>

The proposed final draft correctly noted that the suggested rule remained substantially identical to the interpretation placed on DR 7-104(A)(1) by most authorities.<sup>127</sup>

Although the text of Rule 4.2 itself remained unchanged in the final draft, the comment to the rule was significantly modified. The portion of the comment quoted above was deleted and in its place the following was added:

In the case of an organization, this rule prohibits 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 purposes of civil or criminal liability or whose statement may

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lawyer conduct (and sometimes three potential rules)." *Id.* at 573. Hazard also refers to these conflicting rules as "legal double-speak." *Id.* at 573. Professor Hazard correctly notes that "a lawyer should not have to operate under inherent moral peril with a rule system that is inherently ambiguous." *Id.* at 574.

123. ABA/BNA Lawyer's Manual on Professional Conduct, p. 01:101 (1987).

124. See MODEL RULES OF PROFESSIONAL CONDUCT ER 4.2 (1981). ER 4.2 of the Rules of Professional Conduct provides that:

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.

125. A functional approach to ex parte contacts takes into account the requirements of effective representation by counsel in light of the purposes underlying the attorney-client privilege and the agency and evidentiary burdens imposed on a party by our legal system.

126. See Comment to Rule 4.2, Proposed Final Draft, Model Rules of Professional Conduct, As Revised Through May 1981 (American Bar Association, Commission on Evaluation of Professional Standards, 1981).

127. *Id.*



constitute an admission on the part of the organization.<sup>128</sup>

In other words, the revised and final version of the comment, which was approved by the ABA in 1983, adopts a three pronged approach which combines alter ego and functional concepts. The comment identifies at least three situations in which an attorney's ex parte communications with an adverse party's employees will be deemed to be improper.

1. *When the employee has "managerial responsibility."* The comment does not define the phrase managerial responsibility, but this appears to be the Model Rule's effort to incorporate the old alter ego test which looked to the nature or level of the employees' authority within the corporation. As we have seen, a variety of interpretations have been placed upon the "managerial" expression of the alter ego rule. Some courts and bar associations have looked to the office or position held by the employee and have not inquired further to determine whether the employee has actual knowledge of, or responsibility for the subject matter of the dispute.<sup>129</sup> Others have focused on the employee's actual authority with respect to settlement or resolution of the matter in controversy.<sup>130</sup> The intent of the comment to ER 4.2 in this regard is not clear. However, under a functional approach *all* employees who have knowledge or information gained *in their capacity as employees*, or who could speak for the enterprise in *any* relevant sense would be treated as parties for discovery purposes. The next two categories, which were added to the final draft, include those employees whose conduct or statements will be relevant to resolution of the matter in dispute.

2. *Those whose acts or omissions are relevant to enterprise liability, whether civil or criminal.* In essence, this prohibition recognizes that, under the law of agency, certain employees' conduct will be deemed to be that of the adverse party for purposes of determining liability and that, as a matter of consistency and fairness, such individuals should be treated as parties for discovery purposes. The comment does not distinguish between those whose agency or employment relationship continues at the time of discovery, but instead focuses on the existence of the relationship *at the time of the events in question*, which is the relevant point in time for purposes of analyzing enterprise liability for an employee's acts or omissions.<sup>131</sup> Thus, the rule properly turns on the relevant aspect of the relationship rather than on whether the relationship continues as of the date of discovery or trial, which is usually irrelevant.

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128. ABA/BNA Lawyer's Manual on Professional Conduct, Rule 4.2, Model Code Comparison, p. 01:157 (1987).

129. See *supra* note 17 and accompanying text.

130. See *supra* note 19 and accompanying text; see also *Day v. Illinois Power Co.*, 50 Ill. App.2d 52, 58, 199 N.E. 2d 802, 806 (1964).

131. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 comment (1987). The comment refers not merely to "employees" but "to any other person"; presumably, this would include former employees.

3. *Those whose statements may constitute an admission on the part of the enterprise.* This aspect of the rule recognizes that, under the rules of evidence, the statements of certain employees made during the existence of the relationship will be deemed to be those of a party and, as a matter of consistency, those employees are also treated as parties for discovery purposes. Again, whether the employment relationship continues appears to be—and should be—irrelevant.

Although the text of Rule 4.2 expressly prohibits contact with those whom “the lawyer knows to be represented by another lawyer in the matter,” the accompanying comments unfortunately limit by implication the concept of a “party” to agency and evidentiary considerations. While these concepts are essential to an analysis of the requirements of effective representation by counsel, the policy considerations underlying the attorney-client privilege are at least as important. Although it appears that the modification of the comment to ER 4.2, which occurred shortly after *Upjohn* was decided, was influenced by the United States Supreme Court’s analysis of the attorney-client privilege in the corporate context, Rule 4.2 of the Model Rules of Professional Conduct does not make it clear that adverse counsel’s communications with any employee of an organization who may have privileged communications with enterprise counsel could be unethical. ER 4.2 (the counterpart of DR 7-104[A][1]) must be read with ER 1.6(a)<sup>132</sup> (the counterpart of DR 4-101[B]) in order to fully appreciate the limitations placed on counsel’s ex parte contacts with the employees of an enterprise. In other words, only by a careful analysis of the Model Rules, recent court decisions, and the opinions of the bar associations, will a lawyer come to realize that the three categories of employees expressly enumerated in the comment to ER 4.2 are not necessarily exhaustive.<sup>133</sup>

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132. ER 1.6(a) provides as follows:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(2).

As the Court of Appeals for the Ninth Circuit noted in *MGM Hotel*, “. . . a corollary of the attorneys’ duty not to reveal confidences of a client is the duty not to seek to cause another to do so.” See Slip Opinion, *supra* note 106, at 11-12.

133. Several courts have recently rejected the argument that ex parte contacts should not be permitted in the case of employees who participated in attorney-client privileged communications with enterprise counsel. See *Wright by Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564 (1984). The Washington Supreme Court held in *Wright* that, under the Code of Professional Conduct, adverse counsel could communicate ex parte with current employees of a health maintenance organization unless the employees had managing authority sufficient to give them the right to speak for the corporation. *Id.* at 201, 691 P.2d at 569. The *Wright* court also permitted ex parte contacts with former employees. *Id.* The *Wright* court stated that it could “find no reason to distinguish between employees who, in fact, witnessed an event and those whose act or omission caused the event leading to the action.” *Id.* Furthermore, the *Wright* court held that even though a corporate employee might be a “client” for purposes of applying the attorney-client privilege, the employee need not necessarily be treated as a “party” for purposes of the disciplinary rule prohibiting ex parte contacts with

For example, in the *Upjohn* case, the employees and former employees interviewed by counsel for the company were not necessarily individuals who themselves participated in illegal activities. Employees who might have had knowledge of illegal activities by others were also interviewed, and the Supreme Court held that their communications with counsel were privileged. While an employee with knowledge of illegal conduct by other employees might not fall in any one of the three categories of employees enumerated in the comment to ER 4.2, nevertheless, because their communications with enterprise counsel may be deemed to be privileged, any effort by opposition counsel to discover such communications would be improper.<sup>134</sup> In other

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adverse parties. *Id.* at 202, 691 P.2d at 570. Although the risk of inadvertent or intentional disclosure of privileged information in an ex parte interview is a real one, the *Wright* court seemed to take at face value the argument made by plaintiff's attorney that he did not intend to intrude into privileged communications between the defendant's attorney and its employees, but only sought to discover underlying facts. *See also* *Frey v. Dept. of Health and Human Servs.*, 106 F.R.D. 32, 38 (E.D.N.Y. 1985). *Frey* also was decided under the Code of Professional Conduct, and the District Court for the Eastern District of New York accepted plaintiff's counsel's agreement "not to question employees about communications they made to defendant's counsel in this case." *Frey*, 106 F.R.D. at 38. *Frey* adopted the *Wright* court's definition of a party and authorized plaintiff's counsel to make ex parte contacts with the employees of a government agency which was a defendant in the case unless the employees were individuals who could "bind it to a decision or settle controversies on its behalf." *Id.* The court concluded that "at least the high level managerial employees who participated in the decision not to promote plaintiff fall within that category." *Id.* at 35. Although the court agreed with the *Wright* court's definition of a party, that is, an employee who had "authority to bind the corporation," the *Frey* court concluded that "there is even stronger reason to construe the term 'party' in DR 7-104 narrowly in this case, where the defendant is a government employer." *Id.* at 37. The court noted that "unlike a corporate party, the government also has a duty to advance the public's interest in achieving justice, an ultimate obligation that outweighs its narrower interest in prevailing in a lawsuit." *Id.*

The courts generally seem to take a somewhat more restrictive view of the term "party" when a governmental entity is involved. *See* *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 960-61 (2d Cir. 1983); *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977), *cf.* *Belcher v. Bassett Furniture*, 588 F.2d 904 (4th Cir. 1978).

134. *See* *MGM Hotel*, *supra* note 106, slip op. at 10-22, and authorities cited in court's opinion. *See also* *Mills Land and Water Company v. Golden West Refining Company*, 230 Cal. Rptr. 461 (1986). The *Mills* court held that ex parte contact with a member of the opposing party's board of directors supported disqualification of the offending attorney. The court's rationale was that such an ex parte contact interfered with the ability of corporate counsel to effectively represent the client. ("Corporations enjoy an attorney-client privilege. [Citation omitted.] The question is not simply whether Wynn was in a position to bind Mills in some fashion. His position makes him *potentially* privy to *privileged* information about the litigation. To establish a 'flexible' rule permitting ex parte communication absent a court order would seriously undercut the ability of corporate counsel to represent their client. [Citation omitted.]) *Id.* at 467. The court cited Formal Opinion 410 of the Los Angeles County Bar Association with approval to support its holding. The court also held that the rationale for a rule prohibiting ex parte contacts with enterprise representatives is the preservation of the attorney-client relationship and the proper functioning of the administration of justice. *Id.* at 468. Finally, the court concluded that it is improper for an attorney to make a unilateral decision with respect to the application of the rule prohibiting ex parte contacts with an adverse party when employees of the corporation are involved. *Id.* at 469.

words, these employees should be deemed to be "represented by another lawyer in the matter" for purposes of analyzing the propriety of ex parte communications by adverse counsel. This is true whether the Model Code or the Model Rules govern the propriety of the proposed contact with an enterprise employee.<sup>135</sup>

Although it can be argued that a broader prohibition on ex parte contacts with enterprise employees will make it more difficult for adverse counsel to develop favorable information because the mere presence of enterprise counsel may affect the testimony which an employee is willing to give, there are at least three responses to that argument. First, the situation in which adverse counsel would have to labor is no different than that which confronts counsel when dealing with an individual party. Second, if an enterprise's employees are the representatives through whom it acts and speaks, fairness requires that its representatives receive the same benefit of the advice and protection of counsel as is afforded individuals; only in this way is the enterprise itself effectively represented by counsel.<sup>136</sup> Third, there is no reason why adverse counsel ought to have an advantage when dealing with enterprise representatives that is not available when dealing with individuals who are adverse. While representation of enterprise employees by counsel will probably mean that their testimony will be presented in a light which is more favorable than would have been the case without representation, the provision of such assistance is one of the legitimate roles which attorneys play in our adversary system.<sup>137</sup> If assisting with telling the client's story in the most favorable light possible consistent with truth and accuracy is one of the honorable functions which able counsel fills when representing an individual, why should an enterprise and its spokesmen be deprived of the same kind of representation? While some will no doubt fear that a few attorneys will suborn perjury by enterprise employees, that is a risk which exists in any case involving the attorney-client relationship.

Our rules of professional conduct must be based on the assumption that attorneys will conduct themselves in an ethical fashion and that, while as in the case of an individual client, the attorney will seek to assist in presenting truthful testimony in the most favorable light possible, attorneys will not suborn perjury.<sup>138</sup> When one balances the interests involved, the legitimate need by all parties for representation by counsel should predom-

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135. *Upjohn* was decided under the Model Code, as was the *MGM Hotel* case. Cf. *Wright v. Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564 (1984) (also decided under the Model Code).

136. See Saltzburg, *supra* note 9, at 310. AS Professor Saltzburg notes, one of the dangers associated with a lack of representation is that when an employee is asked a leading question by skilled counsel during the course of an interview, "they may make statements that they really do not intend." *Id.*

137. See *Mitton v. State Bar of Calif.*, 71 Cal.2d 525, 455 P.2d 753, 78 Cal. Rptr. 649 (1969) and *New York City Bar Association Opinion 80-46*.

138. See panel discussion, "Current Issues in Attorney-Client Relationship," 36 *The Business Lawyer* 571, 595. All of our rules of ethical conduct assume that the overwhelming majority of lawyers are honest and will seek to comply with the standards of conduct prescribed.

inate over the possibility of abuse of the attorney-client relationship by a few.<sup>139</sup> A broader rule recognizes that both the enterprise and society as a whole have an interest in the effective representation of counsel and that, in the case of an enterprise, effective representation requires that its attorneys be free to both receive and deliver information to and counsel those employees who may be deemed to speak for the corporation in any relevant sense, or who may act for the corporation in defending its interests or attempting to comply with the law.

It is significant that the new Model Rules of Professional Conduct expressly authorize counsel to request that the employees of a client not talk with opposition counsel. Rule 3.4(F) provides in relevant part:

A lawyer shall not:

. . .

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or *an employee or other agent of a client*;<sup>140</sup> . . .

This is significant for several reasons. First, the rule implicitly recognizes that enterprise employees generally are not mere witnesses but are representatives of a party who should be treated as parties for discovery purposes. Secondly, it legitimizes efforts by counsel to protect enterprise employees from ex parte discovery and sanctions counsel's efforts to limit discovery to those formal procedures which must be employed by adverse counsel when dealing with a party.<sup>141</sup> Third, the rule will result in competent counsel

139. See Saltzburg, *supra* note 9. As Professor Saltzburg notes:

The attorney-client privilege represents a policy judgment that clients should be encouraged to seek legal advice and that lawyers should be fully and completely informed by their clients when rendering that advice.

*Id.* at 283.

140. ABA/BNA Lawyer's Manual on Professional Conduct, pp. 01:149-01:150 (emphasis supplied).

141. The rule was not free from doubt under earlier versions of our rules of professional conduct. The ABA recognized in Formal Opinion No. 131 that it is improper for an attorney to attempt to influence any person "other than his clients or their employees" to refuse to give information to opposing counsel. (Opinion No. 131 was decided under Canon 39 of the Canons of Professional Ethics.) However, some courts took a different view. See *Wright by Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564 (1984). It is interesting to note that Rule 3.4(F) makes no distinction between employees who may be fortuitous witnesses and employees who may be deemed to act or speak for the corporation in some sense. Likewise, the rule does not address the problem of former employees, but seems to refer only to those who are current employees. The failure to make the first distinction may unfairly deprive adverse counsel of the right to interview mere witnesses; the failure to make the second could effectively deprive the enterprise of representation when its liability or defense turns on the conduct or statements of a former employee that occurred while employed. Presumably, counsel for an enterprise could properly give a similar instruction to any person who falls within the ambit of ER 4.2. See HAZARD & HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, p. 382; pp. 384-85; pp. 435-36; Illustrative Case (b) (1986). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 comment (1987).

automatically issuing a request to all enterprise employees that they not participate in ex parte contacts by adverse counsel, thereby effectively putting into place the limitation on such contacts which a functional rule would mandate as a matter of professional ethics.

#### V. SUMMARY AND CONCLUSIONS

A functional approach to the definition of a "party" for discovery purposes should not become entangled in the debate over the scope to be given to the attorney-client privilege when dealing with enterprise employees. Opponents of a broad attorney-client privilege in the case of corporations have expressed two primary concerns in arguing for a narrow privilege. First, they argue that a broad privilege would allow an enterprise to "funnel" information through its attorneys and thereby prevent discovery of facts which should be discoverable. Secondly, they argue that the result would be a "zone of silence."<sup>142</sup> The application of a functional test to discovery from a corporate party would not allow "funneling" or create a zone of silence. As the Supreme Court noted in *Upjohn*, the facts which a person knows are discoverable; it is only certain communications with counsel that are subject to the protection of the attorney-client privilege.<sup>143</sup>

A functional approach recognizes that most enterprise employees who possess relevant information speak for or represent the organization in some sense and therefore should be treated as parties in order to assure the enterprise's effective representation by counsel. The requirements of effective representation by counsel include, but are not limited to protecting the enterprise's attorney-client privilege, whatever its scope or application may be in a particular case. Stated differently, a functional approach to discovery from a corporate party in no way modifies or otherwise affects the scope or application of the attorney-client privilege.

A functional approach takes into account both the broadened application of the privilege as defined by *Upjohn* and the practical requirements of effective representation of an enterprise, which by its very nature can act and speak only through agents for whose actions and statements during the course of the relationship the enterprise will generally be liable. A functional definition of the term "party" treats those employees who are deemed to be "parties" for liability purposes as parties for discovery purposes. A functional approach to the definition of a party for discovery purposes should protect the legitimate interests of the enterprise while simultaneously providing adverse counsel with much clearer guidelines for the conduct of discovery. To the extent uncertainty still exists—and it is

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142. See, e.g., *United States v. Upjohn*, 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); Simon, *The Attorney-Client Privilege As Applied To Corporations*, 65 *YALE L. J.* 953, 955 (1956). The United States Supreme Court in *Upjohn* rejected these arguments. *Upjohn*, 449 U.S. at 395.

143. See *Upjohn*, 449 U.S. at 395. See also 2 J. WEINSTEIN AND M. BERGER, *WEINSTEIN'S EVIDENCE*, 503(1)[04] (1975).

inevitable that some uncertainty will always exist—recognition of the need for and the ethical propriety of seeking a judicial resolution should enable adverse counsel to at least avoid the serious and intractable ethical dilemmas which have confounded counsel under the old rule.<sup>144</sup>

A functional rule of discovery should not diminish the quantum of relevant, non-privileged information available to the opposition. It would facilitate the exchange of information with enterprise counsel that might not otherwise occur and would help assure that the legitimate rights and interests of all parties are protected through the effective representation of counsel. In the highly regulated and complex legal environment in which we live and work, the right to effective representation by counsel is the *sine qua non* of the protection and assertion of each party's rights under the law. The denial of full and effective representation by counsel will inevitably undermine a party's ability to protect its legitimate interests in our lawyer-dominated adversary system of justice.

As applied in most jurisdictions, there are two principal objections to the current majority rule governing discovery from employees of an enterprise. First, the rule is generally too narrow in scope and therefore does not include non-managerial employees whose conduct or statements may have given rise to the matter in dispute or whose statements may be binding on the enterprise as the admissions of a party. The failure to treat these employees as party representatives may effectively deny the enterprise the benefit of full and effective representation by counsel. Secondly, the rule's uneven and uncertain application, as well as the conflicting ethical obligations created by a failure to clearly distinguish between parties and witnesses, will often place adverse counsel in a dilemma and expose them and their clients to the possibility of sanctions. That possibility is manifestly unfair in a situation in which ambiguity and uncertainty are inherent.

The traditional rule governing *ex parte* interviews with current and past enterprise employees appears to be based at least in part on a now outmoded

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144. In *MGM Hotel*, the Ninth Circuit rejected the argument that any ambiguity with respect to an employee's status may be resolved unilaterally by counsel for the adverse party.

The scope of Morris' authority, just as his status, was not for Cozen to decide. Such a determination should be made by the court, not by Cozen based only on subjective reflection.

Slip opinion, *supra* note 106, at 22, n.12. The Ninth Circuit cited L.A. County Bar Opinion 410 as support for its reasoning. While presenting otherwise unresolvable issues to the court carries with it the risk that counsel for the enterprise who has not already done so will make a Rule 3.4(f) request to the enterprise employees who are the subject of dispute, the Model Rules of Professional Conduct in effect adopt the view that there is no "right" to interview enterprise employees because of their substantial identity with the enterprise; therefore, presentation of the matter to court will not cause an adverse party to be deprived of an opportunity to which they are normally "entitled." Moreover, counsel who brings such an issue to the court will have fully satisfied his or her ethical obligations to all parties. As Hazard and Hodes note, "the only thing [adverse counsel] . . . gives up is the right to catch [the employee] . . . unaware, before the company's lawyer legitimately requests [the employee's] . . . silence, pursuant to Rule 3.4(f)." See HAZARD & HODES, *supra* note 141, at 437.

view of the scope of the attorney-client privilege as applied to corporations and other enterprises. To the extent the rule was co-extensive with the now discredited control group test, it is subject to the same deficiencies and should be rejected. Moreover, the traditional rule ignores significant aspects of the agency basis of enterprise liability and the requirements of effective enterprise representation by counsel; the rule is deficient for those additional reasons.

In addition to the factors which were relevant under the alter ego rule, other factors must be analyzed in evaluating the propriety of ex parte contacts with employees or former employees of an enterprise.

1. The implied prohibition against efforts by an attorney to invade another party's attorney-client privilege.<sup>145</sup> This prohibition must be analyzed in light of the privilege's underlying purposes as articulated by *Upjohn* and the scope given to the privilege by the Supreme Court in that case. Such an analysis and the requirements of effective representation by counsel suggest that no current or former employee who may have privileged communications with counsel regarding the matter in controversy should be subject to ex parte contacts by adverse counsel.

2. The prohibition against communicating with an adverse party known to be represented by counsel without the consent of counsel.<sup>146</sup> Under the emerging rule, this prohibition requires a functional analysis, based on the rules of agency and evidence, in order to identify those employees who may be deemed to be party representatives for purposes of establishing enterprise liability or asserting the rights of the enterprise. No ex parte contacts should be permitted with these employees.

An adversary should obtain no evidentiary or discovery advantage because of the fact that one party to a dispute is an enterprise, which of necessity must act through various individuals. Therefore, the ethics committees of the ABA and the various states, as well as the courts, should adopt a rule which deems any present or former employee who is identified with an enterprise, either for purposes of resolving disputed issues or effective representation of the enterprise, to be a party representative for discovery purposes. Any other rule would put enterprises at a distinct and unfair advantage and may effectively deny enterprises the full benefit of representation by counsel, a fundamental right which is one of the mainstays of our adversarial system of justice.

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145. See ABA Code of Professional Responsibility, DR 4-101(A) and (B); Model Rules, ER 1.6(a); see also ABA Informal Opinion 83-1498.

146. See ABA Code of Professional Responsibility, DR 7-104(A)(1) and ABA Model Rules of Professional Conduct, ER 4.2.



