Journal of Civil Rights and Economic Development

Volume 3
Issue 2 *Volume 3, 1988, Issue 2*

Article 8

March 1988

The Ethics of Conducting Ex Parte Interviews

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residency requirement for admission on motion as violative of the privileges and immunites clause leaves the residency rules in the five states that continue to enforce them in jeopardy.[39]

The practice of law is expanding into multistate specialties.[40] It is submitted that once an attorney has passed the multistate bar examination and has practiced for the requisite period of time, he should be admitted to practice in any state without having to reside in that state or take its bar exam. In *Friedman*, the United States Supreme Court, in an effort to further this trend, has struck down residency requirements to practice on motion in what may signal the death knell for all residency requirements associated with bar admission.

Robert Cote

ETHICS OF CONDUCTING *Ex Parte* INTERVIEWS

A lawyer who communicates informally with an adverse party without first obtaining opposing counsel's consent runs the risk of violating the norms of professional ethics.[1] The determination of whether such a violation has occurred is particularly difficult when the adverse party is a corporation.[2] The Supreme Court has held,

[39] *See supra* notes 33 and 38 and accompanying text.
[40] *See* Brakel & Loh, *supra* note 1, at 699-702.

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[1] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). The text of the rule states:
"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id.* The language of Rule 4.2 resembles that of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY which states:

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

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1980). *See generally* Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 138 (1977) (reason for rule is "imbalance in knowledge and skill between the lawyer and the adverse party, who is generally a layman.").
[2] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) (since corpo-

for example, that for purposes of the evidentiary rule of attorney-client privilege in federal cases, lower-level employees of a corporation may be considered "the client".[3] By contrast, in some state courts, corporate employees qualify as the client for purposes of attorney-client privilege if they are members of the corporation's control group.[4]

One issue that has arisen is whether these approaches to the question of attorney-client privilege also govern an attorney's ability to conduct *ex parte* communications with the employees of a corporate adversary. Some authorities have suggested that any corporate employee may be interviewed on an *ex parte* basis without regard to the scope of the corporation's attorney-client privilege.[5] Many commentators, however, agree that certain personnel should not be contacted without prior approval by the corporation or corporate counsel.[6] The difficulty arises when the courts

ration acts only through its agents, identity of client is unclear). *See generally* Miller & Calfo, *Ex parte Contact with Employees and Former Employees of a Corporate Adversary: Is it Ethical?*, 42 BUS. LAW. 1053, 1053 (1987) (although opposing counsel would like to contact employees of corporation, this practice is questionable due to ethical considerations); Note, *Evidence — Privileged Communications — The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 364 (1970) (same); Note, *Privileged Communications — Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 759 (1971) (corporation as "client" is problematic due to being "abstract legal entity" operating through agent's acts).

[3] *See* Upjohn v. United States, 449 U.S. 383, 391 (1981).

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

Id.

[4] *See, e.g.*, Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. App. 2d 103, 432 N.E.2d 250 (1982) (control group of corporation includes advisers upon whom top management relies, but not individuals who merely supply information); OR. R. EVID. 503(1)(d); TEX. R. EVID. 503(a)(2).

[5] *See* International Business Mach. Corp. v. Edelstein, 526 F.2d 37, 42 (2d Cir. 1975). In general, courts frown upon placing constraints on an attorney's ability to gather information from prospective witnesses. *Id. See also* Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 708 (1979). Professor Leubsdorf states: "[O]pposing counsel should be free to contact directly any employee, high or low, who is a possible witness without notice to the employer's counsel. The public interest in obtaining testimony should not be frustrated by the massive embargo that a warned employer could impose." *Id.*

[6] *See, e.g.*, Kurlantzik, *supra* note 1, at 145-46 (important not to have individuals with knowledge violate privileges); Miller & Calfo, *supra* note 2, at 1053 (distinctions should be made between current employees involved in controversy, those not involved and former

attempt to discern precisely who these key people are.[7]

Jurisdictions and bar associations across the United States have devised four major tests to determine which employees may not be interviewed *ex parte*: the "control group" test,[8] the "flexible control group" test,[9] a "balancing" test[10] and a "speaking agent"

employees); Nath, *Upjohn: A New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations*, 30 BUFFALO L. REV. 11, 14-15 (1981) (courts faced with determining who is "client").

[7] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2, comment (1983). The comment identifies three types of persons which fall within the scope of the Rule 4.2 prohibition. *Id.* The protected parties include: (1) persons having a managerial responsibility on behalf of the organization, (2) and with any other person, (a) whose act or omission in connection with that matter may be imputed to the organization or (b) whose statement may constitute an admission on the part of the organization. *Id. See, e.g.*, Mompoint v. Lotus Dev.. Corp., 110 F.R.D. 414, 418 (D. Mass. 1986) (determination of whether employee is protected depends on topic of questioning and scope of employment); Massa v. Eaton Corp., 109 F.R.D. 312, 314-15 (W.D. Mich. 1985) (current plant managers, though not high level management, protected); Frey v. Department of Health and Human Servs., 106 F.R.D. 32, 35 (E.D.N.Y. 1985) (corporation's "alter ego" is protected).

[8] *See* Alabama State Bar, Op. 83-81 (1983) (lawyer litigating against a corporation may interview, *ex parte*, only those non-official, non-managerial employees who have no authority to speak for or bind corporation); Alaska B.A., Op. 71-1 (1971) (lawyer may conduct *ex parte* interviews with corporate employees who do not represent the corporation in matters related to dispute); Arizona State Bar, Op. 201 (1966) (lawyer may contact non-administrative municipal employees without prior notice and consent of the city's counsel); Los Angeles County B.A., Informal Op. 1976-1 (counsel may interview corporation's employees if they are non-management and interviewing attorney informs employees of his identity). *See also* San Francisco B.A., Informal Op. 1973-4 (plaintiff's attorney may interview non-managerial employees of hospital without notice to opposing counsel); Colorado B.A., Op. 69 (Rev.) (6/20/87) (plaintiff's attorney may interview former corporate employees without consent of entity's counsel provided interview excludes any communications which are subject of attorney-client privilege and may interview current employees if bystanders who lack authority to commit organization); Idaho State Bar, Op. 21 (1960) (counsel for plaintiff may interview any defendant corporate employee except directors or officers); Illinois State B.A., Op. 85-12 (1986) (opposing counsel may not conduct *ex parte* interviews of any employees whose actions or statements can bind or be imputed to the corporation); Maryland State B.A., Op. 83-4 (1982) (ex parte interview with corporate employees who share a degree of identity with corporate entity prohibited).

[9] *See* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981). For the purpose of determining which corporate employees were covered by attorney-client privilege, the *Upjohn* Court rejected the control group test because employees other than those in the corporation's control group may have been involved in communications with the corporate attorney. *Id. See also* Wright v. Group Health Hosp., 103 Wash. 2d 192, 202, 691 P.2d 564, 570 (1984) (court referred to test applied in *Upjohn* as "flexible control group" test); Los Angeles County B.A., Op. 410 (1983) (*ex parte* contacts with any employee of corporation that is involved in subject of controversy is prohibited); Massachusetts B.A., Op. 82-7 (1982) (*ex parte* interviews with corporate employees concerning subject matter within scope of their employment prohibited); Minnesota State B.A., Op. 5 (7/86) (*ex parte* interviews with any corporate employee who has managerial responsibility impermissible); New York State County Bar Comm. on Professional Ethics, Op. 528 (1964) (current corporate employees who can either bind the corporation or occupy ministerial positions protected from *ex parte*

test.[11] This article will examine each of these approaches.

Control Group Test

The control group test allows opposing counsel to freely interview all corporate employees except those whose decisions control corporate policy.[12] In *Fair Automotive v. Car-x Service Systems*,[13] the Appellate Court of Illinois used the control group test in determining that the employees contacted by plaintiff's investigator did not have sufficient decision-making authority to be considered part of the corporation's control group.[14] As a result, *ex parte* communication with these employees was permissible.[15]

interviews); New York City B.A., Comm. on Professional Ethics, Inquiry Reference No. 80-46 (1980) (no *ex parte* interviews of corporate defendant employees about any matters which are within the scope of their employment).

[10] Mompoint v. Lotus Dev. Corp., 110 F.R.D. 414, 418 (D. Mass 1986). In *Mompoint*, the court stated that when deciding whether to allow an *ex parte* interview of a corporate defendant, it is impossible to devise a rule. *Id.* An order barring a one-sided interview would "depend on the facts and circumstances of the particular case." *Id.* A balance must be struck, according to the court, between the attorney's need for information and the corporation's need to keep the communications privileged. *Id. See also* Maryland State Bar, Informal Op. 78-27 (1978). Low level corporate employees may be interviewed but a managing agent may not and any request to interview an employee who falls between these extremes must be decided on the facts of the case. *Id.*

[11] *See* Wright v. Group Health Hosp., 103 Wash. 2d 192, 201, 691 P.2d 564, 569 (1984). When deciding whether a corporate employee was a party to the litigation for the purpose of allowing or prohibiting *ex parte* contact with the employee by opposing counsel, the court stated: "We hold the best interpretation of 'party' in litigation involving corporations is only those employees who have the legal authority to 'bind the corporation in a legal evidentiary sense, *i.e.*, those employees who have 'speaking authority' for the corporation." *Id.*

See also Loudon v. Mhyre, 110 Wash. 2d 675, 756 P.2d 138, 142 (1988). The court held: "opposing counsel could interview employees of the corporation *ex parte* so long as such employees were not authorized to speak for the corporation or in a management status." *Id.* (quoting *Wright*, 103 Wash. 2d at 201, 691 P.2d at 569).

See also Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988) In *Chancellor*, the court defined the "speaking agent" test as a *sui generis* determination based on a corporate employee's level of managerial responsibility, whether his or her acts with regard to this matter could be imputed to a corporation for civil or criminal liability, and whether the employee's statements could be an admission on the part of the organization. *Id.* According to the Federal Rules of Evidence, statements of current employees can be treated as binding admissions of a corporation if they concern a matter within the scope of their agency or employment. FED. R. EVID. 801(d)(2)(D).

[12] *See supra* note 8 and accompanying text.

[13] 128 Ill. App. 3d 763, 471 N.E.2d 554 (1984).

[14] 471 N.E.2d at 561. The Court noted that the corporate employees interviewed could not be considered within the top management of the firm. *Id.*

[15] *Id. See also* Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962). The court stated:

In *McKitty v. Board of Education*,[16] a federal court in the Southern District of New York applied the control group test to a small school district and concluded that the plaintiff McKitty could conduct *ex parte* interviews of any school district employee except those who participated in any way in the decision to terminate her or deny her tenure.[17] The court in *McKitty* rejected the school board's argument that the flexible control group test employed in *Upjohn v. United States* [18] controlled.[19] The board, arguing by analogy, reasoned that if the *Upjohn* Court had declared that it was a violation of the evidentiary rule of attorney-client privilege to allow the government to acquire the memoranda representing corporate attorney interviews with non-control group employees, then the *McKitty* court should apply this reasoning to the ethical question of allowing *ex parte* interviews with school board employees.[20]

Magistrate Tyler, writing for the court in *McKitty*, first pointed out that *Upjohn* protected only "communications" between client and attorney and not the underlying facts of the case.[21] The court then dismissed the school board's contention that the question of the ethical propriety of interviewing school board employees was an evidentiary issue under Federal Rule of Evidence 801(d)(2)(D), which exempts from the hearsay rule any statements made by employees within the scope of their employment while employed.[22] Magistrate Tyler doubted that statements made by teachers about employment practices of the school district were within the scope of their employment,[23] but relied upon the reasoning of *Frey v.*

> [I]f the employee making the communication, 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, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.

Id.

[16] No. 86 Civ. 3176 (S.D.N.Y. Dec. 15, 1987) (LEXIS, Genfed library, Dist. file).
[17] *Id.*
[18] 449 U.S. 383, 391 (1981).
[19] No. 86 Civ. 3176 (S.D.N.Y. Dec. 15, 1987) (LEXIS, Genfed library, Dist. file).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

Department of Health and Human Services[24] to reject this argument.[25] The *Frey* court had concluded that if employees are non-parties for the purposes of DR 7-104, then they are also non-parties for the purposes of the Federal Rules of Evidence.[26]

Flexible Control Group Test

The flexible control group test precludes *ex parte* contact not only with people who formulate corporate policy, but also with those who execute it.[27] The United States Supreme Court in *Upjohn v. United States* [28] applied the flexible control group test to determine whether memoranda and notes taken from a corporate counsel's interviews with corporate employees not in the control group were protected by attorney-client privilege.[29] The Court reversed the Sixth Circuit Court of Appeals[30] and held that the communications of employees outside of the corporation's control group should also fall within the attorney-client privilege.[31] The Supreme Court noted that the control group test was too narrow

[24] 106 F.R.D. 32 (E.D.N.Y. 1985).

[25] *See* McKitty v. Board of Education, No. 86 Civ. 3176 (S.D.N.Y. Dec. 15, 1987) (LEXIS, Genfed library, Dist. file).

[26] *Frey*, 106 F.R.D. at 38.

[27] *See supra* note 9 and accompanying text.

[28] 449 U.S. 383 (1981).

[29] *Id.* at 391-97. The flexible control group test, according to the *Upjohn* Court, protects not only those who act on the attorney's advice but the employees who supply information to the attorney, making it possible for him to provide reliable counsel. *Id.* at 390. In a corporation, the Court reasoned, employees in the middle and lower tiers who are not in the control group may have information which the corporate attorney needs to know. *Id.* at 391.

The Supreme Court's flexible control group test is based upon an earlier Eighth Circuit Court of Appeals case in which the court noted that an attorney may need information from middle or non-management employees. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1978). *See generally* Nath, *Upjohn: A New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations*, 30 BUFFALO L. REV. 11, 37 (1981) (outlines effect of *Upjohn* on attorney-client privilege doctrine).

[30] *See* United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). The federal appeals court had held that only communications made to personnel in the corporation's control group — the top management — would be shielded from *ex parte* interviews by opposing counsel. *Id.* at 1226-27.

[31] *See Upjohn*, 449 U.S. at 391. The Court reasoned that the narrow restriction of the attorney-client privilege by the circuit court of appeals would make it difficult for corporate attorneys to give advice to employees who are not within the control group of the corporation. *Id.* at 392. The Court further stated that the lower court's test was difficult to apply and left the parties involved without a test to determine if particular discussions would be protected. *Id.* at 393.

because employees who are not in the upper echelon of corporate management but execute policy decisions would not have their communications with counsel shielded from discovery.[32] In *Massa v. Eaton Corp.*[33] a federal district court in Michigan used the *Upjohn* logic for determining the scope of attorney-client privilege in a corporation as the appropriate standard for DR 7-104(A)(1).[34] The court quoted bar opinions from Michigan,[35] San Diego[36] and Los Angeles[37] to support its position that although non-managerial employees could be questioned *ex parte*, managerial level employees, even if not technically within the control group, could not be so questioned.[38] The court thus extended DR 7-104(A)(1)[39] to include for "the sake of certainty and predictability" any managerial level employee of a corporation.[40]

The California Appellate Court echoed this holding in *Mills Land and Water Co. v. Golden West Refining Co.*[41] Here the court disapproved of an opposing attorney who had contacted a director of the defendant corporation who was no longer a member of the company's control group.[42] The court, quoting a Los Angeles

[32] *Id.* at 391-392.

[33] 109 F.R.D. 312 (W.D. Mich. 1985).

[34] *Id.* at 314. The court stated that while *Upjohn* did not concern DR-7-104, its logic was "easily carried over." *Id.*

[35] *Id.* at 314 (quoting Michigan State Bar Comm. on Professional and Judicial Ethics, Informal Op. 535 (June 18, 1980)).

[36] *Id.* at 314 (quoting San Diego B.A. Ethic Comm. Op. 1984-85, *reprinted in* ABA/BNA Lawyer's Manual of Professional Conduct, Current Reports Vol. 1, No. 24 at 555) (expanded view of DR 7-104(A)(1) to include restriction of *ex parte* interviews with employees similarly situated to those in *Massa*).

[37] *Id.* (quoting Los Angeles County B.A. Formal Op. 410, *reprinted in* ABA/BNA Lawyer's Manual of Professional Conduct) (construed DR 7-104(A)(1) as precluding communication with employees who are not necessarily top management).

[38] *See Massa*, 109 F.R.D. at 314. "While the new Model Rules have not yet been adopted in Michigan, I am not persuaded that Michigan's application of DR-7-104 would allow the conduct of Plaintiffs and their counsel in this case." *Id.*

[39] *See supra* note 1 and accompanying text.

[40] *Massa*, 109 F.R.D. at 315.

[41] 186 Cal. App. 3d 116, 230 Cal. Rptr. 461 (1986). This case concerned the propriety of opposing counsel contacting a former corporate president who was a current member of the board of directors and a shareholder of the corporation. *Id.* at 120, 230 Cal. Rptr. at 462. The trial court disqualified plaintiff's attorney from further participation in the lawsuit and the appellate court affirmed that disqualification. *Id.* at 120-21, 230 Cal. Rptr. at 462.

[42] *Id.* at 127-28, 230 Cal. Rptr. at 467. The court noted that even though the director who was contacted was not in the control group of the corporation, the *ex parte* contact would not be permissible without a court order. *Id.* at 128, 230 Cal. Rptr. at 467. The

County Bar Association opinion, reasoned that although the employee could no longer bind the corporation, having resigned as an officer, as a director he continued to be privy to information which could compromise the effectiveness of the corporation's counsel.[43] The court further concluded that "an attorney may not make a unilateral decision on the application of rule 7-103 involving a corporate party."[44]

Balancing Approach

In addition to the control group and flexible control group tests, a court may use an analysis which balances a plaintiff's need to acquire information with the corporation's need to shield key personnel from an *ex parte* interview.[45] In *Mompoint v. Lotus Development Corp.*,[46] the court had to determine if opposing counsel could question defendant's employees out of the presence of the corporation's attorney.[47] The court first determined whether the employer had "good cause" to prevent plaintiff's attorney from

court pointed out that directors guide the business of a corporation, owe a fiduciary duty to the corporation, control litigation and attend board meetings where litigation may be discussed by the corporate attorneys. *Id.* The court added, "If anything, a director embodies a corporation to an even greater extent than does a salaried employee." *Id.* at 129, 230 Cal. Rptr. at 468.

[43] *Id.* at 129-30, 230 Cal. Rptr. at 468. (quoting Formal Op. No. 410 of the Los Angeles B.A. (1983)). Guided by *Upjohn*, the court adopted the bar association's rationale for rejection of a control group approach: the difficulty in determining who is a member of the control group; the likelihood of the employee prejudicing his own or the corporation's position through binding statements or admissions; and the corporation's interest in preserving information for release to opposing counsel without benefit of corporate counsel. *Id.*

[44] *Id.* at 131, 230 Cal. Rptr. at 469.

[45] *See supra* note 10 and accompanying text. *See generally* Satzberg, *Corporate & Related Attorney-Client Privilege*, 12 HOFSTRA L. REV. 279, 280 (1984) (difficult to implement the attorney-client privilege so "that corporations receive appropriate, but not excessive protection").

[46] 110 F.R.D. 414 (D.C. Mass. 1986). In *Mompoint*, a corporate defendant wanted to prevent the plaintiff from conducting an *ex parte* interview of employees in an action for alleged wrongful termination. *Id.*

[47] *See Mompoint*, 110 F.R.D. at 418. "the question becomes in what circumstances does a corporate party show 'good cause' . . . for the entry of a protective order which prohibits opposing counsel from communicating with its employees except with corporate counsel's consent." *Id.* Plaintiff's counsel wanted to question corporate female employees about alleged sexual advances the plaintiff made to them at the time plaintiff was a corporate employee. *Id.* The court noted that the female employees had already complained to someone in authority at the corporation and the corporation thus had the records of the complaints and the testimony of the people who heard the complaints available to it. *Id.* at 418-19.

communicating with its employees without corporate counsel's consent.[48] Rejecting any attempt to develop a specific test, the court instead decided to proceed on a case by case basis, balancing the interests of the plaintiff and the corporate defendant.[49] The court in *Mompoint* held that there was no "good cause" shown for the entry of a protective order restricting plaintiff's counsel from interviewing employees of defendant's corporation without the presence of the corporation's counsel.[50]

Speaking-Agent Test

When a court employs a broad speaking-agent test, it shields from *ex parte* interviews all agents or employees whose words or actions might legally bind the corporation.[51] In *Wright v. Group Health Hospital*,[52] for example, the Supreme Court of Washington concentrated on communications between a corporation's counselor and its employees.[53] The court then went on to define the term "party" within the meaning of DR 7-104(a).[54] The court concluded that "party" referred to those having authority to legally bind the corporation.[55] Since the people that the plaintiff

[48] *Id.* at 419.

[49] *See Mompoint*, 110 F.R.D. at 418-19. According to the court in *Mompoint*, an initial inquiry would be "whether or not the subject matter of opposing counsel's inquiries to the employee is such that the employee's statements are likely to be admissible against the corporation." *Id.* at 418. *See* FED. R. EVID. 801 (d)(2)(D). According to this rule, an employee's statements to opposing counsel are admissible against an employer if they concern a matter within the scope of the employee's employment. *Id.*

A further inquiry, according to the court, would be whether, in a particular case, it was necessary for "effective representation" that corporate counsel consent to and be present for an interview of an employee by opposing counsel. *Mompoint*, 110 F.R.D. at 418.

[50] *Mompoint* 110 F.R.D. at 419. The court found that in the present case, the plaintiff's need to gather evidence outweighed the interest of the defendant in having its attorney present at the interview. *Id.* The court reasoned that having opposing counsel present at the interview would "inhibit the free and open discussion which an attorney seeks to achieve at such interviews." *Id.*

[51] *See supra* note 11 and accompanying text.

[52] 103 Wash. 2d 192, 691 P.2d 564 (1984).

[53] *Id.*

[54] *See supra* note 1 and accompanying text.

[55] *Wright*, 103 Wash. 2d at 201, 691 P.2d at 569.

In setting out a speaking-agent test, the court stated: "We hold the best interpretation of 'party' in litigation involving corporations is only those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, i.e., those employees who have 'speaking authority' for the corporation." *Id.* Under the Federal Rules of Evidence, statements by lower level employees can "bind" a corporation as admissions as if made within

wanted to interview were no longer with the corporation, the court reasoned that they had no authority to bind the corporation and could be questioned.[56]

Recently, in *Chancellor v. Boeing Co.*,[57] a federal district court in Kansas employed the speaking-agent test,[58] stating that it was (1) consistent with the ABA's most recent approach;[59] (2) in accord with DR-7-104(A)(1)'s protective purpose and (3) flexible enough to keep the testimony of employees accessible to all sides.[60] However, the court in *Chancellor* went further than *Wright* by holding that *former* employees could also be "parties" protected from *ex parte* interviews if their acts and omissions concerned the subject matter of the litigation and were thus imputable to the corporation.[61] Thus, *Chancellor* banned *ex parte* contact with two distinct groups of employees: those with managerial authority as well as those whose actions as agents could bind the corporation.[62]

the scope of their employment. *See* FED. R. EVID. 801(d)(2)(D). *See also* Miller & Calfo, *supra* note 2, at 1058 (evidentiary rules would allow lower level employees to bind corporation). *Accord* Association of the Bar of the City of New York, Comm. on Professional Ethics, Inquiry Reference No. 80-46 (1980). When the opposing counsel wants to question corporate employees, if the subject of the interview is within the scope of the employee's duties, then that employee must be considered to be a party to the litigation. *Id.*

[56] *Wright*, 103 Wash. 2d at 201, 691 P.2d at 569. The *Wright* court would not have allowed opposing counsel to hold *ex parte* interviews with corporate employees if they had managing authority: "We hold 'current' group health employees should be considered 'parties' for the purposes of the disciplinary rule if, under applicable Washington law, they have *managing* authority sufficient to give them the right to speak for, and bind, the corporation." *Id.* (emphasis added). Because those who were sought to be interviewed were no longer employed by the corporation, they could not "speak" for it and the court permitted the *ex parte* interview. *Id. See also* Miller & Calfo, *supra* note 2, at 1056 (outlines *Wright* approach).

[57] 678 F. Supp. 250 (D. Kan. 1988).

[58] *Id.* at 253. The court held that a corporate employee is a "party" pursuant to DR-7-104 (A)(1)(A) if: "he or she has managerial responsibility, his or her acts or omissions in connection with this matter may be imputed to the corporation for purposes of civil or criminal liability, or his or her statements may be an admission on the part of the organization." *Id.*

[59] *Id.* (construing ABA/BNA Lawyer's Manual on Professional Conduct 71:314 (1984)).

[60] *Id.*

[61] *Id.* The court emphasized that the former employee's acts or statements must be "in connection with the matter in representation." *Id. See also* Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 39-40 (D. Mass. 1987) (former employee could be interviewed *ex parte* because his acts could not be imputed to corporation).

[62] *Chancellor*, 678 F. Supp. at 253-54.

Conclusion

A variety of tests have been formulated to determine who, in the corporate setting, is a "party" protected from an *ex parte* interview. It is submitted that in light of recent case law,[63] an attorney should refrain from interviewing *ex parte* employees or agents with managerial or speaking authority to bind the corporation.

Eugene P. Gurr

[63] *See supra* notes 51-62 and accompanying text.