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The *Niesig* and NLRA Union: A Revised Standard for Identifying High-level Employees for *Ex Parte* Interviews

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Currently, few cases actually proceed to trial, despite the reality that more complaints are filed than ever before.[1] The catch is that many cases are tried in discovery.[2] Attorneys use various methods of formal discovery to strengthen their cases while weakening their opponents. They may even use discovery motions to create the appearance of winning in an effort to increase leverage. Because attorneys are skilled in evaluating evidence, at the close of discovery, they can often effectively calculate the probable outcome of a trial. The perceived *winner* of discovery might either leverage a greater settlement or successfully move for summary judgment. In such a litigation climate, methods of informal discovery take on ever greater significance.

Ex parte interviews are a particularly effective method of informal discovery, in actions against entities especially, not least because they comport well with state and federal policies of liberal discovery.[3] An *ex parte* interview is where an attorney questions an individual outside the presence of opposing counsel. Such interviews help streamline the collection of the facts.[4] Witnesses are more likely to be less guarded and provide relevant information at informal interviews than at formal depositions.[5] In such a setting, attorneys are better able to discern which witnesses have relevant information to their theory, a streamlining with cost-cutting benefit.[6] *Ex parte* interviews also help level the playing field, which is especially valuable in

1. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1255 (2005).

2. James W. McElhaney, *Discovery is the Trial: Use Depositions as if They're the Only Chance You'll Have to Try the Case*, 93 A.B.A. 26, 26 (2007) ("In more than 90 percent of all cases filed in the United States, discovery is the only trial anybody gets.").

3. *See* Fed. R. Civ. P. 26(b)(1) and N.Y. C.P.L.R. 3101 (McKinney 2009); Spectrum Sys. Int'l. Corp. v. Chemical Bank, 78 N.Y.2d 371, 376 (1991) (section 3101 "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits."); Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983) (Federal Rules of Civil Procedure "have never been thought to preclude the use of such venerable, if informal, discovery techniques as the *ex parte* interview.").

4. In *Niesig v. Team I*, 76 N.Y.2d 363, 377 (1990), Judge Bellacosa stated, "[d]iscovery of the truth and relevant proofs is the end to which litigation is the means. The fewer the parties to whom counsel can informally turn in the quest for facts on behalf of a client's cause, the more cumbersome becomes the realization of this goal."

5. *See* Stephen Sinaiko, Ex Parte *Communication and The Corporate Adversary: A New Approach*, 66 N.Y.U. L. Rev. 1456, 1477–79 (1991) ("[F]ormal discovery is not an ideal—or even adequate—substitute for the informal interview."); G-1 Holdings v. Baron & Budd, 199 F.R.D. 529, 533 (S.D.N.Y. 2001) ("Indeed, *ex parte* interviews with such persons have been recognized as having an important role in information gathering in that former employees 'often have emotional or economic ties to their former employer and would sometimes be reluctant to come forward with potentially damaging information if they could only do so in the present of the corporations attorney.'") (quoting Polycast Tech. Corp.v. Uniroyal, Inc., 129 F.R.D. 621, 628 (S.D.N.Y. 1990)); Int'l Bus. Machs. Corp. v. Edelstein, 526 F.2d 37, 41 (2d Cir. 1975) ("[I]nterviews in the presence of opposing counsel did not lend themselves to the free and open discussion which IBM sought.").

6. *Int'l Bus. Mach. Corps.*,526 F.2d at 41 ("A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case.").

employment and civil rights cases.[7] Entities, whether commercial or governmental, normally have greater evidentiary advantages than individual plaintiffs because they have immediate access to documents and employee-witnesses, while plaintiffs typically lack such resources.[8] Finally, *ex parte* interviews promote the ideals of justice because costly depositions may actually deter plaintiffs with limited means from pursing legal remedies.[9]

However, New York Professional Code of Conduct Rule 4.2 (Rule 4.2), which had previously been Disciplinary Rule 7-104 prior to 2009 and is in informally known as the "no-contact rule," curtails *ex parte* interviews by prohibiting an attorney from communicating with a "party" who is represented by counsel.[10] The rule is easily applied when a party is a person, but because entities operate through employees, it is unclear which employees constitute the "party." For decades the New York State courts never addressed the problem of when an employee is a "party," and the New York bar associations that took aim at it devised an array of conflicting tests. Finally, in 1990, the New York Court of Appeals seemingly resolved the issue in *Niesig v. Team I* by promulgating a three-prong "alter-ego test."[11] Under this test, a party includes "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel."[12] Since then, both courts and commentators have primarily addressed whether or not low-level and former employees should be considered parties under the test, typically concluding that they are not.[13]

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7. Kaveney v. Murphy, 97 F.Supp.2d 88, 94 (D. Mass. 2000) ("Employment cases, especially discrimination claims, present the most compelling case for court authorization of ex parte contact between the plaintiff's counsel and the defendant's employees.").

8. *See e.g.,* Siguel v. Trs. of Tufts College, No. 88-0626-Y, 1990 WL 29199, at *3 (D. Mass. Mar. 12, 1990) ("[Defendant] controls access to nearly all the information and evidence [plaintiff] needs to present his [discrimination] case."); Wright v. Group Health Hosp., 691 P.2d 564, 568 (Wash. 1984) ("[T]here is the need of the adverse attorney for information which may be in the exclusive possession of the corporation and may be too expensive or impractical to collect through formal discovery.").

9. *See* Bouge v. Smith's Mgmt. Corp., 132 F.R.D. 560, 565 (D. Utah 1990) ("[I]t must be recognized that contemporary litigation is costly and often the 'little guy' . . . is at a distinct disadvantage in the process.").

10. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 (2009); N.Y. Comp. Codes & Regs. tit. 22, § 1200.33 (1990).

11. *See* Niesig v. Team I, 76 N.Y.2d 363 (1990).

12. *Id.*

13. *See, e.g.*, George B. Wyeth, *Talking to the Other Side's Employee's and Ex-Employees*, 4 Litig. 8–11 (1989) (former and low-level employees); Susan J. Becker, *Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints*, 51 Md. L. Rev. 239 (1992); Robert S. Whitman, Ex Parte *Contacts with an Adversary's Former Employees*, 237 NY.L.J. 4 (2007); John E. Iole & John D. Goetz, *Ethics or Procedure? A Discovery-Based Approach to* Ex Parte *Contacts with Former Employees of a Corporate Adversary*, 68 Notre Dame L. Rev. 81 (1992) (former employees); Walter Lucas, *ABA Ethics Unit Approves Ex-Employees Interviews*, 127 N.J.L.J. 1067 (1991); Marshall Lasser, *An Attorney's Right to Interview* Ex Parte *Employees of a Corporate Adversary*, 74 Mich. B. J. 166 (1995); C. Evan Stewart, *Ground Rules Shift for* Ex Parte *Interviews*, 13 Nat'l L. J. S6 (1991); Heidi L. McNeil & Sara R. Roberson, Ex Parte *Communications with Former Employees of an Adversary: When are they Permitted?*, Ariz. Att'y, Jan. 1996, at 19; Katt v. New York City Police Dep't, No. 95 Civ. 8283, 1997 WL 394593,

Surprisingly, the issue that remains largely unexamined is which higher-level employee witnesses are reachable for *ex parte* interviews—since *Niesig* did not completely ban such interviews. This inquiry is not easily resolved. The *Niesig* test fails to demarcate where the boundary-line rests along the organizational hierarchy beyond which attorneys may not pass.[14] Rather, the three-pronged test leaves attorneys, who wish both to zealously advocate for their clients and remain within the ethical lines, with an interpretive puzzle because the test is premised on general and open-ended principles of agency and evidence law that are unsuitable in the attorney disciplinary context. Deferring to agency and evidence law forces attorneys to probe into and verify the employee's status before conducting *ex parte* interviews—an arduous and inexact operation.

Much of the time, attorneys will actually request permission from the employer directly or from the court to conduct such interviews. This situation becomes problematic when an employer objects to an attorney's request or judicial application to interview employees *ex parte* on the grounds that the employees are supervisors or managers. With such a representation from the employer, the employees are presumably off-limits under the *Niesig* test. Consequently, the attorney may abandon the discovery option, or a court may summarily hold that the employee's title satisfies the *Niesig* test.

Yet claiming that an employee is a supervisor or manager should not automatically render the employee a "party"—on the face of it, *Niesig* does not authorize so broad an interpretation. The effect would be inequitable. Consider, for example, a company that employs over 100,000 employees with varying supervisory and managerial levels. The company could use the disciplinary rule offensively to insulate its workforce from *ex parte* interviews solely based on titles,[15] many of which might be simply decorative rather than an actual anointment of authority.[16] Such a result would grant companies exclusive ownership and control over witnesses, a consequence that, as the Second Circuit has

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at *1 (S.D.N.Y. July 14, 1997) (low-level); Pritchard v. County of Erie, No. 04 Civ. 00534, 2007 WL 1703832, at *5 (W.D.N.Y. June 12, 2007) (low-level); Albany Med. Ctr. v. U.S., 04 Civ. 1399, 2006 WL 4573714 (N.D.N.Y. Oct. 17, 2006) (former employee); Wright v. Stern, No. 01 Civ. 4437, 2003 WL 23095571, at *1 (S.D.N.Y. Dec. 30, 2003); Pauling v. Sec'y of the Dep't of Interior, No 95 Civ. 8408, 1997 WL 661393, at *1 (S.D.N.Y. Oct. 22, 1997) (low-level employee); *Wright*, 2003 WL 23095571 at *1 (same); Gidatex v. Campaniello Imps., Ltd., 82 F. Supp. 2d 119, 125 (S.D.N.Y. 1999) (low-level employees); Muriel Siebert & Co. v. Intuit, Inc., 8 N.Y.3d 506, 509 (2007) (former employee); Polycast Tech. Corp. v. Uniroyal, Inc., No. 87 Civ. 3297, 1990 WL 180571, at *2 (S.D.N.Y. Nov. 15, 1990) (same); Judd v. Take-Two Interactive Software, Inc, No. 07 Civ. 7932, 2008 WL 906076, at *1 (S.D.N.Y. Apr. 3, 2008) (same); Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers, LLP, No. 03 Civ. 5560, 2006 WL 1520227, at *5 (S.D.N.Y. June 1, 2006) (former employees).

14. *See Wright*, 2003 WL 23095571, at *1; Burns v. Bank of Am., No. 03 Civ. 1685, 2007 WL 1589437, at *14, n.12 (S.D.N.Y. June 4, 2007) ("[W]hether [the] communications [with an individual] who is certainly in a managerial position . . . would be allowed under *Niesig* is less clear but need not be decided for the purposes of the present motion.").

15. *See* Frey v. Dep't of Health and Human Serv., 106 F.R.D. 32 (E.D.N.Y. 1985) (a blanket ban would "permit [defendant] to barricade huge numbers of potential witnesses from interviews except through costly discovery procedures").

16. One district court has noted, "[d]etermining what employees are managerial, however, can be difficult, especially as industry increasingly recognizes the efficiency advantages in many instances of delegation

made clear, is incompatible with "time-honored and decision-honored principles . . . 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."[17]

While each prong of the alter-ego test suffers from its own infirmities, when an attorney seeks to interview an employee fact witness, the main prong of the test used is whether the employee is able to "bind" the company.[18] In its current state, the binding prong does not effectively help attorneys identify which managerial or supervisory witnesses are parties. The bases for the binding prong—agency and evidence law—are uninformative and raise more questions than they answer.[19] An effective disciplinary rule should be composed in a manner that provides clear guidance; such is fundamental for regulating attorney conduct. If a rule requires judicial clarification, the resultant test should then provide clear guidance. Rule 4.2 is unreasonably vague in relation to organizational parties, and its judicially-created companion *Niesig* test fails to fill in the gaps, a deficiency which invites a broad and inconsistent range of consequences.

Aggressive attorneys who attempt their own interpretation of the binding prong and conduct *ex parte* interviews risk disciplinary sanctions. This threat may also induce less aggressive attorneys to forsake the method altogether, potentially losing access to valuable information and forcing them to resort to more expensive and cumbersome formal methods. Or attorneys may seek wasteful discovery on the ancillary issue of an employee's authority, unnecessarily prolonging and burdening the litigation.[20] Finally, the binding prong does not promote judicial efficiency because it inevitably requires courts to determine whether or not an employee should be designated a party. In so doing, attorneys reveal their legal strategy, which undermines the purpose of the informal interview.

Accordingly, the New York Court of Appeals should further explain the term "binding." Stated differently, the prong requires a practical instrumental basis to make it more operational. Agency and evidence law alone are inadequate. This Article argues that the National Labor Relations Act's "supervisor" test will provide a better basis for the binding prong because it will establish a clearer bright-line standard to determine when employee fact witnesses, high-level ones in particular, are able to bind the employer. The NLRA supervisor test comports well with the current jurisprudential bases of the *Niesig* test and will improve the functionality of the binding prong.

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of decisionmaking authority to the working level." Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 443 (S.D.N.Y. 1995).

17. Int'l Bus. Machs. Corp. v. Edelstein, 526 F.2d 37, 42 (2d Cir. 1975).

18. For the purposes of this Article, fact witness employees are those that do not expose the entity to vicarious liability (imputation prong) or associate with counsel (counsel prong). They are the bystanders who see the events that have given rise to a cause of action.

19. *See* Niesig v. Team I, 76 N.Y.2d 363, 373–75 (1990).

20. *See Niesig*, 76 N.Y.2d at 377 (Bellacosa, J., concurring) (The test may "replace a useful and straightforward ex parte interview with a whole new and expensive litigation tier. . . . [T]he purpose of pretrial discovery—or the ultimate litigation question itself—may well be which employees fit into the protected 'party' category.").

Part I provides a historical overview of American ethical oversight, highlighting the change in oversight from broad standards to regulatory commands and the effect of that evolution on the goals of oversight. Part II specifically focuses on the history of the no-contact rule prior to *Niesig*. While the rule itself has undergone minimal changes since it first appeared in the nineteenth century, both New York bar associations and courts have struggled to clarify the meaning of "party" in the organizational arena, devising numerous tests.

Part III examines the appropriate composition of disciplinary rules as opposed to standards or aspirational commands. When an ethical directive subjects attorneys to punitive sanctions, it must provide clear, prospective guidance. If the directive leaves attorneys guessing or unsure, it fails. Part IV discusses the shortcomings of *Niesig*, focusing on how the doctrines of agency and evidence are inadequate bases to assist attorneys in determining when high-level employees are able to bind their employer. Part V outlines the basic concepts of the NLRA supervisor test. By explicitly defining a supervisor, the test helps articulate a hierarchal boundary beyond which attorneys may not pass.

Finally, Part VI outlines procedural and evidentiary requirements that parties should satisfy either to conduct or preclude *ex parte* interviews, taking into account the purposes of the rule and the interests of all parties. Currently, no uniform procedure is used. Instead, both sides have pursued an array of measures in an effort to protect themselves.

I. A BRIEF HISTORY OF AMERICAN LEGAL ETHICAL OVERSIGHT

The development of American legal ethical oversight has become a familiar history.[21] Ethical oversight grew out of a movement to restore and ensure the integrity, stature, and public trust of the legal profession. To reestablish the profession's honor, legal ethicists pressed classical republican values, which promoted a greater balance between the interests of the social polity and the client. At the same time, the focus of legal ethics has shifted from generalized moral standards toward particularized regulations. These two divergent social standards have often collided with one another. The more regulated the system has become, the more it has progressively diminished the traditional moral characteristics, prized by a profession self-proclaimed as guardians of the law. This gradual sea change has garnered a great deal of scholarly debate over whether narrow, legalistic commands or general, instructive propositions better serve the profession and the law.[22]

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21. *See, e.g.*, Charles W. Wolfram, Modern Legal Ethics 53–63 (West Publishing Co. 1986); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L. J. 1239, 1249–53 (1991); James M. Altman, *Considering the A.B.A's 1908 Canons of Ethics*, 71 Fordham L. Rev. 2395 (2003); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 Fla. L. Rev. 977, 999–1009 (2003); Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 Ala. L. Rev. 471 (1998); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 Vand. J. Transnat'l L. 1117, 1125–45 (1999).

22. *Compare* Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 Iowa L. Rev. 901, 910 (1995) (a "code of positive law cannot serve this prefatory function by placing

A. The Professional Temperament in the Early 20th Century

During the early twentieth century, the legal profession was still recovering from a dramatic decline in public perception. In his 1953 history, *The Lawyer from Antiquity to Modern Times*, Roscoe Pound described the era from the 1830s to 1870s as an "Era of Decadence," characterized by rapid deprofessionalization.[23] The profession lacked uniform and rigorous standards and requirements for education, bar admission, and practice.[24] Many states had, in fact, eliminated educational requirements, while other states substantially reduced them. In some instances, courts were legislatively restricted from reviewing and nullifying relaxed admissions policies.[25] While Jeffersonian and Jacksonian democratic ideals effectively loosened the aristocratic grip over the profession, they also left it without a national institutional infrastructure and the standards and traditions such institutionalism might otherwise foster.[26] Nearly any individual was admitted to practice, regardless of professional or educational aptitude or level of formal education. As a result of this de-institutionalization, "the bar was not," Pound observed, "to be regarded as a profession, but as a mere private, money-making occupation," reducing the vocation into a trade.[27] In addition, with licenses granted indiscriminately, unethical and unprofessionalized attorneys could easily prey on the socially vulnerable, further injuring the profession's reputation.[28] Beginning in the 1870s, states gradually began devising ethical codes, improving educational standards, and toughening bar admission requirements.[29] Local and state bar associations also began to emerge, with the express mandate to fortify the profession's stature.[30]

Despite late nineteenth-century advances, the profession remained largely unchanged and vulnerable at the turn of the century,[31] particularly in a national climate of expanding capital and corporate growth. Many in the profession had allied themselves with wealthy, corporate interests, helping them circumvent or invalidate restrictive economic legislation and defeat social litigation. Many attorneys subordinated civic

ethics outside the sphere of law. Such a positivist misplacement of ethics will prevent lawyers from being guided by 'conscience,' thereby stifling ethics.") *with* Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 Ohio St. L.J. 551 (1991) (attorneys may act with integrity within a positivist ethical system).

23. Roscoe Pound, The Lawyer from Antiquity to Modern Times 221 (1953).

24. *See id.* at 227–29.

25. *See id.* at 230.

26. *See id.* at 234–37; *see also* Harlan F. Stone, Law and its Administration 172 (1915).

27. Pound, *supra* note 23, at 232; *see also* Morton Horwitz, The Transformation of American Law 1780–1860 253 (1977) ("Law, once conceived of as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the community, had come to be thought of as a facilitative of individual desires and as simply reflective of the existing organization of economic and political power.").

28. Stone, *supra* note 26, at 170.

29. Pound, *supra* note 23, at 253–85.

30. *See* Pound, *supra* note 23, at 253–78.

31. Pound noted that "[t]he harm which this deprofessionalizing of the practice of law did to the law, to legal procedures, to the ethics of practice and to forensic conduct has outlived the era." Pound, *supra* note 23.

and social interests to their own and to those of wealthy clients. In a 1905 address at Harvard, Louis Brandeis lamented that lawyers had "allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people."[32] Brandeis worried that the profession's ability to help "capitalists" overcome welfare regulations would accelerate and amplify economic disparity, igniting social unrest.[33] That same year also in an address at Harvard, President Theodore Roosevelt scorned: "[T]he great lawyer who employs his talent and his learning in the highly remunerative task of enabling a very wealthy client to override or circumvent the law is doing all that in him lies to encourage the growth in this county of a spirit of dumb anger against all laws and of disbelief in their efficacy."[34] Roosevelt called on the profession to act as bulwarks against monied interests who were a "menace to our community."[35] Later, Harlan F. Stone reflected: "The tremendous economic changes which took place in this country . . . exercised a powerful influence on the bar" giving "us a new type of lawyer . . . who, at his worst, is the mere hired man of corporations."[36] Stone blamed the deterioration of the bar on the "loss of community interest and loss of pride of professional caste in the legal profession."[37]

In speeches before bar associations and graduating law school classes, a number of less prominent figures echoed the sentiments of national leaders regarding the ethical condition and direction of the profession. In a 1902 address before John Marshall Law School, Judge James Jenkins of the Seventh Circuit advised students against "sharp practice" and "trickery," urging them not to make monetary wealth their sole aim because it "begets avarice or indolence, and either endangers the lawyer, dulling the eye of appreciation for the lofty principles of action which the law inculcates, stupefying zeal in its pursuits."[38] In order to harmonize the relationship between the profession and community, an attorney before the New York State Bar Association (NYSBA) in 1904 argued for the need to remove "speculative actions," "chicanery," and "ambulance-chasing" from the profession.[39] That same year, speaking

32. Louis D. Brandeis, An Exhortation to Organized Labor (Feb. 5, 1905), *in* Business, A Profession, 321 (Small, Maynard & Co. 1914).

33. *Id*. at 323 ("The immense corporate wealth will necessarily develop a hostility from which much trouble will come to us unless the excesses of capital are curbed . . . There will come a revolt of the people against the capitalists unless the aspirations of the people are given some adequate legal expression; and to this end cooperation of the abler lawyers is essential.").

34. Theodore Roosevelt, Harvard Commencement Address, The Harvard Spirit (June 28, 1905), *in* The Harv. Graduates' Mag., Sept. 1905, at 8, *available at* www.archive.org/stream/presidentialadd16roosrich/presidentialadd16roosrich_djvu.txt.

35. *Id*. at 7.

36. Stone, *supra* note 26, at 176.

37. *Id*. at 166.

38. James G. Jenkins, Judge of the United States Court of Appeals for the Seventh Circuit, Address before the Graduating Class of John Marshall Law School 7, 9–10 (June 16, 1902).

39. Edward P. White, Address before the New York State Bar Association, Changed Conditions in the Practice of Law 10 (Jan. 19, 1904).

before the Allegheny County Bar Association, another attorney stressed the need for professional independence from special, monied interests.[40] In 1905, Judge Irving Vann of the New York Court of Appeals warned the graduating class of Albany Law School that "[t]he commercial spirit, which, to an alarming extent, has invaded the bar, is the cause of many abuses, and among the most serious is the setting on of lawsuits for the simple purpose of making money."[41] He stressed that success was not "measured by money" but must "embrace something more," which he defined as being aids in the "administration of justice."[42] Later that year, in an address before the American Bar Association, an attorney noted that there was no room in the profession for "the purely mercenary" attorneys "who view the calling as a trade, as merely the means of gaining a livelihood."[43] This small sampling captures the profession's state of disaffection and greed at the turn of the twentieth century, even as it demonstrates the ethos of reform through appeals to reconnect the profession to a higher-purpose.

B. The Canons of Professional Ethics

For its part, the American Bar Association (ABA) adopted the Canons of Professional Ethics in 1908, which contained thirty-two standards of conduct.[44] The Canons were hortatory and moralistic in tone and scope, largely leaving attorneys to consult their own judgment. According to the legal historian Geoffrey Hazard, the Canons were not binding tenets, but "were used primarily as guides to the ethical duties of lawyers and as standards of professionalism."[45] While not originally intended to possess "the force and effect of statutes," over time, the Canons became "recognized by the Bench and Bar as establishing wholesome standards for professional conduct," which courts enforced or used as guidance in attorney disciplinary proceedings.[46]

The Code's rhetoric promoted an ideology grounded in classical republican values of citizenship—in this instance, the citizen-attorney's duty to the social polity. As

40. David Thompson Watson, Address at the Allegheny County Bar Association Annual Dinner, The Profession 3–4 (Feb. 12, 1904) ("Our influence is of great importance in preventing rash and unwise legislation . . . in restraining the improper use of great power for mere selfish and material end. But to do this . . . the Bar must be united and independent and, above all else, be solely a profession, be composed of professional men who are apart from trade and commerce . . . . Never be owned by any corporations, or any man, or any interest.").

41. Irving G. Vann, Address at the Commencement of Albany Law School (May 31, 1905), *in* Irving G. Vann, Contingent Fees: Address in Hubbard Course on Legal Ethics: Delivered at the Commencement of Albany Law School 4 (1905).

42. *Id*. at 2.

43. Lucien Hugh Alexander, Address at the Annual Meeting of the American Bar Ass'n (Aug. 23, 1905), *in* Lucien Hugh Alexander, Some Requirements for Admission to the Bar Considered Apart from Educational Standards 1 (1905).

44. Code of Prof'l Ethics (1908).

45. Hazard, *supra* note 21, at 1239, n.77.

46. *In re* Connelly, 240 N.Y.S.2d 126, 130 (1st Dep't 1963); *see also In re* Cohen, 261 Mass. 484, 487 (Mass. 1928); Hunter v. Troup, 315 Ill. 293, 302 (Ill. 1925).

Simeon Baldwin, one of the founders of the ABA, observed:, "The new code of the American Bar Association makes no such appeals to motives of expediency and self-advantage. It occupies a higher plane . . . the good of the republic is looked at, not that of the individual"[47] According to Charles Wolfram, the Canons "insisted that a lawyer pursue the high road in every endeavor mentioned."[48] To that end, the Preamble outlines the scope of the attorney's role. For the ABA, the Canons were a public declaration of the legal profession's commitment to the rule of law and its importance to society. The ABA reminded the profession that the stability of justice "rests upon the approval of the people."[49] The public's trust in the administration of law "cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."[50] Accordingly, the welfare of society rested on the ethical conduct of attorneys. The Code's provisions reinforced this ideology. Many provisions explicitly connected the specified conduct to the interests of justice and the legal system.[51] Others simply set forth general platitudes for attorneys to adhere, such as civility, respect, candor, punctuality, expedition, and fairness.[52] In the final catchall Canon, the ABA summarized that through adherence to ethical commands "a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."[53]

The Canon's republican character fashioned two client types to which an attorney was bound.[54] At the immediate level, attorneys zealously represent the party who retains them. More abstractly, attorneys serve the collective, which we might think of as the meta-client. Even in the private sphere, when not in the service of a client, attorneys represent the meta-client. The well-being of the meta-client acts as a moral compass directing attorneys in their personal and professional affairs. In this way, what is good for the collective defines the lawyer's ethical action on behalf of the individual client. By grounding ethical conduct in a higher purpose, attorneys would presumably act, not from self-interest or a fear of punitive threat, but in a kind of stewardship to safeguard society.

The Canons were based on the Alabama State Bar Association Code of Ethics of 1887—the first code of legal ethics.[55] The Preamble to the Alabama Code evinces a similar republican tone: "The purity and efficiency of judicial administration . . .

47. Simeon E. Baldwin, *The New American Code of Legal Ethics*, 8 Colum. L. Rev. 541, 542 (1908).

48. Wolfram, *supra* note 21 at 54.

49. Code of Prof'l Ethics pmbl. (1908).

50. *Id*.

51. *See, e.g.*, *id.* at Canons 1, 5, 15, 20, 28, 29, 30, 32.

52. *See, e.g.*, *id.* at Canons 1, 3, 21, 22, 24.

53. *Id*. at Canon 32.

54. *See generally* ABA Comm. on Code of Prof'l Ethics, Final Report (1908).

55. Model Code of Prof'l Responsibility Preface (1969).

[d]epends as much upon the character, conduct, and demeanor of attorneys in this great trust, as upon the fidelity and learning of courts, or the honesty and intelligence of juries."[56] The Code was rooted in the work of David Hoffman and Judge George Sharswood,[57] both of whom worried about the precarious position of the lawyer, namely, the danger of the steward's proximity to the contagion of moral and social corruption. In his 1836 treatise, Hoffman asserted that the profession "brings its ministers into a too intimate and dangerous acquaintance with man's depravity; it places them in the midst of temptations; and whilst engaged in rescuing others, they sometimes fall the only lamented victims."[58] Attorneys needed to conduct themselves ethically because "any known departure from this excites more than ordinary distrust . . . Character, therefore, and the best of manners are to the lawyer invaluable."[59] In his 1860 essay, Sharswood similarly warned: "[T]here are pitfalls and man-traps at every step, and the mere youth . . . needs often the prudence and self-denial . . . which belong commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction."[60] Despite their shared views of corruption as contagion, the two men differed radically about what constituted the lawyer's principal allegiance, his or her sworn duty. Hoffman instructed attorneys to act "with an eye solely to his country's good."[61] According to Allison Marston, on the other hand, Sharswood separated "the moral responsibility of lawyers from that of society at large," attaching it instead "to the client's interests."[62] This fundamental question—a recurring dilemma—about whether the lawyer's primary duty was to society, and thus, more abstractly, to the law, or to the client, redounds throughout the history of the profession.

C. The Model Code of Professional Responsibility

The Canons survived largely unchanged until 1969, when the ABA enacted the Model Code of Professional Responsibility, a code that modernized and ultimately superseded the Canons. The ABA Special Committee of Evaluation of Ethical Standards concluded that the Canons "were not an effective teaching instrument" and

56. Ala. Code of Ethics pmbl. (1887).

57. Model Code of Prof'l Responsibility Preface (1969).

58. David Hoffman, A Course of Legal Study 745 (Thomas, Cowperthait & Co. 2d Ed. 1846) (1836).

59. *Id.* at 747–48.

60. George Sharswood, An Essay on Professional Ethics 1 (1860).

61. Hoffman, *supra* note 58, at 751.

62. Marston, *supra* note 21, at 495. *Compare* Sharswood, *supra* note 60, at 27 ("The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.") *with* Hoffman, *supra* note 58 (persons "who have violated the laws . . . are entitled to no such special exertions from any member of our pure and honorable professional; and indeed, to no intervention beyond scouring to them a fair and dispassionate investigation of the *facts* of their cause, and the due application of the law; all that goes beyond this . . . is unprofessional.") (emphasis in original).

"many [were] abounded with quaint expressions of the past."[63] Some provisions were poorly organized and others overlapped with one another.[64] They were also unsuitable for attorneys whose practices spanned various settings in an increasingly regulated industrialized and urbanized world, particularly with the rise of large-scale corporate law firms and in-house counsel departments.[65] According to Wolfram, the Canons had assumed a homogeneous profession conformable to a common set of standards.[66]

The Code consists of three parts: 1) Canons, 2) Ethical Considerations, and 3) Disciplinary Rules.[67] The Canons in the Code are "statements of axiomatic norms" intended to "embody the general concepts from which the Ethical Considerations and Disciplinary Rules are derived."[68] They are broad, aphoristic statements that function as subject-headings. For example, Canon 7, under which the no-contact rule is listed, states, "A lawyer . . . is to represent [a] client zealously within the bounds of the law."[69] Similarly, the Ethical Considerations are intended to be strictly "aspirational in character and represent the objectives toward which every member of the profession should strive."[70] They provide explanatory commentary and general practice guideposts. The Disciplinary Rules, in contrast, are "mandatory" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[71]

With the Disciplinary Rules, the ABA transformed ethical oversight into positive law.[72] According to Hazard, "whereas the Canons and the Ethical Considerations represented fraternal understandings that memorialized a shared group discourse, the [Disciplinary Rules] functioned as a statute defining the legal contours of a vocation."[73] The result was a reduction in the moral tenor. An ethic is a general, axiomatic statement of human conduct, which does not dissolve at the border of a polity. But once conduct becomes memorialized as positive law, the moral considerations of the actor become inconsequential; the underlying connective and educative force of the ethic is muted or disposed. The legality of an action instead

63. Model Code of Prof'l Responsibility Preface (1969).

64. *See id.*

65. *See* Daly, *supra* note 21, at 1127–28; *see also* Model Code of Prof'l Responsibility Preface (1969) (One reason for the amendment was the "changed and changing conditions in our legal system and urbanized society required new statements of professional principles.").

66. Wolfram, *supra* note 21, at 54.

67. Model Code of Prof'l Responsibility Preliminary Statement (1969).

68. *Id.*

69. *Id.*

70. Model Code of Prof'l Responsibility Canon 7 (1969).

71. Model Code of Prof'l Responsibility Preliminary Statement (1969).

72. Black's Law Dictionary defines "positive law" as "law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some nonpolitical community." Black's Law Dictionary 1200 (8th ed. 2004).

73. Hazard, *supra* note 21, at 1251.

becomes central, narrowing the focus to the time, place, and circumstances of an occurrence. Ironically, as the profession sought to reform itself, the positivist direction of oversight threatened to diminish the collectivist vision in favor of self-interest (in particular, eluding punitive penalties) as the incentive for ethical conduct.

The ABA, nonetheless, still peddled republican rhetoric. While entirely rewritten, the Preamble echoed the logic and sentiments of the original Canon's introduction. According to the ABA, if the rule of law is central to a free and democratic society then "[l]awyers, as guardians of the law, play a vital role in the preservation of society."[74] As stewards of the polity, lawyers needed to command society's respect and confidence, which they garner from "the highest standards of ethical conduct."[75] The Preamble reminds attorneys that because the Code merely provides minimum directives of conduct, they must also consult their consciences as though the understanding of ethics and morality were universal and the conscience had some access to that truth beyond the experiences of the individual.[76]

Yet differences emerge. One important divergence between the two Preambles is that, for the first time, the Code emphasizes the punitive consequences of unethical practices. It warns attorneys to act ethically to avoid professional repercussions, whether official sanctions or community disapproval, making self-interest an important component of ethical oversight.[77] Conduct was no longer rooted solely in a civic responsibility toward the polity as a result of positivism. The Code, therefore, possessed a paradoxical framework. It simultaneously advanced aspirational goals and obligatory commands; and it instructed attorneys to protect the social entity and themselves equally. As a result, the Code was quickly regarded as ineffective.

D. The Model Rules of Professional Conduct

By the mid-1970s, the ABA determined that the Code needed a complete structural overhaul.[78] The ABA Commission on Evaluation of Professional Standards resolved to adopt the "restatement" format and abandon the tripartite structure.[79] The Commission concluded that the prior format frequently forced attorneys to sift through numerous provisions to determine the correct course of conduct.[80] Additionally, the substantive effects of the Code's Canons and Ethical Considerations

74. Model Code of Prof'l Responsibility pmbl. (1969).

75. *Id.*

76. *See id.* ("Each lawyer must find within his own conscience the touchstones against which to test the extent to which his actions should rise above minimum standards.").

77. *See id.* ("[I]t is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.").

78. *See* Roger J. Kutak, Chairman, ABA Comm. on Evaluation of Prof'l Standards, Report to the House of Delegates (1982), *available at* http://www.abanet.org/cpr/mrpc/kutak_2-82.pdf.

79. *See id.*

80. *See id.*

led to confusion, encouraging the Code's uneven application.[81] The broad statements propounded by the Canons and Ethical Consideration failed to "provide reliable guidance to a lawyer seeking to determine what the ethical standards of the profession require in specific situations."[82] In fact, "[t]he breadth of the language of Canons goes far beyond the scope of specific Disciplinary Rules with the result that a Canon's standard may infinitely extend application of Disciplinary Rules or impose an independent standard apart from any Disciplinary Rule."[83] In some instances, courts actually converted the aspirational goals into additional obligatory commands.[84]

Finally, in 1983, the ABA House of Delegates adopted the Model Rules of Professional Conduct.[85] The Rules consisted of approximately fifty black-letter laws each accompanied by an explanatory comments section.[86] The new organization "provides lawyers with rules in a convenient organization to which they can comfortably turn for answers to questions of professional responsibility."[87] While the ABA reduced the broad and indefinite language, it did not completely remove the dualistic framework from oversight. The majority of the Rules were obligatory, meaning that they sought to "define proper conduct for purposes of professional discipline."[88] Yet, the Rules retained a number of "permissive" directives, leaving attorneys some "discretion to exercise professional judgment."[89]

With the restatement format, the ABA nonetheless still took a larger step toward positive law and away from moral standards.[90] Wolfram noted that the Rules made "no effort to define or explore the moral dimensions of the law practice."[91] The Rules merely maintain that they "do not . . . exhaust the moral and ethical considerations that should inform lawyers."[92] The ABA removed much of the lofty, inspirational republican rhetoric from the preamble replacing it with a list of thirteen "Responsibilities" of lawyers that primarily focus on lawyers' obligations at the immediate level as professional representatives to others.[93]

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81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.*

85. Model Rules of Prof'l Conduct Preface (1983).

86. Kutak, *supra* note 78.

87. *Id.*

88. Model Rules of Prof'l Conduct Scope (1983).

89. *Id.*

90. *See* Daly, *supra* note 21, at 1123. Hazard has noted, "the Rules were rendered in statutory language . . . . [T]he Rules affirmed that the standards of professional conduct were legal obligations and not merely professional ones." Hazard, *supra* note 21, at 1254.

91. Wolfram, *supra* note 21, at 70.

92. Model Rules of Prof'l Conduct Scope (1983).

93. *See id.* at pmbl.

Specifically, the Responsibilities articulate that the basic principles underlying the Rules "include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."[94] What republican rhetoric remains is either subordinated to the official administrative tone of the Responsibilities or remains as a kind of rhetorical garnish to the imperative tone of official policy.[95] By disconnecting ethical oversight from its civic, moralistic mooring in a presumed higher standard, an attorney's ethical foundation consequently came to rest exclusively on self-preservation.[96] Oliver Wendell Holmes Jr., in his well-known *The Path of the Law*, predicated this potential effect of positivism. According to Holmes, the difference between law and morality is that "[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[97] Whether Holmes' conclusion is accurate remains a scholarly debate today—can morality with its epistemic limitations effectively govern a collective group, or can positive law promote moral reflection beyond the legal text?[98]

II. A BRIEF HISTORY OF THE NO-CONTACT RULE

A. The No-Contact Rule prior to the Canons of Professional Ethics

Despite the broader changes in ethical oversight since the nineteenth century, the no-contact rule has remained largely static. In his 1837 treatise, Hoffman offered one of the first statements of the rule in his list of ethical resolutions: "I will never enter into any conversation with my opponent's clients, relative to his claim or defence, except with the consent, and in the presence of his counsel"—a fairly absolute prohibition on any communication, leaving little, if any, room for an exception.[99] Hoffman does not discuss the basis for the rule. His view regarding the need for ethical resolutions, however, suggests that the rule serves to protect the public from attorneys, who having been too long exposed to the corruptions around them, become themselves corrupt. Professor John Leubsdorf located a less obligatory form of the rule in an English authority from around the same time period:

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94. Model Rules of Prof'l Conduct pmbl. (2002).

95. One passage reminds attorneys that among other roles, attorneys are "public citizen[s] having [a] special responsibility for the quality of justice." *Id.* Another passage with republican rhetoric is tucked away in the last statement of the Preamble. Furthermore, the Preamble reminds attorneys that ethical conduct must serve the public interest rather than the "parochial or self-interested concerns of the bar," but this statement seems present solely so that the bar may remain self-regulating. *Id.*

96. Daly, *supra* note 21, at 1123 ("The virtues of rules—predictability and stability—are thus transformed into vices—excessive autonomy and alienated individualism.").

97. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

98. *See supra* note 21.

99. Hoffman, *supra* note 58, at 771 (emphasis omitted).

> Let your love of harmony lead you to recommend your clients to make greater concessions, for the sake of tranquility, than rigid justice could require; and even dare to sacrifice punctilio to concord, when you believe an interview with the adverse party will be more conductive to the extinction of animosity, the settlement of a dispute, and the renewal of good-will, than any negotiation with his legal adviser.[100]

This construction, as Leubsdorf notes, created more of "a professional courtesy than a binding tenet."[101]

Despite Hoffman's resolution, much of the nineteenth century is silent on the subject. Sharswood never mentions it in his lectures.[102] The no-contact rule eventually resurfaces in the Alabama Code of Ethics of 1887: "An attorney should not attempt to compromise with the opposite party, without notifying his client if practicable . . . no[r] engage in discussion or arguments about the merits of the case with the opposite party, without notice to his attorney."[103] The language here is more suggestive and discretionary than the absolutist, moral tone of Hoffman's resolution, affording attorneys some room to engage in *ex parte* settlement discussions, particularly when notifying opposing counsel is impractical or impossible. Prior to the Canons, a number of state bar associations, such as Georgia and Maryland, adopted Alabama's version of the rule.[104] There does not appear, though, to be any published case employing the rule.

B. The No-Contact Rule From the Canons to the Model Rules

The ABA included the no-contact rule in the 1908 Canons of Professional Ethics under Canon 9, which stated:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.[105]

The Canon covered nearly all types of communications, expressly prohibiting subject matter, settlement, misleading, and advisory communications with adverse parties. But the provision is uninformative regarding organizational parties.

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100. John Leubsdorf, *Communicating with another Lawyer's Client: the Lawyer's Veto and the Client's Interests*, 127 U. Pa. L. Rev. 683, 684 (1979) (quoting Letters From A.C. & W.H. Buckland, to an Attorney's Clerk, Containing Directions For His Studies and General Conduct 226 (1837)).

101. *Id.*

102. *See* Sharswood, *supra* note 60.

103. Alabama Code of Ethics (1887).

104. *See* Maryland Code of Ethics (1903); Georgia Code of Ethics (1889).

105. Code of Prof'l Ethics Canon 9 (1908).

Although the Canon offered little rationale for itself, shortly after its enactment, Gleason L. Archer, dean and founder of Suffolk School of Law, provided an early justification for the rule in his 1910 treatise, concentrating on the consequences of improper communications.[106] Such communications threatened to harm opposing counsel because they "affront him personally and by implication [] affirm that he is unworthy of his high profession."[107] An adverse party is endangered because he is "not qualified to match his own imperfect knowledge of his rights against the persuasion of his opponent's lawyer, who is seeking the advantage for his client."[108] Attorneys damage their own reputation because "it is unprofessional, if not positively dishonorable, to deal with an adversary behind the back of his lawyer."[109] Finally, the profession suffers because once attorneys "show mutual disrespect and play mean, underhanded tricks upon each other, just so soon do they lose standing in the community and become the objects of contempt and reproach."[110] These rationales would compose the overarching justification of the rule under later amendments.[111]

In 1969, the ABA superseded Canon 9 with Disciplinary Rule 7-104 (DR 7-104) of the Model Code, which stated:

> During the course of his representation of a client a lawyer shall not (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party.[112]

While the directive remained identical for all intents and purposes, the ABA did remove the examples of communications in favor of simply precluding communications related to the subject matter of the representation, which is relatively indefinite language itself. Ethical Consideration 18, which corresponded with DR 7-104, provided only a general purpose behind the rule and instructed an attorney who speaks with an unrepresented person to refrain from giving legal advice.[113] Other than that, the Consideration provided no instructive guidance regarding the issue of organizational parties.[114]

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106. Gleason L. Archer, Ethical Obligations of the Lawyer 154–57 (Little, Brown & Co. 1910).

107. *Id*.

108. *Id*. at 156.

109. *Id*. at 157.

110. *Id*. at 156.

111. *See* Model Rules of Prof'l Conduct R. 4.2 cmt. 1 (2002) ("This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers.").

112. Model Code of Prof'l Responsibility DR 7-104 (1969).

113. *See id*. at EC 7-18.

114. *See id*.

The ABA next adopted Model Rule 4.2, which borrowed the language of its predecessor nearly verbatim.[115] The central difference was that the Comments section, unlike Ethical Consideration 18, provided an explicit method for identifying employee "parties."[116] Comment 4 defined an organizational "party" as including: 1) managerial employees; 2) persons whose acts or omissions in connection with the matter at issue may be imputed to the corporation for liability; or 3) persons whose statements constitute admissions by the corporation.[117] Courts did not enthusiastically embrace the Comment 4 test. Instead, over the next decade, the bench devised an array of approaches for identifying parties: the case-by-case balancing test, the blanket ban, the alter-ego test, the speaking-agent test, the managing-agent test, the control-group test, and the scope-of-employment test.[118]

In 2002, the ABA revised the Comments to Rule 4.2, redefining an organizational party as:

> [A] constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[119]

The new construction is particularly peculiar. Aside from the imputation language, the added language—"obligate" and "constituent"—has little legal pedigree for interpretation. Courts and rulemaking bodies have not utilized these terms in substantive areas, let alone the disciplinary context, leaving courts and litigants with very little in the way of material for interpretation.

Absent from the revised Comment of Rule 4.2 is a category that focuses on the general status of an employee, which the original Comment had addressed in the "managerial" employee prong. The ABA deleted that prong because it had "been criticized as vague and overly broad."[120] The focus on a constituent's authority does not replace the "managerial" prong, but it acts more like the third *Niesig* prong that deems employees who implement the advice of counsel to be a party. The ABA also

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115. *See* Model Rules of Prof'l Conduct R. 4.2 (1983).

116. *Compare* Model Code of Prof'l Responsibility EC 7-18 (1969) *with* Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (1983).

117. *See* Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (1983).

118. *See, e.g.*, Fair Auto. Repair, Inc. v. Car-X Serv. Sys., Inc., 128 Ill. App. 3d 763, 771 (Ill. App. Ct. 1984) (control-group test); Wright v. Group Health Hosp., 103 Wash.2d 192, 200 (1984) (speaking-agent test); Cagguila v. Wyeth Labs., Inc., 127 F.R.D. 653, 654–55 (E.D. Pa. 1989) (blanket ban); Morrison v. Brandeis Univ., 125 F.R.D. 14, 18 (D. Mass. 1989) (balancing test); Sobel v. Yeshiva Univ., No. 75 Civ. 2232, 1981 WL 334, at *1 (S.D.N.Y. Nov. 19, 1981) (managing-agent test); Niesig v. Team I, 76 N.Y.2d 363, 374 (1990) (alter-ego test).

119. Model Rules of Prof'l Conduct R. 4.2 cmt. 7 (2002). In the 2002 amendments, Comment 4 became Comment 7 under Rule 4.2.

120. ABA Ethics 2000 Comm., Report on the Model Rules of Prof'l Conduct, Reporter's Explanation of Changes, R. 4.2 cmt. 7 (2002), *available at* http://www.abanet.org/cpr/e2k/10-85rem.pdf.

removed from the Comment the prohibition on communications with anyone "whose statement may constitute an admission" because it too was considered "broad and potentially open-ended" and "ha[d] been read by some as prohibiting communication with any person whose testimony would be admissible against the organization."[121] According to one federal district court, the new "obligate" prong replaced the "admission" prong, which ideally limits the reach of the prong. The court correlated an employee's "authority to obligate" as a speaking-authority pursuant to the Second Restatement of Agency, which maintains that an agent's statements are admissible evidence against a principal only if the agent is *authorized* to speak on behalf of the principal,[122] a scope much narrower than the vicarious admission rule under the Federal Rules Evidence on which the admission prong was based. Even though a majority of states have adopted the 2002 amendment,[123] courts have only raised the revised Comment to Rule 4.2 on a few occasions, providing little discussion.[124]

C. The No-Contact Rule in New York Prior to Niesig

The New York State Bar Association adopted the Canons in 1909,[125] yet with the exception of one case in 1930, neither it nor the New York courts referenced Canon 9 until the late-1960s. In three of the four cases published in the 1960s, the New York appellate courts narrowly addressed attorneys who negotiated settlements directly with individual parties.[126] In the fourth case, a trial court used Canon 9, among other grounds, as a basis to preclude a defendant's insurer from contacting the plaintiff *ex parte*.[127] During that time, the New York State Bar Association's ethics opinions also focused on narrow issues unrelated to organizational parties.[128] New York federal courts, on the other hand, do not appear to have ever even mentioned Canon 9 during the Canon period.

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121. *Id.*

122. Mendez v. Hovensa, L.L.C, 49 V.I. 849, 861 (D.V.I. 2008).

123. ABA Model Rules of Professional Conduct, State Adoption of Model Rules, http://www.abanet.org/cpr/mrpc/model_rules.html (stating that "[t]o date, California is the only states [sic] that do not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct).

124. *See, e.g.*, *Mendez*, 49 V.I. at 859–60; Wasmer v. Ohio Dep't of Rehab. and Corr., No. 2:05-cv-0986, 2007 WL 593564, at *2–3 (S.D. Ohio Feb. 21, 2007); Paris v. Union Pacific R.R. Co., 450 F. Supp. 2d 913, 915 (E.D. Ark. 2006); U.S. v. W.R. Grace, 401 F. Supp. 2d 1065, 1066–67 (D. Mont. 2005).

125. *See In re* Connelly, 240 N.Y.S.2d 126, 129 (1st Dep't 1963).

126. *See In re* O'Neil, 239 N.Y.S. 297, 298 (1st Dep't 1930); *In re* Wilkes, 201 N.Y.S.2d 524, 525 (1st Dep't 1960); *In re* Chopak, 202 N.Y.S.2d 46, 46 (1st Dep't. 1960).

127. *See* Juskowitz v. Hahn, 289 N.Y.S.2d 870, 871 (Sup. Ct. Nassau County 1968).

128. *See generally* New York State Bar Ass'n, Prof'l Ethics Comm., Op. 47 (1967) (addressed whether a plaintiff's attorney may communicate with defendant's insurance carrier); New York State Bar Ass'n, Prof'l Ethics Comm. Op., 101 (1969) (addressed whether an attorney appointed a trustee in bankruptcy may communicate directly with the bankrupt); New York State Bar Ass'n, Prof'l Ethics Comm., Op. 101(a) (1969) (addressed whether an attorney trustee in a bankruptcy may serve the bankrupt with formal orders and notices).

Local New York bar associations, however, did apply Canon 9 to organizations. In a 1942 ethics opinion, the Association of the Bar of the City of New York ("New York City Bar Association") examined whether attorneys may interview employees "as to the facts involved in the litigation."[129] The Association authorized blanket permission to interview employees *ex parte* without specifying if permission turned on the type of employees interviewed.[130] Henry Drinker, a legal ethicist who served as Chair of the ABA Committee on Professional Ethics, however, later claimed that the Canon "probably precludes interviews of managing employees of a corporation having authority to bind it."[131] In 1964, the New York County Bar Association, reaching a different conclusion, stated in absolute terms that all current employees are off-limits regardless of "whether such employees are in ministerial categories or have the capacity to bind the corporate employer."[132] The opinion expressly excluded only former employees from the disciplinary rule.[133]

Not until 1970, when the New York Appellate Divisions adopted the Disciplinary Rules of the Model Code, did DR 7-104 replace Canon 9.[134] The Appellate Divisions declined to adopt the Ethical Considerations, which was insignificant since Ethical Consideration 18 provided no guidance regarding organizational parties.[135] New York State courts addressed the disciplinary rule, as with Canon 9, on few occasions prior to *Niesig*. Primarily invoking DR 7-104 in disciplinary proceedings against attorneys accused of either giving advice to an adverse individual party or soliciting a settlement or information from a represented individual.[136] Prior to *Niesig*, the question of who constituted a "party" in the organizational context did not arise in New York State courts.

New York bar associations and federal courts did, however, address the organizational issue under DR 7-104 on several occasions before *Niesig*, devising a number of often conflicting approaches while also potentially providing an early statement of the "alter-ego" test. In 1970, the New York State Bar Association examined whether an attorney may communicate with an employee of a governmental entity, holding conclusorily that "all communications concerning [the] matter must . . . be

129. Bar Ass'n of the City of New York, Op. 613 (1942).

130. *See id.*

131. Henry S. Drinker, Legal Ethics 201 (Columbia Univ. Press 1953).

132. New York County Bar. Ass'n, Op. 528 (1964).

133. *See id.*

134. *See* New York State Bar Ass'n Comm. on Standards of Attorney Conduct, Proposed Rules of Prof'l Conduct (2008), *available at* http://www.nysba.org/AM/Template.cfm?Section=For_Attorneys&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=15184.

135. *See* Model Code of Prof'l Responsibility EC 7-18 (1983).

136. *See, e.g.*, *In re* LaCava, 385 N.Y.S.2d 642, 643 (4th Dep't 1976) (communicated with and secured affidavit from individual party represented by counsel); *In re* Shapiro, 455 N.Y.S.2d 604, 604 (1st Dep't 1982) (communicated a settlement offer with a represented individual); *In re* Blum, 525 N.Y.S.2d 107, 108–09 (4th Dep't 1988) (communicated advice to an adverse party).

made with the designated counsel."[137] In 1982, the New York City Bar Association overturned its 1942 opinion.[138] Examining the interests of both parties and the objectives of the no-contact rule, the Association settled on the scope-of-employment test, which prohibits interviews with employees "whose conduct or statements with respect to matters within the scope of their employment could affect the corporation's legal rights or obligations."[139] In contrast and without explanation, the Nassau County Bar Association had issued a blanket ban against interviewing employees *ex parte* shortly before *Niesig*.[140]

In 1975, the Second Circuit became the first New York federal court to consider the matter. In *Ceramco v. Lee Pharmaceuticals*, the defendant sought to disqualify plaintiff's counsel for contacting an employee *ex parte* and asking questions to help determine venue.[141] Interestingly, the circuit court did not focus on the identity or status of the employee contacted, but rather on the conduct of the attorney. Because the attorney did not overreach or deceive the employee, the Second Circuit found no violation. Six years later in *Sobel v. Yeshiva University*, a district court alternatively considered the identity and position of the employees, this time, mid-level managerial employees.[142] The court permitted the interviews because the employees could not bind their employer. In this case, the definition of the term "bind" extended from the section of the Federal Rules of Civil Procedure that designates officers, directors, and managing agents as "parties" to speak on behalf of an organization at a deposition.[143] The court noted that "[t]he persons sought to be interviewed are those whose depositions could not routinely be compelled." Although the *Sobel* court did not acknowledge it, courts typically use the managing-agent test to determine which employees fall within any of the three categories for a deposition under the civil practice rules. The test is typically "answered pragmatically and on a fact-specific basis," focusing on a number of factors.[144] In 1985, in *Frey v. Department of Health and Humans Services*, another federal district court addressed the merits of interviewing high- and low-level employees. This time the court determined that employees who "are the 'alter-egos' of the entity, that is, those individuals who can bind it to a decision or settle controversies on its behalf," would be deemed parties.[145] Holding that "the high level managerial employees who participated in the decision not to promote plaintiff fall within that category," the court

137. New York State Bar Ass'n, Op. 160 (1970).

138. *See* New York State Bar Ass'n, Prof'l Ethics Comm., Op. 80-46 (1980).

139. *Id*.

140. *See* Nassau County Bar Ass'n Comm. on Prof'l Ethics, Op. 2/89 (1989).

141. *See* 510 F.2d 268, 271 (2d Cir. 1975).

142. *See* No. 75 Civ. 2232, 1981 WL 334, at *1 (S.D.N.Y. Nov. 19, 1981).

143. *See id*.; *see also* Fed. R. Civ. P. 30(b)(6), 32(a)(3).

144. Schindler Elevator Corp. v. Otis Elevator Co., No. 06 Civ. 5377, 2007 WL 1771509, *2 (S.D.N.Y. June 18, 2007).

145. *See* Frey v. Dep't of Health & Humans Servs., 106 F.R.D. 32, 35 (E.D.N.Y. 1985).

sought to balance the interests of the parties when it came to lower-level employees.[146] Two years later, another New York federal district court employed this "alter-ego" test to low-level employees.[147]

At the time of these latter two federal cases, the ABA had enacted Model Rule 4.2, but the New York federal courts did not address the provision and its corresponding Comment until 1990, shortly before *Niesig*. In *Polycast Technology v. Uniroyal, Inc*., the district court examined whether DR 7-104 or Rule 4.2 governed the dispute, since federal courts are not bound to follow the ethical directives of their host state.[148] The court adopted the former directive, yet acknowledged that "[t]his does not mean, however, that this Court is bound by state court interpretations of the Code."[149] Accordingly, in holding that former employees were not parties, the court looked to Comment 4, in addition to policy considerations and out-of-state case law. Subsequent New York federal courts, however, have continued to use the case-by-case balancing-of-interests test.[150] Yet others courts have citied the *Niesig* and the Comment 4 tests simultaneously, as though they supplemented each another,[151] even though *Niesig* flatly rejected the Comment 4 test.[152] Finally, in 1990, the Court of Appeals announced its three prong alter-ego test in *Niesig*. Consisting of a binding prong, an imputation prong, and advice of counsel prong, all premised on agency and evidence law, the alter-ego test was a rejection of nearly every approach that preceded it since the New York City Bar Association first gave permission for all interviews in 1942. Nonetheless, the history of the no-contact rule in New York does not end here.

For the longest time, New York State remained the only state to hang onto the Model Code, while others adopted the Model Rules or some variation of it.[153] Having considered adopting the Model Rules in 1985, the New York State Bar Association was eventually overruled by the NYSBA House of Delegates.[154] Soon after the ABA's 2002 amendments to the Model Rules, the New York State Bar Association

146. *Id*.

147. McKitty v. Bd. of Educ., No. 86 Civ. 3176, 1987 WL 28791, at *2 (S.D.N.Y. Dec. 16, 1987).

148. 129 F.R.D. 621, 625 (S.D.N.Y. 1990).

149. *Id*.

150. Lizotte v. New York City Health & Hosps. Corp., No. 85 Civ. 7548, 1990 WL 267421, at *3–6 (S.D.N.Y. Mar. 13, 1990); Suggs v. Capital Cities/ABC, Inc., No. 86 Civ. 2774, 1990 WL 182314, at *3–6 (S.D.N.Y. Apr. 24, 1990). For example, constitutional or discrimination claims will weigh heavily in plaintiff's favor.

151. *See* Pauling v. Sec'y of the Dep't of Interior, No 95 Civ. 8408, 1997 WL 661393, at *1 (S.D.N.Y. Oct. 22, 1997); Miano v. AC & R Adver., Inc., 148 F.R.D. 68, 76–77 (S.D.N.Y. 1993).

152. *See* Niesig v. Team I, 76 N.Y.2d 363, 375 (1990) ("[W]e make clear that the definition of 'party' we adopt for the purposes of DR 7-104(A)(1) is not derived from the Official Comment to ABA Model rule 4.2.").

153. American Bar Association, Dates of Adoption of the Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/chron_states.html (last visited Oct. 22, 2009).

154. *See* New York State Bar Ass'n, Proposed Rules of Prof'l Conduct, Introduction vi (2008), *available at* http://www.nysba.org/AM/Template.cfm?Section=For_Attorneys&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=15184.

Committee on Standards of Attorney Conduct (COSAC) proposed the adoption of the Rules.[155] According to COSAC, the revised Comment to Rule 4.2 is "consistent with the decision of the Court of Appeals in *Niesig*."[156] But this is merely the Committee's opinion—the Committee provides no explanation or support to back up its conclusion. Both tests presumably intimate different standards. As previously noted, a federal court had already equated the term "obligate" with the speaking-authority test, which *Niesig* did not completely embrace by itself.[157] Rather, *Niesig*'s binding prong potentially casts a wider net, focusing on the authority to bind with conduct or words.

Regardless, in 2007, the NYSBA House of Delegates adopted COSAC's suggestions, and, in February 2008, the NYSBA submitted a resolution to the Appellate Divisions requesting they adopt the Rules.[158] On December 16, 2008, the Appellate Divisions ultimately approved the Model Rules, authorizing them to take effect on April 1, 2009.[159] The Divisions surprisingly did not adopt the Comment sections to the Rules that the NYSBA had recommended.[160] Absent the Comments, the no-contact rule remains largely unchanged under Rule 4.2. Unless the Appellate Divisions adopt the Comments, the Court of Appeals appears unlikely to disturb the alter-ego test. Since *Niesig*, the court has only revisited the test on one occasion. In 2007, in *Muriel Siebert Co. v. Intuit, Inc.*—decided 17 years after *Niesig*—the high court affirmed that former employees are not parties.[161] The Court of Appeals' reluctance to reevaluate the test, however, in no way precludes New York federal courts from revisiting their approach.

III. THE COMPOSITION OF DISCIPLINARY RULES

Underlying the debate about what type of professional self-governing system to implement is the following question: what is the best way to compose ethical directives? Since the Canons, ethical directives have shifted from broader to narrower compositions. One motive for rejecting the Canons was that they "were not cast in

155. *See* Resolution Adopted Nov. 5, 2005 to Govern the Consideration of the Report of the Committee on Standards of Attorney Conduct, *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2839.

156. Staff Memorandum from the New York State Bar Ass'n Comm. on Standards of Attorney Conduct House of Delegates 328 (Jan. 26, 2007), *available at* http://www.nysba.org/Content/NavigationMenu38/CommitteeonStandardsofAttorneyConductHome/COSAC_January_2007_House_Meeting.pdf.

157. *See Niesig*, 76 N.Y.2d at 375 n.5. In footnote five, the court cites to a number of cases and bar associations that have promulgated a "similar test." However, those tests are not as similar to the *Niesig*'s test as the Court of Appeals might have wished. For example, in *Wright v. Group Health Hosp.*, 103 Wash.2d 192, 200 (1984), the court adopted the speaking-agent test, which *Niesig* never fully adopted. Also, in *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988) the court adopted the Comment 4 test.

158. *See* New York State Bar Ass'n Proposed Rules of Prof'l Conduct, *supra* note 154.

159. Press Release, New York State Unified Court System, New Attorney Rules for Professional Conduct Announced (Dec. 16, 2008), http://www.courts.state.ny.us/press/pr2008_7.shtml.

160. *See id*. The new Rules of Professional Conduct will replace the disciplinary rules of N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 (1990). *Id.*

161. 836 N.Y.S.2d 527 (2007).

language designed for disciplinary enforcement."[162] Wolfram, for instance, noted that the "wording [was] too vague and general to afford guidance."[163] In a 1908 letter from Judge Francis C. Lowell of the First Circuit to Ezra Thayer, a member of the committee that prepared the Canons, Lowell criticized the proposed Canons' language and form as improper for guiding professional conduct.[164] He remarked:

> The object of the Code is to provide rules of practice, not by way of a sermon with a homiletic purpose, but by way of ordinances which shall tell all lawyers what they may do professionally and what they are forbidden to do. The Code, as I understand it, like any other body of rules, is not intended primarily to foster indefinite aspirations for virtue, but to regulate the ordinary affairs of the professional life."[165]

According to Judge Lowell, attorneys needed "accurate and concise" directives.[166]

Later, as the ABA changed to the Rules, the Commission on Evaluation of Professional Standards emphasized that the "value of standards of ethical conduct to the individual lawyer who seeks to practice in professionally responsible ways lies in their definiteness."[167] In scope, the "rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."[168] Standards with "sweeping" language fail to provide attorneys with "fair limitation or fair warning."[169] As one federal district court noted in 1990, the "importance of providing attorneys with concrete ethical guidelines cannot be underestimated [because] [t]he disciplinary rules often carry the threat of possible sanctions against attorneys for ethical violations."[170]

The very naming of the ABA's major amendments has also signaled the move toward a more definite and clearer compositional structure of directives. The term "canon" denotes a moralistic, fundamental standard,[171] while a "rule" is legalistic in nature without explicit regard for moral axioms. A rule principally concerns itself with what an actor may or may not do.[172] A rule relies on punitive measures, executed

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162. Model Code of Prof'l Responsibility Preface (1969).

163. Wolfram, *supra* note 21, at 55.

164. *See* Letter from Judge Francis C. Lowell to Ezra Thayer 1 (June 12, 1908) (on file with the Harvard Law School Library).

165. *Id.*

166. *Id.*

167. Kutak, *supra* note 78.

168. Model Rules of Prof'l Conduct pmbl. and Scope (2007).

169. Kutak, *supra* note 78.

170. Siguel v. Trs. of Tufts College, No. 88-0626-Y, 1990 WL 29199, at *5 (D. Mass. Mar. 12, 1990).

171. *See* Oxford English Dictionary Vol. 11 838 (2d. Ed. 1989) (A Canon is "a general rule, fundamental principle, aphorism, or axiom governing the systematic or scientific treatment of a subject.").

172. *See* Daly, *supra* note 21, at 1123 ("From the actors' perspective, rules are usually perceived as more conduct-specific than standards.").

by an external adjudicating body, to ensure compliance, while a canon relies on the actor to reform independently. Circumventing a canon does not trigger punitive action, but relies on self-evaluation to instill a sense of ethical obligation and professionalism.[173] As a result, the composition of a canon differs significantly from that of a rule. Ideally, the former has no compositional limits, while the latter necessitates specificity, namely, notice of required conduct.

Wolfram has criticized the "unnecessary breadth" in ethical oversight for failing to notify attorneys explicitly what conduct will give rise to sanctions.[174] At the core of his criticism, he appeals to the void for vagueness doctrine, which articulates that the "basic principle of due process" means that "an enactment is void . . . if its prohibitions are not clearly defined."[175] Justice Thurgood Marshall expounded upon the doctrine, asserting: "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."[176] Adjudicative bodies should not employ a rule that fails to give individuals notice of the proscribed conduct and then deprive the individuals of their livelihood, especially when the client's interests compel an attorney to advocate zealously.

Courts, however, have been reluctant to annul disciplinary directives as too vague. A disciplinary provision frequently scrutinized as open-ended is DR 1-102(A)(5), which states that a lawyer shall not "engage in any other conduct that adversely reflects on his fitness to practice law."[177] Courts have upheld the directive on the basis that attorneys know or should know those actions that diminish their fitness.[178] According to the New York Court of Appeals, the guiding principle in determining vague directives is "whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed."[179] A New York appellate court added that DR 1-102(A)(5) "does not exist in a vacuum. It must be read in conjunction with the other Disciplinary Rules and the ethical strictures of

173. *See id.* Daly has noted that "[s]tandards are less determinative than rules because they serve to promote the advancement of abstract ideals such as goodness and fairness. From the decisionmaker's perspective, standards are both a blessing and a burden; a blessing because they encourage and legitimize nuanced resolutions, a burden because they demand careful and honest reflection."). *Id.*

174. Wolfram, *supra* note 21, at 87 ("Unecessary breadth is to be regretted in professional rules that can be used to deprive a person of his or her means of livelihood through sanctions that are universally regarded as stigmatizing."). Moreover, Wolfram has disapprovingly referred to certain directives as "garbage cans of the Code . . . into which anything can be tossed." *Id.* at n.50.

175. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

176. *Id.*

177. Model Code of Prof'l Conduct DR 1-102(A)(6) (1969).

178. *In re* Holtzman, 78 N.Y.2d 184, 190–91 (1991); *In re* Cohen, 530 N.Y.S.2d 830, 832 (1st Dep't 1988); *In re* Discipline of an Attorney, 442 Mass. 660, 668–69 (Mass. 2004); *In re* Holley, 729 N.Y.S.2d 128, 132 (1st Dep't 2001).

179. *In re* Holtzman, 78 N.Y.2d at 191.

the Code of Professional Responsibility."[180] The trouble with the reasonable-attorney standard is that it requires a case-by-case factual analysis and attorneys to memorize the Code—an ineffective method for regulating professional conduct, particularly because it could lead to counter-productively cautious client advocacy.

Accordingly, when punitive sanctions attach to disciplinary directives, their semantic construction should be broadly, if not universally, operational. Operational directives are ready-made; once the drafter sets down his or her pen, the directives should contain the necessary language to function in real-life situations. In other words, the author's selected language should effectively communicate the proper scope of conduct across time, place, and circumstances. Directives are operational if they are instrumental, meaning that the language used is mechanistic and universally applicable—requiring no interpretation, only reference. The selected language, therefore, should be narrow, concise, and understandable to its audience. Standards such as the Canons, on the other hand, are too conceptual, inciting reflection and interpretation.[181] They may be cast in broad language, otherwise ineffective for regulations with punitive consequences. If drafters fail to devise an operational directive, they leave the burden on the courts to implement the necessary instrumentalities, which are typically expressed in the form of tests. The resultant tests then should also function mechanistically.

Interestingly, Hoffman stated that ethical directives should be "frame[ed] [] in the manner of resolutions, rather than of *didactic rules*, hoping they may thereby prove more impressive, and be the more likely to be remembered."[182] He specifically focused on the form of the directive rather than the specified conduct. Nearly all of his resolutions begin with the pledge: "I will . . . ."[183] The ensuing conduct of each pledge is broadly defined and moralizing in tone.[184] For example, Resolution 1 states: "I will never permit professional zeal to carry me beyond the limits of sobriety and decorum," and Resolution 2 states: "I will espouse no man's cause out of envy, hatred or malice, towards his antagonist."[185]

Granted, Hoffman's suggestion to frame ethical directives as resolutions only concentrated on the composition of the pledge, rather than conduct. Extending Hoffman's compositional suggestion to the conduct of a directive rather than just to the pledge, however, informs how the *conduct* of contemporary ethical directives should be composed. Consider that resolutions serve to incorporate and bind parties to a resolved statement. Didactic rules, on the other hand, are aphoristic; they express a general truth or wise observation without a binding effect. Didactic rules resemble the early Canons, possessing a generalized meaning and moralistic tone that would

180. *In re Cohen*, 530 N.Y.S.2d at 832.

181. Daly, *supra* note 21, at 1123.

182. Hoffman, *supra* note 58, at 751 (emphasis in original).

183. *Id*. at 752–75.

184. *Id.*

185. *Id*. at 752.

require attorneys to engage in repeated, intensive reading, whereas resolutions would require attorneys to engage in more extensive reading, *viz.* the collection of resolved statements opposed to their dissection. Because a resolution serves to bind a collective to a specific course of conduct, it should ideally be narrowly devised. Otherwise, members of the collective will more likely breach the parameters of the resolution.

Disciplinary Rule 7-104 was not composed properly because the term "party" in the organizational context is open to too many interpretations. The responsibility then falls to the courts to mend the problem and provide attorneys with advance notice of the appropriate limits of conduct. In order to do that, courts should forge a rule, interpretation, or test that effectively communicates a singular, comprehensible denotation of the term "party." In *Niesig*, the Court of Appeals, however, constructed an ineffective test that threatens attorneys' ability to protect their livelihood and advocate zealously.

IV. THE SHORTCOMINGS OF *NIESIG*

In *Niesig*, the plaintiff, a construction worker, was injured when he fell from a scaffold at a construction site.[186] Following commencement of an action against his employer, the plaintiff sought judicial approval to conduct *ex parte* interview of low-level employee witnesses present at the time of the accident.[187] In fashioning the alter-ego test, the Court of Appeals rejected the control-group test and blanket prohibition on such communications.[188] The control-group test defined "party" to include only the most senior management exercising substantial control over the corporation, which left the majority of the workforce susceptible to informal interviews.[189] At the other end of the spectrum, the blanket ban on such interviews, which the Appellate Division had endorsed,[190] classified all current employees as parties. While both of these extremes advance greater predictability in application, they each left one party at a disadvantage. Attempting to strike a balance between both, the court settled on the middle-road, three-prong alter-ego test.

Ironically, the Court of Appeals predicted that the alter-ego test would "become relatively clear in application" because "[i]t is rooted in developed concepts of the law of evidence and the law of agency, thereby minimizing the uncertainty facing lawyers about to embark on employee interviews."[191] This prophecy, however, has not materialized. State and federal courts in New York State have barely, if ever, raised or utilized the commands of agency and evidence law in their analysis.[192] The *Niesig*

186. Niesig v. Team I, 76 N.Y.2d 363, 368 (1990).

187. *Id.*

188. *Id.* at 371.

189. *See id.* at 373.

190. *See id.* at 372.

191. *Id.* at 375.

192. *See, e.g.*, Miano v. AC & R Adver., Inc., 148 F.R.D. 68 (S.D.N.Y. 1993) (holding an executive assistant was not a "party" under the no-contact rule because he did not hold a management level position and his

court in fact never administered the alter-ego test against the employees at issue, but conclusorily permitted the interviews based on their low status.[193] Subsequent New York case law has almost exclusively addressed low-level and former employees, holding, with little explanation, that they are not "parties."[194] In fact, the conclusions insinuate that low-level employees are invariably unable to bind a principal, thus completely disregarding local agency and evidence laws.

Mechum v. Outdoor World Corp[195] and *Gilbert v. State of New York,*[196] virtually the only cases to address whether a supervisor is a party, both illustrate the failure to utilize agency and evidence laws.[197] In *Mechum*, the plaintiff, with the assistance of counsel, tape-recorded a conversation with a supervisor employed by the defendant.[198] The trial court noted that the plaintiff sought to gain an admission that "would have to come from one with authority to speak for or bind the corporation."[199] Without explanation, the court summarily found that while the employee was not senior management, "supervisors have significant managerial responsibility, sufficient to preclude *ex parte* communications."[200] While the summary conclusion suggests that supervisors should be deemed parties based solely on their status,[201] no court has affirmatively adopted *Mechum*. In fact, just a year after the decision, in *Gilbert*, the trial court tacitly rejected the proposition of *Mechum*, but similarly failed to isolate

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statements could not be imputed to the corporation). In *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp.2d 119 (S.D.N.Y. 1999), the court held that the sales clerks were not parties because they were "low-level employees with no management responsibilities whatsoever. As a result, they would generally not be considered parties under DR 7-104(a) because they have no apparent or actual authority to bind the company." *Id.* at 125. That is not necessarily accurate under agency law; while a low-level employee typically has little authority to bind, he or she is not without binding authority simply based on hierarchal status, just as a higher-level employee does not necessarily have power to bind a principal on that fact alone. In *Merrill v. City of New York*, No. 04 Civ. 1371, 2005 WL 2923520, at *1 (S.D.N.Y. Nov. 4, 2005), the court held that a police officer was not a party because he "was not in a position to bind the City, much less the other defendants in this case, in recounting what he observed at a police demonstration." In *Albany Med. Ctr. v. U.S.*, 04 Civ. 1399, 2006 WL 4573714, at *6 (N.D.N.Y. Oct. 17, 2006), the court held that former employees could be interviewed. In *Pauling v. Sec'y of the Dep't of Interior*, No 95 Civ. 8408, 1997 WL 661393, at *2 (S.D.N.Y. Oct. 22, 1997), the court held with little analysis that the employee was not a party. In *Quintana v. City of New York*, 686 N.Y.S.2d 408, 409 (2d Dep't 1999), the court held that the superintendent was a low-level employee.

193. *See* Niesig v. Team I, 76 N.Y.2d 363, 374–76 (1990).

194. *See* cases cited, *supra* note 13.

195. 654 N.Y.S.2d 240 (Sup. Ct. Queens County 1996).

196. 662 N.Y.S.2d 989 (N.Y. Ct. Cl. 1997).

197. *Schmidt v. State*, 695 N.Y.S.2d 225 (N.Y. Ct. Cl. 1999), is a third case that addresses the identity of supervisors. The court held that the supervisor was a party because the supervisor's conduct may impute liability onto the State. *Id.* at 229. The binding and imputation prongs differ in that the binding prong is based on an employee's authority while the other is based on vicarious liability.

198. 654 N.Y.S.2d at 244.

199. *Id.* at 247.

200. *Id.*

201. *Mechum* addressed other issues associated with DR 7-104, to which other courts have cited. *See id.*

how the principles of agency and evidence instructed its analysis of whether a supervisor was able to bind. There, the claimants sued the State for creating the icy road conditions that caused an automobile accident.[202] During discovery, their attorney interviewed a state supervisor *ex parte* who witnessed the condition of the road and the State's snow removal efforts.[203] The State sought to exclude the supervisor's statements under the no-contact rule, on the basis that the supervisor possessed significant powers to bind, such as authority to direct personnel, make field decisions, and file disciplinary complaints against employees.[204] Even though the court explicitly stated that the issue rested on the employee's ability to bind, it went ahead and employed the imputation prong, holding that the supervisor could not subject the State to liability because he was not responsible for the bypass on the day of the accident.[205] The court left open whether or not the supervisor was considered "indistinguishable" from, or could speak for, the State solely based on his authority.

With respect to the binding prong, the doctrines of agency and evidence are unable collectively to provide attorneys with prospective guidance as to whether or not employees have the power to bind their employer. Each doctrine presents complicated, fact intensive issues inappropriate for a mandatory disciplinary rule that requires clear and functional instrumentalities. Aggravating matters, *Niesig* and its progeny fail to supplement one another to build a normative jurisprudence that would help guide attorneys and reduce judicial intervention.

A. Binding under New York Agency Law

Under New York law, employees may possess actual, implied, or apparent authority to bind their principal. Actual authority is defined as "the power of the agent to do an act or to conduct a transaction on account of the principal which . . . he is privileged to do because of the principal's manifestation to him."[206] Under implied authority, an agent is empowered to bind a principal "when verbal or other acts by a principal reasonably give the appearance of authority to the agent."[207] The problem with these two types of authority is obvious: an attorney is forced to investigate what a principal's words or conduct could have been towards an alleged agent. Compounding the problem, an agent may also obtain apparent authority when a "third party relied upon the misrepresentations of [an] agent because of some misleading conduct on the part of

202. *See* Gilbert v. State, 662 N.Y.S.2d 989, 990 (N.Y. Ct. Cl. 1997).

203. *See id.*

204. *See id.*

205. *See id.* at 992–93.

206. Dinaco, Inc. v. Time Warner, Inc., 346 F.3d 64, 68 (2d Cir. 2003); Wen Kroy Realty Co. v. Pub. Nat'l Bank & Trust Co., 260 N.Y. 84, 91 (1932) ("Actual authority is the result of the principal's consent manifested to the agent.").

207. 99 Commercial St. Inc. v. Goldberg, 811 F. Supp. 900, 906 (S.D.N.Y. 1993) (citing Greene v. Hellman, 51 N.Y.2d 197, 204 (1980)).

the principal."[208] Apparent authority is created when "words or conduct of the principal, communicated to a third party, [] give rise to the appearance and belief that the agent possesses authority to enter into a transaction."[209] This requires an attorney to undertake the nearly insurmountable task of uncovering the tangled relationships between an agent, principal, and third party.

Because every employee, regardless of hierarchal rank, may possess any one of these three types of authority to bind the principal at some point, the legal problem is exacerbated. This area of law is in fact often rife with litigation. Even more, a litigant cannot establish any one of the agency authorities formulaically, for example, by relying on titles alone. [210] Yet, neither the Court of Appeals nor New York's lower courts have attempted to more narrowly construe which of the three agency relationships should be utilized and which disregarded, followed by how they should be applied.

B. Binding under New York Evidence Law

The Court of Appeals' adoption of evidence law as a basis refers to the "speaking agent" exception.[211] Under New York law, an agent's statements are generally not binding upon his principal as an admission. The exception, however, maintains that an agent may bind a principal to statements as though the employer itself stated them when the statements are made (1) within the scope of the employee's authority and (2) during the course of the employee's performance of his duties.[212] The central issue typically focuses on the first element, which asks whether the employer implicitly or explicitly authorized the employee to make statements. Explicit authorization is simple enough: an employer instructs an employee to speak to the media, for example. Implicit authorization primarily deals with the employee's responsibilities, i.e., was it a part of the employee's job responsibilities to speak on behalf of the entity?[213] These types of employees typically consist of representatives

208. Ford v Unity Hosp., 32 N.Y.2d 464, 473 (1973).

209. Hallock v. New York, 64 N.Y.2d 224, 231 (1984).

210. The New York Court of Appeals and the State's lower courts have held that an employee's authority to bind, whether in the form of actual or another type of authority, shall not be based merely on the employee's title. *See, e.g., Wolf v. United* Drug Co., 229 N.Y. 537, 538–39 (1920); Bruckner v. Hartford Accident & Indem. Co., 657 N.Y.S.2d 514, 515 (3d Dep't 1997); Studebaker Bros. Co. v. R.M. Rose Co, 119 N.Y.S. 970, 972 (N.Y. City Ct. 1909).

211. *See* Niesig v. Team I, 76 N.Y.2d 363, 374 (1990) ("The potential unfair advantage of extracting concessions and admissions from those who will bind the corporation is negated when employees with 'speaking authority' for the corporation . . . are deemed 'parties.'").

212. *See* Giandana v. Providence Rest Nursing Home, 815 N.Y.S.2d 526, 531 (1st Dep't 2006); Kelly v. Diesel Constr. Div., 35 N.Y.2d 1, 8 (1974); Niesig v. Team I, 545 N.Y.S.2d 153, 157 (2d Dep't 1989).

213. *See* Prado v. Onor Oscar, Inc., 353 N.Y.S.2d 789, 790 (2d Dep't 1974); Jordan v. Excel Moving & Storage, 800 N.Y.S.2d 348, 348 (N.Y. Civ. Ct. Kings County 2005) (due to the nature of job responsibilities, the general manager was in a position "to speak on behalf of the company with respect to the company's general procedures.").

who act in a spokesperson capacity,[214] such as a company communications officer, chief executive officer, public relations officer, or chair of the board.

New York's exception ironically favors the control-group test because normally high-level management employees are those empowered to speak for the entity.[215] But the exception is not that simple. For example, under the exception, a supervisory title alone will not automatically satisfy the element.[216] Mid-level supervisors may have no authority to speak on behalf of the entity, while low-level communications supervisors may.

The appellate court in *Niesig* actually denounced the exception as a test because it would likely expose all employees to *ex parte* interviews,[217] the complaint similarly lodged against the control-group test. First, the appellate court observed that corporate litigants represented by counsel would be unlikely, either explicitly or implicitly, to authorize an employee to engage in *ex parte* interviews.[218] Second, the court was unable to fathom how *ex parte* interviews of employees "could ever be viewed as having been made in the course of that employee's actual duties,"[219] though a press relations officer or a chief executive officer might prove the rare exception. Of course, the difference between the appellate court and the high court is that the latter was not considering the exception as a test, but rather as a basis to satisfy its alter-ego test, which raises multiple rhetorical questions: how should courts and litigants use the evidentiary exception? Are bases employed differently than tests? Are litigants expected to satisfy both elements in the same way they would if faced with an evidentiary question? Did *Niesig* instead seek to employ the spirit of the exception, meaning that those employees typically authorized to speak for the employer would be deemed parties? The court's endorsement of evidence, and agency law for that matter, does not fully provide the answers.

C. Agency and Evidence Law in the Disciplinary Context

Agency and evidence law predominately require a fact specific inquiry into the relationships of persons. Without any clarification, if attorneys want to interview an employee, these two doctrines require them to conduct discovery into and litigate

214. *See, e.g.*, Spett v. President Monroe Bldg. & Mfg. Corp., 19 N.Y.2d 203, 206–07 (1967) (statement made by "general foreman" shortly after plaintiff's accident was admissible because the foreman "whom complete management responsibility for the enterprise was vest[ed,]" essentially, served as the company's "spokesman.").

215. *See id.*

216. The vicarious admission issue frequently arises in premises liability actions where plaintiffs attempt to impute knowledge via employee statements. *See, e.g.*, Cohn v. Mayfair Supermarkets, Inc., 759 N.Y.S.2d 131, 132 (2d Dep't 2003) (no evidence store manager authorized to speak on behalf of the employer); Alvarez v. First Nat'l Supermarkets, Inc., 783 N.Y.S.2d 62, 64 (2d Dep't 2004) (same); Berzon v. D'Agostino Supermarkets, Inc., 792 N.Y.S.2d 94, 95 (2d Dep't 2005) (same).

217. *See Niesig*, 545 N.Y.S.2d at 158.

218. *Id.*

219. *Id.*

whether or not the employer has empowered the employee to act or speak for the entity. Attorneys should not be expected to engage in the sort of analysis with which courts frequently struggle. Courts should explicitly identify how to apply bases, particularly those as conceptual as agency and evidence bases, in the disciplinary context. The courts' failure to do so threatens to leave attorneys hopelessly mired in agency and evidence law.

Another concern is that under agency and evidence law, an agent's ability to bind a principal to a course of conduct or statement rests on whether authority is prescribed; it generates an either-or analysis. The problem then is that employers may empower employees to act or speak for the company in limited or broad circumstances, which prevents drawing a clear line along the organizational hierarchy. In his lone concurrence in *Niesig*, Judge Joseph Bellacosa worried that the alter-ego test would swallow any exceptions, claiming it would "function almost identically with the rejected [blanket ban] test."[220] One reason presumably is that all employees could effectively fall within the binding-prong enclave. For that reason, the term "bind" should be defined by the type of authority possessed, establishing a ceiling beyond which attorneys could not pass.

In that regard, as Judge Bellacosa added, the "purpose [of the no-contact rule is] quite distinct from enactments in public law prescribing the rights and protections of parties to litigation."[221] He was pointing out that a test should satisfy the purposes for which a rule was enacted. Agency and evidence law encompass a vast market of public behavior suitable for *respondent superior* in tort law, for example, but unsuitable for the disciplinary arena, which covers a specific population and sphere of conduct. Historically, the no-contact rule was designed to protect parties from overreaching attorneys extracting undue concessions, admissions, settlements, and privileged communications that, in the organizational context, only those at the helm of an entity, who truly are "indistinguishable" from it, typically have the power to make. A test should then be narrowly tailored to identify those employees and, in doing so, it will fulfill the rule's purposes. The National Labor Relations Act "supervisor" test should help do just that because its purpose is to define those employees who are deemed one and the same as the entity.

V. THE NATIONAL LABOR RELATIONS ACT "SUPERVISOR" TEST

In 1935, Congress passed the National Labor Relations Act (NLRA), informally known as the Wagner Act, which sought to protect employees' right to organize and to reduce industrial unrest.[222] The Act forbids employers from interfering with, restraining, or coercing employees in the exercise of rights related to organizing, forming, or joining a labor organization for collective-bargaining purposes.[223]

220. Niesig v. Team I, 76 N.Y.2d 363, 376 (1990) (Bellacosa, J., concurring).

221. *Id*. at 377.

222. *See* 29 U.S.C. § 151 (2006).

223. *Id*. at § 158(a) (2006).

Initially, the Act did not expressly exclude supervisors from its protections. Under the Act, "the term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse," an exceptionally expansive (and circular) definition.[224] Shortly after its enactment, the unionization of supervisors became a fiercely contested issue. In 1942, the National Labor Relations Board ("Board") affirmatively held in a sequence of cases that supervisors constituted "employees" and were entitled to the Act's protections.[225] The Board reasoned that since supervisors were not included in the three enumerated exclusions, Congress must have intended the Act to cover persons employed as supervisors.[226] A year later, the Board backtracked in *Maryland Drydock Co.*, appearing to overrule its prior position.[227] The Board quickly clarified itself in *Packard Motor Car Co.*, however, maintaining that supervisors were deemed employees, but that the Board had discretion to deny them protections when it served the purposes of the Act.[228] The U.S. Supreme Court affirmed the *Packard Motor Car Co.* decision, solidifying supervisors' NLRA protections.[229]

The Court's decision, however, received stinging criticism. It left the NLRA without a clear distinction between "employees" and "employers." In his *Packard* dissent, Justice William Douglas stated: "The present decision . . . tends to obliterate the line between management and labor" and "tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group . . . and the stockholder."[230]

In response, Congress enacted the Labor Relations Act in 1947, also referred to as the Taft-Harley Act, which amended the NLRA, reversing the Court's *Packard* decision. The amended NLRA explicitly defined supervisors and excluded those so defined from the protections of the Act. Under the Act, a supervisor includes any:

> [I]ndividual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[231]

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224. *Id.* at § 152 (2006).

225. *See* Union Collieries Coal Co., 44 N.L.R.B. 165, 167 (1942); Godchaux Sugars, Inc., 44 N.L.R.B. 874, 879 (1942).

226. *See Union Collieries,* 44 N.L.R.B. at 167–68.

227. *See* 49 N.L.R.B. 733, 737 (1943).

228. *See* 61 N.L.R.B. 4, 5–7 (1945).

229. *See* Packard Motor Car Co. v. Nat'l Labor Relations Bd., 330 U.S. 485, 491–92 (1947).

230. *Id.* at 494 (Douglas, J. dissenting).

231. 29 U.S.C.§ 152(11) (2006). In *Nat'l Labor Relations Bd. v. Health Care & Retirement Corp.*, the U.S. Supreme Court established the supervisory test to identity which employees are deemed statutory

Because the statute is disjunctive, an employee need only possess authority to execute one of the thirteen enumerated functions.[232]

Although an alleged supervisor possesses a listed authority, the statute still requires courts and litigants to focus on the quantity and quality of authority. "In determining whether someone is a supervisor," the Fifth Circuit has stated, "job titles [will] reveal very little, if anything."[233] An employee must have power to exercise *independent judgment* in performing the supervisory functions; otherwise the employee cannot be deemed a supervisor.[234] In other words, supervisors must have "real power" to act in the interests of their employer.[235] According to the Board, in order to exercise such power, "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data."[236] Employees who exercise independent judgment do not need to obtain approval or permission from higher-ranked employees or follow the commands of superiors; instead, they alone make employment decisions regarding the organization's needs.[237] Authority that is customary, sporadic, nominal, or "dictated or controlled by detailed instructions," will likely fall below the required threshold.[238]

Employees who have the autonomous power to hire and terminate other employees are likely the easiest employees to label as a "supervisor" under the NLRA. Some supervisors will, however, fall along an indeterminate position on the chain of command, possessing certain degrees of power. The most common areas that the case law examines are an alleged supervisor's power to direct, assign, or discipline.

A. Power to Responsibly Direct

The power to responsibly direct focuses on two issues: first, supervisors' power to oversee how work is performed and, second, the potential repercussions they face for performance issues. The first component is straightforward. It looks at whether the

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supervisors. The Court instructed litigants to address three questions: 1) does the employee have the authority to exercise at least one of the thirteen listed powers; 2) if so, does the employee exercise a listed power using independent judgment; and 3) does the employee exercise the power in the interest of the employer. 511 U.S. 571, 573–74 (1994).

232. *See* Superior Bakery, Inc. v. Nat'l Labor Relations Bd., 893 F.2d 493, 496 (2d. Cir. 1990); Nat'l Labor Relations Bd. v. Sec. Guard Serv., Inc., 384 F.2d 143, 147 (5th Cir. 1967).

233. Nat'l Labor Relations Bd. v. ADCO Elec. Inc., 6. F.3d 1110, 1117 (5th Cir. 1993).

234. *See Sec. Guard Serv., Inc.,* 384 F.2d at 147 (emphasis added).

235. *Id.* at 148.

236. Oakwood Healthcare, Inc., 348 N.L.R.B. 686, 693 (2006).

237. *See Superior Bakery,* 893 F.2d at 496–97; Nat'l Labor Relations Bd. v. Metro. Petrol. Co., 506 F.2d 616, 617–18 (1st Cir. 1974).

238. *Oakwood Healthcare,* 348 N.L.R.B. at 708; s*ee also Sec. Guard Serv.,* 384 F.2d.at 147 *(quoting* S. Rep. No. 105, at 4 (1947) (The definition of supervisor is "distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as to the right to hire or fire, discipline, or make effective recommendations with respect to such action.")).

alleged supervisor has the power to instruct and correct how work is performed.[239] If alleged supervisors follow preset policies, work orders, or some other type of instructions, their power will likely be deemed routine or clerical, not independent.[240] The same goes for alleged supervisors who direct employees that "generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance."[241] Moreover, simply being the highest-ranking employee on site will not automatically create de facto directing power.[242]

The responsibility component asks whether the alleged supervisor is "answerable for the discharge of a duty or obligation."[243] Employees are deemed answerable when they are "held fully accountable and responsible for the performance and work product of the employees" they direct.[244] Accountability is established with proof that "there is a prospect of adverse consequences for the putative supervisor if he/she does not take [corrective] steps."[245] Being held accountable aligns the employee with the employer; the employee's decisions are made in the employer's interests, not those of the employees.[246]

The question simply boils down to whether the alleged supervisor is on the hook for work problems. Evidence that employees are subject to discipline or unsatisfactory evaluations for the performance of others is typically proof of accountability.[247] For example, an employer issues a written warning to an alleged supervisor because his subordinates fail to meet production goals.[248] Material, adverse consequences, however, should accompany evaluations or warnings; they are usually insufficient by themselves.[249]

B. Power to Assign

The power to assign refers to employees' authority to make immediate, autonomous workforce decisions in connection with employers' business needs. The focus is on

239. *See* Croft Metals, Inc., 348 N.L.R.B. 717, 721 (2006).

240. *See id.*

241. *Id.* at 722.

242. *See* Training School at Vineland and Commc'ns Workers of Am., 332 N.L.R.B. 1412, 1412 (2000) (citing list of cases).

243. *Oakwood Healthcare,* 348 N.L.R.B. at 691 (quoting Nat'l Labor Relations Bd. v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986)).

244. Spentonbush/Red Star Cos. v. Nat'l Labor Relations Bd., 106 F.3d 484, 490–91 (2d Cir. 1997) (court lists a number of legal and policy duties the employee will face consequences for if violated); Nat'l Labor Relations Bd. v. Quinnipiac College, 256 F.3d 68, 77 (2d Cir. 2001) (shift supervisors reprimanded for action of other employees and required to control certain situations).

245. *Oakwood Healthcare,* 348 N.L.R.B. at 692.

246. *See id.*

247. *See id.* at 695.

248. *See* Croft Metals, Inc. 348 N.L.R.B. 717, 722 (2006).

249. *See* Beverly Enterprises-Minnesota, Inc. 348 N.L.R.B. 727, 730 (2006).

what, where, and when work is performed, not on how it is performed.[250] The Board has defined "assign" as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties. i.e., tasks, to an employee."[251]

If employees are empowered to assign, they must still have significant discretion to do so; their decisions may not be predetermined by the employer's orders.[252] Employers who expressly command their "supervisory" employees or institute instructive policies and procedures keep the independent decision-making power in their hands.[253] The Board has even stated that business decisions based on "preexisting priorities—[like] a customer out of [a product]—or commonsense considerations—[like] a sick driver must be replaced" are equally excluded from independence.[254] Furthermore, an assignment that results from an employee's knowledge and skills regarding issues incidental to performing job duties rather than the employee's role as an agent may not suffice.[255] If the assignment is solely based on "equalizing workloads," it too may be deemed routine and clerical.[256] Finally, assigning workers for overtime to meet routine overtime demands is also typically insufficient. Circuit courts have warned, however, that established policies and procedures do not automatically strip an employee of discretion.[257] Employers may still empower alleged supervisors to use significant discretion in making assignment decisions, despite established policies.

C. Power to Discipline

The power to discipline asks whether an employee has authority to effectuate consequences for a subordinate. There are a number of instances where alleged

250. *See Oakwood Healthcare*, 348 N.L.R.B. at 689 ("[C]hoosing the order in which the employee will perform discrete tasks within those assignments . . . would not be indicative of exercising the authority to 'assign.'").

251. *Id.*

252. *See* Nat'l Labor Relations Bd. v. Monroe Tube Co., 545 F.2d 1320, 1324–25 (2d Cir. 1976)*; see also* Nat'l Labor Relations Bd. v. J.W. Mays, Inc., 675 F.2d 442, 444 (2d. Cir. 1982) (employees "collect[ed] information so that others can make decisions, and routinely direct[ed] nontitled guards to do the jobs others [had] assigned them."); Nat'l Labor Relations Bd. v. Meenan Oil Co, 139 F.3d 311, 321 (2d Cir. 1998) (the dispatchers "decisionmaking is directed and circumscribed by clearly established Company policy, and they exercise no authority that transcends the routine or clerical, or that requires the use of independent judgment."); Schnurmacher Nursing Home v. Nat'l Labor Relations Bd., 214 F.3d 260, 266 (2d Cir. 2000) (nurse's exercise of nominal discretion too little to establish assigning authority).

253. *Meenan Oil Co*, 139 F.3d at 321–22 (company established policies and procedures to instruct dispatcher how to direct employees).

254. *See* B.P. Oil, Inc., 256 N.L.R.B. 1107, 1109 (1981).

255. *See* Nat'l Labor Relations Bd. v. Mt. Sinai Hosp., 8 Fed. App'x 111, 113–14 (2d Cir. 2001) (citing Nat'l Labor Relations Bd. v. ADCO Elec. Inc., 6. F.3d 1110, 1117 (5th Cir. 1993)).

256. *Oakwood Healthcare,* 348 N.L.R.B. at 693.

257. *See* Nat'l Labor Relations Bd. v. Quinnipiac College, 256 F.3d 68, 75–76 (2d Cir. 2001) (including itself, provides examples of cases).

supervisors may appear to engage in disciplinary activities, but lack real authority. Many employees may not make any judgments regarding a subordinate's conduct, but merely act as a "conduit for information" for the employer to take necessary action.[258] For example, employees who informally counsel subordinates are not necessarily labeled supervisors.[259] Employees unable to discipline other employees without consulting higher management will not automatically create such status either.[260] Executing performance evaluations also does not necessarily fall within the ambit of authority to discipline. An evaluation or other types of discipline that affects a subordinate's job status, such as termination, demotion, or promotion, should signal that the employee is a supervisor.[261]

D. The Supervisor Test as the Basis for Niesig's *Binding Prong*

The NLRA supervisor test is consistent with the goals of *Niesig* because it focuses on the relationship between the employee and employer by identifying those employees closely linked with the latter. At the same time, the supervisor test should enhance the functionality of the binding prong, which the doctrines of agency and evidence struggle to do. The major advantage of the supervisor test is that the statutory language preempts the analysis by limiting it onto the thirteen enumerated powers. This should have the effect of designating a clearer line along the organizational hierarchy absent from the analysis under the current binding prong. If an employee does not possess any of the thirteen powers, he or she is automatically not a supervisor and thus should be available for *ex parte* interviews**.** Those employees that do possess any of the enumerated powers are not necessarily untouchable. The power must still consist of substantial quality and quantity. Because the focus is solely on the enumerated powers—many of which may be relatively familiar and recognizable to plaintiffs and their counsel, such as the power to hire and terminate—attorneys do not have to go searching for every possible authorization bestowed upon an employee. The breadth of case law on the NLRA supervisor test also should provide attorneys with considerable guidance. As a result, the test should improve attorneys' ability to prospectively identify which employees are able to "bind" the entity.

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258. *Meenan Oil Co*, 139 F.3d at 321.

259. *Quinnipiac College*, 256 F.3d at 75 (employees who may informally counsel subordinates deemed supervisors because they also had the authority to recommend discipline sanctions.). In *Schnurmacher Nursing Home v. Nat'l Labor Relations Bd.*, nurses counseled and disciplined staff members informally and occasionally referred such issues to higher management, but the court did not deem such actions and referrals as disciplinary authority. 214 F.3d 260, 264–65 (2d Cir. 2000).

260. *Mt. Sinai Hosp.*, 8 Fed. App'x at 114.

261. *See* New York Univ. Med. Ctr. v. Nat'l Labor Relations Bd., 156 F.3d 405, 414 (2d Cir.1998) (unit chiefs required to evaluate attending physicians were instructed to give a grade range not deemed supervisors on that basis.); *Schnurmacher*, 214 F.3d at 265 (nurses' written evaluations of subordinates had no effect on job status of subordinates).

VI. PROCEDURAL AND EVIDENTIARY REQUIREMENTS FOR CONDUCTING OR PRECLUDING *EX PARTE* INTERVIEWS

A. Procedural Requirements

The Comment to Model Rule 4.2 advises: "A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order."[262] This procedure disadvantages parties seeking interviews. It compels them to expend time and expense requesting judicial approval, places on them the initial burden of proof, and forces them to disclose their strategy, giving opposing counsel ample time to confer with the witness, all of which further supports the need for improved determinacy.

Despite the Comment, courts have not adopted an official, uniform procedure for requesting or prohibiting *ex parte* interviews. Parties have pursued a number of tactics. Employers have moved for protective orders to prevent plaintiff's counsel from contacting their employees outside formal discovery methods.[263] They have also moved to exclude statements obtained through *ex parte* interviews and to disqualify plaintiffs' counsel for improper interviews.[264] Plaintiffs' attorneys have moved for declaratory orders and to "compel the defendants to desist from interfering with [] counsel's efforts to communicate *ex parte*."[265] Two separate procedures may, however, better balance the interests of all parties and establish uniformity: 1) undisclosed contact, or 2) disclosed contact. While both procedures are devised with the supervisor test and fact witnesses in mind, they can also be adapted to the other two *Niesig* prongs.

1. Undisclosed Contact

Attorneys may contact employees *ex parte* without notifying the employer and pose initial introductory questions to ensure compliance with the no-contact rule. At first, the attorney should question whether the employee has any of the thirteen functions of authority listed in the NLRA supervisor test. If so, the attorney should then vet the quantity and quality of the authority guided by common sense and case law. For fact-witness employees, this type of questioning should not compel the release of any information that the no-contact rule protects. This procedure allows attorneys to gain information, while keeping their strategy hidden from defendants and preserving time and expense from litigating the no-contact issue.

The method, however, presents obvious risks for disciplinary repercussions. Attorneys might reach incorrect conclusions. Or employees might accidentally or

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262. Model Rules of Prof'l Conduct R. 4.2 cmt. 7 (2002).

263. *See, e.g.*, Frey v. Dep't of Health & Humans Servs., 106 F.R.D. 32, 33 (E.D.N.Y. 1985); Wright v. Stern, No. 01 Civ. 4437, 2003 WL 23095571, at *1 (S.D.N.Y. Dec. 30, 2003).

264. *See, e.g.*, Muriel Siebert & Co. v. Intuit, Inc., 8 N.Y.3d 506, 507–08 (2007).

265. *See, e.g.*, McKitty v. Bd. of Educ., No. 86 Civ. 3176, 1987 WL 28791, at *1 (S.D.N.Y. Dec. 16, 1987).

intentionally disclose protected information.[266] Finally, attorneys might not resist eliciting information from a potential wellspring of facts that sits before them when they know the employee is likely a party.

2. Disclosed Contact

If attorneys are unsure whether an employee is a party, or are simply extra cautious, they should provide opposing counsel with a five-day notice of their intention to interview employees *ex parte*, which is not inconsistent with the deposition and subpoena notice requirement under the Federal Rules of Civil Procedure.[267] Upon receipt of a notice, opposing counsel may seek a protective order within a limited five-day timeframe.[268] If declining to object, opposing counsel's silence should be deemed constructive consent, which would then protect attorneys from disciplinary repercussions.

The procedural benefit is twofold. First, the burden shifts to employers to object and offer *prima facie* evidence that the employee is a party (which is where the burden should rest). Employers who seek unjustified protective orders solely to impede their adversary's prosecution may be liable for sanctions. Second, the brief window to object ideally reduces the time employers have to taint the testimony of a witness. Unfortunately, revealing legal strategy might be somewhat unavoidable with any middle-road approach.

B. Evidentiary Burdens

Should an employer object to an *ex parte* interview, the employer should be required to proffer sufficient proof that the employee is a party, since a party seeking

266. *See, e.g.*, G-1 Holdings v. Baron & Budd, 199 F.R.D. 529, 535 (S.D.N.Y. 2001) ("It is unrealistic to expect even the best-intentioned lay person to be able to safeguard the attorney-client privilege.").

267. *See* Fed. R. Civ. P. 30(b)(1); Fed. R. Civ. P. 45; *see also* P.S. v. Farm, Inc. 2009 WL 483236, at *4 (D.Kan. Feb. 24, 2009) (five days notice deemed reasonable); CIF Licensing, LLC v. Agere Systems Inc. 2009 WL 187823, at *2 (D.Del. Jan. 23, 2009) (seven days notice deemed reasonable); Jones v. U.S. 720 F.Supp. 355, 366 (S.D.N.Y. 1989) (eight days notice deemed reasonable). Some courts recognize that service and notice of a subpoena may be performed simultaneously. *See, e.g.,* Florida Media, Inc. v. World Publications, LLC, 236 F.R.D. 693, 694–95 (M.D.Fla. 2006); Shell v. Hilliard, 2007 WL 509263, at *4 (E.D.Tenn. Feb. 13, 2007).

268. Courts have adopted procedures, which are similar to the disclosure procedure discussed here and are instructive. *See, e.g.*, Katt v. New York City Police Dep't, No. 95 Civ. 8283, 1997 WL 394593, at *5 (S.D.N.Y. July 14, 1997) (the court instructed plaintiff to "serve a proposed list of the individuals she intends to interview, which should include the proposed employee's name and job title. Within ten (10) days of the plaintiff's service of the list, defendants may serve and file their objections, if any, to the employees plaintiff proposes. . . . [T]he Court, if the parties are unable to agree in writing, will direct which employees may be interviewed."); *Wright*, 2003 WL 23095571, at *1 (court directed plaintiff's counsel to advise defense counsel in writing of the names and positions (if known) of the employees at least seven days before the interviews); Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers, LLP, No. 03 Civ. 5560, 2006 WL 1520227, at *1 (S.D.N.Y. June 1, 2006) (party instructed to submit a list to opposing counsel, who has ten days to submit an affidavit or declaration attesting that the witnesses had access to privileged information).

to restrict discovery of relevant material has the burden of persuasion.[269] Since titles alone are insufficient to deny a party the right to interview an employee *ex parte*, a company cannot brand an employee with a decorative title of "supervisor" or "manager" in an effort to transform the employee into a "party" under the no-contact rule. Employers should produce admissible evidence, such as affidavits and documents that show their employee has the power to bind. Courts should reject broad, conclusory statements of authority—the NLRB has held as much in connection with the supervisor test.[270] Additionally, courts may not rely solely on the self-serving representations of an employer's counsel regarding an employee's authority. Both state and federal courts in New York have held that absent personal knowledge, counsel's representations are not probative, and therefore, not admissible evidence.[271]

VII. CONCLUSION

The NLRA supervisor test's enumerated functions, at a minimum, should set a floor below which all employee fact-witnesses may be available for *ex parte* interviews, something that agency and evidence law has failed to do. Both doctrines are too fact intensive and difficult to effectively limit in the attorney disciplinary context. The supervisor test, on the other hand, narrows the inquiry into specific forms of authority, some of which are common sense. In many instances, plaintiffs should know, for example, how to identify those employees with real power to hire, terminate, or discipline. An established floor will ideally improve attorneys' ability to prospectively determine when fact witnesses are parties, which in turn will simultaneously allow them to prosecute actions zealously and protect their livelihood.

The NLRA supervisor test will not, however, magically resolve all the problems with the binding prong—nothing short of a blanket ban or possibly the control-group test would. No doubt, attorneys would, in specific instances, still have to expend time and expense litigating the issue, but that is a valid consequence of any approach that attempts to resolve competing interests. The best courts can do in this situation is to implement the clearest possible standard, which is vital for mandatory disciplinary directives.

While judicial intervention may initially be necessary to identify the relevant evidence an employer must present to establish the employee's status as a party, the development of a functional body of law would reduce the need for excessive intervention. Employers will invariably know that empty, conclusory objections are

269. *See* Murray v. Palmer, No. 903 Civ. 1010, 2006 WL 2516485, at *1 (N.D.N.Y. Aug. 29, 2006).

270. Beverly Enterprises-Minnesota, Inc. 348 N.L.R.B. 727, 731 (2006) ("The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue.").

271. *See* Pisani v. Westchester County Health Care Corp., No. 05 Civ. 7113, 2007 WL 107747, at *2–3 (S.D.N.Y. Jan. 16, 2007) (without an affidavit from an affiant with personal knowledge, counsel's statements were deemed insufficient); Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980) ("[T]he bare affirmation of Royfost's attorney who demonstrated no personal knowledge of the manner in which the accident occurred . . . is without evidentiary value.").

inadequate responses to notices to interview, but instead will know that probative evidence is required to establish an employee's authority. Once the evidentiary line is drawn, employers could not reasonably object to proper *ex parte* interviews (particularly at the risk of sanctions), and attorneys should refrain from seeking improper interviews. Moreover, because the courts are not constrained to use the test in accordance with congressional intent or federal jurisprudence, they may amend it to best suit the needs of the no-contact rule, such as making the supervisory functions conjunctive opposed to disjunctive, adhering to circuit courts' narrow interpretation of "independent judgment," or reducing the number of functions a "supervisor" may possess.

The New York Court of Appeals and its lower courts should continually explore revising the approach until the middle-road becomes as functional as possible. A disciplinary rule that invokes sanctions on those it governs warrants clarity from its rule-making and adjudicating branches to be useful. In the end, the latter branch is responsible for mending any deficiencies that the former branch leaves. Adopting the NLRA supervisor test as the determinant of propriety in *ex parte* interviews of employee fact-witnesses would greatly advance that goal.