Suffolk Journal of Trial and Appellate Advocacy

Volume 5 | Issue 1 Article 14

1-1-2000

Communication with Represented Persons: An Analysis of the Scope of Rule 4.2 of the Massachusetts Rules of Professional Conduct as It applies to Corporations and Federal Prosecutors

Ashlie L. Ringel,
Suffolk University Law School

COMMUNICATION WITH REPRESENTED PERSONS: AN ANALYSIS OF THE SCOPE OF RULE 4.2 OF THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT AS IT APPLIES TO CORPORATIONS AND FEDERAL PROSECUTORS

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.[1]

I. INTRODUCTION

Rule 4.2 of the Massachusetts Rules of Professional Conduct took effect January 1, 1998.[2] The Massachusetts version of Rule 4.2, commonly known as the anti-contact rule or no-contact rule, provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[3] Rule 4.2 has been adopted in some form by all fifty states through their respective bar associations.[4] Having a basic understanding of the scope of Rule 4.2 is im-

---

[1] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (MODEL CODE) Canon 7, Ethical Consideration 7-18 (1986).

[2] See MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT (MASS. RULES) Rule 4.2 (1998). The Massachusetts version of Rule 4.2 replaces former Massachusetts Disciplinary Rule (DR) 7-104 (A)(1) of the Massachusetts Canons of Ethics and Disciplinary Rules Regulating the Practice of Law. MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW (MASS. CANONS) DR 7-104(A)(1) (1981).

[3] MASS. RULES Rule 4.2 (1998). The Massachusetts version of Rule 4.2 is identical to Rule 4.2 of the American Bar Association (ABA) MODEL RULES of Professional Conduct MODEL RULES OF PROFESSIONAL CONDUCT (MODEL RULES) Rule 4.2 (1995). Rule 4.2 applies to communication by an attorney with any represented person on the matter of the representation, not just to a named party. MASS. RULES Rule 4.2 cmt. 3 (1998).

[4] *See* Ira H. Leesfield, *Ex Parte Communications by Government Lawyers with Represented Parties*, 72 FLA. B.J. 18, 20 (1998) (discussing historical perspective of Model Rule 4.2 and its application in all fifty states); Neals-Erik William Delker, Com-

portant for all attorneys because the anti-contact rule pervades all areas of practice from transactions to litigation.[5] A great deal of recent controversy and debate surrounds Rule 4.2, including to whom the anti-contact rule applies, when it applies, and which state's anti-contact rule should be enforced when dealing with a violation of the rule in federal court.[6] Much of the controversy is due to the fact that the language of the rule is vague and ambiguous.[7]

Rule 4.2 does not bar communication by an attorney with a represented person on matters outside the representation, nor does it bar direct communication between the parties to a matter.[8] Rule 4.2 bars communication by an attorney with a represented person only when the attorney knows, in fact or from the surrounding circumstances, that the person is represented in the matter to be discussed.[9] An attorney may, however, communicate with a represented person on the matter of the representation if he has the consent of opposing counsel or if he is authorized by law to do so.[10] The prohibition against communication by an attorney with a represented person continues to exist even when the represented

---

ment, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U.L. REV. 855, 858 (1995) (noting long and pervasive history of anti-contact rule).

[5] *See, e.g.*, Mark A. Cohen, *New Ethics Rules Have Traps for Attorneys*, MASS. LAW. WKLY., Jan. 12, 1998, at 1 (noting Massachusetts attorneys should familiarize themselves with new Rules of Professional Conduct); Garrett Hodes, *Ex Parte Contacts With Organizational Employees in Missouri*, 54 J. MO. B. 83, 83 (1998) (stressing understanding of Rule 4.2's reach is necessary to effective advocacy); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 396 (1995) (indicating Rule 4.2 applies equally in transactional context as in context of litigation).

[6] *See* ABA Comm. On Ethics and Professional Responsibility, *supra* note 5 (acknowledging Committee wrote opinion in response to controversy surrounding Rule 4.2); *Corporate Counsel: Corporate Counsel Meeting Provides Forum for Views on Ex Parte Contact Rules*, 14 Law. Manual on Prof. Conduct 545 (November 25, 1998) (observing unsettled nature of present law surrounding Rule 4.2).

[7] *See* Chief Justice Herbert P. Wilkins, *The New Massachusetts Rules of Professional Conduct: An Overview*, 82 MASS. L. REV. 261, 264 (1997) (commenting Rule 4.2 is indefinite and understandably controversial).

[8] *See* MASS. RULES Rule 4.2 cmt. 1 (1998). The comments to Rule 4.2 provide further insight and guidance for the practicing attorney facing a Rule 4.2 ethical dilemma, but the text of the rule is authoritative. MASS. RULES, Scope (9).

[9] *See* MASS. RULES Rule 4.2 cmt. 5 (1998). Where the person is not known to be represented, Rule 4.3 of the Massachusetts Rules of Professional Conduct governs the attorney's communication with that person. Mass. *Id.*

[10] *See* MASS. RULES Rule 4.2 (1998). "Authorized by law" includes seeking and obtaining a court order permitting such communications. *Id.* MODEL CODE Canon 7, Ethical Consideration 7-18 (1986)

person initiates the contact.[11] The represented person cannot waive the anti-contact rule; only the represented person's attorney may waive it.[12]

This Note addresses some of the most current and controversial issues surrounding the anti-contact rule.[13] Section II of this Note examines the evolution of Rule 4.2 and its underlying policy considerations.[14] Section III addresses the scope of Rule 4.2 when the represented "person" is a corporation.[15] Courts, as well as state bar associations, have interpreted Rule 4.2 differently in this regard and various tests have been established to determine which corporate employees may be contacted.[16] Finally, Section IV addresses the scope of Rule 4.2 as it effects federal prosecutors.[17] Over the last decade the United States Department of Justice (DOJ) has diligently maintained that federal prosecutors are exempt from the anti-contact rule.[18] Recent court decisions and legislation have

---

[11] *See* ABA Comm. On Ethics and Professional Responsibility, *supra* note 5 (stating Rule 4.2 does not contemplate client waiver, as decided in Formal Opinion 108 (1934)); Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 341-44 (1992) (noting anti-contact rule, unlike many other ethics rules, does not permit client waiver).

[12] *See* ABA Comm. On Ethics and Professional Responsibility, *supra* note 5 (explaining that anti-contact rule protects not only represented persons but also effectiveness of attorney's representation); Cramton & Udell, *supra* note 11, at 341-44 (acknowledging that anti-contact rule is paternalistic and discussing potential benefits of allowing client waiver).

[13] This Note will not address other, equally important, issues surrounding Rule 4.2, such as its application to pro se lawyers and its effect on class action suits.

[14] *See infra* notes 20-39 and accompanying text. The evolution of Rule 4.2 of the Massachusetts Rules of Professional Conduct has mirrored the evolution of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct. As such, interpretations and opinions regarding Model Rule 4.2 are equally applicable to the Massachusetts version of Rule 4.2.

[15] *See infra* notes 40-80 and accompanying text.

[16] *See* ABA Comm. On Ethics and Professional Responsibility, *supra* note 5 (attempting to clarify scope of Rule 4.2's application to corporations); Jerome N. Krulewitch, Comment, *Ex Parte Communications With Corporate Parties: The Scope of the Limitations on Attorney Communications With One of Adverse Interest*, 82 NW. U.L. REV. 1274, 1285-1301 (1988) (outlining variety of tests that have been used in applying anti-contact rule to corporate parties); Robert B. Fitzpatrick, *Ex Parte Communications With Current and Former Employees*, SD06 A.L.I.-A.B.A. 1065, 1069 (1998) (noting different approaches courts have adopted regarding Rule 4.2 when adverse party is corporation).

[17] *See infra* notes 81-132 and accompanying text.

[18] *See* Memorandum from Dick Thornburgh, Attorney General, United States Department of Justice (June 8, 1989), *reprinted in In re Doe*, 801 F. Supp. 478, 489-93 (exh. E) (D.N.M. 1992) (declaring federal prosecutors exempt from state anti-contact

rejected the DOJ's position, however, and have attempted to definitively pull federal prosecutors back within the purview of Rule 4.2.[19]

II. THE HISTORY OF RULE 4.2

A. Evolution of the Anti-Contact Rule

The anti-contact rule has a long history deeply rooted in the legal profession.[20] The anti-contact rule first existed as an implied rule of professional courtesy.[21] In 1908, the American Bar Association (ABA) adopted the Canons of Professional Ethics.[22] Canon 9 of the ABA Canons of Professional Ethics was the first formal anti-contact rule.[23] In 1970, the ABA drafted the Model Code of Professional Responsibility (Model Code) to replace the Canons of Professional Ethics.[24] The ABA Model Code similarly contained an anti-contact rule, Disciplinary Rule (DR) 7-104(A)(1), barring communication by an attorney with a represented party on the matter of the representation.[25]

---

rules); 28 C.F.R. § 77 (1995) (asserting again federal prosecutors exempt from Rule 4.2); *see also* Leesfield, *supra* note 4 (summarizing repeated attempts by DOJ to exempt federal prosecutors from Rule 4.2); Delker, *supra* note 4, at 855-73 (outlining development of DOJ's position on Rule 4.2).

[19] *See* United States v. McDonnell Douglas Corp., 132 F.3d 1252, 1256 (8th Cir. 1998) (holding DOJ lacks authority to exempt federal prosecutors from Rule 4.2); 28 U.S.C. § 530B (1999) (codifying holding of *McDonnell Douglas* decision and explicitly making federal prosecutors subject to Rule 4.2); *see also* Joan C. Rogers, *Regulation of Bar: Congress Enacts Statute that Subjects Federal Prosecutors to State Laws and Rules*, 14 Law. Manual on Prof. Conduct 498 (October 28, 1998) (considering reactions to new law making government attorneys subject to Rule 4.2).

[20] *See* Cramton & Udell, *supra* note 11, at 318 (noting anti-contact rule is long-standing and widely adopted); ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (acknowledging that every ethical code adopted by American Bar Association has included anti-contact rule).

[21] *See* Cramton & Udell, *supra* note 11, at 324 (observing anti-contact rule existed informally as courtesy even before it appeared in any ethical code).

[22] *See* ABA CANONS OF PROFESSIONAL ETHICS (1908).

[23] *See id.* at Canon 9. Canon 9 provided, in pertinent part: that "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel . . . but should deal only with his counsel." *Id.*

[24] *See* MODEL CODE (1986).

[25] *See id.* at DR 7-104(A)(1). DR 7-104(A)(1) provided, in pertinent part: "[d]uring the course of his representation of a client a lawyer shall not . . . communicate

In 1972, the Massachusetts Supreme Judicial Court (SJC) adopted the Canons of Ethics and Disciplinary Rules Regulating the Practice of Law (Canons).[26] The Canons were modeled after the ABA Model Code.[27] Specifically, DR 7-104(A)(1) was incorporated into the Canons as the Massachusetts anti-contact rule.[28]

In 1983, the ABA adopted the Model Rules of Professional Conduct (Model Rules) to replace the Model Code.[29] The anti-contact rule of the Model Rules, Rule 4.2, as initially created was essentially the same as DR 7-104(A)(1).[30] In 1995, however, the ABA House of Delegates voted to amend Model Rule 4.2 by changing the word "party" to "person" in the text of the rule.[31] The ABA made this change in response to the confusion and controversy surrounding the scope of Model Rule 4.2.[32] The ABA attempted to resolve the ambiguity of the term "party" and made the change in light of the spirit and underlying policy considerations of the anti-contact rule.[33] Finally, in 1998, the SJC adopted the Rules of Professional Conduct for Massachusetts attorneys.[34] The Massachusetts version of Rule 4.2 is identical to Model Rule 4.2.[35]

---

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." *Id.*

[26] *See* MASS. CANONS (1981). The Canons of Ethics and Disciplinary Rules Regulating the Practice of Law were adopted as Supreme Judicial Court Rule 3:07.

[27] *See* Gilda Tuoni, Massachusetts Attorney Conduct Manual 7-95, Intro-4 to Intro-5 (Butterworth ed. 1992) (indicating MASS. CANONS followed provisions of American Bar Association Model Code).

[28] *See* MASS. CANONS DR 7-104(A)(1) (1981).

[29] *See* MODEL RULES Rule 4.2 (1995).

[30] *See id.*

[31] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (announcing proposal to amend Rule 4.2).

[32] *See id.* (acknowledging much of debate surrounding Rule 4.2 caused by use of term "party").

[33] *See id.* (explaining anti-contact rule must have broad coverage to serve its purpose). The Comment to Rule 4.2 already referred to "persons," but this was not seen as authoritative and only added more confusion to the controversy. *See* MODEL RULES Rule 4.2 cmt. 3 (1995).

[34] *See* MASS. RULES (1998).

[35] *See id.* at Rule 4.2. The SJC adopted the same language of ABA Model Rule 4.2. Model Rule 4.2.

B. Policy Considerations of the Anti-Contact Rule

There are several policies and rationales that underlie the anti-contact rule.[36] The primary purpose of the prohibition against communication by an attorney with a represented person is to protect the attorney-client relationship and to promote effective representation.[37] The anti-contact rule also serves to protect the represented person and his or her interests.[38] A more noble objective of the anti-contact rule is to act as a deterrent by dissuading attorneys from contacting represented persons of adverse interest.[39]

III. SCOPE OF RULE 4.2 WHEN THE REPRESENTED "PERSON" IS A CORPORATION

---

[36] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (discussing purpose and premise of anti-contact rule); Fitzpatrick, *supra* note 16, at 1068 (citing cases attempting to explain policy behind anti-contact rule); Cramton & Udell, *supra* note 11, at 324-25 (offering various rationales for anti-contact rule); Krulewitch, *supra* note 16, at 1277-78 (analyzing three objectives of anti-contact rule). The anti-contact rule is premised on the principle that "the legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." MODEL CODE Canon 7, Ethical Consideration 7-18 (1986).

[37] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (noting Rule 4.2 protects attorney-client relationship from interference by opposing counsel); Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (decided under DR 7-104(A)(1)) (explaining anti-contact rule maintains integrity of attorney-client relationship).

[38] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (indicating Rule 4.2 protects represented person from overreaching by opposing counsel); Wright v. Group Health Hosp., 103 Wash. 2d 192, 197, 691 P.2d 564, 567 (1984) (decided under DR 7-104(A)(1)) (explaining anti-contact rule helps to prevent represented persons from being taken advantage of); *Polycast Tech. Corp.*, 129 F.R.D. at 625 (noting anti-contact rule protects represented person from inadvertently divulging privileged information).

[39] *See* Krulewitch, *supra* note 16, at 1278 (noting anti-contact rule intended to promote ethical behavior within legal profession). The anti-contact rule "prevents unprincipled attorneys from exploiting the disparity in legal skills between attorney and lay people." *Polycast Tech. Corp.*, 129 F.R.D. at 625 (quoting Papanicolaou v. Chase Manhattan Bank, N.A., 720 F. Supp. 1080, 1084 (S.D.N.Y. 1989)).

The meaning and scope of Rule 4.2 is relatively straightforward when applied to an individual.[40] A lawyer representing a client may not communicate with a represented person of adverse interest.[41] The meaning and scope of Rule 4.2 becomes more vague and ambiguous, however, when applied to a corporation.[42] A corporation is a legal entity capable of suing and being sued.[43] The debate in this area focuses on the issue of who or what constitutes the corporation when it becomes a party to a lawsuit.[44] An attorney must guess at the ethical limits of Rule 4.2 when dealing with an adverse party corporation.[45]

When the SJC adopted Rule 4.2 for Massachusetts attorneys in 1998, plaintiffs' lawyers and prosecutors argued that it was too broad.[46] The definition of "person" in Rule 4.2 includes "a corporation, an association, a trust, a partnership, and any other organization or legal entity."[47] Concerned parties argued that such language could be used by defense attorneys representing a corporation or any business entity in an attempt to block communication with any and all employees of the cor-

---

[40] *See* Krulewitch, *supra* note 16, at 1275 (commenting on clear definition of "party" as applied to individuals under DR 7-104(A)(1)).

[41] *See* MASS. RULES Rule 4.2 (1998).

[42] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (articulating ABA's position on issue of ex parte communication when "person" is corporation); Wilkins, *supra* note 7, at 265 (observing need for clearer description as to which corporate employees are covered by anti-contact rule); Hodes, *supra* note 5, at 83 (attempting to clarify confusion surrounding application of Rule 4.2 to corporate employees); Krulewitch, *supra* note 16, at 1275 (noting ambiguity of Rule 4.2 as applied to adverse party corporations).

[43] *See* William L. Cary & Melvin Aron Eisenberg, CASES AND MATERIALS ON CORPORATIONS 75 (The Foundation Press, Inc. ed., 7th ed. 1995) (explaining that entity status is characteristic of corporations).

[44] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (attempting to clarify ABA's position on Rule 4.2 as it applies to collective entities); Krulewitch, *supra* note 16, at 1275-76 (addressing problem of identifying who or what represents artificial entity).

[45] *See* Krulewitch, *supra* note 16, at 1275-76 (asserting that attorneys are unsure of Rule 4.2's boundaries when facing adverse party corporation); John Freeman, *Former Employees May Be Interviewed Ex Parte (Usually)*, 9 S.C. LAW. 10, 10 (1998) (observing that attorneys facing adverse party corporation confront unclear and misleading ethical guidelines).

[46] *See* Wilkins, *supra* note 7, at 264 (acknowledging scope of Rule 4.2 as adopted "seems to reach too far"); Cohen, *supra* note 5 (observing that opponents of Rule 4.2 were disappointed with adoption of broad version of Rule 4.2).

[47] *See* MASS. RULES Rule 9.1(h) (1998).

porate client.[48] Although this concern was well-founded, the debate was not a novel one.[49] One of the most controversial issues surrounding DR 7-104(A)(1) of the Model Code was which employees of a corporate client were considered a "party" within the meaning of that anti-contact rule.[50]

Despite the change to the text of Rule 4.2 that substituted "person" for "party," the same question remains: who is included in the class of "persons" to be protected by Rule 4.2 when the adverse party is a corporation?[51] Courts and bar associations have adopted various tests in an attempt to answer this question.[52] The tests, applied to both current and former employees, have failed to produce a specific description of "person."[53]

A. Current Employees

The Comment to the Massachusetts version of Rule 4.2 attempts to define the scope of the rule as it applies to current employees of a represented adverse party corporation.[54] At a minimum, practitioners should

---

[48] *See* Wilkins, *supra* note 7, at 264-65 (considering concerns of prosecutors and plaintiffs' lawyers regarding charges or claims against adverse party corporation); Cohen, *supra* note 5 (noting fear of plaintiffs' lawyers and prosecutors that Rule 4.2 would interfere with investigative activities).

[49] *See* John D. Hodson, Annotation, *Right of Attorney to Conduct Ex Parte Interviews With Corporate Party's Nonmanagement Employees*, 50 A.L.R.4th 652 (1996) (addressing same issue with DR 7-104(A)(1) of MODEL CODE); Krulewitch, *supra* note 14, at 1275 (examining controversy regarding DR 7-104(A)(1) as applied to corporations).

[50] *See* Hodson, *supra* note 49 (outlining tests used to determine who is and is not "party" under DR 7-104(A)(1)); Krulewitch, *supra* note 16, at 1285-1301 (setting forth approaches used to define "party" under DR 7-104(A)(1)); Siguel v. Trustees of Tufts College, No. CIV.A.88-0626-Y, 1990 WL 29199 (D. Mass. March 12, 1990) (considering "hotly-debated" issue of defining "party" in corporate context under DR 7-104(A)(1)).

[51] *See* Wilkins, *supra* note 7, at 265 (discussing controversy surrounding Rule 4.2 and need for better definition of "person" in corporate context).

[52] *See* Fitzpatrick, *supra* note 16 (highlighting various approaches taken by courts on this issue); Hodson, *supra* note 49 (explaining tests adopted by courts); Krulewitch, *supra* note 16, at 1285-1301 (reviewing tests formulated by courts and bar associations in applying Rule 4.2 to adverse corporate party).

[53] *See* Wilkins, *supra* note 7, at 265 (acknowledging vague definition of "person").

[54] *See* MASS. RULES Rule 4.2 cmt. 4 (1998) (explaining prohibitions of Rule 4.2 in context of organizations). Comment 4 to Rule 4.2 bars communications "with persons

not contact managerial employees or employees who may bind the corporation based on their acts, omissions, or statements regarding the subject of the representation.[55] Despite this apparent bright-line rule, distinguishing between managerial employees and non-managerial employees may prove to be difficult in practice.[56] Similarly, distinguishing between those corporate employees who may bind the corporation and those who are mere witnesses may prove to be difficult.[57] This difficulty has forced the courts and bar associations to adopt various tests to clarify these distinctions and ultimately determine which corporate employees adverse attorneys may contact.[58]

The Massachusetts Bar Association Committee on Professional Ethics (Massachusetts Ethics Committee) applies the scope of employment test in determining which current corporate employees may be contacted.[59] This test interprets Rule 4.2 broadly and prohibits a lawyer from communicating with any current corporate employee about matters

---

having managerial responsibility on behalf of the organization with regard to the subject of the representation, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." *Id.* Although the Comment attempts to explain the scope of Rule 4.2 as it applies to an organization, the text of Rule 4.2 is authoritative. *See* MASS. RULES Scope (9).

[55] *See* MASS. RULES Rule 4.2 cmt. 4 (1998) (explaining application of Rule 4.2 to organization); Hodes, *supra* note 5, at 87 (suggesting bright-line rule for attorneys that managerial employees cannot be contacted); Wilkins, *supra* note 7, at 265 (indicating reasonable rule would allow attorneys to contact non-managerial corporate employees); *see also* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (noting private attorney may consent to contact where corporate employee represented by private attorney).

[56] *See* Hodes, *supra* note 5, at 87 (suggesting that in large corporation determining which employees constitute management may be difficult task); Hodson, *supra* note 49 (indicating question as to who or what constitutes managerial employees remains unanswered).

[57] *See* Hodes, *supra* note 5, at 87 (suggesting difficulty in distinguishing between employees who may bind corporation and mere fact witnesses).

[58] *See* Hodson, *supra* note 49 (discussing tests adopted by courts and bar associations in determining what constitutes managerial employees).

[59] *See* Mass. Bar Ass'n. Comm. on Prof'l Ethics, Formal Op. 82-7 (1982), *reprinted in* 67 MASS. L. REV. 208 (1982) (under DR 7-104(A)(1)) (following reasoning and conclusion of New York City Bar Association Committee on Professional Ethics); *see also* Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of New York, Op. 80-46 (1980) (under DR 7-104(A)(1)) (asserting need for broad coverage of rule in order to promote effective representation of corporation).

within the scope of his or her employment.[60] Under the scope of employment test, the only instance in which a lawyer may communicate with a current employee concerning any matter within the scope of his or her employment is when the lawyer has the consent of opposing corporate counsel or if the communication is authorized by law.[61]

Acting under the exception to the anti-contact rule, the United States District Court for the District of Massachusetts applies a balancing test in determining which current corporate employees are protected under Rule 4.2.[62] This balancing test weighs the plaintiff's need to gather information informally with the defendant corporation's need for effective representation.[63] When one party seeks authorization or protection

---

[60] *See* Mass. Bar Ass'n. Comm. on Prof'l Ethics, *supra* note 59 (suggesting broad interpretation is necessary to promote policy rationale and to protect corporation). The Massachusetts Committee emphasizes the fact that the scope of employment test complements the rules of evidence, specifically Federal Rule of Evidence 801(d)(2)(D). *Id.* The Federal Rules of Evidence state that "[a] statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D). The Massachusetts Committee concluded that these employees should similarly be covered by the anti-contact rule because this rule of evidence binds the corporation as to statements made by these employees. Mass. Bar Ass'n Comm. on Prof'l Ethics, *supra* note 59.

[61] *See* Mass. Bar Ass'n Comm. on Prof'l Ethics, *supra* note 59 (explaining scope of employment test complements rule of evidence regarding admissions). The scope of employment test gives the anti-contact rule its "broadest interpretation in the corporate context." Krulewitch, *supra* note 16, at 1290. *See id.* at 1290-94 (analyzing and criticizing scope of employment test).

[62] *See* Mompoint v. Lotus Development Corp., 110 F.R.D. 414, 420 (D. Mass. 1986) (decided under DR 7-104(A)(1)) (rejecting universal rule and adopting case-by-case balancing test); Morrison v. Brandeis University, 125 F.R.D. 14, 18 (D. Mass. 1989) (decided under DR 7-104(A)(1)) (following holding in *Mompoint*); Siguel v. Trustees of Tufts College, No. CIV.A.88-0626-Y, 1990 WL 29199 * 3 (D. Mass. March 12, 1990) (decided under DR 7-104(A)(1)) (following reasoning of *Mompoint* court and *Morrison* court and adopting case-by-case analysis). The *Morrison* court makes clear that it is addressing only the "limited question of when the Court should apply the exception to the rule ("unless authorized to do so") and authorize an attorney to interview employees of a defendant corporation whose statements may be admissible against the corporation." *Morrison*, 125 F.R.D. at 18 n.1. The *Morrison* court is careful not to criticize the anti-contact rule itself or any interpretations given to the rule, but deals only with the situation in which one party seeks authorization or protection from the court. *Id.*

[63] *See Mompoint*, 110 F.R.D. at 418 (holding need for effective representation does not require absolute bar on communication with corporate employees). In reaching a balance, the *Mompoint* court allowed plaintiff's counsel to interview selected employees of the defendant corporation. *Id.* at 419. Similarly, the *Morrison* court found that plaintiff's counsel's need to obtain information outweighed the defendant corporation's need for effective representation. *Morrison*, 125 F.R.D. at 19.

from the court, this jurisdiction rejects tests that attempt to apply a universal rule and instead uses a case-by-case analysis in which the court considers particular facts and circumstances.[64]

At least one state court applies the control group test in determining which current corporate employees attorneys may contact.[65] The control group test interprets Rule 4.2 narrowly and limits the protection it extends to corporate employees.[66] This test allows communication by an attorney with current employees of an adverse party corporation except to the extent that the employees are part of the corporation's control group.[67]

The ABA, as well as one state supreme court, has adopted the managing speaking test.[68] This test allows communication with employees of an adverse party corporation except to the extent that the employees have managing authority in which they are legally able to speak for or bind the corporation.[69] Although the coverage under the managing

---

[64] *See* MASS. RULES Rule 4.2 cmt.7 (1998) (explaining rule does not prohibit attorney from seeking court order allowing communication with represented person); *see also Mompoint*, 110 F.R.D. at 418 (noting there are varying degrees of need and absolute rule does not accommodate this concept); *Morrison*, 125 F.R.D. at 18 (characterizing other tests applied to anti-contact rule in corporate context as inadequate). At least one state court has also adopted a balancing test. *See* Craine v. Trinity College, No. CV950555013S, 1998 WL 809534 (Conn. Nov. 3, 1998) (relying on *Morrison* case in adopting case-by-case analysis).

[65] *See* Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc., 128 Ill. App. 3d 763, 766, 471 N.E.2d 554, 560 (1984) (decided under DR 7-104(A)(1)) (allowing communication with current employees of adverse party corporation not in control group). The *Fair Automotive* court adopted the control group test in response to the Illinois Supreme Court's adoption of the control group test for the corporate attorney client privilege. *See* Krulewitch, *supra* note 16, at 1286-90 (analyzing decision of Illinois court in adopting control group test).

[66] *See* Krulewitch, *supra* note 16, at 1286-90 (criticizing control group test for narrow interpretation of rule and for exposing corporations unnecessarily).

[67] *See id.* (explaining contours of control group test); Hodson, *supra* note 47 (noting employees who may be protected by Rule 4.2 under control group test). The control group includes "top management persons who had the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion." *Fair Automotive*, 128 Ill. App. 3d at 771, 471 N.E.2d at 560.

[68] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (explaining ABA's position on scope of Rule 4.2 as it applies to adverse party corporation); Wright v. Group Health Hosp., 103 Wash.2d 192, 200-01, 691 P.2d 564, 569 (Wash. 1984) (decided under DR 7-104(A)(1)) (adopting managing speaking test).

[69] *See Wright*, 103 Wash. 2d at 200, 691 P.2d at 569 (allowing communication with corporate employees not legally able to bind corporation). The managing speaking

speaking test appears to be extensive with respect to certain corporate employees, the prohibition against communication does not extend to all employees of the corporation.[70]

Notwithstanding that courts and bar associations have developed various tests in an attempt to define the scope of Rule 4.2 when applied to a corporation, no single definition has been universally accepted.[71] The anti-contact rule is not meant to prohibit communication by an attorney with all current employees of a represented corporation.[72] Beyond this tenet, the scope of Rule 4.2 as it applies to current corporate employees is still in the process of being defined.[73] In the meantime, Massachusetts practitioners should not contact managerial employees or employees who may in any way bind the corporation regarding the subject of the representation unless first seeking authorization from a court.[74]

B. Former Employees

The scope of Rule 4.2 as it applies to former employees of an adverse party corporation is more clearly defined.[75] According to the ABA,

---

test is very similar in its application to the Comment to Rule 4.2. *See* Krulewitch, *supra* note 16, at 1301 (acknowledging that both protect same group of corporate employees and should produce same result).

[70] *See* Krulewitch, *supra* note 16, at 1297-1304 (concluding that managing speaking test provides workable standard for attorneys).

[71] *See* Fitzpatrick, *supra* note 16, at 1069, 1071-83 (summarizing approaches taken by courts and examining case law and ethics opinions for each state); Krulewitch, *supra* note 16, at 1285-1301 (noting various interpretations of anti-contact rule each rely on different policy considerations); Wilkins, *supra* note 7, at 264-65 (declaring need in Massachusetts for "careful description" of which current corporate employees may be contacted).

[72] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (stressing Rule 4.2 does not contemplate blanket prohibition covering all employees of represented corporation).

[73] *See* Wilkins, *supra* note 7, at 264-65 (noting controversy and uncertainty surrounding prospective adoption of Rule 4.2 in Massachusetts in 1998); Fitzpatrick, *supra* note 16, at 1069, 1071-83 (addressing only recently issue of communication with current employees of represented corporation).

[74] *See* MASS. RULES Rule 4.2 cmt.4 (1998) (clarifying scope of Rule 4.2 as it applies to organizations); *see also* MASS. RULES Rule 4.2 cmt.7 (1998) (explaining attorney may seek and act under court order allowing communication with represented person).

[75] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (restating and clarifying ABA's position that Rule 4.2 does not prohibit communication

former employees of a corporate defendant may always be contacted.[76] Similarly, the Massachusetts Bar Association has opined that the anti-contact rule does not apply to former employees.[77] Most courts have also held that former employees are not included in the class of persons to be protected under Rule 4.2.[78] The United States District Court for the District of Massachusetts has held that former employees may be contacted where there is no ongoing relationship with the corporate defendant and where the former employee can no longer bind the corporation.[79] Massachusetts practitioners can feel safe that they are acting within ethical guidelines when contacting any former employee so long as the subject of the communication cannot be imputed to the corporation for liability purposes.[80]

---

with former employees); Mass. Bar Ass'n, Formal Op. 7 (1982) (declaring DR 7-104(A)(1) does not apply to former corporate employees); Hodes, *supra* note 5, at 86 (asserting that scope of Rule 4.2 in relation to former employees is generally settled).

[76] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (reiterating ABA's position which it had previously stated in 1991 opinion). In 1995, the ABA announced that Rule 4.2 "does not prohibit contacts with former officers or employees of a represented corporation, even if they were in one of the categories with which communication was prohibited while they were employed." *Id.* The ABA Committee firmly opined that although "arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employees, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended." *Id.*

[77] *See* Mass. Bar Ass'n, Formal Op. 7 (1982) (asserting DR 7-104(A)(1) does not apply to former corporate employees because no ongoing agency relationship).

[78] *See* Wright v. Group Health Hosp., 103 Wash. 2d 192, 201, 691 P.2d 564, 569 (Wash. 1984) (decided under DR 7-104(A)(1)) (explaining that former employees cannot speak for or bind corporation); Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 628 (S.D.N.Y. 1990) (decided under DR 7-104(A)(1)) (holding anti-contact rule does not prohibit communication with former employee in this case).

[79] *See* Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36 (D. Mass. 1987) (decided under DR 7-104(A)(1)) (holding attorney's communication with former managerial employee did not violate anti-contact rule). The *Amarin Plastics* court determined that communication with former employees of a corporate defendant is allowed under the anti-contact rule where the former employees do not have an "ongoing agency or fiduciary relationship with the defendant or where none of their acts or omissions could be imparted to the defendant for . . . liability purposes." Siguel v. Trustees of Tufts College, No. CIV.A.88-0626-Y, 1990 WL 29199 at 4 (D. Mass. March 12, 1990) (referring to holding of *Amarin Plastics* case). The *Amarin Plastics* court found that the former employee in question did not have an ongoing agency or fiduciary relationship with the corporation nor could his acts or omissions be imputed to the corporation. *Amarin Plastics*, 116 F.R.D. at 40.

[80] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (noting that Model Rule 4.2 does not prohibit communication with former corporate employ-

IV. SCOPE OF RULE 4.2 AS IT EFFECTS FEDERAL PROSECUTORS

Application of the anti-contact rule to federal prosecutors is a controversial issue that has intensified over the last decade and has recently reached a boiling point.[81] The change of the word "party" to "person" in the text of Model Rule 4.2 in 1995 (and as adopted in Massachusetts in 1998) expanded the protection afforded by the anti-contact rule and further limited acceptable communication by federal prosecutors.[82] The DOJ is the leader in the attack against the expanding application of Rule 4.2.[83] The DOJ argues that "the scope of Model Rule 4.2 has been broadened to the point that it becomes difficult or impossible for federal prosecutors to fulfill their law enforcement responsibilities."[84] Over the last decade the DOJ has repeatedly attempted to exempt federal prosecutors from state anti-contact rules.[85] The DOJ has met strong resistance,

---

ees); Wilkins, *supra* note 7, at 265 (suggesting that allowing attorney contact with former corporate employees is reasonable rule). *Cf. American Plastics*, 116 F.R.D. at 39-40 (allowing communication with former employee where act, omission or statement cannot bind corporation).

[81] *See* Todd S. Schulman, Note, *Wisdom Without Power: The Department of Justice's Attempt to Exempt Federal Prosecutors From State No-Contact Rules*, 71 N.Y.U. L. REV. 1067, 1069 (1996) (noting intense debate concerning exemption of federal prosecutors from Rule 4.2); Leesfield, *supra* note 4, at 18 (asserting that debate over Rule 4.2's application to federal prosecutors has "reached a head").

[82] *See* ABA Comm. on Ethics and Professional Responsibility, *supra* note 5 (discussing proposal to substitute "person" for "party" in text of Rule 4.2 to give broader coverage). The ABA explicitly stated that Rule 4.2 applies to criminal matters, including federal and state prosecutors. *Id.*

[83] *See* Leesfield, *supra* note 4 (outlining repeated attempts by DOJ to limit reach of Rule 4.2 to exclude federal prosecutors); Delker, *supra* note 4 (examining development of DOJ's position on Rule 4.2); Cramton & Udell, *supra* note 11, at 318-22 (tracing controversy surrounding DOJ's interpretation of Rule 4.2).

[84] Leesfield, *supra* note 4, at 20. *See* Thornburgh Memorandum, *supra* note 18, at 489 (indicating broad interpretation of anti-contact rule threatens to become "substantial burden" on law enforcement process).

[85] *See* Thornburgh Memorandum, *supra* note 18 (representing DOJ's first assertion that its attorneys are exempt from Rule 4.2); 28 C.F.R. § 77 (1995) (representing DOJ's second attempt to exempt federal prosecutors from Rule 4.2).

however, and courts, and most recently, legislatures have rejected its position.[86]

A. The Thornburgh Memorandum

Although the DOJ has always maintained that federal prosecutors are exempt from state anti-contact rules, until 1988 courts had not actively enforced the anti-contact rule.[87] In *United States v. Hammad*,[88] however, the United States Court of Appeals for the Second Circuit explicitly rejected the position of the DOJ.[89] The *Hammad* court held that the anti-contact rule applies to federal criminal investigations even before adversarial proceedings have begun.[90] This decision directly affected the DOJ because it explicitly made the prohibitions of the anti-contact rule applicable to pre-indictment and pre-arrest investigations of suspected criminals who were represented by an attorney.[91]

The DOJ responded to the *Hammad* decision with the Thornburgh Memorandum.[92] Attorney General Richard Thornburgh circulated a memorandum to all DOJ litigators in an attempt to clarify the DOJ's position regarding the scope of the anti-contact rule as it applies to federal

---

[86] *See* United States v. McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998) (holding Reno Rule invalid); 28 U.S.C. § 530B (1999) (codifying holding of *McDonnell Douglas* and explicitly making federal prosecutors subject to Rule 4.2).

[87] *See* Delker, *supra* note 4, at 862 (explaining that lack of enforcement by courts was reason for DOJ's lackadaisical attitude). The DOJ had not previously taken a forceful position on its policy that federal prosecutors are exempted from the anti-contact rule only because it did not have to. *Id.*

[88] 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990).

[89] *See id.* at 839 (holding anti-contact rule applies even in investigatory stage of judicial process).

[90] *See id.* at 838 (concluding that anti-contact rule applies "both before and after indictment").

[91] *See* Delker, *supra* note 4, at 862-65 (noting *Hammad* case forced issue further than any previous case); Leesfield, *supra* note 4, at 18-20 (stating *Hammad* decision ignited issue triggering DOJ's assertion that its attorneys are exempt from rule); Cramton & Udell, *supra* note 11, at 319-20 (observing *Hammad* decision "sent shock waves" through DOJ).

[92] *See* Thornburgh Memorandum, *supra* note 18 (articulating DOJ's position on anti-contact rule as it applies to federal prosecutors). Attorney General Richard Thornburgh stated in the Memorandum that the *Hammad* decision perpetuated "the uncertainty felt by many government attorneys over what is appropriate conduct in this area." *Id.* at 490.

prosecutors.[93] The DOJ articulated as its policy that during the course of a criminal investigation, prior to any formal adversarial proceedings, government attorneys and individuals acting under their direction may communicate with any person, whether they are known to be represented by counsel or not.[94]

The DOJ premises its policy of exemption of federal prosecutors from state anti-contact rules on two grounds.[95] First, the Thornburgh Memorandum asserts that the "authorized by law" exception in the text of the anti-contact rule includes all communication by federal prosecutors with represented persons.[96] Second, the Thornburgh Memorandum asserts that the Supremacy Clause of the Tenth Amendment of the United States Constitution (Supremacy Clause) protects federal prosecutors from any enforcement of the anti-contact rule at the state or local level.[97]

The Thornburgh Memorandum met immediate resistance from both bar associations and courts.[98] The ABA strongly opposed the DOJ's position and argued federal prosecutors are subject to the ethical rules of

---

[93] *See* Thornburgh Memorandum, *supra* note 18, at 489-93 (discussing how policy of DOJ has developed over number of years). The Thornburgh Memorandum cites a 1980 memorandum from the DOJ Office of Legal Counsel asserting that "the extent to which the Department requires its attorneys to conform their conduct to judicial and bar association interpretations of DR 7-104 is solely a question of policy." *Id.* at 491.

[94] *See id.* at 492 (clarifying DOJ's position). The DOJ made its position clear that "contact with a represented individual in the course of authorized law enforcement activity does not violate DR 7-104(A)(1)." *Id.* at 493.

[95] *See id.* at 493 (relying on "authorized by law" exception in text of anti-contact rule and on Supremacy Clause); Delker, *supra* note 4, at 865-66 (explaining grounds on which DOJ's position is based); Leesfield, *supra* note 4, at 18-20 (stating that Attorney General anticipated resistance to DOJ's position so provided sources of claimed authority).

[96] *See* Thornburgh Memorandum, *supra* note 18, at 492-93. The DOJ asserts that its attorneys, and anyone acting under their direction, are authorized to engage in undercover operations and, as such, are authorized to communicate with represented persons during the course of an investigatory undercover operation. *Id.* at 492.

[97] *See id.* at 493 (relying on Supremacy Clause for protection against disciplinary action by any authority other than United States).

[98] *See* United States v. Lopez, 765 F. Supp. 1433, 1440 (N.D. Cal. 1991), *vacated*, 989 F.2d 1032 (9th Cir.), *amended and superseded*, 4 F.3d 1455 (9th Cir. 1993) (rejecting federal prosecutor's use of Thornburgh Memorandum as defense); *In re Doe*, 801 F. Supp. 478, 482 (D.N.M. 1992) (holding that federal prosecutor who violated anti-contact rule was not protected against state disciplinary proceedings); 6 LAW. MANUAL ON PROF. CONDUCT 25 (February 28, 1990) (noting opinion of ABA on issue).

the state bar association in the state in which they are admitted.[99] The courts criticized the Thornburgh Memorandum and effectively reduced it to nothing more than a DOJ policy statement.[100]

In *United States v. Lopez*,[101] the United States Court of Appeals for the Ninth Circuit upheld a district court decision that rejected a federal prosecutor's attempt to use the Thornburgh Memorandum as a justification for violating the anti-contact rule.[102] The *Lopez* court specifically rejected the DOJ's proposition that the actions of federal prosecutors are "authorized by law" within the meaning of Rule 4.2 simply because the Attorney General announced them as such.[103] Similarly, in the case of *In re Doe*,[104] the United States District Court for the District of New Mexico rejected a federal prosecutor's argument that the Supremacy Clause prohibited the state ethics board from initiating proceedings against him.[105] The *In re Doe* court rejected the legal force of the Thornburgh Memorandum an interpreted it, instead, as a policy statement incapable of preempting state law.[106]

---

[99] *See* 6 LAW. MANUAL ON PROF. CONDUCT 25, 27 (February 28, 1990) (setting forth ABA's position and policy in response to Thornburgh Memorandum); Cramton & Udell, *supra* note 11, at 321-22 (discussing heated reaction by ABA and defense bar to Thornburgh Memorandum). The ABA passed a resolution to "oppose any attempt by the Department of Justice unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers under applicable rules of the jurisdictions in which they practice." 6 LAW. MANUAL ON PROF. CONDUCT 25, 27 (February 28, 1990).

[100] *See Lopez*, 4 F.3d at 1458 (expressing disdain for Thornburgh Memorandum and referring to it as policy statement of Attorney General); *In re Doe*, 801 F. Supp. at 487 (refusing to recognize Thornburgh Memorandum as controlling law).

[101] 4 F.3d 1455 (9th Cir. 1993).

[102] *See Lopez*, 765 F. Supp. at 1445-50 (criticizing government's dependence on Thornburgh Memorandum); *Lopez*, 4 F.3d at 1457-58 (noting prudence of government's decision to drop reliance on Thornburgh Memorandum as justification for attorney's actions).

[103] *See Lopez*, 4 F.3d at 1461-62 (holding communication not authorized by law pursuant to statutory scheme or pursuant to judicial approval).

[104] 801 F. Supp. 478 (D.N.M. 1992).

[105] *See id.* at 484-86 (holding Thornburgh Memorandum does not constitute federal law and cannot preempt local ethics rules).

[106] *See id.* at 487 (asserting Thornburgh Memorandum is not law because DOJ had no authority to issue it). In *In re Doe*, the court noted "[w]ere this Court to recognize the memorandum as law, it would allow an agency to issue a regulation exempting itself from ethical restrictions in the absence of any delegated authority or congressional mandate to do so." *Id.*

B. The Reno Rule

Despite the controversy surrounding the Thornburgh Memorandum, the DOJ maintained its position that federal prosecutors are beyond the reach of state anti-contact rules and promulgated the Reno Rule.[107] After suffering harsh criticism from courts and bar associations that it had no authority to promulgate rules in this area, the DOJ now justified its rulemaking power by citing to the authority delegated by Congress to the Attorney General in the Housekeeping Statute.[108] The DOJ again proclaimed that federal prosecutors who communicate with represented persons are "authorized by law to do so" and are protected from state disciplinary authorities by virtue of the Supremacy Clause.[109]

The Reno Rule was directly challenged in the case of *United States v. McDonnell Douglas Corporation*.[110] In *McDonnell Douglas*, the government argued that its contacts with various employees of McDonnell Douglas Corporation without the consent of McDonnell Douglas counsel were authorized by the Reno Rule.[111] The government

---

[107] *See* Communications with Represented Persons, 28 C.F.R. § 77 (1995) (setting forth what became known as Reno Rule). *See* Schulman, *supra* note 81 (referring to 28 C.F.R. § 77 as "Reno Rule" because DOJ adopted it under Attorney General Janet Reno). Although it was initially promulgated in 1992, the DOJ published the final rule in 1994 after several notice and comment periods. *See* Schulman, *supra* note 81, at 1082 (noting three notice and comment periods for new rule); Delker, *supra* note 4, at 871-72 (explaining that DOJ withdrew, reconsidered, and resubmitted proposed rule several times before publishing final rule).

[108] *See* 28 C.F.R. § 77.1(b) (1995) (citing 5 U.S.C. § 301 (1994)). The DOJ asserted that the Reno Rule "is issued under the authority of the Attorney General to prescribe regulations for the government of the Department of Justice, the conduct of its employees, and the performance of its business, pursuant to 5 U.S.C. § 301." *Id.*

[109] *See* Communication with Represented Persons, 59 Fed. Reg. 39910, 39912 (1994) (codified as 28 C.F.R. § 77 (1995)). "[T]he Department believes it must be the final arbiter of the scope of policing with respect to ex parte contacts involving federal prosecutors, subject to the Constitution and laws of the United States. [T]he Department's rules are intended fully to preempt and supersede the application of state and local court rules relating to contacts by Department of Justice attorneys when carrying out their federal law enforcement functions." *Id.*

[110] 132 F.3d 1252 (8th Cir. 1998).

[111] *See id.* at 1254. The DOJ, on behalf of the United States as intervenor, contacted various employees of McDonnell Douglas Corporation during the pre-trial phase of a lawsuit against McDonnell Douglas without the consent of corporate counsel. *Id.* at 1253. The district court granted McDonnell Douglas' motion for a protective order

relied primarily on the Housekeeping Statute as authority for the Attorney General's promulgation of the Reno Rule.[112] The United States Court of Appeals for the Eighth Circuit rejected this argument, holding that the Housekeeping Statute does not provide statutory authority for promulgation of substantive regulations.[113] The *McDonnell Douglas* court concluded that the Reno Rule is invalid because the DOJ lacks statutory authority to promulgate a rule of that kind.[114]

C. Legislative Response: Citizens Protection Act

In the latest blow to the DOJ, Congress recently passed a law explicitly subjecting federal prosecutors to state ethics rules in the state in which they practice.[115] This legislation codifies the holding of *McDonnell Douglas* and essentially forecloses any argument by the DOJ that government attorneys are beyond the reach of the anti-contact rule.[116] This new law is titled the Citizens Protection Act and became effective in April of 1999.[117]

---

preventing such contacts and the government appealed arguing that the contacts were authorized under 28 C.F.R. § 77.10(a) (1995). *Id.* at 1253-54.

[112] *See id.* at 1254-55. 5 U.S.C. § 301 is known as the "Housekeeping Statute" and provides that "the head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301 (1994).

[113] *See id.* at 1255. Not one of the government's theories give "the Attorney General the authority to exempt lawyers representing the United States from the local rules of ethics which bind all other lawyers appearing in that court of the United States." *Id.* at 1257.

[114] *See id.* (acknowledging lack of statutory authority).

[115] *See* 28 U.S.C. § 530B (1999); Rogers, *supra* note 19 (reviewing action taken by Congress and responses to new law).

[116] *See* Rogers, *supra* note 19 (citing M. Peter Moses, Chairman of ABA Standing Committee on Ethics and Professional Responsibility).

[117] *See* 28 U.S.C. § 530B (1999). This law is part of the Justice Department appropriations provisions that are contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Bill for fiscal 1999, which Congress has approved and President Clinton has signed. *See* Rogers, *supra* note 19 (explaining status and background of new regulation). The new law provides, in pertinent part, that "[a]n attorney for the government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties,

Having consistently argued in the past that federal prosecutors should be subject to the same ethics rules that govern all other attorneys, the ABA, state bar associations, criminal defense attorneys, and corporate counsel all praise the new legislation.[118] The DOJ, on the other hand, strongly opposes the new legislation.[119] The DOJ claims the legislation will hamper federal law enforcement.[120] The DOJ also maintains that because states have adopted varying versions of Model Rule 4.2, the anti-contact rule lacks uniformity among the states.[121] The DOJ asserts that this non-uniformity of state ethics rules poses a serious problem for federal prosecutors who are admitted to the bar in different states but working on the same case.[122] Although Congress has taken the latest action in interpreting the scope of Rule 4.2 as it applies to federal prosecutors, the DOJ is not likely to acquiesce.[123]

---

to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

[118] *See* Rogers, *supra* note 19 (noting various groups who oppose position taken by DOJ and applaud action taken by Congress).

[119] *See id.* (pointing out obvious disappointment and frustration felt by DOJ).

[120] *See* Leesfield, *supra* note 4, at 20 (articulating DOJ's fear that Rule 4.2 would interfere in its law enforcement responsibilities); Rogers, *supra* note 19 (discussing criticism by DOJ that new law will impede federal law enforcement). This fear is especially true in the context of federal criminal investigations where undercover operations are often used. *See Corporate Counsel: Corporate Counsel Meeting Provides Forum for Views on Ex Parte Contact Rules, supra* note 6 (suggesting chilling effect on attorneys' willingness to work with agents in investigations). The DOJ argues that criminal law enforcement is unique and the effect of the new legislation will be to interfere with this process. *Id.*

[121] *See* Schulman, *supra* note 81, at 1068-69 (noting varying interpretations lead to uncertainty for federal prosecutors working on same case); Cramton & Udell, *supra* note 11, at 323-24 (acknowledging concern of DOJ as legitimate).

[122] *See* Schulman, *supra* note 81, at 1068-69, 1078 (explaining uncertainty and fear of sanctions effect law enforcement efforts of federal prosecutors); Cramton & Udell, *supra* note 11, at 323-24 (suggesting effectiveness of uniform rules for federal prosecutors working on cases that cross state lines); Leesfield, *supra* note 4, at 20 (discussing concern of DOJ over repercussions of federal prosecutors' actions).

[123] *See Federal Courts: Special Committee Will Study Federal Rules of Attorney Conduct*, 11 LAW. MANUAL ON PROF. CONDUCT 294 (June 24, 1998) (listing various initiatives underway to amend current anti-contact rule or propose new anti-contact rule).

D. The Future of Rule 4.2

There are many projects currently in the works that may yet have a profound effect on the scope of Rule 4.2.[124] The United States Judicial Conference is considering proposals to establish several standardized rules of professional conduct for lawyers in federal court.[125] These uniform federal rules would be consistent with the Citizens Protection Act because the Act specifically makes reference to the fact that federal prosecutors are subject to state rules and local federal court rules.[126] Uniform federal rules would also specifically address the DOJ's fear of having its attorneys subject to non-uniform state anti-contact rules.[127]

The Conference of Chief Justices of state supreme courts is also considering proposals to issue a model ethics rule regarding communication with represented persons.[128] This model rule would serve as an alternative to ABA Model Rule 4.2 for states to consider in adopting their own ethics rules.[129] The Conference of Chief Justices deferred a vote on the proposal several times in 1998, however, due to the recent heated debates surrounding the issue.[130]

---

[124] *See id.* (mentioning various groups in process of revising certain rules of professional conduct). Some of the current initiatives are coming from the ABA Ethics 2000 Project, the American Law Institute, the Conference of Chief Justices of the state supreme courts, and the U.S. Judicial Conference. *Id.*

[125] *See* Rogers, *supra* note 19 (discussing proposed federal rules of conduct and how new legislation effects this proposal). The plan of the U.S. Judicial Conference is to establish a few uniform federal rules that touch on important controversial areas while other matters would still be governed by state ethics rules. *Id.*

[126] *See* 28 U.S.C. § 530B(a) (1999); Rogers, *supra* note 19 (discussing proposal for adoption of several uniform federal rules of professional conduct).

[127] *See* Leesfield, *supra* note 4, at 20 (articulating DOJ's fear that varying interpretations of Rule 4.2 lead to uncertainty for federal prosecutors); Cramton & Udell, *supra* note 11, at 323-24 (suggesting uniform rules may be more effective and less confusing for federal prosecutors).

[128] *See Obligations to Third Persons: Chief Justices, Citing Lack of Consensus, Put Off Vote on Proposal for New Rule 4.2*, 18 LAW. MANUAL ON PROF. CONDUCT 459 (September 30, 1998) (noting proposal would offer states another option in adopting anti-contact rule).

[129] *See id.* (indicating Conference of Chief Justices' proposal would expressly authorize certain communication with represented persons).

[130] *See id.* (citing resolution adopted by Conference of Chief Justices). In August of 1998 the Conference of Chief Justices decided that any action would be premature because of the continuing controversy and debate in the legal community on this issue. *Id.*

The ABA Standing Committee on Ethics and Professional Responsibility, the author of Model Rule 4.2, is itself considering possible modifications to Model Rule 4.2.[131] Similarly, the ABA Ethics 2000 Commission is studying Model Rule 4.2 to determine if and how it should be modified.[132] Not only is the scope and application of the current version of Model Rule 4.2 being debated, but there is much controversy over the vitality of the rule itself.[133]

V. CONCLUSION

The history of the anti-contact rule suggests its strong ties to the legal community. There are numerous policy considerations upon which the anti-contact rule is based. It is important that the scope and application of Rule 4.2 be clearly defined because the rule is integral to maintaining the ethics and integrity of the legal profession.

A Massachusetts attorney who faces a represented adverse party corporation and wants to contact corporate employees is, unfortunately, entering undefined and confusing territory. A common theme in all interpretations of Rule 4.2, however, is that current managerial employees and current employees who may bind the corporation by act, omission or statement, are off limits. This does leave practitioners a safe harbor to some extent within which to ethically contact current employees. Generally, attorneys may contact former employees of a represented adverse party corporation without regard to Rule 4.2.

Practitioners should keep in mind that they may contact any corporate employee with the consent of corporate counsel or where it is authorized by law. Similarly, attorneys may depose any corporate employee. Although these create more formal lines of communication with corporate employees, in some situations this may be the only line of communication available.

---

[131] *See* Rogers, *supra* note 19 (stating Committee has issued draft of modified version of rule for discussion and comment). The ABA is reacting to input from the legal community that Rule 4.2 and the Comment to Rule 4.2 should be more specific in addressing its application. *Id.*

[132] *See id.* (explaining Ethics 2000 Commission is project launched to analyze MODEL RULES generally).

[133] *See id.* (quoting M. Peter Moses, Chairman of ABA Standing Committee on Ethics and Professional Responsibility).

The fate of the anti-contact rule as it applies to federal prosecutors seems to be sealed with the recent passage of the Citizens Protection Act. Whether the DOJ again asserts that its attorneys are exempt from state anti-contact rules notwithstanding this legislation remains to be seen. The DOJ has maintained its position for over a decade and is unlikely to acquiesce now.

The best solution, and perhaps the best compromise, would be the adoption of uniform federal rules of professional conduct that include a federal anti-contact rule. Many of the concerns of the DOJ would be alleviated because its attorneys would be bound by only one anti-contact rule. Similarly, the concerns of courts, bar associations and defense attorneys would be alleviated because the DOJ would not appear as though it is evading all anti-contact rules.

There are many unresolved issues surrounding the anti-contact rule. Rule 4.2 has been scrutinized by courts, legislatures and bar associations, all which have arrived at varying interpretations as to its scope and application. Modifications to the existing Model Rule 4.2, as well as new model anti-contact rules altogether, are likely forthcoming. This will no doubt have an impact on the Massachusetts version of Rule 4.2, which will in turn have an impact on all Massachusetts attorneys.

Ashlie L. Ringel