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NIESIG v. TEAM I*: PERMITTING EX PARTE COMMUNICATION WITH CORPORATE EMPLOYEES

INTRODUCTION

In July 1990, the New York Court of Appeals held in *Niesig v. Team I* that lawyers for a plaintiff suing a corporation may conduct direct, informal interviews with certain employees of the corporate party without the presence or consent of the corporation's counsel. The court found that an attorney has the legal and ethical right to conduct ex parte interviews with any employees who do not function as "alter egos" of the corporation. This broad and far-reaching decision, the first definitive interpretation of Disciplinary Rule 7-104(A)(1) of New York's Code of Professional Responsibility (the "Rule"),¹ represents a further development in the judicial trend of expanding opportunities for attorneys to conduct informal interviews with corporate employees in the interest of efficient, cost-effective fact-finding.²

An established rule of professional ethics, Disciplinary Rule

* 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), *aff'g and modifying* 149 A.D.2d 94, 545 N.Y.S.2d 153 (2d Dep't 1989).

¹ Disciplinary Rule 7-104(A)(1) provides:

During the course of his representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

CODE OF PROFESSIONAL RESPONSIBILITY, N.Y. JUD. LAW APP. (McKinney Supp. 1991).

² This decision affects many national and international corporations that are headquartered in New York. Furthermore, other states may be inclined to follow New York's influential court of appeals. Thomas F. Clauss, Jr. & Maria M. Homan, *Recent Case Highlights Trend in Favor of Ex Parte Interviews*, NAT'L L.J., Dec. 10, 1990, at 24 (analyzing the *Niesig* opinion and its ramifications).

As support for its ruling that DR 7-104(A)(1) allows broad access to corporate employees for discovery purposes, the *Niesig* opinion cited two state supreme court decisions, six federal district court decisions, eleven bar association opinions and the ABA/BNA Lawyers' Manual on Professional Conduct. 76 N.Y.2d at 375 n.5, 558 N.E.2d at 1036 n.5, 559 N.Y.S.2d at 499 n.5. Included was a leading case for the alter ego standard, *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984) (in a medical malpractice action, court held that plaintiffs had a right to conduct ex parte interviews of any employees of defendant hospital who did not have managing authority sufficient to give them the right to speak for and bind the corporation).

7-104(A)(1) prohibits a lawyer from communicating with a party she knows to be represented by a lawyer without that lawyer's consent. The Rule is founded upon strong policy grounds and seeks to promote the effectiveness of the legal system and to protect parties from improper and unethical approaches by adverse counsel.³ When the "parties" are individuals in civil cases, application of the Rule is fairly straightforward. It prevents ex parte contacts between the counseled individual, not his agents or employees, and adverse counsel.⁴ However, when a "party" is a corporation or other business entity, the scope of the Rule is unclear. The Rule itself does not define the term "party," nor does it offer lawyers the means by which to determine its breadth.

While plaintiffs' lawyers have recognized that DR 7-104(A)(1) precludes contacts with some employees of a corporate party, they have argued that the ban on ex parte communication should apply only to "control-group" employees, that is, the most senior officers who exercise substantial control over the corporation's operations.⁵ Not surprisingly, defendant companies have insisted that the Rule should be interpreted to preclude ex parte communication with all employees on the ground that a corporate "party" is synonymous with all of its employees.⁶ Although courts, bar associations and commentators have attempted to resolve this issue by balancing each side's competing interests, they have not devised a satisfactory, workable standard for determining the reach of DR 7-104(A)(1) where a party is a business entity.⁷

³ Jerome N. Krulewitch, *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 (1988) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934) (extensive overview of DR 7-104(A)(1), its underlying policies, goals and application)).

⁴ *Niesig*, 76 N.Y.2d at 370, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496 (citing STEPHEN GILLERS & NORMAN DORSEN, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 433 (2d ed. 1989)).

⁵ See, e.g., Daniel B. Moskowitz, *At the Corporate Level, Opinions Differ on the Definition of Legal Ethics*, WASH. POST, Aug. 13, 1990, at F32 (reviewing the potential effects of *Niesig* on the business community).

⁶ *Id.*

⁷ For a comprehensive overview of four of the tests used to determine the breadth of a corporate "party" under DR 7-104(A)(1), see Krulewitch, *supra* note 3; see also John D. Hodson, Annotation, *Right of Attorney to Conduct Ex Parte Interviews with Corporate Party's Nonmanagement Employees*, 50 A.L.R.4th 652 (1986).

The New York Court of Appeals considered the issue in *Niesig v. Team I* and determined that corporate "parties" include those corporate employees "whose acts or omissions in the matter under inquiry are binding on the corporation . . . or imputed to the corporation for purposes of its liability, or [who are] implementing the advice of counsel."⁸ In doing so, the court embraced the "alter ego" test, arguing that this approach represents a fair compromise between the goal of protecting parties from unscrupulous practices of overzealous opposing counsel and the policy favoring open access to information and discovery.⁹ The court pointed out that the "alter ego" test has been "overwhelmingly adopted by courts and bar associations throughout the country" and has "long practical experience . . . in day-to-day operation."¹⁰ Finally, the court argued that the alter ego test finds strong support in the well-developed law of evidence and agency.¹¹

This Comment examines the alter ego approach adopted by the New York Court of Appeals in *Niesig v. Team I* to shed light on the scope of Disciplinary Rule 7-104(A)(1) when the party being questioned is a corporation. Part I describes the Disciplinary Rule and its underlying policies and reviews the decisions of the appellate division and court of appeals. Part II surveys the different tests courts have used to interpret the scope of the Rule and weighs the successes and failures of these tests in fulfilling the Rule's objectives. This Comment concludes that the court of appeals' espousal of a modified alter ego test represents the best method of interpreting the Rule as it relates to corporate parties: it satisfactorily balances protection for parties against the need for information; it is supported by case law and bar association opinions; and it is well-grounded in the law of evidence and agency. Finally, this Comment recommends practical approaches attorneys can take to comply with the *Niesig* test.

⁸ 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

⁹ *Id.*

¹⁰ 76 N.Y.2d at 375, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499.

¹¹ *Id.*

I. BACKGROUND

A. *Disciplinary Rule 7-104(A)(1)*

The Code of Professional Responsibility, promulgated by the American Bar Association and adopted with modifications by New York State, prescribes high standards of ethical conduct to which all lawyers must adhere in their professional dealings.¹² The Code is comprised of three separate but related parts: canons,¹³ ethical considerations,¹⁴ and disciplinary rules. The disciplinary rules are mandatory and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."¹⁵ The Code does not define either disciplinary procedures or penalties for violation of the disciplinary rules, but it provides that the type of judgment to be levied shall be determined according to the character of the offense and the attendant circumstances.¹⁶

Disciplinary Rule 7-104(A)(1) of the New York State Code of Professional Responsibility provides:

Communicating with One of Adverse Interest

(A) 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 law-

¹² CODE OF PROFESSIONAL RESPONSIBILITY, N.Y. JUD. LAW App. (McKinney Supp. 1991) (Preliminary Statement).

¹³ The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and Disciplinary Rules are derived.

Id.

¹⁴ "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance." *Id.*

¹⁵ *Id.* See N.Y. JUD. LAW § 90(2) (McKinney 1983) ("[T]he appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney . . . who is guilty of professional misconduct . . ."); see also N.Y. RULES OF COURT § 603.2 (McKinney 1991) (1st Dep't) (professional misconduct defined); *id.* § 691.2 (2d Dep't) (same); *id.* § 806.2 (3d Dep't) (grievance program); *id.* § 1022.17 (4th Dep't) (grievance plan).

¹⁶ Penalties can be very severe and may include disqualification or even disbarment. See, e.g., *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080 (S.D.N.Y. 1989) (court disqualified entire law firm as a result of one partner's ex parte communication with plaintiff, since it found such communication had tainted the case).

yer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.¹⁷

The historical purposes of the Rule and its predecessor, the American Bar Association's original Canon 9,¹⁸ were two-fold: to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches and unjust pressures.¹⁹ It is this latter function that is most often stressed;²⁰ theoretically, the presence of a party's attorney

¹⁷ CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) N.Y. JUD. LAW APP. (McKinney Supp. 1991).

Compare Model Rule 4.2 of the Model Rules of Professional Conduct, the more modern ethics code established by the ABA in 1983, which is substantially similar to DR 7-104(A)(1):

Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983).

Each of the Model Rules is accompanied by an explanatory Comment. A Comment, according to the Scope note that introduces the Model Rules, does not add obligations to the Rules. Instead, the Comments are to "provide guidance for practicing in compliance with the Rules." However, "[t]he Comments were also doubtless designed and will be employed by courts and other disciplinary officials as an authoritative and illustrative guide to interpretation of language in the Rules." CHARLES WOLFRAM, *MODERN LEGAL ETHICS* § 2.6.4, at 63 (1986). The Comment to Model Rule 4.2 explicitly describes the breadth of the prohibition on communications with corporate parties. To date, the Model Rules have not been adopted by New York's appellate division, which has the authority to enforce ethical standards imposed upon attorneys.

¹⁸ The original Canon 9 codified by the ABA in 1908 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.

ABA CANONS OF PROFESSIONAL ETHICS Canon 9 (1908). Canon 9 was superseded by the ABA's adoption of the Model Code in 1970.

¹⁹ ABA Comm. on Professional Ethics and Grievances, Formal Op. 103 (1934).

For the history of Canon 9 and the subsequent Rule, see Lewis Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136 (1977) (arguing in a detailed policy-oriented discussion that the present Rule banning all ex parte communication with parties has strong support); but cf. John Leubsdorf, *Communicating with Another Lawyer's Client*, 127 U. PA. L. REV. 683, 684-85 (1979) (arguing that the Rule reinforces traditional patterns of lawyer control over information vital to clients, and hence over those clients' affairs, which is inconsistent with principles of personal responsibility otherwise recognized in the law).

²⁰ See, e.g., Kurlantzik, *supra* note 19, at 139 (A lay person making a statement is "unaware of the technical procedural and evidentiary framework in which he is, in fact, operating. This relative ignorance necessitates limitation by some means of overreaching, and opportunity for overreaching, by the lawyer.").

counterbalances contacts between the party and his or her adversary.²¹ However, other justifications for the Rule include: preventing attorneys from "stealing clients,"²² preventing attorneys from negotiating unfavorable settlements directly with clients,²³ protecting clients from inadvertently disclosing damaging privileged information,²⁴ facilitating settlement by channeling disputes through lawyers accustomed to the negotiation process,²⁵ and rescuing lawyers from a difficult conflict between their duty to advance their clients' interests and their duty not to take advantage of an unprotected opposing party.²⁶ The Rule is also intended to assure standards of simple fairness and ethical behavior on the part of all attorneys and to protect the party's right to effective representation.²⁷

While the standard explanations for the Rule tend to emphasize the dangers of informal ex parte communication, the fact is that attorneys will inevitably seek the advantages of interviewing witnesses outside the presence of counsel. An informal interview is often the best way for an attorney to ascertain what, if any, information a witness may have that is relevant to her theory of the case because witnesses are generally more inclined to speak freely in the course of an informal interview.²⁸ As

²¹ *Niesig*, 76 N.Y.2d at 370, 558 N.E.2d at 1032-33, 559 N.Y.S.2d at 495-96 (quoting *Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984) ("the presence of the party's attorney theoretically neutralizes the contact")).

²² HENRY S. DRINKER, *LEGAL ETHICS* 190 (1953) (arguing that a lawyer has an obligation under the Code not to steal clients), cited in *Wright*, 691 P.2d at 567; see also *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) ("DR 7-104(A)(1) preserves the integrity of the attorney-client relationship . . . That is, counsel is precluded from driving a wedge between the opposing attorney and that attorney's client.").

²³ Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party,"* 61 MINN. L. REV. 1007, 1010 (1977), cited in *Wright*, 691 P.2d at 567. See also WOLFRAM, *supra* note 17, § 11.6.2, at 613 ("[one] objective of the anticontact rule is to prevent improvident settlements").

²⁴ Kurlantzik, *supra* note 19, at 145-46.

²⁵ *Id.* at 148-49.

²⁶ *Id.* at 152.

²⁷ See City of N.Y. Bar Ass'n, Op. 80-46 (1982) (arguing that the principal thrust of the Rule is to protect a party's right to effective representation by enabling the attorney to "aid his client both to avoid procedural pitfalls and to present truthful statements in the most favorable manner") quoted in Krulewitch, *supra* note 3, at 1277-78.

²⁸ See George B. Wyeth, *Talking to the Other Side's Employees and Ex-Employees*, 15 LITIG. 10 (1989) ("The courts allow ex parte contacts partly to avoid the expense of using formal discovery . . . Even more important . . . is the practical fact that an employee-witness will be far more forthcoming in an informal interview than in a formal

the United States Supreme Court implicitly recognized in *Hickman v. Taylor*, proper preparation of a client's case demands that an attorney assemble and utilize any and all relevant information that may be available.²⁹ "The historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests . . . is reflected in [a lawyer's] interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . ." ³⁰ Indeed, the Code mandates that a lawyer do all she can to represent a client "zealously within the bounds of the law."³¹

As the United States Court of Appeals for the Second Circuit has noted, an attorney's right to interview witnesses is a "time-honored and decision-honored principle[]." ³² Ex parte interviews are a critical tool in an attorney's quest for truth, which may outweigh possible burdens or dangers to the opposing party.³³ In fact, interviews are an integral part of the pre-trial investigation that an attorney has an affirmative duty to conduct.³⁴ This inexpensive discovery device is especially important

deposition in the presence of the company's lawyer, and possibly company management."); see also *Niesig*, 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497 ("Costly formal depositions that may deter litigants . . . are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information.").

²⁹ 329 U.S. 495 (1947) (establishing the "work-product" doctrine: an opposing party cannot discover information obtained by an attorney while preparing for litigation, absent a showing of need).

³⁰ *Id.* at 511.

³¹ CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 N.Y. Jud. Law App. (McKinney Supp. 1991). The corresponding Disciplinary Rule 7-101 explicitly states:

A. A lawyer shall not intentionally:

1. Fail to seek the lawful objectives of the client *through reasonably available means permitted by law and the Disciplinary Rules*

Id. (emphasis added).

³² *International Business Mach. v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975) (holding that trial court's restrictions on a party's right to interview adverse witnesses exceeded its authority, since it impaired the constitutional right of parties to effective representation and was contrary to the principle that counsel has a right to interview an adverse party's witnesses privately without the presence of opposing counsel and without a transcript being made).

³³ *Frey v. Department of Health and Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985) (in a sex discrimination suit brought by an employee denied a promotion against her employer, holding that plaintiff had a right to contact other employees on an ex parte basis because "on balance, the proposed questioning sought by plaintiff [would] aid in the search for truth").

³⁴ Federal Rule of Civil Procedure 11 requires that an attorney sign all pleadings,

where a plaintiff of limited means seeks to bring a civil rights suit,³⁵ or where a plaintiff seeks to sue an employer for employment discrimination or for injuries suffered on account of working conditions.³⁶ Barring a plaintiff's access to a potentially vast number of witnesses who might have direct knowledge of corporate practices or facts relevant to a plaintiff's case, outside of costly discovery procedures, "may well frustrate the right of an individual plaintiff with limited resources to a fair trial and deter other litigants from pursuing their legal remedies."³⁷

In civil cases involving individuals, application of the Rule is plain—the term "party" refers to individuals, not to their agents and employees.³⁸ However, application of the Rule becomes more difficult when a business entity becomes involved in a lawsuit. In litigation the corporate entity is the named party, not the employees or agents;³⁹ on the other hand, companies act

motions or other papers that "to the best of the signer's knowledge, information, and belief *formed after reasonable inquiry* . . . is well-grounded in fact and is warranted by existing law" FED. R. CIV. P. 11 (emphasis added). To establish that a claim has merit, an attorney will often need to consult not only her client but also witnesses who may provide important relevant factual information. Interviews are the most efficient tool available to attorneys for this purpose.

³⁵ As the United States Supreme Court recognized in *New York Gaslight Club v. Carey*, 447 U.S. 54, 63 (1980), "one of Congress' primary purposes in enacting [Title VII] was to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'" (quoting 110 CONG. REC. 12724 (1964) (remarks of Sen. Humphrey)).

³⁶ See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978):

The danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted.

³⁷ *Frey*, 106 F.R.D. at 36 (citing Leubsdorf, *supra* note 19).

The costs of an informal interview pale in comparison to the costs of conducting a deposition or other interview with counsel present, since they require the presence of the opposing party's attorney and generally a court reporter. Such costs may effectively prohibit a complainant from pursuing a lawsuit. See Krulewitch, *supra* note 3, at 1283-84 (Although the broad objectives of ex parte interviews can be achieved through a formal deposition, the costs of achieving those objectives will far exceed the costs of informal interviews.); *Shealy v. Laidlaw Bros., Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 1223, 1225 n.1 (D.S.C. 1984) (the advantages of this informal discovery are numerous and "serve the public interest by streamlining litigation and reducing litigation costs").

³⁸ *Niesig*, 76 N.Y.2d at 370, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496.

³⁹ *Id.* See N.Y. CONST. art. X, § 4 ("And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."); N.Y. BUS. CORP. LAW § 202(a)(2) (McKinney 1987) ("Each corporation . . . shall have power in furtherance of its corporate purposes: To sue and be sued in all courts . . .").

solely through natural persons, and unless some of their employees or agents are also considered parties, business entities are effectively read out of the Rule.⁴⁰ Thus, considering that the ethical provisions in the Code apply equally to individual and to corporate parties, some employees of the corporation must be covered by the Rule.⁴¹ The problem arises, however, in determining which corporate employees should be deemed parties for purposes of DR 7-104(A)(1). The Rule, itself, does not define the term "party" and courts have failed to adopt a uniform definition of the term. Balancing the Rule's conflicting goals of protection for parties against their need for informal, inexpensive access to information, courts, bar associations and commentators have developed different tests to determine the definition of the corporate "party."

B. *Facts*

In 1986 the plaintiff, a construction worker, fell from a scaffold at a building site and was injured. The plaintiff commenced an action for damages against defendants J.M. Frederick Construction of New York, Inc., the general contractor on the site, and Team I, the property owner.⁴² The defendants impleaded DeTrae Enterprises, Inc., plaintiff's employer and the subcontractor at the site, as a third-party defendant.

During the course of pretrial discovery, the plaintiff served defendant DeTrae with written interrogatories to which the defendant failed to respond. The plaintiff then moved to compel DeTrae to reveal the names and addresses of all employees pre-

⁴⁰ *Niesig*, 76 N.Y.2d at 370, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496. *See also* *Hasenfratz v. Berger Apartments*, 61 N.Y.S.2d 12, 15 (1946) (an executive officer of a corporation is not merely an agent, but the alter ego of the corporation, so that an act within the scope of his authority is generally considered an act of the corporation); 19 C.J.S. *Corporations* § 586 (1990) ("The agent of a corporation stands in place of the corporation itself in the line of his assigned duties, and acts within his authorized employment are the acts of the corporation, even if the acts are committed without the knowledge of the officers of the corporation.").

⁴¹ *Niesig*, 76 N.Y.2d at 370, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496; *see also* Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 *HOFSTRA L. REV.* 279 (1984) (discussing rationale for attorney-client privilege and reasons corporations are entitled to same protections as natural persons).

⁴² The facts are recounted in both the appellate division and court of appeals opinions. 149 A.D.2d at 96, 545 N.Y.S.2d at 154; 76 N.Y.2d at 367-68, 558 N.E.2d at 1031-32, 559 N.Y.S.2d at 494-95.

sent at the site at the time of the incident. He also sought authorization for his counsel to contact these individuals on an ex parte basis, arguing that such ex parte contact was permissible since these employees were neither "managerial" nor "controlling" members of the corporation.

Defendant DeTrae opposed the motion on the ground that DR 7-104(A)(1) barred unauthorized contacts by plaintiff's lawyer with any of its employees. The New York Supreme Court, Nassau County, denied plaintiff's motion and imposed an absolute ban on ex parte communication with witnesses employed by defendant DeTrae. The court gave no reason and cited no authority for its prohibition on ex parte contacts.⁴³ In an interlocutory appeal the plaintiff argued that the supreme court's rulings were erroneous as a matter of law and that the court had abused its discretion in denying its requests to conduct discovery.⁴⁴

C. *The Appellate Division Decision*

The New York Appellate Division, Second Department considered the issue on appeal. Interpreting DR 7-104(A)(1) broadly, the court found that "all present employees of a corporation" are "parties" for purposes of the Rule.⁴⁵ Thus, the court denied plaintiff's attorneys any informal access to DeTrae's current employees.⁴⁶

To determine the scope of the Rule where the party is a corporation, the court placed great emphasis on *Upjohn Co. v. United States*, the United States Supreme Court decision in which the Court addressed the scope of the attorney-client privilege in the corporate setting.⁴⁷ In addition, the court cited as authority New York's own statutory attorney-client privilege,⁴⁸ dis-

⁴³ Brief for Plaintiff-Appellant at 8, *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990).

⁴⁴ *Id.* at 9.

⁴⁵ 149 A.D.2d at 106, 545 N.Y.S.2d at 159.

⁴⁶ The court modified the supreme court's order so far as it applied to former DeTrae employees, stating in dicta that DR 7-104(A)(1) does not apply to former corporate employees. 149 A.D.2d at 99, 100 n.1, 545 N.Y.S.2d at 155, 156 n.1.

⁴⁷ 449 U.S. 383 (1981) (in an action by a corporation contesting an order to produce certain documents prepared by employees for corporate counsel, holding that communications by a corporation's employees, including low- and mid-level employees, with corporate counsel are protected by the attorney-client privilege).

⁴⁸ N.Y. CIV. PRAC. L. & R. 4503(a) (McKinney 1990); see note 62 and accompanying text *infra*.

covery rules,⁴⁹ and common law hearsay exception.⁵⁰

The appellate division linked the plaintiff's request to conduct ex parte interviews with those corporate employees who were not alter egos of the corporation with an assumption on the part of the plaintiff that the attorney who represented the corporation did not represent its employees.⁵¹ In response, the court pointed out that the Supreme Court held in *Upjohn* that the attorney-client privilege protects information obtained by corporate attorneys from employees at every level of the corporation.⁵²

In *Upjohn* the corporation's general counsel had solicited confidential information from various employees in connection with an internal investigation into "questionable payments" made to foreign governments.⁵³ The Internal Revenue Service sought to compel the production of this information, but *Upjohn* refused, arguing that such communications were protected under the attorney-client privilege.⁵⁴ The United States Court of Appeals for the Sixth Circuit held that only communications between counsel and the corporation's "control group" were privileged, that is, communications between counsel and those "officers and agents . . . responsible for directing [the company's] actions in response to legal advice."⁵⁵

The Supreme Court, however, rejected the control group test, arguing that its narrow scope frustrated the purposes of the privilege in three respects.⁵⁶ First, the test inhibited communica-

⁴⁹ Scope of Disclosure, N.Y. CIV. PRAC. L. & R. § 3101(a)(1) (McKinney 1990) ("There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party.").

⁵⁰ See notes 68-70 and accompanying text *infra*.

⁵¹ 149 A.D.2d at 100, 545 N.Y.S.2d at 156 ("The plaintiff assumes, in other words, that DeTrae's attorneys have no attorney-client relationship with the employees of DeTrae whom the plaintiff seeks to interview.").

⁵² *Id.* ("It is clear . . . that any agent of DeTrae could avail himself of the attorney-client privilege with respect to communications made by him to DeTrae's attorneys on the subject matter of this litigation . . . This was the essential holding of the Supreme Court in *Upjohn Co. v. United States*.").

⁵³ 449 U.S. at 386.

⁵⁴ *Id.* at 388.

⁵⁵ *Id.*

⁵⁶ *Id.* at 392-93; see also Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 MICH. L. REV. 665 (1983) (rejecting the various standards adopted by courts in defining the scope of the privilege and arguing for a consistent approach).

tions between corporate counsel and mid- and low-level employees by denying them the protection of the privilege:

Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.⁵⁷

Second, this narrow approach frustrated attorneys' efforts to ensure the corporation's compliance with regulatory law which frequently involves lower level employees for implementation.⁵⁸ Third, the uncertainty and unpredictability of this test inhibited communications between corporate employees and attorneys.⁵⁹

Thus the Court held that the attorney-client privilege extended to communications made by corporate employees to corporate counsel in connection with a pending investigation but made clear that its decision was narrowly confined to the case before it.⁶⁰ The Court also pointed out in dicta that the privilege only protects disclosure of communications; "it does not protect disclosure of the underlying facts by those who communicated with the attorney."⁶¹ The Court thereby acknowledged an attorney's right to conduct necessary discovery. The appellate division argued that *Upjohn* defines the scope of the common law

⁵⁷ *Upjohn*, 449 U.S. at 391 (citing *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978)).

⁵⁸ *Id.* at 392 ("The narrow scope given the attorney-client privilege by the court below . . . threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.").

⁵⁹ *Id.* at 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

⁶⁰ *Id.* at 396 ("[W]e decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501.").

⁶¹ *Id.* at 395. The Court further stated:

[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Id. at 395-96 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D.Pa. 1962)).

attorney-client privilege adopted in New York by statute.⁶² The court reasoned that this attorney-client relationship extended between DeTrae's attorneys and all current DeTrae employees who were connected in any way with the subject of the litigation.⁶³ Thus the court concluded that since there was an attorney-client relationship with all corporate employees, all DeTrae employees were clients and, therefore, parties to the litigation.⁶⁴ Accordingly, the court denied plaintiff's request to conduct ex parte interviews with any DeTrae employees, stating that "the terms of DR 7-104(A)(1) may effectively be enforced 'only by viewing all present employees of a corporation as parties.'"⁶⁵

⁶² 149 A.D.2d at 101, 545 N.Y.S.2d at 156. See N.Y. Civ. PRAC. L. & R. 4503(a) (McKinney 1991) which provides:

Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication . . . in any action.

Note that Rule 501 of the Federal Rules of Evidence sets forth a general rule that, with certain exceptions, evidentiary privileges shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. FED. R. EVID. 501. However, Rule 501 also provides for the determination of privilege questions in accordance with state law in civil actions for elements of a claim or defense where state law supplies the rule of decision. Bruce I. McDaniel, Annotation, *Situations in Which Federal Courts are Governed by State Law of Privilege Under Rule 501 of Federal Rules of Evidence*, 48 A.L.R. FED 259 § 2(a) (1986).

⁶³ 149 A.D.2d at 99-100, 545 N.Y.S.2d at 156.

⁶⁴ 149 A.D.2d at 101, 545 N.Y.S.2d at 157. One commentator has argued that this reasoning by the court is specious. Robert A. Barker, *An Interview with the Adversary Party*, N.Y.L.J., Oct. 22, 1990, at 3 ("Since attorneys can only have protected communications with clients, goes this syllogism, it follows that all the employees must be clients and hence, in litigation, parties."). The problem with the court's applying *Upjohn* to the situation in *Niesig* is that a "corporate employee who is a 'client' under the attorney-client privilege is not necessarily a 'party' for purposes of the disciplinary rule." Wright v. Group Health Hosp., 691 P.2d 564, 570 (Wash. 1984). Although both the attorney-client privilege and the disciplinary rules aim to further the attorney-client relationship, the policies behind these two rules are different. *Id.*; see also *Niesig*, 76 N.Y.2d at 371-72, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497. In the corporate context the attorney-client privilege serves to promote open communication between employees and corporate counsel. In contrast, Disciplinary Rule 7-104(A)(1) exists to protect the corporate entity against unscrupulous practices of adversary counsel.

Furthermore, the plaintiff's attorney in *Niesig* did not seek to discover communications regarding the accident between DeTrae employees and corporate counsel that were protected by the attorney-client privilege. Rather, the attorney sought to interview DeTrae employees to discover the underlying facts that according to the *Upjohn* court are exempt from the attorney-client privilege. See note 61 and accompanying text *supra*.

⁶⁵ *Id.* at 106, 545 N.Y.S.2d at 159 (quoting City of N.Y. Bar Ass'n, Op. 80-46 (1932)). The court's reliance on this opinion was misplaced. The Association did not advocate a

Finally, the court rejected the alter ego standard advocated by the plaintiff as immensely impractical⁶⁶ and theoretically deficient.⁶⁷ In particular, the court argued that the alter ego standard, which distinguishes corporate employees according to the evidentiary question of whether the employee can "speak for" or "bind" the company,⁶⁸ runs afoul of New York's evidence rule, which differs from that of the Federal Rules of Evidence. Federal Rule of Evidence 801(d)(2)(D) provides that out-of-court statements made by an employee concerning a matter within the scope of employment are admissible against the corporation as admissions.⁶⁹ Under this hearsay rule, out-of-court statements

ban on all ex parte communications with corporate employees; rather, it adopted the far narrower scope of employment test which prohibits attorneys from interviewing any employees about matters that relate to the scope of their employment. Thus the court's placing a blanket ban on ex parte interviews cannot be justified by the reasoning in *Upjohn* or Opinion 80-46.

⁶⁶ The plaintiff has offered no concrete standard by which the courts could distinguish, in a consistent manner, between the type of corporate employees with respect to whom ex parte contact by adverse counsel would be forbidden, on the one hand, and the type of corporate employees with respect to whom such contact would be allowed, on the other.

149 A.D.2d at 102, 545 N.Y.S.2d at 157.

⁶⁷ *Id.*

⁶⁸ The alter ego standard derives from the law of evidence and agency. *Niesig*, 76 N.Y.2d at 375, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499. In a 1978 Informal Opinion regarding DR 7-104(A)(1) the ABA employed principles of evidence and agency to construct a workable definition of the corporate party. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978) ("If the officers and employees that you propose to interview could commit the corporation because of their authority as corporate officers or employees or for some other reason the law cloaks them with authority, then they, as the alter egos of the corporation, are parties for purposes of DR 7-104(A)(1).") This position has received support from commentators, including one ethics expert who has stated that attorneys should be prohibited from ex parte contact with those "who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer." WOLFRAM, *supra* note 17, § 11.6.2 at 613.

The use of evidentiary principles in this definition appears to stem from concern that, because an employee's out-of-court statements concerning matters within the scope of employment may be admissible against the corporation as admissions, the corporation risks undue exposure from ex parte contacts. See *Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984) ("It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts . . . Rather, the rule's function is to preclude the interviewing of those corporate employees who have the authority to bind the corporation.").

⁶⁹ Federal Rule of Evidence 801(d)(2)(D) provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency of employment, made during the existence of the relationship." FED. R. EVID. 801(d)(2)(D).

by a broad range of employees may be used as admissions against the corporation and correspondingly in the context of DR 7-104(A)(1), a broad range of employees will be off-limits to ex parte contacts. However, under New York evidence law, an employee's statement is admissible "only if the making of the statement is an activity within the scope of his authority."⁷⁰ Since generally few corporate employees are authorized by the corporation to speak, few employees will be considered parties under the New York rule and the corporate defendant will be unduly exposed to opposing counsel.

Thus the appellate court determined that New York's narrow hearsay exception does not provide adequate guidance in determining whether an employee constitutes an alter ego of the corporation, and allowing such contacts with agents or employees would result in the "granting of a virtual carte blanche to conduct ex parte interviews with the employees of institutional defendants under almost any circumstance."⁷¹ The court also criticized the argument advanced by the plaintiff that public policy considerations required that his attorney be able to conduct ex parte interviews with the defendant's current employees as a matter of "personal expedience."⁷²

D. *The Court of Appeals Decision*

The court of appeals modified the appellate division's order to permit ex parte communications by the plaintiff's attorney

⁷⁰ It is the long-settled law of this State that an oral or written statement made by an agent may be received in evidence against his principal under the admissions exception to the hearsay rule only if it was spoken or written within the scope of authority of the agent to speak or write for his employer.

Loschiavo v. Port Auth. of New York and New Jersey, 86 A.D.2d 624, 625, 446 N.Y.S.2d 358, 359 (1982).

⁷¹ 149 A.D.2d at 104, 545 N.Y.S.2d at 158. But see the court of appeals' opinion in which the court points out that "[i]nformal encounters between a lawyer and an employee-witness are not—as a blanket ban assumes—invariably calculated to elicit unwitting admissions; [rather,] they serve long-recognized values in the litigation process." 76 N.Y.2d at 372-73, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

⁷² 149 A.D.2d at 106, 545 N.Y.S.2d at 159-60. The court stated that the "real interests" which the plaintiff sought to advance were financial (i.e., ex parte interviews are less expensive than depositions) and tactical (i.e., witnesses may be more forthcoming and therefore more apt to present prejudicial information if counsel is not present) and argued that the plaintiff's "search for the truth" could be accomplished by means of regular pre-trial depositions. However, financial and tactical benefits are among the interests that the Rule is meant to promote. See notes 18-37 and accompanying text *supra*.

with all current DeTrae employees who were not "alter egos" of the corporation. The court determined that the "alter ego" test is the most "workable" solution to the dilemma facing attorneys who must interpret the Rule's ban on ex parte contacts with corporate parties.⁷³

The court prefaced its analysis by noting that the Code of Professional Responsibility, which is not a statute, does not have the force of law.⁷⁴ Therefore, the court stated it was not bound to read the rules literally or achieve the intent of the drafters, but was required only to "look to the rules as guidelines to be applied with due regard for the broad range of interests at stake."⁷⁵ Where there is uncertainty, the court emphasized it must use the "judicial process" to make its decision. This fact is significant because it permitted the court to adopt the alter ego standard largely on public policy grounds.⁷⁶ However, the court did buttress its opinion with references to case law and interpretive commentary surrounding the test, as well as "developed

⁷³ This test "minimiz[es] the uncertainty facing lawyers about to embark on employee interviews." 76 N.Y.2d at 375, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499.

⁷⁴ "Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline." 76 N.Y.2d at 369, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495 (citing CODE OF PROFESSIONAL RESPONSIBILITY, N.Y. JUD. LAW App. (McKinney Supp. 1991) (Preliminary Statement)).

⁷⁵ 76 N.Y.2d at 369-70, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495. The court recognized its role as follows:

When we agree that the Code applies in an equitable manner to a matter before us, we should not hesitate to enforce it with vigor. When we find an area of uncertainty, however, we must use our judicial process to make our own decision in the interests of justice to all concerned.

Id. (quoting *Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1360 (2d Cir. 1975) (an appeal from an order of the district court denying defendant's motion to disqualify plaintiffs' law firm from further representation in the case due to various improprieties)). *See also Niesig*, 76 N.Y.2d at 378, 558 N.E.2d at 1038, 559 N.Y.S.2d at 501 (Bellacosa, J., concurring) ("We are free to make a policy choice somewhat on a *tabula rasa*, save for the guidance only of the specialized Code of Professional Responsibility, not some broad public policy legislative enactment."). *See also* CODE OF PROFESSIONAL RESPONSIBILITY, N.Y. JUD. LAW App. (McKinney Supp. 1991) (Preliminary Statement) ("[A]n enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.").

⁷⁶ 76 N.Y.2d at 368, 559 N.E.2d at 1031, 559 N.Y.S.2d at 494 ("The trial court and the Appellate Division both [found] that an employee of a counseled corporate party in litigation is by definition also a 'party' within the rule, and prohibited the interviews. For reasons of policy, we disagree.").

concepts of the law of evidence and the law of agency."⁷⁷

First, the court discussed the policies that inform the Rule and emphasized that DR 7-104(A)(1) "prevent[s] situations in which a represented party may be taken advantage of by adverse counsel" and thereby "safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions."⁷⁸ Acknowledging that the fundamental principle behind the Rule is "fairness," the court went on to identify the importance of informal discovery methods to advance the litigation process and to promote the efficient resolution of disputes.⁷⁹

Next the court reviewed the different tests courts have used to determine the scope of the corporate "party" and rejected each of them based on their intrinsic deficiencies.⁸⁰ In particular, the court repudiated the appellate division's adoption of the broad blanket ban standard and criticized its reliance on *Upjohn* as inapposite.⁸¹ While the court recognized the clarity and certainty inherent in a test that equates a corporate "party" with all of its employees, the court argued that the blanket rule exacted too high a price in closing off all avenues of informal discovery.⁸² As the court noted, "The broader the definition of 'party' in the interests of fairness to the corporation, the greater

⁷⁷ 76 N.Y.2d at 375, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499 (citing as examples decisions from state or district courts in Illinois, Kansas, Montana, New York, South Carolina, and Washington, as well as commentaries spanning over ten years). See, e.g., Krulewicz, *supra* note 3; Samuel R. Miller & Angelo J. Calfo, *Ex parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 Bus. LAW. 1053 (1987); Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181, 1196 (1987); Wyeth, *supra* note 28.

⁷⁸ 76 N.Y.2d at 370, 558 N.E.2d at 1032-33, 559 N.Y.S.2d at 495-96.

⁷⁹ *Id.* (citing ABA Canons of Professional Ethics). See note 18 *supra*.

⁸⁰ The court dismissed the blanket rule (because it "exact[s] a high price . . . [by] clos[ing] off avenues of informal discovery of information"), the control group test (since it "wholly overlooks the fact that corporate employees other than senior management also can bind the corporation"), the case-by-case balancing test and the scope of employment test ("they give too little guidance or otherwise seem unworkable"), in favor of the alter ego standard. 76 N.Y.2d at 372-74, 558 N.E.2d at 1034-35, 559 N.Y.S.2d at 497-98.

⁸¹ *Upjohn* . . . addresses an entirely different subject, [the attorney-client privilege,] with policy objectives that have little relation to the question whether a corporate employee should be considered a 'party' for purposes of the disciplinary rule . . . [A] corporate employee who may be a 'client' for purposes of the attorney-client privilege is not necessarily a "party" for purposes of DR 7-104(A)(1).

76 N.Y.2d at 371-72, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497. See also note 64 *supra*.

⁸² 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497. See also notes 95-102 and accompanying text *infra*.

the cost in terms of foreclosing vital informal access to facts."⁸³

Finally, the court adopted a modified version of the alter ego test developed by the American Bar Association.⁸⁴ The court defined "party" for purposes of DR 7-104(A)(1) to include those corporate employees "whose acts or omissions in the matter under inquiry are binding on the corporation . . . or imputed to the corporation for purposes of its liability, or [who are] implementing the advice of counsel."⁸⁵ The court argued that its alter ego test is the fairest gauge for determining the scope of a corporate party for purposes of the Rule because it equitably balances the parties' competing interests in protection and access to underlying facts.⁸⁶ The court also asserted that the alter ego test negates the potential unfair advantage of extracting admissions from those who will bind the corporation; it upholds the important attorney-client privilege; it permits direct access to employees who were witnesses to an event; and it is clear and predictable in application since it relies on developed standards of the law of evidence and the law of agency.⁸⁷ In addition to these strong policy arguments, the court supported its espousal of the alter ego test by noting that a similar test had been "overwhelmingly adopted by courts and bar associations throughout the country" and had enjoyed successful practical application.⁸⁸

⁸³ 76 N.Y.2d at 371, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496.

⁸⁴ The alter ego approach was described by the ABA in a 1978 Informal Opinion. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978). See note 68 *supra*.

⁸⁵ 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

Courts that have adopted the alter ego test have tended to employ the ABA's definition of the corporate "party," that is, those employees having legal authority to "speak for" or "bind" the corporation. In contrast, the test adopted by the *Niesig* court is more stringent and prohibits *ex parte* contacts with a wider range of corporate employees. See notes 135-42 and accompanying text *infra*.

⁸⁶ 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

⁸⁷ *Id.*

⁸⁸ 76 N.Y.2d at 375, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499. Cases cited include *Chancellor v. Boeing Co.*, 678 F. Supp. 250 (D. Kan. 1988) (in an action against employer involving promotion denials, court held that plaintiff was prohibited from interviewing informally those employees who might have been involved in the issue such that their actions could be imputed to the corporation for purposes of civil liability); *Frey v. Department of Health and Human Servs.*, 106 F.R.D. 32 (E.D.N.Y. 1985) (in a sex discrimination suit, court found that plaintiff could contact corporate employees, except those high-level managerial employees who participated in decision not to promote plaintiff); *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984) (in a medical malpractice action, court held that plaintiffs had a right to conduct *ex parte* interviews with those employees of defendant hospital who did not have managing authority sufficient to give

II. ANALYSIS

A. *Different Tests for Interpreting DR 7-104(A)(1)*

Disciplinary Rule 7-104(A)(1) mandates that a lawyer not "communicate on the subject of the representation with a party he knows to be represented by a lawyer." Unfortunately, the ambiguity of the term "party" has made it difficult for lawyers to determine the ethical limit of ex parte interviews when the opposing party is a business entity.⁸⁹ Consequently, a lawyer may be confronted with an ethical dilemma when faced with the opportunity to conduct an ex parte interview with another party's employee.⁹⁰ On one hand she must comply with the Code's command to represent one's client zealously; on the other hand she must be careful not to violate the Rule's injunction since a violation could result in sanctions or even disqualification.⁹¹

Courts and bar associations have attempted to reconcile the problem of interpreting the scope of a corporate "party" by formulating a number of tests that balance the various policy interests informing the Rule.⁹² Generally, they have weighed such significant factors as the need for discovery, protection of

them the right to speak for and bind corporation). See also ABA/BNA Lawyers' Manual on Professional Conduct 71:03 (1984) (officers and directors with power to bind the corporation tend to be considered parties).

Bar association opinions cited include Alabama State Bar Ass'n, Ethics Op. RO-83-81 (1983); Colorado Bar Ass'n, Ethics Op. 69 (1985); Virginia State Bar, Legal Ethics Op. 905 (1987).

⁸⁹ Krulewitch, *supra* note 3, at 1275 ("Attorneys opposing corporate parties have no standard to determine which employees or agents of the corporation they may interview ex parte."); see also *In re FMC Corp.*, 430 F. Supp. 1108, 1110 (S.D.W.Va. 1977) ("When applied . . . to a corporation, no objective standard usable for all cases is readily available.").

⁹⁰ Stahl, *supra* note 77, at 1184-85 (criticizing the ambiguities in the Code and arguing for more careful analysis from courts and bar associations in defining parties and witnesses). Other commentators have criticized the vagueness and ambiguity in the Code. See, e.g., Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571 (1981); Panel Discussion, 35 U. MIAMI L. REV. 669 (1981) (cited in Stahl, *supra* note 77, at 1184 n.13). See also Leubsdorf, *supra* note 19, at 688-93 (arguing that the Rule actually harms the client by providing attorneys with over-expansive authority to control all communications with the opposing party).

⁹¹ Note that the client suffers, too, when her lawyer is disqualified for improperly contacting a witness.

⁹² See generally Hodson, *supra* note 7. Unfortunately, the courts and bar associations that have considered the problem have failed to establish a uniform standard. Krulewitch, *supra* note 3, at 1275 (courts "have failed to resolve the confusion").

vulnerable parties, predictability and judicial efficiency in developing a standard that can be used to fulfill the Rule's objectives.⁹³ While a test may accomplish one important goal of the Rule, for example, a party's need to conduct discovery, the test will ultimately fail if it unduly hampers other policies, for example, protection of the corporate party.⁹⁴ This section of the Comment surveys the different tests that have been used to determine the scope of the corporate "party" in light of the goals of DR 7-104(A)(1).

1. The Blanket Ban Test

The "blanket ban" test equates a corporate "party" with all employees of the corporation, and thereby prohibits attorneys from interviewing any employees of a corporation informally.⁹⁵ In practice, the blanket test places all employees off-limits to informal questioning by an adversary's attorney, even where the employees were merely witnesses to an event relevant to the liti-

⁹³ See notes 18-37 and accompanying text *supra*.

⁹⁴ Krulewitch, *supra* note 3, at 1278.

⁹⁵ There is a dearth of judicial support for this test. Courts that have adopted the blanket ban test include, *Niesig*, 149 A.D.2d 94, 545 N.Y.S.2d 153 (2d Dep't 1989); *Caguila v. Wyeth Labs.*, 127 F.R.D. 653 (E.D.Pa. 1989) (Court relied expressly on lower court decision in *Niesig* in granting defendant's motion to prohibit use of corporate employee's statement by interpreting Model Rule 4.2 to prohibit ex parte contact with nonmanagerial employee despite the explicit definition of Model Rule 4.2. See note 17 *supra*.); *Hewlett-Packard Co. v. Superior Court of Orange County*, 252 Cal. Rptr. 14 (Cal. Ct. App. 1988) (depublished) (in a suit for defamation by employee against employer, court upheld the blanket ban test but denied disqualification of opposing counsel who contacted employees on ex parte basis and discussed facts of case) (for a discussion of the significance of depublication, see note 102 *infra*); *Mills Land and Water Co. v. Golden West Ref. Co.*, 230 Cal. Rptr. 461 (Cal. Ct. App. 1986) (where corporation sought disqualification of opposing counsel who directly contacted corporate director, court held that disqualification was proper, even though director was not a member of control group).

Three bar associations and one commentator have advocated the blanket rule. See Comm. on Professional Ethics, Bar Ass'n of Nassau County, Op. 2-89 (1989) ("[d]irect contact with employees of an adverse corporate party is prohibited when the corporation is represented by counsel"); Los Angeles County Comm. on Professional Ethics, Formal Ethics Op. 410 (1983) (arguing that adoption of this bright-line rule promotes confidentiality of corporate counsel's advice and insures that opposing counsel do not have improper contact with the opposing party) *cited in* Stahl, *supra* note 77, at 1208-11; New York County Lawyers' Ass'n, Op. 528 (1964) ("The fact that the corporation and its current employees are represented by counsel is sufficient to protect them from interference or contact by opposing counsel."); see also Miller & Calfo, *supra* note 77 (recommending the recognition of a clear rule forbidding ex parte contacts concerning a subject of controversy with current employees of a corporate party).

gation. The benefit of such a test is its absolute clarity.⁹⁶ As noted by the court of appeals in *Niesig*, "No lawyer need ever risk disqualification or discipline because of uncertainty as to which employees are covered by the rule and which not."⁹⁷ In addition, the test provides substantial protection for a corporate party that, because of its large size and decentralized nature, risks having its employees improperly contacted by opposing counsel.

Nevertheless, this extremely broad definition of "party" has been generally disfavored by courts and bar associations because it places a premium on protecting the corporate party at the high cost of foreclosing the adversary party's ability to obtain valuable information efficiently.⁹⁸ Reliance on this bright-line test is contrary to the strong policy mandating that an attorney do all she can, by investigating a claim and conducting discovery, to represent a client zealously.⁹⁹ The blanket rule is unduly restrictive in that it closes off avenues of informal discovery which promote "the expeditious resolution of disputes" and thus forces attorneys to conduct investigations by means of expensive depositions.¹⁰⁰ As such, it abrogates an important policy underlying DR 7-104(A)(1): to foster resolution of disputes.

The appellate division in *Niesig* adopted the blanket ban rule based mainly on its reading of the Supreme Court's interpretation of the corporate party for purposes of the attorney-client privilege in *Upjohn Co. v. United States* and on its view of New York evidentiary principles.¹⁰¹ In addition, the court cited opinions by the California Court of Appeals as persuasive authority.¹⁰² However, the court's rationale for its adoption of

⁹⁶ *Niesig*, 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Canon 7 of the Code requires that a lawyer "represent a client zealously within the bounds of the law." CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 N.Y. JUD. LAW App. (McKinney Supp. 1991). See note 31 and accompanying text *supra*.

¹⁰⁰ *Niesig*, 76 N.Y.2d at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497; see also text accompanying notes 32-37 *supra*.

¹⁰¹ See notes 45-72 and accompanying text *supra*.

¹⁰² See *Hewlett-Packard Co. v. Superior Court of Orange County*, 252 Cal. Rptr. 14 (Cal. Ct. App. 1988) (depublished); *Mills Land and Water Co. v. Golden West Ref. Co.*, 230 Cal. Rptr. 461 (Cal. Ct. App. 1986). In fact, the California Supreme Court "depublished" the more recent court of appeals opinion at about the same time the State Bar of California approved a new rule that allows attorneys to interview most routine fact witnesses on an ex parte basis. The significance of "depublishing" has been explained by an

the blanket rule is faulty: the court not only misread *Upjohn* and the California cases, but it also failed to give adequate weight to the important policies that underlie the Rule. The blanket ban test embraced by the appellate division is overly injurious to an attorney's ability to investigate and conduct discovery in developing a theory and defense of a client's case.

2. The Case-by-Case Balancing Test

In the "case-by-case balancing" test the parties' competing interests are weighed and a balance is sought between the attorney's ability to discover the facts of the case and the corporation's interest in protecting itself.¹⁰³ For example, whether a court will permit ex parte contacts with a truck driver-employee

Associate Justice of the California Supreme Court in Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984) ("[T]he California Supreme Court has ordered that certain opinions of the court of appeal be 'depublished,' that is, not printed in the Official Reports . . . [I]t has done this because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent.").

See also CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-100 (1991), which provides: Communication with a Represented Party

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

- (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership, or
- (2) An association member or an employee of an association, corporation, or partnership.

Nevertheless, on a motion for reconsideration or leave to appeal, the appellate division ruled that the "depublishing" of the *Hewlett-Packard* case "has no effect on the persuasive value inherent in the reasoning expressed in the decision." 545 N.Y.S.2d at 162.

¹⁰³ This test has been adopted by two district courts. See *B.H. by Monahan v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989) (in class action suit brought against government agency, court will make determination whether employees of the organization are covered by the Rule precluding ex parte contacts based on facts of the case); *Morrison v. Brandeis Univ.*, 125 F.R.D. 14 (D. Mass. 1989) (in a sex discrimination case brought by university instructor against university following denial of tenure, court held it would determine which university employees were "parties" by analyzing interests and needs of both sides on basis of facts and circumstances of case); *Mompoin v. Lotus Dev. Corp.*, 110 F.R.D. 414 (D. Mass. 1986) (in a sex discrimination action brought by corporate employee against corporate defendant for wrongful termination court held that facts and circumstances of particular case dictated whether a protective order prohibiting ex parte contact with corporate employees should issue).

involved in an accident while on duty or with an employee who witnessed alleged sex discrimination against a co-employee depends on the court's consideration of each party's interests in protection and in acquiring necessary facts. Preventing off-the-record conversations with corporate employee-witnesses may frustrate a plaintiff-employee's efforts to obtain relief; however, permitting informal interviews of employees will undoubtedly jeopardize the corporate party. The court's decision ultimately rests on its appraisal of the facts and circumstances of the individual case.¹⁰⁴

The balancing test has been criticized for its failure to offer attorneys concrete guidelines of ethical behavior¹⁰⁵ and for its inefficient use of judicial resources.¹⁰⁶ Although the disciplinary rules endeavor to provide attorneys with guidelines to gauge their conduct, the balancing test fails to offer attorneys any practical standard by which to conduct discovery.¹⁰⁷ Since the test operates on a case-by-case basis, the parties must litigate whether ex parte interviews are permissible under the circumstances of the particular case. Given the overcrowding of court calendars, a standard that actually increases litigation rather than streamlining it is unsatisfactory.¹⁰⁸ In addition, the balancing test cannot ensure a consistent and impartial application of the Rule to all parties. Rather, it assesses "each case independently, emphasizing the interests of the case at hand, and not the interests of future or past litigants."¹⁰⁹ As one commentator

¹⁰⁴ In *Morrison* the court described why it opted for a case-by-case balancing test: A plaintiff's need to gather information on an informal basis on the one hand and the defendant's need for effective representation on the other can, in most cases, only be balanced with reference to the facts and circumstances which appertain to the particular case at hand. Those tests which purport to strike a universal balance in all cases do not, in my view, adequately meet the needs of either party.

125 F.R.D. at 18.

¹⁰⁵ *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498 (the balancing test "give[s] too little guidance"). An attorney who violates the Rule risks sanctions or even disqualification. See text accompanying notes 13-16 *supra*.

¹⁰⁶ Krulewitch, *supra* note 3, at 1296.

¹⁰⁷ *Id.* ("Because the disciplinary rules often do have sanctions as enforcement mechanisms, it would be unjust to subject attorneys to an uncertain standard.").

¹⁰⁸ *Id.* ("Since the balancing test provides no general standard to guide the behavior of the parties, disputes concerning the interpretation of DR 7-104(A)(1) will be common.").

¹⁰⁹ *Id.* at 1297.

has pointed out, "While the rule may achieve justice in the microcosm of a particular case, in the macrocosm of the legal system the rule often fails to promote a just result."¹¹⁰ For these reasons the balancing test is "unworkable."¹¹¹

3. The Scope of Employment Test

The "scope of employment" test permits an attorney to interview corporate employees, without the consent of the corporation's attorney, on subjects outside the scope of their employment, so long as no deception is practiced.¹¹² For instance, an adverse attorney would be prohibited from interviewing on an ex parte basis a truck driver-employee who was involved in an accident while on duty, but would be permitted to interview an employee who happened to observe an incident over which he had neither responsibility nor authority, such as an incident of sex discrimination in the workplace.¹¹³

¹¹⁰ *Id.*

¹¹¹ *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

¹¹² City of N.Y. Bar Ass'n, Op. 80-46 (1982) [hereinafter Opinion 80-461] (citing Disciplinary Rule 1-102(A)(4) which states that "[a] lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation").

While not widely embraced, the test has been advocated by two bar associations and one state court. See Opinion 80-46, *supra* (arguing that the Code in DR 7-104(A)(1) has determined that the consideration of a party's need for discovery must be subordinated to the need to protect an adverse lay party from unsupervised communication with opposing counsel, and concluding that the scope of employment test best protects the corporation's right to effective representation); Massachusetts Bar Ass'n, Formal Op. 82-7 (1982), cited in Krulewitch, *supra* note 3, at 1292 ("[T]o prevent adverse counsel from obtaining admissions against the corporation through ex parte interviews, such interviews must be considered violative of DR 7-104(A)(1) if they involve matters within the scope of the employee's employment."). See also *Pearce v. E.F. Hutton Group, Inc.*, No. 86-0008, 1987 U.S. Dist. LEXIS 13236, at *6 (D.C. Cir. 1987) (adopting the approach taken by the City of N.Y. Bar Association which it found to be "quite cogent").

For support for this standard, see Miller & Calfo, *supra* note 77, at 1058 (arguing that Opinion 80-46 takes into account the failure of the alter ego test to protect corporations against binding admissions by low-level employees); Stahl, *supra* note 77, at 1199 (asserting that the definition of "party" adopted in Opinion 80-46 "represents a logical extension of the United States Supreme Court's analysis and conclusions in *Upjohn*").

¹¹³ Opinion 80-46, *supra* note 112, actually cites a hypothetical application of the test in a situation that mirrors the one at issue in *Niesig*:

For example, if an employee happened to observe an incident over which he had neither responsibility nor authority, such as an accident at the site of his employer, his statements on the subject would relate to matters outside the scope of his employment and adverse counsel could approach him directly without running afoul of DR 7-104(a)(1).

Opinion 80-46, *supra* note 112.

A decided benefit of the scope of employment test is that it upholds an attorney's right to free and candid discussions with employees who are not involved in the subject matter of the suit, while at the same time it protects the corporate party from potentially damaging admissions by its employees, whether managerial or not. In addition, the test is arguably a well-established standard because it derives from agency law,¹¹⁴ tort law,¹¹⁵ and the law of evidence.¹¹⁶ Essentially, the evidentiary principle under the Federal Rules of Evidence and under some states' law is that an employee may make a statement concerning a matter within the scope of her employment which is thereafter admissible as an admission against the corporation.¹¹⁷ Where the potential for such admissions exists, the employee is deemed to be off-

¹¹⁴ The Restatement (Second) of Agency defines "scope of employment" as follows:

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master, and
 - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

¹¹⁵ "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958). This principle of vicarious liability is a fundamental concept of tort law. See W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 501-502 (5th ed. 1984) ("Once it is determined that the man at work is a servant, the master becomes subject to vicarious liability for his torts . . . [H]is vicarious liability . . . extends to any and all tortious conduct of the servant which is within the 'scope of employment.'").

¹¹⁶ Krulewitch, *supra* note 3, at 1294 n.123 ("The scope of employment standard is based upon Federal Rule of Evidence 801(d)(2)(D). Because this is a well-established standard, parties will be able to determine from prior litigation and court rulings what falls within the scope of an employee's employment."); see also Opinion 80-46, *supra* note 112, ("[O]ur interpretation of DR 7-104(a)(1) is co-extensive with the evidentiary rule that an employee may make a statement concerning a matter within the scope of his employment which is thereafter admissible through the testimony of the interviewer as an admission by the corporation." (citing FED. R. EVID. 801(d)(2)(D))).

¹¹⁷ The applicable rule is Federal Rule of Evidence 801(d)(2)(D). See note 69 *supra*. The evidentiary principle of admissions by an employee or agent is also found in the law of agency. According to Restatement (Second) of Agency § 286:

In an action between the principal and a third person, statements of an agent to a third person are admissible in evidence against the principal to prove the truth of facts asserted in them as though made by the principal, *if the agent was authorized to make the statement or was authorized to make, on the principal's behalf, any statements concerning the subject matter.*

RESTATEMENT (SECOND) OF AGENCY § 286 (1958) (emphasis added). As in New York's hearsay exception, admissibility under agency law depends upon the principal's authorization. See note 70 *supra*.

limits to opposing counsel for informal interviews.

The appellate division and court of appeals in *Niesig* rejected this test on the ground that New York's hearsay exception is different from the federal rule.¹¹⁸ Under New York law, the statement of an employee is admissible against her employer under the admissions exception to the hearsay rule "only if the making of the statement is an activity within the scope of his authority."¹¹⁹ Applying this standard to determine which employees are parties for purposes of DR 7-104(A)(1), attorneys will be prevented from informally interviewing only those employees authorized by the corporation to speak. Since it is exceedingly rare that an employer will confer such authority on its employees, few employees will be off-limits to opposing counsel, leaving corporate parties sorely unprotected under this standard.

The most significant problem with this test, however, is interpreting the breadth of the ambiguous phrase "scope of employment." As commentators have put it: "This highly indefinite phrase, which sometimes is varied with 'in the course of the employment,' is so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions."¹²⁰ However, this flexibility is not desirable in

¹¹⁸ 149 A.D.2d at 103-04, 545 N.Y.S.2d at 157-58; 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

Although the court of appeals in *Niesig* expressly rejected the scope of employment test, the court effectively incorporated the principles behind the scope of employment test into its modified alter ego test by placing off limits those employees whose acts or omissions are "imputed to the corporation for purposes of its liability." *Id.*; see notes 138 & 139 and accompanying text *infra*.

¹¹⁹ See *Loschiano v. Port Auth. of N.Y. & N.J.*, 58 N.Y.2d 1040, 1041, 448 N.E.2d 1351, 1352, 462 N.Y.S.2d 440, 441 (1983); see also *Kelly v. Diesel Constr. Div. of Carl A. Morse*, 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974) (in a negligence action brought by employee against subcontractor held that statements of superintendent for general contractor were properly excluded at trial in absence of showing that superintendent was authorized by general contractor to make admissions); EDITH L. FISCH, *NEW YORK EVIDENCE* § 800 (2d ed. 1977); CHARLES T. MCCORMICK, *MCCORMICK ON EVIDENCE* § 267 (Edward W. Cleary ed., 3d ed. 1984); JEROME PRINCE, *RICHARDSON ON EVIDENCE* § 253 (10th ed. 1973). Cf. *FED. R. EVID.* 801(d)(2)(D) (see note 69 *supra* for text).

¹²⁰ PROSSER & KEETON, *supra* note 115, § 70, at 502. Other commentators have argued that the "amorphous standard" adopted in the Restatement (Second) of Agency requires analysis of a myriad of factors to assess whether an employee's conduct, "although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment." Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1565 n.24 (1990) (quoting *RESTATEMENT (SECOND) OF AGENCY* § 229(2) (1958)).

construing the scope of the term "party" in DR 7-104(A)(1). Lawyers who must rely on the test to determine which employees are sheltered by the Rule risk severe penalties if they misjudge its scope and contact protected employees.¹²¹

4. The Control Group Test

The "control group" test permits attorneys to interview any employees not in the corporation's control group, that is, "those top management persons who ha[ve] 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."¹²² Under this narrow standard, few employees, except the company's board of directors and senior officers, are protected against ex parte contacts by opposing counsel.¹²³ Thus, an attorney would be permit-

To resolve the ambiguity in the phrase "scope of employment," commentators have offered different interpretations. For example, according to Prosser & Keeton, the scope of employment encompasses "acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." PROSSER & KEETON, *supra* note 115, § 70, at 502. Another commentator has opted for a simpler definition. A tort is within the scope of employment if "it can be said rationally that the employment is the primary cause of the tort." WARREN A. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 87(A), at 148 (1964), *cited in* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 583 nn.48 & 49 (advancing suggestions for reforming the scope-of-employment limitation).

On the other hand, some acts by employees are generally accepted to be outside the scope of employment. For example, in the classic "frolic and detour" cases an employee who deviates from his assigned tasks for personal errands or other personal business while on travel for the employer is said to step outside his employment. PROSSER & KEETON, *supra* note 115, § 70, at 503. Thus, no liability for his act is foisted upon the employer. *Id.* Whether an officer's ex parte communication with adverse counsel regarding another employee's act or omission, in which he had no involvement and over which he had no authority, is within or without that officer's scope of employment is less obvious.

¹²¹ See notes 15-16 and accompanying text *supra*.

¹²² *Fair Automotive Repair, Inc. v. Car-X Serv. Sys.*, 471 N.E.2d 554, 560 (Ill. App. Ct. 1984) (a defamation suit in which plaintiff alleged defendant had violated the Rule by conducting informal, unethical interviews with plaintiff's employees by hiring investigators who posed as customers, court denied plaintiff's motion, holding that the investigations were not violative because the employees contacted were not within plaintiff's control group).

¹²³ The control group test has been adopted by a state court in Illinois, a district court in Kansas and by bar associations in California, Arizona and Idaho. See *Fair Automotive*, 471 N.E.2d at 554; *Maxwell v. Southwestern Bell Tel. Co.*, No. 80-4239 (D. Kan. Oct. 28, 1980), *cited in* *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 251 (D. Kan. 1983).

ted to interview informally a truck driver-employee involved in an accident while on duty as well as any corporate employee not within the control group who may have been a witness to an incident that may give rise to litigation, such as discrimination by one employee against another.

While the test promotes broad access to relevant information,¹²⁴ an important policy underlying the Rule, the control group test has been criticized as dangerous to corporate parties.¹²⁵ One of the principal purposes of DR 7-104(A)(1) is to protect a represented party from being taken advantage of by an opposing attorney; limiting the applicability of the Rule to the control group arguably defeats this purpose.¹²⁶ In addition, the test is unpredictable since it is not always apparent which employees comprise the company's control group.¹²⁷ Furthermore,

See also Los Angeles County Bar Ass'n, Op. 369 (1977) (digested in OLAVI MARU, 1980 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 75-76 (1982)) (distinguishing employees with "authority to negotiate," whose admissions are valid and who have access to confidential corporate information); Arizona State Bar Ass'n, Op. 203 (1966) (digested in OLAVI MARU, 1970 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 127 (1972) (employees who "speak for and bind" municipality); Idaho State Bar Ass'n, Op. 21 (1960) (digested in OLAVI MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 105 (1970)) (officers and directors who were the corporation's alter ego).

¹²⁴ *Neisig*, 76 N.Y.2d at 373, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

In his concurring opinion in *Niesig*, Judge Bellacosa advocated the adoption of the control group test on the grounds that this test fosters certainty and predictability and better balances the respective interests of the parties. 76 N.Y.2d at 377, 558 N.E.2d at 1037, 559 N.Y.S.2d at 500. However, Judge Bellacosa failed to confront the problem articulated by the Supreme Court in *Upjohn*, namely that middle and/or low-level employees often possess sensitive information which when divulged may have serious legal ramifications for the corporation. Judge Bellacosa also failed to recognize that the alter ego test provides more protection for the corporation than the control group test. See notes 133-42 and accompanying text *infra*.

¹²⁵ 76 N.Y.2d at 373, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498 (the control group test gives "insufficient regard to the principles motivating DR 7-104(A)(1) . . . [and] all but 'nullifies the benefits of the disciplinary rule to corporations.'" (quoting Krulewitch, *supra* note 3, at 1287-88)). See also *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 16-17 (D. Mass. 1989) (criticizing the control group test because it conflicts with Fed. R. Evid. 801(d)(2)(D) which does not limit the admissibility of statements against a corporation to statements made by its officers, directors or managing agents, but also permits admissions by parties or their agents or servants concerning matters within the scope of their employment); *Massa v. Eaton Corp.*, 109 F.R.D. 312, 313-14 (W.D. Mich. 1985) (arguing that the control group test is an unduly restrictive interpretation of the disciplinary rule, at least to the extent that it allows middle or upper level management personnel of a corporate party to be interviewed informally).

¹²⁶ Krulewitch, *supra* note 3, at 1287.

¹²⁷ *Id.* at 1288; see *Upjohn v. United States*, 449 U.S. 383, 393 (1981) ("Disparate decisions in cases applying this test illustrate its unpredictability. Compare *Hogan v.*

the validity of the control group standard appears to have been vitiated by the United States Supreme Court's decision in *Upjohn* in which the Court declined to restrict the attorney-client privilege to those corporate employees in the control group.¹²⁸ Overall, the control group test provides very little protection to corporations from ex parte communications and places the corporate party at substantial risk of being taken advantage of by opposing counsel, thereby undermining the primary purpose of the Rule.

5. The Alter Ego Test

The "alter ego" or "managing-speaking agent" test defines corporate "parties" as those "employees who have the legal authority to 'bind' the corporation in the legal evidentiary sense . . . [that is], those employees who have 'speaking authority' for the corporation."¹²⁹ The test, developed by the American Bar Association, is increasingly favored by courts and bar associa-

Zletz, 43 F.R.D. 308, 315-16 (N.D.Okla. 1967), *aff'd in part sub nom. Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968) (control group includes managers and assistant managers of patent division and research and development department) *with Congoleum Indus. v. GAF Corp.*, 49 F.R.D. 82, 83-85 (E.D.Pa. 1969), *aff'd*, 478 F.2d 1398 (3rd Cir. 1973) (control group includes only division and corporate vice presidents and not two directors of research and vice president for production and research). See also Opinion 80-46, *supra* note 112, (arguing that it is difficult for attorneys to determine whether employees are within the control group in light of the realities of modern corporate operations).

¹²⁸ *Upjohn*, 449 U.S. at 683-84. Although the court of appeals acknowledged the Supreme Court's concern that corporations were not adequately protected under the overly narrow control group standard, it found *Upjohn* to be inapplicable to defining the scope of the Rule. See note 64 *supra*. But see Krulewitch, *supra* note 3, at 1288 (arguing that the Supreme Court's vigorous attack on the control group test in *Upjohn* for providing too little protection to corporations "renders dubious the use of the control group test to determine the applicability of DR 7-104(A)(1) to corporations").

¹²⁹ *Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984). See also *DRINKER*, *supra* note 22, at 201 (DR 7-104(A)(1) "probably precludes interviews of managing employees of a corporation having authority to bind it") (citation omitted).

To "bind" a corporation means "to obligate [it]; to bring or place [it] under definite duties or legal obligations, particularly by a bond or covenant." (emphasis added). BLACK'S LAW DICTIONARY 168 (6th ed. 1991). According to established principles of agency law, the "'power of an agent' denotes the ability of an agent . . . to affect the legal relations of the principal in matters connected with the agency The exercise of this power may result in binding the principal to a third person in contract." RESTATEMENT (SECOND) OF AGENCY § 12 cmt. a (1958). Although the *Wright* court and others that have adopted this standard refer to the legal evidentiary premise which underlies the Rule, they have actually relied more on principles of contract and agency law than those of evidence law. Krulewitch, *supra* note 3, at 1301 n.175.

tions.¹³⁰ The alter ego test precludes contacts by adverse counsel with all employees who have authority to make managerial decisions.¹³¹ It does not, however, distinguish between nonmanagerial employees who simply witnessed an event and those whose acts or omissions caused the event leading to the action.¹³² Thus, a managerial-level employee would be off-limits to adverse counsel investigating alleged sex discrimination against another corporate employee; however, a nonmanagerial employee who witnessed or even participated in the offensive acts could be approached. Likewise, opposing counsel would have the right to contact a low-level truck driver-employee who was involved in an accident while on company business.

The alter ego test has been praised by a number of courts

¹³⁰ ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978). See note 68 *supra*.

For a nonexclusive list of authorities advocating the alter ego standard, see *Niesig*, 76 N.Y.2d at 375 n.5, 558 N.E.2d at 1036 n.5, 559 N.Y.S.2d at 499 n.5 (citing *Bey v. Village of Arlington Heights*, 50 Fair Empl. Prac. Cas. (BNA) 1375 (N.D. Ill. 1989) (in an employment discrimination action, held that plaintiff-employee's counsel may interview lower echelon police department employees who do not have "speaking authority" for the department); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116 (D. Mont. 1986) (in a suit alleging wrongful termination, court held that employee-plaintiff's attorney could conduct ex parte interviews of employees, except those with managerial responsibilities concerning the matter in litigation); *Frey v. Dep't of Health and Human Servs.*, 106 F.R.D. 32 (E.D.N.Y. 1985) (in sex discrimination suit, court found that plaintiff could not contact employees who were defendant agency's alter ego, including high level managerial employees who participated in decision not to promote plaintiff, but could contact other employees informally); *Shealy v. Laidlaw Bros*, 34 Fair Empl. Prac. Cas. (BNA) 1223 (D.S.C. 1984) (in age discrimination suit, held that counsel for former employee may communicate informally with those employees who are not officers, directors or managing agents); *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984) (in a medical malpractice action, court held that plaintiffs had right to interview on an ex parte basis any current and former employees of defendant hospital who did not have managing authority sufficient to give them right to speak for and bind corporation); see also opinions by state bar associations, including Alabama, Alaska, Colorado, Georgia, Idaho, Maine, Texas and Virginia.

¹³¹ It has been called a "flexible [test] under the circumstances of each case." See *Wright*, 691 P.2d at 569 (citing *Young v. Group Health Coop.*, 534 P.2d 1349 (Wash. 1975) (doctor had speaking authority for hospital); *Griffiths v. Big Bear Stores, Inc.*, 347 P.2d 532 (Wash. 1959) (manager of supermarket had speaking authority); *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 422 P.2d 496 (Wash. 1967) (maintenance manager for commercial fishing company did not have speaking authority)).

¹³² *Wright*, 691 P.2d at 569 ("It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts. Rather, the rule's function is to preclude the interviewing of those corporate employees who have the authority to bind the corporation.") (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 117 (1934)).

and commentators as the best interpretation of the scope of DR 7-104(A)(1) on the ground that it provides a flexible, practical standard that best balances the competing interests.¹³³ The principal benefit of this approach is its respect for the parties' compelling needs for accessibility to the truth. However, the alter ego test is ultimately unsatisfactory because it is too narrow. Like the control group test, the alter ego approach does not account for middle and lower level employees who do not make managerial decisions, but nevertheless possess sensitive information which if disclosed may be acutely damaging to the corporation. Furthermore, it does not prevent ex parte communications by adverse counsel with employees whose acts or omissions have precipitated events giving rise to litigation. Although the ABA alter ego test provides the corporate party greater protection against ex parte interviews than does the control group test, it fails to guard against contacts by opposing counsel with those nonmanagerial employees whose acts or omissions may be imputed to the corporation for purposes of its liability.¹³⁴

B. *The Modified Alter Ego Test Adopted by the Court of Appeals*

In *Niesig* the court of appeals formulated a modified three-part alter ego test for interpreting the scope of the corporate party under DR 7-104(A)(1). The modified alter ego test it devised expands the ABA alter ego standard to prohibit ex parte contacts with a larger pool of corporate employees, and thereby provides adequate protection for the corporate party. The *Niesig* test defines a corporate "party" to include employees "whose acts or omissions in the matter under inquiry are (1) binding on the corporation (in effect, the corporation's 'alter egos'), or (2) imputed to the corporation for purposes of its lia-

¹³³ See, e.g., *Wright*, 691 P.2d at 569; see also Krulewitch, *supra* note 3, at 1300-05 (advocating that courts adopt the alter ego test as the uniform standard).

¹³⁴ Under the doctrine of respondeat superior, a corporation is vicariously liable for its employees' acts or omissions within the scope of their employment. PROSSER & KEETON, *supra* note 115, § 70, at 501-502; RESTATEMENT (SECOND) OF AGENCY § 219 (1958). See also Miller & Calfo, *supra* note 77, at 1060 (criticizing the alter ego test for failing to account adequately for the fact that nonmanagerial employees may make admissions against an employer and for failing to protect against potential disclosures of attorney-client confidences).

bility, or (3) employees implementing the advice of counsel."¹³⁵ In effect, it synthesizes the alter ego test, scope of employment test and control group test into an acceptable, practical standard.¹³⁶

Part one of the *Niesig* test adopts the ABA alter ego test and shields from adverse counsel "those officials, but only those, who have the legal power to bind the corporation in the matter."¹³⁷ Part two expands the ABA alter ego definition to include employees, whether managerial or not, whose acts or omissions are imputed to the corporation for purposes of its liability. This part protects the corporation from an adversary's attempt to gain a "potential unfair advantage" by extracting concessions and admissions from those whose acts are binding on the corporation under the doctrine of respondeat superior.¹³⁸ Although part two of the *Niesig* test is similar to the scope of employment test, the formulation adopted by the court of appeals—"imputed to the corporation for purposes of its liability"—is preferable because it embraces the evidentiary principles behind that test but avoids the ambiguities and limitations in the scope of employment standard.¹³⁹ Part three of the test prohibits contacts with "employees implementing the advice of counsel."¹⁴⁰ Concerned about "the protection of the attorney-client privilege," the court placed off-limits to opposing counsel those high-level employees who are in contact with corporate counsel and are authorized to implement corporate counsel's advice, that is, the corporation's control group.¹⁴¹ Under part one of the *Niesig* test, an attorney

¹³⁵ *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

¹³⁶ According to the court of appeals, this test "best balances the competing interests[] and incorporates the most desirable elements of the other approaches." *Id.*

¹³⁷ *Id.* (quoting WOLFRAM, *supra* note 17, § 11.6, at 613).

¹³⁸ *Id.* See note 134 *supra*.

Note that at least one court has construed the comment to Model Rule 4.2, *supra* note 17, to mean that not only are the alter egos of the corporation off limits, but also those employees whose acts are imputed to the corporation for purposes of liability. See *Chancellor v. Boeing Co.*, 678 F. Supp. 250 (D. Kan. 1988) (court held that plaintiff's attorney was prohibited from informally interviewing managerial employees or nonmanagerial employees who might have been involved in the incident if their actions could be imputed to the corporation for purposes of civil liability).

¹³⁹ *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498; see notes 118-21 and accompanying text *supra*.

¹⁴⁰ *Niesig*, 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

¹⁴¹ *Id.* (citing *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625, 628-29 (S.D.N.Y. 1990) (arguing that one of the policies behind DR 7-104(A)(1) is preserva-

would be prevented from informally interviewing a managerial-level employee regarding alleged sex discrimination against another corporate employee; however, an attorney could approach a nonmanagerial employee-witness to the discrimination. Under part two of the test, an adverse attorney would not be permitted to contact a low-level truck driver-employee who is involved in an accident while on company business, since her actions may be imputed to the defendant corporation for purposes of its liability. The attorney could, however, interview an employee who witnessed the event.¹⁴² Finally, under part three of the test, a plaintiff's attorney could not approach a high-ranking corporate official on an ex parte basis regarding actions the official had taken on the advice of corporate counsel.

Under the modified alter ego test, a defendant corporation is shielded from unwanted ex parte communications with its managerial employees as well as nonmanagerial employees whose acts or omissions can result in liability for the corporation. At the same time, plaintiffs are afforded the opportunity to contact employee witnesses who may offer valuable information in the absence of corporate counsel. Thus, the *Niesig* alter ego test represents the best solution to the problem of interpreting the scope of DR 7-104(A)(1) in a way that is fair to the interests of both parties.

C. *Legal Support for the Niesig Test*

Although the court of appeals asserted in *Niesig* that its decision was based on "policy" considerations,¹⁴³ the court also ac-

tion of the integrity of the attorney-client relationship)); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 436-37 (Supp. 1989) (arguing that some former managerial employees might be covered by the Rule since they might be privy to privileged information).

In fact, part three of the *Niesig* test is not really distinguishable from part one of the test. Part three protects against ex parte communications with the corporation's control group, and part one protects against such contacts with managerial employees, which clearly includes the control group. The court's purpose in formulating part three of the test appears to be to underscore that the protection provided to corporate parties by the Rule complements that of the attorney-client privilege. See text accompanying notes 174-81 *infra*. See also Clauss & Homan, *supra* note 2, at 24 (referring to this part of the *Niesig* test as "an important addition" to the alter ego standard).

¹⁴² This result would not be obtained under the ABA alter ego test. See note 132 and accompanying text *supra*.

¹⁴³ 76 N.Y.2d at 368, 558 N.E.2d at 1031, 559 N.Y.S.2d at 494. See note 76 *supra*.

knowledge that its adoption of a modified alter ego test was strongly supported by case law and "rooted in developed concepts of the law of evidence and the law of agency."¹⁴⁴ This section of the Comment examines the wealth of legal support for the *Niesig* alter ego test.

1. Case Law and Bar Association Opinions

In *Niesig* the court of appeals declared that the test it adopted was "similar [to] . . . the one overwhelmingly adopted by courts and bar associations throughout the country," that is, the ABA alter ego test.¹⁴⁵ The court argued that the test's "long practical experience persuades us that—in day-to-day operation—it is workable."¹⁴⁶ To support its position the court cited as persuasive authority cases that had employed the ABA alter ego test to achieve a just result.¹⁴⁷

For example, the court cited a Washington Supreme Court case, *Wright v. Group Health Hospital*, which is the leading case for the alter ego standard.¹⁴⁸ In *Wright* plaintiffs suing a health maintenance organization and a physician-employee sought a protective order declaring that their attorney had the right to conduct ex parte interviews of nurses and other employees of the defendant organization. The defendant contended that it had a policy of instructing its employees not to discuss cases with anyone other than the organization's outside counsel. However, the Washington Supreme Court rejected the defendant's argument as obstructionist and recognized that a "flexible interpretation of 'parties' . . . advances the policy of keeping the testimony of employee witnesses freely accessible to both parties."¹⁴⁹ Applying the ABA alter ego test, the court held that the plaintiffs had the right to contact the defendant's employees who did not have authority sufficient to give them the right to speak for and bind the corporation.

In another case cited by the court, a federal district court in

¹⁴⁴ 76 N.Y.2d at 375, 559 N.E.2d at 1036, 559 N.Y.S.2d at 499.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; see note 88 and accompanying text *supra*. Although the case law cited by the court expressly supports the ABA alter ego test, the policy arguments advanced in such cases also support the court of appeals' broader, more satisfactory, alter ego test.

¹⁴⁸ 691 P.2d 564 (Wash. 1984).

¹⁴⁹ *Id.* at 569.

New York applied the ABA alter ego test in a sex discrimination action against the Social Security Administration. The plaintiff in *Frey v. Department of Health & Human Services* alleged she was denied a promotion because of her sex.¹⁵⁰ The agency moved for a protective order to prevent the plaintiff's counsel from contacting any agency employees outside formal discovery procedures. The court, however, denied the defendant's motion on the ground that such a broad order was "in direct conflict with the goal of broad access to witnesses to uncover and present all relevant evidence to the fact finder."¹⁵¹ Weighing the plaintiff's need for information in the exclusive possession of the defendant against the defendant's need for protection, the court found that the plaintiff's need was particularly acute since the defendant was a vast government agency encompassing many organizational departments and thousands of employees.¹⁵² Thus the court held that the plaintiff had the right to interview informally all agency employees, except those employees who were the agency's alter egos and those high level managerial employees who participated in the decision not to promote the plaintiff, even though they lacked the power to bind the agency.

In addition to citing case law as persuasive authority for its adoption of a modified alter ego test, the court of appeals noted that the alter ego test is advocated by the ABA¹⁵³ and has been endorsed by bar associations nationwide.¹⁵⁴ Bar association ethics opinions typically provide answers to lawyers' questions on professional conduct, but they are also a "means by which the bar establishment can affirm its conception of the appropriate roles and attitudes of lawyers."¹⁵⁵ While ethics opinions do not have the significance of stare decisis, they are useful to courts in assessing professional standards.¹⁵⁶ The numerous bar associa-

¹⁵⁰ 106 F.R.D. 32 (E.D.N.Y. 1985).

¹⁵¹ *Id.* at 36.

¹⁵² *Id.*

¹⁵³ ABA/BNA Lawyers' Manual on Professional Conduct 71:303-71:304 (1984). See also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978) (discussed at note 68 *supra*).

¹⁵⁴ 76 N.Y.2d at 375 n.5, 558 N.E.2d at 1036 n.5, 559 N.Y.S.2d at 499 n.5 (citing ten state bar associations, one city bar association and the District of Columbia bar association).

¹⁵⁵ WOLFRAM, *supra* note 17, § 2.6.6, at 65 (discussing the changing significance of ethics opinions).

¹⁵⁶ According to Wolfram, ethics opinions are rarely cited and relied upon in judicial

tion ethics opinions advocating an alter ego test suggest that the test has been successfully applied by lawyers throughout the nation and lends further legitimacy in terms of uniformity, to the *Niesig* court's ruling.¹⁵⁷

2. Law of Agency and Evidence

The modified alter ego test adopted by the *Niesig* court to determine the parameters of the corporate party for purposes of the disciplinary rule also takes into account established principles of the law of agency and law of evidence.¹⁵⁸ The *Niesig* test recognizes the defendant corporation's vulnerability to ex parte contacts with certain of its employees and limits those contacts according to agency and evidentiary principles.

Since a corporation is an artificial entity, it must act through its employees.¹⁵⁹ Agency law recognizes a legal relationship between the corporation or "principal" and its employees or "agents."¹⁶⁰ The agency relationship is a fiduciary relationship in which the fiduciary or agent acts on behalf of the corporation; in return, the corporation assumes vicarious liability for torts that its employees or agents commit within the course of employment.¹⁶¹ This concept of vicarious liability is also embraced by the law of evidence which provides that statements made by an employee concerning a matter within the scope of employment may be admissible against the corporate employer as an admission.¹⁶²

Under the agency doctrine of vicarious liability and the corresponding evidentiary principle, a corporation is exposed to lia-

decisions; however, they "retain potential educational value through publication in bar journals and other lawyer periodicals." *Id.*

¹⁵⁷ *Niesig*, 76 N.Y.2d at 375, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499.

¹⁵⁸ *Id.*

¹⁵⁹ "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

¹⁶⁰ RESTATEMENT (SECOND) OF AGENCY § 1 cmts. a, b (1958) (describing the relation of agency and its effects); see *id.* § 2 cmts. d, e (1958) (defining "principals" and "agents").

¹⁶¹ *Id.* § 219(1); see note 115 *supra*. Regarding the principle of vicarious liability, see also text accompanying notes 112-21 *supra*.

¹⁶² FED. R. EVID. 801(d)(2)(D) (see note 69 *supra*); cf. note 70 *supra* (New York's hearsay exception). See also RESTATEMENT (SECOND) OF AGENCY § 286 (provided at note 117 *supra*).

bility by the conduct of its employees. Thus an opposing attorney's unmonitored contacts with managerial employees or with nonmanagerial employees whose conduct is imputed to the corporation for purposes of its liability are dangerous to the corporation. Whether or not the statements are ultimately admissible, the contacts could undermine the corporation's defense strategy and negotiating posture.¹⁶³ Such contacts fall squarely within the kind of conduct the Rule was meant to prevent.

The court of appeals incorporated agency and evidentiary principles into its definition of the corporate party. The *Niesig* test places off-limits to adverse counsel not only those managerial employees with power to bind the corporation, but also those middle and lower level employees whose acts or omissions may be imputed to the corporation for purposes of its liability. Therefore, the modified alter ego test created by the court of appeals provides corporate parties with adequate protection against overzealous opposing counsel.¹⁶⁴

¹⁶³ Under New York's evidence law, admissions by an employee within the scope of employment are not admissible unless the employee is authorized by the employer to speak. See note 70 *supra*. Since it is rare for a corporation to grant employees this power, admissions by employees will rarely be admissible. Nevertheless, the court of appeals recognized that revealing employees' admissions to adverse counsel can damage a corporation's defense strategy and therefore, prohibited such ex parte contacts. See notes 138-39 and accompanying text *supra*.

¹⁶⁴ Some commentators have criticized the court's apparent limitation on the evidentiary use of informally obtained statements in light of New York's hearsay exception which is somewhat narrower than that of the Federal Rules of Evidence. See Clauss & Homan, *supra* note 2, at 24; notes 69 & 70 *supra*. Clauss and Homan argue that the court did not expressly address how statements obtained in informal ex parte interviews could be used. Although the court's dicta about the necessity of "off-the-record private" interviews and its rejection of the scope of employment test can be read to mean that the court will not permit such informal interviews to be used as evidence in New York state courts, they contend that the absence of a direct statement on the matter could lead to a disparity of results. Furthermore, the court did not consider that federal courts in New York are not bound to enforce the New York state court's view of what constitutes ethical professional conduct. Although federal courts in New York have tended to apply the alter ego test, such courts are governed by the federal hearsay rule which allows the statements of a broad range of employees to be used as admissions by the corporation. Thus they argue counsel in New York may be faced with two different sets of rules, depending on where the case is filed. *Id.*

Nevertheless, even if such informal interviews cannot be used as admissions—and generally they will not be—the fact remains that informal meetings with corporate employees provide adverse counsel with important factual information and aid in investigating the merits of the case. See notes 18-27 and accompanying text *supra*.

3. Public Policy Considerations

In *Niesig* the court of appeals expressly grounded its decision on public policy considerations.¹⁶⁵ The modified alter ego test it adopted fulfills the Rule's dual objectives: to preserve the functioning of the attorney-client relationship and to protect the opposing party from improper approaches.¹⁶⁶ With its three-part scheme, the *Niesig* alter ego test is far more successful than the ABA version in balancing the parties' competing goals. It provides greater protection for the corporate defendant by prohibiting contacts with both managerial employees who have the power to bind the corporation or who were acting on the advice of counsel and nonmanagerial employees who have the potential for making damaging admissions. At the same time, the *Niesig* test is responsive to plaintiffs' compelling need for easy fact gathering by sanctioning ex parte contacts with nonmanagerial employees who are mere witnesses to the subject matter at issue.¹⁶⁷

The modified alter ego test provides lawyers with a workable standard by which to determine whether or not an employee

¹⁶⁵ See note 76 *supra*.

¹⁶⁶ ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934).

¹⁶⁷ See notes 135-42 and accompanying text *supra*.

Some commentators have argued that the *Niesig* test provides inadequate protection for corporations and that the practical effect of the decision will be that corporations will avoid ex parte contacts entirely by imposing gag orders on their employees. See, e.g., Barbara Franklin, *Ripples Among Lawyers from 'Niesig' Ruling*, N.Y.L.J., Aug. 2, 1990, at 1, 5 (discussing procedures that employers could implement to protect against ex parte communications with employees); Stuart A. Schlesinger, *Depositions of Employees; Videotapes*, N.Y.L.J., Dec. 21, 1990, at 3 ("In real life . . . counsel can be sure that any time they seek to interview a witness, they will be told that this witness either in fact has an interest to protect or has suddenly been promoted by the corporation as a spokesperson."). Cf. *Wright v. Group Health Hosp.*, 691 P.2d 565, 570 (Wash. 1984) ("An attorney's right to interview corporate employees would be a hollow one if corporations were permitted to instruct their employees not to meet with adverse counsel . . . [A] corporate party, or its counsel, may not *prohibit* its non-speaking/managing agent employees from meeting with adverse counsel.").

However, the *Niesig* test gives corporations significant protection. As the court of appeals noted:

It has possession of its own information and unique access to its documents and employees; the corporation's lawyer thus has the earliest and best opportunity to gather the facts, to elicit information from employees, and to counsel and prepare them so that they will not make the feared improvident disclosures that engendered the rule.

Niesig, 76 N.Y.2d at 372-73, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

can be approached informally.¹⁶⁸ Lawyers will no longer confront an ethical dilemma when faced with the chance to interview an employee informally since the *Niesig* test promotes predictability.¹⁶⁹ In addition, it promotes judicial efficiency and cost containment since lawyers will not be forced to litigate the issue of ex parte contacts every time the opportunity for informal interviews arises. Furthermore, the *Niesig* test safeguards the corporate attorney-client privilege by placing off-limits those employees responsible for actually effectuating the advice of counsel in the matter. Based on these strong public policy rationales, the *Niesig* alter ego test is the most effective solution to the problem of ascertaining the scope of a corporate party for purposes of DR 7-104(A)(1).

While the court of appeals in *Niesig* was not asked to consider questions relating to the actual conduct of ex parte interviews, the court did offer lawyers some practical advice on how they should proceed when approaching corporate employees informally.¹⁷⁰ At a minimum, the court asserted that counsel must "make their identity and interest known to interviewees and comport themselves ethically."¹⁷¹ Some commentators have interpreted this broad statement by the court to require certain actions by counsel who plan to take advantage of the informal fact-finding process.¹⁷² First, counsel should determine whether an individual employee is personally represented by counsel on the matter and, if so, should terminate the interview. Second, the interviewing counsel should warn employees who are to be

¹⁶⁸ *Niesig*, 76 N.Y.2d at 375, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499 ("Apart from striking the correct balance, this test should also become relatively clear in application.").

¹⁶⁹ See Krulewitch, *supra* note 3, at 1284-85.

Besides promoting the lofty goal of formal justice, certainty and predictability also provide a more practical benefit: these norms enable the individuals governed by the rule to adjust their behavior to conform with the rule. If all parties clearly know how a rule applies in a particular situation, the parties will know what the law expects of them.

¹⁷⁰ *Niesig*, 76 N.Y.2d at 376, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499.

¹⁷¹ *Id.*

¹⁷² See Clauss & Homan, *supra* note 2, at 24-25; see also *In re FMC Corp.*, 430 F. Supp. 1108, 1111 (S.D.W. Va. 1977), cited in Clauss & Homan at 25 n.25 (discussing requirements imposed by the government upon agency investigators before conducting ex parte interviews). See also C. Evan Stewart, *Ground Rules Shift for Ex Parte Interviews*, NAT'L L.J., Mar. 11, 1991, at S6 (reviewing the ramifications of the *Niesig* decision on corporate counsel in particular).

interviewed not to disclose any communications they might have had with corporate counsel. Third, counsel may consider advising interviewees that they can contact their employers to have corporate counsel present during the interview.¹⁷³ Fourth, counsel should memorialize the process so as to be able to defend their actions later, if necessary. By following these procedures, attorneys can enjoy the benefits of this time-saving and inexpensive discovery method sanctioned by the *Niesig* court, avoid the appearance of impropriety and minimize potential claims that the interviewing counsel went beyond the bounds of the Code.

4. The Attorney-Client Privilege

A major objective of DR 7-104(A)(1) is to preserve the attorney-client relationship, an important component of which is the attorney-client privilege.¹⁷⁴ The purpose of the privilege is "to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment."¹⁷⁵ It has long been recognized that corporations may avail themselves of the attorney-client privilege for confidential communications with corporate counsel relating to corporate legal matters.¹⁷⁶ At the same time, courts

¹⁷³ Clauss & Homan, *supra* note 2 at 25 (arguing that although such warnings could impede the speed and efficiency of the informal process, such precautions might ultimately serve to protect interviewing counsel against claims of overreaching).

¹⁷⁴ ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934) (the original purpose of the Rule was to preserve the attorney-client relationship).

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 JOHN H. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961), cited in *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

¹⁷⁵ *Priest v. Hennessy*, 51 N.Y.2d 62, 67-68, 409 N.E.2d 983, 985, 431 N.Y.S.2d 511, 513-14 (1980).

¹⁷⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (citing *United States v. Louisville & Nashville R.R.*, 236 U.S. 318 (1915)). See also *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 592, 540 N.E.2d 703, 705, 542 N.Y.S.2d 508, 510 (1989) ("A corporation's communications with counsel, no less than the communications of other clients with counsel, are encompassed within the legislative purposes of CPLR 4503, which include fostering uninhibited dialogue between lawyers and clients in their professional engagements, thereby ultimately promoting the administration of justice."). In New York the privilege is codified at N.Y. CIV. PRAC. L. & R. 4503(a). See notes 48 & 62 *supra*. See also J.A. Glenn, Annotation, *Attorney-Client Privilege in Federal Courts: Under What Circumstances Can Corporation Claim Privilege for Communications From Its Employees and Agents to Corporation's Attorney*, 9 A.L.R. FED 685 (1971); Annotation, *Comment Note, Right of Corporation to Assert Attorney-Client Privilege*,

have been acutely aware of the need to apply the privilege cautiously and narrowly so as to prevent corporations from sealing off potential disclosure by the mere involvement of corporate counsel.¹⁷⁷ One important restriction on overbroad application of the privilege is the fact that the privilege extends only to "‘confidential communication[s]’ made to the attorney for the purpose of obtaining legal advice or services."¹⁷⁸ Thus, not all communications to corporate counsel are privileged; factual information is fully discoverable.

In *Niesig* the court of appeals was sensitive to the importance of the attorney-client privilege and expressly stated that it included in its definition of "party" those employees responsible for actually effectuating the advice of counsel because of "concern for the protection of the attorney-client privilege."¹⁷⁹ Nevertheless, the court's test for determining the scope of a corporate "party" for purposes of DR 7-104(A)(1) was in no way meant to offer corporate counsel the opportunity to use the attorney-client privilege as a sword to impede plaintiff's counsel's discovery. Instead, the court's opinion exhibits great regard for a corporate adversary's need for and right to "vital informal access to facts."¹⁸⁰ The modified alter ego test adopted by the court neither augments nor decreases the privilege afforded to a corporate party; rather, it complements it.¹⁸¹

CONCLUSION

Disciplinary Rule 7-104(A)(1), which prohibits lawyers from communicating on an ex parte basis with parties represented by counsel, is founded upon strong policy rationales—to promote the effectiveness of the legal system and protect parties from improper approaches by opposing counsel. When parties are indi-

98 A.L.R.2d 241 (1964) (authorities for attorney-client privilege accorded to corporations).

¹⁷⁷ *Upjohn*, 449 U.S. 383. See also note 167 *supra*.

¹⁷⁸ *Priest*, 51 N.Y.2d at 69, 409 N.E.2d at 986, 431 N.Y.S.2d at 514.

¹⁷⁹ 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498 (citing *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) ("counsel is precluded from driving a wedge between the opposing attorney and that attorney's client")).

¹⁸⁰ *Niesig*, 76 N.Y.2d at 371, 558 N.E.2d at 1033, 559 N.Y.S.2d at 496.

¹⁸¹ At least one commentator has criticized the *Niesig* opinion on the ground that the alter ego test works at the expense of the attorney-client privilege. C. Evan Stewart, *Whither the Attorney-Client Privilege*, N.Y.L.J., Oct. 11, 1990, at 1.

viduals, application of the Rule is clear; however, when a party is a corporation, attorneys generally have not had a clear-cut standard to follow. As a result, an attorney may be confronted with an ethical dilemma when faced with the opportunity to interview a corporate employee informally. The problem is compounded because courts and bar associations have attempted to resolve the problem by adopting different tests to interpret the scope of a corporate "party" by weighing the parties' competing interests.

In *Niesig v. Team I* the New York Court of Appeals devised a definitive, workable interpretation of the breadth of the corporate "party" in DR 7-104(A)(1). The court adopted a three-part modified "alter ego" test which places off-limits those corporate employees who have authority to bind the corporation, whose acts or omissions may be imputed to the corporation for purposes of its liability, or who are implementing the advice of counsel. From a public policy standpoint, the *Niesig* test represents the best solution to effectuate the goals of Disciplinary Rule 7-104(A)(1) where parties are corporations. It satisfactorily balances the need to discover truth and the desire to preserve adequate legal representation in the corporate context. In addition, this test, which derives from case law as well as principles of agency and evidence law, is legally supportable. Other courts faced with interpreting the Rule would do well to adopt this test.

Sophie Hager Hume