Ex Parte Contacts with Employees
of the Defendant Employer

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One of the stickier issues facing employment attorneys -- especially those who represent plaintiffs in employment litigation -- is the no-contact rule, which restricts ex parte communications between lawyers and represented parties regarding the subject of the representation.1 It has been particularly difficult to know the limits on contact with employees of defendant employers regarding fact questions. Different states, and the federal courts in various jurisdictions, have devised several tests for determining what is legitimate fact-finding and what is unethical conduct, and there can be serious consequences to crossing the line. Recent revisions of the Official Comments to the ABA’s model no-contact rule, however, reflect a trend among state and federal courts to curtail the reach of the rule, in recognition of the importance of allowing investigation into the factual bases for asserted claims.

I. The ANo-Contact Rule

Most states have adopted some form of the ABA Model Rule 4.2, which provides:

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1Because of the complexity of some of the issues raised presented by the ANo-contact rule, this paper focuses exclusively on that rule and the ethical questions it presents. Other potential issues involved in contacting employees of defendant employers for example, issues of privilege and solicitation will be briefly discussed during the panel presentation.
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.\(^2\)

As a general matter, ethical rules based on Model Rule 4.2 prohibiting *ex parte* communications with a represented party extend to some, but not all, employees of defendant employers. While many threshold questions regarding the application of no-contact rules are fairly settled, two important questions regarding which employees are off-limits remain in flux: (1) which employees are "managerial" or have the authority to bind the corporation, such that they stand in the shoes of the represented "party" and cannot be contracted without consent of counsel; and (2) are non-managerial employees whose mere *statements* (as opposed to acts or omissions) may constitute an admission on the part of the corporation included within the prohibition on *ex parte* communication?

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\(^2\)ABA Model Rules of Prof-1 Conduct, rule 4.2.  *See also* ABA Model Code of Prof-1 Responsibility, Canon 7, Disciplinary Rule 7-104, ACommunicating with one of Adverse Interest\(^3\)

(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 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.
Prior to 2002, the Official Comments to Model Rule 4.2 left considerable room for interpretation on the important question of which employees of the defendant employer are "off limits," and under what circumstances. See Ethical Limitations on Investigating Employment Discrimination Claims: The Prohibition on EX Parte Contact with a Defendant=s Employees, 24 U.C. Davis L. Rev. 1243 (1991). Several tests were developed by the courts to aid interpretation both as to who should be considered a managing employee and when informal communication with even non-managing employees should be prohibited. Although most courts determining these questions have relied at least in part on the same Official Comments to the 1983 version of Model Rule 4.2, the different tests have resulted in significant variance in application of similarly phrased no-contact rules.3

Amendments to the Official Comments, which took effect in 2002, were intended to clarify the scope of the rule=s application as regards employees of corporate parties.4 While the language of Model Rule 4.2 has not changed significantly,5 the explanation of the rule=s application provided in the Comments to the Model Rule has been altered to clarify (and further narrow) the category of "managerial" employees generally shielded by the rule, and to exclude from the rule=s prohibition employees whose statements could constitute an admission by the corporation.6 As most states follow the model rule and its Comments in large part, many are

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4 See Model Rule 4.2=BReporter=s Explanation of Changes at http://www.abanet.org/cpr/rule42memo.html (Feb. 21, 2000).

5 See Reporter=s Explanation of Changes, supra n.3, changing Bor is authorized by law to do so, to Bor is authorized to do so by law or a court order.@

6 See generally Id.
currently considering, but have not yet determined, how or if to amend their rules to reflect the 2002 amendments to the Official Comments.\textsuperscript{7}

II. Some ABasics@
While questions about the scope of the prohibition as applied to employees remain in considerable flux, other elements of the rule are generally well settled and bear brief mention. For example, actual knowledge by the lawyer that the other party is represented generally is required.8 Courts generally agree that the only rule that fairly allows plaintiffs to develop sufficient pre-litigation fact support to avoid Rule 11 is one that limits the attachment of the prohibition to the time when the lawyer knows that the other person or party is in fact represented in regards to that matter and does not cut off all pre-litigation investigation.9 The 2002 amendments to the Comments to the Model Rule clarified that it is incorrect to suggest that actual knowledge can be established by proof that the lawyer had substantial reason to believe that the person was represented in the matter.10

Another generally accepted principle is that the prohibition on ex parte communications by the lawyer attaches regardless of whether the

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8 See ABA Model Rules of Prof-


10 See Reporter-Explanation at 7.
represented party initiated or consented to the communication. Thus, even when a lawyer is contacted by a represented party and that party expresses agreement to discuss a subject of representation, the rule applies.

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11 See rule 4.2, Comment 3. Cf. United States v. Talao, 222 F.3d 1133, 1140 (9th Cir. 2000) (reversing sanction against prosecutor continuing communications initiated by employee of defendant corporation on the basis of public policy where the employee communicated for the purpose of disclosing that corporate officers [were] attempting to suborn perjury and obstruct justice).
In addition, most jurisdictions recognize limited, but important, exceptions to the rule where a statute or a court order permits the communication. Such communications may include, for example, communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.12

III. Employees covered by the Rule

The more difficult questions under no-contact rules revolve around which employees of defendant employers are off-limits because of their role in the corporate management structure or their specific involvement in the matter that is the subject of litigation. Which employees of a defendant are subject to the rule?

1. Former Employees

Although the question of whether former employees are ever included within the no-contact rule has been described as unsettled, there appear to be very few courts who have extended the rule beyond current employees.13

12 See rule 4.2 (A. . . or is authorized to do so by law or a court order). See also Cal. Rules Prof.-1 Conduct, rule 2-100(C)(1) and (3) (excepting Acommunications with a public officer, board, committee, or body; or . . . otherwise authorized by law). See also Vega v. Bloomsburgh, 427 F.Supp. 593 (D.Mass. 1977) (suggesting that public employees might have first amendment interest in speaking informally to plaintiff’s counsel regarding lawsuit under Medicaid program).

But there is not absolute uniformity on this point. One court, while noting that the majority of courts that have decided this issue have concluded that former employees, for the most part, do not fall within the constraints of rule 4.2, has recently suggested that the issue should be addressed by the organized bar through the rule making process.  

But see Camden v. State of Maryland, 910 F.Supp. 1115, 1116 (extending the ex parte no contact rule to a former employee the lawyer knows or should know . . . has been extensively exposed to confidential client information of the other interested party . . . and granting motion to strike testimony and disqualify counsel.)

14 See Patriarca, 438 Mass. at 140–41.
The Reporter's Explanation to recent amendments to Rule 4.2 Comments, however, clarifies that the rule is not to be construed to prohibit communication with former employees because there is not sufficient unity of interests between an organization and its former employees to justify treating a former employee as a representative of the organization.\textsuperscript{15} The discussion accompanying California's no-contact rule, for example, also notes that the prohibition applies only to persons employed at the time of the communication.\textsuperscript{16}

B. Current Employees

The picture has not been so clear when it comes to current employees of defendant employers. Prior to the 2002 Amendments, in attempts to balance competing policies of protecting attorney-client relationships while not unduly infringing on lawyers' ability to investigate claims and make use of informal and less expensive means of discovering information, courts have developed different tests that fall into four main categories:

\$ The "party opponent admission" test:

\textsuperscript{15}See Reporter's Explanations, at 6.

The "managing/speaking" test;  
The "control group" test; and  
The "alter ego" test.

The party opponent admission test strictly follows the text of Model Rule 4.2 Comments prior to the 2002 amendments, not only prohibiting ex parte communications with managing employees and non-managing employees whose acts or omissions could impute liability to the corporation, but also prohibiting such communications with employees who merely observe such acts or omissions but whose statements could constitute party-opponent admissions according to hearsay rules.17 The managing/speaking test interprets the former Comments to preclude communication only with those employees who have the authority to speak for the corporation. It does not prohibit informal contact with employees whose statements could be party-opponent admissions unless the evidence rules would preclude the corporation from later controverting such statements.18 The control group test narrows the prohibition even further, precluding ex parte communications only with

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top level managers with authority to make final decisions. And, the Alter ego test mirrors in large part the managing/speaking test, but expands the prohibition further by including those non-managing employees whose acts or omissions could impute liability to the corporation.

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As noted above, in its 2002 Comments to Rule 4.2, the ABA tried to clear up some of this doctrinal confusion. The Reporter's Explanation of the amendments to Model Rule 4.2 explained that by deleting the sentence from the previous version of the Comment that stated that the prohibition extended to any other person . . . whose statement may constitute an admission on the part of the organization, they intended to redress the misinterpretation that this was meant to include any person whose testimony would be admissible against the organization as an exception to the hearsay rule. Thus, aside from employees who are considered to have managerial responsibility, the current Comment to Model Rule 4.2 includes in the scope of the rule only those persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

The recent amendments to the Comments accompanying ABA Model Rule 4.2 were also intended to clarify who is to be considered a person with managerial responsibility in an organization or corporation.

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21 See Reporter's Explanation. The California Rule, by contrast, retains the sentence recently deleted from the ABA Model Rule, defining party to include not only persons whose acts or omissions might be binding on the organization but also those whose statement may constitute an admission on the part of the organization. Cal. Rules Prof.-1 Conduct, Rule 2-100(B)(2) (1995).

22ABA Model Rules Prof.-1 Conduct, rule 4.2, Comment 7 (2002)(emphasis added).

23 See Reporter's Explanation at 6.
While the previous Comments created confusion, the amendments focus on the employee's participation in the company's legal representation in the matter or his or her possession of authority to obligate the organization in the matter. The Comment now explains that the Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter.

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24 Id.

25 ABA Model Rule, rule 4.2, Comment 7. The corresponding part of the California Rule provides that An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership, is included within the scope of a party for the purposes of the rule. Cal. Rules Prof.-l Conduct, Rule 2-100(B)(1) (1995).
It is not clear how the new Comments will affect formulation and application of no-contact rules in various state and federal jurisdictions. Only one court has fully considered the 2002 amendments to the Rule 4.2 Comments that attempt to clarify the extent to which employees of a defendant employer are to be considered "parties" with whom ex parte communications are prohibited. The Nevada Supreme Court, in Palmer v. Pioneer Inn, considered the recent amendments but decided not to follow them, adopting what appears to be an even narrower reading of the prohibition on communicating with a corporate defendant's employees. After comparing the main tests outlined above and their ability to balance the competing interests at play, the Nevada Court chose to follow the managing-speaking test. Until greater uniformity is achieved, it is necessary to be familiar with the various tests developed to delineate the reach of no-contact rules in situations involving employees of defendant employers. The following briefly discusses development and application of the tests in various jurisdictions.

C. Development and Application of the Tests


28 See Palmer, 59 P.3d at 1242. A New Jersey district court adopted a bright-line rule prohibiting ex-parte communications with all current and former employees. See Public Serv. Elec. & Gas v. Associated Elec. & Gas, 745 F.Supp. 1037 (D.N.J. 1990), superseded by rule amendment as recognized in Klier v. Sordoni Skanska Const. Col, 337 N.J.Super. 76, 766 A.2d 761 (2001). The PSE&G rule was only rarely followed and even courts that had followed its reasoning have since rejected the bright-line approach. See Palmer, 59 P.3d at 1243.
Party-Opponent Admission Test: The party-opponent admissions test, criticized for being as broad as a bright-line rule including all employees, relies on the recently deleted sentence from the Comments to Model Rule 4.2 that had included within the prohibition those employees whose statement may constitute an admission on the part of the organization in interpreting the rule as being co-extensive with the hearsay rule regarding party-opponent admissions. There is some tension in the authorities discussing and applying the test. For example, a federal district court in West Virginia, in Cole v. Appalachian Power Company, refused to follow an earlier decision by the West Virginia Supreme Court, in Dent v. Kaufman, that had adopted the narrower formulation of the rule. Cole rejected the holding in Dent that effectively eliminated the portion of the Official Comment to Rule 4.2 which concerns statements which constitute admissions. The Cole court determined that while the Official Comments were not binding they were

29See Palmer, 59 P.3d at 1243
34Cole, 903 F.Supp. at 977.
and held that *ex parte* communications were prohibited with any employee whose statement could constitute a party-opponent admission.35 Presumably, the interpretation by the court in *Cole* is exactly the kind of misinterpretation the recent amendments to the Comments were meant to correct.36

35 *Cole*, 903 F.Supp. at 979.
36 See Reporter’s Explanation at 6.
The party-opponent admissions test would seem most vulnerable in light of the new Model Rule Comments. Thus, noting that few jurisdictions had followed the Cole test, the Nevada Supreme Court ultimately rejected it in Palmer, describing it as affording extensive protection to an organization while frustrating the search for truth and forcing plaintiff's attorneys to make a difficult choice between risking violation of either Rule 11 or the Nevada equivalent of Rule 4.2.

Manager-Speaking Test: In Palmer, the Nevada court pointed to the managing-speaking test formulated by the Washington Supreme Court as one that attempted to reach a more equal balance between the competing interests. Following the United States Supreme Court's holding in Upjohn Co. v. United States, where the Court held that the attorney-client privilege of an organization could extend beyond the control group to employees who could have information necessary to defend against a potential claim, courts have adopted a similar reasoning in

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38 Palmer, 59 P.3d at 1243–44.

39 See Palmer, 59 P.3d at 1244.


construing Model Rule 4.2.42

The Washington State Supreme Court noted that while the no-contact rule was intended to prevent situations in which a represented party may be taken advantage of by adverse counsel, it was not intended to protect a corporate party from the revelation of prejudicial facts. The court narrowed the prohibition further than would even the 2002 amended Comments to the Model Rule, concluding that, we find no reason to distinguish between employees who in fact witnessed an event and those whose act or omission caused the event leading to the action. The Washington court=s test would prohibit communication only with those employees who have the legal authority to bind the corporation in a legal evidentiary sense, i.e., those employees who have speaking authority. The court explicitly rejected the claims that the expansion of the attorney-client privilege in Upjohn or the party-opponent exception to hearsay meant that the no-contact rule must also be more expansive than its test would allow. The Wright court also noted that, consistent with its holding that the plaintiff=s attorney was allowed, under the ethical rules, to communicate ex parte with

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44 Wright, 103 Wash.2d at 200.
45 Wright, 103 Wash.2d at 200.
46 Wright, 103 Wash.2d at 202.
An nonspeaking/managing agent employees, the employer could not advise its employees not to speak with plaintiffs= attorneys. While the managing-speaking test generally results in a more narrow definition of employees included within the no-contact rule, applications of the test have resulted in prohibiting communications with employees who seem to fit only as party-opponent admissions.

**Control Group Test:** The control group test, also based on the previous Comments to Model Rule 4.2, most narrowly defines the category of employees encompassed within the prohibition on *ex parte* communication. The test includes only those top management level employees who have responsibility for making final decisions, and those employees whose advisory roles to top management indicate that a decision would not normally be made without those employees= advice or opinion. This test however, has been less frequently adopted since the Supreme Court in *Upjohn* articulated its reasoning for extending the attorney-client privilege and courts have incorporated that reasoning in analyzing the scope of the *ex parte* communication prohibition.

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47 Wright, 103 Wash.2d at 203.
48 Palmer, 59 P.3d at 1245
50 See Palmer, 59 P.3d at 1245.
Alter-Ego Test: New York has also formulated a test that has been widely adopted,\textsuperscript{51} rejecting the guidance of the former Comments and purporting to strike a balance between the broad blanket test and narrow control group test while creating a test that would be more predictable in application.\textsuperscript{52} The New York Court of Appeals formulating its Alter ego\textsuperscript{©} test in \textit{Niesig v. Team I},\textsuperscript{53} did not refer to the official Comments to Model Rule 4.2 in determining which employees fell within the prohibition on \textit{ex parte} communications.\textsuperscript{54} The \textit{Niesig} court noted the Long-recognized potential value\textsuperscript{©} of informal interviews of employees and asserted that the corporate party has significant protection at hand. It has possession of its own information and unique access to its documents and employees.\textsuperscript{55} The court rejected the control group test as too narrow a protection for corporations, noting that it had been adopted by


\textsuperscript{52} \textit{Palmer}, 59 P.3d at 1246, citing \textit{Niesig v. Team I}, 76 N.Y.2d 363, 558 N.E.2d 1030 (1990) (holding that prohibition on \textit{ex parte} communications with represented party did not extend to employees of corporate defendant who witnessed an accident).

\textsuperscript{53} 76 N.Y.2d 363 (1990).

\textsuperscript{54} See \textit{Niesig}, 76 N.Y.2d at 370.

\textsuperscript{55} \textit{Niesig}, 76 N.Y.2d at 372-73.
only a few courts. The test adopted by *Niesig*, including only those corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation=alter egos=) or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel, essentially reflects the recently amended Official Comments. The *Niesig* court suggested that its test was similar to the one overwhelmingly adopted by courts and bar associations, referring to the test formulated in the Washington case, *Wright v. Group Health Hospital*.

**IV. The Future: The Nevada Supreme Court's Interpretation of the Tests and Other Interesting Approaches**

**A. Palmer**

The most recent doctrinal developments suggest that state jurisdictions applying their no contact rules will continue to chart their own courses, while taking note of the policy considerations underlying the 2002 amendments to the ABA commentary. In the most recent analysis of the scope of Rule 4.2 as applied to corporate employees, the Nevada court in *Palmer* interpreted the Nevada rule which was adopted

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56 *Niesig*, 76 N.Y.2d at 373, n.4.
57 *Niesig*, 76 N.Y.2d at 374; ABA Model Rules, rule 4.2, Comment 7.
58 *Niesig*, 76 N.Y.2d at 375, n.5.
verbatim from the original version of ABA Model Rule 4.2. The court noted the recent amendments to the Comment to Model Rule 4.2 were intended to clarify that the clause was only ever intended to encompass those few jurisdictions with a law of evidence providing that statements by certain employees of an organization were not only admissible against the organization but could not thereafter be controverted by the organization. The *Palmer* court noted that most existing tests used to determine whether an employee is within the scope of the no-contact rule base their interpretation on the former Comment to Model Rule 4.2.

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59 *Palmer*, 59 P.3d at 1240.

60 *Palmer*, 59 P.3d at 1242.

61 See *Palmer*, 59 P.3d at 1242.
The Nevada court adopted the managing-speaking test as the one that best balanced the competing interests and responded appropriately to the related reasoning in *Upjohn*. The court asserted that it was not adopting the Model Rule's 2002 Comment which essentially tracks the New York test. and held that this court does not protect the organization at the expense of the justice system's truth-finding function by including employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior.

B. **Other Interesting Approaches**

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62 *Palmer*, 59 P.3d at 1248. The plaintiff in *Palmer* claimed that the Pioneer Inn unlawfully discriminated her in refusing to hire her as a restaurant supervisor. *Palmer*, 59 P.3d at 1238. The plaintiff's attorney was contacted by a chef at the Inn who eventually signed an affidavit supporting the plaintiff's claim. *Palmer*, 59 P.3d at 1239. Although the court noted that the employee in this case had some interviewing and hiring responsibilities, he did not have responsibility for hiring the positions at issue in the plaintiff's case. *Palmer*, 59 P.3d at 1239-1240.

63 *Palmer*, 59 P.3d at 1248.

64 *Palmer*, 59 P.3d at 1248.
California continues to more strictly limit *ex parte* contacts with employees of defendant employers, while noting the importance of not unduly restricting such contacts. California has developed some bright-line rules intended to protect attorneys' ability to advocate for their client without risking sanctions for apparently appropriate behavior, including a clear rule that the lawyer have *actual knowledge* of the representation of the other party and a rule allowing *ex parte* communication with *any* former employee.\(^{65}\) A California court recently explained that with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. . . . Unclear rules risk blunting an advocate's zealous representation of a client.\(^{66}\) California maintains, however, in the text of its rule and in cases interpreting the rule, a limitation on *ex parte* communications with employees whose statements might impute liability to the corporate employer.\(^{67}\) As such, the balance


\(^{66}\)Nalian Truck Lines, Inc., 6 Cal.App.4th at 1264. The court did indicate, however, that defendants could seed a protective order with regards to any former employee who possessed privileged information. See Id.

\(^{67}\)See *Triple A Machine Shop v. State of California*, 213 Cal.App.3d 131, 140 (1989) ([defining the limits of California's rule: A rule 2-100 permits opposing counsel to initiate *ex parte* contacts with unrepresented former employees, and present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in
in California remains tilted toward protecting the defendant employer from unfavorable disclosures and against allowing plaintiffs’ attorneys to thoroughly investigate claims without bearing the significant and often prohibitive costs of formal discovery.\(^{68}\)

New Jersey has taken a different approach, one that is perhaps least restrictive of \textit{ex parte} contacts among the various tests developed by the courts. \textit{See Andrews v. Goodyear Tire & Rubber Co., Inc.}, 191 F.R.D. 59, 69, n.9 (D.N.J. 2000). In \textit{Andrews}, the district court explained that, after a period of significant uncertainty regarding limits on contacts with employees of defendant employers, the New Jersey Supreme Court created a committee to study rule 4.2 generally and the issue of contact with employees of a party in particular. \textit{Id.} at 74-75. The committee considered, but rejected, the assorted judicial tests (including, inter alia, the control group test, alter ego test, and the managing speaking agent test), and recommended that rule 4.2’s prohibition on \textit{ex parte} communication cover only those persons in a corporation’s litigation control group\(^{®}\) -- A current and former employees of an organization, corporate or non-corporate, who are or were responsible for or significantly involved in the determination of the organization’s legal position.\(^{®}\) \textit{Id.} at 75. The committee explained that the New Jersey rule is not intended to extend to A typical fact witness[es]\(^{®}\) who are involved in the litigation only to the extent of giving information to the organization, and the rule, as adopted, also requires an approaching attorney to exercise \textit{reasonable diligence} in ascertaining whether a person is

\(^{68}\)\textit{But see Nalian Truck Lines, Inc.}, 6 Cal.App.4th at 1262, n.7 (recognizing that drafters of the California Rule intended that the control group test should be used regardless of the holding in \textit{Upjohn Co. v. United States} because it best accounts for the near impossibility of investigating claims under a more restrictive rule); \textit{See also Continental Ins. Co. v. Superior Court}, 32 Cal.2d. 94, 112(1955)(indicating that California courts have not enunciated a clear rule to determine the scope of the no-contact rule as applied to current employees).

represented, or . . . a member of the litigation control group. @ Id. at 75.

Applying the rule to the facts in Andrews, the court held that the approaching attorney did not violate the rule by contacting an employee before he knew whether or not he was in the litigation control group when the purpose of the initial contact was to find out whether the person was represented. Id. at 78. The Andrews court rejected the defendant corporation=s argument that management level employees were off limits, noting that the New Jersey Supreme Court in adopting the A>legal position= test@ had narrowed the scope of the prohibition, and suggesting that New Jersey=s new test gave an even more limited application of the rule than even the control group test. See Id. at 78-79.

V. Conclusion

In construing the scope of Rule 4.2 as it applies to employees of a defendant employer, courts (and advisory committees) have identified and attempted to balance competing interests affected by narrower or broader interpretations of the prohibition. Palmer identified interests in Aprotecting the attorney-client relationship from interference; protecting represented parties from overreaching by opposing lawyers; protecting against the inadvertent disclosure of privileged information@69 The Palmer court also identified the competing interests in Apermitting more equitable access to information . . . allowing investigation before

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69 Palmer, 59 P.3d at 1242. See also ABA Model Rules, rule 4.2, Comment 1; Nieszig v. Team I, 76 N.Y.2d 363, 558 N.E.2d 1030 (1990); Wright v. Group Health Hosp., 105
litigation and informal information-gathering during litigation; permitting a plaintiff=s attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with Rule 11; and enhancing the court=s truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely. @70

In light of the recent amendments to the Official Comments to ABA Rule 4.2, more state action on these difficult issues should be expected. Indeed, many states are currently in the process of considering the 2002 amendments and revising rules to reflect the policy considerations behind those amendments. Particularly for those representing employees in litigation against employers, it is an opportune time to weigh in on the appropriate scope of the no-contact rule=s prohibition on informal contacts with employees, to allow reasonable access to those who may know the facts important to asserted claims.


@70Palmer, 59 P.3d at 1242.