THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
SOUTHERN DISTRICT 05-C-296

WILLIAM D. AND BARBARA S. TOTHEROW

V.

RIVIER COLLEGE, WILLIAM J. FARRELL AND THERESE LAROCHELLE

AMENDED ORDER ON MOTION AUTHORIZING COMMUNICATIONS WITH EMPLOYEES OF DEFENDANT RIVIER COLLEGE

LYNN, C.J.

The plaintiff, William D. Totherow, a long time professor of chemistry at defendant Rivier College, was discharged from his employment in 2003. Claiming that his discharge was improper, Totherow thereafter instituted this action against the college and two of its officials, President William J. Farrell and Academic Vice President Therese Larochelle. The writ contains counts for breach of contract, violation of the covenant of good faith and fair dealing, defamation, negligent and intentional infliction of emotional distress and enhanced compensatory damages. Plaintiff Barbara Totherow, the wife of William, also has made a claim for loss of consortium. Presently before the court is plaintiffs' motion for an order authorizing their counsel to conduct ex parte interviews (i.e., without prior notice to the defendants) of "lower echelon employees [of Rivier College] who are not representatives of the organization."[1] For the reasons stated below, I grant the motion in part and deny it in part.

[1] Although asserting their belief that they have a right to conduct ex parte interviews with lower echelon employees, plaintiffs' counsel note that if their view was later found to be incorrect they could be faced with possible sanctions for violating Rule 4.2 of the New Hampshire Rules of Professional Conduct. In order to avoid the prospect of such career-damaging exposure, counsel requests an affirmative order of approval from this court prior to undertaking said action.

Among the "lower echelon employees" plaintiffs' counsel seek permission to contact and interview on an ex parte basis are current and former members of the college's Rank & Tenure Committee and Ad Hoc Hearing Committee. According to plaintiff, both of these committees played an advisory, but non-binding, role in the internal proceedings undertaken by the college prior to the termination of Professor Totherow. In their response to the motion, the defendants, without specifying which employees fall within this designation, contend that Rule 4.2 prohibits plaintiffs' counsel from having ex parte contact with any current or former "members of the administration" of Rivier College.[2]

As amended effective July 1, 2006[3], New Hampshire Rule of Professional Conduct 4.2 states:

> 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. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

[2] Plaintiffs' motion suggests that the parties have engaged in a game of cat and mouse over this issue. Thus, in response to the request of plaintiffs' counsel that the defense assent to ex parte interviews, defendants' counsel have asserted that such assent cannot be provided until after plaintiffs' counsel identify the individuals they desire to interview. Not surprisingly, plaintiffs' counsel declined this request and instead proposed that defendants' counsel identify which present or former employees of Rivier College the defendants claim are "administration members." Defendants' counsel have similarly declined to show their cards first.

[3] The 2006 amendment substituted the word "person" for the word "party" in the first sentence and added the second sentence to the Rule. While it can be argued that, in some contexts, substitution of the word "person" for the word "party" reflects an intention that the amended rule prohibit ex parte contact with a broader class than the former version, courts generally have not interpreted this change to expand the scope of the prohibition applicable to employees of a represented organization. See Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 764 N.E.2d 825, 830-31 (2002).

This rule traces its origins to the American Bar Association Canons of 1908, and was previously embodied in Disciplinary Rule ("DR") 7-104(A)(1) of the 1970 Model Code of Professional Responsibility (which in 1986 was replaced by the Rules of Professional Conduct). The rule has been adopted in one form or another by federal and state courts throughout the country. The purpose of the rule is "to protect the attorney-client relationship and to prevent clients from making ill-advised statements without counsel of their attorneys." Clark v. Beverly Health & Rehabilitation Services, Inc., 797 N.E.2d 905, 909 (Mass. 2003) (quoting Messing, supra, 764 N.E.2d at 833-34)); accord. United States v. Jamil, 707 F.2d 638, 646 (2d Cir. 1983) (rule justified as effort to prevent skilled counsel from taking advantage of a represented person through use of "artfully crafted questions").

Although application of the rule is relatively straightforward when the represented person is an individual, the opposite is true when the one represented is a corporation or other collective organization. The difficulty arises, of course, because an organization can act only through it agents and employees, and the critical issue therefore is determining which agents or employees of the organization fall within the protection of the rule. A review of the decisions that have grappled with this issue reveals that courts have adopted no less than five different formulations, as specified below.

Control Group Test: This test is the narrowest and includes within its coverage the fewest number of organization employees. The control group is defined as:

> [T]hose top management persons who [have] 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 or whose opinions in fact form the basis for any final decision.

Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 560 (Ill.App. 1984). See Klier v. Sordoni Skanska Construction Co., 766 A.2d 761, 766-70 (N.J.App. 2001).[4]

Blanket Ban: This approach represents the other extreme; it bans ex parte contact with all current and (under some formulations) former employees of the corporate adversary. Courts which have adhered to this view have tended to rely on the United States Supreme Court's decision in Upjohn Co. v. United States, 449 U.S. 383 (1981), which rejected the "control group" test in the attorney-client privilege context, and held that the privilege can apply to communications between lower echelon corporate employees and the corporation's lawyer. See Young v. Plymouth State College, Civil No. 96-75-SD (Oct. 22, 1998)(Devine, S.J.); Public Service Elec. & Gas Co. v. Associated Elec. & Gas, Inc., 745 F.Supp. 1037, 1039 (D.N.J. 1990).

Managing/Speaking Test: The managing/speaking test holds that the prohibition on ex parte contact applies only to those agents of the corporation who, under the applicable

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[4] In 1996, New Jersey adopted a more refined version of the control group formulation. It amended Rule 4.2 so as to specifically prohibit contact with a represented organization's "litigation control group." It then adopted RPC [Rule of Professional Conduct] 1.13, which states:

> For the purposes of RPC 4.2 ... the organization's lawyer shall be deemed to represent not only the organizational entity but also members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow such representation.

substantive law, have the legal authority to speak for and bind the corporation. The leading case authority for this approach is Wright by Wright v. Group Health Hospital, 691 P.2d 564 (Wash. 1984). See also Palmer v. Pioneer Inn Associates, Ltd., 59 P.3d 1237, 1247-49 (Nev. 2002). [5]

Alter Ego Test: This test is similar to but slightly broader than the Managing/Speaking Test. It encompasses within the ambit of Rule 4.2 those employees or agents of a represented organization (1) whose acts or omissions have the legal power to bind the organization in the matter, (2) whose acts or omissions are imputed to the organization for the purposes of determining its liability, or (3) who are responsible for implementing the advice of the organization's lawyer. The leading case supporting this test is Niesig v. Team I, 559 N.Y.S.2d 493 (N.Y.Ct.App. 1990). See also United States ex rel. O'Keefe v. McDonnell Douglas Corp. 132 F.3d 1252 (8th Cir. 1998); Strawser v. Exxon Co., U.S.A., 843 P.2d 613, 619-21 (Wyo. 1992). This test is broader than the Managing/Speaking Test in that it covers low level employees who have no authority to speak for or bind the organization, but who allegedly committed the act or omission upon which the organization's liability is based under the doctrine of respondeat superior. Under this test, ex parte contact with low level employees who are merely witnesses is not prohibited. As one court has pointed out, however, a practical difficulty with this test is that it may not be possible to determine whether a particular employee fits into the category of

[5] The cases purporting to apply the Managing/Speaking Test have not always reached consistent results on the issue of whether an attorney is prohibited from having ex parte contact with any agent or employee of a represented organization whose statement could merely bind the organization in an evidentiary sense (i.e., the employee's statement would be admissible against the organization as non-hearsay evidence under Rule of Evidence 801(d)(2)(D)), or whether the agent or employee must have the authority to conclusively bind the organization. See Weider Sports Equip. Co., Ltd. V. Fitness First, Inc., 912 F.Supp. 502, 507 n.7, 509-10 (D.Utah 1996). In its recent adoption of this test, the Nevada Supreme Court made it clear that only an employee who can conclusively bind the organization is included within that state's no-contact rule. See Palmer, supra, 53 P.3d at 1248.

"mere witness" or one whose liability is imputed to the organization until after an interview of the employee is completed, and obviously a lawyer's right to conduct the interview cannot be made to turn on its outcome. See Matter of Advisory Committee Opinion 688, 633 A.2d 959, 962 (N.J. 1993).

Balancing Test: This test weighs the following factors -- (1) whether an employee's statements are likely to be admissible against the employer, (2) the employer's need to have counsel present in the particular circumstance of the case, and (3) the plaintiff's need for informal discovery -- and then makes a case by case determination of whether ex parte contact should be allowed. See Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 82 (D.N.J. 1991); Morrison v. Brandeis University, 125 F.R.D. 14 (D.Mass. 1989); Mompoint v. Lotus Development Corp., 110 F.R.D. 414, 418-19 (D.Mass. 1986); Frey v. Department of Health & Human Services, 106 F.R.D. 32, 36 (E.D.N.Y. 1985).

Although the New Hampshire Supreme Court has not had occasion to address the issue of how Rule 4.2 applies in the organizational context, the existing commentary to New Hampshire's rule strongly suggests that the drafters intended to adopt the control group test. The New Hampshire Comments specifically reflect that certain language from the ABA comments to Model Rule 4.2 were eliminated by the Committee which drafted the New Hampshire rule. The New Hampshire comments state:

> The New Hampshire Committee has modified the official comment to Rule 4.2 by eliminating the following language from the comment thoughts by the ABA in August of 1983: "This rule prohibits communications by a lawyer ... with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Instead the New Hampshire Committee decided to adopt the comments originally proposed by the Kutak Committee in May of 1981.

> Using the example of taking a statement from the driver of a Titanic Oil gasoline truck involved in an accident, the committee felt there was nothing improper or unethical for plaintiff's counsel to take a statement from the driver even though counsel knew that Titanic Oil was represented by retained counsel.[6]

The conclusion that the drafters of New Hampshire Rule 4.2 intended to adopt the control group test is further reinforced by the fact that our rules of evidence explicitly adopt this test for purposes of applying the attorney-client privilege. See N.H.R. Evid. 502(a)(2) (defining "representative of a client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client"); id., Reporter's Notes ("Uniform Rule 502(a)(2) adopts a definition in terms of authority to obtain or act upon the basis of legal services, the so-called 'control group' test, which the Federal Advisory Committee described as the 'most restricted position.' . . . The approach of the Uniform Rule has been adopted, because it is consistent with the purpose of the privilege to encourage communications without unduly inhibiting trial preparation in the special context of corporate activity. The 'control group' test is preferable to the principal alternative, which is that the privilege cover any employee communication to counsel directed by the employer and referring to the performance of his duties.").

Given the drafters' apparent purpose in promulgating New Hampshire Professional Conduct Rule 4.2, and in the absence of controlling precedent to the contrary from our supreme court, I apply the control group test in deciding the instant motion. Utilizing this

[6] Although the New Hampshire Supreme Court adopted the version of Rule 4.2 quoted at the beginning of this opinion in 2006, the court has not yet adopted either the revised ABA or New Hampshire comments to the rule. Thus, the existing comments quoted in the text are the ones applicable to this case. Proposed revisions to the comments are currently before the New Hampshire Supreme Court's Advisory Committee on Rules. The ABA comments to its latest (2004) version of the rule state that the rule is intended to adopt the Managing/Speaking Test. The proposed New Hampshire comments merely identify the various tests, indicate that the New Hampshire Supreme Court has not ruled on the matter, and note that New Hampshire has adopted the Control Group Test for purposes of applying the attorney-client privilege.

test, I hold that plaintiffs' counsel may initiate ex parte contacts with, and may conduct ex parte interviews of, all current employees of defendant Rivier College other than those high level management officials of the college who are responsible for or are significantly involved in the making of final decisions with regard to the college's legal position in this litigation. See Klier, supra, 766 A.2d at 768. The mere fact that an employee of the college may possess factual information concerning the litigation, or even may have engaged in conduct that could be imputed to the college or upon which the college could be found liable, does not render such a person a member of the control group. Id. at 768-70.

However, I further hold that plaintiffs' counsel may not conduct ex parte interviews with current employees of Rivier College who either presently are members of the college's Rank & Tenure Committee or Ad Hoc Hearing Committee or were members of these committees at the time the proceedings against Professor Totherow were ongoing. Although it is true, as plaintiffs argue, that members of the foregoing committees lacked the authority to make final decisions regarding Professor Totherow's employment status, the record indicates that, at the very least, these committees played significant advisory roles to the college's top management in its decision-making on this matter. Consequently, I conclude that both committees are part of the college's control group for purposes of this litigation.

Lastly, I consider application of Rule 4.2 with respect to former employees of the college, including those former employees who may have been members of the Rank and Tenure Committee or the Ad Hoc Hearing Committee at the time those committees dealt with the Totherow matter. As to all such former employees of the college, I find the

reasoning of cases such as Clark, supra, and H.B.A. Management, Inc. v. Schwartz, 693 So.2d 541 (Fla. 1997), persuasive and I therefore follow the majority view in holding that Rule 4.2 simply does not apply to former employees of an organization. Accordingly, former employees of the college may be contacted and interviewed ex parte by plaintiffs' counsel.[7]

So ordered.

February 20, 2007

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ROBERT J. LYNN
Chief Justice

[7] Of course, should any present or former employee of the college indicate that he or she is represented (either by the college's attorneys or by independent counsel), Rule 4.2 will preclude plaintiffs' attorneys from interviewing that person without the consent of the person's lawyer. Moreover, in conducting any ex parte interviews, plaintiffs' counsel must comport with Professional Conduct Rules 4.1 (governing a lawyer's duty of truthfulness to a third person), 4.3 (governing a lawyer's dealings with unrepresented persons), and 4.4 (requiring that a lawyer not resort to improper or illegal methods of obtaining evidence), and must refrain from inquiring into matters that are privileged. See Clark, supra, 797 N.E.2d at 911-12.