IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF ZUNI, on behalf of itself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. CIV 01-1046 WJ/WPL
	)	Filed Electronically
UNITED STATES OF AMERICA, et a1.	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' CROSS MOTION FOR PROTECTIVE ORDER

The Government's cross-motion requests a protective order prohibiting the Pueblo's attorneys from contacting certain employees and imposing strict conditions on the contact with other employees. The Government asks this Court to limit the Pueblo's participation in public meetings, including imposing prior restraints on counsel's speech at those meetings. The request raises significant First Amendment issues. This brief addresses the Government's cross-motion, including the First Amendment issues.

FACTUAL BACKGROUND

The Pueblo's lead counsel, Mr. Miller, frequently attends national and regional meetings of governmental and private organizations concerned with Native American legal, policy and fiscal issues. At these meetings, current legal issues between the Tribes and the Indian Health Service are discussed, including contract support cost issues generally, and the *Cherokee* and *Zuni* cases

specifically. In the usual year, these meetings include three meetings of the National Congress of American Indians (NCAI); two tribal "self-governance" meetings (also co-hosted by the Department of Health and Human Services and the Department of the Interior); an annual meeting of the National Indian Health Board; IHS semi-annual meetings of the CSC Work Group; meetings of executive and legislative committees of these entities; and periodic annual, semi-annual or quarterly Area regional meetings of tribal leaders and tribal regional health boards (such as the Affiliated Tribes of Northwest Indians, Portland Area Indian Health Board, the Aberdeen Area Tribal Chairmans Association, the Aberdeen Area Health Board, United Southern and Eastern Tribes, and many others).

These same issues regularly become the subject of discussions in formal and informal tribal-specific negotiations with IHS field, Area and Headquarters personnel, and in diverse discussions between tribal clients of Mr. Miller's firm and IHS throughout the contract year. Over 90 percent of Mr. Miller's current practice involves ISDA contracting issues, as does substantial portions of the practice of several other attorneys of his firm. It should be noted that Mr. Miller has infrequently represented the Pueblo of Zuni *per se* at these meetings. Rather, he generally either attends meetings and speaks on behalf of other Tribes, or attends as an invited guest speaker.

The Government claims that a protective order is necessary to regulate Mr. Miller's participation in these public meetings with IHS, BIA and Tribal representatives. The Government expresses particular concern over Mr. Miller's participation in the CSC Work Group (which already includes agency counsel), making the vague claim that "[t]hrough these workgroups, and especially through discussions on topics such as contract support costs, Plaintiff's counsel is able to

communicate with Defendants' represented employees about topics regarding the subject matter of this litigation." Def. Consol. Mem. at 14 n.5 (Jan. 13, 2006).

ARGUMENT

1. The Pueblo's First Amendment right to petition the Government for redress protects its right to contact IHS to discuss matters related to the litigation, and this right cannot be burdened absent a compelling governmental interest.

The Government seeks to prohibit the Pueblo's counsel from contact with represented IHS employees regarding the subject matter of the lawsuit or from discussing the litigation at all (Def. Proposed Protective Order at 4, ¶¶ 6-7), to require Plaintiff's counsel to provide five days' notice before any contact to discuss even "general prospective policy matters" (*id*. at 4, ¶ 7), to provide an extensive disclaimer before any contact with represented or unrepresented party employees (*id*. at 4, ¶¶ 7-8), and to "refrain from asking any question or obtaining any information from the unrepresented party employee that may violate a privilege." *Id*. at 7, ¶ 9. The proposed protective order raises extraordinary First Amendment concerns and should not be granted.

The First Amendment protects "vigorous advocacy" by guaranteeing the freedom to speak, to petition the government for redress and to assemble in furtherance of these rights. U.S. Const., amend. I; *NAACP v. Button,* 371 U.S. 415, 429 (1963). *See also California Motor Trans. Co. v. Trucking Unltd.*, 404 U.S. 508, 510-11 (1972). Participation in public meetings and engagement in efforts to influence public officials have long been protected by courts as part of this right. *See United States v. Cruikshank*, 92 U.S. (2 Ott.) 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."); *E. R.R. Presidents Conference*

v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961) (antitrust laws do not prevent a united effort by railroads to influence legislation destructive of the trucking business); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (*Noerr* protects "concerted effort[s] to influence public officials").

Infringements on the right to petition may be justified only by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas" that cannot be achieved through less restrictive means. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*); *Buckley v. Valeo*, 424 U.S. 1, 17-19 (1976). The Government bears substantially heavier burdens to justify a prior restraint on the right to petition. *New York Times*, 403 U.S. at 714. Any attempt at the preemptive regulation of public discussion "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (holding that a statute requiring a person to register as an organizer before soliciting union membership was an invalid "previous restraint" on the right of speech and assembly when applied to punish someone for addressing a public meeting of workers and asking them to join a union without first registering).

Two lines of authority establish Mr. Miller's (and his firm's) right to communicate with government officials concerning CSC issues. First, Mr. Miller's participation in these meetings fits squarely within a widely-recognized First Amendment exception to the no-contact professional ethics rule that is the basis of the Government's complaint. Second, if the no-contact rule were interpreted to authorize such sweeping and unprecedented limits, the rule itself would be invalid as a prior restraint on Plaintiff's First Amendment rights that cannot be justified by the Government's

speculative interest in preventing attorney misconduct.

2. The no-contact rule does not apply to prohibit attorneys from participating in public meetings to discuss policy related to the litigation.

"No-contact" rules such as New Mexico Rule 16-402 do not prohibit attorneys in litigation against the government from contacting government officials in situations that implicate First Amendment rights. The Government cites to ABA Model Rule 4.2, which prohibits a lawyer from communicating with a represented party without the other attorney's consent except where such contact is "authorized by law."[1] ABA Model Rules of Prof'l Conduct R. 4.2 (2002). Contact with government officials on policy matters is protected by the First Amendment and therefore falls within the "authorized by law" exception. As the commentary to the 2002 Model Rule indicates, "[c]ommunications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government." *Id.* R. 4.2 cmt. [5]. In other words, the rule on which the government relies does not cover the conduct the government challenges.

The relationship between the no-contact rule and the constitutional right to petition the government for redress of grievances was formally addressed by the American Bar Association in 1997. *See* ABA Comments on Ethics and Prof'l Responsibility, Formal Op. 97-408 (1997). The Opinion held that Model Rule 4.2 does not prevent a lawyer representing a private party in litigation against the government from communicating with officials who have the authority to take or

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[1] The Pueblo agrees that in certain limited circumstances (tort actions, for example), Model Rule 4.2 and its State analogues may apply to litigation involving represented governmental entities in a manner similar to private litigation. Nonetheless, the Rule's application is subject always to the opposing litigant's First Amendment rights.

recommend action for the purpose of addressing a policy issue, including settlement. *Id.* at 6-7. The Opinion distinguished between a case in which the government essentially occupied the position of a private litigant – such as employment discrimination – from a policy dispute, because the latter directly implicates the First Amendment right to petition the government for resolution of the policy dispute. Acknowledging the important ethical considerations embodied in the rule – such as protecting against overreaching by adverse counsel, safeguarding the lawyer-client relationship and reducing the likelihood that clients will inadvertently disclose harmful or privileged information – the Opinion nevertheless concluded that the no-contact rule "has a limited application in situations where a citizen has a constitutional right to communicate directly with a government decision maker." *Id.* at 4. The Committee reasoned that the rule "must not be applied so as to frustrate a citizen's right to petition, exercised by direct communication with government decision makers, though a lawyer." *Id.* at 6.[2]

In reaching its conclusion, the Committee took a more conservative position than many commentators[3] by imposing two conditions on the exception: (1) the communication must address a policy issue and the official must have authority to take or recommend action related to the policy issue, and (2) the attorney must give reasonable advance notice to opposing counsel and must

[2] The Opinion sets forth the narrow situations where constitutional concerns would not trump the rule: "In situations where the right to petition has no apparent applicability, either because it is not the sole purpose of the contact to address a policy issue or because the government officials with whom the lawyer wishes to communicate are not authorized to take or recommend action in the matter," the no-contact rule is fully applicable. *Id.* at 8.

[3] *See e.g., Camden v. Maryland*, 910 F. Supp. 1115, 1118 n.8 (D. Md. 1996) (concluding that "[i]nsofar as a party's right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable.").

identify himself as an attorney. Here, the Pueblo's proposed protective order would satisfy this standard. (In contrast, the Government's proposed order reaches far beyond the scope of permissible conditions.)

A District of Columbia Bar Association opinion from the same year addresses the rule's application to attendance at public meetings where adverse parties may be present. D.C. Bar Legal Ethics Comm., Formal Op. 274 (1997). At issue was whether public meetings held by the federal Pension Benefit Guaranty Corporation (PBGC) violated the rule prohibiting communications between lawyers and opposing parties. PBGC is the agency responsible for administering pension plan termination insurance programs, and holds public meetings to provide general information about the PBGC insurance system once an under-funded pension plan terminates. An attorney representing 300 plan beneficiaries pursuing individual claims for payment sought to prevent PBGC from holding the meeting. The Opinion describes the meeting as follows:

> At meetings of this type, PBGC employees discuss the procedures for filing claims, the nature and extent of these types of benefits that are guaranteed by PBGC, and the agency's policies and procedures for handling claims. The meetings are thought to be an efficient method of disseminating information to claimants and of answering recurrent questions that claimants tend to raise with the agency.
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> PBCG does not discuss the facts and circumstances of individual claimants at such meetings. Rather, as we understand it, the purpose of these meetings is to give general information concerning the outlines of the agency's program and the types of benefits that the agency guarantees and to answer general questions along these lines. <u>The rules of ethics for lawyers should not interfere with the right of non-lawyer employees and staff attorneys for a government agency from communicating this kind of useful information to the interested public absent a very clear reason to do so.</u>

Id. (emphasis added)

The Committee determined that the intent of Rule 4.2 – to protect represented parties from being induced into making admissions, waiving confidentiality or unknowingly taking positions detrimental to their interests – was not implicated in a public meeting setting. The Committee noted that the lawyer representing the claimants could choose to attend the meeting with her clients or counsel her clients not to attend. Instead, however, she sought "to convert a prophylactic rule, which prevents unconsented contact with her clients by opposing counsel, into an offensive weapon by which the lawyer can prevent PBGC from conducting its public meeting." *Id.* Although Opinion 274 involved the government's right to communicate with represented parties – rather than the private parties' right to petition the government – the court's reasoning applies equally here. As in Opinion 274, counsel for the Government remains free to recommend to her clients that they not attend a particular CSC meeting or public hearing, or may attend with them to safeguard the Government's interests. If Rule 4.2 does not bar contact with opposing parties at public meetings where the right to petition was not implicated, it surely does not bar such contact here.

More recent state and local ethics opinions confirm that the ABA view is still in effect. *See, e.g.,* Conn. Comm. on Prof'l Ethics, Informal Op. 01-17, at 1, 3 (2001) (state analogue of ABA Model Rule 4.2 authorizes a party in a controversy with the government to contact represented government officials who have authority to take or recommend action for the purpose of settling a policy matter, and burden is on lawyer to determine whether there is a legal basis for the contact); Phila. Bar Ass'n Prof'l Guidance Comm. Op. 00-11, at 3 (2001) ("A key instance of the 'authorized by law' exception to Rule 4.2, grounded in the right to petition, is communication with a government

agency concerning a matter within its province."); Alabama State Bar, Op. Gen. Counsel (March, 2004) (Rule 4.2 allows attorney suing a governmental entity "to communicate directly with the [governmental officials] to discuss settlement without obtaining the consent or approval of the attorney representing the county board.").

In fact, some state ethics rules explicitly recognize this First Amendment exception. For example, the California Rules of Professional Conduct categorically exempt "communications with a public officer, board, committee or body" from the no-contact rule. Cal. Rules of Prof'l Conduct, R. 2-100 (C)(1), (C)(3). Likewise, the District of Columbia rule "does not prohibit communications by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client . . . ." D.C. Rules of Prof'l Conduct, R. 4.2(d). *See also* Utah Rules of Prof'l Conduct, R. 4.2(a)(1) and cmt. ("A communication is authorized under subparagraph (a)(1) if the lawyer is assisting the client to exercise a constitutional right to petition the government for redress of grievances in a policy dispute with the government . . . ."). The commentary to the D.C. Rule states that the exception is "intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to the dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute." D.C. Rules of Prof'l Conduct, R. 4.2 cmt. [7]. The Third Restatement also acknowledges the First Amendment exception. Restatement (Third) of The Law Governing Lawyers § 101 (2000).

In *American Canoe Ass'n, Inc. v. City of St. Albans*, 18 F. Supp. 2d 620, 621 (S.D. W.Va. 1998), a West Virginia district court denied a similar motion for a protective order sought by a

government agency defendant seeking to prohibit the plaintiff's counsel from communicating with the agency or its employees.[4] Acknowledging that communications with adverse parties are generally prohibited by Model Rule 4.2, the court nevertheless held that the Rule does not prevent communications that implicate a plaintiffs's "constitutionally protected right to petition the government and the derivative public policy of ensuring a citizen's right of access to government decision makers." *Id.* at 622. The court explained that the "Government remains the servant of the people, even when citizens are litigating against it. Thus, when citizens deal with government agencies, several sorts of direct contact are 'authorized by law' and permissible." *Id.* at 621.[5]

Mr. Miller's participation in CSC workgroups and public meetings is exactly the kind of advocacy envisioned in the First Amendment exception. This participation has continued for over 10 years, throughout the life of this litigation and the life of other CSC litigation brought by Mr. Miller, all without any complaint from Defendants. The Pueblo and Mr. Miller's other clients vigorously dispute the Government's policy on contract support costs. The Constitution protects their representative's ability to petition the Government for resolution of this issue in the courts, in

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[4] Similarly, in a case where the defendant agency issued a memorandum instructing employees not to meet with the plaintiff's attorney and later asked the court to require the plaintiffs' attorney to recite a detailed disclaimer in advance of any permitted contact, the Massachusetts district court held that "the attempt of defendants to suggest to their employees that they refrain from giving the plaintiffs' attorneys information about the internal government processes that might be privileged" could not be permitted. *Vega v. Bloomsburgh*, 427 F. Supp. 593, 595 (D. Mass. 1977).

[5] The court also noted that certain citizen-access statutes, such as the Freedom of Information Act, may also authorize communications with government officials. *American Canoe Assoc'n*, 18 F. Supp. 2d at 622. *But see* Conn. Comm. on Prof'l Ethics Informal Op. 92-11 (1992) (holding that FOIA does not authorize contact with a government official that would otherwise be prohibited by Rule 4.2). Significantly, the court held that a limit on this statutory right to government information was appropriate with respect to "materials produced incident to the litigation," such as interagency materials that would not otherwise be available. 18 F. Supp. 2d at 622. In those situations, the court held that plaintiffs must prepare and sign an inventory of all materials received. The court did not impose a similar restriction on direct communications.

Congress, and with the responsible agency. In the litigation, the Government occupies the role of a policymaker, not a private litigant, and these public meetings and discussions – in particular the IHS CSC Work Group – are where much of the most critical CSC policy discussion and advocacy takes place. Mr. Miller's attendance at and participation in these meetings is a vital component of his advocacy on behalf of the Pueblo and other tribal contractors on CSC issues. His contact with represented IHS officials in the course of these meetings is therefore squarely within the exception to New Mexico Rule 89.3 and ABA Model Rule 4.2. The Government's motion to limit participation in, and to impose prior restraints on counsel's participation and public speech at these meetings, should accordingly be denied.

3. Under the Supreme Court's balancing test, the Pueblo's right to petition outweighs the State of New Mexico's interest in regulating the practice of law.

If New Mexico Rule 89.3 is interpreted to permit limits on Mr. Miller's participation in public meetings and CSC workgroups, it violates his clients' First Amendment rights to petition the government for redress. It is, of course, correct that States have broad power to regulate the practice of law. *See* Def. Consol. Opp., at 1. But the Supreme Court has long established that it is "equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms." *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). While there is little case law on the question of contact with government agencies, the Supreme Court has recognized First Amendment limitations on legal ethics rules in other contexts. In these cases, the Court has established that where ethics rules place a substantial burden on First Amendment rights, a State

must show that the ethics rules serve a compelling and immediate interest and are the least restrictive means of doing so. *United Mine Workers of Am.*, 389 U.S. at 224-25; *NAACP v. Button*, 371 U.S. 415, 444 (1963); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 6 (1964).

In *United Mine Workers of America*, a State court issued an order prohibiting a union from hiring attorneys to represent its members before the workers' compensation board. The State Bar Association alleged that the practice violated State ethical rules relating to the unauthorized practice of law. The Court held that the State's interest in regulating ethical standards could not support an order that "substantially impair[ed]" the union members' right of access to the courts. 389 U.S. at 225. The Court reasoned that the "theoretically imaginable" ethical issues presented by the attorney arrangement were not sufficient to support such a restraint on First Amendment rights. *Id.* at 224. *See also Trainmen*, 377 U.S. at 6 ("[W]e have had occasion in the past to recognize that in regulating the practice of law a state cannot ignore the rights of individuals.")

Similarly, in *Button* the Court evaluated a statutory ban on improper solicitation of legal business as applied to the activities of the NAACP. At issue was the organization's practice of holding public meetings to identify potential plaintiffs for specific types of litigation. The NAACP argued that the statute infringed the rights of members and lawyers to associate for the purpose of assisting people seeking legal redress. *Id.* at 428. The Court recognized that the statute fell "within the traditional purview of state regulation of professional conduct" and recognized that the solicitation ban was intended to discourage lawyers from "stirring up litigation," especially for "the oppressive, malicious, or avaricious use of the legal process for purely private gain." *Id.* at 438, 440-41, 443. The Court nonetheless held that the State's regulatory interest in outlawing "barratry,

maintenance and champetry" was insufficient to justify the burden on the associational rights of NAACP members and attorneys. *Id.* at 439, 444. *See also Vega* 427 F. Supp. at 595 (the government's interest in being protected from the statements of its own employees "is outweighed by the first amendment interests of their employees.")

The balance of interests at stake here is similar to that involved in *United Mine Workers of America*, *Trainmen* and *Button*. The Pueblo's right to petition the government would be significantly burdened by the proposed protective order. Indeed, the order would effectively prohibit the Pueblo's exercise of that right. The Government cannot satisfy the burden necessary to justify such an infringement.

The Government cites Local Civil Rule 89.3 and ABA Model Rule 4.2, which prohibit attorneys from communicating about the subject of the representation with a party known to be represented by the opposing attorney. Def. Consol. Mem. at 8-9. The purpose of the no-contact rule, as Defendants point out, is to protect against "possible" overreaching, interference with the lawyer-client relationship and uncounseled disclosure of information. But the Government points to no specific instances of overreaching or other misconduct during these public meetings. Though the government's interest in the ethical practice of law is indeed important, the government cannot justify such significant burdens on First Amendment rights where the risk of unethical practice is so speculative.

4. Discouragement and Disclosure in Witness Contacts.

The last area raised by the Government's cross-motion involves (1) what Pueblo counsel may say in communications with Government fact witnesses, and (2) what Government counsel may say

in seeking to dissuade unrepresented employees from communicating with the Pueblo's counsel. The Government argues that in any contact with Government employees, the Pueblo's counsel needs to "'immediately disclose his capacity as the plaintiff['s counsel in this matter] and the purpose of the contact, *i.e.*, to request an interview.'"[6] The Government proposes that the Pueblo's counsel recite a lengthy and intimidating "script" at the outset of each such contact.[7]

Conversely, the Pueblo is deeply concerned -- based upon the Government's correspondence, the tenor of its briefing in the motions at bar and its proposed orders -- that the Government will inappropriately discourage its employees from perfectly proper communication with the Pueblo's counsel. The Pueblo's right to informal discovery from fact witnesses will be a dead letter if the Government intimidates its employees and or actively discourages them from communicating with the Pueblo's representatives.

Each of the parties believes that the other's concern is overblown. The Pueblo has not engaged in any pattern or practice of *ex parte* interviews, and believes that the Government's reaction to the Patrick Smith deposition scheduling contact was unjustified and intemperate. The Government responds that it has not discouraged or intimidated any of its employees from proper

[6] Opposition at 19, *quoting Siguel v. Trustees of Tufts College*, 1990 WL 291999 (D. Mass. Mar. 12, 1990).

[7] The Government proposes a draconian, nine-page protective order, with fourteen sub-parts, that purports to address its concerns. To justify this extraordinary approach, the Government relies on pre-2002 decisions applying the "admissions evidence" test and cases involving particularly egregious fact patterns that are simply not present here. *See*, Opposition at 13 - 15, *citing*, *inter alia*, *McCallum v. CSX Transp., Inc*., 149 F.R.D. 104, 113 (M.D.N.C. 1993) (applying "admission evidence" test); *Holdren v. General Motors Corp*., 13 F.Supp. 2d 1992 (D. Kansas 1998), *but see*, *Turnbull v. Topeka State Hospital*, 185 F.R.D. 645 (D. Kansas 1999) (distinguishing *Holdren*, denying request for protective order regarding contacts with employees in absence of hard evidence by moving party, noting "In an era when easing or eliminating the unnecessary burdens and expense of litigation is widely viewed as desirable, this court is loath to create limitations on attorney communications which make the litigation process more difficult while providing little in the way of a corresponding benefit") quoting, *Aiken v. Business Industry Group*, 885 F. Supp. 1474 (D. Kansas 1995).

contacts with the Pueblo's representatives. Nonetheless, and despite the difference in the parties' views, their positions on the legal issues are narrower than may appear at first blush.

First, the Pueblo agrees with the Government that a party's employee lying outside the Rule 16-402 'managerial class' is considered a "non-represented party" for purposes of the New Mexico Rules of Professional Conduct. Counsel's contact with such a person therefore need only comply with New Mexico Rule 16-403 (dealings with unrepresented persons):

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.[8]

Rule 16-403 only requires that counsel refrain from affirmative misrepresentations concerning counsel's role, and make reasonable efforts to correct any misunderstandings of that role. The Pueblo has reviewed the Government's authorities and the ABA Annotation to Model Rule 4.3, and agrees that the generally accepted rule is that "to avoid misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to the unrepresented person."[9] The revised proposed order submitted with the Pueblo's Reply in Support of Motion for Protective Order (Feb. 17, 2006) incorporates this approach.

Second, the Pueblo agrees that New Mexico Rule of Professional Conduct 16-304 governs the parties' instructions to their own witnesses. The Government confuses two parts of the Rule.

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[8] Rule 16-403, "Dealing with unrepresented person," comes into play because the Government's non-managerial fact witnesses are "unrepresented" for purposes of contact by the Pueblo's counsel.

[9] Annotation, ABA Model Rule 4.3 (2005 ed.).

Section (a) provides "a lawyer shall not . . . unlawfully obstruct another party's access to evidence or . . . counsel or assist another person to do any such act." Section (c) provides that "a lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party, unless the person . . . is an employee or agent of the client." As the Pueblo reads these provisions, anything beyond a "request" to the agency's unrepresented employees to "refrain from voluntarily giving relevant information" amounts to an improper obstruction of the opposing party's access to evidence. The word "refrain" in Section (c) means "to keep or prevent oneself from doing or saying something" and implies free will on the part of the unrepresented employee to choose whether or not to communicate with opposing counsel. This compares with "obstruct" in Section (a), which means that counsel cannot "block, impede, retard, or interfere with, [or] hinder" those communications.[10] *The American Heritage Dictionary of the English Language* (4th ed. 2000) (quoted on www.dictionary.com). The Pueblo's proposed order captures this distinction.

Thus, under New Mexico Rule 16-403, counsel may request that an employee refrain from communications with opposing counsel, but may not do anything, directly or indirectly, that discourages the employee from doing so if the employee so chooses. *See, e.g., Andrews v. Goodyear Tire and Rubber Co., Inc.*, 191 F.R.D. 59, 80 (D.N.J., 2000). Here, too, the Pueblo's revised proposed order incorporates this approach.

[10] Similarly, "intimidate" means "to frighten into submission, compliance, or acquiescence" and "preclude" means "to make impossible, as by action taken in advance, prevent," both of which imply threats or demands by counsel or the client to the unrepresented employee. *Cf. Long Island Savings Bank v. United States*, 63 Fed. Cl. 157 (Fed. Cl. 2004) (rejecting Government's attempt to block opposing party's access to former agency employee witnesses; entering protective order barring witnesses from disclosing to Government what questions were asked by opposing counsel).

5. Conclusion.

The Government's cross-motion requests prior restraints on public speech and on contacts with Government policy makers by the Pueblo's counsel that go far beyond acceptable bounds. The Government has proffered no evidence that counsel's participation in the active, vigorous and entirely public debate on contract support cost matters is inappropriate. Nor has the Government shown that counsel has, in any manner, transgressed the New Mexico Rules of Professional Conduct in participating in that debate on behalf of counsel's clients.

In filing this action the Pueblo of Zuni did not relinquish its First Amendment rights to petition the Government for redress of grievances and its right to speak on matters of public concern involving contract support costs. The Government's cross-motion should accordingly be denied.

Respectfully submitted this 17th day of February 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February 2006, I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the **Plaintiff's Opposition to Defendants' Cross Motion for Protective Order** to the following attorneys of record (or their co-counsel) for Defendants:

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