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 REPLY MEMORANDUM
RE: MOTION FOR PROTECTIVE ORDER (WITNESS CONTACT) (Dkt. No. 179)

Plaintiff's motion for protective order stems from the Government's reaction to a two-minute telephone contact on September 7, 2005, between plaintiff Pueblo of Zuni's counsel and a Government employee, Patrick Smith. The Government objects to this contact and by cross-motion proposes wide-ranging restrictions on the Pueblo's counsel, including prior restraints on public speech. This memorandum addresses the Pueblo's motion.[1]

After conferring with the Court, the parties attempted to resolve these issues but did not agree. Having considered the Court's comments and the Government's points, the Pueblo requests that the Court grant the Pueblo's motion on the terms stated in the Pueblo's revised proposed order (attached). Although the formal pre-certification discovery period has closed, informal fact-finding and investigation continues.

[1] The Pueblo objects to the Government's attempt to restrict informal discovery and to its proposed prior restraints on public speech. Since the issues raised by the Government's cross-motion are analytically and factually distinct, they are addressed in the Pueblo's Opposition to Cross-Motion being filed this date.

FACTUAL BACKGROUND.

Review of the facts should put this tempest back in the teapot where it belongs.

Patrick Smith is an accountant in the U.S. HHS Program Support Center, Division of Cost Allocation (DCA). Smith works at the DCA's Western Regional Office in San Francisco. Exh. J (HHS Employee Detail). The DCA's Western Regional Office is many bureaucratic layers removed from (and below) the DHHS Secretary. Smith is at the bottom of DCA's organizational chart, listed as "Staff." He does not supervise any Government employees.[2]

Counsel's call to Smith was prompted by the Government's proffer of Wallace Chan as a deposition witness in this matter.[3] This choice was unusual. Chan is not identified in the Government's initial disclosures. Exh. M (Defendants' Initial Disclosures). Chan's name does not appear on the Indian Health Service contracts at issue in this matter, nor in any of the 44,000 pages of documents exchanged by the parties in discovery.[4] Chan's name was unknown to the Pueblo's expert as a person involved in matters relevant to this suit. Yet, the Government insisted on Chan.[5]

The Pueblo was not confident of this choice. Patrick Smith – who, unlike Chan, is known to the Pueblo's expert and whose name appears in the Government's discovery responses – was

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[2] Exh. K; http://rates.psc.gov/fms/dca/western.html.

[3] Defs. Exhs. 2 and 4. Smith is supervised by Naomi Tamashiro, the DCA's "Branch Chief for State, Local and Tribal Governments," who, in turn, is supervised by Wallace Chan, the DCA's Western Regional "District Manager." Chan's job description (Supervisory Account GS-510-14), unlike Smith's, specifically states that "The incumbent of this position is a working supervisor." Exh. L.

[4] Zawodny Aff., at ¶¶4, 5.

[5] Mather Aff., at ¶4. Dr. Mather has negotiated dozens of IHS contracts with the DCA's San Francisco office and never encountered Chan in those negotiations. *E.g.*, *see* Defs. Exhs. 2 and 4. The proposed deposition was a simple discovery deposition, not a Rule 30(b)(6) deposition.

identified by the Pueblo's expert as the most appropriate witness for the DCA deposition.[6] Communications between counsel failed to shed light on Chan. On September 7, 2005, the Pueblo's counsel briefly called Smith to ascertain if Smith was, in fact, still the person who deals with tribal issues for DCA and was thus the appropriate deponent.

The contact was brief — between two and three minutes, including time spent getting through the receptionist. Zawodny Aff. at ¶4. The purpose was simply to confirm that Smith was the individual who the Pueblo's expert believed he was, so that the Pueblo could depose the appropriate witness. As noted in Smith's deposition, counsel first identified himself and the litigation; Smith next identified himself; and then "we decided we better not have any more conversations [...]" except through counsel.[7] At that point, Smith was not involved in this matter, and "really didn't know about this particular case" at all.[8]

Later that same day, counsel's legal secretary called the DCA office to obtain Smith's correct job title and address for the deposition notice. The secretary did not ask for Smith and did not speak with Smith, as far as she is aware. Her only inquiry was to Smith's job title and address. *See* Tempel Aff. at ¶3. And that is the sum and substance that led to this dispute: two to three minutes

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[6] Mather Aff., at ¶4; see also Exh. N, Appendix B to Defendants' July 14, 2005 Objections and Responses to Plaintiff's Interrogatories

[7] Patrick Smith Deposition, at 31-32, Defs. Exh. 16.

[8] Patrick Smith Deposition, at 31-32, Defs. Exh. 16. Contrary to the Government's assertions, it is readily apparent from the deposition transcript that the Pueblo's counsel informed Smith as to who he was and that the inquiry involved this litigation — indeed, Smith testified that after the call he inquired with his supervisor, "who was aware that there was a case going on – an on-going case." *Id.*

of telephonic contact to identify a deponent and obtain his job title and address.[9]

ARGUMENT

1. The Dispute Has Narrowed.

The parties agree that contacts between counsel and an opposing parties' employees are governed by New Mexico Rule of Professional Conduct 16-402.[10] The parties agree that under the Rule, "persons having a managerial responsibility on behalf of the organization" generally may not be contacted directly by opposing counsel concerning a matter in litigation:

> 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. Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel.

The parties also agree that the "managing-speaking agent test" enunciated by the Washington Supreme Court in *Wright by Wright* and cited with approval by the Tenth Circuit in *Weeks v. Independent School District* is the appropriate measure by which employees may be determined to have "managerial responsibility" under the New Mexico Rule.[11] *Wright by Wright* held that

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[9] And for the record -- since the Government persists in raising the question -- the Pueblo's counsel certifies pursuant to Civil Rule 11 that the Pueblo's counsel have not interviewed, or taken statements from, any Government employee in this matter, other than at depositions with the Government's counsel present.

[10] Local Rule 83.9 states, "The Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico apply except as otherwise provided by local rule or by Court order."

[11] *Wright by Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984) (*en banc*); *Weeks v. Independent School District No. I-89 of Oklahoma County, Oklahoma, Board of Education*, 230 F.3d 1202, 1209 (10th Cir. 2000) (applying Oklahoma law; noting that Oklahoma courts apply the "managing-speaking agent test" under Oklahoma's Rule 4.2, which varies from New Mexico's in that it does not include the last sentence of Rule 16-402), *cert. denied sub nom Barringer v. Independent School District No. I-89 of Oklahoma County, Oklahoma, Board of Education*, 532 U.S. 1020

"employees should be considered 'parties' for purposes of the disciplinary rule if, under applicable ... law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation," 691 P.2d at 569, adding "[i]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." *Id.*

2. Permissible Direct Contact with Government Employees.

Under New Mexico RPC 16-402 and the *Wright by Wright* test, the Pueblo's counsel are entitled to communicate directly with IHS and DCA employees on the subject of this matter, provided those employees are not in a position to make binding judicial admissions for the IHS. Those who may not be directly contacted are top officials, "analogous to ... person[s] who possess[] power to settle a dispute on behalf of the organization."[12] As noted in *Wright by Wright*:

> Those who are ultimately responsible for managing the entity's operations have the strongest interest in the outcome of any dispute involving the entity. ... These officials are the multi-person entity's alter ego - - they can speak and act for the entity and can settle controversies on its behalf. ... [13]

The Pueblo submits that the "managerial responsibility" clause in New Mexico Rule 16-402, together with the "bind the organization," "alter ego" and "settle controversies on behalf of" aspects of the *Wright by Wright* managing-speaking agent test, generally defines the group of Government officials who may not be directly contacted by counsel. The Government contends, however, based

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(2001), cited and quoted in Government's Opposition at 11.

[12] *Restatement (Third) of the Law Governing Lawyers* § 100 comment e.

[13] *Wright by Wright*, 691 P.2d at 570 ("A corporate employee who is a 'client' under the attorney-client privilege is not necessarily a 'party' for purposes of the disciplinary rule.")

on *Weeks* and *In re Air Crash Disaster*,[14] that Rule 16-402 bars contact with any Government employee whose statements may be admissible into evidence under Federal Rule of Evidence 801(d)(2)(D).[15] With all due respect, both *Weeks* and *Air Crash* misinterpreted 1995 ABA Comment [4] to Model Rule 4.2. That Comment, now repealed, read:

> In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, *and with any other person* whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or *whose statement may constitute an admission on the part of the organization*. [16]

Weeks and *Air Crash* relied on the second italicized phrase ("*any person ... whose statement may constitute an admission on the part of the organization*"). In 2002, however, <u>after</u> *Weeks* and *Air Crash*, the ABA substantially revised Comment [4]. The italicized phrase was deleted specifically because it had been misinterpreted by a number of courts — including the Tenth Circuit in *Weeks*:

> In particular, the Reporter's Explanation of Changes states that the 'admission' clause was deleted because it had been misapplied to situations when an employee's statement could be admissible against the organizational employer, when 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

[14] *Weeks*, *supra*.; *In re Air Crash Disaster*, 909 F. Supp. 1116 (N.D. Ill. 1995).

[15] F.R.E. 801(d)(2)(D) ("Admission by party-opponent") discussed in Opposition, at 11 (stating that Rule 801(d)(2)(D) includes "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship"). The "admission evidence" test would cover thousands of Government employees.

[16] ABA Model Rules of Prof. Conduct 4.2, Comment [4] (1995), *quoted in Palmer v. Pioneer Inn Assoc., Ltd.*, 59 P.3d 1237, 1241 (Nev. 2002) (emphasis added by Nevada court) and cited in *Weeks*, 230 F.3d at 1208-09 ("we know it includes employees below the level of corporate management because otherwise the third category of employees mentioned in Rule 4.2 [i.e., the 'admission' clause] would be redundant to the employees described in the first category of Rule 4.2 ('persons having a managerial responsibility on behalf of the organization')").

> admissible against the organization but could not thereafter be controverted by the organization.[17]

Comment [4] was amended because "it had been read to prohibit communication with anyone whose testimony would be *admissible* against the organization under an exception to the hearsay rule," an erroneous interpretation. *Weeks* is cited as an example of a decision that misread Comment [4].[18] The revised Comment, now Comment [7], reads:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or who has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. . .[19]

Although the New Mexico Annotated Rules include the 1995 Comment [4] relied on in *Weeks* and have not yet been updated,[20] this is immaterial. As the 2002 Annotation notes, the correct reading of former Comment [4] is much narrower than *Weeks* and *Air Crash* mistakenly believed. Moreover, the New Mexico annotations are not determinative. They are "intended as guides to

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[17] *Palmer*, 59 P.3d 1237 at 1242, citing, *Model Rule 4.2 — Reporter's Explanation of Changes* (ABA, Feb. 21, 2000).

[18] Annotation, Model Rule 4.2, *ABA Annotated Rules of Professional Conduct, 5th Edition*, at 425 (emphasis added). *N.b.*, 1995 Comment [4] is now renumbered and is 2002 Comment [7].

[19] Comment [7], Model Rule 4.2, *ABA Annotated Rules of Professional Conduct, 5th Edition*, at 425 (emphasis added). The Government cites to only one case that post-dates the 2002 Comment, *Parker v. Pepsi Cola Gen. Bottlers, Inc.*, 249 F. Supp. 2d 1006 (N.D. Ill. 2003). *Parker* does not discuss either the 1995 or the 2002 ABA Comments and involved an egregious situation: counsel issued a subpoena to an individual plaintiff and took the plaintiff's deposition without notifying the plaintiff's counsel. The Court ordered the deposition struck as a sanction.

[20] New Mexico Rules Annotated, Rule 16-402, listed as "ABA Comment to Model Rules."

interpretation, but the text of each rule is authoritative."[21] The New Mexico Court, presumably, will look to the current ABA Comments when it next needs "guidance" on Rule 16-402.[22]

In the District of Montana, the Government recently – and successfully – argued the reverse of the position it takes here. In *W.R. Grace*, the Government argued that *ex parte* witness contacts with former employees were allowed under Montana's analog to Model Rule 4.2. The Government argued that the court should look to 2002 Comment [7], and not to 1995 Comment [4], when considering the Rule. The District Court agreed, holding that "the standards of conduct applicable in this case are those set forth in the current version of Model Rule 4.2." The court held that the Government's *ex parte* contact:

> is prohibited neither by Rule 4.2 nor by the attorney-client privilege, so long as plaintiff does not attempt to interview present or former employees with managerial responsibilities concerning the matter in litigation, and does not inquire into privileged areas of communication.[23]

W.R. Grace is firmly in accord with current legal thinking on Model Rule 4.2. This is demonstrated by *Palmer,* a case the Ninth Circuit certified to the Nevada Supreme Court. The Nevada court uses the ABA Comments in the same manner as the New Mexico court: not as binding authority, but as guidance.[24] *Palmer* involved an affidavit prepared by plaintiff's counsel and signed, *ex parte*, by the defendant's employee. The U.S. District Court struck the affidavit and disqualified

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[21] New Mexico Rules Annotated, Rules of Professional Conduct, "Scope."

[22] *E.g*, *State v. Gonzalez*, 119 P.3d 151 (N.M. 2005) (alleged prosecutorial misconduct);*In the matter of John Doe, Esq*., 801 F.Supp. 478 (D. N.M. 1992), *appeal after remand sub nom. Matter of Howes*, 940 P.2d 159 (N.M.1997) (Assistant United States Attorney censured for direct contact with represented defendant).

[23] *United States v. W.R. Grace, Inc., et al.*, 401 F.Supp. 2d 1065, 1068 (D. Mont. 2005) (former employees).

[24] *Palmer v. Pioneer Inn Assoc., Ltd.*, 59 P.3d 1237, 1244 (Nev. 2002).

plaintiff's counsel. On appeal, the Ninth Circuit certified the question of whether this result correctly interpreted Nevada's Model Rule 4.2 analog. *Palmer*, 338 F.3d at 987. The Nevada Supreme Court adopted the *Wright by Wright* test and squarely rejected the "evidentiary admissions" test, noting that the test "essentially covers all or almost all employees, since any employee could make statements concerning a matter within the scope of his or her employment." This "effectively serve[s] as a blanket [prohibition] test, thus frustrating the search for truth." The Nevada court concluded that *Wright by Wright*

> best balances the policies at stake when considering what contact with an organization's representatives is appropriate. The test protects from overbearance by opposing counsel those representatives who are in a position to speak for and bind the organization, while still providing ample opportunity for an adequate Rule 11 investigation. ... In applying this test, we specifically note that an employee does not 'speak for' the organization simply because his or her statement may be admissible as a party-opponent admission. Rather the inquiry is whether the employee can bind the organization with his or her statement.[25]

Looking at the controversy that precipitated these motions under either the Comment [7] approach or the *Wright v. Wright* test is illustrative. Under Comment [7], Smith does not "supervise, direct or regularly consult with the organization's lawyer concerning the matter." Smith does not supervise anyone, let alone lawyers, and did not know about this 5-year old litigation until Mr. Miller informed him about it. Similarly, Smith does not have any "authority to obligate the organization *with respect to the matter*." Smith has limited authority to negotiate contracts executed by higher-

[25] *Palmer*, 59 P.3d at 1247-48; *accord. Restatement (Third) of the Law Governing Lawyers* § 100 comment e (noting that employees who have the power to make binding evidentiary admissions are "analogous to ... person[s] who possess[] power to settle a dispute on behalf of the organization"). After reviewing the Nevada court's decision, the Ninth Circuit vacated the District Court's sanctions and ordered a new trial on the merits. 338 F.3d at 989. The court noted that an evidentiary admission is qualitatively far less significant than a judicial admission, since a judicial admission is conclusive while an evidentiary admission can be challenged "through impeachment of the witness, by presenting contradictory evidence, or by explaining the admission."

level employees, but Smith cannot settle this matter for the Government. Last, the Pueblo seriously doubts Smith's "act or omission *in connection with the matter* may be imputed to the [IHS] for purposes of civil or criminal liability."[26]

Similarly, applying *Wright v. Wright* Smith is not "in a position to bind" the Government to judicial admissions. Any "ill-considered statements or admissions"[27] Smith might make would be, at most, evidentiary admissions that could be challenged, explained or contradicted by the Government's counsel and other witnesses.[28] Smith is at the bottom of the organizational chart. He is not "ultimately responsible for managing the [Government's] operations," nor is he the Government's "alter ego - - [who] can speak and act for the [Government] and can settle controversies on its behalf." *Wright by Wright,* 691 P.2d at 569.

Smith, like other similarly situated Government employees, is simply a fact witness, and under either 2002 Comment [7] or *Wright by Wright,* Smith and other similar employees are accessible to the Pueblo's counsel. The two-minute contact that prompted the cross-motions was entirely proper. There is simply no basis on this record to restrict the Pueblo's counsel from informal, direct contact with Smith or other similar Government employees (whether at their initiative or at counsel's).[29] Such informal discovery is widely recognized as one of the most cost-

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[26] Patrick Smith Deposition, at 31-32, Exh. 16. It does not appear that Smith has ever acted "in connection with [this] matter."

[27] Opposition at 8, *quoting, In re Air Crash Disaster*, 909 F. Supp. at 1121.

[28] *Palmer*, 59 P.3d at 1241("the comments to the ABA Model Rules were not adopted by this court, but can be consulted for guidance").

[29] *Turnbull v. Topeka State Hospital*, 185 F.R.D. 645 (D. Kansas 1999).

effective and efficient means of gathering evidence.[30] New Mexico Rule 16-402, both on its face and properly interpreted, allows the Pueblo to utilize this method of discovering facts.

To avoid future misunderstandings, the Pueblo requests that the Court direct Defendants to identify those officials who have "managerial responsibility" within the meaning of New Mexico Rule 16-402, ABA Comment [7] and the *Wright by Wright* test: current officials who have authority to make binding judicial admissions for the Government, in depositions or at trial; who actively supervise Government counsel; or who possess settlement authority for the Government. The Government should provide sufficient information to permit the Pueblo and, if required, the Court, to determine whether the Government's "managerial" designations are correct.[31]

The Government argues that this approach is "lavish and impractical," noting, *non sequitur*, that the United States "likely employ[s] thousands, if not hundreds of thousands, of different positions [sic] and employees, most of whom it is unlikely that Plaintiff has an interest in contacting." Instead, the Government proposes that the Pueblo "provide a list of only those party employees of Defendants whom they have [sic] or will directly contact." Opp. at 15. The Government's proposal that the Pueblo submit a list of those employees who it believes may be properly contacted makes no sense. As the Government points out, there are "thousands, if not hundreds of thousands" of Government employees. While the subset of "all" IHS and DCA

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[30] *Niesig v. Team I*, 558 N.E.2d 1030, 1034 (N.Y. 1990) (direct interviews with employee witnesses provides "informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes.").

[31] *Metrahealth Insurance Co. v. Anclote Psychiatric Hosp.*, 961 F.Supp. 1580, 1584 (M.D. Fla 1997). (Rule 4.2 "requires a demonstration that the person exercised managerial responsibilities ... [the] bare contention that the person possessed a title that contained the word 'manager' is inadequate" to support a claim that the person has "managerial responsibility" for Rule 4.2 purposes.).

employees is undoubtedly much smaller than the group of "all" Government employees, there are still many hundreds. The Pueblo has no means of knowing which IHS and DCA employees may have information relevant to this matter.

The better approach — the only realistic approach — is for the Government to identify the much smaller group of top officials who fit within Rule 16-402's prohibitions on direct contact. That very small group, in the Pueblo's view, is comprised of (1) the IHS Division Directors covering certain IHS offices, (2) IHS Director Charles Grim and his immediate staff (subject to the Pueblo's First Amendment rights, as discussed in the Pueblo's Opposition to the Defendants' Cross-Motion.), and (3) parallel positions in the DCA.[32] Statements by these top officials may fairly be said to "bind" the Government in the same manner as an affirmative response to a request for admission under Civil Rule 26(f) or an admission in the Government's Answer.[33]

Respectfully submitted this 17th day of February 2006.

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & MIELKE, LLP

/s/ Lloyd B. Miller
By:____________________________________
Lloyd B. Miller
David C. Mielke
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[32] Exh. O, IHS Organizational Statement, 70 Fed. Reg. 60350 (Oct. 17, 2005). As a further accommodation to Defendants, the Pueblo has narrowed its proposed Order to eliminate various IHS offices whose functions have nothing to do with the matters at issue in this case. *See* Exh. P (Plaintiff's chart).

[33] *See also Chaffee v. Kraft General Foods, Inc.*, 886 F.Supp. 1164 (D.N.J.1995) (explaining the difference between a judicial admission, which is conclusively binding, and an evidentiary party admission, which may be challenged).

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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 Reply Memorandum Re: Motion for Protective Order (Witness Contact)(Dkt. No. 179)** to the following attorneys of record (or their co-counsel) for Defendants:

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/s/ Lindy O. Bockhorst

By:____
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