

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. CV 01-1046 WJ/WPL

UNITED STATES OF AMERICA; et al.,

Defendants.

**PLAINTIFF PUEBLO OF ZUNI'S RESPONSE TO
DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S
MEMORANDUM OPINION AND PROTECTIVE ORDER (Dkt. No. 279)**

Magistrate Judge Lynch's resolution of the parties' cross-motions for a protective order concerning contacts by counsel with an opposing party's employees is well reasoned and thoughtful. Mem. Op. and Prot. Order Re: Contact with Witnesses ("Mem. Op.") (Dkt. No. 247). The Defendants' objections are without merit.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Pueblo of Zuni filed a motion for a protective order following Defendants' instruction to Plaintiff's counsel that it might "take further action" if counsel had any "contact with its [Defendants'] employees regarding this litigation." Pl.'s Mem. in Supp. of Mot. for Prot. Order, Ex. A (Letter of Nov. 8, 2005, from R. Hines to L. Miller) (Dkt. No. 180). Defendants' letter and the ensuing motion practice were, as Magistrate Judge Lynch subsequently found, triggered by "three

brief telephone contacts between counsel and support staff for the Pueblo and Patrick Smith, a Senior Accountant at the Division of Cost Allocation [DCA] for the Department of Health and Human Services.” Mem. Op. at 1 (Dkt. No. 247). The contacts with Mr. Smith were made to determine if Mr. Smith was the appropriate individual at the DCA to depose on certain factual matters and, if so, to obtain his correct name, address and job title for the deposition notice.¹

While the contact with Smith was insignificant, Defendants’ blanket instruction against any contact about this litigation with any employee of DHHS, IHS or the United States raised the broader issue of how and under what conditions the Pueblo could ever conduct routine informal discovery in this case with the Defendants’ “thousands, if not hundreds of thousands of different positions and employees.” See Defs.’ Consol. Mem. in Supp. of Defs.’ Cross Mot. for Prot. Order and in Opp’n to Pl.’s Mot. for Prot. Order at 15 (Dkt. No. 188). Informal discovery is a critically important aspect of cost-effective case preparation, and particularly in matters involving large organizations direct interviews with lower-level employees are recognized as an essential component. Kaveney v. Murphy, 97 F. Supp. 2d 88, 95 (D. Mass. 2000) (“Formal discovery has consistently been recognized

¹ The Magistrate Judge did not adopt Defendants’ characterization of the contacts, which is repeated again in Defendants’ Objections to the Magistrate Judge’s Mem. Op. and Prot. Order (“Objections”) at 4–5 (Dkt. No. 279). As noted in Smith’s subsequent deposition (and contrary to Defendants’ assertions), during the roughly two to three minute telephone conversation at issue, first Plaintiff’s counsel identified himself and the litigation; Smith next identified himself; and then “we decided we better not have any more conversations [...]’ except through counsel.” Pl.’s Reply in Supp. of Mot. for Prot. Order at 2–4 (Dkt. No. 210) (discussing and quoting Dep. of Patrick Smith at 31–32). There was no discussion of substantive matters. Mr. Smith is not involved in the Government’s defense and, in fact, “really didn’t know about this particular case” at all. Id. at 3 (citing Smith Dep. at 31–32). The Pueblo’s counsel informed Smith 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. For a more detailed discussion of the facts and law as applied to Mr. Smith, see id. at 2–4, 9–11. See also Andrews v. Goodyear Tire & Rubber Co., 191 F.R.D. 59, 77–78 (D.N.J. 2000) (noting New Jersey version of Rule 4.2 prohibits only “substantive” ex parte communications with employee, not limited communications undertaken “for the sole purpose of ascertaining the fact of representation”) (emphasis in original).

as an inadequate substitute for the ‘opportunity to speak directly with potentially favorable witnesses’ . . .”) (quoting Siguel v. Trustees of Tufts Coll., No. CIV A.88-0626-Y, 1990 WL 29199, at *3 n.4 (D. Mass. Mar. 12, 1990) and citing IBM v. Edelstein, 526 F.2d 37, 41 n.4 (2d Cir. 1975) and Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990) (“Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information.”)); Morrison v. Brandeis Univ., 125 F.R.D. 14, 19 (D. Mass. 1989) (noting “the tendency which the presence of opposing counsel has to inhibit the free and open discussion which an attorney seeks to achieve at such interviews.”).²

Under New Mexico Rule of Professional Conduct 16-402, the Pueblo is expressly authorized to contact employees other than those few individuals having managerial responsibility for the agency. Specifically, Rule 16-402 states that “[e]xcept for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation” or other organizational defendant. Given Defendants’ contrary position, the Pueblo sought judicial guidance from Magistrate Judge Lynch. FED. R. CIV. P. 26(c); see Pl.’s Mot. for Prot. Order and related filings (Dkt. Nos. 179–182).

Defendants responded with a cross-motion seeking a blanket, agency-wide prohibition on all direct contacts. (Dkt. Nos. 188–189). To support this argument, Defendants avoided the directly

² See also Niesig, 558 N.E.2d at 1034 (direct interviews with employee witnesses provide “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. Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions.”).

controlling language of Rule 16-402, and instead relied on an outdated and non-binding “Comment” to the Rule. After extensive briefing, Magistrate Judge Lynch largely agreed with the Pueblo’s factual and legal analysis, “grant[ed] in part and denie[d] in part” the parties’ respective cross-motions, and entered a Protective Order which, fairly characterized, falls somewhere between the parties’ proposed orders. Mem. Op. at 1 (Dkt. No. 247).

Defendants do not seriously object to Magistrate Judge Lynch’s factual determinations, only to his interpretation of Rule 16-402 (Objections at 6–10 (Dkt. No. 279)), and its application in the Protective Order (id. at 10–16). The root problems with Defendants’ Objections are twofold. First, Magistrate Judge Lynch’s decision was correct as a matter of law; second, Defendants’ objections to how the Protective Order will be applied are premature, for Magistrate Judge Lynch deliberately chose not to apply the Protective Order to any specific employee in hopes that the parties could work out that issue. During a May 8, 2006 telephonic conference with counsel to discuss the Protective Order, Magistrate Judge Lynch directed the parties to work out an agreeable schedule for simultaneously briefing these very implementation issues. Thus, much of Defendants’ Objections is not directed to what was actually decided.

II. STANDARD OF REVIEW

Objections to a magistrate’s rulings on non-dispositive discovery matters are determined under the “clearly erroneous or contrary to law” standard of FED. R. CIV. P. 72(a). 28 U.S.C. § 636(b)(1)(A). “[T]he district court must defer to the magistrate judge’s ruling unless it is clearly erroneous or contrary to law.” Hutchinson v. Pfeil, 105 F.3d 562, 566 (10th Cir. 1997).

The “clearly erroneous” standard applicable to a magistrate’s discovery rulings “requires that

the reviewing court affirm unless it . . . is left with the definite and firm conviction that a mistake has been committed.” Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1464 (10th Cir. 1988) (internal quotation omitted). As Chief Magistrate Judge Garcia once pungently noted, “to be found clearly erroneous, a magistrate’s decision ‘. . . must strike us as more than just maybe or probably wrong; it must . . . strike us with the force of a five-week old, unrefrigerated dead fish.”” Ctr. for Biological Diversity v. Norton, 336 F. Supp. 2d 1155, 1158 (D. N.M. 2004) (quoting Parts & Elec. Motors, Inc. v. Sterling Elec. Inc., 866 F.2d 228, 233 (7th Cir. 1988)). Overall, the “clearly erroneous” standard “is intended to give the magistrate a free hand in managing discovery issues.” Harrington v. City of Albuquerque, No. CIV 01-0531 LH/WDSA, 2004 WL 1149494, at *1 (D. N.M. May 11, 2004) (quoting Ocelot Oil) (additional citations omitted).

III. ARGUMENT

Magistrate Judge Lynch properly applied Rule 16-402 to the situation presented here, and followed the leading cases on this subject when doing so. Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237, 1241 (Nev. 2002) (Palmer III) (decision upon certification of question from the Ninth Circuit),³ and Wright by Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984) (en banc). Defendants are simply wrong when they assert that the Magistrate Judge’s decision “relies on a state court decision in a different state and circuit, and creates a new standard, inconsistent with Tenth Circuit law.” Objections at 3 (Dkt. No. 279). To the contrary, the Memorandum Opinion and

³ See generally, Palmer v. Pioneer Inn Assocs., Ltd., 19 F. Supp. 2d 1157 (D. Nev. 1998) (Palmer I) (applying party opponent admission test); certifying question to Nevada Supreme Court, 257 F.3d 999, 1003 (9th Cir. 2001) (Palmer II); upon certification 59 P.3d 1237, 1248 (Nev. 2002) (per curiam) (Palmer III) (applying “managing-speaking agent test”); post-certification 338 F.3d 981, 987–988 (9th Cir. 2003) (Palmer IV) (reversing district court based upon “managing-speaking agent test”).

Protective Order closely follows the text of Rule 16-402, and applies the broadly accepted “managing-speaking agent test.” It is Defendants who, through both extraordinarily broad and unduly restrictive language in their proposed protective orders, seek to “create[] a new standard” in this area of the law.⁴

A. Magistrate Judge Lynch’s Protective Order Is Consistent With The Plain Meaning of New Mexico Rule of Professional Conduct 16-402

The central issue below was whether, and under what conditions, counsel may directly communicate with employees of the opposing party. Communications between counsel and an opposing party’s employees are subject to New Mexico Rule of Professional Conduct 16-402:

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.

(emphasis added).⁵

As Magistrate Judge Lynch noted, “[a]t first glance, New Mexico’s Rule of Professional Conduct 16-402 seems to provide an unequivocal answer to the issue raised in this case by allowing contact with employees who do not have a managerial responsibility on behalf of a party.” Mem.

⁴ See Pl.’s Memo. in Opp. to Cross-Mot. for Prot. Order at 3–16 (Dkt. No. 211) (responding to Defendants’ position). Defendants’ proposed protective order—rejected by Magistrate Judge Lynch—was extreme and, if entered, would have gone far beyond any reasonable regulation of direct contact with an opposing party’s employees. Id.

⁵ Quoted in Mem. Op. at 2 (Dkt. No. 247). D. N.M. LR-Civ. 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.” Defendants’ attorneys are required by 28 U.S.C. § 530B to comply with New Mexico Rule 16-402 when practicing in this District.

Op. 1–2. Rule 16-402 differs from the broader ABA Model Rule 4.2 by the addition of its second sentence: “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” The New Mexico language, unlike Model Rule 4.2, expressly authorizes counsel to contact employees other than top managers.

Although the language of the Rule would appear to end the analysis, Magistrate Judge Lynch recognized that a theoretical ambiguity arises from the Comment to Rule 16-402, which continues to repeat verbatim the now-repealed 1995 ABA Comment [4] to ABA Model Rule 4.2. Therein lies the heart of the dispute at bar. Defendants describe the “Comment” as “a prior version of an [ABA] comment that still is published as guidance to New Mexico Rule 16-402,” Objections at 2 (Dkt. No. 279), and urge it be followed despite inconsistency with the plain language of the Rule.

The now-repealed 1995 ABA Comment [4] and the ‘still published’ New Mexico Comment both read as follows:

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.

Palmer I, 59 P.3d at 1241 (emphasis by Nevada court) (quoting MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. [4] (1995)). See also N.M. RULES OF PROF’L CONDUCT R. 16-402 cmt. (same but substituting “one party” for “another person or entity”).

Magistrate Judge Lynch correctly discerned that “[t]he Comment [to Rule 16-402] seems to

have been written in support of another rule, one that is much broader in scope than Rule 16-402.” Mem. Op. at 2 (Dkt. No. 247). The 1995 ABA Comment [4], although ‘still published’ in New Mexico, does not fit New Mexico Rule 16-402. The Comment was drafted to explain ABA Model Rule 4.2, which does not contain the second sentence in Rule 16-402. The text of the ABA Comment is thus at odds with the New Mexico Rule. In this situation, the Rule, and not the Comment, must control, for the New Mexico Comments are only “intended as guides to interpretation, but the text of each rule is authoritative.”⁶

Magistrate Judge Lynch correctly rejected the 1995 ABA Comment [4]. Indeed, it is widely recognized that the now-repealed ABA Comment was poorly drafted to begin with and, as a consequence, caused considerable confusion when applied. Some courts—including the Tenth Circuit—read the Comment as extending the prohibition on witness contacts to any employee whose act or statement could constitute an admission against interest under FED. R. EVID. 801(d)(2)(D) (commonly termed the “party-opponent admission test,” see Palmer III, 59 P.3d at 1243 & n.25). Weeks v. Indep. Sch. Dist. No. I-89, 230 F.3d 1201, 1208–09 (10th Cir. 2000) (interpreting Oklahoma law, and construing Oklahoma’s Rule 4.2 (which does not include the last sentence of New Mexico’s Rule 16-402)), cert. denied sub nom. Barringer v. Indep. Sch. Dist. No. I-89, 532 U.S. 1020 (2001).

As they did below, Defendants rely on Weeks, as well as In re Air Crash Disaster, 909 F.

⁶ N.M. RULES OF PROF’L CONDUCT, “Scope.” Cf. Palmer IV, 338 F.3d at 987 n.4 (interpreting similar language in Nevada Rules) (“According to Nevada Supreme Court Rule 150(2), the commentary does not bind the court but may be ‘consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct’”) and quoting Palmer III, 59 P.3d at 1242 (“the former comment was never binding on Nevada lawyers, and so retroactivity is not a concern.”).

Supp. 1116 (N.D. Ill. 1995) (applying Illinois’s Rule 4.2), and several other pre-2002 cases that all followed the 1995 ABA Comment [4]. *E.g.*, Objections at 8–12 (Dkt. No. 279). But they overlook that neither the Oklahoma rule applied in Weeks nor the Illinois rule applied in In re Air Crash has the second sentence that appears in New Mexico Rule 16-402: “Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees” Given that this controlling language is the crux of the motions at bar, the relevance of Weeks and In re Air Crash is, at best, remote.

B. Any Non-Binding Persuasive Effect of Weeks Has Further Been Diminished By Subsequent Events

Critically, in 2002—following Weeks, In re Air Crash, and the other cases cited by Defendants—the ABA itself repudiated Comment [4]. The ABA did so specifically because Comment [4] had been misinterpreted by many courts—including specifically the Tenth Circuit in Weeks (addressing Oklahoma’s identical Comment)—to require application of the “party-opponent admission test” (or “scope-of-employment” test, *see Weeks*, 230 F.3d at 1214–1215 (Briscoe, J. concurring)), under which counsel are prohibited from directly contacting any employee whose testimony could merely be admissible against his or her employer as a statement against interest under FED. R. EVID. 801(d)(2)(D).

The ABA Commission on Evaluation of the Rules of Professional Conduct reviewed Comment [4] and concluded that “the original formulation was ‘broad and open ended,’ noting that it had been read to prohibit communication with anyone whose testimony would be admissible

against the organization under an exception to the hearsay rule.”⁷ As a later court noted, the

Comment was never meant to be read in such a broad manner:

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 admissible against the organization but could not thereafter be controverted by the organization.

Palmer III, 59 P.3d at 1241 (citing Model Rule 4.2 - Reporter’s Explanation of Changes (ABA, Feb. 21, 2000)). The ABA attempted to correct these misunderstandings when it revised Comment [4], now redesignated Comment [7]:

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.

MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. [7] (2002). This approach is commonly referred to as the “managing-speaking agent test,” and it is intended to displace the “party-opponent admission test.” Palmer III, 59 P.3d at 1241–1242 (discussing 2002 change) & 1248 (discussing similarity between Comment [7] and the “alter ego” test adopted in Niesig, 558 N.E.2d at 1035).

Magistrate Judge Lynch recognized this evolution, noting –

The problem with the application of the party-opponent admission test to an organization is that it is too broad: “[I]t essentially covers all or almost all employees, since any employee could make statements concerning a matter within the scope of his or her employment, and thus could potentially be included within the rule.”

⁷ ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 425 (5th ed. 2003) (emphasis added) (quoting ABA Report to the House of Delegates, No. 401 (Feb. 2002), Model Rule 4.2, Reporter’s Observations, at [6], and citing Weeks as an example of a court that had misunderstood Comment [4]).

Mem. Op. at 3–4 (quoting Palmer III, 59 P.3d at 1243) (Dkt. No. 247). Magistrate Judge Lynch accurately characterized the Weeks “party-opponent admission” (or “scope-of-employment”) approach (which Defendants advance once again here) to be a “blanket” test, as it effectively places a nearly complete or “blanket” prohibition on direct contact with an opposing party’s employees. Id. at 3–4 (quoting In Re Air Crash, 909 F. Supp. at 1121 (“Under FED. R. EVID. 801(d)(2)(D), virtually every employee may conceivably make admissions binding on his or her employer.”)). See also Palmer III, 59 P.3d at 1242 (“At one extreme is the ‘blanket’ test, which prohibits contact with current and former employees of an organizational client.*** The blanket test prohibits all contact, and appears to have been adopted in very few published decisions.) & 1243 (“The [party-opponent admission] test based on the hearsay rule appears to encompass almost as many employees as the blanket test . . .”).

The “blanket test” is squarely at odds with the plain and expressly permissive language of New Mexico Rule 16-402 (“an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity”) (emphasis added). Under the New Mexico Rule, the only communications that must go through counsel are those with “persons having a managerial responsibility on behalf of the organization.” Id. (emphasis added).

C. Magistrate Judge Lynch’s Analysis Is Consistent With Modern Case Law

Magistrate Judge Lynch carefully reviewed the old and new ABA Comments—both of which he fairly described as “hardly models of clarity,” Mem. Op. at 4, and he examined the Nevada Supreme Court’s ruling in Palmer III, together with the Washington Supreme Court’s decision in Wright by Wright. Magistrate Judge Lynch rejected Defendants’ “blanket test” in favor of the now

widely-accepted “managing-speaking agent test” as articulated by the Nevada and Washington courts:

I believe that the managing speaking agent test precludes ex parte contact with employees of the organization who have authority to bind the organization with his or her statement. “[A]n employee does not ‘speak for’ the organization simply because his or her statement may be admissible as a party-opponent admission.” Palmer, 59 P.3d at 1248. This interpretation of Rule 16-402 is consistent both with the language of the Rule and the purpose behind the Rule, which is to protect the attorney-client relationship, but not to protect an organization from the discovery of adverse facts. *Id.*

Mem. Op. at 4 (emphasis added) (Dkt. No 247).⁸

While the Rule does not define the phrase “managerial responsibility”—nor do the New Mexico cases⁹—authority from other jurisdictions gives guidance. The managing-speaking agent rule

⁸ Defendants argue that Magistrate Judge Lynch’s Protective Order does not expressly embrace all parts of ABA Comment [7]. Objections at 8–9 (Dkt. No. 279). But the issue presented here is not the meaning of Comment [7], but the meaning of Rule 16-402, and that Rule is perfectly clear on its face. Moreover, Defendants misinterpret the final phrase of Comment [7] (referring to a person “whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability”) as an endorsement of the old “party-opponent admission test” that Comment [7] was specifically designed to repudiate. Palmer III, 59 P.3d at 1241 (citing Model Rule 4.2 - Reporter’s Explanation of Changes (ABA, Feb. 21, 2000)). Here, Magistrate Judge Lynch correctly followed the Wright by Wright and Palmer approach to this issue. See Palmer III, 59 P.3d at 1249 (“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.”).

The Court’s Protective Order expressly includes as managers all persons “who have the authority to bind the organization with his or her statement (‘managing employees’).” Mem. Op. at 5 ¶ 1. This is a clearer formulation of the test than Comment [7]’s reference to persons “whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability,” but it has essentially the same meaning. It is also the only interpretation that conforms with Rule 16-402. By contrast, Defendants’ formulation would reach those persons not only having authority “to bind” the organization (or whose statements are “imputed” to the organization because they have the authority to “speak for it”), but also to every person who merely possesses evidence that might be admitted against the organization. Rule 16-402 cannot reasonably be taken that far. Defendants’ suggestion would not only be at odds with the controlling New Mexico Rule; it would effectively nullify Comment [7] and restore repealed Comment [4].

⁹ The closest case on point, In re Herkenhoff, 866 P.2d 350 (N.M. 1993), involved the president and chief executive officer of the Bank of the Rio Grande, whose “managerial responsibility” was obvious. Id. at 352. The New Mexico Supreme Court also applied Rule 16-402 in State ex rel. Children, Youth & Families Dep’t v. George F., 964 P.2d 158 (N.M. Ct. App. 1998), which dealt with direct contacts between an attorney serving as a guardian ad litem and state social workers, and turned on New Mexico’s law on guardians ad litem. Both this Court and the New Mexico Supreme Court condemned direct contacts by a prosecutor with a represented individual defendant in a criminal matter.

was summarized well by the Washington Supreme Court sitting en banc in the leading case of

Wright by Wright v. Group Health Cooperative Hospital:

We hold current Group Health employees should be considered “parties” for the purposes of the disciplinary rule if, under applicable Washington law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation. Since former employees cannot possibly speak for the corporation, we hold that [the no-contact rule] does not apply to them.¹⁰

It remains for Magistrate Judge Lynch to apply this test to specific individuals, a task Judge Lynch reserved for further briefing by the parties. (The Pueblo believes that applying Rule 16-402 as written to the precipitating event here confirms that the Pueblo’s inconsequential and non-substantive contact with Mr. Smith was entirely proper. Mr. Smith is not an agency manager and has no authority to bind Defendants in this matter.¹¹)

In re John Doe, Esq., 801 F. Supp. 478 (D. N.M. 1992), appeal after remand sub nom. In re Howes, 940 P.2d 159 (N.M. 1997) (per curiam) (Assistant United States Attorney censured for direct contact with represented defendant).

¹⁰ 691 P.2d 564, 569 (emphasis in original) (interpreting former Washington Code of Professional Responsibility DR 7-104(A)(1)). Washington has since adopted ABA Model Rule 4.2. See WASH. RULES OF PROF’L CONDUCT R. 4.2 (“Communication with Person Represented by Counsel”). See also Palmer IV, 338 F.3d at 987 (discussing Palmer III and noting that “[u]nder the managing-speaking test, ex parte interviews are barred for employees holding managerial positions giving them the authority to speak for and bind the corporation.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 cmt. e (2000) (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.”). The “managing-speaking agent test” bars direct communications with individuals who are in a position to make judicial admissions against interest, i.e., admissions that will bind the organization as a legal matter, and does not simply “prohibit communication with anyone whose testimony would be admissible against the organization under an exception to the hearsay rule.” ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 425 (5th ed. 2003). See also Palmer III, 59 P.3d at 1244 & n.31 (discussing same).

¹¹ Although Defendants persist in arguing that Mr. Smith is a “represented party,” e.g., Objections at 4 (Dkt. No. 279), in point of fact he is not a manager at all and does not have any authority to bind the Government or make “judicial admissions” in this action. Mr. Smith is at the bottom of the DCA organizational chart; he does not supervise any employees; and (as Defendants nowhere dispute) he does not hold authority to make “judicial admissions” or otherwise to bind the Government in this action. See Pl.’s Mem. in Supp. of Mot. for Prot. Order at 10 n.23 (Dkt. No. 180); Pl.’s Reply in Supp. of Mot. for Prot. Order at 2–3, 9–11 & Ex. O (IHS Organizational Statement, published at 70 Fed. Reg. 60350 (Oct. 17, 2005)) (Dkt. No. 179). See also supra at 2 n.1 (discussing Mr. Smith).

Defendants roundly disparage Magistrate Judge Lynch’s analysis. Objections at 3 (“relies on a state court decision in a different state and circuit”), 9 (“fail[s] to identify any legal basis” and “selectively chooses certain language”), 10 (“mixing the language of different tests”), & 16 (“is simply wrong”) (Dkt. No. 279). These characterizations are unfair. Magistrate Judge Lynch undertook a careful analysis of the issue following extensive briefing. His reliance on the Nevada Supreme Court’s exhaustive analysis in Palmer III for guidance was entirely appropriate, for Palmer III responded to a certified question from the Ninth Circuit with a comprehensive review of the cases, concepts and recent trends in the pertinent law. The Ninth Circuit later observed that:

the [Palmer III] court reviewed the various tests for determining which employees fell within the scope of the rule and rejected, among others, the party-opponent admission test relied upon by the district court below. The opinion provides a thoughtful and extensive survey of the various tests and the competing policy considerations.

Palmer IV, 338 F.3d at 987 (citation omitted). Magistrate Judge Lynch did not err in looking to the Palmer cases for guidance.

Magistrate Judge Lynch also correctly rejected Weeks as controlling here, notwithstanding Defendants’ continuing reliance on that case. First, although decided by the Tenth Circuit, Weeks is not controlling because it interpreted Oklahoma law, not New Mexico law—and in particular because it interpreted Oklahoma’s Rule 4.2 analogue which, like ABA Model Rule 4.2, omits any provision similar to the second sentence of New Mexico Rule 16-402.

Second, Weeks was decided before the ABA revised 1995 Comment [4]. In point of fact, Weeks is often cited as a prime example of a court that had misunderstood the 1995 Comment [4] and had therefore misapplied Rule 4.2. Supra at 9–10. Thus, even as to Oklahoma legal practice

Weeks' continuing vitality is doubtful. The law has moved on, and there is no reason for this Court to adhere to an outdated interpretation of Model Rule 4.2 in a case involving a different state and controlled by a different rule.

Third, in the District of Montana the Government recently—and successfully—argued the reverse of its position here. In United States v. W.R. Grace, Inc., 401 F. Supp. 2d 1065 (D. Mont. 2005), the Government argued that direct witness contacts with former employees were permitted under Montana's analog to Model Rule 4.2. The Government specifically argued that, when considering Rule 4.2, the court should look to the 2002 ABA Comment [7], and not to 1995 Comment [4]. 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” (401 F. Supp. 2d at 1068):

The Court agrees with the reasoning set forth in Wright and Frey [v. Department of Health and Human Services, 106 F.R.D. 32 (E.D.N.Y. 1985)] and concludes that plaintiff's ex parte conduct 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.

Id. at 1067.

The prevailing current view—as the Government asserted in Montana in W.R. Grace, as the Nevada Supreme Court held in Palmer III, as the Ninth Circuit concurred in Palmer IV, and as Magistrate Judge Lynch found persuasive here—is that ABA Model Rule 4.2 implicitly prevents direct contact only with top managers: i.e., an individual “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.”¹² That is the only fair and reasonable course that is consistent with modern discovery principles.

D. Defendants’ Remaining Objections Are Without Merit

Defendants have lodged four additional objections to the Magistrate Judge’s Memorandum Opinion and Protective Order. These are discussed seriatim.

1. Identification of “managing-speaking agent” employees. Defendants object that the Protective Order does not provide any “mechanism” to identify which of Defendants’ employees may be contacted directly by the Pueblo’s counsel. Objections at 10–12 (Dkt. No. 279). As an initial matter, Magistrate Judge Lynch advised the parties at a follow-on May 8, 2006 telephonic status conference that, in light of the parties’ continuing disagreements, Magistrate Judge Lynch intends to issue a further order on this very subject following simultaneous briefing. Thus, Defendants’ objection is premature.

Further, Defendants err in pressing for a rule under which the Pueblo’s counsel would be required to “provide to Defendants’ counsel as comprehensive a list as possible of the names of all party employees of Defendants with whom Plaintiff’s counsel already have communicated or intend to communicate directly, without the actual presence of Defendants’ counsel, regarding the subject matter of this litigation.” Objections at 11 n.6 (Dkt. No. 279). For support, Defendants rely on three cases pre-dating the ABA’s rescission of Comment [4]: In re Air Crash, 909 F. Supp. at 1122; McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 113 (M.D.N.C. 1993); and Univ. Patents Inc. v.

¹² ABA, ANNOTATED MODEL RULES OF PROF’L CONDUCT 418 (2003) (Model Rule 4.2, cmt. [7]).

Kligman, 737 F. Supp. 325, 329 (E.D. Pa. 1990). Objections at 11–12 (Dkt. No. 279).¹³

This approach is backwards. Defendants acknowledge that the Department has “a multitude” of employees. Objections at 12 (Dkt. No. 279). See also Defs.’ Consol. Mem. in Supp. of Defs.’ Cross Mot. for Prot. Order and in Opp. to Pl. Mot. for Prot. Order at 15 (noting Defendants include the United States and employ “thousands, if not hundreds of thousands of different positions and employees”) (Dkt. No. 188). Under Rule 16-402 and the managing-speaking agent test, the Pueblo’s counsel are expressly authorized to communicate directly with any of this “multitude” of employees about the facts of this matter, provided those employees are not in a position to make binding judicial admissions for the Department. The few employees who may not be directly contacted are the agency’s managers and top officials, “analogous to . . . person[s] who possess[] power to settle a dispute on behalf of the organization”:¹⁴

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.

Wright by Wright, 691 P.2d at 570 (alteration in original).

The Pueblo proposed to Magistrate Judge Lynch that Defendants identify the limited officials

¹³ None of the cases applies here. In re Air Crash applied the discredited “party-opponent admission test” to direct contacts with an opposing party’s employees, based on Illinois’s Model Rule 4.2 analog which does not include the second sentence of New Mexico’s Rule 16-402. 909 F. Supp. at 1122. McCallum similarly applied North Carolina’s version of Model Rule 4.2, and Kligman applied Pennsylvania’s version, neither of which includes the second sentence of Rule 16-402. 149 F.R.D. at 112; 737 F. Supp. at 327 (respectively). All three cases pre-date the ABA’s repeal of Comment [4]. The Department of Justice’s own Chief Administrative Hearing Officer described McCallum as “neither controlling nor, on this point, persuasive,” Avila v. Select Temps., Inc., No. 01B00050, 2002 WL 1752382, 9 OCAHO 1079, at *6 (June 5, 2002) (DOJ Office of Chief Administrative Hearing Officer) (construing California’s unique version of Model Rule 4.2).

¹⁴ R ESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §100 cmt. e (2000).

who they contend have “managing-speaking agent” authority and thus fall into this narrow group. Pl.’s Reply in Supp. of Prot. Order at 11 (Dkt. No. 210). There are surely no more than a handful of these officials, and Defendants must know exactly who they are. Indeed, while this matter was pending before Magistrate Judge Lynch, and without waiting for the decision, Defendants admit that IHS sent to “a limited set of IHS employees (individuals that we likely would contend were represented parties) that they should not discuss matters in litigation with tribal attorneys.” Ex. 1 (attached) (e-mail of May 8, 2006 from R. Hines to L. Miller).

Within the Department of Health and Human Services, that very small group is, in the Pueblo’s view, comprised at most of (1) the Secretary and all Departmental officials subject to Senate confirmation; (2) IHS Director Grim and possibly his immediate professional staff; (3) possibly the IHS Division Directors; and (4) possibly parallel positions in the Division of Cost Allocation.¹⁵ Statements by these top officials may fairly be said to “bind” and be “imputed to” Defendants in the same manner as either an affirmative response to a request for an admission under Civil Rule 26(f) or an admission in Defendants’ Answer. Wright by Wright, 691 P.2d at 569. If Defendants promptly and correctly identify these individuals, Magistrate Judge Lynch will readily be able to resolve any ambiguity in the permissible scope of direct contacts.

The Defendants resist the straightforward approach, which their own conduct shows is simple and practical. Instead, they propose a guessing game in which the Pueblo must speculate in advance whom it might wish to contact or interview informally, and Defendants will then decide whether to

¹⁵ Pl.’s Reply in Supp. of Mot. for Prot. Order, Exh. O (IHS Organizational Statement) (Dkt. No. 210).

assert a Rule 16-402 bar. Thus, Defendants seek an Order where within ten days of the Order's issuance the Pueblo must produce a list of the employees whom the Pueblo may, at some future point in the litigation, elect to contact—whether to track down a correct name, to identify a potential deponent, or for any other permitted purpose. Objections at 12 (Dkt. No. 279). Although every defendant would prefer the opportunity to know in advance about his opponents' informal discovery efforts, Rule 16-402 does not confer upon a party that advantage—an advantage that would quickly lead to chilling employees from having any contact with opposing counsel. Moreover, an “interpretation that would require the approaching attorney to first alert his adversary of his plan to contact the potential witness, via notice to the court or notice directly to the adversary” would “eviscerate[]” the whole point of permitting contact with non-represented employees. Goodyear, 191 F.R.D. at 78.

Informal discovery is supposed to be just that, a cost-effective and time efficient means of adducing the basic facts needed for case preparation, and it is effective precisely because it is spontaneous. It would be impossible for the Pueblo to predict in advance whom it may seek to contact on such factual issues during the life of this case (nor could the Pueblo predict the employees who may initiate contact). In any event, Magistrate Judge Lynch has already informed the parties orally that he will issue an Order on this very point, following full briefing. The orderly administration of this case counsels in favor of permitting Magistrate Judge Lynch to conclude the detailed process he has begun with his initial Protective Order.

2. “Unilateral Interpretation of Terms.” Defendants' second objection is not an objection at all, but rather a complaint that the Pueblo has not complied with the Magistrate's Protective Order

regarding the identification of prior contacts. The Pueblo respectfully disagrees. To be clear, the Pueblo’s counsel has not had any undisclosed contacts about this matter with Defendants’s management cohort (described in paragraph 6 of Magistrate Judge Lynch’s Protective Order as “party employees of Defendants”). Mem. Op. at 7 (Dkt. No. 247). Contrary to Defendants’s evident suspicions, counsel have not collected statements and interviews with Defendants’ employees. When the dispute over the brief contact with Mr. Smith arose, the Pueblo promptly sought judicial guidance and did not initiate (or receive) any further contacts with Defendants’ employees about this matter.

The Pueblo has followed paragraph 6 of the Protective Order to the letter. If Defendants believe otherwise—and Defendants’ Objections represent the first time Defendants have raised the issue of the Pueblo’s compliance with paragraph 6—then the course is clear: if concurrence cannot be reached after conferring with counsel under Local Rule 7.4, Defendants are free to raise their concerns with Magistrate Judge Lynch by appropriate motion, precisely as contemplated by paragraph 8 of the Protective Order and FED. R. CIV. P. 37(b). But Plaintiff’s alleged non-compliance with the Protective Order is not an “objection” to the Magistrate Judge’s Order cognizable under Rule 72(a).¹⁶

3. “Initiation of Contact.” Defendants next object that paragraph 6 of Magistrate Judge Lynch’s Protective Order does not specifically state that direct contacts with managerial employees

¹⁶ In a similar vein (Objections at 4–5), Defendants continue to protest too much about what Magistrate Judge Lynch correctly found, based upon his assessment of the affidavit proof and deposition testimony, to be but “three brief telephone conference contacts.” Mem. Op. at 1 (Dkt. No. 247). Again, if Defendants intend to ask the Court for some relief associated with those past contacts, then before lodging an “Objection” with this Court Defendants should first request relief from Magistrate Judge Lynch. This they have never done.

are not allowed regardless of who initiates the contact. Defendants contend that the Order should so specify because the Pueblo “attempted to draw a distinction between ex parte communications initiated by Plaintiff’s counsel and those initiated by Defendants’ employees.” Objections at 15 (Dkt. No. 279).

The Defendants misunderstand the Pueblo’s argument. The Pueblo agrees there is no distinction under Rule 16-402 based on who initiates a contact. The Pueblo’s only point was that the Pueblo’s counsel could never predict in advance which of the hundreds of thousands of the Defendants’ employees might choose to contact the Pueblo or its counsel about this matter at some point during the life of this complex case, and it would be impractical to place upon the Pueblo the burden to guess whether that employee is a managing-speaking agent.

4. “Blanket Prohibition.” The Defendants’ final objection is that the Magistrate Judge’s decision is “simply wrong” by characterizing the “party-opponent admission” or “evidentiary admission” test advanced by Defendants as a “‘blanket’ test, which prohibits all contact with current and former employees of an organizational client.” Objections at 16 (quoting Mem. Op. at 3) (Dkt. No. 279).

With respect, on this point it is Defendants that are “simply wrong.” Not only does Magistrate Judge Lynch’s decision accurately cite Defendants’ brief, see Mem. Op. at 3 (Dkt. No. 247) (“Defendants in essence urge adoption of [the ‘blanket’] test, asserting that the more prudent course of action for the Pueblo is to forego ex parte contacts with Defendants’ employees and simply take their depositions [Dkt. No. 187 at 21]”); it accurately characterizes Defendants’ test as a “blanket prohibition.” The Nevada Supreme Court in Palmer III described Defendants’ preferred

“party-opponent admission” test in precisely this manner, noting that it “essentially covers all or almost all employees, since any employee could make statements concerning a matter within the scope of his or her employment,” and would “effectively serve as a blanket [prohibition] test, thus frustrating the search for truth.” 59 P.3d at 1243–44.

IV. CONCLUSION

Magistrate Judge Lynch’s partial disposition of the parties’ cross-motions for a protective order addressing the appropriate rule to apply regarding counsel-employee contacts was correctly decided, and is neither “clearly erroneous [nor] contrary to law.” “[T]he district court must defer to the magistrate judge’s ruling unless it is clearly erroneous or contrary to law.” Hutchinson, 105 F.3d at 566. To the extent the parties cannot agree on remaining issues, further proceedings before the Magistrate will address (1) the parties’ competing positions regarding how best to identify Defendants’ management speakers, and (2) whether each party has acted in conformity with the Order and their related obligations. At this early stage in the litigation, it remains important to “give the magistrate a free hand in managing discovery issues.” Harrington, 2004 WL 1149494 at *1.

The Defendants’ objections should be overruled.

Respectfully submitted this 19th day of June 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of **PLAINTIFF PUEBLO OF ZUNI'S RESPONSE TO DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND PROTECTIVE ORDER (Dkt. No. 279)** to the following attorneys of record (or their co-counsel) this 20th day of June 2006:

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/s/ Lindy O. Bockhorst

By: _____
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