

**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.)
)
UNITED STATES OF AMERICA; *et al*)
)
Defendants.)
_____)

Case No. CIV 01-1046 WJ/WPL
Filed Electronically

MEMORANDUM IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER

Plaintiff Pueblo of Zuni respectfully moves the Court to enter the attached proposed *Protective Order Re: Contact With Government Witnesses* pursuant to Fed. R. of Civ. Proc. 26(c). The Government asserts that the Pueblo's counsel are barred from interviewing or otherwise contacting fact witnesses employed by the Government. The Government's counsel have threatened to take unspecified action against the Pueblo's counsel if direct contact is made with any additional Government employees.¹

The Government's position is incorrect and its threats are improper. Consent of opposing counsel is not required for the Pueblo's counsel to contact non-managerial Government employees.² Evidence in litigation involving corporations and governmental organizations frequently includes,

¹ Letter from Hines to Miller, November 8, 2005, Exh. A. *See also* Exhibits B through H (correspondence between Plaintiff's counsel and Government's counsel).

² New Mexico Rule of Professional Conduct 16-402; ABA Formal Ethics Opinion 95-396, at 14 - 15 (1995); *cf.*, Alabama Bar Ethics Op. 2003-03.

or is derived from, the testimony of the organization's present and past employees. Informal, direct contact with lower level employees by opposing counsel is widely recognized as one of the most cost-effective and efficient means of gathering evidence.³ This is recognized by New Mexico's Rule of Professional Conduct 16-402, made applicable to this action by District of New Mexico Local Rule 83.9:

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.**⁴

Under New Mexico RPC 16-402, the Pueblo's counsel are entitled to communicate directly with Government employees, including those of the Indian Health Service, on the subject of this matter, provided the employees are not "managerial" employees who are in a position to make

³ *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. Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions. . . . 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."), *citing, inter alia, IBM v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975).

⁴ New Mexico Rule of Professional Conduct 16-402 (emphasis added). 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."

binding judicial admissions for the IHS.⁵

The Pueblo therefore requests that a protective order be issued (1) preventing the Government from blocking such contacts by Plaintiff's counsel, (2) preventing the Government from instructing its employees not to cooperate with Plaintiff's counsel or otherwise inhibiting informal discovery, and (3) directing the Government to withdraw any existing instructions to its employees that conflict with the protective order.⁶

ARGUMENT

A. New Mexico Rule of Professional Conduct 16-402.

Quite likely because New Mexico RPC 16-402 is so clear, there is only one reported New Mexico Supreme Court case construing the rule in a matter involving contacts with organizational employees. *In the Matter of Herkenhoff* involved an attorney disciplined for a series of direct communications with the president of the Bank of the Rio Grande. The Bank's counsel had objected to plaintiff's counsel communicating directly with the Bank's president about a matter in litigation. The New Mexico court held that plaintiff's counsel's subsequent direct communication with the

⁵ This is referred to as "managing-speaking test." *See, discussion, infra* at 5-6; *see also Wright by Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984) (*en banc*) and *Weeks v. Independent School District No. I-89 of Oklahoma County, Oklahoma, Board of Education*, 230 F.3d 1202, 1209 (10th Cir. 2000) (applying the "managing-speaking agent test" under Oklahoma's Rule 4.2), *cert. denied sub nom Barringer v. Independent School District No. I-89 of Oklahoma County, Oklahoma, Board of Education*, 532 U.S. 1020 (2001).

⁶ *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).

Bank's president was improper:

. . . Arend is the president and chief executive officer of the Bank represented by [counsel James A.] Roggow since January 1991. As president and CEO, Arend clearly has managerial responsibility for the Bank and is a person protected by the prohibitions of Rule 16-402, which directs that in representing a client a lawyer may not communicate directly about the subject matter of the representation with a party the lawyer knows to be represented by another lawyer in that matter.⁷

In this matter, the Pueblo does not seek to communicate directly with the Indian Health Service's top managers. The Pueblo does, however, intend to conduct informal discovery by directly contacting other Indian Health Service and Government employees who have relevant factual knowledge. Under New Mexico RPC 16-402, this is entirely proper.

B. Scope of Authorized Direct Contact.

There is disagreement concerning which Government employees the Pueblo is authorized to contact directly under the Rule. The Government apparently believes that the Rule bars the Pueblo from contacting any employee with any knowledge of any underlying facts in this matter, regardless of the employee's position or involvement in this litigation.⁸ The Government's interpretation of the Rule is absurdly overbroad.

The New Mexico Rule excludes only "persons having managerial responsibility" from direct contact. While the Rule does not define that phrase – nor do the New Mexico cases⁹ – authority

⁷ *In the Matter of W. Eugene Herkenhoff*, 866 P.2d 350, 352 (N.M. 1993).

⁸ Exh. G, Letter from Hines to Miller, December 22, 2005 (enclosing draft Stipulation).

⁹ The closest case on point, *Herkenhoff*, *supra*, involved the president and chief executive officer of the Bank of the Rio Grande, whose "managerial responsibility" was obvious. *Herkenhoff*, *supra*, 866 P.2d at 352. The New Mexico Supreme Court also applied RPC 16-402 in *State of New*

from other jurisdictions gives guidance. New Mexico's RPC 16-402 is based on ABA Model Rule of Professional Conduct 4.2, which has been adopted, with local variations, by most state courts.¹⁰ The Model Rule differs from New Mexico's RPC 16-402 in that the New Mexico Rule expressly allows counsel to directly contact organizational employees other than top managers, while the Model Rule does not expressly so state:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.¹¹

Even without an express authorization to contact non-managerial employees, courts and commentators interpreting Model Rule 4.2 have rejected attempts by organizational counsel to block opposing counsel from interviewing employee witnesses.¹² The prevailing view is that Model Rule 4.2, like New Mexico Rule 16-402, only prevents direct contact with top managers: *i.e.*, an

Mexico, Children Youth and Families Dep't v. George F. and Frank F., Children, 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. *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).

¹⁰ *E.g. Palmer v. Pioneer Inn Assoc., Ltd.*, 59 P.3d 1237 (Nev. 2002).

¹¹ American Bar Association, Model Rule of Professional Conduct 4.2, "Communication with Person Represented by Counsel," *ABA Annotated Rules of Professional Conduct, 5th Edition* (Chicago: ABA Center for Professional Responsibility, 2003), at 417; *accord*, ABA Formal Ethics Opinion 95-136, *supra*, at 14-15.

¹² *Messing, Rudavsky & Weliky, P.C., v. President and Fellows of Harvard College*, 764 N.E.2d 825, 830 (M.A. 2002); *Long Island Savings Bank v. United States*, 63 Fed. Cl. 157 (Fed. Cl. 2004).

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.”¹³

The Model Rule approach is in harmony with the New Mexico Rule. It follows the “managing-speaking rule,” and bars direct contacts by counsel only with individuals who have sufficient managerial authority to make binding judicial admissions for the organization.¹⁴ The managing-speaking rule was succinctly summarized by the Washington Supreme Court in the leading case of *Wright by Wright v. Group Health Cooperative Hospital*:

¹³ *Comment [7]*, Model Rule 4.2, *ABA Annotated Rules of Professional Conduct, 5th Edition*, at 418. *Cf.*, ABA Committee on Ethics and Professional Responsibility, Formal Opinion 97-408, at 9 n. 14, *quoting*, Formal Opinion 95-396 at 15-16 (“the no-contact rule does not bar communications with all current employees of a represented government entity, but only with ‘persons having a managerial responsibility on behalf of the [government]’ in connection with the controverted matter, ‘plus 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.’ [...] If an employee cannot by statement, act or omission bind the organization with respect to the particular matter, then that employee may ethically be contacted by opposing counsel without the consent of in-house counsel.”) (interpreting former Rule 4.2 Comment [4]).

¹⁴ *Palmer v. Pioneer Inn Assoc., Ltd.*, 338 F.3d 981, 987 (9th Cir. 2003) *discussing* *Palmer v. Pioneer Inn Assoc., Ltd.*, 59 P.3d 1237 (Nev. 2002); *see, Palmer v. Pioneer Inn Assoc., Ltd.*, 257 F.3d 999 (9th Cir. 2001) (“[u]nder the managing-speaking test, *ex parte* interviews are barred for employees holding managerial positions giving them authority to speak for and bind the corporation.”); *Weeks*, 230 F.3d at 1209. *See also* *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”). It is important to note that the “managing-speaking 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.” *Annotation*, Model Rule 4.2, *ABA Annotated Rules of Professional Conduct, 5th Edition*, at 425 (emphasis added).

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.¹⁵

To avoid misunderstandings, the Pueblo requests that the Court direct the Government to identify its “managerial employees:” current employees that it concedes have authority to make binding judicial admissions for the Government, both in depositions and at trial; who actively supervise the Government’s counsel; and who have settlement authority in this matter for the Government. The Government should also be required to provide sufficient information (including job descriptions) that the Pueblo and, if required, the Court, can determine whether the Government’s “managerial” designations are correct.

C. Access to Evidence.

Next, the Pueblo notes that blocking opposing parties from gathering evidence is strongly disfavored. Not infrequently, and as is happening here, an organization’s counsel will attempt to invoke the no-contact rule to block access to the organization’s employees.¹⁶ This conflicts with the policies behind liberal discovery and with counsel’s ethical duties. ABA Model Rule 3.4(a) and its state law counterparts, including New Mexico’s RPC 16-304, provide that “A lawyer shall not:

¹⁵ *Wright by Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984) (*en banc*) (emphasis in original) (interpreting former Washington Code of Professional Responsibility DR 7-104(A)(1)). Washington has since adopted the 1985 version of Model Rule 4.2. See Washington R.P.C. 4.2 (“Communication with Person Represented by Counsel”).

¹⁶ F. Reid, “*Ethical Limitations on Investigating Employment Discrimination Claims: the Prohibition on Ex Parte Contact with a Defendant’s Employees*,” 24 U.C. Davis L. Rev. 1243, 1248-49 n. 25.

(a) unlawfully obstruct another party's access to evidence [...]."¹⁷

The self-serving desires of a corporation or government agency to limit access to its witnesses must be balanced against the legitimate interests of the opposing party in having a full, fair and unfettered opportunity to develop its evidence. This requires not only access to the evidence, but assurances that the witnesses will not be intimidated or discouraged from communicating with opposing counsel.¹⁸

In this matter, unfortunately, the Pueblo's counsel and representatives have been blocked in their efforts to conduct the informal discovery that New Mexico RPC 16-402 expressly permits. The Government insists that each and every Indian Health Service employee who may have any knowledge about contract support costs whatsoever is "managerial."¹⁹ The Pueblo is thus required to bring this motion to clarify its rights to contact fact witnesses, and to define the Government's concomitant obligation to allow access to those witnesses.

D. New Mexico Rule 16-403.

Alternately, the Government suggests that New Mexico Rule of Professional Conduct 16-403 requires the Pueblo's counsel to recite an intimidating "script" when contacting Government witnesses. The Government's proposed "script" is without a doubt designed to strongly discourage

¹⁷ *ABA Annotated Rules of Professional Conduct*, 5th Edition, at 347 ("*Fairness to Opposing Party and Counsel*").

¹⁸ *Long Island Savings Bank*, 63 Fed. Cl. at 161.

¹⁹ Exh. G, Letter from Hines to Miller, December 22, 2005.

its employees from speaking with the Pueblo's counsel.²⁰ New Mexico Rule 16-403, of course, does not require any such "script." Instead, the Rule provides only that:

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.²¹

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 Rule does not require that the Pueblo's counsel begin an interview with a lengthy, intimidating prologue. In some circumstances, courts have required that counsel make specific disclosures when contacting an opposing organization's fact witnesses. The courts also recognize, however, that the "script" approach proposed by the Government here is unworkable, is unnecessary when counsel make reasonable efforts to meet the Rule's requirements, and obstructs, rather than enhances, the search for discoverable evidence:

it is simply impractical to suggest, as Goodyear does, that every attorney, seeking to determine if a current employee of an organization is represented, is required to read in robot-like fashion from the same script. In fact, this Court believes such a requirement would seriously hinder an investigation by an attorney into the merits of a case. . . .²²

²⁰ *Id.*

²¹ 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.

²² *Andrews v. Goodyear Tire and Rubber Co., Inc.*, 191 F.R.D. 59, 80 (D.N.J., 2000); *Siguel v. Trustees of Tufts College*, 1990 WL 29199 (D.Mass., 1990); *cf. Shearson Lehman Bros., Inc. v.*

The Government's proffered "script" is almost guaranteed to prompt any federal employee who is contacted by the Pueblo's counsel to hang up the telephone immediately and hide under their desk, quivering in fear of saying a word. There is simply no basis to require a "script" of this nature. As the interview which prompted the parties' disagreement shows, the Pueblo's counsel has acted cautiously and properly at all times in contacting witnesses,²³ and the Pueblo expressly disavows any intent to inquire into attorney-client communications.²⁴

Of greater concern are the steps that the Government may take — or, for that matter, may have already taken — to discourage its employees from speaking with the Pueblo's counsel. It is axiomatic that, in ethics matters, a lawyer cannot do indirectly what he or she is precluded from doing directly.²⁵ The Pueblo's right to conduct informal discovery will be a dead letter if the Government is allowed to direct its employees to refuse to speak with the Pueblo's counsel, takes other similar steps to discourage its employees, and demands that all its employees report all contacts

Wasatch Bank, 139 F.R.D. 412 (D.Utah,1991) (former employees).

²³ The dispute at bar was prompted by the Pueblo's brief contact with Senior Accountant Patrick Smith at the Division of Cost Allocation. Mr. Smith's job description states that he is a "non-supervisory senior accountant," and his deposition testimony confirms that he has had no involvement whatsoever in this matter. Exh. I. Nonetheless, because his job requires contract negotiation, the Government claims he is a "managerial employee" and counsel's contact was improper. Exh. G, Letter from Hines to Miller, December 22, 2005. *But see, Andrews, supra.* (interview of employee fact witness not improper) and ABA Formal Ethics Opinion 95-636 (initial contact to determine if employee is "represented" under Rule 4.2 proper).

²⁴ Disclosure of attorney-client communications are, apparently, one of the Government's prime concerns. It is doubtful any "non-managerial" Government employees have had any contact with the Government's counsel that would cause this to be a *bona fide* issue.

²⁵ Model Rule 8.4(A); New Mexico Rule of Professional Conduct 16-804(A).

to Government counsel.²⁶

E. Relief Requested.

For the foregoing reasons the Pueblo requests that a protective order promptly be issued (1) preventing the Government from blocking such contacts by Plaintiff's counsel, (2) preventing the Government from instructing its employees not to cooperate with Plaintiff's counsel or otherwise inhibiting informal discovery, and (3) directing the Government to withdraw any existing instructions to its employees that conflict with the protective order. A proposed order has been lodged.

²⁶ *See, Andrews, supra*, at 81 (describing intimidation by corporate counsel of employee fact witness) (“This is not to suggest that Goodyear's lawyers did anything inappropriate or unethical, but it is quite possible that Guffey [the employee witness] could have become intimidated after speaking with Goodyear's attorneys. Conceivably, Guffey could have started to think he might lose his job. Whatever the reason, it is highly coincidental that, after Goodyear's counsel spoke with Guffey and Guffey was then deposed, Guffey's recollection of the pertinent conversation differed so drastically from what Bergenfield said happened.”)

Respectfully submitted this 27th day of December 2005.

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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 **MEMORANDUM IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER**, and proposed **PROTECTIVE ORDER RE: CONTACT WITH GOVERNMENT WITNESSES** to the following attorneys of record this 27th day of December 2005:

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