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# Navigating the Investigation Quagmire at Messing and Patriarca

Gerard J. Clark

*Suffolk University Law School*, [gclark@suffolk.edu](mailto:gclark@suffolk.edu)

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Navigating the Investigation Quagmire after Messing and Patriarca (2-6 -03 )  
(FINAL)

By Gerard J. Clark  
Professor of Law  
Suffolk Univ Law School  
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I. Introduction

In 2002, the Massachusetts Supreme Judicial Court has confronted the difficult and controversial question of the propriety of a lawyer's factual investigations into an institutional adversary on three separate occasions. In March, the Court issued its opinion in Messing, in June it revised Comment 2 to Rule 4.2 and in November it decided the Patriarca case. The answer to the questions presented on each of these occasions, ones presented to lawyers every day, are more than a narrow interpretation of Rule 4.2 of Massachusetts Rules of Professional Conduct ("MRPC")<sup>1</sup>, but broad statements both about how lawyers inform themselves about their clients' problems, and also about corporate privilege and accountability. The authorities and precedent are in disarray and the issue had been the subject of a decade-long controversy between the American Bar Association and the United States Department of Justice. The oral arguments in the two cases attracted overflow crowds, mostly of lawyers and the both cases generated

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numerous amici briefs.<sup>2</sup>

## II. The Three SJC Actions

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<sup>2</sup>Briefs in *Messing* were filed by the National Employment Lawyers Association, AFL-CIO, NAACP Legal Defense Fund, Mass. ACLU, Greater Boston Legal Services, Boston Area Management Attorneys, Teachers of Professional Responsibility, and Mass. Attorney General. At the behest of a motion by Harvard its brief and its record appendix were impounded pursuant to SJC Rule 1:15. In *Patriarca*, briefs were filed by the Associated Industries of Massachusetts, New England Legal Foundation, U.S. Attorney, and Mass. Academy of Trial Attorneys

Messing<sup>3</sup> was an appeal from an order of the Superior Court sanctioning the petitioner law firm (MR&W) for violations of Rule 4.2<sup>4</sup> and its predecessor. The law firm represented Kathleen Stanford, a sergeant on the Harvard University Police Force, in an administrative proceeding before the Massachusetts Commission Against Discrimination, where the claimant charged sex discrimination. MR&W investigated the plaintiff's claim by taking statements from five proposed witnesses who were members of the Police force, including two lieutenants. After the Commission ruled that this contact was improper, the case was removed to Superior Court where MR&W was sanctioned in the amount of \$94,419.14 representing an amount covering costs and attorney's fees of Harvard expended on the Harvard's motion for sanctions.

After ruling that the appeal of the superior court order for sanctions was a proper invocation of the Court's superintendence powers,<sup>5</sup> the SJC addressed the propriety of the attorneys' investigative actions. It cited Rule 4.2, which Massachusetts adopted verbatim from the American Bar Association (ABA) Model Rules of Professional Conduct in 1998. Rule 4.2 provides:

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<sup>3</sup> Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College 436 Mass. 347 (2002)

<sup>4</sup>Mass. R. Prof. C. 4.2 426 Mass. 1402 (1998)

<sup>5</sup>MGL c. 211 Sec. 3.

"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 by law to do so."<sup>6</sup>

While the Rule presents few interpretive difficulties when the client is an individual, organizational parties like Harvard University add complications. The Court turned to the comments to the Rules, which suggests that three groups of investigatees are covered by the organization's relationship with its counsel:<sup>7</sup> those having managerial responsibility over the

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<sup>6</sup>The Court also cited the predecessor rule Disciplinary Rule 7-104(A)(1) which provides: "During the course of his representation of a client a lawyer shall not: . . . Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." While noting that the only significant difference between the two was the substitution of the word "party" in 7-101 with the word "person" in 4.2. While acknowledging the expansiveness of the latter term, the Court treated them as equals.

<sup>7</sup> "According to comment [4] to rule 4.2, an attorney may not speak ex parte to three

subject matter of the controversy, those whose conduct may be imputed to the organization, and those whose statements may be an admission attributable to the organization.

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categories of employees: (1) "persons having managerial responsibility on behalf of the organization with regard to the subject of the representation"; (2) persons "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability"; and (3) persons "whose statement may constitute an admission on the part of the organization." n6 Mass. R. Prof. C. 4.2 comment [4], 426 Mass. 1403 (1998).

The definition of the last group has been read as a technical invocation of the admissions exception to the hearsay rule in the law of evidence,<sup>8</sup> which the Court noted is virtually limitless.<sup>9</sup> The Court adopted the rule of the leading case of Neisig which limits prohibited investigations to employees “who have the legal power to bind the corporation in the matter or who are responsible for the implementing the advice of the corporations lawyer or whose interests are directly at stake in a representation.”<sup>10</sup>

The Court summarized its new rule as prohibiting: ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have

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<sup>8</sup>See e.g. Fed R. Evid. 801 (d)(2)(D)

<sup>9</sup>Here the Court cites In re Air Crash Disaster near Roselawn, Ind., 909 F. Supp. 1116 (N.D Ill., 1995) (“virtually every employee”)

<sup>10</sup>Niesig v. Team I 76 N.Y.2d 363 (1990); compare Citing Johnson v. Cadillac Plastic Group, Inc. 930 F. Supp. 1437 (D, Colo. 1996) (limiting institutional admissions to members of the control group, which includes only “the “uppermost echelons of the organization’s management.”)

committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.”<sup>11</sup> Gone apparently is any reference to imputation or to the admissions rule in the rules of evidence.<sup>12</sup>

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<sup>11</sup>This result is substantially the same as the Niesig test because it "prohibit[s] direct communication ... 'with those officials ... who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer ... or whose own interests are directly at stake in a representation.'" Niesig v. Team I, supra at 374, 559 N.Y.S.2d 493, 558 N.E.2d 1030, quoting C. Wolfram, *Modern Legal Ethics* § **11.6**, at **613 (1986)**.

<sup>12</sup>But see discussion, *infra*.

Applying these tests to the officers interviewed in the case, the Rule 4.2 prohibitions do not apply: although two of those interviewed are lieutenants who supervised the plaintiff, they are not deemed to have ‘managerial’ responsibility in the sense intended by the comment.”<sup>13</sup>

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<sup>13</sup>At 361, citing Orlowski v. Dominick’s Finer foods, Inc. 937 F. upp. 723, 729 (E.D.Pa., 1995) This assertion is strange and explicitly at odds with the finding of the Superior Court. “Two of the five affiants, John Rooney ("Rooney") and Edward Sheridan ("Sheridan"), were lieutenants when M&R questioned them. Rooney had held the rank of lieutenant since 1990 and Sheridan since 1991. Both Rooney and Sheridan had significant managerial duties as a function

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of their rank. Each lieutenant in the HUPD was responsible for managing a division of officers, which included supervision and evaluation of sergeants under their command. Rooney and Sheridan both supervised Stanford by directing and evaluating her work performance.

HUPD has a hierarchical management structure with the Chief at the highest rank. Until the fall of 1996 when two captains were added to the managerial ranks, both lieutenants reported directly to the Chief. At the time M&R communicated with HUPD employees, lieutenants reported to captains who, in turn, reported to the Chief. The other three affiants were Officers Donahue and Morrison, and dispatcher Bonney Louison.” Memorandum and Order on Defendants’ Motion for an Evidentiary Hearing and Sanctions Signed by Superior Court Judge John C. Cratsley, Nov. 1, 2000. This order suppressed the offending statements, granted the motion for sanctions, namely the costs of bringing the motion and denied a motion to disqualify the offending law firm.

In a final footnote, the Superior Court noted, “ This court cannot help but note that the firm of Messing and Rudavsky, LLP, has been involved in two previous disciplinary matters arising out of its ex parte contact with an opposing parties employees in which the courts explicitly acknowledged the uncertainty of the rule's scope. See Bruce v. Silber, 1989 WL

The Court states that its rule protects the organization from improper contacts with employees while promoting access to relevant facts by allowing informal interviews to witnesses without judicial approval.<sup>14</sup>

In June the Court revised Comment 2 to Rule 4.2 to conform to and perhaps clarify

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206452 (D. Mass. 1989); *Hurley v. Modern Continental Construction Co.*, 1999 WL 95723 (D. Mass. 1999). This uncertainty alone, should have prompted M&R to seek judicial authorization prior to making ex parte contact.”

<sup>14</sup>The concurring opinion agrees that the fines imposed against counsel by the Superior Court were improper but disagrees with the majority’s interpretation of Rule 4.2. It is concerned about “significant implications” for defining “the parameters of the attorney-client relationship,” as well as for determining to what extent the statements of individuals “will be imputed” to organizations in legal proceedings.

the Messing opinion.<sup>15</sup> The new text limits the Rule’s prohibitions to “agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation.” The two most expansive concepts, admissions and imputation, are excluded.

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<sup>15</sup>437 Mass. 1301 (2002) see Paul R. Tremblay, The No-Contact Rule in Massachusetts Post Messing Boston Bar Journal, Sept/Oct, 2002 p. 10.

Patriarca<sup>16</sup> was a wrongful termination case brought by a registered nurse whose duties included assisting persons with permanent or chronic disabilities to live independently. She claimed that she was terminated because she resisted the suggestions of the Center's director that she participate in fraudulent billing. After interrogatories indicated that the plaintiff had spoken to a number of former employees of the defendant, defense counsel moved for a protective order. The Superior Court order barred plaintiff's counsel from "contacting any former employees of the defendant corporation on matters concerning their former employment and this litigation unless defense counsel is present or permission is granted from this court or opposing counsel." Defendant cited confidentiality agreements protecting the Defendant's practices from disclosure. The Court read Rule 4.2 narrowly. The threshold question was "whether a particular employee [was] actually represented by corporate counsel." It rejected any notion of "blanket representation" arising out of the simple fact of employment by an institution that is represented by counsel. Applying these principles to the four witnesses covered by the protective order the court found that three of the witnesses were essentially co-workers of the plaintiff. Although a fourth witness was a "central part of the center's management team, the Court found no evidence in the record that he was involved in the events giving rise to the litigation. The Court did not find it necessary to decide specifically if Rule 4.2 applies to former employees because it found that these particular employees would not have been covered even if they were still working for the defendant. The Court's final footnote cites extensive authority from other jurisdictions most of which suggest that Rule 4.2 would not apply to former employees.

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<sup>16</sup>Patriarca v. Center for Living & Working, Inc. 428 Mass. 132, 135 (2002)

### III. Rule 4.2

Massachusetts adopted its version of the Model Rules in 1998. Its Rule 4.2 is a verbatim adoption of the Model Rule. Massachusetts, however, added to the comments: paragraph 2 excludes from coverage investigations by government lawyers engaged in law enforcement; paragraph 3 extends coverage of the rule to non-litigants; paragraph 5 limits the rule to knowing violations; paragraph 6 cross-references Rule 4.3 for those unrepresented; and, paragraph 7 excludes investigations with the permission of the court. Paragraph 4, the focus of most of the Court's attention in Messing, was, with two exceptions,<sup>17</sup> a verbatim adoption of Model Rules Comment 2.

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<sup>17</sup>The Model Rule Comment 2 applies its prohibitions to lawyers representing "a party," whereas the Mass. adoption expands the reference to "person or entity." The Mass. Rule also limits the coverage of those exercising managerial responsibility, to such responsibility "with regard to the subject matter of the representation."

Since the investigations in *Messing* occurred before the adoption of the Model Rules, the Court also cited the Massachusetts predecessor DR 7-104(a), which, with one exception,<sup>18</sup> tracks Rule 4.2. The Rule advances the policy of protecting the integrity of attorney-client relationship.<sup>19</sup> It assumes that client contact with any outside lawyer will be deleterious to the relationship. The Rule as written appears to apply to an outside lawyer from whom the client might seek a second opinion.<sup>20</sup> Of course, most individuals do not have a lawyer on continuous retainer. Neither do small organizations. They hire lawyers on an as needed basis after the occurrence of an event which may demand counsel. Large organizations, the very rich and organized crime figures might have continuous relationships with lawyers whom they hire. Much

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<sup>18</sup>The Model Code applied only to “parties” whereas the Model Rule applies to “persons.” ABA Code of Professional Responsibility. The ABA has promulgated three model codes for lawyers since 1908: The Canons of Ethics in 1908, The Model Code of Professional Responsibility in 1969 and the Model Rules of Professional Conduct in 1983. All three are dominated by a model of the lawyer-client relationship that assumes an individual solo practitioner representing an individual client. Once the client becomes an institution whether a corporation, a partnership, an unincorporated association the subject gets murkier.

<sup>19</sup>The policy origins of the rule are unclear. The comment to the rule speaks merely to applications of the rule and to exceptions to its applicability. The Ethical Consideration to the predecessor of the Rule in the Code, EC 7-17 just restates the obligation and the Canons of Ethics speak only of a fear against misleading the party in question. While a possible rationale for the Rule is the protection the integrity of the adversary system, the Comment to Rule 4.2 makes clear that the Rule applies outside of the adversary system. The Rule is apparently intended to insulate the attorney client relationship from the outside interference of another lawyer. ABA Canons of Ethics, Canon 9. From a more skeptical perspective, the Rule protects, first, a lawyers economic relationship with a client improper competition or raiding; and, second, a lawyer’s opinions from being second-guessed by consultation with a competitor. See Gerard J. Clark, Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission’s Rules 17 *Suffolk L. Rev.* 79 (suggesting that much of professional self-regulation is motivated by lawyer self interest)

<sup>20</sup>The Rule is a prohibition on speech and acts as a prior restraint on speech. (Cite)As such it would have to serve a compelling governmental interest under Free Speech analysis.(cite) Indeed, the ACLU suggested that the Rule operated to violate freedom of association

of the case law interpreting Rule 4.2 make two assumptions which expand its coverage: first, that in-house or retained counsel's "representation" of the institutional entity comes into play with respect to any inquiry lodged at the entity that may have legal implications; and, second, the counsel for the entity, by virtue of that status, has an implied attorney-client relationship with countless agents, or other "constituents," who never consented to his or her representation. This unilateral and all-encompassing professional relationship implies the power of counsel to issue the no-contact letter, a unilateral alteration of the contract of employment, which, by virtue of the proscriptions of Rule 4.2, insulates them from casual investigations from lawyers and their agents, although not from others. While the agents or employees of an organizational principal owe fiduciary duties to the principal within their scope of the employment to advance and not undermine organizational goals, this duty should not include covering up violations of legal obligations imposed by law, whether criminal or civil.<sup>21</sup>

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<sup>21</sup> For instance, in the debacle surrounding the deregulation of the savings and loan industry, the Office of Thrift Supervision, which had a statutory right to access to the books of savings and loan institutions, was frustrated in its attempts to investigate and prevent the looting of Lincoln Savings and Loan's assets by its counsel, Kaye Scholer, which insisted that all requests for information from OTS to Lincoln Savings be funneled through Kaye.Scholer. This delay and atmosphere of contentiousness contributed to the loss of some \$3.4 billion which liabilities were then transferred to the American taxpayer. William H. Simon, The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology 23 *Law and Social Inquiry* 243, 248; compare the conclusions drawn in Keith Fisher, Neither

While the rule has the salutary effect of protecting against inaccuracies, inequalities of advantage, and deception between the lawyer-questioner and the unsuspecting witness, it has the effect of creating a generalized right for some individuals and institutions to be insulated from outside lawyer initiated investigations which might uncover facts that may impose liability on the witness interviewed , or on his or her principal.

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Evaders nor Apologists: A Reply to Professor Simon 23 Law and Social Inquiry 341 (1998)

Violations of Rule 4.2 bespeak of some kind of tortious interference with an agency relationship. The retention of the lawyer agent signals a notice to the world of lawyer investigators that subsequent inquiries should be made to the agent and not the principal. The lawyer-agent can now control access to the principal's information in an almost proprietary fashion. Counsel for institutions often issue no contact letters to employees.<sup>22</sup> Disloyal employees and whistle-blowers act at their jeopardy.<sup>23</sup>

#### IV. Representation of Institutions

Since the Rule often comes into play with medium to large organizations as in Messing, it seems fair to ask about the nature of that particular species of attorney-client relationships. The client may be a business entity like a corporation or a partnership, a non-profit like a university

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<sup>22</sup>Vega v. Bloomsburgh 427 F. Supp. 593 (D. Mass., 1977) (no contact letter violates the First Amendment)

<sup>23</sup>Indeed the First Circuit has held that non-assistance agreements wherein employees who settle discrimination claims are bound not to assist others with similar claims are unenforceable. EEOC v. Astra USA, Inc. 94 Fed 3<sup>rd</sup> 738 (1st Cir., 1996). Courts have also noted the dangers of witness intimidation. NLRB v. Robbins Tire and Rubber Co. 437 US 214, 240 (1978)

or hospital or an unincorporated association like a trade association or a union. The lawyer may be in-house counsel or on continuous retainer; the retainer may be specific, like tax counsel, or more generalized.<sup>24</sup>

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<sup>24</sup>Gerard J. Clark, American Lawyers on the Year 2000: An Introduction 33 Suffolk L. Rev. 292 (2000) (Description of how lawyers are organized)

At least four distinct principles define representation of institutions: Rule 1.13 (“Organization as Client”), Rule 4.2 (“Communication With Person Represented by Counsel”), the attorney client privilege and the work product doctrine. Client identification is left vague by Model Rule 1.13 which states that the lawyer for the organization represents “the organization acting through its duly authorized constituents.”<sup>25</sup> The term “constituents” appears to be intentionally imprecise including, in the corporate example, boards of directors, stockholders, senior management, employees.<sup>26</sup> Analogies between representation of institutions and individuals,<sup>27</sup> like an individual and trusted family counsel, only serve to obscure the relationship, which frequently concerns entity regulation. The substantive law teaches that a corporation is a bundle of agency relationships. Employees, regardless of where they stand on the organizational chart owe fiduciary duties to the entity, limited however by the scope of their employment.<sup>28</sup> Rule 1.13 does not address what one does if the various constituencies have conflicting goals, liabilities or interests. Nor does it address how the principle of confidentiality should be observed among constituents who have differing amounts of culpable information and

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<sup>25</sup>ABA Model Rules of Professional Conduct, Rule 1.13. The predecessor in the Model Code stated that the lawyers “owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.” ABA CPR EC 5-18.

<sup>26</sup>See Comment 1 to Rule 1.13.

<sup>27</sup>The imprecision of the analogy between individuals and corporations has plagued the law since 1888 when the Supreme Court first ruled that corporations had constitutional rights. **Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394 (1886)**; *First National Bank of Boston v Bellotti* 435 U.S. 765 (1978) (Corporations have rights of free speech)

<sup>28</sup>*Chelsea Industry, Inc. Gaffney* 389 Mass. 1,11-12 (employee must act “solely for his employer’s benefit”)

responsibility.

The corporate attorney-client privilege<sup>29</sup> is a rule of evidence that blocks official inquiry into information disclosed in the relationship. Instead of testing whether the incidents of the attorney-client relationship have occurred between institutional counsel and an institutional agent the courts apply a number of talismanic tests. The subject matter test, extends the privilege to all corporate personnel when conversing with corporate counsel, acting in that capacity, about the subject of their employment.<sup>30</sup> The control group test covers only communications with persons having managerial responsibility for the matter under review.<sup>31</sup> Stockholder derivative actions require an exception to the privilege because the plaintiff-stockholder, acting now on behalf of the corporation, challenges the action of the corporate officers and thereby creating a conflict between corporate counsel and senior management.<sup>32</sup>

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<sup>29</sup>Charles W. Wolfram, Modern Legal Ethics, pp 284 et seq.

<sup>30</sup>Weissenberger, Toward Precision in the Application of the Attorney-Client Privilege for Corporations 65 Iowa L. Rev 889 (1980)

<sup>31</sup>Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test 84 Harv. L. Rev. 424 (1970)

<sup>32</sup>Garner v. Wolfinbarger 430 F. 2d 1093 (5<sup>th</sup> Cir., 1970)

The Supreme Court in Upjohn<sup>33</sup> extended the federal attorney client privilege to persons with whom corporate counsel almost certainly was prohibited from forming an attorney-client relationship because of conflict of interest. In Upjohn, the IRS subpoenaed the answers to written questionnaires sent by the corporations general counsel to various middle managers as part of the corporation's internal investigation in questionable foreign payments made by subsidiaries. The Court protected the information because it enabled counsel "to give sound and informed advice."<sup>34</sup> The case is better understood as a work product case.

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<sup>33</sup> Upjohn v. United States 449 U.S. 383 (1981); see generally Sexton, A Post-Upjohn Consideration of the Corporate Attorney-client Privilege 57 NYU L. Rev. 443 (1982)

<sup>34</sup> Id. at 390. For a very different approach to the attorney-client privilege, see **Grand Jury Subpoena Duces Tecum**, 112 F.3d 910, cert.den. 117 SCt 2482 (1987), where the Eighth Circuit reversed an Arkansas District Court denial of a motion by the Whitewater Independent Counsel, Kenneth Starr, to compel production of notes taken by White House Counsel during its representation of Hilary Clinton, rejecting a claim of protection of the attorney-client privilege. The documents that the Independent Counsel sought were two: notes taken by White House Counsel ("WHC") at a meeting attended by Mrs. Clinton, her personal lawyer, and Special White House Counsel in July, 1995 to discuss Mrs. Clinton's activities following the death of Vincent Foster, Deputy White House Counsel; and notes of Special WHC taken at meetings during breaks in Mrs. Clinton's grand jury testimony investigating the discovery in the White House in January of 1996, of missing billing records of the Rose law firm at which WHC and her personal counsel were present. When WHC refused to produce the documents, the Office of Independent Counsel moved for an order to compel. The U.S. District Court denied the order to compel, finding that the documents were covered both by the attorney-client privilege and by the work-product doctrine. On appeal the Eighth Circuit reversed in a wide-ranging opinion issued in May of 1997 that forebodes a more narrow protection for notes and work papers for all government attorneys, with a vigorous dissent.

The majority opinion rejects the claim of privilege of the WHC, reasoning that whenever WHC appears the real party in interest is the White House or the Office of the President. The presence of WHC at the meetings in question was thus inappropriate and therefore unprivileged. Further WHC, as the representative of an entity of the federal government, may not resist a claim for information of another entity of the federal government, here a federal grand jury.

The scope of the work product doctrine was announced by the Court in Hickman v. Taylor,<sup>35</sup> where plaintiff's in a wrongful death action on behalf of a seaman sought from defense counsel written statements of plaintiff's fellow crew members. While it was clear to the Court that the privilege did not apply because the crew members were not clients, it protected the statements as work product, stating that "proper representation" requires the assembly of information without undue and needless interference and that a lack of such protection would lead to "[i]nefficiency, unfairness and sharp practices."<sup>36</sup>

## V. The Laws of Investigations

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<sup>35</sup>329 U.S. 495 (1947)

<sup>36</sup> Id. at 510-11.

Indeed, the subject of investigations is a minefield of conflicting rules and principles from disparate fields of law. Criminal law prohibits the obstruction of justice<sup>37</sup>, perjury<sup>38</sup>, conspiracy<sup>39</sup>, aiding and abetting and serving as an accessory after the fact<sup>40</sup>. A lack of candor in response to a

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<sup>37</sup>18 U.S.C. sec 1512 makes criminal “knowingly... engaging in misleading conduct toward another person, with intent to cause or induce any person to” secrete evidence. see also MGL ch 268 sec. 13B.

<sup>38</sup>MGL ch 268 sec1.

<sup>39</sup>MGL ch 274 sec.7.

<sup>40</sup>MGL ch 274 sec.4

direct question may be a crime<sup>41</sup> by a client and a lawyer that facilitates that lack of candor can likewise be held criminally responsible.<sup>42</sup> The rules of evidence limit the flow of information before tribunals. Rule 11 requires lawyer investigation in judicial proceedings.<sup>43</sup> Rule 23 requires communication with prospective clients<sup>44</sup>. State and federal statutes, especially those protecting

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<sup>41</sup>18 U.S.C.A. sec.1001.

<sup>42</sup>President Clinton was suspended from practice for five years and fined \$25,000 for giving false and misleading answers to questions in a civil deposition in the Paula Jones case. See Clinton v. Jones 520 U.S. 681 (1997) (denying presidential immunity for previous acts of sexual harassment) see generally Ronald D. Rotunda, Professional Responsibility A Student Guide (2001 Edition) p. 441.

<sup>43</sup>Van Christo Advertising, Inc v. M/A-COM/LCS 426 Mass. 410 (reversing Rule 11 sanctions for failure to investigate)

<sup>44</sup>Bernard v. Gulf Oil Co. 619 F.2nd 459 (5<sup>th</sup> Cir, 1980) aff'd on other grounds 452 US 89 (1981) (ban on communication between class counsel and class members is violative of the First Amendment)

worker rights, mandate contacts that might otherwise violate Rule 4.2<sup>45</sup>.

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<sup>45</sup>Indeed many employee protection statutes contemplate contact between the employees of an institution represented by counsel and adversarial counsel. *Melnychenko v. 84 Lumber Co.* 424 Mass. 285 (implying that such contacts are protected un MGL ch 151B; *Pratt v. National Railroad Passenger Corporation* 54 F.Supp. 2d 78 (D. Mass., 1999) (Young,J.) See brief Amicus Curiae of National Employment Lawyers Association

The Model Rules govern information transfer and communication in a wide variety of ways. Rule 1.6 requires the confidentiality of client communications. Rule 3.3 regulates the offer of evidence to a tribunal.<sup>46</sup> Rule 4.1 prohibits frauds and false statements to third parties. Rule 4.3 limits what a lawyer may say to an unrepresented person. The First Amendment protects speech, including consultation and advocacy<sup>47</sup> as well as the association<sup>48</sup> of attorney with client.<sup>49</sup>; It protects the right to communicate and prohibits prior restraints.<sup>50</sup>

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<sup>46</sup>Rule 3.4 (f), for instance, prohibits a lawyer to “request a person other than a client to refrain from voluntarily giving relevant information to another party...”

<sup>47</sup>In re Primus 436 U.S. 412 (1978)

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The Brief Amicus Curiae, filed by the American Civil Liberties Union of Massachusetts in the Messing case, emphasized that the police officer witnesses interviewed by MRW supported the plaintiff’s position and voluntarily spoke to her lawyers. They were thus associating with the plaintiff in combating discrimination. As such they claim the associational protections announced in *United Mine Workers v. Illinois Bar Ass’n* 389 U.S. 217,222 (rules that protect the administration of justice (in this case anti-solicitation rules) “can in their actual operation significantly impair the value of associational freedoms”); *NAACP v. Button* 371 U.S.415 (anti-solicitation rules frustrate the enforcement of civil rights). Further the Rule imposes on the witnesses an association to which they have not consented. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* 515 US 557 (1995) (right of association protects against forced association)

The National Labor Relations Act 29 U.S.C. 151 et seq. and MGL ch 150A protect similar interests to engage in concerted activity for mutual aid or protection. See Amicus Curiae Brief of AFL-CIO p. 11. See generally Archibald Cox, The Right to Engage in Concerted Activities 26 Ind L.J. 319 (1951)

<sup>49</sup>*Legal Services Corporation v. Velasquez* 531 U.S. 533(2001) (Statutory limitation on claims that a lawyer may raise on behalf of a client violates the First Amendment); *Bates v. State Bar of Arizona* 433 U.S. 350 (1977) (Attorney advertising is protected by the First Amendment)

<sup>50</sup>*Near v. State of Minnesota ex rel. Olsen* 283 U.S. 625 (1931) (injunctions against publications are censorship and violate the First Amendment)

Indeed, in criminal cases, the Fifth Amendment protects against making incriminating statements to questions lodged by government<sup>51</sup> and the Sixth Amendment<sup>52</sup> protects against interference with the attorney-client relationship by government seeking to uncover evidence of crime.

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<sup>51</sup>In Fisher v. United States 425 US 391 (1976), where IRS subpoenaed taxpayers' records from their attorneys the Court stated that attorneys are protected against disclosure by the Fifth Amendment rights of their clients, the Sixth Amendment prohibits governmental interception of attorney-client information

<sup>52</sup>Pamela S. Karlen, The Right to Counsel 105 Harv.L. Rev 670

The analogies from criminal law are instructive. Massiah v. United States<sup>53</sup> involved a claim that a governmental agent's testimony concerning admissions made by a defendant which were surreptitiously recorded, after the defendant had been charged with drug trafficking and had retained counsel were inadmissible because they were secured in violation of the defendant's right to counsel. The government secured the cooperation of a co-defendant and installed a listening device in the co-defendant's car allowing a governmental agent to hear the defendant's admissions which were admitted into evidence against him. The Court labeled the period between arraignment and trial as the "most critical period of the proceedings." for "consultation, thorough-going investigation, and preparation"<sup>54</sup> and that the government's use of the subterfuge to obtain the defendant's statement during this period in the absence of counsel was violative of the Sixth Amendment.

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<sup>53</sup>377 US 201 (1964): see also US v. Henry 447US 264 (1980) (cell-block snitch); Kuhlmann v. Wilson 477 US 436 (1986) (listening post informant); Michigan v. Jackson 475 US 625 (1986)(once counsel is requested, no police interrogation can continue); Patterson v. Illinois 487 US 285(1988) (No violation when defendant invokes right to counsel and then voluntarily talks) Michigan v. Harvey 494 US 344 (1990) (statements made in violation of the right to counsel can be used to impeach); Commonwealth v. Rainwater 425 Mass. 540 (discussed in Breyer dissent in Cobb)

<sup>54</sup>At p. 205

Texas v. Cobb<sup>55</sup> involved a murder conviction based upon statements the defendant made to the police after proceedings against him had been initiated and in the absence of his appointed counsel. He had been charged with burglary to which he confessed, but denied killing the burglary victims. Fourteen months after being indicted for the burglary, the defendant, free on bond, was questioned by the police without permission of counsel. The defendant's confession was upheld because Justice Rehnquist for the 5-4 majority held that the Right to Counsel is offense specific<sup>56</sup>, applying only to questioning about the burglary for which the defendant had already been indicted.<sup>57</sup> The Court distinguished Moulton<sup>58</sup> and Brewer<sup>59</sup> and found no Sixth Amendment violation and declaring, over Justice Breyer's dissent<sup>60</sup> that the protections of the Fifth Amendment's Right against Self-Incrimination are adequate protection for the defendant.

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<sup>55</sup>121 S.Ct. 1335 (2001)

<sup>56</sup>The Court here relies on McNeil v. Wisconsin 501 US 171 (1991)

<sup>57</sup>At p. 1340 relying on Michigan v. Jackson 475 US 625 (1986) (the continuation of questioning after the defendant invoked right to counsel violates the Sixth Amendment)

<sup>58</sup>Maine v. Moulton 474 US 159 (1985)(police wire a co-defendant after bail during the pendency of trial and record incriminating statements which are introduced at trial; ct suppresses these statements as violative of the Sixth Amendment Right to Counsel)

<sup>59</sup>Brewer V. Williams 430 US 387 (1977) (The suggestion by the police, in the absence of counsel, that the murder victim deserves Christian burial cause the defendant to lead police to the dead bodies violated the Right to Counsel)

<sup>60</sup>The dissent, per Breyer, suggests that the majority's narrow reading of the offense charged seriously undermines the protections of the Sixth Amendment. Those protections are similar, he suggests, as the protections of Rule 4.2: "to prevent lawyers from taking advantage of uncounseled lay persons and to preserve the integrity of the lawyer-client relationship." The dissent also describes criminal codes as "lengthy and highly detailed, often proliferating" such that the unschooled citizen needs the "medium" of the lawyer to stand between himself and the state.

## VI. ABA-Justice fight

The interpretation of Rule 4.2 and its applicability to federal prosecutors led to open warfare between the American Bar Association and the Department of Justice during the 1990's. The precipitating event appears to have been the Second Circuit opinion in United States v. Hammond<sup>61</sup>, wherein the Court was critical of the government's investigation tactics in an arson investigation because the government's use of an undercover informant involved contact with a defendant who had already retained counsel in a related medicare fraud investigation. The decision sent shock waves through the Department of Justice.<sup>62</sup> Clearly, no lawyers had ever been allowed in grand jury inquiries and government has always felt free to question witnesses, use undercover agents, tipsters, eavesdropping and other tricks in ferreting out crime.<sup>63</sup> Relying upon the general authority to enforce federal statutes,<sup>64</sup> Attorney General Thornburgh authorized department lawyers "to contact or communicate with any individual in the course of an

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<sup>61</sup>858 F.2d 838 (2<sup>nd</sup> Cir., 1988)

<sup>62</sup>Jerry E. Norton, Government Attorneys in Transition 72 *Judicature* 299 (1989)

<sup>63</sup>William J. Stuntz, Lawyers, Deception and Evidence Gathering 79 *Va. L. Rev.* 1903 (1993) (summarizing the unsavory business of crime stopping)

<sup>64</sup>28 USC sec 533 generally provides that the Attorney General may appoint officials to prosecute crimes and "to conduct such other investigations regarding official matters... as may be directed by the Attorney General.

investigation or prosecution,” unless specifically prohibited.<sup>65</sup> Thornburgh’s successor, Janet Reno, extended and formalized these powers in the Code of Federal Regulations allowing investigations of “on-going crimes or civil violations...”<sup>66</sup> But the DOJ position was not well-received in the courts.<sup>67</sup> The relationship between the ABA and the Justice Department festered.<sup>68</sup> The resolution of the dispute came definitively in 1998 with the enactment of the Ethical Standards for Attorneys for the Government Act<sup>69</sup>, which clearly mandates that federal government attorneys must comply with local ethical rules.

In Messing,<sup>70</sup> the Attorney General Of Massachusetts filed an Amicus Curiae Brief in which he argued that the “public interest strongly encourages citizens to provide law enforcement

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<sup>65</sup>Quoted in Roger C. Crampton and Lisa K. Udell, State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules 53 U. Pitt L. Rev. 291, 320; Richard Thornburgh, Ethics and the Attorney General: The Attorney General Responds 74 Judicature 290 (April-May, 1991)

<sup>66</sup>38 CFR sec. 77.5 et seq quoted in Rotunda, op. cit. P.518, n. 7

<sup>67</sup>United States v. Lopez 4 F. 3<sup>rd</sup> 1455 (9<sup>th</sup> Cir., 1993) ( DOJ contact with defendant, even at the behest of the defendant, is improper); In re Howes 123 N.M. 311 (1997) (disciplinary action against DOJ attorney)

<sup>68</sup>Other reasons for the deterioration in the relationship was the increasing use by the Justice Department and U.S. Attorney’s Offices across the nation were subpoenas directed at attorneys and seizure of attorneys’ when they were the fruit of a criminal enterprise. Max D. Stern & David Hoffman, Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform 136 U. Pa. L. Rev. 1783 (1988); United States v. Klubock 832 F. 2d 664 (1<sup>st</sup> Cir., 1987) (discussion of the supremacy of federal law); Kathleen F. Brickey, Tainted Assets and the Right to Counsel- The Money Laundering Conundrum 66 Wash L. Q. 47 (1988); Caplin & Drysdale, Chartered v. United States 491 U.S. 617 (1989) ( neither Attorney-client privilege nor the Sixth Amendment prohibit the government from subjecting assets intended for attorney’s fees form forfeiture.)

<sup>69</sup>28 U.S.C.A. sec 530B

<sup>70</sup>Supra, at n–.

agencies with information regarding crimes and violations of civil law.”<sup>71</sup> The brief suggested that enforcement of laws involving minimum wage, workplace safety, fair housing and employment, public charities, insurance regulation and criminal law require attorneys and investigators to rely upon an information flow to the government from employees, informants and whistle blowers whose interests may be adverse to their employers. While Rule 4.2 makes an exception for investigations “authorized by law,”<sup>72</sup> the Attorney General claimed uncertainty as to the parameters of that exception and requested clarity from the Court to guide his staff.<sup>73</sup> Comment 2 to Mass Rule 4.2 instructs that the “by law “ exception should be read expansively.

## X. Critique

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<sup>71</sup>Amicus Curiae Brief of Attorney General, p. 5.

<sup>72</sup>Rule 4.2

<sup>73</sup>In re Criminal Investigation of John Doe Inc. 194 F.R.D. 375 (D.Mass., 2000) (Judge Saris refers to the law of criminal investigations as a legal wilderness)

The SJC's decision in Messing to reverse the Superior Court's assessment of \$94,419<sup>74</sup> in costs against MRW and in favor of Harvard University and Bingham Dana and Gould was clearly correct. Attorney fees ought only be used for procedural defalcations that are egregious. Here MRW were merely investigating their case; they were honest with the witnesses who gave their statements voluntarily: they had a right to the information and it was relevant to the underlying action. The law surrounding Rule 4.2 was anything but clear. The award was solely for the cost of moving for sanctions; no other purpose was served by the motion.

The Court's narrowing of the scope of Rule 4.2 was indeed welcome. The admissions exception to the hearsay rule has nothing to do with this kind of factual investigation and the drafters of the comment to the Model Rules were ill-advised to refer to it as were their successors in Massachusetts.<sup>75</sup> But the Messing opinion is confusing and internally contradictory.

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<sup>74</sup>The award was for 448.3 hours which excluded the original request to include an amount for the Harvard Office of General Counsel. The original request was for \$152,255.96

<sup>75</sup>ABA Ethics 2000 Commission extensively revised the comments to Rule 4.2. The Restatement of the Law Governing Lawyers sec 100 is similarly critical.

After ruling that a broad interpretation of the admissions test in the Comment to Rule 4.2 should be rejected because “this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation,”<sup>76</sup> the Court interprets the rule “to ban only contact with those employees who have the authority to commit the organization to a position regarding the subject matter of the representation.”<sup>77</sup> These employees are later referred to as having “speaking authority” for the organization, who could “make decisions about the course of the litigation”<sup>78</sup> If the opinion had stopped there the rule would be clear and arguably correct.

In the next paragraph however the Court backtracks and adds those with “managerial responsibility in the matter” and “those who committed the wrongful acts at issue in the litigation.”<sup>79</sup> Two pages later the Court refers to its new rule as including those whose acts or omission may be “imputed to the organization” for purposes of civil or criminal liability.<sup>80</sup>

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<sup>76</sup>Messing at 356,7.

<sup>77</sup>Ibid. p. 357

<sup>78</sup>Ibid p. 357

<sup>79</sup>Ibid. p.357.

<sup>80</sup>Ibid. p. 361.

The application to the facts is confusing as well. Two of those interviewed by MGW were lieutenants, superior in rank to the plaintiff. Certainly if these lieutenants were blatant sexists who belittled the plaintiff's work by suggesting female inferiority, these acts would be imputed to Harvard. But the Court cites the failure to name the lieutenants in the Complaint<sup>81</sup> and plaintiff's affidavit exculpating these witnesses to conclude that they were "not active participants."<sup>82</sup> Next the Court asks whether the lieutenants exercise "managerial responsibility" over the subject matter. The intuitive answer is yes. But the Court finds otherwise stating that "some supervisory authority" over co-workers is not the kind of supervisory authority intended by the Comment. The Court goes on to find "no evidence in the record" that the lieutenants completed any evaluations or offered any opinion of the plaintiff. This is at odds with the Superior Court finding: "Each lieutenant in the HUPD was responsible for managing a division of officers, which included supervision and evaluation of sergeants under their command. Rooney and Sheridan [the two affiants] both supervised Stanford [the plaintiff] by directing and evaluating her work performance." If the same facts as Messing were to repeat themselves, an analysis of the Court's opinion would suggest that interviewing Stanford's co-workers would be a dangerous course of action.<sup>83</sup>

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<sup>81</sup>The lieutenants were not a covered "employer" in MGL ch 151B

<sup>82</sup>Ibid. p. 361.

<sup>83</sup>Judge Young acknowledged the "need for clarity" in Siguel v. Trustees of Tufts College 1990 U.S. Dist. LEXIS 2775: He complained that seeking court permission for such interview where the court balances the interests of the parties **"is wasteful of judicial resources, runs the risk of treating similarly situated litigants differently, and fails to provide attorneys with any practical standard by which to conduct discovery. An attorney confronted with the ethical dilemma of whether he can interview employees of a corporate defendant has little basis to answer this question without first litigating the issue. The**

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**balancing test is a case-by-case analysis that renders a different conclusion in each factual situation. The test simply fails to promote the underlying goal of the disciplinary rules -- to give attorneys clear guidelines of ethical behavior. The importance of providing attorneys with concrete ethical guidelines cannot be under-estimated. The disciplinary rules often carry the threat of possible sanctions against attorneys for ethical violations. Furthermore, the rules attempt to promulgate standards of acceptable ethical behavior.”** The Court continued that “**harsh criticism is strikingly applicable to the presently confused state of the boundaries of DR 7-104(A)(1) in this District. Consider the following: the Massachusetts Bar Association has promulgated an ethical opinion arguably binding on its members and open to citation as persuasive authority in the courts. Its opinion interprets the Rule as sweepingly as possible in a manner most protective of corporate interests and contrary to a number of considered decisions by a variety of courts and bar associations. Id. at 1286-87. In practical effect, however, such a sweeping interpretation of the Rule is unenforced and unenforceable. In every case in which an attorney has challenged the broad parameters of the Rule as drawn by the Massachusetts Bar Association, courts in this District have refused such broad enforcement, preferring, instead, a case-by-case balancing analysis. citing Morrison v. Brandeis University, 125 F.R.D. 14, 19 (D. Mass. 1989)(Collings, U.S.M.)and Mompont v. Lotus Development Corp., 110 F.R.D. 414, 419 [D. Mass. 1986]); See also Kaveney v. Murphy 97 F. supp. 2d 88 (D.Mass, 2000) (Gertner J. allowing inquiry into Cambridge Police Department)**

In any vicarious liability situation, principals are liable for the civil wrongs of their agents. Agents can bind principals in contact with third parties and third parties have a claim against the principal in case of breach.<sup>84</sup> Similarly in the tort, the principal (now usually called a master) who has the additional right to control the physical conduct of the agent (now called a servant) is liable for tortious injury.<sup>85</sup> Contract liability, common in purchases and sales, usually follow strict protocols involving price, supply and established forms. Tort liability typically arises out of serendipity or mistake by the servant or employee. In either case, the attorney for an injured party will be confronted by the question of who to interview and how Rule 4.2 will apply.

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<sup>84</sup>Restatement of the Law, Second Agency 2d (1959) sec. 144

<sup>85</sup>Ibid., sec 220.

Patriarca succeeds, while Messing, Upjohn and the June revision of Comment 2 fails, by asking the most fundamental question: whether agent-witnesses, whose testimony is sought, have an attorney client relationship with institutional counsel.<sup>86</sup> Did Bingham Dana have an attorney-client relationship with these five officers? Was Bingham Dana the agent of the police officer witnesses as principals?<sup>87</sup> The Model Rules require attorneys to “consult”<sup>88</sup> with client, to “abide by client decisions,”<sup>89</sup> “to hold inviolate client “confidential information,”<sup>90</sup> and to avoid the “adverse affect”<sup>91</sup> of conflicting client interests. Judged by these standards agents like the police officer witnesses in Messing<sup>92</sup> are not clients of counsel for Harvard, whether in-house or retained. Counsel for Harvard may consult with them, but clearly would not be required to abide by their decisions. Nor would their information be confidential, but would freely be revealed with management for the institution’s benefit. Likewise in Patriarca, did retained counsel for the Center for Living & Working, Inc. have such a relationship with the former employee witnesses who were contacted by Patriarca. Further, in a seeming majority of cases, where a third party is

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<sup>86</sup>There is no bright line test as to when an attorney-client relationship begins. Courts use detrimental reliance, reasonable belief and implied agreement in favor of creation. see e.g. *DeVaux v. American Home Assurance Company* 387 Mass. 814 (1983) (mere all to law office secretary can create attorney-client relationship)

<sup>87</sup>(“A threshold question is whether a particular employee is actually represented by corporate counsel,” and answering the question in the negative in the case of a former employee)

<sup>88</sup>ABA MRPC Rule 1.2 (a)

<sup>89</sup>ABA MRPC Rule 1.2 (b)

<sup>90</sup>ABA MRPC Rule 1.6 Comment 1

<sup>91</sup>ABA MRPC Rule 1.7

<sup>92</sup>Supra at n.-

charging the institution with wrongdoing, the agent-perpetrator is individually subject to liability with possible collateral consequences, including loss of employment. This individual liability creates a conflict of interest between institutional counsel and an agent like an employee.<sup>93</sup> Indeed, the attribution of an attorney-client relationship to situations where none exists imposes a bar to relationships where employees might become better informed about their rights.<sup>94</sup> Nor are they shielded from casual investigation by journalists, insurance investigators or law enforcement

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<sup>93</sup>The definition of “employer” in state MGL ch 151B and federal Title VII of the 1964 Civil Rights Act appear to exclude individual liability attributable to the agents. MGL ch 151B sec1 states: “ For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation,... genetic information, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.” Employer is defined as follows “The term ""employer" does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ, but shall include the commonwealth and all political subdivisions, boards, departments and commissions thereof...”

The federal prohibition states at sec 2: “It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”

The federal definition of employer at 42 USC 2000e sec1: (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person,...

<sup>94</sup>Indeed, extension of the principle of the superior court in either case would inhibit a lawyer from taking on the representation of any employee in a claim against an employer who had a continuous relationship with counsel.

personnel.

While Patriarca's emphasis on the existence of an attorney-client relationship helps, it continues to indicate in its analysis of the facts that a close examination of the duties of the proposed witness will still need to be done by adversary counsel. Seeking permission of the court is no solution before litigation is filed, or indeed in transactional matters.<sup>95</sup> The revision of the Rule's Comment 2 is also helpful, but not enough. The revision should have excluded any reference to managerial powers or indeed to who committed the wrongful act. It should have protected only those who had already consulted with institutional counsel and with whom institutional counsel had made commitment to represent. The commitment must, of course, comply with all the rules of professional conduct.

If, on the other hand, the institution seeks to establish a common defense strategy against some civil claim of an outsider, institutional counsel must seek to minimize possible conflicts by assuring that the witness-employee is indemnified against any damage claims and otherwise held harmless for any resulting finding of liability. Confidences would need to be maintained unless waived.

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<sup>95</sup>Even after litigation is filed, courts surely would be an obstacle to fast, efficient and inexpensive investigations.

Finally, one might ask what became of the sex discrimination claim of Kathleen Stanford or the wrongful discharge claim of Ellen Patriarca that was supposedly the basis for all of this.<sup>96</sup> Their claims got lost in an ethical sideshow which must appear strange to those outside the profession. First, ethical rules should not be used as substantive rules in litigation.<sup>97</sup> The Rules of Professional Conduct create a licensor-licensee relationship between the SJC and lawyers admitted to practice under its auspices. The Rules are the conditions that lawyers must meet in

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<sup>96</sup>Indeed motions like those in Messing and Patriarca that question the ethics of adversary counsel are misjoinders. The parties and the claims are different than in the claim in chief. Attacking the ethics of one's adversary arises most often in the motion to disqualify adversary counsel, which were labeled by Justice Liacos as part of a "catalogue of pretrial tactics" which use the code as a weapon in litigation. Borman v. Borman 378 Mass. 775, 787 (1979)

<sup>97</sup> The Preamble to the Model Rules, as amended by The Ethics 2000 Commission states at paragraph 20: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."

Massachusetts substituted the relevant Model Rule Preamble with the following: "A violation of a canon of ethics or a disciplinary rule . . . is not itself an actionable breach of duty to a client." Fishman v. Brooks, 396 Mass. 643, 649 (1986). The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. The fact that a Rule is just a basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not necessarily mean that an antagonist in a collateral proceeding or transaction may rely on a violation of a Rule. "As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence." *Id.* at 649.

order to remain in good standing. They do not confer substantive rights on individuals. Claims of violation of these rules are referred to the Board of Bar Overseers, which is referred to as the “exclusive disciplinary jurisdiction,” in SJC Rule 4:01. Violations such as the one presented in this case would rarely result in harsh disciplinary sanctions.

Nor should the Rules be used in combination with Rule 11 to empower adversary counsel to act as a continuing disciplinary monitor who is then empowered to use all the tools of discovery to delve into the files of an adversary and create a costly and time-consuming satellite litigation.<sup>98</sup> Indeed the opinions in both Messing and Patriarca appear to assume some sort of inherent power in the superior court to discipline attorneys who appear before it by shifting fees, issuing fines and punishments, suppressing the fruits of a lawyer’s investigations, and directing counsel’s representation of client<sup>99</sup>. Nor should Rule 4.2 be converted into some sort of exclusionary rule. The Sixth Amendment cases are not analogical. The motions in both Messing and Patriarca appear as attacks on adversary counsel to untrack messy litigation. In Messing the motion appears to have been used by a large institutional client with a large institutional law firm to grind a female minority security guard and her small firm into the ground for having the temerity to charge Harvard with discrimination. Similarly the Patriarca litigation appears to have the potential for embarrassment for the defendant.

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<sup>98</sup>Indeed the motion filed on behalf of Harvard sought an evidentiary hearing, discovery, suppression of information, disqualification of MRW and costs. Brief of MRW

<sup>99</sup>Wolfram, Modern Legal Ethics (West Publishing, 1986) p.22

Indeed the Rules of Professional Conduct do not create individual rights and even if they did they are not the rights of either of the institutions or their law firms and thus neither has standing to invoke them<sup>100</sup>. The parties with the supposed rights in this case were the affiant police officers in Messing and the co-workers of Patriarca. The rights would be in the nature of interference with an on-going attorney-client relationship. But neither set of witnesses had met with institutional counsel at the time of the interviews. If these witnesses had such rights, they were assumedly waivable after disclosure. Any broader claim by employers to control their employees in unsolicited investigations would create a new condition of employment which would have to be bargained and included in a collective bargaining agreement for unionized workers.

Any broader insulation would have to be legislated. The policy question is whether the public should generally be protected from investigations of lawyers representing potential adversaries. The Sixth Amendment offers analogous protections in criminal cases from police questioning after counsel has filed an appearance. Expansion into civil cases presents an interesting policy question but on balance it might be rejected as sacrificing the search for truth. It certainly should not be implied from a provision the Rules of Professional Conduct.

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<sup>100</sup>Joint Anti-/fascist Refugee Committee v. McGrath 341 U.S. 123 (1951) (plaintiff must assert an “interest protected in analogous situations at common law, by statute or by the Constitution”)

