***Please note that this is a research memorandum produced by a law student intern. CAFL cannot confirm that the research and analysis are accurate or current. Counsel should not rely on this research; rather, it is intended to provide a jump-start for counsel’s own research.***

**MEMORANDUM**

To: CAFL Appellate Panel Support Unit

From: [Law student intern]

Re: Due Process – Right to Counsel; Are DCF Social Workers and Foster Parents the “Clients” of DCF Counsel? (That is, Can Parents’ and Child’s Counsel Speak to DCF Social Workers and Foster Parents without Permission from DCF Counsel?)

Date: December 2015

**Questions Presented**

1. Can lawyers for parents or children speak directly to *DCF social workers* without the permission of DCF counsel? Can these attorneys speak to more senior DCF staff, such as supervisors, regional directors, or area directors without violating any law or ethical rule?
2. Can lawyers for parents or children speak directly to *foster parents* without the permission of DCF counsel without violating any law or ethical rule? DCF regulations specify that DCF counsel does not represent foster parents; does that suggest that parents’ or child’s counsel may speak with them freely?
3. While DCF social workers and foster parents can always decline to speak to counsel for a parent or child, can DCF counsel “forbid” parents’ or child’s counsel from talking to the social worker or foster parent? Can DCF counsel tell a social worker or foster parent not to speak to parents’ or child’s counsel? If the answer is no, might DCF counsel face some form of ethical sanction for doing so?

**Short Answers**

1. According to Mass. R. Prof. C. 4.2 and *Messing*, front-line social workers are not the DCF attorney’s “clients,” and parents’ and child’s counsel are free to speak with them without the permission or presence of DCF counsel. However, more senior staff, such as supervisors and regional and area directors, have “managerial responsibility” and “authority on behalf of the organization” to make litigation decisions. DCF counsel therefore represents these senior staff members as “clients.” Accordingly, parents’ and children’s counsel should not approach them about a case without DCF counsel’s permission.
2. Under Mass. R. Prof. C. 4.2, foster parents are not DCF’s “clients.” Nevertheless, an argument – albeit a weak one – can be made that foster parents belong to the class of “agents” that the principal’s counsel can limit access to. If foster parents are *not* agents of this type, parents’ and child’s counsel are free to speak with them without the permission or presence of DCF counsel. If they *are* agents of this type, parents’ and child’s counsel would have to obtain permission from DCF’s counsel. Parents’ and child’s counsel may wish to seek clarification from the court on this on a case-by-case basis.
3. DCF counsel would violate Mass. R. Prof. C. 3.4(f) if he were to prohibit social workers or foster parents (assuming they are not “agents” that the principal – DCF – can limit access to) from speaking with opposing counsel. If DCF counsel wrongly attempts to prohibit social workers or foster parents from speaking to parents’ or child’s counsel, he may be subject to certain ethical sanctions.

**Facts**

 Attorney Sarah Matthews represents Jessica Jones (Mother) in a care and protection case in Massachusetts. John Jones (Child) is represented by Attorney Chris Chase. Father is absent. Both Attorney Matthews and Attorney Chase wish to speak with the Bells, Child’s foster parents (Foster Parents), in order to learn about Child’s successes and struggles in the foster home. Both attorneys also wish to speak with Nancy Nichols, the ongoing DCF social worker (Social Worker) about Mother’s progress during visitation, Child’s improvements, and the current plan for reunification. The Foster Parents and the Social Worker refuse to speak to Attorneys Matthews and Chase without the presence of DCF Attorney Joe Jacobs because Attorney Jacobs has forbidden them to speak with Mother’s or Child’s counsel in his absence.

**Analysis**

***I. Social Workers***

A. Rule 4.2- Communications with Person Represented by Counsel

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.

Mass. R. Prof. C. 4.2 (effective July 1, 2015). In an organization, not all employees are “represented” by the organization’s counsel for purposes of Rule 4.2. “An organization may not assert a preemptive and exclusive representation by the organization’s lawyer of all current (or former) employees as a means to invoke rule 4.2 and insulate them all from ex parte communication with the lawyers of potential adversary parties.” *Patriarca v. Ctr. for Living & Working*, 438 Mass. 132, 135-136 (2002); *see* *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*, 436 Mass. 347, 356-357 (2002) (rejecting over-protection of organization as prohibitive of opposing counsel’s ability to contact and interview employees); ABA Formal Op. 95-396, § VI (1995) (stating Rule 4.2 does not contemplate blanket representation of all employees). When organizations attempt to restrict opposing counsel’s informal contact with all employees, the organization goes beyond the protection of attorney-client privilege and prevention of ill-advised employee statements without counsel. *See Patriarca*, 438 Mass. at 135; *see also* *Niesig v. Team I*, 558 N.E.2d 1030, 1034 (N.Y. 1990) (rejecting blanket ban due to unnecessarily high price to achieve party protection); *Frey v. Dep’t of Health & Human Servs.*, 106 F.R.D. 32, 36-37 (E.D. N.Y. 1985) (rejecting extension of Rule 4.2 to all current employees).

The Rule prohibits *ex parte* contact by opposing counsel *only* with employees of an organization “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 corporation to make decisions about the course of the litigation.” *See* Mass. R. Prof. C. 4.2, cmt. 4 (effective July 1, 2015); *Patriarca*, 438 Mass. at 137; *Messing*, 436 Mass. at 357. Thus, interviews with employees without counsel approval are permitted “when an employee *clearly* falls outside of the rule’s scope.” *Messing*, 436 Mass. at 359 (emphasis added); *Patriarca*, 438 Mass. at 137.

B. Managerial Responsibility

Employees with managerial responsibility in the matter “include[] *only* those employees who have supervisory authority over the events at issue in the litigation.” *See Messing*, 436 Mass.at 361 (emphasis added). However, “not all employees with some supervisory power over their coworkers are deemed to have ‘managerial’ responsibility.” *Id.* at 362. Supervising a “small group” does not amount to managerial responsibility within an organization. *See id.*

Ongoing DCF social workers do not supervise others, nor do they “supervise” the clinical case or the care and protection litigation. Therefore, without true “supervisory authority over the events at issue in the litigation,” it is unlikely that a DCF social worker will fall into the category of having the necessary managerial responsibility for being “represented” under Rule 4.2.

C. Committed Wrongful Acts

Employees who have committed the wrongful acts that are the subject of the litigation are “represented” employees. However “wrong” the actions of DCF social workers may be, and however their “failings” regarding services, placement, or visitation, it is not their actions that are the subject of a care and protection petition. Rather, the wrongful acts litigated in care and protection cases are those of (alleged) abuse or neglect by the parents. *See* G.L.c. 119, § 24 (granting custody to DCF based on reasonable belief of parental abuse or neglect). Social workers have not committed the wrongful acts that are the *subject* of the litigation. (In the context of a tort or civil rights action alleging wrong-doing by social workers, this part of the Rule might be relevant.)

D. Authority to Make Litigation Decisions

“Employees who can commit the organization are those with authority to make decisions about the course of the litigation, such as when to initiate suit, and when to settle a pending case.” *See Messing*, 436 Mass. at 357; *see also* Restatement (Third) of the Law Governing Lawyers, § 100 cmt. e (Am. Law Inst. 2000) (explaining that agents or employees with authority to make binding statements or contractual settlements are “represented” non-clients, but agents who make admissions notwithstanding hearsay are not represented). Employees who can commit the organization are “represented” employees. *Patriarca* suggests that this class is very limited:

Patriarca was employed by the center as a registered nurse whose job responsibility was to manage the personal care attendant program, a program that provides persons who have permanent or chronic disabilities with assistance to allow them to live independently in their community instead of being institutionalized. *See* 130 Code Mass. Regs. §§ 422.416 -422.423 (1999). Two of the former employees with whom she made contact had been occupational therapists. A third was an assistant community department manager-supervisor and skills trainer. These three had worked closely with Patriarca and Bailey at the center. The fourth had been a business manager at the center and had witnessed the events which led to Patriarca's separation from the center.

These four former employees of the center do not come within any category of employee covered by rule 4.2. *See* [*Messing*, *supra*, 436 Mass. at 357](https://advance.lexis.com/search/practicepagesearch/?pdmfid=1000516&crid=77c422c3-f914-427d-95a3-1b60802f7e61&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchterms=438+Mass.+132&pdsearchtype=SearchBox&pdqttype=and&pdpsf=jur%3A1%3A44&ecomp=ht5hk&earg=pdpsf&prid=66f4557d-2959-4287-b0da-525011639db4). None of them is alleged to have committed the wrongful acts at issue in the litigation. There is no evidence, under their job descriptions or otherwise, that any of them had authority on behalf of the corporation to make decisions about the course of the litigation.

*Patriarca*, 438 Mass. at 137-138.

Note that the requirement in *Messing* that contact may be prohibited when the employee has the authority to “commit the organization to a position regarding the subject matter of representation,” 436 Mass. at 357-58, is more than just the employee’s ability to make an “admission” that can be held against the employer. The SJC in *Messing* expressly rejected this interpretation as overly-protective of the organization and overly-restrictive of opposing counsel’s ability to discovery information. *See* *id*. at 357. Accordingly, “authority to commit the organization” means that the employee must have authority to “make decisions about the course of litigation.” *Id.*; *Mendez v. Hovensa, L.L.C.*, 2008 WL 906768, \*9 (D. V.I. Mar. 31 2008) (finding no unfairness in permitting opposing counsel to interview employees whose statements would be admissible according to Fed. R. Evid. 801(d)(2)(D)).

Ongoing social workers and other front-line social workers cannot commit DCF to decisions about the course of litigation. Senior staff members, such as supervisors, regional and area directors, and more senior administrators make the binding decision to initiate or settle cases against parents. The fact that front-line social workers are witnesses to the events in the litigation is irrelevant. *See* *Messing*, 436 Mass. at 361 (fact that the five Harvard employees were witnesses to the alleged discrimination was not relevant to the “managerial authority” inquiry); *Patriarca*, 438 Mass. at 139 (“Being a ‘witness’ to the plaintiff’s separation does not establish that the fourth employee was involved in supervising, planning, or directing the events and practices that led to this litigation.”). The discovery of unfavorable facts is not a legitimate reason to prohibit ex parte contact. *See Clark*, 440 Mass. 270, 276 (2003).

Social workers do not have managerial or supervisory responsibility over the subject of the litigation. Social workers have not committed the wrongful acts that are the subject of the litigation. Social workers do not have the authority to commit DCF or make litigation decisions. It is not unfairly prejudicial toward DCF for opposing counsel to speak with social workers to obtain relevant information. Parents’ and child’s counsel can therefore speak with DCF social workers without the consent or presence of the DCF attorney.

One caveat: all other Rules of Professional Conduct apply to counsel’s conversations with social workers as “unrepresented parties.” For example, counsel for a parent or child cannot question social workers regarding information counsel knows to be privileged or confidential:

Although [rule 4.2](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=085ee538-14b7-48c1-95de-0c926f1fe294&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A49WG-4950-0039-400B-00000-00&pdcomponentid=7683&ecomp=7tmk&earg=sr5&prid=1b300ff6-2e3f-43d0-bf29-2f37be351c04) does not prohibit a lawyer from making contact with former employees of a represented corporation, “counsel must, of course, be assiduous in meeting other ethical and professional standards found outside [rule 4.2](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=085ee538-14b7-48c1-95de-0c926f1fe294&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A49WG-4950-0039-400B-00000-00&pdcomponentid=7683&ecomp=7tmk&earg=sr5&prid=1b300ff6-2e3f-43d0-bf29-2f37be351c04).” [Patriarca, *supra* at 139](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=085ee538-14b7-48c1-95de-0c926f1fe294&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A49WG-4950-0039-400B-00000-00&pdcomponentid=7683&ecomp=7tmk&earg=sr5&prid=1b300ff6-2e3f-43d0-bf29-2f37be351c04). Without limitation, counsel conducting the ex parte interview must pay particular attention to avoid transgressing [Mass. R. Prof. C. 4.1](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=085ee538-14b7-48c1-95de-0c926f1fe294&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A49WG-4950-0039-400B-00000-00&pdcomponentid=7683&ecomp=7tmk&earg=sr5&prid=1b300ff6-2e3f-43d0-bf29-2f37be351c04), 426 Mass. 1401 (1998), governing a lawyer’s duty of truthfulness to a third party; [Mass. R. Prof. C. 4.3](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=085ee538-14b7-48c1-95de-0c926f1fe294&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A49WG-4950-0039-400B-00000-00&pdcomponentid=7683&ecomp=7tmk&earg=sr5&prid=1b300ff6-2e3f-43d0-bf29-2f37be351c04), 426 Mass. 1404 (1998), governing a lawyer’s dealings with unrepresented persons; and [Mass. R. Prof. C. 4.4](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=085ee538-14b7-48c1-95de-0c926f1fe294&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A49WG-4950-0039-400B-00000-00&pdcomponentid=7683&ecomp=7tmk&earg=sr5&prid=1b300ff6-2e3f-43d0-bf29-2f37be351c04), 426 Mass. 1405 (1998), requiring the lawyer to refrain from using unfair or illegal tactics to obtain evidence. *See* [*Patriarca*, *supra* at 139-141 & nn. 9, 10](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=085ee538-14b7-48c1-95de-0c926f1fe294&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A49WG-4950-0039-400B-00000-00&pdcomponentid=7683&ecomp=7tmk&earg=sr5&prid=1b300ff6-2e3f-43d0-bf29-2f37be351c04). Further, counsel must also be careful to avoid violating applicable privileges or matters subject to appropriate confidences or protections.

*Clark*, 440 Mass. at 278-279; *cf*. *Col v. Me. Med. Ctr.*, 2012 U.S. Dist. LEXIS 31468, \*6-7 (D. Me. 2012) (warning plaintiff’s counsel that, for each interview with an unrepresented employee of the defendant, counsel must “identify himself or herself as an attorney for the plaintiff, state that the interview is voluntary, and not inquire about statements of the defendant's attorneys subject to privilege or protection.”). Counsel for a parent or child should therefore refrain from asking a social worker about conversations with DCF counsel or about privileged medical or mental health information of other parties.

***II. Foster Parents***

Foster parents are not DCF employees. Moreover, foster parents have no supervisory authority over the litigation. Foster parents have “managerial responsibility” overthe children in their foster homes, but that is not the kind of authority addressed by the SJC in *Messing*. Foster parents do not have authority to make litigation decisions in care and protection cases. Further, the wrongful acts of the foster parents are not being litigated. Therefore, foster parents do not fall into any of the categories of “represented employees” of DCF requiring no-contact by counsel for opposing parties.

Although foster parents are not employees of DCF, certain non-employee agents of a party are covered by Rule 4.2. The SJC’s language in *Messing* and amended comment [4] to Rule 4.2 apply not just to employees of a party, but to agents of a party. *See* *Clark*, 440 Mass. at 274-75 & n. 7 (“In response to our holding in *Messing*, comment [4] was amended, effective June 5, 2002, in terms identical to our language in *Messing* with the addition of the word “agents.”). Are foster parents “agents” of DCF? They probably are, although they almost certainly do not fall within the protections of Rule 4.2.

In *Adoption of Vidal*, the foster care agency, contracted by DCF, provided written assessments of the needs of the child. 56 Mass. App. Ct. 916, 916 (2002). The Appeals Court held that “[a]n assessment completed by one employed by an organization under contract with [DCF] is the functional equivalent of an assessment undertaken by a person employed directly by [DCF].” *Id.* at 917. The trial court properly admitted the reports written by the foster care agency as “official reports” because they were substantially similar to the admissible reports and reviews submitted by DCF’s direct employees. *Id.* at 916. Accordingly, for hearsay purposes, DCF agents may be treated as if they are employees if they are performing a public function otherwise performed by DCF employees.

Further, foster parents are considered “public employees” under G.L. c. 254, § 1. As public employees, foster parents working within the scope of their employment are entitled to civil immunity from negligence claims. *See* *Archer ex rel. Goodwin v. Dare Family Servs.*, 14 Mass. L. Rep. 375, \*6 (2002) (providing liability protection regardless of direction and control test). Moreover, private institutions have been considered state actors when “performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties.” *See* *Perez v. Sugarman*, 499 F.2d 761, 765 (2nd Cir. 1974) (finding private child custody institutions “state actors” when stepping into government’s shoes to care for children in need of “public assistance and care, support and protection”). Foster parents step into the shoes of DCF when they care for children. Foster parents are, in this capacity, “state actors.”

Finally, foster parents are heavily regulated and directed by DCF. When DCF chooses to utilize a foster care agency’s services to provide a foster home for a child in DCF’s custody, the foster parents must comply with DCF standards and requirements. *See, e.g.,* 110 CMR 7.100 (discussing eligibility of foster parents); 110 CMR 7.104 (providing standards for foster parent licensure); 110 CMR 7.106E (permitting limitations and regulations of contracted foster parents); 110 CMR 7.107 (explaining assessment and licensure of foster parents). When an independent contractor is subject to a certain degree of regulation and control, the independent contractor is an employee of the contracting employer and subject to employee status benefits. *See* G.L.c. 149, § 148B(a) (distinguishing between independent individuals and employees); *Corsetti v. Stone Co.*, 396 Mass. 1, 9-10 (1985) (finding sufficient direction and control over work of independent contractor to be considered employee). Accordingly, by this analysis, foster parents might be treated as DCF “represented agents” of DCF for purposes of Rule 4.2.[[1]](#footnote-1)

Nevertheless, foster parents, while probably “agents” of DCF, are almost certainly not “represented” clients under Rule 4.2 and comment [4]. They are not represented because they do not have managerial or supervisory authority over the subject of the litigation; they have not committed the wrongful acts subject to litigation; and they cannot commit DCF or authorize litigation decisions. Therefore, parents’ and child’s counsel can freely speak to them without the presence or permission of DCF counsel. The same caveat applies, as set forth above; counsel for a child or parent must be careful to follow all other Rules of Professional Conduct when dealing with foster parents.

***III. Can DCF Counsel Tell Opposing Counsel Not to Contact Front-Line DCF Social Workers or Foster Parents?***

Sometimes DCF attorneys attempt to bar parents’ and children’s attorneys from speaking to DCF social workers or foster parents. Sometimes DCF attorneys tell the social workers or foster parents not to speak to other counsel. This is improper, and can lead to adverse consequences for the DCF attorney (or child’s counsel, if child’s counsel is improperly instructing the social worker or foster parent). Mass. R. Prof. C. 3.4(f) speaks to this issue:

A lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client and (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

Mass. R. Prof. C. 3.4(f); *see also* Restatement (Third) of the Law Governing Lawyers, § 116(4) (prohibiting lawyer’s prevention of individual voluntarily providing information to opposing party).

Attorneys who violate Rule 3.4(f) (or its out-of-state equivalent) have been subject to monetary sanction, reprimand, and disqualification. *See, e.g., Briggs v. McWeeny*, 260 Conn. 296, 332-33, 335, 796 A.2d 516, 540-42 (Conn. 2002) (disqualifying plaintiff attorney who violated Rule from future cases involving defendants, and noting that “[i]n matters of attorney misconduct, ‘[the trial] court is free to determine in each case, as may seem best in light of the entire record before it, whether a sanction is appropriate and, if so, what the sanction should be.’”) (citations omitted); *Harlan v. Lewis*, 982 F.2d 1255, 1258 (8th Cir. 1993) (sanctioning attorney $2,500 for prohibiting non-client witness from speaking with opposing counsel); *Kensington Int’l Ltd. v. Republic of Congo*, 2007 U.S. Dist. LEXIS 63115, \*34, 2007 WL 2456993, \*10 (S.D.N.Y. Aug. 24, 2007) (ordering defendant’s counsel to pay costs and attorneys’ fees to plaintiff after influencing witness not to attend deposition in violation of, inter alia, Rule 3.4(f), intending the sanction to serve as a “formal reprimand” to the firm); *Synergetics, Inc. v. Hurst*, 2007 WL 2422871, \*15 (E.D. M.I. Aug. 21, 2007) (ordering monetary sanctions for witness tampering). Accordingly, if DCF counsel prohibits DCF social workers or foster parents, who are not clients of DCF, from speaking with parents’ or children’s counsel, DCF counsel may be subject to fines, reprimand, disqualification, or other sanction.

**Conclusion**

 According to Mass. R. Prof. C. 4.2 and *Messing*, front-line DCF social workers are not “represented employees” of DCF requiring parents’ or children’s counsel to obtain DCF’s counsel’s permission before making contact. Foster parents are probably “agents” of DCF for purposes of Rule 4.2, but even so, they are not “represented employees” or “represented agents” under the Rule. DCF counsel is not permitted to prohibit social workers and foster parents from speaking to parents’ and children’s counsel. Doing so violates Mass. R. Prof. C. 3.4(f), and may subject the attorney to financial or other sanctions.

1. Note, however, that “the mere fact that a State agency regulates a private party is not sufficient to make that party a State actor.” *Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001). Most courts have expressly rejected the idea that foster parents are state actors (at least in the context of civil rights litigation). *See id.* at 1349 (holding foster parents are not state actors). “Foster parents are *not* state actors for purposes of Section 1983.”  *Howard v. Malac*, 270 F.Supp.2d 132, 143 (D. Mass. 2003) (citing *Rayburn*, 241 F.3d at 1349; *Leshko v. Servis*, 423 F.3d 337, 347 (3rd Cir. 2005); *K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990); *Milburn v. Anne Arundel Cty. Dep’t of Soc. Svcs.*, 871 F.2d 474, 479 (4th Cir. 1989)). There is a narrow exception to this: where state officials “knew that the foster parent was abusing the child and . . . colluded with the foster parent to cover up the abuse,” there may be a sufficient “connection between the state and the foster parent’s child abuse to potentially render the foster parent a state actor at trial.” *Marr ex rel. Marr v. Schofield*, 307 F.Supp.2d 130, 134 (D.Me. 2004) (citing *Howard*, 270 F .Supp.2d at 145-46). That exception is not relevant in this context. [↑](#footnote-ref-1)