IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

WILLIAM JAMES QUIRK Plaintiff, v. JOHN M. PALMS, Individually and in his ccapacity as President of the University of South Carolina; THE UNIVERSITY OF SOUTH CAROLINA; JEROME D. ODOM, Individually and in his capacity as Provost of The University of South Carolina; R. BRUCE DUNLAP, KARL G. HEIDER, DANIEL L. REGER, PAULA R. FELDMAN, SARAH A. WOODIN, AND WILLIAM T. MOORE, Individually and in their capacities as members of the University Committee on Named and Distinguished Professorships, Defendants.	C/A No. 3:02-1238-22 **Order on Motion to Strike Affidavit**

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INTRODUCTION

This matter is before the court on Defendants' motion to strike the affidavit of John E. Montgomery, Esquire, Dean of the University of South Carolina School of Law. Dean Montgomery's affidavit was filed as an attachment to Plaintiff's motion for partial summary judgment. The motion to strike is based on alleged improper *ex parte* contact between Plaintiff's counsel and Montgomery. The affidavit was obtained as a direct result of this contact. Defendants maintain the contact violated Rule 4.2 of the South Carolina Rules of Professional Conduct, SCACR 407, which prohibits contact with represented parties absent consent of counsel and subject to certain exceptions discussed herein.

For the reasons set forth below, the court concludes that the contact was improper and prospectively bars future contact of this nature in this action. While finding a violation of the rule, the court declines to strike the affidavit for a variety of reasons including that the commentary to the relevant ethics rule may fairly be read to permit the challenged contact and that no resulting harm has been shown. Nonetheless, the court leaves open Defendants' right to challenge specific portions of the affidavit either based on a showing of harm or other grounds. Such challenges, if any, shall be included in Defendants' response to Plaintiff's pending motion for partial summary judgment.

FACTS

Through this action, Plaintiff William James Quirk, Esquire, a professor at the University of South Carolina School of Law, challenges his non-reappointment to an endowed chair position. Specifically, he alleges that the non-reappointment and related process violated his rights to procedural and substantive due process as well as his right to equal protection under the constitutions of the United States and State of South Carolina. Quirk also asserts a variety of purely state law claims including for breach of contract, defamation, and breach of fiduciary duty.

Each of the individual Defendants, including the members of the University Committee on Named and Distinguished Professorships ("Committee"), the President of the University, and the University's Provost played a role in the non-reappointment decision. Ultimately, however, the decision was a decision of the University of South Carolina ("USC"), which is also a named Defendant. It is Montgomery's relationship to this organizational defendant which gives rise to the present motion.

Montgomery, whose affidavit is at issue in this motion, served as Dean of the USC School of Law at all times relevant to this action. Montgomery was not a decision maker in the process which led to Quirk's non-reappointment. Nonetheless, he played an official role in the process

including passing on information to be used in the review process and making his own recommendation which was also forwarded to the decision-making body.

At all relevant times, Professor Quirk reported to Dean Montgomery. Likewise, one of Plaintiff's attorneys, R. Randall Bridwell, Esquire, was at all relevant times a professor at the USC School of Law. Bridwell also reported to Dean Montgomery. The primary contacts at issue are contacts between Professor Bridwell and Dean Montgomery, although there is mention of an earlier message left by Quirk's other attorney, Harry Swaggert, Esquire, an attorney in private practice.

First Montgomery Affidavit. The affidavit which is the subject of the motion to strike (hereinafter "First Montgomery Affidavit"), first describes Montgomery's limited role in the underlying reappointment process and provides a chronology of events, describing and quoting documents which were either provided to or were authored by the decision-making body.[1] Although the affidavit refers to the numerous documents as attachments, they are not, in fact attached to the affidavit filed with the court. Second, Montgomery's first affidavit provides an explanation of Montgomery's intent as to several of the documents he authored.[2] Third, a few items appear to

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[1] First Montgomery Affidavit ¶¶ 1-4 (describing Montgomery's limited role in process); ¶¶ 5-7 (quoting from pay raise recommendations made by Montgomery in 1996 and 1998); ¶¶ 8-9 (describing and quoting from Montgomery's February 15, 1999 letter recommending renewal of Quirk's appointment); ¶¶ 11-13 (stating that Quirk was reappointed [in 1999], and describing and quoting from a form letter sent to Quirk relating to the next reappointment review); ¶¶ 14-15 (stating that Montgomery reevaluated Quirk in connection with the 2001 reappointment and quoting the February 12, 2001 letter which included his written recommendation); ¶¶ 18-22 (stating what actions he took after learning that President Palms was reconsidering the non-reappointment decision, which culminated in Montgomery sending a letter to Palms on October 8, 2001, apparently addressing the failure to consider a significant piece of research not earlier considered); ¶ 24 (quoting from the February 12, 2001 letter).

[2] First Montgomery Affidavit ¶ 10 (explaining intent of comment in Montgomery's February 15, 1999 letter); & ¶ 16 (explaining the intent of certain comments in Montgomery's February 12, 2001 letter and stating that he was unaware of a separate piece of research when he wrote the February 2001 letter).

address facts which may not be subject to other proof.[3] Finally, the affidavit provides Montgomery's opinion on certain matters related to Quirk's past and expected performance as well as to the decision directly at issue.[4]

Second Montgomery Affidavit. The events that led to Quirk's submission of the First Montgomery Affidavit are explained in a second affidavit submitted by Defendants in support of their motion to strike (hereinafter "Second Montgomery Affidavit"). In this second affidavit, Montgomery states that he was first contacted about providing an affidavit or submitting to a deposition by Harry Swaggert or someone in Swaggert's office. Second Montgomery Affidavit ¶ 4. Although he does not expressly state this fact, Montgomery was, presumably, aware at the time he received this call that Quirk had instituted litigation against the University and that Swaggert was acting as Quirk's attorney in that litigation. This initial contact was by voice mail message left some time after the litigation was initiated. *Id.* It does not, however, appear that there was any follow up to this communication or, more importantly, that Montgomery ever provided any information in response to this initial voice mail message.

Montgomery states that Bridwell contacted him several months after the initial contact from Swaggert's office. Bridwell asked Montgomery to sign an affidavit which Bridwell had drafted. *Id.*

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[3] First Montgomery Affidavit ¶¶ 27 & 28 (discussed *infra*); ¶¶ 31 & 32 (stating that he had received notice in other cases in which warnings were issued in regard to endowed chairs which provided him the opportunity to counsel the chair holder but that he did not receive such notice as to Quirk).

[4] First Montgomery Affidavit ¶ 17 (stating that he expected continued excellent output); ¶ 23 (stating his view of the significance of the article he had not considered in making his initial recommendation); ¶¶ 25 & 26 (explaining his view of the significance of the research which had not been considered in his February 12, 2001 letter and why and how he modified his recommendation in the October 8, 2001 letter written as part of the reconsideration process); ¶ 29 (stating Montgomery's opinion of Quirk as a "productive scholar" who had brought "national attention to the Law School through years of sustained and highly respected scholarly works"); ¶ 30 (stating Montgomery's opinion that Quirk's scholarly output justifies his reappointment).

¶ 5. Montgomery states that he did not know at that time that Bridwell was representing Plaintiff in the present lawsuit. *Id.* Nonetheless, it appears that Montgomery would have been aware of the lawsuit and clearly would have understood that Bridwell, an attorney, was acting on Quirk's behalf in seeking the affidavit. Montgomery waited several months, then rewrote the affidavit removing what he believed to be inaccuracies. *Id.* ¶ 6. After executing the affidavit, Montgomery provided it to Bridwell. *Id.* Montgomery does not suggest that he contacted the University's attorneys during the time he held the affidavit, although he would obviously have had the opportunity to do so.

Quirk Affidavit. Quirk has also submitted an affidavit relating to his personal contacts with Montgomery. Quirk states that he first discussed the issue of his non-reappointment with Montgomery in April and May of 2001, prior to initiation of this litigation, for the purpose of advising Montgomery of the non-reappointment. Quirk Affidavit ¶¶ 4-5. Quirk states that Montgomery expressed outrage, "offered to help in any way he could," and later passed on information to Quirk regarding what Montgomery had learned from a member of the Committee. Quirk Affidavit ¶¶ 5, 8 & 10.[5] Quirk also states that he "later told Professor Bridwell of the Dean's willingness to help and [that Quirk] later understood that [Bridwell] would ask the Dean for an affidavit to assist [Quirk], as the Dean had offered." Quirk Affidavit ¶ 11. Quirk does not provide any time frame for his conversation with Bridwell. There is, however, no evidence to contradict Montgomery's statements that Bridwell contacted Montgomery to request the affidavit after this litigation was instituted.

[5] The content of the statement from a member of the Committee regarding the actions of the Committee, passed on through Montgomery to Quirk, would not likely be admissible to prove that the statement was made by the Committee member unless Montgomery's statement is, itself, considered a party admission. Such a determination runs at odds to at least one of Plaintiff's arguments for exclusion of Montgomery's statement. The statement may, however, have independent relevance to the present motion, to the extent that it is relevant that Montgomery made the statement to Quirk.

DISCUSSION

Rule 4.2 of the applicable Rules of Professional Conduct prohibits contact with represented parties as follows:

> 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.*

Rule 4.2, SCACR 407.[6]

The comments to the rule address how it applies to employees of an organization, prohibiting contact with some but not all employees:

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

Comment, Rule 4.2, SCACR 407.

The comments also explain that the "authorized by law" language "includes . . . the right of a party to a controversy with a government agency to speak with government officials about the matter." *Id.* The scope of this aspect of the "authorized by law" exception (referred to herein as the "governmental exception"), lies at the heart of the present motion.

The University of South Carolina (USC) is an institution of the State of South Carolina. The USC School of Law, of which Montgomery was Dean at the relevant time, is a school within the greater university. The present action is, moreover, founded, at least in part, on the status of USC as a governmental entity in that it alleges violations of constitutional provisions applicable only to governmental bodies.

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[6] This rule, adopted by the South Carolina Supreme Court through Rule 407, SCACR, is controlling in this court pursuant to Local Civil Rule 83.I.08 IV. B.

Defendants argue that Plaintiff violated Rule 4.2 by contacting Montgomery directly in regard to this litigation. Plaintiff argues that the contact was not improper both because the governmental exception applies and because Montgomery does not fall within the category of agents of an organization subject to protection from contact under 4.2. Plaintiff also argues that, even if the contact was impermissible, the court should, at most, strike the affidavit. The court will deal with these arguments in order.

1. **Governmental Exception.**

The South Carolina Supreme Court has not addressed the scope of the "authorized by law" limitation on Rule 4.2 as it applies to contacts with governmental officials or employees. It appears, however, that this limitation on the no-contact rule is founded on the First Amendment right to petition the government for redress of grievances. *See generally* ABA Formal Ethics Opinion 97-408 at 1 (1997) ("Model Rule 4.2 generally protects represented government entities from unconsented contacts by opposing counsel, with an important exception based on the constitutional right to petition and the derivative public policy ensuring a citizen's right of access to government decision makers.").[7]

For the reasons set forth below, this court predicts that, in the absence of express statutory authority authorizing greater contact, the state court would interpret the "as authorized by law" exemption only to authorize *ex parte* contacts with government officials to the extent mandated by the First Amendment right to petition for redress of grievances and derivative public policy of ensuring citizen access to government decision makers.

[7] Page citations in this order to the ABA Formal Opinion refer to the pages as reflected in the Westlaw print out.

Plaintiff's cited authority. As Plaintiff correctly notes in his memorandum in opposition to the motion to strike, none of the cases cited by Defendants in their opening brief involve a public university.[8] Neither do Defendants address the governmental exception in their opening brief. Plaintiff, however, offers the court minimal guidance in interpreting the exception as his memorandum cites only the above quoted comment to the rule.

Subsequent to filing his responsive memorandum, Plaintiff submitted an ethics opinion from Utah which directly addresses the governmental exception. *See* Utah State Bar Ethics Advisory Opinion No. 115 (May 20, 1993). This opinion reads the exception broadly:

> Because the Utah and United States Constitutions guarantee all private citizens access to government, *all communication, whether oral or in writing, with employees or officials of a government agency under any circumstances are permitted.* Thus, a lawyer representing a government office or department may not prevent his non-government counterpart from contacting any employee of the government office or department outside the presence of the government attorney, whether or not the communication involves a matter in litigation. However, if counsel for a private party contacts a government employee about pending litigation, counsel must inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel; and (b) about his representation of a private party in that litigation.

Id. (emphasis added).[9] Plaintiff offers no other authority to guide the court in interpreting this

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[8] In their opening brief, Defendants relied on three cases involving universities in which Rule 4.2 was applied: *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1121 (8th Cir. 1997); *University Patents, Inc. & Univ. of Penn. v. Kligman*, 737 F. Supp. 325, 328 (E.D. Pa. 1990); and *Kole v. Loyola Univ. of Chicago*, 1997 WL 47454 (N.D. Ill. 1997). According to their web sites, however, none of the universities involved are public institutions. Thus, while the three university cases cited by Defendants in their opening brief may guide the court as to general application of Rule 4.2, they are of no guidance as to application of the governmental exception.

[9] Plaintiff does not address the limitations found at the conclusion of this passage which, according to Montgomery's Second Affidavit, may have been technically violated by Bridwell's contact with Montgomery in that Bridwell does not appear to have affirmatively advised Montgomery as required by this passage. Nonetheless, any such failure would appear to be harmless as Montgomery was aware of the litigation and aware that Bridwell, an attorney, was acting on behalf of Quirk, even if Montgomery was unaware of Bridwell's formal status as counsel of record in this action.

exception.

Defendants' cited authority. Defendants address the governmental exception only in their reply brief where they cite to two cases in which the courts addressed the governmental exception to Rule 4.2. The first of these, *Camden v. State of Maryland,* 910 F. Supp. 1115 (D. Md. 1996), deals with a state university. However, the governmental exception was not raised by the parties and is only mentioned by the court in a footnote. 910 F. Supp. at 1118, n.8 ("the parties have assumed that [the state university] enjoys whatever protections corporations and other organizations enjoy generally with regard to Rule 4.2"). After suggesting a very broad interpretation of the governmental exception,[10] the *Camden* court questions "whether the authorities had the case of a public educational institution in mind when they crafted this governmental agency exception, particularly where the institution finds itself in the more corporation-like stance of employer rather than its role of enforcer of governmental mandates." *Id.* The court did not, however, further address the application of the governmental exception to public universities. *Id.* Instead, the court focused on the availability of the attorney-client privilege and work-product protection, regardless of the applicability of Rule 4.2. *Id.* ("Even so, there is no doubt that governmental agencies may avail themselves of the attorney-client and work-product privileges . . . and whatever rules a court might fashion to protect and preserve them).

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[10] The *Camden* court states that "[i]nsofar as a party's right to speak with government officials about a controversy is concerned, *Rule 4.2 has been uniformly interpreted to be inapplicable.*" 910 F. Supp. at 1118, n. 8 (emphasis added). This statement appears to overstate the scope of the exemption as it is interpreted by most courts. *See generally,* ABA Formal Opinion No 97-408 at 2 ("Most state bar associations and courts that have considered the issue are in agreement that the no-contact rule generally applies where lawyers for private parties seek to communicate about a controversy with governmental officials.") and at n. 6 (citing cases and ethics opinions from seven jurisdictions applying Rule 4.2 to limit contact with employees of governmental parties except under limited circumstances).

Ultimately, the court found these protections and privileges to have been violated because of the role that the former government employee had played in an earlier investigation which included extensive communications with counsel and work done at the direction of counsel.[11] To the extent the *Camden* court addressed the scope of Rule 4.2, that discussion focused on application of the rule to an organizational party's former employees. *Id.* at 1118-22. Neither this issue nor the concerns actually addressed in *Camden* are presented in the case *sub judice*.[12]

Defendant also relies on *Hammond v. City of Junction City, Kansas*, 2002 WL 169370 (D. Kan. 2002), which held that the governmental exemption was limited so that "counsel may ethically engage in *ex parte* contact with an employee of a government agency *only* when the employee has 'authority to take or to recommend action in the matter;' when the sole purpose of the communication is to address a policy issue, including settling the controversy; *and* when the lawyer for the party gives government counsel reasonable advance notice of the intent to communicate with the official." *Id.* at *6 (emphasis added). If this interpretation of the governmental exception applies, Bridwell's contact with Montgomery would violate the rule on all three points.

ABA Formal Ethics Opinion. The *Hammond* court relies on an ABA ethics opinion which this court finds to be the most persuasive of the available authority. *See* ABA Formal ethics Opinion

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[11] The communications between opposing counsel and the former government employee resulted in actual disclosure of what was obviously privileged and protected information. In addition, the court noted that the university had expressly asked plaintiff's attorney not to contact the former employee, and he agreed not to do so, although he did not abide by his agreement. *Id.* at 1122.

[12] In the present case, there is no suggestion that Montgomery had any privileged or protected information relating to the matter. While this may not excuse the contact if otherwise impermissible, it may reflect both on the proper application of the basic rule to him (assuming the governmental exception does not apply), and on the degree of any resulting harm. The latter would impact on the proper remedy.

97-408. This opinion, titled "Communication with Government Agency Represented by Counsel," provides a detailed analysis of how Rule 4.2 had been applied to contacts with governmental employees by the various jurisdictions which have addressed the issue. While noting that two jurisdictions provide a broader exemption and that many commentators argue for limited application of the no-contact rule to governmental agencies, the opinion finds that "[m]ost state bar associations and courts that have considered the issue [agree] that the no-contact rule generally applies where lawyers for private parties seek to communicate about a controversy with governmental officials," even though "most jurisdictions . . . also interpreted the rule to accommodate the constitutional right to petition and the derivative public policy of ensuring a citizen's right to access to government decision makers." *Id.* at 2.[13]

After addressing the existing authority, the opinion concludes:

> The Committee agrees with the weight of authority that Rule 4.2 is generally applicable to communications by lawyers with represented government entities. We see no basis for categorically exempting government entities from the protection afforded by the no-contact rule where such entities have chosen to deal with a particular controverted issue through legal counsel. At the same time, we also agree that the no contact rule must not be applied so as to frustrate a citizen's right to petition, exercised by direct communication with government decision makers, through a lawyer. . . .
>
> The Committee therefore concludes that Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate directly with government decision makers in certain limited circumstances within the ambit of the right to petition, even though it would in the same circumstances prohibit communication with a represented private person or organization without consent of counsel.
>
> Recognizing the uncertain parameters of the constitutional right to petition and the limited scope of our own jurisdiction to opine on questions of law, *the Committee believes that the most responsible way of accommodating the tension between a citizen's right of access and the government's right to be protected from*

[13] Cited page numbers are to page as printed from Westlaw.

uncounselled communications by an opposing party's lawyer, is to make all unconsented contacts with government officials that would otherwise be prohibited by the no-contact rule subject to two important conditions.

First, the *government official to be contacted must have authority to take or recommend action in the controversy, and the sole purpose of the communication must be to address a policy issue, including settling the controversy.*

Second, because of the predictable difficulty of confining the scope of the communication to policy issues where a contacted official is also a potential fact witness, and in recognition that the government has a right to the active participation of its lawyers even where the right to petition applies, the Committee believes it essential to ensure that government officials will have an opportunity to be advised by counsel in making the decision whether to grant an interview with the lawyer for a private party seeking redress. *Thus the lawyer for the private party must always give government counsel advance notice* that it intends to communicate with officials of the agency to afford such officials an opportunity to discuss with government counsel the advisability of entertaining the communication. . . .

In situations where the right to petition has no apparent applicability, either because it is not the sole purpose of the contact to address a policy issue or because the government officials with whom the lawyer wishes to communicate are not authorized to take or recommend action in the matter, Rule 4.2 should be considered fully applicable to a lawyer's communications with officials of a represented government entity just as it would apply to a lawyer's communications with officials of a private organization. In such situations, no communication by the lawyer is permitted except with consent of counsel.

Id. at 2-3 (emphasis added).

This court finds the rationale of the ABA opinion as quoted above to be persuasive. It further concludes that the recommended limits adequately protect the First Amendment right to petition the government for redress while balancing the government's right to protect its legitimate interests as a litigant. This court, therefore, predicts that the South Carolina Supreme Court would adopt the above quoted narrow reading of the governmental exception.

Application of the Rule to the Contact with Montgomery. Applying the rule to the present circumstances, it is apparent that the purpose of the contact with Montgomery was not to

address a policy issue and that he was not authorized, at least at the time contacted, to take or recommend action in the matter. Further, even had he been a person properly contacted, no prior notice was given to counsel for the University. Thus, assuming that Rule 4.2 would apply to Montgomery if he were employed by a private organization, the communications with him would be improper.

2. General Applicability of Rule 4.2

The court agrees with Defendants' arguments as to why Montgomery is a person with whom contact is prohibited under Rule 4.2 absent consent of opposing counsel or an applicable exception. Clearly, at the relevant time, Montgomery was a "person[] having a managerial responsibility on behalf of the organization." Comment, Rule 4.2. Assuming without deciding that the managerial responsibility must relate to the matter at issue, the court would find adequate support for such a finding in the affidavit itself. While Montgomery may not have had decision-making authority, he certainly played a managerial role by making a recommendation and passing along relevant information on which the decision would be made. It is also by virtue of this role that he had useful information regarding the process.

For the same reasons, Montgomery is a "person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil . . . liability." *Id.* That is, his failure to pass on information or his actions in regard to the reappointment process could be grounds for imposing liability on the University.[14]

Finally, it seems likely that Montgomery's "statements may constitute an admission on the part of the organization." This is at least true as to his own actions in regard to the process

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[14] For purposes of this discussion, the University itself is the only relevant Defendant as Montgomery was not an agent of the various Defendants named in their individual capacities.

(including any failure to pass on information or passing on misinformation). It is also most likely true as to comments made to him by members of the Committee which he passed on to Quirk. *See supra* n. 5 (discussing Quirk Affidavit).

3. Proper Remedy

Although the court concludes that Montgomery should not have been contacted without prior consent of the University's counsel, the court finds that the mistake was not made in bad faith. This is first and foremost due to the lack of prior guidance from any binding authority coupled with the broad interpretation of the governmental exception which might reasonably be drawn from the comment to the rule. Further, what authority is available suggests a divergence of opinion as to application of the governmental exception. Indeed, even the members of the Ethics Committee of the ABA have differed as to the proper scope of the "governmental exception." In light of this determination, the court concludes that the remedy should be limited to a prospective prohibition on further contact and such further relief as is necessary to remedy actual harm.

The court further finds little if any risk of harm from the contact under the very unique circumstances of this case which include that: (1) Montgomery is an attorney; (2) the direct contact at issue came from Montgomery's subordinate, Bridwell; (3) even if Montgomery was unaware that Bridwell was acting as counsel in the litigation, he was aware of the litigation and that Bridwell was an attorney and was acting on behalf of Quirk; (4) Montgomery took several months to consider the requested affidavit during which time he could have contacted counsel for the University; (5) Montgomery ultimately revised the affidavit according to his own recollection; (6) there is, at present, no suggestion that Montgomery had privileged information regarding the litigation which he might have revealed or which might have influenced his wording of the affidavit; and (7) while he falls within the scope of persons covered by Rule 4.2, Montgomery was removed from the

ultimate decision-making process. *See generally Kole*, 1997 WL 47454 at *4 (discussing reasons for the rule).[15]

In light of this minimal risk of harm and absent further showing of actual harm, the court will not strike the affidavit. As noted above, however, the court will prohibit further contact with Montgomery absent prior consent of defense counsel. The court will also allow Defendants to present further argument as to why any specific portion of the affidavit should be disregarded, based on a showing of actual harm or genuine risk of harm. Likewise, the court will consider limiting Montgomery's testimony based on a similar showing.

While not directly related to the present motion, the court notes that there may be other reasons for excluding or disregarding Montgomery's proffered testimony. Some of these may overlap with the requisite showing of harm discussed above. For instance, with the possible exception of Montgomery's explanation of the absence of information in the file at the time one letter was written, the information in the numerous paragraphs listing documents appears to do no more than lay a foundation for consideration of the listed documents. *See supra* n. 1. The actual documents would, obviously, speak for themselves as to content and, more importantly, be the better evidence of what information was provided to the decision makers. While it is not clear from the present motion, it would also appear that the cited documents are subject to introduction through other means.

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[15] While the court finds that Montgomery's status as an attorney, *coupled with the other unique factors presented in this case*, mitigates the risk of harm, it rejects Plaintiff's suggestion that Rule 4.2 is somehow inapplicable simply because the person contacted is an attorney. Likewise, the court rejects Plaintiff's suggestion that *Kole* found Rule 4.2 not to be implicated where the persons contacted were attorneys. Rather, that court merely referenced that fact in concluding that one of the reasons underlying the rule was "not as important . . . as is normally the case." *Kole* at *4.

Other aspects of the affidavit may be subject to challenge on a variety of grounds. For instance, it seems doubtful that Montgomery's subjective intent in writing any particular letter would be relevant to any issue before the court absent an indication that this intent was passed on to any decision maker. *See supra* n. 2. Similarly, assertions of fact presented in a way that suggests they are not made based on first hand knowledge may be subject to exclusion on grounds independent from Rule 4.2.[16] Finally, to the extent the affidavit offers opinion testimony (as opposed to fact testimony of opinions which Montgomery passed on to the Committee), it may be subject to exclusion unless Montgomery has been listed as an expert witness whose opinion might be offered, which does not appear to be the case.[17] *See supra* n. 4.

By pointing to these concerns, the court does not intend to indicate that it has predetermined that these portions of the affidavit should be excluded. Rather, it raises the concerns so that they may be addressed in the parties' subsequent briefs relating to Plaintiff's motion for partial summary judgment. **Prior to further briefing, the parties shall consult to determine whether any agreement can be reached as to exclusion of challenged portions of the affidavit. To facilitate that consultation, Defendants shall be allowed twenty-one days from the filing date of this order to file their memorandum in response to Plaintiff's motion for partial summary judgment.** Counsel shall complete this consultation within one week of the filing date of this order in order to allow Defendants adequate time to prepare their responsive memorandum.

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[16] *See* First Montgomery Affidavit ¶ 27 (stating that Montgomery "*was informed* that President Palms was also considering having Professor Quirk's work reviewed by one or more authorities from other law schools"–emphasis added); ¶ 28 (stating that other professors who Montgomery "knew to be productive" *had received* admonitions regarding the quality or quantity of their scholarly work from the President or Provost–emphasis added).

[17] This category of testimony would also appear to present more of a risk of harm from the uncounselled communications with Plaintiff's counsel.

CONCLUSION

For the reasons set forth above, the court grants in part and denies in part Defendants' motion to strike, to wit: while future contact with Montgomery is prohibited, the court will not strike the affidavit absent a further showing of harm. That showing of harm may be made in Defendants' memorandum in response to Plaintiff's motion for partial summary judgment which shall be due twenty-one days from the filing date shown on this order. The additional time is provided to allow the parties to consult to determine whether agreement can be reached as to any specifically challenged portion of the affidavit.

IT IS SO ORDERED.

Cameron McGowan Currie

CAMERON McGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
July 2, 2003