Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles

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I am being cautious in my approach because I recognize that the area of contacts with former employees is a veritable minefield in which, until it is cleared by authoritative interpretation, short and tentative steps are the most appropriate.¹

I. INTRODUCTION

Many domestic, international, and foreign enterprises have drastically “downsized,” “rightsized,” and “redeployed” their work forces in recent years.² Individuals are also voluntarily changing jobs at near-
record levels. As a result, “former employees” now populate this planet.

When employees depart, voluntarily or otherwise, they take with them extensive general knowledge of the day to day operations of their former employers. Former employees frequently retain information specific to the particular event, transaction, or occurrence that led to a claim or litigation. It is not unusual for former employees to be eyewitnesses to key events, authors or recipients of the dreaded “smoking-gun” documents, or players in the decisionmaking process which led to the disputed matter. This phenomenon applies to mid-level and lower-level former employees as well as more senior executives.

3. See Robert O’Neill, Fewer Americans Happy with Their Jobs, Survey Finds, PLAIN DEALER, Aug. 22, 2002, at C1 (reporting on survey that found continuing decrease in job satisfaction among U.S. workers); Leigh Strope, Layoffs and Job Uncertainty Put a Damper on Labor Day, RECORD, Sept. 2, 2001, at A7 (stating that less than one-fourth of survey respondents said they were committed to their current employer and planned to stay at least another two years); Daniel McGinn and John McCormick, Your Next Job, NEWSWEEK, Feb. 1, 1999, at 43 (documenting the willingness of U.S. workers to change employers frequently if change advances career goals); see also Tami Luhby, Big Stores Told Turnover Costly, NEWSDAY, Jan. 17, 2001, at A46 (reporting that nationwide survey of retailers by Institute for Retail Excellence showed that 21% of managers and 73% of nonmanagers leave their jobs each year); Devorah Ben-David, Many Taking a Look at the Market; Some Job Seekers Are on an Active Hunt; Others Look Silently, RICH. TIMES-DISPATCH, May 20, 2001, at S-3 (reporting results of a national poll conducted in 2000 showing that 34% of the workforce said they were likely to change jobs during that year and from a 2001 poll indicating that 38% said they were likely to change jobs in 2001).

4. In the patent infringement case of Rally Mfg., Inc. v. Mr. Gasket Co., No. 87-1533 CIV., 1992 U.S. Dist. LEXIS 20681 (S.D. Fla. June 12, 1992), for example, the former employee of the defendant embroiled in a discovery controversy was the designer of the defendant’s allegedly infringing product. In another case, the former employee at issue had been the primary underwriter of a defendant insurance company that faced $50 million in potential liability in a reinsurance dispute. See Centennial Mgmt. Servs., Inc. v. Axa Re Vie, 193 F.R.D. 671 (D. Kan. 2000). And in yet another matter, the former employee was the driver of a sanitation truck whose negligence allegedly caused plaintiff’s injuries. See Sanfill of Ga., Inc. v. Roberts, 502 S.E.2d 343 (Ga. Ct. App. 1998).

DISCOVERY AND FORMER EMPLOYEES

As one court observed, every former employee has a memory. Stated more bluntly, former employees know where the bodies are buried.

Some former employees also retain, intentionally or inadvertently, documents and other tangible evidence among their personal possessions. This possibility grows greater as each day passes due to the continued exponential growth of technology in the work place and at home. Indeed, entire records of a corporation, division, or department can now be downloaded onto a few floppy or compact disks and physically removed from the employer's premises, or attached to an e-mail file and whisked by a single click of a mouse to a home office computer or other remote location. More and more people work for their employer while at home, thereby creating and storing employer-related records and back-up files on their home computers.

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7. A party allegedly obtained sixty-two boxes of documents from an adversary's former employees in In re Bank of Louisiana/Kenwin Shops, Inc., 1998 WL 788776 (E.D. La. Nov. 10, 1998). The court ordered the documents returned to the former employer. Id. at *5. In another case, a long-time employee of Philip Morris took documents that allegedly proved that the tobacco company intentionally manipulated nicotine levels in its products. Suein L. Hwang, Phillip Morris Files Fall into Hand of Antitobacco Team, WALL ST. J., Apr. 10, 1996, at B8. The employee's ex-fiancé gave the documents to plaintiffs' counsel in a class action where Phillip Morris was a defendant. Id.

8. One of the perks of working for Enron Corporation, for example, was that it furnished home computers for all its workers. Jeff Kunerth, Enron Chiefs Rise Begun in Winter Park, ORLANDO SENTINEL, Dec. 23, 2001, at A1. Data stored on those home computers undoubtedly became highly relevant when Enron collapsed and its accounting firm of Arthur Andersen was charged with and ultimately convicted of illegally destroying relevant documents. See Jeff Freeley, Arthur Andersen Ordered to Protect Enron Documents, BLOOMBERG NEWS SERV., Jan. 24, 2002 (reporting on court order requiring Arthur Andersen to report to court how destroyed documents could be reconstructed).


10. Such activity can occur with or without the employer's knowledge. An individual described by the press as a "rogue trader," for example, allegedly used his home computer to forge transactions aimed at covering up $750 million in investment losses. Weekend Press Briefing, FIN. TIMES LTD., Feb. 11, 2002, at 27.

Simply put, former employees often possess information and documentation critical to, if not determinative of, a matter in litigation. The discovery process is the heart and soul of modern litigation. A litigator’s premier task is to discover well-supported facts on which a claim or defense can be built. Failure to fully explore the reality underlying a claim or defense can result in unpleasant surprises for legal counsel engaged in pre-filing negotiation or post-filing mediation, arbitration, discovery, summary judgment, settlement negotiation or trial. For the reasons previously mentioned, today’s litigators cannot ignore former employees of clients or of adversaries as key sources of information. And yet, one inappropriate step by counsel in contacting a litigant’s former employees may result in sanctions such as disqualification of counsel, exclusion of evidence obtained from former employees, monetary penalties, and initiation of disciplinary action. 

12. See, e.g., Peralta v. Cendant Corp., 190 F.R.D. 38, 39 (D. Conn. 1999) (noting that former employee of defendant was plaintiff’s “former immediate supervisor and allegedly the decision-maker with regard to plaintiff’s claim of employment discrimination”).

13. In some instances, former employees are the only persons with information about the disputed matter. See, e.g., Jakob v. Champion Int’l Corp., No. 01 C 0497, 2001 U.S. Dist. LEXIS 19019, at *2 (N.D. Ill. Nov. 14, 2001) (observing that several rapid changes of ownership of corporate defendant resulted in situation where no current employees of defendant had knowledge of the events on which plaintiff’s retaliatory discharge claim were based).

14. As the U.S. Supreme Court stated, the basic notice pleading requirements of modern rules of civil procedure rely “on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” Swierkiewicz v. Sorema, 534 U.S. 506, 512 (2002).


16. A client’s displeasure with her attorney’s failure to divine all relevant facts may, of course, also result in a meritorious malpractice claim being pursued against the attorney.

17. Trial courts have significant discretion in determining whether an attorney’s conduct in obtaining information from a litigant’s former employees violates ethical standards, general or localized rules of procedure, or other relevant authorities, and in fashioning a remedy appropriate to the offense. Weeks v. Indep. Sch. Dist. No. I-89, 230 F.3d 1201, 1208 (10th Cir. 2000). Potential sanctions include disciplinary action, entry of a protective order precluding further contact, dismissal of the adversary proceeding, compelled production of documents and information obtained from former employees, suppression of evidence, impositions of fees and costs, and, in extreme cases, disqualification of counsel. See FleetBoston Robertson Stephens, Inc. v. Innovex, Inc., 172 F. Supp. 2d 1190, 1194 (D. Minn. 2001) (considering but ultimately rejecting defense motion to strike declaration of former employee attached in support of plaintiff’s summary judgment motion and to exclude former employee from testifying at trial); Rockland Trust Co. v. Computer Assocs. Int’l, Inc., 1999 WL 95722 (D. Mass. Feb. 19, 1999) (ruling on motion to strike affidavit in support of defendant’s motion for summary judgment.
however, merely defending against a claim of inappropriate behavior significantly sidetracks the attorney from focusing on the merits of the case, and therefore from advancing her client's interests. Imposition of even mild or moderate sanctions places a party at a significant tac-


Courts have been somewhat hesitant to readily impose the most severe of sanctions where the law defining the objectionable conduct is clearly unsettled.


Courts also refrain from imposing extreme sanctions such as disqualification of counsel or exclusion of evidence where doing so will penalize the client rather than punish the attorney’s unethical behavior. See Weider Sports Equip. Co., Ltd. v. Fitness First, Inc., 912 F. Supp. 502, 510–11 (D. Utah 1996); Brown, 148 F.R.D. at 255; Kitchen, 769 F. Supp. at 256.
tical disadvantage,18 as rulings on sanctions are rarely subject to immediate appeal.19

The role of former employees in litigated matters presents a variety of legal, ethical, and practical concerns for attorneys who wish to obtain information from their own clients’ or their opponents’ former employees.20 What are the appropriate boundaries attorneys must observe when contacting a party’s former employee who is a potential witness? Is informal, ex parte contact with the opponent’s former employees permissible? Is the approval of the court or notice to the other side necessary, either before or after contact is made? May an attorney agree to represent a former employee of his client without violating the ethical canons on conflict of interest and client solicitation? Is an attorney’s contact with a litigant’s former employees shielded from discovery by the attorney-client privilege, work product doctrine, or other laws of privilege? Can an employer successfully prevent or limit former employees’ cooperation with an opposing party through use of a separation agreement or similar contractual arrangement? Should the answers to these questions change based on the status the former employee held within the organization or the role she played in the situation that led to the dispute? Should the answers change based on

18. In Weider Sports Equip. Co., Ltd., 912 F. Supp. at 509, for example, the court noted that defendants’ efforts to have serious sanctions imposed on opposing counsel were motivated not by an interest in legal ethics but rather to obtain “tactical trial advantages.” In another case, the court disqualified plaintiff’s trial counsel for contacting defendant’s current and former employees and ordered an associate to proceed with the trial. McCarthy v. S.E. Pa. Transp. Auth., 772 A.2d 987 (Pa. Super. Ct. 2001). After losing at trial, plaintiff convinced the appellate court that the trial court erred in disqualifying her original attorney, and the case was remanded for a new trial. Id. at 995. Thus, after months of litigating the disqualification motion and completing an entire trial, the parties were back where they started, resulting in a tactical advantage for neither side.

19. “Matters concerning the disqualification of counsel and pretrial discovery matters are invariably treated as non-dispositive pretrial motions by courts in this jurisdiction and elsewhere.” Andrews v. Goodyear Tire & Rubber Co., 191 F.R.D. 59, 68 (D.N.J. 2000) (citations omitted). As a practical matter, the interlocutory status precludes an immediate appeal, except via extraordinary means such as filing a writ of mandamus. See, e.g., Weeks, 230 F.3d at 1201 (illustrating usual procedure of counsel appealing her pretrial disqualification ruling after substitute counsel had litigated case to final appealable order stage); Humco, Inc. v. Noble, 31 S.W.3d 916 (Ky. 2000) (detailing party’s unsuccessful attempt to use writ of mandamus to obtain reversal of trial court’s interlocutory order denying defendant’s motion to disqualify plaintiff’s counsel for contacting defendant’s current and former employees).

20. This situation becomes even more complicated when the potential witness is a former employee of more than one party, or when the witness is a former employee of one party and a current employee of another. See, e.g., WorldCom, Inc. v. O’Hara, No. 97 C 6158, 1998 U.S. Dist. LEXIS 17608 (N.D. Ill. Oct. 6, 1998).
whether the attorney is pursuing informal or formal means of discovery?21

Unfortunately for attorneys, their clients, and the courts, these questions "certainly raise interesting ethics issues that are far from settled."22 To the contrary, "serious ethical issues . . . will often be confronted by . . . attorneys who seek to aggressively represent their clients"23 by initiating discovery of an adversary's former employees.24

As noted throughout this Article, multiple authorities touch on the questions highlighted above. Rules of civil procedure, evidentiary standards, common law and statutory privileges, and ethical rules governing attorneys' conduct apply directly or by analogy. In addition, trial courts' inherent power to sanction attorneys for improper conduct may operate even when no specific rule has been violated.25 But no single legal authority comprehensively addresses the most troublesome issues. In fact, rules that appear to govern a particular issue relating to former employees are interpreted and applied by judges—even judges presiding in the same jurisdiction26—to reach opposite results. The goal of this Article is to untangle some of the issues surrounding the recurring dilemmas posed by discovery of information held by former employees.27

21. "Informal discovery" is, by default, any method an attorney uses to obtain information for which no express authorization is found in the formal discovery rules such as Fed. R. Civ. P. 26–37, 45, 69 or analogous state and agency procedural rules and statutes. The most common form of informal discovery is an ex parte interview of a potential witness. The interview may also involve an examination of documents or other tangible materials possessed by the interviewee.

22. Olson, 183 F.R.D. at 542; see also Lang v. Reedy Creek Improvement Dist., 888 F. Supp. 1143, 1145 (M.D. Fla. 1995).


24. For an illustrative discussion of the myriad cases and issues arising in the federal and state courts within a single state, see Bernard H. Dempsey, Jr., New Developments in the Law, Ex Parte Communications with Current and Former Employees of a Corporate Defendant, 71 Fla. B.J. 10 (1997).

25. See Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (holding that trial court has inherent power to sanction litigant and counsel for filing false pleadings and motions and for engaging in fraudulent conduct outside of court).


27. A limited amount of material here updates issues previously addressed by the author in Susan J. Becker, Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints, 51 Md. L. Rev. 239 (1992). The greater part of this Article presents discovery dilemmas not discussed in the previous piece.
Part II of this Article elucidates the competing interests of the litigants, their respective clients, the courts, and the potential witnesses when discovery is sought from former employees of a party. Part III provides a brief overview of the various legal authorities that govern an attorney's discovery of former employees and the synergy created by these sources. Part IV examines the potential pitfalls attorneys encounter when pursuing informal discovery of former employees of a party. Part V presents specific issues that arise when an attorney uses formal discovery devices to obtain information from former employees of a party. Part VI outlines the major additional limitations imposed on an attorney’s communications and interactions with former employees of a party that must be heeded when discovery is sought under formal or informal methods. Part VII concludes the Article with the author's modest suggestions for clarifying applicable standards and avoiding the myriad minefields highlighted throughout this Article.28

II. THE CLASH OF INTERESTS IN EXPANDING OR LIMITING DISCOVERY OF A PARTY’S FORMER EMPLOYEES

Whenever an ethical choice arises in which a lawyer cannot serve simultaneously the interests of the client, the court, and/or the guild, such that the interests of one or more must yield, our ethical rules resort to a ‘rock, paper, scissors’ method of solving the problem, only without the clarity or the simplicity of that childhood game.29

Allowing expanded, informal, ex parte access to former employees of a party significantly reduces costs30 and expedites resolution of dis-
It enables counsel “to access the merits of a case inexpensively and quickly by contacting these witnesses.” The information obtained during former employee interviews may persuade counsel to initiate or reject litigation as a means of resolving the dispute, or may be instrumental in counsel’s decision to pursue or to settle pending litigation. “Formal discovery, in turn, can create protracted and quarrelsome discovery disputes which consume finite judicial resources.”

As one judge surmised, “[f]ormal discovery is no substitute . . . for the opportunity to speak to witnesses, whether favorable or not, outside of opposing counsel's presence.”

So why not allow unfettered, informal access to former employees as a matter of course? Such a bright line would be easy to apply and would respect “the time honored right of counsel for all parties to interview willing non-party witnesses in private, without the presence or consent of opposing counsel and without a transcript being made.”

The reason for adopting a bright line test is perhaps obvious. As is true of many legal issues, the competing interests of those involved and the unique facts each case presents undermine any chance of establishing a “one size fits all” standard for informal discovery of former employees. Unfortunately, even the application of explicit rules governing formal discovery do not always reconcile the competing interests of all the actors. And no rules will remedy contentious discovery situations where litigation is motivated by something other than seeking a legal remedy, such as attempts to gain favorable market position or to mandate or punish ongoing conduct of nonparties.

31. See, e.g., United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257, 262 (N.D. Ohio 1997) (opining that the “basic cornerstone of our judicial system is the unimpeded flow of information between adversaries to encourage the early detection and elimination of both undisputed and meritless claims”).
32. Cram v. Lamson & Sessions Co., 148 F.R.D. 259, 261 (S.D. Iowa 1993). In a ruling allowing ex parte contact between an attorney and his opponent's former employees, one court stated: "In an era when easing or eliminating the unnecessary burdens and expense of litigation is widely viewed as desirable, this court is loath to create limitations on attorney communications which make the litigation process more difficult while providing little in the way of corresponding benefit." Turnbull v. Topeka State Hosp., 185 F.R.D. 645, 652 (D. Kan. 1999).
36. See infra Part V (Formal Discovery).
37. See, e.g., Gucci Am., Inc. v. Costco Co., No. 98CIV. 5613, 2000 U.S. Dist. LEXIS 602, at *2 (S.D.N.Y. Jan. 24, 2000) (observing that the many discovery battles in
Judges, attorneys, litigants, and former employee witnesses no doubt agree, at least in principle, that the free flow of information among parties and other persons with relevant knowledge is the key to the fair and efficient resolution of any case. Yet, each player has a slightly different perspective on how and when the information should flow, resulting in conflicts that significantly hamper efficient resolution of disputes.

Judges desire that parties effectuate discovery without court intervention, yet are often called upon to compel compliance with the fluid limitations established by the formal rules governing discovery and unclear ethical standards governing informal discovery. Judges must effectuate a gate-keeping function that allows information to flow freely to all parties, but prevents materials from being obtained in violation of rules and privileges that shield certain data from disclosure and limit inappropriate influences.

Certainly, allowing former employees to be interviewed in a relaxed and familiar atmosphere, such as their own homes and by a single attorney, encourages the flow of information that might otherwise be stifled "under intense and formal proceedings." At the same time, unregulated ex parte communication with these former employees and other nonparty witnesses licenses the attorney to shape, intentionally or inadvertently, the recollection—and thus the veracity of the factual contributions—of the former employees. As a result, some judges have constructed their own rules to govern discovery of former employees. As one judge opined, "[t]he integrity of the justice system is at risk unless a stand is taken against the conduct of the sort" that allows parties to invade other parties confidential information.

Attorneys desire unrestricted access to opposing parties' former employees without the "chill" exacted by opposing counsel's presence on the disclosure of relevant factual information. At a minimum, ex parte access provides an inexpensive means of discovering basic information about the case, and allows the attorney to make decisions as to whether formal discovery is warranted. Ex parte contact also provides an opportunity to recruit former employees into the contacting attorney's camp, or at least determine if the persons are, or plan to become, soldiers for an adversary. The use of formal discovery, especially subpoenas, provides the attorney with additional tools for mining information from an adversary's former employees.

the case arose "because each side appears to have certain goals which are not immediately apparent from the face of the pleadings").

42. See infra subsection V.B.4.d (Subpoenas and Subpoenas Duces Tecum).
While expecting unfettered access to an adversary's former employees, most attorneys prefer to shield their own clients' former employees from the discovery spotlight. This is because a former employee, especially a disgruntled one, "is precisely the witness most likely to shed light on internal corporate activities that otherwise would be difficult or impossible to uncover." This reality often inspires attempts by counsel to discourage clients' former employees from speaking to opposing counsel, or from fully responding to a subpoena. In general, however, counsel cannot forbid the former employees from doing so.

Former employees may be reluctant to cooperate with attorneys for a variety of personal and professional reasons. The time and emotional demands of participating in litigation or other dispute resolution processes is one obvious disincentive. Former employees may fear negative economic consequences from their former employer and social ostracism from former co-workers following cooperation with an adversary. Cooperation with either side's attorney could lead to pressure to provide information spun in a way that decreases its accuracy, thus causing former employees to wrestle with issues of conscience. In an extreme case, former employees may feel pressured to commit perjury. Former employees also may fear revealing facts that implicate personal culpability for the alleged wrongdoing or even civil or criminal liability.

In some instances, of course, all participants in the litigation, arbitration, or other dispute resolution process share common objectives and philosophies that predispose them to an amiable resolution of potentially troublesome issues surrounding discovery of information held by former employees. Those situations go unreported by the courts, the popular press, and legal journals. But because our evolving adversary system encourages but does not necessarily reward co-

43. George B. Wyeth, Talking to the Other Side's Employees and Ex-Employees, 15 Litig. 8, 12 (1989).
44. See Brown v. St. Joseph's County, 148 F.R.D. 246, 248 (N.D. Ind. 1993) (noting that former employee had been told not to speak to opposing counsel "under any circumstances").
45. The most common tactic in this respect involves an attorney moving to quash the subpoena directed to a client's former employees. The issue of whether the attorney has standing to pursue this motion is discussed infra text accompanying notes 444–63.
46. Prohibitions against speaking to opposing counsel might be appropriate based on a contractual agreement with the former employer, although the enforceability of such agreements is questionable. See infra section VI.F (Private Law).
48. In Smith v. Kansas City So. Ry. Co., No. WD 59676, 2002 Mo. App. LEXIS 1437 (Mo. Ct. App. June 28, 2002), for example, a former employee stated that a defendant former employer had asked him to testify falsely that plaintiff had a bad back prior to the injury that precipitated the litigation. Id. at *6.
operation, the players often struggle fiercely to protect their own interests rather than seek common ground that might accommodate all participants' perspectives. As the many cases cited throughout this Article demonstrate, judges and former employees often find themselves caught in the crossfire of those struggles without clear legal authority to arm or to shield them.

III. SYNERGY OF RULES, CODES, AND COMMON LAW DOCTRINES

Procedural rules, ethical codes, privilege doctrines, and the common law weave a jurisprudential web that sometimes serves as a trap and other times as a safety net for attorneys, their clients, and non-parties engaged in discovery disputes. As discussed throughout this Article, various rules and doctrines clearly apply to many situations with former employees, yet they rarely converge into a coherent map for practitioners and courts to follow. This is because legal authorities routinely overlook the vital role former employees play in resolving modern litigation. It also results from the competing policies underlying the various standards governing informal and formal discovery.

Ongoing efforts by the American Bar Association ("ABA"),49 the American Law Institute ("ALI"),50 the Judicial Conference of the


50. The ALI's contribution is embodied in its Restatement (Third) of the Law Governing Lawyers. See ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections, 8 LAW. MAN. PROF. CONDUCT (ABA/BNA) 211 (May 13, 1998). The Restatement attempts to combine and reconcile various standards and laws that govern attorney conduct into a single cohesive authority. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Foreword, at xxii (Proposed Final Draft No. 1, 1996) (reporting that the "rules of law set forth in this Restatement are generally drawn, and in all events influenced, by the rules set forth" in the existing "lawyer code" comprised not only of the Model Rules and the Model Code...
and others to make the rules governing attorney conduct more uniform and practical have been helpful, but have failed to generate uniformity on general principles, much less something as specific as discovery of former employees. Significant amendments to relevant rules of civil procedure in 1993 and 2000 and to model ethical rules in 2002 have not eliminated the confusion. The explosion of local rules of courts and detailed standing orders by individual judges add more layers of regulation, and therefore, of complexity.

The most significant change effectuated by the 1993 amendments was the requirement that parties voluntarily disclose certain information at the initiation of the lawsuit. See Fed. R. Civ. P. 26(a) (1993). District courts could, however, opt out of the mandatory disclosure system, id., and about half of them did. A number of other changes required heightened cooperation among counsel, litigants, and the courts. See, e.g., Fed. R. Civ. P. 26(f)(2) (requiring adversaries to jointly develop a discovery plan addressing “whether discovery should be conducted in phases or be limited to or focused upon particular issues,” and whether modifications should be made to discovery as provided for in the general or local rules of court); see also discussion of the 1993 amendments in section V.B., infra.

The 2000 amendments removed the provision that allowed district courts to opt out of mandatory disclosure procedures. See Fed. R. Civ. P. 26(a); see also subsection V.B.2, infra.


Federal judges may develop standing orders imposing detailed requirements on attorneys and others appearing before them pursuant to courts’ inherent power to manage dockets and control decorum during the litigation process. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); Cannon v. Cherry Hill Toyota, 190 F.R.D. 147, 161 (D.N.J. 1999) (stating that court’s inherent power “may be invoked to regulate the conduct of lawyers appearing before it and, when necessary, may be invoked to impose sanctions on those lawyers who violate the Rules
The chaos is compounded by the ubiquitous codes of professionalism and civility readily embraced by state and federal courts in recent years, adding yet more briars of uncertainty to an already thorny thicket. All efforts to reform standards of attorney conduct are being done against a backdrop of a larger reform movement to simplify the law in this country.

The law's amorphous boundaries create major challenges for attorneys, especially those who practice in multiple state and federal courts. It also routinely vexes judges who are mired in discovery disputes and the disciplinary boards that adjudicate charges of unethical conduct by attorneys. The ALI has put forth a valiant effort to bring some order to this chaos in its Restatement (Third) of the Law Governing Lawyers. Formulated through more than a decade of de-
bated and formally approved by the ALI in 1998, the Restatement attempts to reconcile and refine the core ethical rules, privilege doctrines, and other authorities that collectively define a lawyer's appropriate role in the profession and in society at large. Like the Model Rules of Professional Conduct, the Restatement's provisions are not binding unless a court specifically adopts them. As one observer explained, the Restatement may be consulted when violations of attorney disciplinary codes are alleged, but "its primary purpose is to guide lawyers and judges on what the law says in matters arising in the civil context," including malpractice actions and disputes over motions to disqualify counsel. Accordingly, courts may turn to the Restatement for guidance on difficult attorney conduct issues, but no state or federal court has expressly adopted the Restatement in toto.

In its current state, all of the authorities cited above seek, on the one hand, to provide expansive opportunities for an efficient and inexpensive exchange of information throughout litigation and other civil dispute resolution processes. On the other hand, these authorities seek to draw lines regarding how, when, and what information can properly be obtained. While engaging in these line drawing exercises, the law tries to accommodate diverse interests ranging from corporate trade secrets to individual privacy, from the lawyer's duty to zealously represent her clients to the court's duty to protect the integrity of the civil justice system. These often opposing goals of the law are evidenced throughout this Article, as are the efforts of courts, counsel, and litigants to locate that elusive middle ground where all interests are served.

Faced with layers of legal authority that do not apply to former employees, courts often switch focus from the letter of the law to an analysis of the underlying policies. Through this process, many discovery disputes, and certainly those involving former employees, are decided by the specific judge's weighing of policies favoring free disclosure of information against policies demanding protection of certain types of information from particular sources. Accordingly, judicial discretion injects a wild card into any discovery dispute, and especially those involving former employees of a party.

64. Id.
65. See, e.g., Peralta v. Cendant Corp., 190 F.R.D. 38, 41 n.1 (D. Conn. 1999) (citing Restatement (Third) of Law Governing Lawyers as one of numerous sources consulted on the applicability of attorney-client privilege to a deposition discovery dispute).
IV. INFORMAL DISCOVERY OF A PARTY'S FORMER EMPLOYEES

Suffice it to say that the full spectrum of ethical requirements that bind an attorney in any other situation is equally binding when the attorney engages in ex parte contact with an unrepresented former employee of an opposing organizational party.66

The right of counsel for all parties to interview willing nonparty witnesses in private and without a transcript being made is based on "time-honored and decision-honored principles."67 These principles apply, in theory, "to former employees of an adverse party."68 And yet, attorneys initiating ex parte contact with an adversary's former employees navigate a minefield of ethical rules and privilege doctrines. The most potentially explosive conventions are the ethical rules prohibiting contact with a represented party69 and the attorney-client privilege. As more fully explained throughout this Article, however, numerous other rules and doctrines are also implicated, and violations of any of these rules or standards can result in significant sanctions.

The Model Rules of Professional Conduct promulgated by the American Bar Association in 1983 serve as the focal point for this Part. Where adopted, the Model Rules govern attorney conduct when litigation or other formal adversary proceeding is contemplated but not yet initiated,70 in criminal and civil matters,71 and in transactional work.72 More than two-thirds of the states and the District of Columbia have adopted the Model Rules73 as have U.S. territories.74 Several states have developed hybrid rules by retaining the ABA's

68. G-I Holdings, 199 F.R.D. at 533.
69. One study concluded that interpretations of these rules accounted for over ten percent of the disciplinary actions taken by federal district court judges. McMorrow & Coquille, supra note 51, ¶ 802.60.
70. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) (noting that the interest the rules seek to protect "are engaged when litigation is simply under consideration, even though it has not actually been instituted," so long as potential parties have retained counsel to handle the dispute).
71. See, e.g., id. (advising that model rule prohibiting attorney from contacting party represented by counsel applies equally in criminal and civil cases); see also Brenna K. DeVaney, Note, The "No Contact" Rule: Helping or Hurting Criminal Defendants in Plea Negotiations?, 14 GEO. J. LEGAL ETHICS 933 (2001) (questioning the wisdom of applying Model Rule 4.2 in criminal cases).
72. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) (holding that "although most frequently encountered in the context of litigation," rules prohibiting contact with a represented party apply "in transactional circumstances as well," such as the sale and purchase of real estate).
73. See generally Gregory C. Sisk, Iowa's Legal Ethics Rules: It's Time to Join the Crowd, 47 Drake L. Rev. 279, 280-83 (1999) (explaining that, as of 1999, Georgia, Tennessee, Vermont and Virginia are moving away from the Model Code,
previous exemplar, the Model Code, and making substantial amendments that often reflect Model Rule standards. Other states have developed their own systems of ethical rules.

Significant variations of "model" rules are found in federal as well as state courts. Federal law controls the ethical standards of attorneys appearing in federal courts. Through local rules, federal courts frequently adopt the ethical rules of the states in which they sit and the state courts' interpretations of those rules. The [potentially leaving only Iowa, Nebraska, New York, Ohio and Oregon adhering to the Model Code).]


76. California, for example, has adopted a black letter law format with official "Discussions" interpreting the rules. See Rules of Professional Conduct of the State Bar of California (2002). Additional rules are found in other California laws, such as the rule on client confidentiality set forth in the California Business and Professional Code § 6068(e) (providing that duties of an attorney include "to maintain inviolate the confidence . . . of his or her client").

77. See generally McMorrow & Coquillette, supra note 51.

78. In re Snyder, 472 U.S. 634, 645 n.6 (1985).


80. As of June 2001, eighty-two of the ninety-four federal district courts had enacted local rules adopting the standards of the state in which the court was located. McMorrow & Coquillette, supra note 51, ¶ 802.06; see, e.g., Branham v. Norfolk & Western Ry. Co., 151 F.R.D. 67 (S.D.W. Va. 1993) (applying ethical rules adopted by West Virginia's highest court); McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 108 (M.D.N.C. 1993) (holding that "[n]asmuch as neither Congress nor the Supreme Court have adopted a uniform set of federal ethical standards governing attorneys practicing in the federal courts, the various federal courts may look to the rules of the state in which that court sits or widely accepted national rules, such as the American Bar Association (ABA) Model Rules of Professional Conduct"); Goff v. Wheaton Indus., 145 F.R.D. 351, 353 (D.N.J. 1992) (stating that federal court sitting in New Jersey applies ABA's Rules of Professional Conduct as modified by the New Jersey Supreme Court along with other standards "required or permitted by federal statute, regulation, court rules, or decisions of law"); Valassis v. Samelson, 143 F.R.D. 118, 120 n.1 (E.D. Mich. 1992) (stating that an attorneys practicing in the Eastern District of Michigan are governed by the Rules of Professional Conduct adopted by the Michigan Supreme Court). Federal courts' use of state law is recommended by the ABA. See
rowed state standards are often supplemented with district-specific local rules governing attorney conduct. Several comprehensive studies of federal courts conducted in the mid-1990s "confirmed that there were literally hundreds of different local rules governing attorney conduct in the district courts, and many more in the courts of appeal and bankruptcy courts."

Even when federal courts adopt the ethical rules of their home states, however, state court decisions interpreting those rules do not bind the federal courts. Federal courts are guided on ethical issues "by federal case law, as well as the ABA's comments to its Model Rules of Professional Conduct and the policies underlying the particular ethical rule at issue." As is the case with state courts, formal and informal opinions on the rules issued by the ABA and state attorney disciplinary boards provide guidance but are not binding on the federal courts. In short, the unified system of federal courts has no uniform standards governing attorney conduct, despite many compelling arguments favoring one set of standards for all federal courts.

MODEL FEDERAL RULES OF DISCIPLINARY ENFORCEMENT R. IV(B) (1978). But even with most federal courts adopting the ethics standards of the states in which they sit, lack of uniformity arises between districts in the same state. In the U.S. District Court for the Northern District of Ohio, for example, attorney conduct is governed by the Code of Professional Responsibility as adopted by the Supreme Court of Ohio. See N.D.L.R. 1:5.1(b), as embellished by N.D.L.R. 1:5.2's procedures for attorney discipline and disbarment. In contrast, the U.S. District Court for the Southern District of Ohio has adopted all but two of the fifteen Model Federal Rules detailing attorney discipline and procedure. See S.D. Ohio L.R. 83.4(f); see also Roach, supra note 75, at 914-18 (explaining the conflicting ethical standards in federal courts).

81. See, e.g., Rogosin v. Mayor and City Council of Baltimore, 164 F. Supp. 2d 684, 686 (D. Md. 2001) (stating that the federal district court located in Maryland applies the Maryland Rules of Professional Conduct "as they have been construed by the Maryland Court of Appeals").

82. McCMORROW & COQUILLETTE, supra note 51, ¶ 802.06; see, e.g., McCallum, 149 F.R.D. at 108 (stating that "the various federal courts may look to the rules of the state in which that court sits"); Kitchen v. Aristech Chem., 769 F. Supp. 254, 258 (S.D. Ohio 1991) (looking toward federal case law to determine whether local ethics rules had been violated).

83. McCMORROW & COQUILLETTE, supra note 51, ¶ 801.52 (citation omitted).


86. See, e.g., FleetBoston Robertson Stephens, Inc. v. Innovex, Inc., 172 F. Supp. 2d 1190, 1194 (D. Minn. 2001) (observing that "[w]hile the ABA's opinion is not binding upon this court, the Eighth Circuit has instructed courts to consider the ABA Code of Professional Responsibility in Construing the Minnesota Rules of Professional Conduct") (citing United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982)).

87. See McCMORROW & COQUILLETTE, supra note 51, ¶¶ 802.79–802.113 (describing efforts to establish a uniform set of "Federal Rules of Attorney Conduct" and offering a possible text of those rules); see also H. Geoffrey Moulton, Jr., Federalism
Battles also rage over whether attorneys representing the federal government are subject to state and federal court rules governing attorney conduct, and whether administrative agencies, such as the Internal Revenue Service, Patent and Trademark Office, and the Securities and Exchange Commission have independent authority to promulgate their own standards governing the conduct of the attorneys who practice before them. Agencies regularly promulgate and enforce such standards, and also establish standards for their own attorneys. The National Labor Relations Board, for example, recently enacted new guidelines designed to avoid the ethical problems that arise when interviewing current and former employees of a party engaged in an unfair labor practice proceeding. In addition, Executive Orders have been issued by recent U.S. Presidents to control the conduct of attorneys who litigate on behalf of the federal government in federal and state courts and other adjudicatory settings.

88. The issue of whether federal government counsel should be exempt from state and federal attorney conduct rules has plagued the profession for years. The matter appeared to be resolved when the so-called “McDade Amendment” was enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999. Codified at 28 U.S.C. §503B, the amendment subjects federal government attorneys to the same standards as all other attorneys who practice in a particular jurisdiction. 28 U.S.C. §503(B)(a) (2001). Controversy remains, however, as federal prosecutors and others claim that the rules prevent them from effectively conducting investigations vital to their assignments. See Note, Federal Prosecutors, State Ethics Regulations, and the McDade Amendment, 113 HARV. L.REV. 2080 (2001); Randy Lee, Symposium, Legal Ethics for Government Lawyers: Straight Talk for Tough Times, 9 WIDENER J. PUBLIC. L. 199 (2000). A proposed Senate bill, S. 1437, would prohibit the Department of Justice from writing its own ethical rules and would direct the Judicial Conference to develop a national uniform rule for government attorneys relating to contact with represented persons. The legislation was referred to the Senate's Judiciary Committee on Sept. 19, 2001 and no further action has been taken.

89. MCMORROW & COQUILLETTE, supra note 51, ¶ 801.42.


91. See, e.g., Exec. Order No. 12988, reprinted in 3 U.S.C. § 301 (1996) (promulgating “Guidelines to Promote Just and Efficient Government Civil Litigation” requiring attorneys who represent the federal government to provide pre-filing notices of complaints to potential defendants, actively explore settlement possibilities prior to and during litigation, participate in alternative dispute resolution where feasible, and to cooperate fully with opposing counsel in discovery). This Executive Order, issued by then-President William Clinton, revoked a similar order executed by President George Bush. Id. at § 12. Absent action by current President George W. Bush, this Executive Order remains in effect.
Despite the lack of overall uniformity in the rules and standards governing attorney conduct and the recurring criticisms of whatever code applies, certain themes permeate all codes. These include limitations applicable to obtaining discovery from former employees, such as prohibitions against client solicitation, requirements that attorneys respect their own clients' confidences and secrets and the privileges owned by persons who are not clients, avoidance of conflicts of interest, bars on ex parte contact with persons represented by counsel, and mandates that attorneys cannot insulate themselves from disciplinary actions by directing or encouraging others to engage in activities prohibited by the rules. In addition, whatever the literal language of the code in a particular jurisdiction, the same spirit of restraining attorneys from overzealous representation pervades all codes. One clear message is that ethical rules should be used to guide and govern attorney's conduct, and must not be utilized by counsel to control and limit the flow of pertinent, non-privileged information to another party.

Finally, ethical rules are neither all encompassing nor self-explanatory. Courts and litigators seek guidance in advisory opinions issued by the ABA's Standing Committee on Ethics and Professional Responsibility and states' ethics committees. They also consider the policies and practices that their own colleagues adopt to comply with the rules.


93. See id., app. B at 143-50 (explaining variations on requirement screening of lawyers within firm to avoid conflicts of interest).

94. Model Rule 5.3 and Model Code DR 4-101(D) make a lawyer responsible for the actions of her nonlawyer employees and associates. Specifically, Model Rule 5.3(b) states that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Model Rule 8.4(a) and Model Code DR 1-102(A) state that it is professional misconduct for an attorney to circumvent an ethical rule through the actions of another. And, if those rules are not clear enough, the comment to the rule on which debate usually focuses in cases involving discovery and former employees adds this advice: "A lawyer may not make a communication prohibited by this Rule through the acts of another."


cies underlying the rule in question, the decisions of other state and federal judges interpreting the rule, and similar interpretations of analogous rules from other ethical codes.98

A. Model Rule 4.2 and DR 7-104: Who is a “Person Represented by Counsel”?

There is a split of decision across the nation on the propriety of ex parte contact with former employees.99 The inescapable conclusion is that the rule is ambiguous.100

A breach of the ethical rules governing contact with a litigant’s former employees can be avoided by making two threshold inquiries. The first is whether ex parte contact with an adversary’s former employees is proper. If not, the lawyer must avoid contact, or if preliminary contact has been made, immediately terminate contact with the former employee.101 If contact is appropriate initially, then a second analysis is required to define the proper breadth of the ex parte communications between the attorney and the former employees. As explained here and in Part V below, significant variations exist as to the factors courts take into consideration in performing these two analyses.

As early as 1836, attorneys recognized a potential ethical problem in directly contacting a party already represented by counsel.102 The ABA’s 1908 Canons of Professional Ethics also reflected this con-

97. See, e.g., Brown v. Or. Dept. of Corrections, 173 F.R.D. 265 (D. Or. 1997) (consulting informal and formal opinions of the Legal Ethics Committee of the Oregon State Bar to resolve discovery dispute over ex parte contact between plaintiff’s counsel and defendant’s current and former employees); Zachair, Ltd. v. Driggs, 965 F. Supp. 741, 752 (D. Md. 1997) (observing that “lit is settled . . . that the opinions issued by the Ethics Committee of the Maryland State Bar Association are not binding” on the courts); see also Lawrence K. Hellman, A Better Way to Make State Legal Ethics Opinions, 22 OKLA. CITY U. L. REV. 973 (1997).


102. An early nineteenth century legal ethicist provided the following guidance on the subject: “I will never enter into any conversation with my opponent’s client, relative to his claim or defense, except with the consent, and in the presence of his counsel.” 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 771 (Baltimore, 2d ed. 1836) (1817), quoted in John Leubsdorf, Communicating with Another's Client: the Lawyer's Veto and the Client's Interests, 127 U. Pa. L. REV. 683, 684 n.6 (1979).
In more recent times, Model Rule 4.2 of the Model Rules of Professional Conduct and its counterpart, Disciplinary Rule 7-104(A) of the Model Code of Professional Responsibility, prohibit attorneys from contacting persons represented by counsel. These modern rules, often interpreted and applied interchangeably, lie at the heart of most controversies involving an attorney whose discovery plan includes ex parte contact with former employees of a party represented by counsel.

The Model Rules attempt to accomplish the laudable goals of protecting uncounseled persons from the overzealous attorneys of their adversaries through seemingly straightforward language. Until

103. “A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel . . . but should deal only with his counsel.”

104. From its inception until 1995, Model Rule 4.2 provided: “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.”

105. The text of DR 7-104(a) states: “During the course of his representation of a client a lawyer shall not . . . [c]ommunicate 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.” (emphasis added).

106. See, e.g., United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257, 259 n.2, 261 n.3 (N.D. Ohio 1997) (applying ABA formal opinion interpreting Model Rule 4.2 to DR 7-104(A)(1)); Cram v. Lamson & Sessions Co., 148 F.R.D. 259, 261 (S.D. Iowa 1993) (determining that “appropriate resolution” of a dispute regarding ex parte contact with former employees “is guided by substantial case law on this issue interpreting both DR 7-104(A)(1) and Model Rule 4.2”).

107. For an excellent historical account of one state’s struggle with the interpretation of Model Rule 4.2 and DR 7-104(a), see Andrews v. Goodyear Tire & Rubber Co., 191 F.R.D. 59, 69–76 (D.N.J. 2000) (recounting efforts by state and federal courts in New Jersey to apply Model Rule 4.2 in the corporate context).

108. The critical role played by Model Rule 4.2 and its predecessor DR 7-104(A)(1) in an adversarial system of justice was explained by a federal district court judge at follows:

It preserves the integrity of the lawyer-client relationship by prohibiting contact, absent consent or legal authorization, with the represented party. It also recognizes that without such a Rule “the professionally trained lawyer may, in many cases, be able to win, or in the extreme case coerce, damaging concessions from the unshielded layman.” The Rule is designed to prevent counsel from overreaching and exploiting uncounseled employees into making ill-considered statements or admissions. While the Rule is not intended to prevent a party from discovering potentially prejudicial facts, it is intended to protect the attorney-client relationship of counsel with a corporate client.
1995, Model Rule 4.2, titled Communication with a Party Represented by Counsel, provided:

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.\(^{109}\)

The parallel language of DR 7-104(A)(1) provides in pertinent part:

During the course of his representation of a client a lawyer shall not . . . [c]ommunicate 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.\(^{110}\)

It is fairly obvious that "[f]ormer employees who are in fact represented by the former employer's counsel, or any counsel, are plainly off limits under the language of the rules."\(^{111}\) But the voluminous case law, ethics committee opinions, and legal literature spawned by Model Rule 4.2 and DR 7-104(A)(1) attest to the significant difficulty in fully discerning the outside boundaries of these seemingly simple rules when former employees whose status of being "represented by counsel" is unclear. Accordingly, "[t]he Courts have never set forth a bright line rule as to the applicability of 4.2 to former employees."\(^{112}\) This has caused judges even within the same jurisdictions to issue conflicting opinions.\(^{113}\)

The lack of clear standards is largely due to the ambiguity inherent in the use of the word "party" in both Model Rule 4.2 and DR 7-104(A)(1).\(^{114}\) Several courts have observed that "[w]hether an employee, past or present, is considered within the perimeters of the

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\(^{110}\) MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A) (1969).


\(^{113}\) The determination of whether a former employee is a "party" is also critical in determining whether ex parte contact might impermissibly invade the attorney-client privilege owned by the former employer/litigant. See infra section VI.A (Attorney-Client Privilege).
term ‘party’ . . . has been the source of confusion and considerable litigation.”

One of the most contentious issues is whether legal representation of a collective entity, such as a corporation, means that former employees of that entity are automatically represented by the former employer’s counsel, thus barring ex parte contact between opposing counsel and those former employees. One court explained:

Basically, there are five positions [adopted by courts and ethics committees] on the acceptability of such contact: (1) the ex parte communication with any former employee is not permitted; (2) ex parte communication with all former employees is permitted, so long as no other privilege or rule is violated; (3) ex parte communication with former managerial employees is permitted so long as specified guidelines are followed and the former employee cannot impute liability to the former employer; (4) ex parte communication with former employees is permitted unless the employees’ acts or omissions in the matter under inquiry are binding on the corporation or imputed to the corporation for the purposes of liability; (5) ex parte communication with former employees is permitted, but where former employees’ acts or omissions could be imputed to the former employer, the former employer should be given the opportunity to consent to the contact.

Indeed, the issue of appropriate contact with former employees even divided the ABA committee charged with interpreting the ABA Model Rules, and caused the Supreme Court of New Jersey to appoint a special committee to study the issue. Indeed, the issue of appropriate contact with former employees even divided the ABA committee charged with interpreting the ABA Model Rules, and caused the Supreme Court of New Jersey to appoint a special committee to study the issue.

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116. Any analysis of Rule 4.2 must begin with a determination that the person to be approached by the attorney is indeed a party. If the litigants are individuals, it is relatively simple to determine the identity of the parties. In the case of an organization, however, the determination of a ‘party’ is less obvious. As a corporation is simply a group of persons, each member of a corporation is a potential party.


118. See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995) (featuring a vigorous dissent by Committee Member Ralph G. Elliot that the majority had misconstrued too broadly the term “party” as used in Model Rule 4.2 and DR 7-104(A)(1)).

Underlying the linguistic battles over the appropriate reach of the word "party" are philosophical differences regarding the proper categorization of former employees in the context of litigation involving the former employer. Are former employees sufficiently detached from the former employer to constitute non-party witnesses? If so, counsel for both sides may freely engage in ex parte contact with them. Are former employees non-parties, but non-parties tinged with potential agency or fiduciary relationships with the former employer? If so, then ex parte contact may be appropriate in some cases and not in others. Or, are former employees sufficiently aligned with the former employer so that they remain a single entity in the eyes of the law? If so, contact of former employees is prohibited once the former employer retains counsel.

The rules' originator, the ABA, historically advocated the first philosophy by interpreting the word "party" as generally excluding former employees. In a Formal Opinion issued in 1991, the ABA Committee on Ethics and Professional Responsibility observed that "[n]either the Rule nor its comment purports to deal with former employees of a corporate party. Because an organizational party (as contrasted with an individual party) necessarily acts through others, however, the concerns reflected in the Comment to Rule 4.2 may survive the termination of the employment relationship." In a Formal Opinion issued four years later, the ABA affirmed its position that contact with former employees was not automatically prohibited under Model Rule 4.2. After reviewing the conflicting case law and opinions of commentators on the applicability of Rule 4.2 to former employees, the ABA Committee acknowledged persuasive arguments for extending Rule 4.2's prohibition of contact to former employees; however, the Committee was "loathe" to extend the Rule to former employees where, as in the case before it, application of the rule would "inhibit the acquisition of information about one's case." Accordingly, the ABA Committee concluded that a lawyer may "communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer." Also in 1995, the ABA sought to clarify Model Rule 4.2 by replacing the term "party" with "person" and amending the comment to reflect this textual change. The rationale for the change was that "person" is

124. Id.
a much broader term than "party," and would appropriately shift focus to whether the individual being contacted was currently represented by counsel, rather than focusing on the individual's current relationship with, or former status within, a corporate or other organizational party. But as the many citations to post-1995 cases in this Article demonstrate, the textual modification has not resolved the problem. Rather, the recurring issue is whether a particular former employee is sufficiently aligned with the former employer/litigant to automatically become "represented by counsel" when the former employer retains counsel.

The ABA declined the opportunity to clarify the text of Rule 4.2 during the Ethics 2000 revision process that resulted in the approval of a significant number of amendments to the Model Rules by that organization in February 2002. The ABA did, however, change the official comment to Model Rule 4.2, discussed immediately below, in an effort to clarify the application of the text.

B. Comment to Model Rule 4.2

"The Comments are intended as guides to interpretation, but the text of each rule is authoritative." Nonetheless, arguments based on the text of Model Rule 4.2—both before and after the "party" to "person" amendment in 1995—are often accompanied by citation to the ABA's official comment accompanying Rule 4.2.

In its original form and as modified by the 1995 amendments, the comment suggests that a former employee could, under certain circumstances, fall within the rule's purview, but would not be automatically included or excluded. (The Ethical Considerations

125. To the extent ambiguity existed on the applicability of Model Rule 4.2 to pre-litigation contact with former employees, the use of the word "person" rather than "party" seems to have resolved that issue as well.

126. See, e.g., Centennial Mgt. Serv. Inc. v. Axa Re Vie, 193 F.R.D. 671, 684 (D. Kan. 2000) (declining to apply ABA's amendment to Model Rule 4.2 changing "party" to "person" because the Kansas Supreme Court had not yet adopted the amendment).

127. Numerous amendments to Model Rule 4.2 were proposed and extensively debated as part of the ABA Ethics 2000 project, but in the end, the only change to the rule was the addition of language allowing an attorney to contact a represented person if authorized by a court order to do so. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002); Raack, supra note 49, at 256. Most of the controversy focused on the application of the rule to prosecutors attempting to investigate crimes. See, e.g., Ethics 2000 Commission Releases Drafts for Amendments to Some ABA Model Rules, 67 U.S.L.W. 2486 (Feb. 23, 1999).


130. In relevant part, the 1983 version of the comment states that Model Rule 4.2 "prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in..."
accompanying Disciplinary Rule 7-104(A)(1) similarly provide no clear guidance for interpreting and applying the rule.\textsuperscript{131} The ABA Committee on Ethics and Professional Responsibility relied on Model Rule 4.2's comment in its 1991 Formal Opinion allowing contact with former employees of a corporate party.\textsuperscript{132} Courts have similarly sought guidance from the comments when interpreting and applying Model Rule 4.2, but have not always agreed with the ABA's conclusion that ex parte contact with a party's former employees is proper.\textsuperscript{133}

The comment to Model Rule 4.2 was significantly changed in February 2002 to further define the rule's applicability to current and former employees of a corporation or other entity represented by counsel. The new language provides:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent.\textsuperscript{134}

The ABA's crystallization of the comment to Model Rule 4.2 to exclude former employees of a party will not immediately end the controversy. The ABA's amendments to its \textit{Model Rules} and accompanying comments are not effective until adopted by the states and federal courts that follow the \textit{Model Rules}.\textsuperscript{135} Even after being adopted, courts may continue to struggle with how much weight to afford the comments to the rules,\textsuperscript{136} as the rules themselves classify the com-

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\textsuperscript{131} \textit{MODEL CODE OF PROF'L RESPONSIBILITY} EC 7-18 (1980), offers a rationale for DR 7-104(A)(1), but gives no guidance as to the rule's application.


\textsuperscript{134} \textit{MODEL RULES OF PROF'L CONDUCT} R. 4.2 cmt. 7 (2002) (emphasis added).

\textsuperscript{135} See, e.g., Weider Sports Equip. Co. v. Fitness First, Inc., 912 F. Supp. 502, 506 (D. Utah 1996) (recognizing that the ABA had changed the language of Model Rule 4.2 but noting that "the changes are not now a part of the ethical rules of this district"). In addition, the ABA no longer suggests amendments to the Disciplinary Rules; the language of DR 7-104 remains unchanged absent independent action by the handful of states which still follow that rule.

\textsuperscript{136} In \textit{Valassis v. Samelson}, 143 F.R.D. 118, 122 (E.D. Mich. 1992), for example, the judge found fault with other courts that placed too much stock in the comment to Rule 4.2: "The Court initially observes that the purpose of a comment is to explain a rule; a comment to a rule does not add to or any way expand upon the rule; it is explicative of the rule. Therefore, although the Comment in this case explains the application of Rule 4.2 to a corporate party, it does not expand the scope of that rule" to persons not a party to the lawsuit.
ments as guidelines rather than mandates. Because of the longstanding confusion regarding application of Model Rule 4.2 to former employees, even courts that purport to adopt the 2002 version of the rule and its comment may choose to retain the standards for contacting a party's former employees that they have developed over many years and after much debate and weighing of the competition policies supporting protection and disclosure. Finally, while allowing contact with former employees as a general rule, the newly revised comment to Model Rule 4.2 adds this caveat: "In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization." This observation reiterates the possibility of other limitations on ex parte contact with a party's former employee based on attorney-client privilege, work product doctrine, trade secrets, and other legal doctrines discussed in Part VI of this Article.

C. Additional Ambiguities in Model Rule 4.2 and DR 7-104

Three other provisions of Model Rule 4.2 and DR 7-104 serve to simultaneously clarify and cloud the lines between permissible and impermissible contact with an adversary's former employees. First, the rule does not prohibit all communication, but only bars communication between the attorney and the represented person on the "subject of the representation." An attorney is allowed to contact a former employee who has counsel, as long as the communication is limited to topics outside the dispute or controversy. At a minimum, this clarifies that an attorney may contact, with impunity, a former employee solely for the purpose of determining whether counsel represents her. Further, it empowers the attorney to discuss some matters with the former employee. But the extent of those further discussions is governed by the vague contours of the "subject of the representation."

Second, Model Rule 4.2's prohibition applies when the attorney knows that the person being contacted is represented by counsel. The comment states "[i]t means that the lawyer has actual knowledge of the fact of the representation." However, "such actual knowledge

139. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 6 (2002).
140. "If a person is represented by counsel on a particular matter, that representation does not bar communications on other, unrelated matters." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).
141. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 8 (2002). The same standard applied prior to the 2002 amendments to the rule and comment.
may be inferred from the circumstances.” The concept of “actual inferred” knowledge is a legal oxymoron as it attempts to eliminate the use of constructive knowledge while defining “actual” in a way that allows imputation of knowledge, commonly known as constructive knowledge. At a minimum, “a lawyer may not avoid Rule 4.2’s bar against communication with a represented person simply by closing her eyes to the obvious.” But just how “obvious” does the representation have to be before knowledge will be imputed to the attorney? The use of the oxymoronic standard adds more ambiguity to the determination of when sanctions are appropriate for violation of the rule.

Third and finally, there is no prohibition on contact when the lawyer has the consent of opposing counsel or is authorized by law to initiate communication with a person represented by counsel.

These additional requirements give rise to an unlimited combination of issues in any case where the ethical ramifications of an attorney contacting a former employee are debated. For example, is it appropriate for an attorney to contact a former employee who has counsel and inquire only as to the person’s attitude toward his former employer, or ask if the person has plans to relocate beyond the court’s subpoena power in the near future? Stated differently, are such inquiries “about the subject of the representation”? Similarly, since the prohibition only limits contacts to persons the attorney knows to be represented by counsel, is actual knowledge, as the comment to the rule suggests, truly required of the representation, or is the constructive “should have known” standard applicable? And when is an attorney “authorized by law” to contact a former employee or other person represented by counsel?

142. Id.
144. Consent to contact can be explicit or implied. See, e.g., Dillon Co. v. Sico Co., No. CIV.A.92-1512, 1993 U.S. Dist. LEXIS 17450, at *6–9 (E.D. Pa. Nov. 24, 1993) (holding that where defense attorneys consented to review of documents by plaintiff’s counsel with defendant’s employee, but with no defense counsel present, it was not unreasonable for plaintiff's counsel to conclude that implied consent had been given to question the employee about the documents).
145. “Communications authorized by law include . . . the right of a party to a controversy with a government agency to speak with government officials about the matter.” MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 2 (1999). In a situation involving a former employee, a court order allowing ex parte contact could constitute contact “authorized by law.” See generally ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).
146. The “authorized by law” exception generally involves situations with government personnel. For example, a person litigating a case against the government may seek ex parte contact with government officials. Such contact is normally viewed
Like the definition of the word “party” or “person,” there are no universal answers to any of these questions; rather, the three additional qualifications of Model Rule 4.2 and DR 7-104 mandate exacting examination of the facts of each situation to determine whether the disputed contact was within the prohibitions established by the rules.

D. Current Interpretations of Model Rule 4.2 and DR 7-104

Many courts and disciplinary boards allow ex parte contact with former employees of a party,\(^{147}\) while others reject such contact.\(^{148}\) A few jurisdictions have standing prohibitions against ex parte contact with former employees,\(^{149}\) while some utilize the “control group test”\(^{150}\) to limit but not prohibit such contact. The control group stan-
standard prohibits contact only with employees who manage and speak for
the corporation,\textsuperscript{151} and is sometimes even more narrowly limited to
those who make decisions directly related to the management of the
litigation or controversy for which the entity retained legal counsel.\textsuperscript{152}

Still other courts endorse a "management-speaking agent" test prohibiting contact with current or former employees who have the authority
to bind the former employer "in a legal evidentiary sense."\textsuperscript{153} Other
jurisdictions allow contact as long as the contacting attorney observes
certain limitations,\textsuperscript{154} such as taking precautions against the former
employee divulging privileged information.\textsuperscript{155} A few courts embrace a
multi-factor weighing test.\textsuperscript{156} Whether these jurisdictions will each
abandon or alter their current standards and adopt a uniform rule
allowing at least a presumption in favor of contact with former em-

\textsuperscript{151} See, e.g., NAACP v. Fla. Bd. of Regents, 122 F. Supp. 1335, 1340 n.6 (M.D. Fla. 2000) (barring contact with former high level management employees); Smith v. Kansas City S. Ry., No. WD59676, 2002 Mo. App. LEXIS 1437, at *23–25 (Mo. Ct. App. June 28, 2002) (recognizing that some of defendant's former managerial employees might be off limits to plaintiff's counsel, but holding that former employee at issue did not fit within that classification); Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1984) (interpreting DR 7-104(A)(1) in concluding that former employees could not bind corporation, therefore attorney for corporation's opponent could contact them).

\textsuperscript{152} See, e.g., Essex County Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 418 (D.N.J. 1998) (using "litigation control group" standard); In re Prudential Ins. Co. of Am., 911 F. Supp. 148, 153–54 (D.N.J. 1995) (applying New Jersey law, court defines control group as persons "making final decisions regarding the company's conduct of the instant litigation" and persons who established firm-wide policies and procedures on which plaintiffs based their claim of fraud).


\textsuperscript{154} See, e.g., Lang v. Reedy Creek Imp. Dist., 888 F. Supp. 1143 (D.Fla. 1995) (ruling contact permissible if counsel identifies self, explains purpose of interview, informs person of their right to decline to participate, avoids disclosure of privileged information, and keeps detailed records of contact with all former employees which opponent is allowed to review).


\textsuperscript{156} See Spencer v. Steinman, 179 F.R.D. 484, 491 (E.D. Pa. 1998) (holding that determination of whether contact with former employee was appropriate depended "upon weighing such factors as the positions of the former employees in relation to the issues in the suit; whether they were privy to communications between the former employer and its counsel concerning the subject matter of the litigation, or otherwise; the nature of the inquiry by opposing counsel; and how much time had elapsed between the end of the employment relationship and the questioning by opposing counsel"). The \textit{Spencer} approach was previously utilized in \textit{Dillon Cos. v. Sico Co.}, No. CIV.A.92-1512, 1993 WL 492746, at *5 (E.D. Pa. Nov. 24, 1993).
employees as advocated in the ABA's 2002 amendments to Model Rule 4.2 and its comments is a page of legal history yet to be written.\textsuperscript{157}

Counsel considering initiating informal discovery of an opponent's former employee must also keep these caveats in mind. Since "[t]he rule against communicating with represented parties is fundamentally concerned with the duties of attorneys, not the rights of parties," the represented party cannot waive it.\textsuperscript{158} Thus, an attorney may be subject to disciplinary action even if the represented former employee initiated the contact. Moreover, even when a represented former employee informs the contacting attorney that he has or is going to terminate the existing representation, the contacting (or contacted) attorney must obtain reasonable assurances that representation has in fact been terminated before communicating with that person.\textsuperscript{159}

In addition, an attorney cannot use an investigator or other agent to circumvent the rules prohibiting contact with a former employee represented by counsel.\textsuperscript{160} Thus, while the ethical rules do not pro-


\textsuperscript{158} United States v. Lopez, 4 F.3d 1455, 1462 (9th Cir. 1993); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).


hibit a party from independently contacting potential witnesses including former employees, the attorney cannot facilitate or encourage contacts that would be inappropriate if made by the attorney. An attorney can also be sanctioned for the unintentional violation of ethical rules by a paralegal or other subordinate working under the attorney's supervision. And, a former employee's placing of information about his employer into the public domain does not prevent the court from barring ex parte interviews with the counsel of an adversary.

In sum, interpretation of the ethical rules prohibiting ex parte contact with represented persons, as well as the more subtle nuances of the principles underlying the rules, varies greatly among jurisdictions. An attorney must carefully research local ethical rules and common practices before initiating contact with a party's former employees.

E. Dealing with Unrepresented Persons

An attorney who initiates ex parte contact with a former employee may also find herself defending against a claim that she violated Model Rule 4.3. (There is no direct analogy in the Model Code to Model Rule 4.3.) Model Rule 4.3 does not prohibit such contacts, but unequivocally requires that the contacting attorney make clear her role in the pending litigation or other matter that inspired the contact. The pre-2002 comment to Model Rule 4.3 and the text of DR 7-1215 (W.D. Mich. 1991); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) (interpreting and applying Model Rules 5.3 and 8.4(a)).

162. Id. at 1195-96.
164. See, e.g., Castona v. Am. Tobacco Co., 908 F. Supp. 378 (E.D. La. 1995) (concluding that interviews given by former employee of defendant to Department of Justice officials, a member of Congress, and a television network did not exempt former employee from the courts' order forbidding contact by plaintiff's counsel with certain former employees of defendant).
165. Prior to February 2002, Rule 4.3 stated: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." MODEL RULES OF PROF'L CONDUCT R. 4.3 (1983). The 2002 revisions added this sentence: "The lawyer shall not give legal advice to an unrepresented person, other than advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 4.3 (2002).
104(A)(2) forbid the lawyer from giving advice to the unrepresented person contacted on behalf of another client, although the lawyer may suggest that the unrepresented person should obtain counsel. The February 2002 amendments incorporate this requirement into the text of the Model Rule.168

Courts have interpreted Model Rule 4.3 to require counsel to provide a Miranda-type warning to former employees and other unrepresented persons whom they contact ex parte. "Under this rule, the lawyer must make clear to the unrepresented employee the lawyer's role in the case, including the nature of the case, the identity of the lawyer's client, and the fact that the person's former or current employer is an adverse party."169 In addition,

[the interviewer should inform the potential interviewee that she need not speak to the interviewer, that she may wish an attorney and that if, during her employment . . . she ever engaged in discussion with [the former employer's] . . . counsel regarding this lawsuit or the circumstances from which it arose, she should not reveal it.170

The ABA has approved this cautionary approach.171

Efforts to avoid the restraints of Model Rule 4.3 by using a nonlawyer intermediary to gather information have proven unwise.172 In one multi-district case initiated by plaintiffs injured in an airplane crash, plaintiffs' counsel hired a consulting expert to serve as an intermediary empowered to commission a survey of pilots by a research corporation.173 Improper de-icing of the aircraft was one of plaintiff's theories of liability. The survey asked pilots who flew aircraft manufactured by one of the defendants—Avions de Transport Regional ("ATR")—about the training and experience they received regarding icing conditions on ATR aircraft.174 Pilots employed by another defendant in

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167. DR 7-104(A)(2) states that a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel."
168. See supra note 165 for text of Model Rule 4.3.
171. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991) (requiring that lawyers "punctiliously comply" with Rule 4.3's requirements when contacting a party's former employees).
174. See id. at 1118.
this case—the airplane's owner/operator Simmons Airline, Inc.—were among those who received the surveys.175

The cover letter accompanying the surveys did not disclose any relationship to the pending litigation, and further implied that the Federal Aviation Administration, which had supplied the names of the pilots, had endorsed the survey.176 Defendants suspected that plaintiff's counsel might have sponsored the survey, but efforts to discover that information from the survey company were unavailing.177 Plaintiff's counsel eventually admitted his role in the survey.178 Defendant sought sanctions including exclusion from evidence of all data gathered by the surveys, an order enjoining plaintiff's counsel from continuing with its planned distribution of surveys, and monetary sanctions.179

In ruling on the motions for sanctions, the court adopted the defendants' view that the cover letter "contained misleading information regarding the true purpose underlying the distribution of the questionnaire" which constituted "a paradigm example of conduct prohibited by Rule 4.3."180 The court further recognized that counsel's use of an intermediary to develop the cover letter and questionnaire was "irrelevant with regard to their accountability for such actions," since an attorney cannot induce or assist others to engage in conduct violating the ethical rules without running afoul of the rules himself.181

Relying on its inherent power and broad discretion to discipline an attorney, the court considered "the seriousness of the violations and whether the violations were intentional, as well as the nature and extent of the prejudice suffered or likely to be suffered by the parties in the future as a result of the violation."182 Concluding that plaintiff's counsel operated "in good faith but used poor judgment,"183 and being "mindful of the fact that there is a general absence of case law in this area,"184 the court imposed sanctions including the return of the questionnaire responses to defense counsel and suppression of any evi-

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175. The court's primary concern with the so-called "ATR survey" was that it might be distributed to current employees of another defendant, Simmons Airlines, Inc., the owner/operator of the ATR plane that crashed. Because the planned distribution of the ATR survey included over a thousand pilots who flew similar aircraft, it is logical to include that former employees of defendant Simmons would also be asked to respond to the questionnaires. See id. at 1118–19.
176. See id. at 1119.
177. See id.
178. See Id. at 1119–20.
179. See id. at 1124.
180. See id. at 1123.
181. Id. at 1124 (citing Model Rules of Prof'l Conduct R. 8.4(a)(2) (1983)).
182. Id. (citing generally In re Am. Airlines, Inc., 972 F.2d 605, 611 (5th Cir. 1992)).
183. Id. at 1125.
184. Id.
dence gleaned from the surveys, but declined to impose further sanctions including a monetary penalty.185

The 2002 amendments to the comment to Model Rule 4.3 codified this common law practice of requiring extensive disclosure by an attorney to any unrepresented persons (including former employees) as to his client and the client’s interests that might be in conflict with the interests of the individual.186

F. Soliciting Clients

When an attorney contacts a former employee of his client or opponent, the individual may respond that counsel already represents her. The attorney’s knowledge that counsel represents the person usually should cause the attorney to terminate the ex parte communication as required by Model Rule 4.2 and DR 7-104(A). The inquiring attorney must then resort to formal discovery to obtain information from the represented former employee. If, however, the extant legal representation of the former employee was borne in contravention of long-established ethical rules187 prohibiting client solicitation, then the alleged attorney-client relationship may not be a shield to discovery.188

As one author observed:

For most people, the term “attorney solicitation” conjures up stereotypical images of “ambulance chasing” attorneys who prey on bed-ridden accident victims. Whether the solicitation occurs in the personal injury context, or simply through the practice of “giving unsolicited legal advice . . . [and accepting] . . . employment resulting from such advice,” both the United States Supreme Court and the American Bar Association ("ABA") condemn this practice.189

185. See id.
187. The 1908 version of the ethical rules deemed it “unprofessional” for an attorney to solicit employment “by circulars, advertisements, . . . or by personal communications or interviews not warranted by personal relations.” ABA CANONS OF PROF'L ETHICS Canon 27 (1908).
188. First Amendment concerns are often raised due to the restrictions solicitation rules place on the free speech and association rights of attorneys and potential clients. See generally Kathleen M. Sullivan, The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights, 67 Fordham L. Rev. 569 (1998); Roederick White Sr., Constitutional Ethics: Lawyer Solicitation of Clients, 22 S.U. L. REV. 275 (1995); L. Anita Richardson, Stopping the Chase: Solicitation Regulations are Well Intentioned, but May Be Unconstitutional, A.B.A. J., Jan. 1995, at 38. For the purpose of this Article it is assumed that courts will honor the solicitation rules as written, or will view the First Amendment concerns as legitimate but not determinative. Support for this assumption is found in cases such as Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), in which the Supreme Court rejected constitutional attacks to the rules prohibiting in-person solicitation of clients by lawyers.
This condemnation should be compounded when an attorney solicits a former employee as a client for the specific purpose of preventing opposing counsel’s effort to obtain informal discovery from the former employee.\textsuperscript{190}

Model Rule 7.3 and its counterparts in the \textit{Model Code}, DR 2-103 and DR 2-104, prohibit an attorney from directly soliciting clients. Before and after the 2002 amendments, Model Rule 7.3 prohibits an attorney from soliciting a client where “a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain,”\textsuperscript{191} where “the solicitation involves coercion, duress, or harassment,”\textsuperscript{192} or where the lawyer knows the client does not want to retain the attorney.\textsuperscript{193} DR 2-103(A) states that “a lawyer shall not . . . recommend employment . . . of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.”\textsuperscript{194} DR 2-104(A) prohibits a lawyer from giving unsolicited advice to a lay person “that he should obtain legal counsel or take legal action” and then accepting employment stemming from that advice.\textsuperscript{195}

The prohibition against direct client solicitation protects lay persons from overzealous “importuning”\textsuperscript{196} by attorneys. The comment to Model Rule 7.3 explains that the prospective client “may already feel overwhelmed by the circumstances giving rise to the need for legal services,” and thus be unable to clearly assess other alternatives with an appropriate degree of self-interest while being pressured by the attorney to engage his services.\textsuperscript{197} This scenario “is fraught with the possibility of undue influence, intimidation, and over-reaching”\textsuperscript{198} by the attorney seeking employment. In short, the anti-solicitation rules are intended to prevent “invasion of privacy and the subordination of the client’s legal interests to the attorney’s financial [or other] self-interest.”\textsuperscript{199} The United States Supreme Court demonstrated deep re-

\textsuperscript{190} In addition to the solicitation rules discussed above, soliciting a client for the purposes of inhibiting an opponent’s discovery efforts arguably violates ethical rules governing fairness discussed in section IV.H, infra.

\textsuperscript{191} \textit{MODEL RULES OF PROF’L CONDUCT} R. 7.3(a) (2002).

\textsuperscript{192} \textit{Id.} R. 7.3(b)(2).

\textsuperscript{193} \textit{Id.} R. 7.3(b)(1).

\textsuperscript{194} \textit{MODEL CODE OF PROF’L RESPONSIBILITY} DR 2-103(A) (1980).

\textsuperscript{195} \textit{Id.} DR 2-104(A) specifically states: “a lawyer who has given in-person unsolicited advice to a lay person that he should obtain counsel or take legal action shall not accept employment resulting from that advice.”

\textsuperscript{196} \textit{MODEL RULES OF PROF’L CONDUCT} R. 7.3 cmt. 1 (2002).

\textsuperscript{197} \textit{See id.}

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} Steven P. Handler et al., \textit{The Ethics of Solicitation of Business from Corporate Clients}, 5 GEO. J. LEGAL ETHICS 423, 424 (1991). An attorney who “volunteers” to represent a former employee of a client obtains a pecuniary gain from such representation. The attorney may receive both a direct financial benefit, found in the hourly rate the client pays the attorney to work with the former employee, and an indirect benefit, such as obtaining more work from the satisfied client. An attor-
spect for the goals of anti-solicitation rules when it rejected attorneys' arguments that such rules violate attorneys' First Amendment rights.\textsuperscript{200}

The letter as well as the spirit of the anti-solicitation rules could be breached in a number of situations involving former employees of a litigant. The attorney representing the former employer, for example, could exert undue influence or otherwise harass his client's former employees to accept his representation under a thinly veiled threat that the employees may lose pension or other continuing benefits if they fail to cooperate. A lawyer for the former employer's adversary might easily convince disgruntled former employees that joining forces with the employer's adversary will be an appropriate "pay back" to the employer. A lawyer for either side could hint that the former employees may be joined as parties to one lawsuit, thereby raising the potential of significant personal liability, if the persons refuse the proffered legal services.\textsuperscript{201}

An attorney who solicits former employees introduces policy concerns beyond those normally associated with solicitation rules. First, acceptance of the volunteered services elevates the former employees to "persons represented by counsel," thus blocking the other side from conducting informal interviews pursuant to Model Rule 4.2.\textsuperscript{202} Second, such representation opens the door for intentional or insidious coaching of the former employees by the soliciting attorney.\textsuperscript{203} The third, related concern is that the opposing attorney's efforts to explore

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ney who volunteers to represent his opponent's former employee may enjoy those same benefits, and in addition, may be able to demand a higher settlement due to the recruitment of the adversary's former employee to his camp. See Aspgren v. Montgomery Ward & Co., No. 82 C 7277, 1984 U.S. Dist. LEXIS 21892, at *10–11, 87 Fair Empl. Prac. Cas. (BNA) 1438 (N.D. Ill. Nov. 19, 1984) (discussing the remuneration the attorney received by volunteering to represent his client's former employees during their depositions).


\textsuperscript{201} If the attorney has no grounds for joining former employees, the threat to them as parties also violates Model Rule 7.1, which prohibits an attorney from making a "false or misleading communication" regarding his services. Model Rules of Prof'l Conduct R. 7.1 (2002). A communication meets those criteria "if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Id.

\textsuperscript{202} Ethics rules cannot be construed to "empower the organization to create a fiction-piece in which its attorney is deemed to represent former employees for the sake of barring an adversary's informal contacts with them." Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 91 (D.N.J. 1991).

\textsuperscript{203} During the sessions devoted to "coaching," the future witness is likely to try to adapt himself to expectations mirrored in the interviewer's one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer's expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions.
\end{quote}
the extent of his adversary's coaching of the former employees are thwarted by the application of the attorney-client privilege and possibly the work-product doctrine.

Should this trilogy of taboos justify a ban on attorneys from either side from soliciting former employees as clients? Opposing answers to that question were rendered by the federal trial and appellate courts overseeing the pretrial phase of a major petroleum antitrust case.\textsuperscript{204}

In that case, plaintiffs were the attorneys general of several states and the defendants were several major oil producers accused of conspiring to violate antitrust laws.\textsuperscript{205} At the plaintiffs' urging, the district court disqualified the oil defendants' attorneys from representing current and former employees of their clients during depositions and other proceedings.\textsuperscript{206}

In reaching this decision, the trial court characterized the former employees as "independent witnesses whose duty and only appropriate objective is to tell 'the truth, the whole truth, and nothing but the truth.'\textsuperscript{207} In contrast, the court described the duty of defense counsel as causing "the record of a deposition or of a trial to be just as favorable to their clients as they can."\textsuperscript{208} This raised the court's concern that defense counsel's "orientation and guidance" of the former employees—in terms of refreshing their memories, familiarizing them with documents, and communicating the company's "views and attitudes concerning the litigation"—could have significant impact on the witnesses' testimony.\textsuperscript{209} The court was especially wary of allowing defense attorneys to solicit the representation of former employees because any coaching of those employees/witnesses would remain impenetrable by opposing counsel due to the attorney-client privilege.\textsuperscript{210}

Since the former employees were not parties, the court declared, "it is in the interests of justice that both sides be entitled to their testimony and be able to make full inquiry into any influences that may have affected such testimony."\textsuperscript{211} Therefore, the trial court forbid formation of an attorney-client relationship between defense counsel and

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\textsuperscript{205} See id. at 1095.
\textsuperscript{206} See id. at 1097.
\textsuperscript{207} Id. at 1095.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 1097.
\textsuperscript{210} See id.
\textsuperscript{211} Id.
former employees that would block such inquiry by plaintiffs' counsel.212

The Ninth Circuit reversed the disqualification ruling213 in large part because it found the trial court's concerns largely "anticipatory and speculative,"214 and thus not serious enough to override the former employees' rights to be represented by counsel of their choice.215 The court concluded that "[t]he 'solicitation' alleged, even if it could be substantiated, does not cut to the heart of the integrity of the system so as to require the court to take drastic steps to safeguard the image of the judicial process in the eyes of the public."216

These petroleum antitrust decisions illustrate the continuing competing policies that courts attempt to reconcile when counsel for an organizational party volunteers to represent her client's former employees. Those conflicting policies caused two other courts to find middle ground by holding that a former employer's attorneys may represent a client's former employees, but could not, in keeping with the anti-solicitation rules, contact the former employees and offer their legal services at no cost.217

In both cases, the former employer's attorneys were allowed to contact former employees regarding upcoming depositions planned by their respective adversaries and advise the former employees that they could be deposed with or without counsel.218 However, the former employers' attorneys could not provide legal services gratuitously unless the prospective deponent specifically requested representation by the employer's attorneys.219

Arguments centering on client solicitation are readily available to adversaries disputing the appropriate bounds of each side's contact with former employees, and yet are not always raised.220 When

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212. See id.
214. Id. at 1361.
215. See id.
216. Id. The Ninth Circuit also based its holding on a then-recent Supreme Court opinion, Upjohn v. United States, 449 U.S. 383 (1981), which arguably redefined the attorney-client relationship in the corporate context. Id. The 1981 Upjohn decision and its applicability to former employees of an organizational party are discussed in detail in Becker, supra note 27, at 255–68. See also Sherman L. Cohn, The Organizational Client: Attorney-Client Privilege and the No-Contact Rule, 10 Geo. J. Legal Ethics 739 (1997).
219. See id.
220. In National Union Fire Insurance Co. v. Stauffer Chemical Co., No. 87C-SE-11, 1990 Del. Super. LEXIS 346 (Del. Super. Ct. Sept. 13, 1990), for example, plaintiff's counsel apparently did not raise the issue of solicitation even though en-
raised, however, one thing is clear: a former employee must consent to the representation by his former employer's attorney before the limitations on contacting represented persons under Model Rule 4.2 or DR 7-104(A) apply.221

G. Conflicts of Interest

A lawyer's general duty to avoid conflicts of interest is another cornerstone of the various codes of attorney conduct.222 "In fact, such a duty lies at the core of professional responsibility."223 Avoiding actual and potential conflicts sounds like a clear command, but, as usual, the devil lies in the details. This is especially true when the rules are applied to an attorney's representation of former employees of a client.

Model Rule 1.7 prohibits a lawyer from representing a client if representation "will be directly adverse to another client"224 or "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."225 Representation is permitted, however, if "the lawyer reasonably believes" representation of both clients will not adversely affect each client226 and if consent is obtained from both clients after full explanation about the conflict.227 Parallel provisions are found in the Model Code.228

221. In Brown v. St. Joseph's County, 148 F.R.D. 246, 248 (N.D. Ind. 1993), for example, a former employer initially argued, successfully, that former employees were both "parties" and "represented by counsel" under Model Rule 4.2 because the employer's liability insurer retained a law firm to represent all current and former employees covered under its policy. The court subsequently vacated its order prohibiting contact with former employees due to the lack of evidence that the former employees had consented to be represented by the employer's attorney and their statements disavowing the employer's attorney as their counsel. Id. at 255.

222. The initial rules promulgated by the ABA deemed it "unprofessional to represent conflicting interests, except by express consent of all concerned given after full disclosure of the facts." CANONS OF PROF'L ETHICS Canon 6 (1908).


224. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (1987).

225. Id. R. 1.7(b).

226. Id. R. 1.7(a)(1) and (b)(1).

227. Id. R. 1.7(a)(2) and (b)(1).

228. The Model Code prohibits an attorney from accepting employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected." MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(A) (1980). Multiple clients may be represented, however, "if it is obvious" that the lawyer "can adequately represent the interest of each and if each consents to the representation after full disclosure." Id. DR 5-105(C).
The mere possibility of conflict does not preclude representation. “The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose causes of action that reasonably should be pursued on behalf of the client.”

The potential for sanctionable conflict arises when the attorney is receiving compensation from someone other than the client being represented. Such a fee arrangement is only appropriate under the Model Rules if three conditions are met: “the client consents after consultation,” the fee arrangement does not interfere “with the lawyer's independence of professional judgment or the client-lawyer relationship,” and the client's confidences and secrets are maintained. The Model Code offers this caveat: “Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.”

Potential conflicts of interest are ubiquitous in the former employee-former employer relationship. The most striking examples are found in cases, such as environmental clean-up, sexual harassment, or civil whistleblower litigation, where the former employee might face personal liability based on facts exposed during the litigation process. Another scenario rife with potential conflict is where the former employee is considering litigation against the employer, either by joining an existing lawsuit or filing a separate action. Nonetheless, there is a surprising dearth of case law where an attorney's representation.

230. Id. R. 1.8(f); Model Code of Prof'l Responsibility DR 5-107(A)(1) (1980).
232. Id. R. 1.8(f)(2).
233. Id. R. 1.8(f)(3).
234. Model Code of Prof'l Responsibility EC 5-23 (1980).
236. In Dondore v. NGK Metals Corp., No. 00-1966, 2001 U.S. Dist. LEXIS 6268 (E.D. Pa. 2001), for example, the court was faced with resolving conflicts of interest and Model Rule 4.2 issues surrounding defense counsel's request to engage in ex parte contact with his client's former employees who were putative members of a class action pending before another court. The court allowed the contact provided that defense counsel contact the former employees by mail and include specific language in the correspondence explaining potential ethical problems. Id. at *7-13.
tation of both the employer and one or more former employees has been challenged under conflict of interest principles.

Several factors may contribute to this lack of reported cases. An opposing party generally lacks standing to move for disqualification of an opposing party's counsel under Model Rule 1.7 because standing to pursue a conflict of interest claim is usually only accorded a current or former client of the attorney.\textsuperscript{237} An opposing party will have standing, however, if the conflict negatively impacts the fair and efficient administration of justice or implicates public interests.\textsuperscript{238} "Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment."\textsuperscript{239}

Even if an opposing party satisfies the standing requirement, there is often a significant gap between the potential for conflict, which may appear obvious, and actual proof of such conflict, which is often elusive.\textsuperscript{240} Another possibility is that attorneys representing former employers may be disengaging from representing former employees when an actionable conflict of interest arises, thus avoiding protracted sidebar litigation and/or disciplinary proceedings regarding the propriety of representing both the former employers and employees. Finally, attorneys may be avoiding sanctions due to apparent or actual conflicts by obtaining consent of all parties whose interests are affected by the multiple representation.\textsuperscript{241}

\section{H. Fairness and Civility}

In a civil justice system where equity is valued as highly as black letter law, the requirement that advocates treat each other fairly seems obvious. Nonetheless, codes of ethics have long mandated fairness to clients, parties, the courts, and non-parties. If these provisions leave any doubt, the recent proliferation of civility and professionalism codes in state and federal courts have hammered home the point

\begin{itemize}
\item \textsuperscript{238} MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 15 (1987); Dawson, 901 F. Supp. at 315; Chapman, 766 F. Supp. at 955.
\item \textsuperscript{239} MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 15 (1987).
\item \textsuperscript{241} Ethical rules allowing clients to waive conflicts of interest include MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7(a) and (b) (1987), and MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1980). See generally Fred C. Zacharias, Waiving Conflicts of Interest, 108 YALE L.J. 407 (1998).
\end{itemize}
that attorneys who seek justice must practice fairness or risk the wrath of the courts.242

Fairness means acting in a “just and honest” manner.243 To a certain degree, then, every rule of ethics has fairness as its core. In dealing with the propriety of an attorney contacting former employees of an adversary, however, specific fairness provisions apply. These are found in Model Rule 3.4 and its counterparts in the Model Code: DR 7-102(A)(6), DR 7-104(A)(2), and DR 7-109(B).

Model Rule 3.4, entitled “Fairness to Opposing Party and Counsel,” states in relevant part:

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do such act;
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
...
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.244

Similarly, the Model Code prohibits an attorney from suppressing evidence,245 encouraging a witness to make herself unavailable,246 participating in the “creation or preservation” of false evidence,247 providing financial inducements that might tempt witnesses to testify untruthfully,248 or giving any advice to an unrepresented person “if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.”249

The express language of Model Rule 3.4 and its counterparts in the Model Code clearly place restraints on attorneys when contacting their clients' or their opponents' former employees. An attorney may not suggest that former employees hide or destroy documents or other evidence the employees possess, aid in the creation of false testimony or other evidence, provide an “inducement” to employees for testimony favorable to their clients if such inducement will result in tainted testimony, or instruct employees to refrain from voluntarily giving relevant information to anyone else—including opponents' counsel. In

242. See discussion of new codes of civility and professionalism supra note 59.
245. A lawyer “shall not suppress any evidence that he or his client has a legal obligation to reveal.” Model Code of Prof'l Responsibility DR 7-109(A) (1980).
246. Id. DR 7-109(B).
247. Id. DR 7-102(A)(6).
248. Id. EC 7-28.
249. Id. DR 7-104(A)(2).
addition to disciplinary measures and litigation sanctions, attorneys who violate Model Rule 3.4 could face criminal\textsuperscript{250} and other civil liability.\textsuperscript{251}

Fairness rules raise a number of interesting questions regarding contact with former employees of a party. Does an attorney's meeting with the former employee and "suggesting" various facts to help fill in memory gaps create "false" evidence because such detailed testimonial evidence would not have existed but for the attorney's intervention? Does an offer to serve as counsel in the event that the person is deposed or otherwise called to testify by the former employer serve as an improper "inducement" to testify?\textsuperscript{252} Obtaining legal counsel could prove quite expensive to the former employee, so an offer of "free" representation may sway that person's testimony favorably toward the party underwriting the costs. And what of counsel's attempts to dissuade his client's former employees from communicating with opposing counsel? Does such conduct violate Model Rule 4.3(f)'s proscription on requesting that a third party "refrain from voluntarily giving relevant information to another party?"\textsuperscript{253}

Each of the scenarios profiled in the above inquiries occur commonly in modern litigation, yet none of the questions posed can be answered in the abstract. The determination of whether a particular attorney has violated Model Rule 4.3 or attendant sections of the Model Code during contact with former employees of a litigant is highly fact specific. Thus, like the other rules and doctrines discussed herein, the fairness rules neither commend nor condemn contact between former employees and counsel for the employer or the adversary's attorney. Rather, these rules provide additional tutelage on the proper boundaries between counsel for opposing parties and former employees of a litigant who possess information relevant to the litigation.

\textsuperscript{250} "Applicable law in many jurisdictions makes it an offense to destroy material for purposes of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense." \textit{Model Rules of Prof'l Conduct} R. 3.4 cmt. 2 (1983).


\textsuperscript{252} As previously noted, such an offer might also be construed as a violation of ethical rules prohibiting client solicitation. \textit{See supra} section IV.F.

\textsuperscript{253} At least one court has held that Model Rule 3.4(f) prohibits a litigant from advising its former employees to refrain from voluntarily giving information to another party. \textit{See} Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 n.3 (D. Mont. 1986). As the discussion in this section of the Article makes clear, however, not all courts hold that view.
The battles waged in a Delaware court over Model Rule 3.4(f)'s prohibition on discouraging a nonparty “from voluntarily giving relevant information to another party” illustrate the equivocal nature of that rule. The plaintiff sought sanctions, arguing that the letter violated Delaware's version of Model Rule 3.4(f). The plaintiff also asserted that the violation warranted an order requiring the defendant to send a curative letter and withdraw its offer to provide legal counsel to the defendant's former employees.

The Delaware court denied the plaintiff's motion. In its terse order, the court explained that even if defendant's conduct violated Model Rule 3.4, the plaintiff had not met its burden of showing that the defendant's action “had tainted, or threatened to taint, the proceedings before the Court.” The court refused to “impose a remedy that might affect the outcome of the litigation before it,” but did refer the matter to the Delaware Disciplinary Counsel.

In denying the plaintiff's request for certification of an interlocutory appeal of the order denying sanctions, the court clarified that its previous order did not prohibit plaintiff's counsel from engaging in informal discovery with the defendant's former employees. The court further opined that had the ruling effectively required plaintiff's counsel to use formal discovery to obtain information from the defendant's former employees, it still would not have affected a substantial legal right or resolve a major issue as required for certification.

Everyone lost in that Model Rule 3.4 dispute. The defendant and the plaintiff no doubt incurred substantial attorney fees in pursuing and opposing the initial motion for sanctions and subsequent motion to certify. The plaintiff most likely had to resort to subpoenas and depositions to obtain information from the defendant’s former employees. Defense counsel may have succeeded in shielding their client’s former employees from ex parte contact with plaintiff’s counsel, but

255. See id. at *1.
256. See id. at *2.
257. See id.
258. Id. at *3.
259. Id. at *4 (citation omitted).
260. See id.
262. See id. at *6.
263. See id.
still had to justify their methods to the Disciplinary Counsel, and, of course, the court spent significant time considering the issue.

In another matter, a defendant invoked Model Rule 3.4(f) to challenge a federal magistrate's remedial order. The magistrate determined that the investigative firm hired by defendant conducted inappropriate interviews of plaintiff's former employees regarding environmental damage in an insurance coverage dispute. The magistrate ordered defendant's investigators to send letters to plaintiff's former employees informing them of their right to refuse to talk to anyone about the case. The court required the letter to state that it is "being sent pursuant to a federal court order" to help the former employees make "an informed decision whether to consent to an interview." The court also required that the letter clearly explain the investigators' relationship with the defendant, and inform the employees that they had "the freedom to refuse to be interviewed."

Defendant appealed the magistrate's ruling, arguing that the remedial letter was inappropriate because it violated Model Rule 3.4(f)'s prohibition on requesting that a person, other than a client, not voluntarily provide information to another party. The district court rejected this argument for two reasons. First, the court found that "the letter is a clear statement defining the reader's options and does not constitute an inducement not to voluntarily provide information." Second, the court found no effort on the investigators' part "to clarify misconceptions that the investigators should have known the interviewees had." Callous disregard by the investigators made the magistrate's letter appropriate.

Model Rule 3.4(b)'s prohibition of offering "an inducement to a witness that is prohibited by law" was one of several ethical violations asserted by defense counsel in a Kansas federal court. In a case borne when several employees departed plaintiff's company to work for a competitor, a defense attorney hired Marilyn Johnson, formerly employed by plaintiff as an executive administrative assistant, to help organize documents that the plaintiff had produced. The defense

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265. The investigators hired by defendant failed clearly to identify themselves as representing an adversary of the plaintiff/former employer and to provide other information required by ethics rules in Michigan. Id. at 1212.
266. See id.
267. Id. at 1216.
268. Id. at 1216–17.
269. Id.
270. See id. at 1217.
271. Id.
272. Id.
273. See id.
275. See id. at 665.
attorney also represented Johnson without charge when plaintiff deposed her.\(^\text{276}\) The plaintiff/former employer sought disqualification of defense counsel by arguing, inter alia, that the compensation the defendant provided to Johnson for organizing plaintiff's documents and the free legal services constituted "an inducement to a witness that is prohibited by law" according to Model Rule 3.4(b).\(^\text{277}\)

The court rejected plaintiff's allegation that defense counsel breached Model Rule 3.4(b). The court recognized that "[e]mployment of a witness can amount to inducing a witness when it serves as a pretext for paying a witness for testimony."\(^\text{278}\) In this case, however, the plaintiff failed to show that defense counsel hired Johnson as a pretext for payment influencing Johnson's testimony.\(^\text{279}\) Thus, defense counsel's conduct stood in contrast to cases where Model Rule 3.4(b) was violated due to "an express agreement that payment was either directly in exchange for testimony or contingent upon a favorable outcome of the case."\(^\text{280}\)

While also recognizing that free legal services could provide an improper inducement to testify in some cases,\(^\text{281}\) the court found no evidence that defense counsel had exchanged free legal services for Johnson's testimony.\(^\text{282}\) Absent hard evidence, the court was "unwilling to infer" that the legal services were offered for Johnson's favorable testimony.\(^\text{283}\) Moreover, the court noted that even if defense counsel had intended to influence Johnson's testimony, the attendant loss in Johnson's credibility due to her relationship with defense counsel "seriously diminished" any impact such testimony might have on the jury.\(^\text{284}\)

\(^{276}\) See id.
\(^{277}\) Id. at 669–70.
\(^{278}\) Id. at 670 (citing Comm. on Legal Ethics v. Sheatsley, 452 S.E.2d 75, 80 (W. Va. 1994)).
\(^{279}\) See id. at 670.
\(^{280}\) Id. The contrasting cases cited by the court, where Model Rule 3.4(b) violations were found, were Sheatsley, 452 S.E.2d at 80, and Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990).
\(^{281}\) See Biocore Med. Techs., Inc., 181 F.R.D. at 670.
\(^{282}\) See id. at 671.
\(^{283}\) Id.
\(^{284}\) Id. A similar conclusion could be reached in Centennial Management Services, Inc. v. Axa Re Vie, 193 F.R.D. 671, 682 (D. Kan. 2000) (rejecting claim that a party violated Model Rule 3.4(b) and other ethical laws by entering a lucrative consulting contract with a former employee who had key information about the matter being litigated). A discussion of the Centennial Management case is provided infra notes 824–57 and accompanying text.
V. FORMAL DISCOVERY OF A PARTY'S FORMER EMPLOYEES

A. Overview

Numerous rules of civil procedure are wielded as weapons in battles over discovery of a litigant's former employees. Since no explicit provisions in the rules address discovery of former employees, an understanding of the purpose and goals of the rules in general, as well as the specific rules invoked when discovery of a former employee is at issue, is necessary.

The Federal Rules of Civil Procedure were adopted the same year the United States Supreme Court issued its groundbreaking opinion in *Erie v. Thompkins*. This 1938 pairing of a single set of rules to govern all federal district court procedures with the *Erie* Court's clarification on the substantive and procedural law applicable in federal courts was heralded as a high water mark in the uniformity and clarity of federal court proceedings. The new Federal Rules mandated that they "be construed to secure the just, speedy, and inexpensive determination of every action." The subsequent adoption of the Federal Rules by many states provided even greater hope for lucidity and uniformity in procedural matters.

As the years progressed, the utopian vision of efficiency and uniformity among federal and state courts faded. Courts and litigants encountered difficulties in deciding which laws were procedural as opposed to substantive for purposes of applying the *Erie* doctrine. Not all state courts adopted the Federal Rules of Civil Procedure, and those that did often amended them to create versions only roughly resembling the original. The Federal Rules also underwent numerous amendments and local rules of court exploded in popularity and

285. The rules discussed herein also apply to discovery commenced prior to litigation pursuant to FED. R. CIV. P. 27 and analogous state rules, and to discovery taken in aid of judgment authorized by FED. R. CIV. P. 69 and state counterparts.

286. 304 U.S. 64 (1938) (announcing the "Erie Doctrine" directing federal courts to use federal procedural law in all cases and to apply the substantive law of the states, rather than federal common law, in cases where subject matter jurisdiction is based on diversity).

287. FED. R. CIV. P. 1 (1938). The rule was changed in 1993 to clarify that rules should be "construed and administered" toward the expedient and inexpensive resolution of lawsuits, thus emphasizing the judges' role as litigation manager. FED. R. CIV. P. 1 advisory committee note (1993) (emphasis added).


impact. Today, local rules significantly alter the applicable general rules of procedure, as do judges’ standing orders and courts’ “internal operating procedures.”

Although many of the reform efforts aimed at state and federal rules were meant to encourage efficiency, economies offered by uniformity were often sacrificed in the process.

Recent reform efforts added more pieces to the patchwork quilt of rules governing modern civil procedure. As a result, attorneys may no longer assume that all rules are created and interpreted uniformly among jurisdictions, even when the rules appear facially identical or substantially similar. Local court rules must be meticulously reviewed and the judge’s standing order consulted, especially on matters relating to discovery.

State and federal discovery rules, in particular, have undergone sea changes in the past decade. Clearly, the autonomous civil justice systems of the various states and the unified federal system remain adversarial in nature, with each side bearing the burden of preparing its own case. But a new tide of compulsory cooperation has ridden in with recent amendments. Modern Federal Rules, for example, place heightened responsibilities on counsel and judicial officers.

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290. McMorrow & Coquillette, supra note 51, ¶ 801.15.
291. The Civil Justice Reform Act 1990, 28 U.S.C. §§ 471-82 (1990), for example, required every federal district court to re-examine, and where necessary, to revise, its local rules and procedures in an effort to streamline the litigation process. This congressional mandate resulted in federal districts formulating rules that complimented their individual cultures and caseloads, without much concern for whether the revised procedures were consistent with those used by other districts.

292. Virtually all local rules of court and some judges’ standing orders are available on the courts’ Internet home pages. Links to state court home pages are provided at the National Center for State Courts homepage found at http://www.ncsconline.org. Information on federal courts is found at http://www.uscourts.gov/districtcourts.html. The home page for a particular court can also be located by typing in the full or abbreviated name of the court (e.g., “Northern District Ohio,” for the U.S. District Court for the Northern District of Ohio) in any Internet general search engine.


294. To the extent the term “compulsory cooperation” is oxymoronic, the author intends the linguistic implications.

295. See, e.g., Fed. R. Civ. P. 26(f) (requiring adversaries to jointly develop a discovery plan for the court’s review and possible integration into a pretrial management order that addresses “whether discovery should be conducted in phases or be limited to or focused upon particular issues” and whether modifications should be made to the limitations on discovery imposed by the general or local rules of court).

296. The 1993 amendment to Fed. R. Civ. P. 1 added the term “and administered” to the rule that requires efficient and fair construction of all other procedural rules. The added language was intended “to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is
to anticipate discovery and other disputes and exert substantial good faith efforts to amicably resolve those disagreements.

The most radical and controversial amendments to discovery practice are rules that demand automatic disclosure of information to opposing counsel at the outset of litigation.\textsuperscript{297} These disclosures must be completed in all federal courts and some state courts prior to using traditional discovery devices such as requests for production of documents, interrogatories, and depositions.\textsuperscript{298} The impact of these rule changes on discovery of information held by former employees of a party is discussed later in this Article.\textsuperscript{299}

The procedural rule most frequently invoked when disputes arise over former employees is Federal Rule of Civil Procedure ("Fed. R. Civ. P.") \textsuperscript{26(c)}. This rule vests trial judges with wide discretion to fashion "any order which justice requires"\textsuperscript{300} to control discovery. Attorneys often invoke Fed. R. Civ. P. 26(c) when urging courts to allow, limit, condition, or deny ex parte informal communications with, or formal discovery of, former employees.\textsuperscript{301}

In addition, Fed. R. Civ. P. 26(b) and state counterparts authorize discovery of "any matter, not privileged, that is relevant to the claim resolved not only fairly, but also without undue cost or delay." Fed. R. Civ. P. 1 advisory committee note, 1993 amendments; see also, Fed. R. Civ. P. 16(a)(2) (suggesting that the court hold one or more pretrial conferences starting shortly after each case is commenced with the goal of "establishing early and continuing control so that the case will not be protracted because of lack of management"); Fed. R. Civ. P. 16(b) (requiring the court to enter a scheduling order controlling the timing of filing motions, completing discovery, and other matters); Fed. R. Civ. P. 26(c)(7) (advising the court to consider, and if possible, take action, on numerous matters during pretrial conferences including "the control and scheduling of discovery").


\textsuperscript{298} The mandatory disclosure requirements were effectuated in federal courts through the adoption of Fed. R. Civ. P. 26(a)(1). Inaugurated in 1993 and materially amended in 2000, Fed. R. Civ. P. 26(a)(1) requires that "a party must, without awaiting a discovery request, provide to other parties" non-privileged information including names and addresses of individuals with knowledge supportive of the disclosing party's claims or defenses, copies or descriptions of documents and tangible things that the disclosing party may use to support its claims or defenses, and "a computation of any category of damages claimed by the disclosing party," with documentation of those calculations made available to opponents. Arizona's rule mandating automatic disclosure, which predates the federal rule, requires even more information to be disclosed. See Ariz. R. Civ. P. 26.1(a) (requiring, inter alia, automatic disclosure of the factual basis and the legal theories for each claim or defense asserted by the disclosing party).

\textsuperscript{299} See infra subsection V.B.2 (discussing initial mandatory disclosures).

\textsuperscript{300} Fed. R. Civ. P. 26(c).

\textsuperscript{301} The role of protective orders in disputes concerning former employees is discussed infra subsection V.B.4.f.
or defense of any party.” As explained below, this rule often takes center stage when adversaries clash over whether discovery of former employees will invade privileges owned by the former employer.  

Finally, pursuant to Fed. R. Civ. P. 11 and analogous state rules, every pleading, motion, and other paper submitted to a court carries an implicit certification that “an inquiry reasonable under the circumstances” has been conducted, and that “the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” Courts have recognized that rigid application of ethical and other rules to limit discovery, especially informal discovery, can seriously cripple an attorney’s effort to meet Fed. R. Civ. P. 11’s mandate, and thus should be construed with Fed. R. Civ. P. 11 in mind.

B. The Pretrial Process

Modern litigation involves a wide range of pretrial rules that demand immediate attention and action by counsel and judicial officers. The goal of recent revisions to the rules, especially in federal
courts, is to inject a calming and cooperative influence\(^{307}\) into a process that, not uncommonly, digresses into a chaotic and combative one.\(^{308}\) Stated differently, the amended pretrial rules are intended to temper the phases of litigation where the “most distinguishing characteristic is the level of acrimony displayed by counsel towards each other.”\(^{309}\)

General discussions of the federal pretrial rules, and virtually all disputes as to their appropriate interpretation in a specific case, reference the premier rule. Fed. R. Civ. P. 1 mandates construction and administration of the rules to secure “the just, speedy, and inexpensive determination of every action.”\(^{310}\) Carrying on with this theme, Fed. R. Civ. P. 26(b) espouses a liberal discovery approach by permitting “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”\(^{311}\) Discovery expressly encompasses witness testimony, documents, and other tangible materials.\(^{312}\) Separately and in tandem, these rules permit, if not require, broad, inexpensive, informal discovery as well as streamlined utilization of the formal discovery mechanisms, provided that the information and materials being disclosed are not privileged.

and attorneys failing to comply with new and existing requirements in the discovery rules). The 2000 amendments were fairly minor. One noteworthy change is the 2000 amendment to Fed. R. Civ. P. 26(a), which eliminated the power of individual district courts to opt-out of the mandatory disclosure requirements and clarified the categories of information subject to initial mandatory disclosure to opposing counsel.

307. For example, modern rules governing depositions require attorneys to state objections “concisely and in a non-argumentative and non-suggestive manner,” Fed. R. Civ. P. 30(d)(1), thereby discouraging so-called “speaking objections” used by defending counsel to interrupt the flow of information from the deponent to opposing counsel. See generally Gerson A. Zweifach, Depositions Under the New Federal Rules, 23 Litig. 6 (1997). The Federal Rules also now require a party to include in all motions to compel discovery “a certification that that the movant has in good faith conferred or attempted to confer” with opposing counsel to resolve the dispute before seeking judicial intervention. Fed. R. Civ. P. 37(a)(2)(A). Litigants must also serve opponents with motions for sanctions for non-discovery related transgressions at least twenty-one days before filing the motions with the court to provide opponents time to modify or correct the offending actions without judicial intervention. Fed. R. Civ. P. 11(c)(1)(A). In addition, substantial recent additions and amendments to local rules of court have required increased cooperation among counsel. See, e.g., David H. Taylor, Rambo as Potted Plant: Local Rulemaking’s Preemptive Strike Against Witness-Coaching During Depositions, 40 Vill. L. Rev. 1057 (1995).

308. See, e.g., John D. Shugrue, Identifying and Combating Discovery Abuse, 23 Litig. 10 (1997).


312. See id.
Due to the conflict among and within jurisdictions regarding the appropriateness of ex parte contact or formal discovery involving former employees, an attorney would have, in the recent past, been well-counseled to turn immediately to Fed. R. Civ. P. 29313 or its state counterpart to negotiate an agreement with opposing counsel. However, recent changes in the rules of civil procedure, especially in federal court, require that counsel give careful consideration to the role former employees might play in a controversy even before drafting the complaint or preparing a responsive pleading. These important changes to federal practice are discussed below.314

Arizona preceded the Federal Rules in requiring mandatory initial disclosure and other cooperative rule requirements,315 and Alaska followed the federal courts' lead.316 Other states, however, have been extremely reluctant to adopt the mandatory initial disclosure model.317 Indeed, even federal courts were hesitant to begin the shift from a purely adversarial model of discovery to a more cooperative one as envisioned in the 1993 and 2000 amendments to the Federal Rules.318 Accordingly, the discussion below applies primarily to federal court practice and assumes that federal courts are following Fed. R. Civ. P. 26(a)(1)'s requirement of mandatory initial disclosure. But even if a district court purports to honor Fed. R. Civ. P. 26(a), attorneys should, in the matter of initial disclosures and all others, carefully review the local rules of court and the assigned judge's standing order to determine the contours of mandatory disclosure and other discovery rules in that judge's chambers.319

313. Fed. R. Civ. P. 29 provides in pertinent part that, "[u]less otherwise directed by the court, the parties may by written stipulation . . . modify . . . procedures governing or limitations placed upon discovery."
314. The process for amending the Federal Rules is explained in McMorrow & Coquillette, supra note 51, ¶¶ 801.25–801.42.
316. See Ala. R. Civ. P. 26(a) (containing rules paralleling federal procedures).
317. Some states require automatic disclosure of certain information in specific proceedings. For example, New York requires disclosure of "any written report of an accident prepared in the regular course of business operations or practices of any person, firm, corporation, association, or other public or private entity." N.Y. Civil Practice and Rules § 3101(g). Massachusetts has mandatory self-disclosure of financial information in domestic relations cases, including disclosure of the parties' state and federal income tax returns for the past three years, bank account statements, pay stubs, and other documents that verify the assets and liabilities of the parties. Mass. Special Probate Court Rules: Domestic Relations Special Rules Special Rules R. 410(a)(1)(a)–(g).
319. Local rules for all federal judicial districts are available in multi-volume sets including West Group's Federal Local Court Rules (3d ed. 2001). Most state and federal courts also have Internet home pages sites with links to full text versions of the local rules, judges' standing orders, and other jurisdiction-specific informa-

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1. Meeting with Opposing Counsel

Added to the Federal Rules in 1993 and as amended in 2000, Fed. R. Civ. P. 26(f) directs that "the parties must, as soon as practicable and, in any event, at least twenty-one days before a scheduling conference is held," meet to discuss a number of issues. The parties must confer on "the possibilities for a prompt settlement or resolution of the case" and must either "make or arrange for" the automatic disclosures of information required by the Federal Rules. The parties must also jointly prepare a "proposed discovery plan that indicates the parties' views and proposals" on several topics, including the timing and scope of discovery and any limitations that should be imposed on discovery.

Counsel for the parties "are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days of the conference a written report outlining the plan." A court may, by local rule, modify the timing for submission of the plan or permit an oral report in lieu of a written one, but such modifications are appropriate only where necessary to comply with a court's other local rules requiring expedited pretrial conferences with a judicial officer.

Fed. R. Civ. P. 26(f) provides an opportunity, if not a duty, for counsel to raise anticipated issues regarding discovery of former employees, to resolve them amicably, and present their resolution for the court's blessing. If good faith negotiations fail to produce accord, attorneys are obliged to bring the issues to the court's attention in the jointly authored discovery proposal.

Rules requiring counsel to reach an accord regarding discovery of all incendiary discovery matters raise a more precise issue: to what should an attorney agree when former employees are an issue? One reasonable approach is to agree that counsel can contact former employees of their respective clients, provided that full and fair information. The web sites are easily located by subject searching under the name of the court on any general Internet search engine.

321. Id.
322. Id.
323. Fed. R. Civ. P. 26(f)(2) & (3). See generally Jonathan M. Stern, The Discovery Plan, 24 LITIG. 34, 37 (Spring 1998) (noting that "discovery is but one part, albeit an extremely important part, of the litigation plan," and providing an overview of the plan's required contents as well as practical considerations in jointly preparing the plan with opposing counsel).
325. See id.
tion is provided to the persons being contacted.\textsuperscript{327} Another possibility is agreeing to provide notice to opposing counsel in advance of contacting a particular former employee, paired with an agreement that former employee's counsel will not contact the person between the time of the notice and before the conclusion of the interview.\textsuperscript{328} Among other things, the notice gives the former employer's counsel time to ascertain whether claims of privilege may exist regarding the interviewee, and to seek judicial intervention when necessary to preserve the endangered privilege.\textsuperscript{329} Another option is to allow opposing counsel to attend the interview, but not participate except to state objections on the grounds of privilege.\textsuperscript{330}

These procedures defeat any advantage gained through stealth discovery of an opponent's former employees, but they also minimize the possibility of significant collateral litigation and the imposition of sanctions stemming from improper contact with former employees as discussed throughout this Article.\textsuperscript{331}

2. Initial Mandatory Disclosures

The current Federal Rules\textsuperscript{332} and some state rules\textsuperscript{333} embrace efficiency and cooperation as core values by requiring parties to automatically disclose certain information and materials to their opponents shortly after commencement of litigation. Completed disclosure is usually a prerequisite to formal discovery.\textsuperscript{334} Rules requiring

\textsuperscript{327} See discussion of Model Rule 4.3 supra text accompanying notes 242–84.
\textsuperscript{328} The approach was endorsed by the court in \textit{In re Prudential Insurance Co. of America}, 911 F. Supp. 148, 153 (D.N.J. 1995).
\textsuperscript{329} See id.
\textsuperscript{330} See id.
\textsuperscript{331} See generally John E. Iole & John D. Goetz, \textit{Ethics or Procedure? A Discovery Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary}, 68 NOTRE DAME L. REV. 81 (1992) (suggesting that formal discovery may be more appropriate as it avoids ethical dilemmas presented by ex parte contact).
\textsuperscript{332} These amendments were part of the civil justice reform movement that gained momentum in the late 1980s and continues to the present day. \textit{See}, e.g., The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (enacting and amending various laws aimed at creating a more efficient justice system, including the Civil Justice Reform Act (CJRA), codified at 28 U.S.C. §§ 471–82 (2001), which directed every federal district court to revise its local procedures to streamline the litigation process); Heather Russell Koenig, \textit{The Eastern District of Virginia: A Working Solution for Civil Justice Reform}, 32 U. RICH. L. REV. 799, 801 (1998) (arguing that the subject district was highly efficient prior to the CJRA due to "judge-controlled dockets and strict attorney compliance with, and unconditional respect for, the local rules of the district"); Gregory P. Joseph, \textit{Emerging Issues Under the 1993 Amendments to the Federal Civil Rules}, 540 PLI/LITIG. 429 (1996) (discussing the positive and negative impact of the reforms effectuated by the 1993 amendments to the Federal Rules of Civil Procedure).
\textsuperscript{333} See \textit{ARiz. R. Civ. P.} 26.1; \textit{ALA. R. Civ. P.} 26(a).
\textsuperscript{334} See \textit{FED. R. CIV. P.} 26(d).
mandatory disclosures have been lauded\textsuperscript{335} and condemned\textsuperscript{336} Commentators have critiqued disclosure requirements on general principles, such as being directly contrary to our adversarial system of justice, and in specific application, especially regarding the lack of clarity the 1993 Federal Rules provided as to the consent and timing of disclosure. Supporters of the changes countered that the adversary system should be abandoned\textsuperscript{337} They also opined that the controversy surrounding rules mandating early disclosure of information that would inevitably be exchanged during the subsequent formal discovery phase constituted “much ado about nothing.”\textsuperscript{338}

Lack of clarity in the 1993 version of Fed. R. Civ. P. 26(a) warranted criticism. The 1993 rule required initial disclosures of the name, address, and telephone number “of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings” and to identify the type of information each person might have.\textsuperscript{339} The 1993 rules also required automatic disclosure of all documents and tangible evidence “in the possession, custody, or control of the party that are relevant to disputed facts.”\textsuperscript{340}

The 1993 requirements arguably mandated disclosure of the identity of and information held by a litigant’s former employees which were relevant to all claims and defenses advocated by all parties to the litigation. However, the issue of how much investigation a party had

\begin{itemize}
\item \textsuperscript{336} When the U.S. Supreme Court forwarded the proposed amendments that included the mandatory disclosure provisions to Congress in 1993, Justice Scalia was joined in dissent by Justices Souter and Thomas. The dissenters characterized mandatory disclosure as “potentially disastrous,” stating that it would undermine the traditional adversary principle that each counsel must prepare his or her own case. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 510–12 (1993). Once the matter was in Congress’ hands, the House of Representatives passed legislation removing the mandatory disclosure provisions from the amendments to Fed. R. Civ. P. 26(a). See H.R. 2814, 103d Cong. § 2 (1993). The Senate’s failure to pass similar legislation allowed the provisions to become effective. See also Griffin B. Bell et al., \textit{Automatic Disclosure in Discovery – The Rush to Reform}, 27 GA. L. REV. 1, 28 (1992) (commenting that “[t]he radical nature of the proposed changes to Rule 26 triggered a storm of criticism” from academics, practicing lawyers, bar associations, and other groups and individuals).
\end{itemize}
to do at the initiation of the litigation, including locating and communicat-
ing with former employees, was not answered by the 1993 rule changes.

Another legitimate criticism of the 1993 version of Fed. R. Civ. P. 26(a) was that the civil pleading rules do not require, and indeed re-
ject, the concept of pleading with particularity. Modern rules re-
quire only that the complaint contain “a short and plain statement of
the claim showing that the pleader is entitled to relief.” The rules
legitimize the most minimal pleadings necessary to give “fair notice
of what the plaintiff's claim is and the grounds upon which it rests.” Thus, requiring disclosure of information relevant to facts “plead
with particularity” was at best confusing and at worst meaningless in a
notice pleading system.

As enacted in 1993, Fed. R. Civ. P. 26(a) also expressly allowed
individual federal district courts to opt out of the mandatory disclo-
sure provision, and about one-half of the federal trial courts did.

The lack of uniform adoption of mandatory disclosure and the in-
herent ambiguity in the rules where the practice was adopted resulted
in significant amendments to Fed. R. Civ. P. 26(a). These changes,
effective in December 2000, eliminated the “opt out” provision for dis-

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341. Pleading requirements in Fed. R. Civ. P. 8 and in analogous state rules advocate
basic “notice pleading,” which is the antithesis of pleading with particularity. See
Fed. R. Civ. P. 84 (explaining that the Appendix of Forms provided with the Fed-
eral Rules “are intended to indicate the simplicity and brevity” of pleadings con-
templated by the rules); Swierkiewicz v. Sorema, 534 U.S. 506 (2002) (rejecting
heightened pleading standard for federal age discrimination claims); Leatherman
v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163,
168–69 (1993) (rejecting court-imposed heightened pleading standards for cases
involving claims of constitutional rights violations where qualified immunity de-
fense is anticipated).


343. Swierkiewicz, 534 U.S. at 512 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

344. Pleading with particularity is, however, still required in a narrow group of cases.
These include cases alleging common law fraud, where particularity is demanded
by Fed. R. Civ. P. 9(b), and in federal securities litigation, where significantly
detailed pleading is required due to recent efforts to reform federal securities
laws to eliminate specious suits. See, e.g., In re Nice Sys., 135 F. Supp. 2d 551,
569 (D.N.J. 2001) (holding that the level of detailed pleading required to state
sufficient federal securities law claim included not only information about the
alleged fraudulent acts of the defendant but also the identity of defendant's for-
mer employees from whom the information regarding defendant's action was
obtained).

345. A survey conducted by the Federal Judicial Center concluded that forty-five of
the ninety-four federal district courts opted out of the mandatory disclosure re-
quirements, but eighteen of the forty-five districts that opted out allowed individ-
ual judges to adopt mandatory disclosure if they so desired. Donna Stiensra,
Federal Judicial Center, Implementation of Disclosure in the United States District
Courts, With Special Attention to Courts' Responses to Se-
Thus, mandatory disclosure appears to be a permanent feature on our legal landscape, assuming, as previously noted, that judges are honoring these requirements in their local rules of court and in their standing and case-specific orders.

At least two other important clarifications were achieved by the 2000 amendments to Fed. R. Civ. P. 26(a). First, the internally inconsistent requirement that information “relevant to disputed facts plead with particularity” was eliminated. Instead, the rule simply requires disclosure of “discoverable information.” Second, the rule no longer requires disclosure of all “relevant” information, but rather narrows the category to “information that the disclosing party may use to support its claims or defenses.” Thus, a party is no longer obligated to anticipate information in its possession that might be relevant to their opponent’s claims or defenses.

With the above parameters in mind, all parties must now disclose “the name and, if known, the address and telephone number of each individual likely to have discoverable information”; identify the subjects on which the identified individuals may have information; provide copies of, or a description of, documents and other tangible items “that are in the possession, custody, or control of the [disclosing] party”; and render a “computation of any category of damages claimed by the disclosing party,” accompanied by any non-privileged documents and other evidentiary materials that support the damage calculation. Disclosures “must be made in writing, signed, and served” pursuant to other applicable rules. A party must also seasonably update information and materials furnished to an adversary during initial mandatory disclosures “if the party learns that in some material respect the information disclosed is incomplete or incorrect.”

The 2000 amendments clarified Fed. R. Civ. P. 26(a), but they did not resolve all questions relating to mandatory discovery. The most important question, and one certainly outside the scope of this Article, is whether attorneys and judges who have long participated in an adversary process will embrace rule changes that value cooperation.

348. Id. (emphasis added).
350. See id.
353. See id.
356. The adversary process is frequently analogized to a war, with opponents becoming firmly moored in their respective trenches, employing various tactical devices.
over combativeness. Another threshold issue lurks in the requirement that “discoverable information” be automatically disclosed. As discussed later in this Article, major discovery battles are frequently waged over whether particular information or evidence is “discoverable” or is shielded from discovery under privilege, work product, and other doctrines.357

In short, numerous specific questions concerning the role of former employees in discovery linger despite the 2000 revision of Fed. R. Civ. P. 26(a). What information, if any, must a party provide to an adversary about former employees during the initial disclosure phase of the litigation? Is the former employer obligated to locate former employees and then turn the fruits of the investigation over to the adversary, either at the commencement of the litigation or in supplemental responses?358 Are documents, computer files, and other tangible materials retained by former employees “in the possession, custody, or control” of the former employer? And, even more to the point, what sanctions, if any, will a party face for failing to voluntarily disclose information and materials held by former employees?

The advisory committee notes and the text of the 2000 version of Fed. R. Civ. P. 26(a) do not directly answer these questions or provide much guidance on the myriad issues presented by former employees. The rule demands that the “party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case.”359 Again, the “reasonably available” language adds another layer of ambiguity to the employer’s responsibility

as cannon fodder, and using surprise attacks to cause the opponent to be the first to wave the white flag. See, e.g., DAVID BARNHIZER, THE WARRIOR LAWYER (1998) (stating that the litigation/war analogy is common but arguing that attorneys achieve better results for clients by being less combative and more cooperative throughout the litigation process, and especially by carefully thinking through strategy before implementing it). In a more precise sense, the adversary process utilized in the U.S. “is a unified concept that works by the use of a number of interconnecting procedures.” Stephan A. Landsman, A Brief Survey of the Development of the Adversary System, 44 OHIO ST. L.J. 713, 714 (1983).

The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.

Id.

357. See Part VI, infra.

358. The rules impose a duty to supplement initial disclosures “at appropriate intervals . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect.” Fed. R. Civ. P. 26(e)(1). The same requirement applies to material obtained through formal discovery mechanisms. See Fed. R. Civ. P. 26(e)(2).

to locate and identify information retained by former employees. At a minimum, the inherent ambiguity as to the rule's applicability to former employees suggests that a candid discussion with the judge, and possibly opposing counsel, on the topic of former employees and discovery is warranted at the outset of the litigation.

Broaching the subject of former employees at the commencement of litigation essentially destroys a party's ability to use former employees (either their own or those of an opponent) as secret weapons in the litigation process. That deprivation is not insignificant, but the forfeiture of any litigation strategy must always be weighed against the possibility of the tactic backfiring. If a court ultimately decides that a party was without "substantial justification" for failing to disclose information from or about a former employee, the offending party faces sanctions including being denied use of the former employee’s information "as evidence at a trial, at a hearing, or on a motion." In addition to excluding a party's key evidence, the court "may impose other appropriate sanctions," including the payment of attorneys fees, the designation of certain facts as established for the remainder of the litigation, "informing the jury of the failure to make the disclosure," dismissal of all or part of the offending party's claims for relief, and stripping the offending party of certain defenses or entering default judgment.

3. Initial Pretrial Conference and Resultant Scheduling Order

The Federal Rules outline a process where the parties and the court take timely and focused control over the litigation. The initial requirement is the meeting, "as soon as practicable," of parties to discuss discovery and other issues portended by the case, followed within fourteen days by a joint submission of a written proposal detailing the timing and substance of initial mandatory disclosures and subsequent formal discovery.

The second step is a meeting of the litigants and the judge to discuss the parties' proposal. Agreements reached and decisions rendered during this initial pretrial conference are memorialized in a

360. Fed. R. Civ. P. 37(c)(1). In Jakob v. Champion International Corp., No. 01 C 0497, 2001 U.S. Dist. LEXIS 19010 (N.D. Ill. Nov. 14, 2001), the court recognized that the defendant should have voluntarily disclosed the identities and locations of former employees with knowledge of plaintiff's termination and resultant claim of retaliatory discharge, but did not impose sanctions because defendant agreed, prior to the hearing on this and related discovery disputes, to provide the information and to hire a private investigator if necessary to help locate the former employees with knowledge. Id. at *4 n.1, *5 n.2.

361. Id. (incorporating sanctions provided in Fed. R. Civ. P. 37(b)(2)(A)–(C)).


court order establishing case-specific discovery rules and deadlines.\textsuperscript{364} Expediency remains a priority during this phase, as the rules require the initial scheduling order be issued “as soon as practicable,” and, “in any event within 90 days of the appearance of a defendant and within 120 days after the complaint has been served on a defendant.”\textsuperscript{365} The court may also issue, either as part of the initial scheduling order\textsuperscript{366} or as a separate decree, protective orders that limit the nature and sources of discovery, including access to former employees of the litigant.\textsuperscript{367}

Court orders become the law of the case, superseding discovery directives, standards, and timetables set forth in general and local civil rules and in other authorities that govern attorney conduct.\textsuperscript{368} Thus, any rules established in court orders for informal or formal contact with former employees of a party must be scrupulously obeyed.\textsuperscript{369}

Counsel are, of course, free to seek modification of an initial or subsequent court order governing discovery, and such motions may be pursued jointly or individually.\textsuperscript{370} Counsel should be aware, however, that issuance of a court order seriously impedes if not defeats the

\textsuperscript{364} See id.

\textsuperscript{365} Fed. R. Civ. P. 16(b). Of course, the timetable for the initial pretrial conference that the rules purportedly impose on courts cannot be enforced by the parties. Indeed, the rule changes aimed as redefining judges as aggressive case managers are for the most part advisory. Individual district courts also have internal rules and procedures, established and administered by the chief judge, governing judges’ duties related to case management and timely disposition of cases. But neither court administrative rules nor the rules of procedure provide litigants with a remedy when judges disregard the rules. In an extreme case, a party might resort to filing an extraordinary writ with an appeals court or a complaint that a judge violated the Judicial Code of Ethics by disregarding the rules. The likely result of either tactic, however, is that the litigants will become embroiled in an extended collateral adversarial proceeding, and the judge (and perhaps his or her colleagues) will be deeply offended by the attack. Neither result advances the client’s interests or the attorney’s future prospects for success in that court.

\textsuperscript{366} Fed. R. Civ. P. 16(b)(6) authorizes the judge to include in the initial court order “any other matters appropriate in the circumstances of the case.”

\textsuperscript{367} Fed. R. Civ. P. 26(c) empowers a court to resolve discovery disputes by entering protective orders that set discovery boundaries appropriate for the particular case. See also infra subsection V.B.4.f.

\textsuperscript{368} For an example of how comprehensive a pretrial order might be, see Northern Indiana Public Service Co. v. Certain Underwriters at Lloyd’s of London, No. 1:95-CV-331, 1996 WL 115466 (N.D. Ind. Mar. 5, 1996) (governing all aspects of formal and informal discovery and other aspects of pretrial litigation, including placing limits on ex parte communications with former employees of adversaries).

\textsuperscript{369} As amended in February 2002, the comment to Model Rule 4.2 advises that obtaining a court order is appropriate for a “lawyer who is uncertain whether a communication with a represented person is permissible.” MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 6 (2002).

\textsuperscript{370} Fed. R. Civ. P. 16(b), for example, states that the initial discovery order entered by the court “shall not be modified except upon a showing of good cause and by leave of the district judge or . . . by a magistrate judge.” Fed. R. Civ. P. 26(c)
power litigants otherwise possess to modify the "procedures governing or limitations placed upon discovery" by entering into a written stipulation with opposing counsel. In addition, penalties for violating a court order are traditionally harsher than those imposed for violating a rule of procedure.

4. Formal Discovery Devices

All rules of civil procedure require parties to exhibit reasonable, good faith efforts to provide accurate and complete information when responding to formal discovery requests. When parties respond to interrogatories, requests for production of documents, deposition notices, and other formal discovery devices, a critical issue arises as to what, if any, control a former employer/litigant has over its former employees and the information they possess.

Is it appropriate, for example, for the former employer’s counsel to “advise” a former employee not to speak to other counsel “under any circumstances”? Must an employer seek information from former employees to fully respond to interrogatories or document requests? Does the former employer have standing to move to quash a subpoena duces tecum issued to a former employee? Can counsel for the former employer defend the former employee during a deposition? The law remains unclear on these issues.

One of the few set rules in the otherwise ambiguous jurisprudence surrounding former employees is that information about them must be relevant to the lawsuit before it is discoverable. Another is that an attorney cannot unilaterally establish an attorney-client relation-

\[\text{\textsuperscript{371}}. \text{\textsuperscript{372}}\]

allows a party from whom discovery is sought to move the court for an order decreeing that discovery not be had or only be had under specific circumstances.

\[\text{\textsuperscript{371}. FED. R. CIV. P. 29.}\]
\[\text{\textsuperscript{372}. Sanctions for failure to respond to discovery in the manner required by applicable procedural rules include an award of expenses including attorney fees, entry of an order compelling disclosure, and entry of a protective order detailing what is to be disclosed and what is privileged. See FED. R. CIV. P. 37(a)(4). In contrast, failure to comply with a court order compelling or otherwise governing discovery may result in more severe sanctions that include designating certain facts as established, excluding evidence, dismissal of some or all of the offending party’s claims, exclusion of specific defenses, and entry of default judgment. FED. R. CIV. P. 37(b)(2)(A)-(D).}\]

\[\text{\textsuperscript{373}. In Brown v. St. Joseph’s County, 148 F.R.D. 246, 248 (N.D. Ill. 1993), for example, defense counsel “advised” a former employer not to speak to opposing counsel “under any circumstances.” The court did not comment on the propriety of counsel’s “advice.”}\]

\[\text{\textsuperscript{374}. See, e.g., Spina v. Our Lady of Mercy Med. Ctr., No. 97 CIV 4661 (RCC), 2001 U.S. Dist. LEXIS 7338, 86 Fair Empl. Prac. Cas. (BNA) 246 (S.D.N.Y. June 7, 2001) (rejecting sexual harassment plaintiff’s motion to compel additional information about defendant’s former employee who was terminated eighteen months before plaintiff was hired by defendant).}\]
ship with a client's former employees. Thus, it cannot be assumed that the former employer has standing to move to quash a subpoena issued to a former employee, or that the former employer's attorney has the right to object to questions its client finds objectionable during a former employee's deposition. These and related topics are discussed below.

a. Interrogatories

The initial mandatory disclosure of information under the Federal Rules arguably requires a former employer/litigant to at least identify former employees with information relevant to the employer's claims or defenses. Parties are also routinely asked in subsequent interrogatories to identify any persons with knowledge about the facts of the case and are entitled to complete responses to this question. As

375. A corporate defendant was unsuccessful in arguing that its former employees were “parties” within the meaning of Model Rule 4.2 by virtue of its insurance company's retention of an attorney to represent the corporation and all current and former employees. The court held that the attorney-client relationship, which is generally determined by contract and agency principles, cannot be established absent the express or at least implied consent of those involved in the relationship. Brown, 148 F.R.D. at 250-53. Accordingly, former employees who never requested nor accepted the legal services of their former employer's legal counsel were not “represented by counsel” within the meaning of Model Rule 4.2. Id. at 253.

376. See supra subsection V.B.2.

377. FED. R. CIV. P. 33 governs the use of interrogatories in federal court. Interrogatories are relatively easy to prepare, and thus constitute one of the most frequently used and least expensive discovery devices available to a litigant. R. Lawrence Dessem, PRETRIAL LITIGATION, LAW, POLICY & PRACTICE 290-91 (3d ed. 2001). Except for the standard limitations required under various privilege doctrines, see infra Part VI, a party can use interrogatories to discover factual information and to inquire as to opinions and legal contentions held by a party. FED. R. CIV. P. 33(c) (clarifying that an interrogatory is not subject to objection “merely because the answer ... involves an opinion or contention that relates to fact or the application of law to fact”); Iain D. Johnston & Robert G. Johnston, Contention Interrogatories in Federal Court, 148 F.R.D. 441 (1993). The utility of interrogatories to fully flesh out an opponent's evidence and legal theories was substantially curtailed in federal courts, however, by the 1993 amendments limiting each party to twenty-five interrogatories, including subparts, unless the proponent obtains leave of court or written stipulation from the responding party allowing a larger number. FED. R. CIV. P. 33(a). And, even prior to the 1993 amendments to the general rule, the vast majority of federal district courts had, through local rules of court, limited the number of interrogatories available without leave of court. See Daniel R. Coquillette, Mary P. Squiers & Stephen N. Subrin, The Role of Local Rules, A.B.A. J., Jan. 1989, at 62, 65 (reporting limitations on interrogatories in 80% of federal courts).

378. Baker v. First Tenn. Bank Nat'l Ass'n, No. 96-6740, 1998 WL 136560, at *5 (6th Cir. Mar. 19, 1998) (noting that two former employees were named in defendant's response to interrogatories asking defendant to identify persons with knowledge); Robbins v. Camden Bd. of Ed., 105 F.R.D. 49, 58 (D.N.J. 1985) (recognizing the parties are “clearly entitled to know the identity of persons having knowledge of

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emphasized throughout this Article, former employees of a party frequently fall within the category of "persons with knowledge."\textsuperscript{379} Courts have also compelled counsel to identify the former employees of an adversary from whom documents and information were obtained as a sanction for inappropriately contacting those individuals.\textsuperscript{380} A related issue is whether the former employer has a duty to consult with former employees to provide full answers to interrogatories propounded by an opponent.

The debate over identifying former employees in interrogatory responses arose in \textit{Houck v. Hardee's Food Systems, Inc.}\textsuperscript{381} Plaintiff was a former vice president of Hardee's who sued to recover severance pay.\textsuperscript{382} One of the plaintiff's interrogatories asked his former employer to provide the names and last known addresses of all Hardee's officers terminated on a particular date.\textsuperscript{383} Hardee's provided the names, but not the addresses of four former officers. Defendant's reason for excluding the addresses was that it was inappropriate for plaintiff to interview these former corporate officers ex parte.\textsuperscript{384}

The court compelled production of the former employees' addresses based on ethics opinions issued by North Carolina and the ABA allowing for contact with former employees of a party, even where those employees had occupied managerial positions.\textsuperscript{385} The court held that factual information willingly provided by defendant's former employees could be appropriately harvested by plaintiff via informal discovery, but cautioned plaintiff's counsel "that they may not communicate ex parte with any [former] employee regarding matters protected by the attorney-client privilege."\textsuperscript{386}
Given the high degree of relevance in many cases of the information held by former employees of a litigant, it appears disingenuous for a party to refuse to identify former employees in the "persons with knowledge category." However, the response of Hardee's counsel in providing names but not addresses was appropriate, as counsel presented a good faith, legally supported argument, well grounded in ethical rules, that opposing counsel's ex parte contact with defendant's former employees might be inappropriate. Even though ultimately compelled to provide the addresses, the defendant obtained a court order clarifying that opposing counsel could not invade any privileged information while interviewing the former employees. Thus, while not winning the war, counsel for the former employer won an important battle by clarifying and entrenching applicable discovery principles and ethics rules in a case-specific court order governing opposing counsel's communication with the former employees.

The issue of whether a former employer must consult with former employees to fully answer interrogatories is a more difficult matter, with no guidance readily available from case law. The Federal Rules and analogous state rules require that, absent an express and detailed objection, "each interrogatory shall be answered separately and fully in writing under oath." If a party fails to respond to an interrogatory, opposing counsel may, after making a good faith effort to persuade the offending party to respond, move to compel an answer. "An evasive or incomplete" answer constitutes a failure to respond. In addition to ordering a full response to the interrogatory, the court can require the offending party to pay her opponent's expenses, including attorney fees, related to compelling the motion.

Mandatory consultations with former employees to formulate complete responses to interrogatories may be obvious in some cases, as where the only persons with knowledge are former employees. And it is undoubtedly contrary to the spirit, if not the letter, of modern discovery rules for a party who has an ongoing relationship with former employees to harvest the former employees' knowledge about a disputed matter and then refuse to share discoverable facts with an

specific restrictions on plaintiff's ex parte contact with defendant's former employees).

387. Extensive manual and computer-based research located no court opinions directly on point.
393. The former employer could reap the information as part of a formal relationship created through a consulting arrangement, or through an informal process such as inviting the former employee to the company's annual golf outing or holiday.
opponent seeking such information through interrogatories. As with any discovery dilemma, the effort a party must put forth to contact former employees to fully answer interrogatories can only be determined on a case by case basis. A counsel’s resolution of this dilemma, however, must take into account the heightened standards of good faith and cooperation to which her conduct will be held under modern civil rules governing discovery, local rules of court, and the standing and case-specific orders of the judicial officer presiding over the case.

b. Depositions

Following the exchange of initial mandatory disclosures, the Federal Rules allow a party to “take the testimony of any person, including a party, by deposition upon oral examination without leave of court.” Deposition of a party is effectuated by giving “reasonable notice in writing” to all parties to the litigation, specifying the time and place for the deposition, the identity of the deponent, and information on how the deposition is to be recorded. A subpoena duces tecum may also be served, requiring the deponent to produce materials designated in the subpoena at or before commencement of the deposition.

The importance of depositions cannot be understated. The recorded exchange between examining attorney and deponent provides critical factual information supporting or undermining the claims and defenses asserted in the case and provides the sworn materials needed to support dispositive motions. Equally important, the live deposition allows counsel to assess the demeanor and thus the relative credibility of potential trial witnesses as they relay information under conditions similar to those at trial, including the possibility of being penalized for perjured testimony. Settlement is commonly inspired by a deposition of a witness who either remains calm and convincing or who crumbles. And, as previously noted, formal depositions of a party’s former em-

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394. One court labeled such tactics as the “Stalingrad Defense,” that is, yielding “not a single inch, and eventually the opposition may be beaten down into submission by not only by the cold, unforgiving winter, but also by the sheer tenacity and persistence of the defenders.” In re GMC Corp., 110 F.3d 1003, 1008 (4th Cir. 1996), cert denied, 522 U.S. 814 (1997). The court also sanctioned the defenders who employed the Stalingrad strategy. Id.


398. Id.; see also infra subsection V.B.4.d (Subpoenas and Subpoenas Duces Tecum).
employees may be required when informal ex parte communications have been deemed improper.399

At least two scenarios commonly arise regarding depositions of former employees of a party. One scenario, addressed later in this Article,400 involves a former employee who has previously sued the employer and entered a confidential settlement agreement. The key issue present in that situation is whether the former employee can be deposed for the purpose of learning the details of the settled case. A second common topic is closely intertwined with the previous discussion of Model Rule 4.2 and the legal classification of the former employee and employer as either a single unified entity or as separate autonomous beings. The specific question raised in this second scenario is whether the former employee is sufficiently aligned with the former employer so that (1) the former employer is responsible for securing the former employee's attendance at the deposition and (2) whether the former employer's counsel has standing to assert objections and otherwise defend the former employee during the deposition. Controversies surrounding subpoenas of former employees are discussed in a separate subsection of this Article.401 The remaining issues of securing the former employee's attendance and defending the deposition are addressed directly below.

Responsibility for attendance at a deposition turns in large part on the current relationship between the former employee/deponent and the former employer/party. For example, the court made a domestic corporate plaintiff produce a former employee for a telephone deposition where the person was currently employed by plaintiff's European-based parent company.402 In contrast, a court denied a plaintiff's motion to compel defendant to produce former employees for deposition where the employees had no continuing relationship with the defendant.403

The "current relationship" factor is likely determinative of whether an employer is responsible for securing the attendance of a former employee specifically named in a notice of deposition, or producing one or

400. See infra section VI.G (Court Settlements Mandating Confidentiality).
401. See infra subsection V.B.4.d (Subpoenas and Subpoenas Duces Tecum).
more former employees in response to a Fed. R. Civ. P. 30(b)(6) deposition notice.  

The court in *Peralta v. Cendant Corp.* squarely confronted the issue of whether the former employer's counsel can assert objections and otherwise defend the former employee's deposition. In that employment discrimination case, plaintiff's counsel subpoenaed a former employee of defendant, Randi Klaber, who was plaintiff's immediate supervisor and a key actor in the events that lead to the lawsuit. Defendant did not object to the subpoena; in fact, the deposition was scheduled through defendant's human resources department.

During a break in Klaber's deposition, defense counsel conferred with Klaber and subsequently objected and instructed Klaber not to answer questions from plaintiff's counsel about the content of those communications. Although defense counsel did not represent Klaber during the deposition or otherwise, defendant claimed that the content of the communications between defense counsel and any former employee of the defendant was shielded from discovery by the attorney-client privilege. Plaintiff contested defendant's privilege claim, and the parties turned to the court to referee their dispute.

Finding no authority directly on point, the court scoured authorities including Supreme Court and lower court opinions, ethical rules, and legal treatises for guidance on the extension of the attorney-client privilege to former employees. Not surprisingly, the court found vague and conflicting advice. Relying heavily on the Supreme Court's decision in *Upjohn Co. v United States*, the *Peralta* court created the following test for determining when communications between a party's former employees and the party's counsel constitute

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404. Fed. R. Civ. P. 30(b)(6) requires a litigant to designate and produce for deposition one or more officers, managing agents, or other persons with knowledge of the matters described with particularity in the notice. Courts have required a corporate defendant to produce former employees for deposition in response to a Fed. R. Civ. P. 30(b)(6) notice where no current employees could provide the relevant information as specified in the deposition notice. See, e.g., Jakob v. Champion Int'l Corp., No. 01 C 0497, 2001 U.S. Dist. LEXIS 19010, at *3 (N.D. Ill. Nov. 14, 2001); Canal Barge Co. v. Commonwealth Edison Co., No. 98-C0509, 2001 WL 817853 (N.D. Ill. July 19, 2001).


406. See id. at 39.

407. See id.

408. See id.

409. See id.

410. See id.

411. See id. at 39–42.

412. See id. at 41 (stating that the conclusions reached by the court after reviewing various authorities "does not completely resolve the parties' current dispute"); see also infra section VI.A (Attorney-Client Privilege).

privileged communication that cannot be inquired into during the former employee's deposition:

Did the communication relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment? If so, such communication is protected from disclosure by defendant's attorney-client privilege under Upjohn. As to any communication between defendant's counsel and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness's testimony, consciously or unconsciously, no attorney-client privilege applies.414

The Peralta court raised sua sponte the applicability of the work product doctrine, concluding that it also might limit Klaber's deposition testimony to the extent that testimony might reveal defense counsel's mental impressions and opinions regarding the case.415 The court concluded that "[w]hile plaintiff's counsel will therefore be precluded from asking Ms. Klaber explicitly about [defense attorney] Ms. Bresnan's legal conclusions or legal opinions that reveal defendant's legal strategy, the work product doctrine will not preclude inquiry into the other non-privileged communications as set out above."416 The court ordered Klaber's deposition resumed in accordance with its opinion.417

Peralta is troubling in that defense counsel appeared to get the best of both worlds by maintaining inherently inconsistent positions. That is, defendant was able to distance itself from its former employee (Klaber), a major actor in the dispute, by not undertaking her legal defense or formally representing her in the deposition.418 At the same time, defendant was able to shield to a significant degree the contents of communications between its attorney and its former employee from discovery.

On the other hand, the Peralta court made a valiant effort to clarify the bounds of appropriate deposition questions posed by plaintiff's counsel to a former employee of defendant, and, perhaps most importantly, came up with a workable standard. The standards espoused in Peralta respect the necessity of holding privileged the communications between a former employee and the former employer's counsel so that factual information will flow freely to the former employer's attorney. As recognized in Upjohn, this factual flow is critical to the attorney's ability to provide sound legal advice to the employee.419

414. 190 F.R.D. at 41-42.
415. See id. at 42.
416. Id.
417. See id.
418. For instance, defendant's non-representation of its former employee would likely prove beneficial as the case proceeded to settlement negotiations, summary judgment, or trial because defendant's distance from its former employee would make more credible a defense portraying Klaber as a lone actor responsible for the discrimination against plaintiff, thus negating the corporate defendant's liability.
DISCOVERY AND FORMER EMPLOYEES

The sagacity of Peralta is that its designation of specific attorney-client communications as off limits to the plaintiff's counsel in no way interferes with a key premise of all privilege doctrines, namely, that the facts underlying the communications remain subject to discovery. Thus, the sanctity of the attorney-client and work product privileges is preserved while the adversary can still obtain the factual information from the former employee being deposed. In addition, opposing counsel is always authorized to ask a deponent about the sources of the deponent's factual information, and to inquire about potential influences that might bias the deponent's testimony. Peralta reiterates that right and makes explicit that deposing counsel may inquire as to the role the former employer's counsel played in helping the deponent formulate responses to deposition questions.

c. Requests for Production of Documents and Tangible Things

The Federal Rules and state counterparts provide for the liberal exchange of documents and other tangible evidence during the discovery process. The Federal Rules mandate automatic disclosure—or at least identification and description—of "all documents, data compilations, and tangible things . . . that the disclosing party may use to support its claims or defenses." Evidentiary material supporting "any category of damages claimed by the disclosing party" and any insurance agreement that may indemnify or reimburse a party for liability determined in the action must be provided to the adversary as well. Once initial disclosures are made, parties can use the very broad authority of Fed. R. Civ. P. 34 to request additional documents

420. The practical import of the decision is that Peralta's attorney would be able to inquire freely of Klaber about the circumstances surrounding plaintiff's employment with defendant, including the specific facts which support or undermine plaintiff's discrimination claims and defendant's corresponding defenses. Plaintiff's counsel would not, however, be able to solicit information by asking questions of Klaber such as "what did defense counsel ask you about Peralta's employment, and what did you tell counsel?" Because Klaber's responses to such questions not only reveal facts but also implicate counsel's thought processes and opinions about the litigation, they are clearly barred by the court's order.

421. In the context of Peralta, for example, plaintiff's counsel might properly inquire about whether the deponent/former employee has independent knowledge of the facts constituting her testimony or whether she obtained that information from other sources including defense counsel. Counsel might inquire as to any potential for bias on the part of the former-employee deponent, such as promised rewards or threatened retaliation by her former employer based on the content of her testimony.

422. 190 F.R.D. at 41-42.
423. Fed. R. Civ. P. 26(a)(1)(B); see also supra subsection V.B.2 (Initial Mandatory Disclosures).
and tangible evidence from opponents. Once again, neither the Federal Rules nor the accompanying advisory committee notes provide guidance on whether a party must consult with former employees before representing that it has fully and fairly complied with the discovery rules.

Two provisions in the Federal Rules suggest that a party need not consult with its former employees prior to providing initial disclosures or responding to document requests. First, parties are only required to produce documents and things that are within the party's "possession, custody, or control." Absent a consulting or other continuing relationship with its former employees, a party cannot be said to constructively own or manage materials that their former employees possess. Second, the rules offer explicit mechanisms for parties to obtain documents and materials from persons who are not parties—a category that includes most former employees.

Consistent with the general supposition that each side must prepare its own case, the burden technically falls on the former employer's adversary—rather than the former employer—to seek out information and materials held by non-party former employees. From a strategic view, however, counsel for the former employer is generally well advised to conduct her own discovery, formal or otherwise, of former employees to ferret out any materials that support or undermine her client's position. Such discovery is, however, a double-edged sword: once the former employer's attorney obtains copies of materials from her client's former employees, the materials are within her client's "possession, custody or control." The materials obtained from former employees are thus subject to production if they fall within the categories requested by the opponent. The materials may even warrant automatic disclosure to the adversary under the duty to supplement found in the initial disclosure rules.

A party would be ill advised to try to exploit the rules by shipping off boxes of relevant documents to former employees and then claiming that it has no responsive materials within its possession. Such


427. Fed. R. Civ. P. 34(c) (stating that discovery of documents and items from non-parties is accomplished though use of Fed. R. Civ. P. 45); Fed. R. Civ. P. 45 (setting forth detailed requirements for obtaining testimony and materials from non-party witnesses); see also infra subsection V.B.4.d (Subpoenas and Subpoenas Duces Tecum).

428. Fed. R. Civ. P. 26(e)(1) (creating a duty to supplement initial disclosures "if the party learns that in some material respect the information disclosed is incomplete"). But see Intel Corp. v. VIA Techs., Inc., 204 F.R.D. 450, 451–52 (N.D. Cal. 2001) (holding that declaration obtained by defendant from plaintiff's former employee and used to support defendant's summary judgment motion was not a "document" that should have been disclosed pursuant to Fed. R. Civ. P. 26(a)(1)(B)).
deviousness would violate the literal language as well as the spirit of modern discovery rules that demand good faith compliance and cooperation. It would also perpetrate a fraud on the court subject to the most severe contempt sanctions.

d. **Subpoenas and Subpoenas Duces Tecum**

Subpoenas are commonly used to exact nonparties' participation in the discovery process.\(^{429}\) Federal and analogous state rules allow nonparties to be compelled not only to provide deposition testimony, but also to produce documents and other tangible things in response to a subpoena.\(^{430}\) Thus, former employees who prefer not to be involved in litigation may find themselves compelled, under penalty of perjury, to provide information and materials critical to the outcome of the case.

In some jurisdictions, including all federal district courts, attorneys may issue subpoenas in their capacity as officers of the court.\(^{431}\) The rules for issuing subpoenas, including highly specific notice requirements for nonparties, are quite detailed, but not particularly burdensome.\(^{432}\) A subpoena may require the person served to appear for deposition (subpoena ad testificandum), to produce tangible items (subpoena duces tecum), or to do both. Subpoenas duces tecum effectively extend formal discovery available from parties, including pro-


\(^{430}\) See, e.g., Fed. R. Civ. P. 45(a)(1) (providing that "[a] command to produce evidence . . . may be joined with a command to appear at . . . deposition, or may be issued separately."). The use of a subpoena to require a former employee or other nonparty to produce tangible materials parallels the adversary’s right to obtain documents and other materials from a party under Fed. R. Civ. P. 34. See generally Jeffrey F. Liss, Formal Discovery from Nonparties, reprinted in The Litigation Manual 149 (John G. Koetl ed., 2d ed. 1989) (explaining the utility of subpoenas to obtain information from nonparties).

\(^{431}\) See, e.g., Fed. R. Civ. P. 45(a)(3)(A)–(B) (empowering an attorney to issue a subpoena on behalf of any federal district court "in which the attorney is authorized to practice" and on behalf of any court "for a district in which a deposition or production is compelled by the subpoena," provided the discovery "pertains to an action pending in a court in which the attorney is authorized to practice").

\(^{432}\) Under the Federal Rules, for example, the person subject to the subpoena must be personally served. Fed. R. Civ. P. 45(b)(1)(A). Where attendance at a deposition is required, a check must be tendered when the subpoena is served that fairly compensates the respondent for mileage and one day’s attendance fees. Id. Service of a subpoena is effective within the issuing district, or outside the district, if served within a 100 mile radius of the place where the deposition is to take place or as otherwise provided by the state court rules for the place in which the subpoena is served. Fed. R. Civ. P. 45(b)(2). In addition to providing information about where and when the deposition will take place, the subpoena must contain the exact language of Fed. R. Civ. P. 45(c) and (d), detailing the person’s rights and responsibilities in responding to the subpoena. Fed. R. Civ. P. 45(a)(1)(A).
duction of documents under Fed R. Civ. P. 34, to nonparties. Thus, a subpoena duces tecum may properly command a nonparty to produce a wide category of materials including charts, photographs, personal and business calendars, audio and video recordings, e-mails, computer files, drafts, non-identical copies of documents, and even “the now ubiquitous yellow ‘post-its’” notes.

Because a subpoena is a court order, contempt sanctions await persons who fail to respond appropriately. The rules are somewhat solicitous of nonparties, however, requiring attorneys to “take reasonable steps to avoid imposing undue burden or expense” on the person being subpoenaed. The rules also place the burden on the issuing attorneys to obtain an order to compel production of documents and tangible things if the person subject to the subpoena provides a timely, written objection to the issuing attorney.

The power vested in attorneys to issue subpoenas, especially subpoenas compelling former employees to produce documents and other tangible items in her possession, yields tremendous returns. As one experienced litigator observed, “a judge or jury will often believe the barest scrap of paper over the memory of any witness.” Accordingly, “[o]btaining documents through discovery is the heart of the lawsuit; knowing the rules of the discovery game is vital for successful litigation.” The former employer/litigant may already be immersed in responding to requests for production of documents from other parties and monitoring like requests it has propounded to its adversaries. A wildcard production by a former employee in response to an adver-

433. “A person not a party to the action may be compelled to produce documents and things . . . as provided in Rule 45.” FED. R. CIV. P. 34(c).
434. Elliot G. Sagor, Victory is in the Documents, 23 LITIG. 36, 39 (1997); see also FED. R. CIV. P. 34(a) (providing an extensive, illustrative list of discoverable materials).
435. See, e.g., FED. R. CIV. P. 45(e) (providing that “[f]ailure by any person without adequate excuse to obey a subpoena . . . may be deemed a contempt of the court from which the subpoena issued”); see also FED. R. CIV. P. 45 advisory committee note, 1991 amendments, subdivision (a) (advising that “[a]lthough the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act of defiance of a court order and exposes the defendant witness to contempt sanctions”).
436. FED. R. CIV. P. 45(c)(1).
437. FED. R. CIV. P. 45(c)(2)(B). Stated differently, this rule requires an attorney attempting to subpoena a nonparty to obtain the court’s cooperation in enforcing a subpoena duces tecum, rather than requiring a nonparty subject to the subpoena to file a motion to quash with the court under FED. R. CIV. P. 45(c)(3). If the person is compelled to produce the materials, the court must protect the nonparty from bearing “significant expense” related to the production, FED. R. CIV. P. 45(c)(2)(B). Presumably this is achieved by ordering the party issuing the subpoena to pay costs incurred in assembling, copying, and transporting the documents.
438. Sagor, supra note 434, at 36.
439. Id.
sary's subpoena inevitably causes serious disruption of even the best formulated litigation strategy.

The power delegated to an attorney to issue orders on behalf of the court, and the corresponding potential for abuse, necessitate that adequate notice be given to all parties prior to the date of the commanded production or testimony from the nonparty. Failure to provide adequate notice injures a party by denying the right to use the safeguard provided in the rule for objecting to release of the information sought prior to disclosure, and also harms the public because failure to observe the rules “compromises the integrity of the court's processes.” Accordingly, a court may issue sanctions for failing to notify parties of the issuance of subpoenas to nonparties even when no actual prejudice is demonstrated.

Today, many employees work at least part of the time at home, often creating computer records and files in the process. The growing potential for individual liability in corporate settings may also inspire employees to create their own paper or electronic files of the employer's documents for later defensive use. The possibility that disgruntled employees will utilize the same strategy to amass evidence to support an eventual offensive claim against the employer is equally obvious. Accordingly, the dreaded “smoking gun” and other telling documents may lie smoldering in a former employee's personal files.

In short, it is the rare case when a party welcomes an adversary's subpoenaing of the party's former employees to testify, and subpoenas duces tecum directed to former employees are even less well received. The issue of whether the former employer has standing to move to quash a subpoena served on a former employee, however, remains a highly disputed topic.

Certainly, the former employee being subpoenaed may move the court to modify or quash the subpoena on a variety of grounds, including the argument that compelled testimony or production will invade a privilege owned by that person. Notice of a subpoena must be given to all parties to afford them “an opportunity to object to the pro-

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440. Requirements that all parties receive notice of subpoenas directed to nonparties are set forth in Fed. R. Civ. P. 30(b)(1)-(3) and Fed. R. Civ. P. 45(b)(1).
442. See id.
443. In Spencer v. Steinman, for example, the offending attorney was publicly admonished by the court, required to file an affidavit that all documents obtained pursuant to the non-party subpoena had been turned over to opposing counsel, and directed to pay legal fees associated with the adversary’s motion that brought the matter to the court’s attention. Id.
444. The recipient can seek to quash or modify because the subpoena does not allow adequate time to respond, requires travel beyond that specified in the rule, requires disclosure of privileged information, or imposes undue burden. Fed. R. Civ. P. 45(c)(3)(A)(i)-(iv).
duction or inspection."\(^{445}\) A court can modify or quash a subpoena to avoid disclosure of privileged information (including trade secrets) belonging not only to the subpoenaed person but also any person (including a party) "affected by" the subpoena.\(^{446}\)

Case law demonstrates, however, that providing a person "affected by" a subpoena "an opportunity to object" is not the same as bestowing standing to object. Rather, "[t]he injury in fact element of standing requires the complainant to have suffered an invasion of a legally protected interest which is concrete and particularized."\(^{447}\) Therefore, a party generally "has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought."\(^{448}\)

Identifying whether a party has a "personal right or privilege" at stake is especially challenging when the subpoena is issued on a former employee of a party. *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*\(^{449}\) represents one court's attempt to answer that question. This case also provides general guidance on the propriety of using a subpoena duces tecum to obtain information from an adversary's former employee.

In *Westside-Marrero Jeep Eagle*, plaintiffs sued Chrysler for alleged extraction of cash payments in exchange for an increased allocation of new automobiles for plaintiffs' automobile dealership. A former employee of Chrysler, Alfred S. Stevens, Jr., was a key actor in the events leading to the litigation and had originally been named as a defendant in the lawsuit.\(^{450}\) Chrysler had rejected Stevens' request that Chrysler defend and indemnify him, and the former employee entered into a settlement agreement with the plaintiffs.\(^{451}\)

Chrysler and the plaintiffs each served Stevens with subpoenas duces tecum.\(^{452}\) Chrysler advised plaintiffs' counsel that it was moving for a protective order to prevent Stevens from producing privileged documents to plaintiffs. Prior to Chrysler's filing of the motion, Stevens provided plaintiffs with the documents they requested.\(^{453}\)

\(^{445}\) FED. R. CIV. P. 45(b)(1) advisory committee note, 1991 amendments, subdivision (b).

\(^{446}\) FED. R. CIV. P. 45(c)(3)(B)(iii).


\(^{448}\) 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2459, nn.15-16 (citing cases) (2d ed. 1994).


\(^{450}\) See id. at *1.

\(^{451}\) See id. at *1-2.

\(^{452}\) See id. at *2.

\(^{453}\) See id.
Plaintiffs moved to quash Chrysler's subpoena, or, in the alternative, to obtain a protective order limiting the information Chrysler could obtain from Stevens through the subpoena process.\textsuperscript{454} Chrysler moved, inter alia, for an order requiring plaintiffs to provide to Chrysler all the documents Stevens provided to plaintiffs pursuant to plaintiffs' subpoena duces tecum.

By entertaining plaintiffs' motion, the court implicitly held that plaintiffs had standing to move to quash Chrysler's subpoena directed at Stevens insofar as plaintiffs challenged (1) Chrysler's right to obtain information about the settlement agreement between the former employee and plaintiffs and (2) the overly broad and burdensome nature of one of the requests.\textsuperscript{455} However, the court held that the plaintiffs had no standing to object to Chrysler's four document requests that sought financial and other personal information from Stevens because plaintiffs' counsel neither represented Chrysler's former employee Stevens in the matter nor had any "conceivable interest"\textsuperscript{456} in the information. In addition, the court held that the Stevens' relinquishment of all relevant documents in his possession to plaintiffs in response to plaintiffs' subpoena did not absolve Stevens of the obligation to respond to Chrysler's subpoena.\textsuperscript{457} "This argument is irrelevant and does not relieve Stevens of his obligation to respond to a subpoena,"\textsuperscript{458} the court opined. "If he has no responsive documents, he must say so under oath and explain what happened to any responsive documents that he formerly possessed."\textsuperscript{459}

Similarly, the court entertained Chrysler's challenge to plaintiffs' use of a subpoena duces tecum to obtain from Chrysler's former employee Stevens potentially privileged and propriety information owned by Chrysler.\textsuperscript{460} The court also ordered that the former employee consult with his own attorney or a Chrysler attorney before revealing any information that might breach a privilege owned by Chrysler,\textsuperscript{461} and ordered plaintiffs to immediately produce the documents Stevens had provided to them pursuant to the plaintiffs' subpoena.\textsuperscript{462} The court further chastised plaintiffs' counsel for accepting the documents from Chrysler's former employee before Chrysler had adequate notice to object to plaintiffs' subpoena.\textsuperscript{463}

\begin{itemize}
\item \textsuperscript{454} See id.
\item \textsuperscript{455} See id. at *2-4.
\item \textsuperscript{456} Id. at *4.
\item \textsuperscript{457} See id. at *2
\item \textsuperscript{458} Id.
\item \textsuperscript{459} Id.
\item \textsuperscript{460} See id. at *6-8.
\item \textsuperscript{461} See id. at *6.
\item \textsuperscript{462} See id. at *7-8.
\item \textsuperscript{463} See id. at *7.
\end{itemize}
In sum, subpoenas and subpoenas duces tecum may be the most
effective formal discovery mechanism for obtaining testimony and tan-
gible evidence from a litigant's former employees. As with every de-
vice, care must be taken to observe not only the letter but also the
spirit of the rules governing these powerful discovery tools. Failing to
provide adequate notice to parties, placing undue burdens on former
employees in responding to the subpoenas, and abusing the process to
bully non-parties into cooperating on harsh terms is, and will un-
doubtedly remain, grounds for imposition of sanctions on the offending
attorney.

e. Consultants and Expert Witnesses

There is nothing improper, or even unusual, about an employer re-
taining its former employees as expert witnesses and consultants for
an individual case or series of litigated matters. Modern federal
procedural rules and many of their state counterparts, however, se-
verely limit an adversary's ability to obtain discovery from a former
employee serving as a non-testifying trial consultant, while allowing
liberal discovery of an expert witness designated as a trial witness.
These important differences are explained briefly here.

The Federal Rules governing mandatory initial disclosure require
parties to identify experts they anticipate calling at trial. Disclosure of
testifying experts is made "at the times and in the sequence
directed by the court." Disclosure must be accompanied by a writ-
ten report containing "a complete statement of all opinions to be ex-
pressed and the basis and reasons therefor." The expert's signed
report must also include the data underlying the witness's opinions,
the qualifications of the witness including a list of publications au-
thored in the past decade, an explanation of the expert's compensation
arrangement, any exhibits the witness will use to support her conclu-
sions, and a list of all cases in which the witness has testified as an
expert, either in deposition or at trial, during the previous four
years. Counsel for the opposing party may depose the expert after
the report is furnished, provided that counsel pays the expert a

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464. Potential improprieties arising when a litigant retains its adversary's former em-
ployees as consultants and experts are discussed infra subsection VI.F.2.b (Turn-
coat Agreements).
466. Fed. R. Civ. P. 26(a)(2)(C). Accordingly, the subject of expert witnesses should be
broached with opposing counsel at the Fed. R. Civ. P. 26(f) conference and with
the court at the initial pretrial conference. See supra subsections V.B.1–3 (Meet-
ing with Opposing Counsel, Initial Mandatory Disclosures, and Initial Pretrial
Conference and Resultant Scheduling Order).
468. See id.
“reasonable fee for time spent” related to the deposition.\textsuperscript{470} An expert who refuses to answer deposition questions based on claims of privilege or work product must be sufficiently specific regarding the materials or information being withheld to “enable other parties to assess the applicability of the privilege or protection.”\textsuperscript{471}

In contrast, discovery from a non-testifying expert or consultant is rarely allowed.\textsuperscript{472} The use of deposition or interrogatories to “discover facts known or opinions held” by a non-testifying individual retained by an adversary “in anticipation of litigation or preparation for trial”\textsuperscript{473} is not completely forbidden. Discovery of such a witness is allowed, however, only “upon a showing of exceptional circumstances”\textsuperscript{474} where it is “impracticable for the party seeking discovery to obtain facts or opinions on the subject by other means.”\textsuperscript{475} This restriction, paired with the significant restraints imposed on discovery of materials classified as work product,\textsuperscript{476} generally make the non-testifying former employee/consulting expert off limits to the former employer’s adversaries. This is true in many state as well as federal courts.\textsuperscript{477}

A perhaps unintended consequence of the different standards for testifying and non-testifying experts is that the rules allow, if not encourage, a former employer to keep former employees out of the discovery limelight by retaining them as “trial consultants.” This practice may also shield from discovery any work product shared with the former employee-consultant.\textsuperscript{478} A party’s use of this tactic to monopolize the market of potential experts with knowledge relevant to a case or series of lawsuits may, however, backfire. In an effort to preempt adversaries from retaining a party’s former employees, the former employer may create the situation where information is not available from any other source. In that scenario, the former em-

\textsuperscript{470} FED. R. CIV. P. 26(b)(4)(C)(i).
\textsuperscript{471} FED. R. CIV. P. 26(b)(5).
\textsuperscript{473} FED. R. CIV. P. 26(b)(4)(B).
\textsuperscript{474} Id.
\textsuperscript{475} Id.
\textsuperscript{476} See infra section VI.B (Work Product).
\textsuperscript{477} See, e.g., ILL. S. CR. R. 201 (limiting discovery of a non-testifying litigation consultant or expert). See generally Stephen D. Easton, \textit{Can we Talk?: Removing Counterproductive Ethical Restraints upon Ex Parte Communication Between Attorneys and Adverse Expert Witnesses}, 76 IND. L.J. 647 (2001) (explaining the many restrictions on informal and formal discovery of adverse experts and advocating for more open access to experts for opposing counsel).
\textsuperscript{478} Plunkett, \textit{supra} note 472, at 451 n.1 (explaining that work product shared with testifying expert witnesses is likely subject to discovery, while non-testifying consultants are almost immune from discovery).
ployer's adversaries would be able to make a showing of undue hardship and impracticality, thus persuading a court to allow discovery of the former employee-consultants.

**f. Protective Orders**

As previously explained, all federal district courts and some state courts now require counsel to negotiate the scope, timing, and limitations on discovery at the outset of the litigation, and to memorialize their agreement in a proposed discovery plan presented to the court prior to the first pretrial conference. Where potential for discovery disputes loom large, the plan should propose entry of a comprehensive protective order that sets appropriate boundaries regarding the matters to be discovered, identifies the sources from whom discovery may be sought, and acknowledges the appropriate discovery mechanisms to be used. As previously advised, modern procedural rules provide counsel with the opportunity, while simultaneously imposing the duty, to bring to the court's attention anticipated issues concerning the discovery of information from former employees, and to reach a court approved resolution of the issues.

After the initial pretrial conference, litigants are authorized to seek additional protective orders further clarifying the scope of discovery. Despite the argument that protective orders provided for in Fed. R. Civ. P. 26(c) explicitly only apply to "formal" discovery, courts have frequently entertained a party's request that a protective order be entered to regulate informal, ex parte contact between an attorney and former employees of an adversary. Even if Fed. R. Civ. P. 26(c) is not directly applicable, entry of a protective order is author-

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481. See Fed. R. Civ. P. 26(c) and analogous state rules. In cases where identical or similar claims are filed by the same plaintiffs against the same defendants in several state and federal courts, a party may also seek a preliminary injunction from a federal court, pursuant to the All Writs Act, 28 U.S.C. § 1651 (2001), or Fed. R. Civ. P. 65, staying or limiting discovery and other proceedings in the related cases. See, e.g., G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529 (S.D.N.Y. 2001).
482. Holdren v. Gen. Motors Corp., 13 F. Supp. 2d 1192, 1193 n.1 (D. Kan. 1998) (recognizing that both Fed. R. Civ. P. 26(c) and the court's inherent power to regulate attorney conduct empowered it to enter a protective order even though no formal rules of discovery were violated).
ized by the court’s “inherent power to require adherence by counsel to applicable disciplinary rules,”484 including Model Rule 4.2.485

As a threshold matter, a party offended by an opponent’s discovery tactics must make a good faith effort “to confer with other affected parties in an effort to resolve the dispute without court action.”486 If resolution cannot be achieved, the party or a nonparty from whom the challenged discovery is sought may seek judicial intervention.487 The burden remains on the movant to justify the requested restrictions on an adversary’s discovery strategy.488 The movant must demonstrate that the adversary’s past or planned conduct violates specific procedural rules or ethical standards. Bluntly stated, “[s]peculation does not constitute an adequate basis for a protective order.”489

Once that burden is satisfied, the trial judge or magistrate has tremendous discretion to fashion a protective order that balances the actual or potential harm resulting if the discovery is allowed against the rights and duties of an adversary to zealously search out relevant facts and legal theories.490 The court may rule that the discovery not be allowed,491 that it only be made under specified terms or conditions,492 that it be accomplished by a method other than the one pursued by the adversary,493 that inquiry not be made regarding certain topics494 including trade secrets and other confidential information,495 and that certain people be present when discovery is had.496

485. Id.; see also Holdren, 13 F. Supp. 2d at 1193, n.1; supra sections IV.A–D (discussing Model Rule 4.2).
486. Fed. R. Civ. P. 26 (c). While parties are free to resolve their differences and continue with discovery in accord with their agreement, a split of authority exists as to whether the parties can stipulate to an entry of a specific protective order or whether an order is only appropriately entered by a court upon a finding of good cause. See, e.g., Citizens First Nat’l Bank v. Cincinnati Ins. Co., 178 F.3d 943 (7th Cir. 1999) (recognizing that the First, Third, and Eleventh Circuits allow entry of a protective order by stipulation, but siding with the Sixth, Eighth, Ninth, and D.C. Circuits that require the district courts to find good cause). Those cases, however, focus on the appropriateness of stipulated umbrella orders denying public access to discovery materials, rather than to disputes between parties as to how a specific type of discovery should proceed.
488. Turnbull, 185 F.R.D. at 651; see also G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529, 533 (S.D.N.Y. 2001) (explaining that Fed. R. Civ. P. 26(c) requires the movant to show good cause for issuance of a protective order).
489. Turnbull, 185 F.R.D. at 652.
A combination of these and additional requirements may also be ordered by the court.\textsuperscript{497} Protective orders may prove especially useful when discovery is sought from an adversary's former employees. In \textit{G-I Holdings, Inc. v. Baron & Budd},\textsuperscript{498} for example, the defendants in a personal injury asbestos case sought a protective order barring plaintiff's counsel from directing its investigators to conduct ex parte interviews with defendant's former employees. After considering the parties' respective arguments, the court expressed substantial concern that the ex parte interviews might uncover information that should be protected under the attorney-client privilege.\textsuperscript{499}

Balancing the "time-honored"\textsuperscript{500} right of counsel to interview willing nonparty witnesses against the possibility of invading the attorney-client privilege presented a situation in which the court found it "very difficult to craft a true compromise."\textsuperscript{501} The court's decision was not aided by the parties, as they respectively argued only extreme, bright line positions allowing or denying the ex parte interviews.\textsuperscript{502} Utilizing its discretion to fashion an equitable solution, the court entered a protective order allowing two alternatives. First, the interviews of defendant's former employees could continue, with prior notice to defense counsel and the right of counsel to be present.\textsuperscript{503} Alternatively, the interviews could be conducted in the presence of a special master agreed upon by the parties, with costs shared equally.\textsuperscript{504}

Of the various lessons taught by \textit{G-I Holdings, Inc.}, the most important is perhaps one of the most subtle. That is, the attorneys did a disservice to themselves and their clients by advocating absolute positions that the discovery of former employees was either permitted or prohibited. Had the attorneys been more flexible and creative, they might have offered solutions to the court more favorable to their respective positions. Defense counsel might have urged, for example, that they be allowed to speak with each former employee prior to the

\begin{footnotesize}
\textsuperscript{497} FED. R. CIV. P. 26(c).
\textsuperscript{498} 199 F.R.D. 529 (S.D.N.Y. 2001).
\textsuperscript{499} Id. at 535. The court was especially concerned because neither the individuals conducting the interviews nor any of the former employees being interviewed were attorneys. "It is unrealistic to expect even the best-intentioned lay person to be able to safeguard the attorney-client privilege," the court held. "The danger of inadvertent disclosure is compounded by the fact that the investigators . . . are in little better position than the interviewees to assess whether privileged material is being disclosed." Id.
\textsuperscript{500} Id. at 533.
\textsuperscript{501} Id. at 535.
\textsuperscript{502} See id.
\textsuperscript{503} See id.
\textsuperscript{504} See id. The judge further advised that he would designate a special master from a list of names submitted by the parties if they could not agree on a person to fulfill that role. Id.
\end{footnotesize}
plaintiff's interviews to determine whether the employee possessed privileged information of any kind. Plaintiff's attorney might have offered to record the interviews for in camera inspection should an issue of attorney-client privilege arise. In the end, of course, the court would exercise its discretion to draft an appropriate protective order, and even with additional input from counsel, it may have issued an order identical to the protective order it fashioned without the aid of counsel. What the attorneys forfeited in *G-I Holdings, Inc.* was an important opportunity to influence the court's decision in a matter of great importance to their clients and possibly to the outcome of the litigation.505

VI. APPROPRIATE BREADTH OF INFORMAL AND FORMAL DISCOVERY OF FORMER EMPLOYEES

The seven major categories of considerations addressed in this Part are not necessarily exhaustive of all other legal complications that arise when discovery is sought from litigants' former employees. They do, however, represent the most common conundrums for attorneys representing and opposing former employers and for the courts charged with refereeing these discovery bouts. Except where expressly stated, the limitations on communications with, and discovery of, former employees as discussed in this Part apply to both informal, ex parte contact and contact pursuant to formal discovery devices.506

505. See generally supra sections IV.A–D (discussing informal discovery and Model Rule 4.2); see also infra sections VI.A–E (discussing privilege doctrines).
506. This Article provides an in-depth analysis of the privileges most commonly implicated when discovery is sought from litigants' former employees, such as attorney-client privilege, trade secrets, and work product doctrine. Based on the unique circumstances surrounding a particular case, however, an attorney may also encounter other barriers, such as the ubiquitous physician-patient privilege, and privileges not universally recognized. These privileges include the accountant-taxpayer privilege, see, e.g., IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (creating narrow accountant-client privilege); *In re Am. Rest. Operations*, 957 P.2d 473 (Kan. 1998) (recognizing very broad accountant-client privilege), corporate ombudsman privilege, see, e.g., *Shabazz v. Scarr*, 662 F. Supp. 90 (S.D. Iowa 1987) (recognizing this privilege); *Carman v. McDonnell Douglas Corp.*, 114 F.3d.790 (8th Cir. 1997) (rejecting existence of such a privilege), executive or governmental privilege, see, e.g., *United States v. Reynolds*, 345 U.S. 1 (1952); 5 U.S.C. § 301 (2001) (shielding from discovery secrets of military or diplomatic nature), Fifth Amendment privilege against self-incrimination, see, e.g., *United States v. Fla. Cities Water Co.*, No. 93-281-CIV-FTM-21, 1995 U.S. Dist. Lexis 7921 (M.D. Fla. 1995) (holding that former employees could be subject to criminal liability under the Clean Water Act based on their communications with the Department of Justice attorneys); *Mark W. Williams, Pleading the Fifth in Civil Cases*, 20 LITIG. 31 (1994), the informer's privilege, see, e.g., *Dole v. Local 1942, Int'l Bd. of Elec. Workers*, 870 F. 2d 368 (7th Cir. 1989) (covering communications with persons who offer assistance to government investigations), medical peer review privilege, see, e.g., *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001); *Fardo v. Gen. Hosp. Corp.*, No. 98-2714, 2000 Mass. Super.
A. Attorney-Client Privilege

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications," and remains "ubiquitous in contemporary American litigation." It arises "in every imaginable situation with all possible permutations." Attorney ethical rules do not purport to define or enforce the doctrine of attorney-client privilege. Rather, the doctrine finds both its genesis and continued vitality in federal and state common law.


509. See id.

510. For example, the introductory material in the ABA's Model Rules of Professional Conduct makes clear that "these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege." Model Rules of Prof'L Conduct, Scope (2002). However, there are many ethical rules and code sections that require lawyers to maintain the confidences of clients that extend past the protections afforded by the privilege itself. See generally Richard A. Corwin, Ethical Considerations: The Attorney-Client Relationship, 75 TUL. L. REV. 1327 (2001). In addition, a state attorney disciplinary board may use invasion of attorney-client privilege as grounds to sanction an attorney. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359, 6 (1991) advising that "the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer's counsel are protected by the privilege"; Virginia State Bar Standing Comm. on Legal Ethics, Op. 1749 (2001) (advising that it is unethical for attorney to talk to corporate adversary's former employees regarding discussions employees had with corporate counsel while still employed).


The purpose of the privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”

“The practical consequence of the privilege is that there can be neither compelled nor voluntary disclosure by the lawyer of matters conveyed to the lawyer in confidence by a client for the purpose of seeking legal advice.”

A federal district court provided this thorough and still accurate description of attorney-client privilege more than half a century ago:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion on law, or (ii) legal services, or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or a tort; and (4) the privilege has been (a) claimed, and (b) not waived by the client.

In sum, the attorney-client privilege shields from disclosure communications made between privileged persons—that is, from client to attorney as well as from attorney to client—if the oral or written exchanges were made in confidence and for the purpose of obtaining or providing legal advice for a client or prospective client. The client, not the attorney, owns the privilege and therefore has the right to assert it and the power to waive it.

Application of the attorney-client privilege has proven especially difficult when the client is a legal fiction, such as a corporation or

513. The skeleton of the attorney-client privilege is occasionally codified in state statutes, but the substantial body of law that fully animates the doctrine is found in common law. See, e.g., OHIO REV. CODE ANN § 2317.02 (2001) (prohibiting an attorney from testifying “concerning a communication made to [him] by [his] client in that relation or [his] advice to [his] client,” except where the client expressly consents to the testimony, but providing no further details as to the definition or application of the doctrine). In federal courts, privileges are “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” FED. R. EVID. 501. In federal civil cases in “which State law supplies the rule of decision, . . . privilege . . . shall be determined in accordance with State law.” Id.


515. Epstein, supra note 508, at 28.


517. Epstein, supra note 508, at 28.

518. Id. at 184. However, because the client is rarely aware of the existence and/or modus operandi of the privilege, the attorney is obligated to raise the privilege on the client’s behalf. Id. at 28, 165. And, “in most instances, it is through the actions taken (or not taken) by counsel that courts find a waiver has occurred.” Id. at 165.
partnership, rather than a human being. In the context of a corporation or other entity, "the attorney-client privilege applies to communications between corporate employees and counsel, made at the direction of corporate superiors in order to secure legal advice, and employees are aware that they are being questioned so that the corporation can obtain legal advice." The Supreme Court has clarified that, in federal courts, the privilege is not limited to upper echelon and mid-level managerial employees of a corporation who constitute the entity's "control group." Rather, the privilege extends to any employee who provides information to the corporation's attorney so the attorney can provide appropriate legal counsel to the corporation.

The attorney-client privilege is implicated in at least five situations involving a former employee of a party: (1) where the former employee is a lawyer and served the former employer in that capacity, (2) where the former employee communicated with the employer's counsel during her period of employment, (3) where the former employee was privy to attorney-client privileged information during her period of employment, (4) where an attorney-client relationship is established between the former employee and her employer's counsel after termination of employment, and (5) when communications between a party's counsel and a former employee of that party result in waiver of the attorney-client privilege.

The first situation described above—ex parte contact between an attorney formerly employed by a party and opposing party's counsel—is almost guaranteed to invade the former employer's attorney-client privilege, resulting in the harshest of sanctions being imposed on the attorney who initiated the ex parte contact. The second and third

520. Id. at 390-92.
521. See id. at 391-92.
522. See, e.g., Zachair, Ltd. v. Driggs, 965 F. Supp. 741 (D. Md. 1997); Spencer v. Steinman, 179 F.R.D. 484, 490-91 (E.D. Pa. 1998) (determining that communications with a former lawyer/employee of an opposing counsel was appropriate because no privileged matters were revealed).
525. See supra sections IV.A-D (discussing Model Rule 4.2).
527. See, e.g., Zachair, 965 F. Supp. at 752-55 (D. Md. 1997) (disqualifying counsel due to counsel's extensive ex parte contacts with nonparty who had been employed as opponent's in-house counsel; court found that both counsel and the former employee/attorney had violated several ethical rules as well as the attorney-client privilege). Application of the attorney-client privilege to in-house counsel poses many complexities beyond the scope of this Article. One of the most pressing concerns is that in-house counsels often advise corporate boards and executives on issues that are non-legal or quasi-legal in nature, thus falling outside of
scenarios are covered by the Ninth Circuit’s observation that “the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves.”\textsuperscript{528} The fourth scenario is a common one, but exists only where the former employee expressly agrees to representation by her former employer’s counsel: representation will not be assumed.\textsuperscript{529} Clearly, “an attorney-client relationship cannot be created unilaterally or imposed upon the employees without their consent.”\textsuperscript{530} The fifth and final scenario—waiver created by counsel’s communication of his client’s former employees—is one that should strike fear into the heart of every attorney.\textsuperscript{531}

The existence and extent of the attorney-client privilege in all former employee situations requires highly fact-specific examinations of the circumstances surrounding the communications for which the privilege is claimed. Obviously, “[t]he attorney-client privilege cannot be used to justify an absolute proscription against ex parte communications with [or formal discovery of] former employees. The attorney-client privilege exists only to the extent that attorney-client confidences are implicated.”\textsuperscript{532} But each situation as explained above gives rise to the possibility that the former employer’s adversary may
access attorney-client privileged information through informal or formal discovery of former employees.533

Various courts, the ABA, and other authorities have warned that even when contact with a former employee of an adversary is otherwise appropriate, care must be taken to avoid breaching any walls of attorney-client privilege that shield information the employee has from discovery.534 Former employees should not divulge privileged information they possess.535 It is equally well settled that attorneys are “not free to raid” their adversary’s “roster of former employees where those employees, during their tenure, have become privy to matters protected by the attorney client or work product privilege.”536 Stated differently, an attorney may contact former employees to “investigate the underlying facts leading up to the disputed matter, but he must forgo inquiry into attorney-client communication during the contact.”537 This is because the attorney-client privilege, once established, exists essentially in perpetuity,538 and “[a]n organization has no less interest in protecting its confidences when an employee who once shared those confidences leaves the company fold.”539


534. In re Bank of La./Kenwin Shops, Inc., 1998 WL 788776, at *3 (E.D. La. Nov. 10, 1998); Hannetz v. Shiley, Inc., 766 F. Supp. 258, 271 (D.N.J. 1991); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991) (concluding that “[w]ith respect to any unrepresented former employee, of course, the potentially communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer’s counsel are protected by the privilege”); Pa. Bar. Ass’n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 90-142 (Dec. 7 1990) (recognizing that “[i]f there is a real or perceived risk of disclosure of confidential information protected by the privilege which is or may be damaging to the party in interest, due process considerations may prohibit ex parte contact by adverse counsel with a current or former employee”).


Even though "the attorney client privilege is a rule of evidence more(341,692),(658,709)(449,692),(658,709) than a rule of ethics," invasion of the privilege through inappropriate contact with a former employee may serve as grounds for disqualification of counsel or other disciplinary action. Such an invasion may be construed as a violation of Model Rule 4.2 and as a violation of Model Rule 4.4, which bars attorneys from using "methods of obtaining evidence that violate the legal rights of" others. It is also grounds for a protective order and the imposition of sanctions.

Amatuzio v. Gandalf Systems Corp. presents an interesting scenario regarding a former employee and the limits of the attorney-client privilege. In Amatuzio, several terminated employees sued their former employer, Gandalf Systems Corporation ("GSC"), claiming that GSC's reduction of severance agreements violated state and federal law. Plaintiffs' counsel served a deposition subpoena on GSC former employee Vincent Messina. When employed by GSC, Messina reported directly to the director of human resources and attended several meetings during which GSC officials and their legal counsel discussed reduction of the severance agreement. The night before the scheduled deposition, and without any prompting from plaintiffs' counsel, Messina contacted plaintiffs' counsel and told them he wanted to join the lawsuit and wanted plaintiffs' counsel to represent him. Plaintiffs' counsel agreed.

GSC moved to disqualify plaintiffs' counsel on the grounds that Messina had disclosed attorney-client privileged information generated during the meetings between GSC officials and their attorneys where severance packages had been discussed. The court denied the motion to disqualify for both practical and legal reasons.

541. See id. (stating that "because the right of a client to communicate confidentially with his attorney goes to the very core of the litigation process, the court can disqualify an attorney if necessary to protect this fundamental value"); see also Rentclub Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff'd, 43 F.3d 1439 (11th Cir.1995) (disqualifying plaintiff's counsel for entering consulting agreement with former employee of defendant which presumably resulted in breach of former employer's confidences).
542. Camden, 910 F. Supp. at 1119 (determining whether ex parte contact with former employee of opposing party is appropriate in a particular case "requires consideration of a legal concern separate from but closely related to Rule 4.2, namely the attorney-client privilege").
543. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2002); see also Amatuzio, 932 F. Supp. at 115.
544. FED. R. CIV. P. 26(c); see also supra subsection V.B.4.f (Protective Orders).
As a practical matter, the court observed "that the problem raised in this case will not go away even if [plaintiffs' counsel] Mattioni does, since there will always remain the question of Messina's right to disclose to any attorney he might hire the contents of the communications now claimed to be privileged." 547

Turning to the legal issues, the court found that neither the ethical rules applicable in cases involving disclosure by former employees, specifically Model Rules 4.2 and 4.4, nor the common law principles of attorney-client privilege squarely fit the case before it. Recognizing that the attorney-client privilege should be narrowly construed when "it has the potential to frustrate the court's truth-seeking function," 548 the Amatuzio court articulated a rule intended to balance the right of a corporate employer to seek legal advice in confidence with the right of a former employee to breach that confidence if necessary to vindicate a legal right asserted against the corporation:

\[\text{Communications with a corporation's attorney made by, to, or in the presence of a non-attorney employee who later becomes adverse to the corporation are not protected by RPC 4.2, RCP 4.4, or the attorney-client privilege from disclosure by the former employee to his litigation counsel if (i) the litigation involves an allegation by the employee that the corporation breached a statutory or common law duty which it owed to the employee, (ii) the communication disclosed involves or relates to the subject matter of the litigation, and (iii) the employee was not responsible for managing the litigation or making the corporate decisions which led to the litigation.}\] 549

The court recognized that its rule might at times invade a corporation's expectation of privacy in its communications with legal counsel, but declared that "the strong public policy embodied in laws which protect employees must trump the need for confidentiality." 550 The court also held that the same or similar rule would "apply with respect to disputes that have not yet resulted in litigation." 551

Applying its rule to the case before it, the Amatuzio court found nothing inappropriate in plaintiffs' counsel's representation of defendant's former employee Messina. The court further opined that defendant—and all other corporate employers—could protect themselves from disclosure of attorney-client communications by being more selective about the employees present in meetings with corporate legal counsel. The court advised that a former employee such as Messina, who was present only to provide factual information and who was likely to be terminated under the plan being discussed by defendant's officials, should be excluded from meetings where legal strategies surrounding the terminations are discussed if the employer wishes to en-
joy the protection otherwise afforded by the attorney-client privilege.\footnote{552}

Where the attorney-client privilege applies, only the written or oral communications between the attorney and her client are protected: the facts underlying the subject of the communication are not.\footnote{553} Simply put, "[t]he revelation of damaging facts . . . does not implicate the attorney-client privilege."\footnote{554} As one judge noted, "[a] corporation cannot bring former employees back into the fold for purposes of a lawsuit merely because there is a risk that the former employee might disclose unfavorable facts."\footnote{555} Unless those facts, however damaging, are protected under another privilege, "they may be discovered through any means other than a question of the form ‘what did you say to your attorney?’"\footnote{556}

Waiver furnishes a sharp sword for an adversary attempting to pierce the attorney-client shield.\footnote{557} As a general proposition, a party cannot "waive" any legal rights without intentionally and knowingly renouncing those rights.\footnote{558} With the attorney-client privilege, however, "the fact of waiver may follow from an inadvertent disclosure or from any conduct by the client that would make it unfair for the client thereafter to assert the privilege."\footnote{559} And even though the client owns the privilege, "in most instances, it is through actions taken (or not taken) by counsel that courts find a waiver has occurred."\footnote{560} Carelessness often lies at the heart of such inadvertent disclosures.\footnote{561}

\footnote{552. Id. at 119 (holding that "[w]hen a corporation chooses to make a potential target of an adverse employment action privy to communications with its lawyer, the corporation has no right to expect that those communications will be kept secret if the employee should sue the corporation regarding the legality of that adverse action").


\footnote{554. Hanntz, 766 F. Supp. at 265. The Supreme Court has noted that the attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.” Upjohn, 449 U.S. at 395.


\footnote{556. PAUL R. RICE, BEST-KEPT SECRETS OF EVIDENCE LAW 196 (2001) (footnote omitted).

\footnote{557. See Epstein, supra note 508, at 167–224 (discussing the various ways in which parties inadvertently waive the attorney-client privilege).

\footnote{558. Id. at 158.

\footnote{559. Id.

\footnote{560. Id. at 165.

\footnote{561. See id. at 185.
Verschoth v. Time-Warner, Inc. 562 teaches an important lesson on avoiding inadvertent waiver of the attorney-client privilege when communicating with former employees about pending litigation. In Verschoth, the plaintiff was a fulltime employee who became a freelance writer under contract with Sports Illustrated, a magazine owned and published by defendant Time-Warner. 563 One of plaintiff's areas of expertise was Olympic events. 564 Time-Warner informed plaintiff that her contract would not be renewed, and plaintiff retained legal counsel who sent a letter to Time-Warner in January 1999, threatening employment discrimination litigation. 565

Shortly after Time-Warner received the letter, five of its managing editors met to discuss advice from Time-Warner's legal department that plaintiff should not be given any additional assignments. 566 One of the attendees at that January meeting, Craig Neff, was directed to communicate the content of the editors' discussions about legal counsel's advice to Jeffrey Kirshenbaum, a former editor who continued to do freelance editing for Sports Illustrated on stories about the Olympic Games and other events. 567 Neff did so. 568

In March 1999, plaintiff filed a complaint alleging sex and age discrimination under federal and state laws. She also sought a preliminary injunction prohibiting Time-Warner from not renewing her freelance contract. 569 Plaintiff supported her motion with an affidavit in which she recounted a conversation between herself and Kirshenbaum in early February 1999, during which Kirshenbaum revealed the details of the editors' January 1999 meeting in which corporate counsel's legal advice was discussed. 570 Plaintiff's motion was denied and she voluntarily dismissed her suit without prejudice, but refiled less than a year later. 571

During discovery in the second action, plaintiff sought additional information regarding the communications that occurred among the five editors in the January 1999 meeting as well as the subsequent conversation about that meeting between current Time-Warner employee Neff and former Time-Warner employee Kirshenbaum. 572 Time-Warner argued that because the editors' meeting focused on ad-

563. See id. at *1-2.
564. See id. at *4.
565. See id. at *2.
566. See id. at *3-4.
567. See id. at *4.
568. See id.
569. See id. at *2.
570. See id. at *2-3.
571. See id. at *3.
572. See id. at *4.
vice provided by its in-house counsel, the content of the meeting and subsequent communications about the meeting were shielded from discovery by the attorney-client privilege. The court disagreed.

Examining the attorney-client privilege in the corporate context, the court recognized that the privilege only applies when legal advice is shared with persons responsible for the matter that is the subject of the advice. "Furthermore, the originator of the communication must have intended that it be kept confidential, and it may not be circulated beyond those employees with a need to know the information." Persons with a need to know, the court further explained, are executives such as vice presidents for design and safety engineers trying to remedy a design defect that has created liability for an automobile manufacturer; workers on the assembly line, in contrast, have no need to know the legal basis for a chance in production even though the change directly affects their employment.

The Verschoth court classified defendant's former employee Kirshenbaum as an assembly line worker rather than a vice president or safety engineer. Even though Kirshenbaum had worked for Sports Illustrated for thirty years and continued working for the magazine as a freelance editor, the court found that Kirshenbaum had no managerial responsibilities in general and had no duties specifically related to hiring and firing of others. "Mr. Kirshenbaum, like the autoworker on the assembly line, needed to be told what procedure to follow [i.e., not to accept any more articles from plaintiff], but he had no reason to be informed of any legal analysis that went into the formulation of the procedure." Moreover, the court held that the defendant's editors who attended the January 1999 meeting during which the legal advice was discussed possessed the authority to determine whether the information should be kept confidential or whether confidentiality should be waived. By directing Neff to share the content of the communications between defendant's editors and legal counsel with former editor Kirshenbaum, defendant "lost any privilege with respect to that advice."

Attorneys should take to heart Verschoth's lesson on the consequences of inadvertent waiver. Simply put, attorneys and their clients should share the content of attorney-client privileged communications

573. See id.
574. Id. at *5.
575. Id. at *6 (citations omitted).
576. See id. at *7.
577. See id. at *8.
578. See id.
579. Id. at *9.
580. See id. at *9.
581. Id.
only with employees who "need to know"—a category that rarely, if ever, includes former employees. Convincing a court that former employees were privy to details of litigation strategy and that corporate counsel intended to protect confidentiality while sharing this private information with former employees is a battle rarely won, and thus, best avoided.

B. Work Product Doctrine

The work product doctrine articulated in *Hickman v. Taylor* and its progeny, including *Upjohn Co. v. United States*, is codified in the Federal Rules of Civil Procedure and analogous state rules. The doctrine shields from discovery "documents and tangible things" that were "prepared in anticipation of litigation or for trial by or for another party or by that party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Work product materials may be discoverable "only upon a showing that the party seeking discovery has substantial need of the materials... and... is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Despite its codification, the common law borne of *Hickman v. Taylor* still plays a critical role in the application of the work product doctrine. One commentator identified the following trilogy of propositions culled from *Hickman* as critical to resolving modern work product disputes:

1. Material collected by counsel in the course of preparation for possible litigation is protected from disclosure in discovery.
2. That protection is qualified, in that the adversary may obtain discovery on showing sufficient need for the material.
3. The lawyer's thinking—theories, analysis, mental impressions, beliefs, and so on—is at the heart of the adversary system, and privacy is essential for the lawyer's thinking; thus the protection is greatest, if not absolute, for materials that would reveal that part of the work product.

The work product doctrine encourages "careful and thorough preparation by the lawyer." "Unlike the attorney-client privilege, disclosure to third parties does not necessarily waive work-product protection," but waiver may be found in that situation. In addition, objections to discovery based on work product must be asserted

582. 329 U.S. 495 (1947).
584. FED. R. CIV. P. 26(b)(3).
585. Id.
586. Id.
587. EINSTEIN, supra note 508, at 291.
588. Id. at 287.
separately, because work product objections are not automatically subsumed by objections based on attorney-client privilege.\textsuperscript{591}

A party seeking discovery of work product bears an extraordinarily high burden of showing that the information cannot be obtained by other means.\textsuperscript{592} And even where the burden is met, courts overseeing discovery must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."\textsuperscript{593}

The work product doctrine ingratiates itself into discovery of former employees in at least two ways. First, where communications between opposing counsel and former employees of a litigant are appropriate, the doctrine may shield interview notes and other materials generated by the contacting attorney from discovery.\textsuperscript{594} Second, former employees may possess or have knowledge of work product prepared by or for the former employer. In that case, actual or potential invasion of this work product through contact between the former employee and counsel for the former employer's adversary may provide grounds for the entry of protective orders or imposition of sanctions on the contacting counsel.\textsuperscript{595}

Application of the work product doctrine in the first scenario described above has been discussed at length elsewhere\textsuperscript{596} and need not be recounted here. In short, the work product doctrine may, but does not always, shield from discovery notes and memoranda prepared by a party's representatives during and after interviews with former employees,\textsuperscript{597} witness statements signed by former employees,\textsuperscript{598} the identity of documents discussed at interviews,\textsuperscript{599} and even oral com-

\textsuperscript{591} Epstein, supra note 508, at 401.

\textsuperscript{592} In Upjohn, for example, the Court refused to order production of work product, even though the I.R.S., as the party seeking discovery, would literally have to travel around the world to obtain the "substantial equivalent" of the materials sought regarding the corporation's overseas activities. 449 U.S. at 399.

\textsuperscript{593} Fed. R. Civ. P. 26(b)(3).

\textsuperscript{594} See, e.g., Westside-Marrero Jeep Eagle v. Chrysler Corp., No. CIV.A.97-3012, 1998 WL 186705, at *3 (E.D. La. Apr. 17, 1998) (accepting counsel's argument that statement former employee gave to them under oath was work product, but holding statement discoverable due to purported waiver of the work product doctrine).

\textsuperscript{595} See, e.g., In re Bank of La./Kenwin Shops, Inc., No. 1193, 1998 WL 788776, at *6, (E.D. La. Nov. 10, 1998) (deciding that where party claims adversary's counsel improperly obtained work product from party's former employees, contacting attorney must submit contested materials to court to determine whether work product rule was violated).

\textsuperscript{596} See Becker, supra note 27, at 291–310.

\textsuperscript{597} Id. at 294–95.

\textsuperscript{598} Id. at 295–300; Intel Corp. v. VIA Tech., Inc., 204 F.R.D. 450, 452 (N.D. Cal. 2001) (holding that statement of plaintiff's former employee obtained by defendant constituted work product of plaintiff's counsel).

\textsuperscript{599} See Becker, supra note 27, at 300–06.
munications between counsel and an opposing party's former employees.\textsuperscript{600}

The application of the work product doctrine to the second scenario—i.e., to prevent or punish inappropriate informal or formal discovery of former employees—deserves further discussion. In a fraud class action against an insurance company,\textsuperscript{601} for example, plaintiffs properly (though ultimately unsuccessfully) invoked the work product doctrine to challenge a protective order defining the procedures for contacting former employees of the defendants. The court allowed plaintiffs' counsel liberal contact with the defendant insurance company's former employees,\textsuperscript{602} but required, among other things, that "each side must inform opposing counsel, within ten days of such an ex parte interview, of its intention to take that person's deposition or introduce that person's testimony at trial."\textsuperscript{603} Plaintiffs complained that disclosing this information would reveal its legal strategy in contravention of the letter and spirit of the work product doctrine.

The trial court rejected plaintiffs' objection to the order for two reasons. First, requiring plaintiffs to reveal information that would "eventually be disclosed anyway" did not, in the court's view, constitute a violation of the doctrine.\textsuperscript{604} Second, the court found "the strong competing interest in a case of this nature in efficient, cost-effective discovery"\textsuperscript{605} warranted disclosure.

The court's first rationale is more credible than its second. Certainly, the court's conclusion that it was not compelling the discovery of otherwise protected information, but simply accelerating the time line for certain required disclosures, has some validity.\textsuperscript{606} But the court's secondary rationale—i.e., that such disclosure is warranted because it serves the interests of efficiency and cost containment—can-

\textsuperscript{600} Id. at 306–10; Haga v. L.A.P. Care Servs., Inc., No. 1:01CV00105, 2002 U.S. Dist. Lexis 1605 (W.D. Va. Feb. 1, 2002) (holding that content of interviews conducted by plaintiff's counsel of defendant's former employees were work product not subject to discovery). But see Schwartz v. Camp Robin Hood, No. 01-12032-RWZ, 2002 U.S. Dist. LEXIS 8342, at *5 (D. Mass. May 8, 2002) (allowing plaintiff's counsel to conduct ex parte telephone interviews of defendant's former employees provided that counsel conducting interviews provide "detailed and complete notes of the interviews"—i.e., plaintiff's work product—to defense counsel).


\textsuperscript{602} See id. at 152–53.

\textsuperscript{603} Id. at 153.

\textsuperscript{604} Id.

\textsuperscript{605} Id.

\textsuperscript{606} Requiring early disclosure of this information is problematic to the extent that it reveals counsel's thoughts and opinions of the case as they are evolving; such revelations are generally prohibited by the higher level of protection accorded the so-called "opinion work product." Courts are instructed by the Federal Rules and state counterparts to take special care to shield from disclosure "mental impressions, conclusions, opinions, or legal theories of an attorney." FED. R. CIV. P. 26(b)(3).
not stand on its own. To the contrary, the Supreme Court made clear in Upjohn that the privilege should not be pierced even where a party has to travel around the globe to obtain the information already contained in an opponent’s work product.\(^{607}\)

The work product doctrine also played a critical role in the resolution of the heated discovery dispute surrounding a former employee in Westside-Marrero Jeep-Eagle, Inc. v. Chrysler Corp.\(^{608}\) In that case, plaintiffs obtained a statement under oath and documents from a former employee of Chrysler named Alfred S. Stevens, Jr. Stevens was originally named as a co-defendant and had briefly consulted with Chrysler regarding the lawsuit. Chrysler refused to pay Stevens’ attorney’s fees or to indemnify him for any judgment. Stevens resigned from Chrysler, settled with the plaintiffs, and provided plaintiffs’ counsel with a sworn statement and documents obtained during his employment with Chrysler.

Chrysler and plaintiffs both served subpoenas duces tecum on Stevens. Chrysler sought the statement and documents Stevens had provided to plaintiffs’ counsel and plaintiffs sought additional documents from Stevens related to his employment with Chrysler. Each party moved for protective orders effectively quashing their opponent’s subpoenas.

Plaintiffs argued that Stevens’ sworn statement was work product. The court rejected this argument by construing the statement as the property of Stevens and further noted that the work product doctrine did not apply because Stevens was not a party, representative, consultant, or agent of a party when he made the statement.\(^{609}\)

The court also rejected Chrysler’s argument that contact by plaintiffs’ counsel with Stevens was inappropriate because Stevens might disclose some of the work product Chrysler had developed in defending this case. Relying on Louisiana case law that interpreted Rule 4.2 of the Louisiana Code of Professional Conduct to allow contact with former employees, the court refused to sanction past contacts or prohibit future ones between plaintiffs’ counsel and Stevens.\(^{610}\) The court, however, instructed plaintiffs’ counsel meticulously to avoid any intrusion on materials protected by the work product doctrine and to avoid the breach of any other privileges that attached to the information Stevens possessed.\(^{611}\)

\(^{609}\) Id. at *3.
\(^{610}\) See id. at *5–6.
\(^{611}\) See id. at *6; see also supra text accompanying notes 449–63 (discussing issues surrounding subpoenas in this case).
As with the attorney-client privilege, waiver often delineates the availability and extent of work product protection.\(^{612}\) Waiver of work product protection will not, however, necessarily be found in the same situations that constitute waiver of the attorney-client privilege. This is especially true with disclosure to non-parties or so called “third persons,” categories that include virtually all former employees of a litigant.

Disclosure of attorney-client communications to third persons invalidates the attorney-client protection of those communications because the principle of confidentiality served by the privilege is tainted if not destroyed by that disclosure.\(^ {613}\) “Selective and strategic disclosure”\(^ {614}\) of work product, in contrast, remains consistent with its genesis principle of “implementing the adversary process, not just encouraging confidential communications.”\(^ {615}\) Thus, disclosure to third parties waives work product protection only if it “substantially increases the likelihood that the work product will fall into the hands of the adversary.”\(^ {616}\)

Such was the situation in the previously discussed \textit{Verschoth} case.\(^ {617}\) In that case, all attorney-client and work product protections that would have encompassed the meeting of defendant’s current editors to discuss plaintiff’s anticipated litigation were waived by the editors’ subsequent disclosure of the meeting’s content to former editor Kirshenbaum.\(^ {618}\) The editors either knew or should have known that Kirshenbaum was friends with the plaintiff and would convey information about the meeting to her.\(^ {619}\)

Waiver could have been avoided in \textit{Verschoth} (and in any similar situation) by “selectively and strategically” sharing the information only with current employees who need to possess the information to fully perform their regular duties and to help their employer effectuate its litigation strategy. Once again, effective use of the protections afforded by the legal doctrine requires a delicate balancing of the costs and benefits of disclosing information beyond the “need to know” group, the exercise of sound legal judgment, and the engagement of that most elusive of attributes, basic common sense.

\(^{612}\) \textit{See generally} Epstein, supra note 508, at 401–26.  
\(^{613}\) \textit{See id.} at 403.  
\(^{614}\) \textit{Id.}  
\(^{615}\) \textit{Id.}  
\(^{617}\) \textit{See discussion of} Verschoth, supra notes 562–81 and accompanying text.  
\(^{619}\) \textit{See id.}
C. Trade Secrets and Confidential Commercial Information

The rights and duties arising from the employer-employee relationship are the context of the great majority of reported trade secret cases.\textsuperscript{620}

Protection for trade secrets and other confidential commercial information\textsuperscript{621} is maintained through a network of legal authorities that includes state and federal statutes, duties implied by common law, and express agreements between employees and employers.\textsuperscript{622} Monetary damages, injunctive relief, and other remedies are available to persons and entities whose trade secrets and proprietary information have been misappropriated. This Article, however, is purposefully limited to the role played by trade secrets and proprietary information in hobbling the discovery of information possessed by former employees. The primary focus here is not the misuse of trade secrets per se, but rather the revelation of trade secret or proprietary information in the prosecution or defense of an action such as an employment discrimination matter or a personal injury claim.

\textsuperscript{620} ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS 5.02[1] (1996).

\textsuperscript{621} Courts and litigants generally use the terms “trade secrets” and “proprietary information” interchangeably, although, as explained in this and the following section of this Article, they are distinct categories of information afforded different levels of protection.

Trade secrets and propriety information do not enjoy the presumption of non-disclosure that closely guards classes of protected information such as work product and attorney-client communications. Rather, a party advocating non-disclosure based on trade secrets and proprietary information must usually identify such materials with utmost particularity, present a convincing argument that the materials constitute trade secrets, make a further compelling argument as to why the materials should not be disclosed, and convince the court that secrecy creates no public harm. Often, a court order is required before such information is considered off limits to an adversary conducting formal or informal discovery. Sanctions may be available for invading trade secrets and confidential information, however, even if no order is in place.

The Federal Rules of Civil Procedure and their state procedural rules and common law counterparts empower courts to sculpt discovery in a given case so "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." Such sculpting is usually reflected in a protective order. Sanctions for disregarding the order include designation of certain facts established for the purposes of the action, the exclusion of improperly gained evidence, the dismissal of claims or entry of default judgment, and the assessment of penalties for contempt of court.

Attorneys often invoke the trade secrets doctrine in an effort to bar their adversaries from obtaining formal and informal discovery from former employees of their clients. The first challenge is convincing the court that information possessed by former employees meets the defi-

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623. See, e.g., Union Pac. R.R. Co. v. Mower, 219 F.3d 1069 (9th Cir. 2000) (reversing district court injunction prohibiting former employee from disclosing certain information to adversary of former employer because employer had not met burden of proof that information deserved trade secret protection).

624. If the information sought by an adversary is relevant to the claims or defenses in a particular case, discovery is not denied merely because the information might be classified as trade secrets. See United States v. United Fruit Co., 410 F.2d 553, 556 (5th Cir. 1969).

625. See, e.g., Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956 (D. Md. 1997) (resolving plaintiff's motion for disqualification of counsel or other sanctions due to defense counsel's contacts with plaintiff's former employee who had access to plaintiff's trade secret information). Lao, supra note 622, at 1666-68 (discussing limitations of federal criminal trade secrets law); see also supra subsection V.B.4.f (Protective Orders).

626. FED. R. CIV. P. 26(c)(7).


629. FED. R. CIV. P. 37(b)(2)(C).

630. FED. R. CIV. P. 37(b)(2)(D).
ition of "trade secret." The term is subject to numerous interpretations, making the success of any particular argument largely dependent upon the jurisdiction in which it is lodged.

In its broadest sense, "[a] trade secret can be anything used in one's business which gives an advantage over competitors who do not know or use it." More precise definitions of "trade secrets" vary from state to state and may be defined statutorily. Some states rely upon common law trade secret principles reflected in the Restatement (First) of Torts, while others have adopted the Uniform Trade Secrets Act with significant modifications that reflect each state's philosophy on trade secret protection.

Section 757 of the Restatement (First) of Torts, promulgated by the American Law Institute ("ALI") in 1939, represented the "first major effort at synthesis of the developing U.S. law of trade secrets." Still used by a handful of states, the Restatement defines trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." The

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632. The Supreme Court found a fundamental privacy right at the heart of trade secret doctrine. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). However, each state is free to assess the value of trade secrets to its business and industry and to determine how much protection to afford such information.


634. The variations among states in defining and enforcing trade secret law have led commentators to call for a federal statutory standard preempting the field. See, e.g., Lao, supra note 622, at 1633 (1998) (arguing that the lack of uniformity among states was once acceptable but is now problematic due to the impact of trade secrets law on interstate commerce and international transactions and the complex choice of law problems non-uniform standards present); Christopher Rebe l J. Pace, The Case for a Federal Trade Secrets Act, 8 Harv. J.L. & Tech. 427 (1995).


636. Lao, supra note 622, at 1635.


638. The seven states still using the Restatement (First) of Torts definition are Massachusetts, Michigan, New York, New Jersey, Pennsylvania, Tennessee, Texas and Wyoming. Lao, supra note 525, at 1650 n.99.

639. Restatement (First) of Torts § 757 cmt. b (1939); see also Julie Research Labs, 810 F. Supp. at 517 (using this definition). Trade secrets were not covered in the Restatement (Second) of Torts; rather, this topic was shifted to the Restatement
Restatement finds trade secret protection primarily applicable "to the production of goods," but also holds it applicable "to the sale of goods or to other operations in the business," such as formulas for determining prices, "or a list of specialized customers, or a method of bookkeeping or other office management" techniques.640

The Uniform Trade Secrets Act ("UTSA") was developed by the National Conference of Commissioners on Uniform State Law ("NCUSL") in 1979641 and revised in 1985.642 The UTSA has been adopted in a variety of forms in forty-two states.643 The UTSA's definition of trade secrets is broader than section 757 of the Restatement (First) of Torts, and has been incorporated into the ALI's Restatement (Third) of Unfair Competition.644 Trade secrets covered by the UTSA include the following:

[Information, including a formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.645

"The UTSA's definition of trade secret information focuses on the value of the information to the owner, rather than the type of information sought to be protected."646 In addition to providing a more comprehensive definition of trade secret than section 757 of the Restatement (First) of Torts,647 the UTSA also eliminated the Restatement (First)'s requirement "that a trade secret be 'continually used in one's business'" to be worthy of protection.648 The UTSA thereby extended protection to information that the Restatement (First) does not

640. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).
642. First enacted in 1979, the UTSA "was amended in 1985 primarily to clarify ambiguities in the original Act and to strengthen its remedial provisions." Lao, supra note 622, at 1653, n.118. The 1985 amendments, however, "do not significantly modify the scope or philosophy of the original Act." Id.
643. See UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985) (providing "Table of Jurisdictions Wherein Act has Been Adopted").
645. UNIF. TRADE SECRETS ACT § 1(4).
647. One court concluded that the trade secret definition used in the UTSA provides protection for almost all business information that is maintained in confidence. U.S. West Communications, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993).
648. UNIF. TRADE SECRETS ACT § 1 cmt.
cover, including "the terms of secret bids and impending business announcements," other "information that an innovator has not had an opportunity to exploit," and even negative information—"i.e. information about what not to do" in running a successful enterprise.649

Sharing the fate of many other "uniform" laws, "the UTSA never won the support of all the states, and even the states that did adopt the UTSA modified it, sometimes substantially, before enactment."650 Versions of the Act adopted in Alabama and in North Carolina, for example, "deviate so radically from the UTSA that they are hardly recognizable as adoptions of the uniform act."651 Some states that adopted the UTSA continued to develop and rely on common law standards, thus frustrating the purpose of adopting uniform statutory standards.652 Moreover, "[s]everal states have materially altered the definition of trade secret,"653 with some states expanding and others constricting the USTA definition.654 The ALI's attempt to clarify trade secret law by enacting the Restatement (Third) of Unfair Competition in 1995655 made little impact because so few states still rely on common law. The possibility of other unifying reforms has not yet

649. Lao, supra note 622, at 1658–59. See also Emmert, supra note 646, at 1181–83. While the Restatement (Third) of Unfair Competition §§ 36–39 (1993), seeks to provide the most expansive protection of trade secrets available to date, see id. § 39 cmt. a, the existing statutes enacted by the vast majority of states negate the possibility of wholesale adoption of the Restatement by the courts. It is possible, of course, that state legislators could be inspired by the Restatement to amend (and therefore expand) their respective trade secret laws, or that courts could use the Restatement provisions to fill in gaps in current trade secret legislation.

650. Lao, supra note 622, at 1649–50.

651. Id. at 1657; see also Emmert, supra note 646, at 1190–92 (explaining California's deviations from key UTSA provision).


653. Lao, supra note 622, at 1662.

654. Id. at 1661–63. For a comprehensive compilation of state trade secret statutes, see Lao, supra note 622, at 1657 nn. 143–44. See also Linda B. Samuels & Bryan K. Johnson, The Uniform Trade Secrets Act: The States' Response, 24 Creighton L. Rev. 49 (1990).

come to fruition. Thus, "the law on trade secret misappropriation continues to vary from jurisdiction to jurisdiction." While trade secrets defy a single definition, one scholar offers this apt generalization of trade secrets law found among the various states: "To qualify as a trade secret, information must meet three requirements: (1) it must confer a competitive advantage when kept secret; (2) it must be secret in fact; and (3) in many states, it must be protected by reasonable secrecy safeguards.

The "competitive advantage" requirement is quite broad. While many cases hinge on the technology underlying the product at issue, "such as the formula for Coca-Cola, a process for making methanol, or the dimensions of a robot-operated machine," just about anything with potential to generate commercial value can qualify as a trade secret. "Courts have protected subject matter as varied as customer lists, pricing information, business methods and plans, and marketing research data."

The second requirement of "actual secrecy" lies at the heart of trade secret protection. Interestingly, the "secracy need not be absolute." The owner of the secrets can share them with employees and others as needed to develop a product's commercial value, provided that some precautions are taken to prevent disclosure to unauthorized persons. "However, if information is known by most of a

656. See, e.g., Rochelle Cooper Dreyfus, Do you Want to Know a Trade Secret? How Article 2B will Make Licensing Trade Secrets Easier (But Innovation More Difficult), 87 CAL. L. REV. 191 (1999) (elaborating on a joint effort of the ALI and NCCUSL to promulgate Article 2B of the Uniform Commercial Code covering "transactions in information" and other commercial transactions that, among other things, would include a uniform definition of trade secrets). Unfortunately, major disagreements between Article 2B co-sponsors ALI and NCCUSL caused their joint project to be scuttled and replaced with a NCCUSL proposed draft that offers little hope of creating a uniform definition of trade secrets. To date the NCCUSL has only been adopted in Virginia and Maryland. See generally Ajay Ayyappan, Note, UCITA: Uniformity at the Price of Fairness?, 69 FORDHAM L. REV. 2471 (2001) (explaining NCCUSL's Uniform Computer Information Transactions Act).

657. Lao, supra note 622, at 1650.

658. Bone, supra note 622, at 248 (footnote omitted). Another scholar offers this similar conclusion: "Although there is no single definition of the term 'trade secret' or 'misappropriation,' trade secret law fundamentally proscribes taking from another, through 'improper means,' an item of information that has value, so long as the possessor of the information has taken reasonable means to guard its secrecy." Lao, supra note 525, at 1642.

659. Bone, supra note 622, at 248.

660. Id. (footnotes omitted).

661. See id.

662. Id. (footnotes omitted).

663. Id.

664. Id. (footnotes omitted).
firm's competitors, or can be easily discovered independently or by reverse engineering, it cannot qualify as a trade secret." 665

The final requirement for trade secret protection is that the owner has taken precautions reasonable under the circumstances to limit disclosure. “Such precautions may include disclosing the secret only under a confidentiality agreement and on a need-to-know basis . . . .” 666 Deficient efforts to maintain secrecy constitute a “fatal defect” in assertions of the privilege. 667 “While absolute secrecy is not necessary, a showing of substantial measures to protect the secret nature of the process is required.” 668 The adequacy of protection is a fact question for the jury, and even accidental or inadvertent disclosure can doom a trade secret claim. 669

When sanctions are sought for invasion of trade secrets during discovery and no court order is in place, additional concerns arise. Of course, identifying the relevant governing definition of “trade secret” remains the threshold challenge. Another important prerequisite to the imposition of sanctions for alleged invasion of trade secrets during formal or informal discovery of an adversary’s former employees is that the alleged trade secrets divulged must be relevant to the subject of the litigation, especially where the sanction sought is a limitation on evidence introduced at trial.

In Davidson Supply Co. v. P.P.E., Inc., 670 for example, two competitors in the beauty supply market litigated defendant’s alleged violation of the Electronic Communications Privacy Act of 1986 and related claims. Plaintiff claimed the violation occurred when two of the plaintiff’s former employees, who had gone to work for the defendant, wrongly accessed voice mail messages from the plaintiff’s system and used the information to defendant’s competitive advantage. 671 The court recognized that the former employee at issue, a marketer, “might well have had access to certain trade-confidential information,” 672 but deemed such access “immaterial.” 673

The Davidson Supply court clarified that “the claims asserted have to do with discrete illegal acts that allegedly violated specific federal statutes, and they do not implicate broad issues of trade confidentiality.” 674 The court concluded that because the only relevant informa-

665. Id. at 249 (footnote omitted).
666. Id. at 249 (footnote omitted).
668. Id. (citations omitted).
669. See id.
671. See id. at 957.
672. Id. at 959.
673. Id.
674. Id.
tion gleaned from the former employee related to defendant's allegedly illegal conduct, "there is no privilege . . . arising out of trade secrets protection . . . that precludes the introduction of the evidence in question."  

An employer may also inadvertently waive trade secret protection, even while taking steps to safeguard such information. The Ninth Circuit overturned a district court's injunction prohibiting a former employee from testifying in a personal injury suit against the former employer, for example, because the confidentiality agreement between the former employer and employee had expired. The court held that the express agreement requiring confidentiality superseded any other legal obligations the former employee might have had to remain silent. Thus, the former employee was free to consult with plaintiff's attorney regarding a report he had prepared while employed by the defendant former employer regarding injuries similar to the one sustained by the plaintiff.

D. Proprietary Protections

Proprietary or confidential information is data that the owner desires to keep secret from others in the same industry and possibly the general public. Courts and litigants frequently use the terms "trade secrets" and "proprietary information" interchangeably, even though they are discrete categories of protected information. It is possible, and even desirable, to divine distinct, exacting definitions for each term since information classified as "trade secrets" is usually accorded, as discussed above, a fairly sophisticated analysis when disclosure is sought and given significant protection. In contrast, information labeled merely "proprietary" or "confidential" has no set analytical counterpart or protection.

The exercise of crafting fine-line distinctions and creating a corresponding hierarchy of protection for different types of secret, commercially valuable information has been competently undertaken elsewhere and is beyond the scope of this Article. For the purposes of this Article, proprietary or confidential information is simply a subcategory of commercial information shielded from disclosure under the umbrella of trade secrets law. One scholar provided this apt definition:

675. Id.
676. Union Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1074 (9th Cir. 2000).
677. Id.
678. Id. at 1078; see also infra section VI.F (Private Law).
679. See Unikel, supra note 622 (dividing commercial information into three distinct categories and arguing for various levels of protection for each based on the relative secrecy required and competing policy interests served by protection compared to disclosure).
Confidential information roughly can be defined as data, technology, or know-how that is known by a substantial number of persons in a particular industry (such that its status as a technical "trade secret" is in doubt) but that, nonetheless, retains some economic and/or competitive value by virtue of the fact that it is unknown to certain industry participants.\footnote{680}

Confidential or proprietary information does not enjoy the highest level of protection afforded information guarded by intellectual property principles of copyright, patent, and trademark law, nor does it benefit from the intermediate levels of protection afforded trade secrets. Although propriety information is expressly recognized as a distinct category of materials potentially shielded from an adversary in discovery,\footnote{681} surprisingly little legislation and common law offer clarity on what constitutes propriety information, when protection from discovery is appropriate, and what sanctions are available when a litigant intentionally or inadvertently invades an adversary's propriety information.

Case law suggests that courts prefer to define what propriety information is not, rather than what it is. In a case where the defendant contracted to install air conditioning units in plaintiff's apartment complex, for example, a dispute erupted regarding the quality of work done and the validity of defendant's invoices.\footnote{682} As the litigation progressed, plaintiff claimed that defense counsel improperly conducted ex parte interviews of plaintiff's former employee. The specific alleged impropriety was that the information defense counsel gained regarding the serial numbers of the air conditioning units in certain apartments and the disclosure that some of the units had been stolen or moved was propriety to the plaintiff.\footnote{683}

The court rejected plaintiff's argument that defendant should not be allowed to use this information as evidence. The court concluded that because "the information here concerns facts, and is something that could be obtained through reasonable research, it is not proprietary."\footnote{684}

Proprietary information may be protected from disclosure under the duty of loyalty owed by an employee to a current or former employer as well as the other standards discussed herein. The Restatement (Second) of Agency, for example, recognizes an agent's duty of loyalty to include confidentiality covering all information related to

\footnotesize{\begin{itemize}
\item \footnote{Id. at 844.}
\item \footnote{FED. R. CIV. P. 26(c)(7), for example, empowers a court to bar or limit disclosure of both trade secrets and other "confidential research, development or commercial information" owned by a party. For the purposes of this Article, this type of information is collectively categorized as "propriety information."}
\item \footnote{See \textit{id.} at *2, *4.}
\item \footnote{Id. at *4.}
\end{itemize}}
the principal’s business “unless the information is a matter of general knowledge.” These agency principles apply to the employer/employee relationship and survive termination of the employment.

In sum, nondisclosure of trade secrets and proprietary information protects commercial inventors and entrepreneurs and ensures “standards of commercial ethics.” Such safeguards are perhaps a necessity in a capitalistic society, but an unfortunate byproduct of such protection is the complications arising when trade secrets or proprietary information are used to limit or prohibit discovery of information relevant to the claims or defenses asserted in litigation. This is an especially common occurrence when discovery is sought from former employees of a party.

E. Self-Evaluative Privilege

The increase in federal, state, and local regulation of business and industry and the proliferation of compliance litigation in recent decades has inspired many entities to conduct internal audits. These self-examinations ascertain levels of compliance with environmental regulations, employment discrimination statutes, tax and accounting rules, and a myriad of other legal standards portending liability. Obviously, the value of such audits to the conducting entity and society as a whole correlates directly to the degree of candor with which compliance data is gathered and analyzed. Equally obvious are the devastating consequences, from both public relations and legal perspectives, when reports admitting an entity’s shortcomings are made public.

To encourage self-examination, courts and legislators have developed, albeit reluctantly, the “self-evaluative privilege,” also known as the “privilege of critical self analysis.” At least three criteria must

685. Restatement (Second) of Agency § 395 (1957).
688. The privilege was first recognized in Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970). The medical malpractice plaintiff in Bredice was prohibited from discovering the minutes of medical staff meetings because the purpose of the staff meetings was “the improvement, through self-analysis,” of medical care rendered, and because of the “overwhelming public interest” in maintaining the confidentiality of the staff meetings “so that the flow of ideas and advice can continue unimpeded.” Id. at 250–51. See generally, Hon. Arlene R. Lindsay & Lisa C. Solbakken, Dispelling Suspicions as to the Existence of the Self-Evaluative Privilege, 65 Brooklyn L. Rev. 459 (1999); Brad Bacon, Note, The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege, 8 Kan. J. L. & Pub. Pol’y 221 (1999); Phillip Leahy, The Privilege for Self-Critical Analysis in Statutory and Common Law, 7 Dick. J. Envtl. L. Pol’y 49 (1998); Note, The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083 (1983). This 1983 Note in the Harvard Law Review has been described as “the alpha point for many of the analyses conducted by district courts when considering the privilege.” Lindsay & Solbakken, supra, at 462 n.12.
be met before information will be shielded from discovery under the self-evaluative privilege:

First, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.689

"The privilege is premised on the rationale that unimpeded self-criticism serves a social good outweighing the cost of evidentiary exclusion."690 It limits the disclosure of an entity's critical self-analysis in its compiled format as well as the conclusions drawn from the self-auditing process.691 "The privilege has been asserted, with varying degrees of success, to prevent disclosure of internal investigatory reports, equal employment opportunity studies, hospital committee reports, and accident investigatory reports within the context of personal injury suits."692

One would be mistaken, however, to assume that the self-evaluative privilege is universally respected. Some courts will not honor the privilege absent a showing that the information was gathered and analyzed "with the expectation that it would be kept confidential, and has in fact been kept confidential."693 Application of the privilege will likely be denied when a government agency, rather than a private litigant, seeks disclosure.694 One court's explanation of the status of the privilege more than two decades ago remains substantially apt today:

A number of courts have relied upon a 'self-evaluative' privilege in diverse factual settings . . . . More recently, however, courts have appeared reluctant to enforce even a qualified 'self-evaluative' privilege. They typically concede its possible application in some situations, but then proceed to find a reason why the documents in question do not fall within its scope.695

690. Bacon, supra note 688, at 223.
692. Lindsay & Solbakken, supra note 688, at 461–62 (footnotes omitted).
694. Leahy, supra note 688, at 56–58.
In federal courts, the sluggish development and acceptance of the self-evaluative privilege is inspired, at least in part, by the Supreme Court's admonition that privileges should not be "lightly created nor expansively construed, for they are in derogation of the search for the truth." State courts have, according to one commentator, "been even more reluctant than federal courts to find the privilege for self-critical analysis." A growing body of state legislation attests to a warmer, though hardly universal, embracing of the self-evaluative privilege in certain situations, most commonly in shielding environmental self audits from disclosure.

Where the self-evaluative privilege is recognized, its utility is limited because, like the attorney-client and other privileges, it does not shield the facts underlying the audit and analyses from disclosure through use of depositions, interrogatories, and other standard discovery devices. And, as with other privileges, the distinction between "facts" and "analyses" often proves elusive.

The ongoing debate surrounding the viability and scope of the self-evaluative privilege creates yet another potential landmine for an attorney seeking discovery from an adversary's former employees. The potential application of the privilege to limit or defeat a party's ability to obtain information from former employees who helped gather and/or analyze information for a self-evaluative report is a concern, as is the possibility that former employees could possess, either in paper copy or electronic format, sections, drafts, or final versions of an adversary's self-evaluative report.

F. Private Law

Employees frequently enter confidentiality agreements as an initial condition of employment, as part of a severance package, or under a settlement agreement avoiding or resolving litigation following termination of employment. The scope of such agreements varies widely,

696. United States v. Nixon, 418 U.S. 683, 710 (1974). The Supreme Court has never addressed the self-evaluative privilege per se, but its refusal to shield confidential peer review information about college professors from disclosure in Univer-

697. Leahy, supra note 688, at 58.

698. See Bacon, supra note 688, at 226–28.


but a common fixture is a promise by the employee not to reveal any trade secrets or other confidential information about the employer's policies and practices.\textsuperscript{701}

Former employees also commonly enter consulting relationships with former employers. Such agreements may obligate the employee to work on discrete projects or to assist in the prosecution or defense of litigation.\textsuperscript{702} These consulting arrangements often entail promises of confidentiality.\textsuperscript{703} The confidentiality clause, in turn, may render the former employee unavailable to opposing counsel seeking informal discovery and possibly formal discovery as well.\textsuperscript{704} The tables are turned and additional complexities added when an attorney retains an adversary's former employee as a consultant to help prepare for the litigation or to testify as a fact or expert witness.

Courts are reluctant to enforce private law borne of confidentiality and consulting agreements when enforcement impedes the former employees' ability to engage in their chosen professions or restrains competition in a particular market.\textsuperscript{705} "Accordingly, these agreements are limited or prohibited by statute in some states, and closely examined in others."\textsuperscript{706} Even where non-compete clauses are honored, "courts typically scrutinize these agreements carefully to ensure that their terms, including in particular their duration and geographic scope, are fair and reasonable."\textsuperscript{707}

\textsuperscript{701} See, e.g., Kitchen v. Aristech Chem., 769 F. Supp. 254, 255 (S.D. Ohio 1991) (resolving discovery dispute involving environmental systems consultant who signed agreement with employer "acknowledging that he would have access to confidential information and agreeing not to reveal that information").


\textsuperscript{703} See, e.g., Union Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1071 (9th Cir. 2000) (refereeing discovery dispute concerning employer and former employee who entered a resignation and consulting agreement forbidding former employee from communicating confidential business information to third parties and consulting with persons with potential claims against the former employer).

\textsuperscript{704} An explanation of the different rules for obtaining discovery of information from expert witnesses as compared to non-testifying consultants is provided supra, in subsection V.B.4.e. (Consultants and Expert Witnesses).

\textsuperscript{705} See generally Lawrence I. Weinstein, Revisiting the Inevitability Doctrine: When Can a Former Employee Who Never Signed a Non-Compete Agreement nor Threatened to Use or Disclose Trade Secrets be Prohibited from Working for a Competitor?, 21 AM. J. TRIAL. ADVOC. 211, 212–15 (1997) (discussing the public policy favoring an employee's right to change jobs to improve her station in life and the conflicting policy of protecting a former employer's trade secrets).

\textsuperscript{706} Terry Morehead Dworkin & Elletta Sangrey Callahan, Buying Silence, 36 AM. BUS. L.J. 151, 156 (1998) (footnotes omitted).

\textsuperscript{707} Weinstein, supra note 705, at 213 (footnote omitted).
Jurisdictions that generally disfavor non-compete agreements may, however, honor discrete provisions requiring former employees to maintain the former employers' confidences.\textsuperscript{708} Selective enforcement is achieved by severing the unenforceable non-compete clause and honoring the remaining clauses, including confidentiality provisions.\textsuperscript{709} Consulting/confidentiality agreements that are independent of non-compete agreements are upheld in toto.

Whatever the origin of the confidentiality pact, judges take a distinctively dim view of agreements between former employees and employers that infringe, either intentionally or inadvertently, on the public's right to know of past or present harmful conduct by the former employer.\textsuperscript{710} Courts also disfavor confidentiality agreements that purport to limit an adversary's ability to obtain from former employees factual information relevant to a litigated matter.\textsuperscript{711} Thus, clients should not be advised to enter contracts with their former employees with the expectation that private law will prevent—or at least rigidly control—discovery by adversaries of information held by former employees.\textsuperscript{712}

The courts' reticence to honor confidentiality agreements does not, however, give attorneys impunity to disregard those agreements when seeking discovery from an opponent's former employees. Courts have upheld some confidentiality and consulting agreements between employers and their former employees as a legitimate generation of private law that, among other things, prescribes the appropriate contours of discovery in certain situations.\textsuperscript{713} For example, "[f]ormer employees acting as trial consultants or otherwise actively and extensively working with the corporations [sic] attorney in marshaling evidence and preparing for litigation may be off limits to ex parte contact

\textsuperscript{708} See id.

\textsuperscript{709} See Baxter Int'l, Inc. v. Morris, 976 F.2d 1189 (8th Cir. 1992).

\textsuperscript{710} Dworkin & Callahan, supra note 706, at 152–53 (discussing the growth and importance of whistleblowers and the negative ramifications of confidentiality agreements between individuals and their former employers that silence would-be whistleblowers).

\textsuperscript{711} See, e.g., Uniroyal Goodrich Tire Co. v Hudson, 873 F. Supp. 1037, 1049 (E.D. Mich. 1994), aff'd, 97 F.3d 1452 (6th Cir. 1996) (recognizing the important public policy against limiting flow of information in private litigation, but holding that agreement at issue did not violate that policy because persons other than former employee were available to testify).

\textsuperscript{712} See generally Dworkin & Callahan, supra note 706.

\textsuperscript{713} See, e.g., Uniroyal Goodrich Tire Co., 873 F. Supp. at 1049 (honoring confidentiality agreement by issuing permanent injunction prohibiting former employee from testifying as an expert witness for plaintiff in cases where his former employer is a defendant, but allowing former employee to testify as an expert in cases where former employer is not a party, provided that confidential information belonging to former employer is not disclosed).
by an attorney for an adverse party." Restrictions may also apply when information is sought from those former employees through formal discovery channels.

1. Confidentiality Agreements

Confidentiality agreements create and define reciprocal rights and duties of the former employee and employer. Therefore, a breach of contract action is the most obvious remedy for a former employer when a former employee has wrongly disclosed information. Contractual remedies include the possibility of monetary judgment and injunctive relief preventing additional disclosures of the confidential information. Pursuing a civil claim in contract or tort against the attorney or party who induced the former employee to breach the agreement, or at least joining the information seekers as defendants in the injunction phase of the action, is another viable option.

In addition to basic contract law considerations, other legal doctrines and principles previously discussed in this Article are pulled into the fray when the validity of private confidentiality agreements are asserted or challenged. Ethical rules requiring attorneys to preserve the confidences and secrets of their own clients and to respect the confidences of other attorneys’ clients, statutes and common law protecting trade secret and propriety information, and the civil rules of procedure that limit or prohibit discovery of privileged information all portend legitimacy for private confidentiality agreements between former employees and employers. Accordingly, failure to respect this added layer of private law privilege may provoke imposition of discovery or trial sanctions.

A confidentiality agreement lay at the heart of the court’s analysis of an allegedly improper ex parte communication between plaintiff’s

716. Dworkin & Callahan, supra note 706, at 155–56; see also Morgan Chu & David Bridgeford, Litigating a Trade Secrets Case: The Employee’s Case, in TRADE SECRETS, RESTRICTIVE COVENANTS & OTHER SAFEGUARDS FOR PROTECTING BUSINESS INFORMATION 258, 268–72 (1986) (explaining elements for obtaining injunctive relief and suggesting ways to defeat injunction); Union Pac. R.R. Co. v. Mower, 219 F.3d 1069 (9th Cir. 2000) (reversing district court’s permanent injunction prohibiting former employee from testifying in any lawsuits involving former employer because contract requiring confidentiality had expired and no implied duty of confidentiality existed).
717. Tortious interference with contract is one appropriate cause of action for the former employer to pursue in such a situation. See, e.g., DDS, Inc. v. Lucas Aerospace Power Transmission Corp., 182 F.R.D. 1 (N.D.N.Y. 1998) (involving former employer pursuing civil remedy against several corporate defendants for allegedly encouraging former employee to divulge confidential information in violation of former employee’s confidentiality agreement with plaintiff).
counsel and defendants' former employee in *Kitchen v. Aristech Chemical*.

In *Kitchen*, the defendants in a toxic tort case sought disqualification of plaintiff's counsel because counsel engaged in ex parte communications with defendants' former employee George Chada. Chada signed a confidentiality agreement when hired by defendants as a senior environmental systems consultant, and was privy to attorney-client privileged information, work product (including some that Chada himself authored), and other confidential information directly related to the toxic tort litigation while employed by defendants. Defendants claimed that Chada's intimate knowledge of defendants' litigation strategy and general operating procedures and his execution of the confidentiality agreement made Chada a "party" within the meaning of the ethical rules prohibiting ex parte contact with a party represented by counsel.

The court held that disqualification of counsel might be an appropriate remedy for violation of an ethics rule, but further observed that such motions "should be viewed with extreme caution for they can be misused as a technique of harassment." The court used a three-prong weighing test to determine if disqualification was warranted, considering 1) the client's interest in being represented by counsel of its own choice; 2) the opposing party's interest in a trial free from prejudice due to disclosures of confidential information; and 3) the public's interest in the scrupulous administration of justice.

Because some of the information gathered from Chada by plaintiff's attorney had already been placed in the public domain through Chada's testimony before the Ohio Environmental Protection Agency, and because Chada's personal attorney was present during the contact, the court held that the conduct of plaintiff's counsel "was not so egregious that it warrants the extreme sanction of disqualification."

The court relied primarily on the second prong of the test, finding that defendants had not met their burden of showing prejudice from the disclosures. The court viewed the "normal protections" provided by the rules of civil procedure and evidence as sufficient to pre-
vent the confidential information from being inappropriately used at trial or elsewhere. The court further observed that defendants could continue to gather information from Chada and other sources using formal discovery devices "with which they can test his credibility and the validity of his opinions."

Defendants' argument that sanctions were warranted because Chada violated his confidentiality agreement by talking with plaintiffs attorney did not influence the court's analysis. To the contrary, the court characterized Chada's alleged breach of contract as essentially irrelevant to the issue of disqualification of plaintiff's counsel. The court stated:

Defendants argue that Chada violated his confidentiality agreement when he contacted [plaintiffs counsel] Greenwald. Although this may be true, this violation does not support defendants' contention that Greenwald should be disqualified, since Chada's alleged violation has no relationship with the three competing interests . . . applicable to the analysis of defendants motion to disqualify.

At first blush, Kitchen is troubling due to the court's reluctance to impose sanctions where contact between counsel and an opposing party's former employee arguably breached not only the walls of a confidentiality agreement but also the barricades normally provided by the attorney-client privilege and work product doctrine. But on closer examination, the decision is rooted more in the court's judgment that the defendants' requested sanction—disqualification of opposing counsel—was much too severe given defendants' failure to demonstrate actual harm resulting from the former employee's alleged disclosures. Thus, overreaching by defense counsel, rather than lack of respect by the court for the confidentiality agreement, is the key to this case and to future disputes resolved with reference to this decision.

2. Consulting Agreements

Discovery disputes involving the validity of consulting agreements between former employees and litigants arise in at least three situations. The first situation occurs when the former employer retains its own former employee as a consultant to assist in the prosecution or defense of existing or anticipated litigation. Former employee/employer arrangements can be termed "Allegiance Agreements." A second and more controversial scenario exists where a former employee is retained as a consultant, or perhaps even as an expert witness, by an adversary of the former employer. The former employee/adversary

728. See id.
729. Id. at 259.
730. Id.
The third situation, representing a combination of the first two, presents when the former employee enters an Allegiance Agreement but then defects or attempts to defect to an adversary's camp. These about-face situations will be termed "Defector Agreements." All three situations are discussed below.\(^7\)

\textbf{a. Allegiance Agreements}

Two primary concerns that arise when an attorney seeks discovery of information from an adversary's former employee/consultant are discussed elsewhere in this Article. These are: (1) whether the consulting agreement between the former employee and employer is a valid contract reflecting an appropriate exchange of financial compensation for services rendered, or whether the litigant/former employer is buying the former employee's loyalty and/or silence;\(^7\) and (2) whether the former employee/consultant is a person "represented" by the former employer's counsel, thus implicating the ethics rules' prohibition against contacting a person or party represented by legal counsel.\(^7\) This second issue deserves further discussion here.

Depending on the specific structure of the relationship, a former employee retained as a consultant by the former employer could be considered directly analogous to a current employee for the purposes of informal contact or formal discovery. While the current employee analogy does not automatically answer all questions as to the propriety of specific discovery by opposing counsel,\(^7\) it does suggest that counsel exercise caution in approaching an adversary's former employee/consultant.

The situation calls for heightened caution for several reasons. Courts generally provide more protection against ex parte contacts with current employees of a party than they do former employees.\(^7\)

\(^7\) See generally Brad Bole, Former Employees as Adverse Witnesses, The Practical and Ethical Implications of Retaining a Turncoat Employee, LITIG. NEWS, Mar. 1997, at 3.

\(^7\) The related topic of obtaining formal discovery from a trial consultant compared to an expert witness is discussed supra, subsection V.B.4.e.

\(^7\) See supra text accompanying notes 464–78; infra text accompanying notes 824–57.

\(^7\) See Part IV, supra.

\(^7\) Although outside the scope of this Article, rules regarding contact with current employees also vary from jurisdiction to jurisdiction. See Michaels v. Woodland, 988 F. Supp. 468, 470–72 (D.N.J. 1997) (discussing various tests used by courts to determine if contact with current employees of a party is ethical); In re Air Crash Disaster, 909 F. Supp. 1116 (N.D. Ill. 1995) (same); Joseph P. Beckman, Split Decision: Ex Parte Communication with Adversary's Employees Still Troublesome, LITIG. NEWS, May 2001, at 8.

\(^7\) See, e.g., Wagner v. City of Holyoke, 183 F. Supp. 2d 289 (D. Mass. 2001) (allowing interviews of defendant's current employees under specific and limited
Thus, a violation of the ethical rules, specifically Model Rule 4.2 and DR 7-104, is more probable when the former employee is also a current consultant of a party.\footnote{737}

Additionally, the former employee may have been retained as a consultant specifically for the purpose of supporting the former employer’s litigation efforts. In this role, the former employee has significant exposure to information privileged as attorney-client communications, and work product relevant to the dispute.\footnote{738} Accordingly, unauthorized contact by counsel with an adversary’s former employee/trial consultant is likely to stir the court’s wrath since such communication defies not only rules of procedure and ethics, but also breaches the time-honored stockades of attorney work product and attorney-client privilege.\footnote{739}

There exists another key issue that relates to status and timing: When does a former employee rise to the status of a “trial consultant”? An express agreement, written or oral, between counsel and a client’s former employee no doubt confers that status. At the other end of the spectrum are former employees with a few contacts with a former employee’s counsel. As one court explained, “[a] few meetings and telephone conversations with a former employee falls far short of the extensive contact with counsel, substantial disclosure of attorney work product and ongoing access to litigation materials and strategy that signify a trial consultant.”\footnote{740} The mid-point of the spectrum is occupied by former employees whose work while employed or following termination by a party makes the employees de facto trial consultants.\footnote{741}

The critical threshold inquiry as to consultant status is answered by common sense as well as case law because once again there is no bright line of demarcation. Unfortunately, straying to the wrong side

\footnote{737. See supra sections IV.A–D (discussing these rules).}
\footnote{738. See, e.g., Shoreline Computers, Inc. v. Warnaco, Inc., No. C.V. 9904228535, 2000 Conn. Super. LEXIS 842, at *5 (Conn. Super. Ct. Apr. 3, 2000) (recognizing that “the very purpose” an attorney initiates ex parte contact with an adversary’s former employee/consultant “may be to obtain privileged information,” and further acknowledging that “at the very least there is a high risk of disclosure” of information privileged as litigation strategy and work product).}
\footnote{741. See MMR/Wallace Power & Indus., Inc. v. Thames Assocs., 764 F. Supp. 712 (D. Conn. 1991).}
of the line as the judge draws it can result in sanctions including attorney disqualification.

In *MMR/Wallace Power & Industrial, Inc. v. Thames Associates*, for example, Richard Willett served as office manager for plaintiff construction company, MMR/Wallace, as it performed mechanical construction on a cogeneration power plant. In that capacity, Willett had extensive exposure to plaintiff's day-to-day operations on the project. When the general contractor, Thames, terminated plaintiff's work on the project, plaintiff commenced preparations to sue Thames. Those preparations included reassigning Willett to work with MRR/Wallace's legal counsel, a role that Willett continued to occupy after litigation commenced. Willett set up plaintiff's document control system and did extensive review and analysis of discovery materials, culminating in reports for attorneys and meetings with counsel to discuss litigation strategy.

After working for plaintiff's trial team for ten months, Willett was transferred to another project. Willett was terminated a few months later when plaintiff filed for bankruptcy. Willett offered to work as litigation consultant to plaintiff, but was unable to reach an agreement with his former employer. Willett then used a friend to contact counsel for defendant Thames to inquire about working as a trial consultant for his former employer's adversary.

Defense counsel interviewed Willett. A technical consultant for defendant was also present during this meeting that lasted several hours. Defense counsel first confirmed that Willett had no current consulting or employment agreement with plaintiff and then cautioned Willett not to disclose any information about plaintiff protected by the attorney-client privilege or that involved trade secrets. Defense counsel subsequently hired Willett as a trial consultant. The letter of agreement subsequently reiterated that Willett was not currently employed

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743. Id. at 714.
744. See id.
745. See id.
746. See id. at 714-15.
747. See id. at 725.
748. See id. at 715.
749. See id. at 715 n.3.
750. See id. at 715.
751. See id.
752. See id.
753. See id.
754. See id.
755. See id. at 716. Willett was to receive a minimum of $15,000 for services rendered to the defendant. Id.
or retained by plaintiff and that any communications shielded by the attorney-client privilege would not be divulged.\textsuperscript{756}

Plaintiff moved to disqualify defense counsel based on the consulting agreement with the plaintiff's former employee Willett.\textsuperscript{757} The court granted plaintiff's motion.\textsuperscript{758} In so doing, the court characterized Willett as "an 'indispensable' member of his [former] employer's litigation preparation efforts"\textsuperscript{759} and as plaintiff's "de facto trial consultant and/or paralegal." Defense counsel's contact with a person of this status, the court held, violated numerous ethical norms and rules that preclude "an attorney from acquiring, inadvertently or otherwise, confidential or privileged information about his adversary's litigation strategy."\textsuperscript{760}

The court gave little credence to defense counsel's claim that adequate safeguards were in place to prevent Willett from disclosing plaintiff's confidential information. Indeed, the court found that defense attorneys had no interest in hiring Willett other than obtaining information from him to which they were not entitled since they could obtain purely factual information simply by deposing former employees such as Willett.\textsuperscript{761} Willett's lack of sophistication as to the appropriate boundaries of legal privilege further convinced the court that disclosure of privileged materials was inevitable during Willett's consultation with defense counsel.\textsuperscript{762} Although the court was reluctant to disqualify defense counsel, it found the case before it "one of those 'unusual situations' where the appearance of impropriety is clearly sufficient to warrant so drastic a remedy."\textsuperscript{763}

The former employee's status as plaintiff's de facto trial consultant contributed substantially to the "unusual circumstances" warranting disqualification of defense counsel in \textit{MMR/Wallace Power}. Plaintiff's former employee had no official title or special compensation related to his trial consultant duties, but it was beyond peradventure that the ten months he spent working as a member of plaintiff's litigation team exposed him to privileged information. His assigned role was akin to a novice legal assistant, and it appears he was given the assignment primarily to keep him employed as long as possible while plaintiff was sliding into bankruptcy. These particulars were irrelevant to the court, however, as it clearly viewed him as an integral part of plaintiff's litigation team prior to his termination. Thus, his initial role as a

\textsuperscript{756} The text of the letter is included in the opinion. See \textit{id.} at 716–17 n.6.
\textsuperscript{757} See \textit{id.} at 717.
\textsuperscript{758} See \textit{id.} at 728.
\textsuperscript{759} \textit{Id.} at 723 n.19.
\textsuperscript{760} \textit{Id.} at 718.
\textsuperscript{761} \textit{See id.} at 727.
\textsuperscript{762} \textit{See id.}
\textsuperscript{763} \textit{Id.} at 728.
de facto consultant to plaintiff, and the duty of confidentiality attendant that position, made any contact by defense counsel improper.\textsuperscript{764}

The same federal district court faced a very different situation in United States v. Housing Authority of Milford.\textsuperscript{765} In Milford, defense counsel had one meeting with his client’s former employee after the employee terminated his employment.\textsuperscript{766} According to defense counsel, that discussion focused on “marshalling evidence to aid in the defense” of pending and future litigation.\textsuperscript{767} The former employee also spoke by phone with another member of the defense team.\textsuperscript{768}

Due to the dearth of evidence that conversations between defense counsel and their client’s former employee addressed anything more than non-privileged facts underlying the litigation,\textsuperscript{769} the court refused to cast the former employee in the role of trial consultant immune to plaintiff’s discovery efforts.\textsuperscript{770} And even if the former employee, though ill-suited for the role, was deemed a trial consultant, the court found defense counsel’s failure to specify the nature of the privileged matters in jeopardy and to articulate the harms disclosure would wreak on defendant’s case as fatal to defendant’s claim that contact between plaintiff’s counsel and the former employee should be barred.\textsuperscript{771} The court did, however, caution plaintiff’s counsel against asking the former employee to divulge information gathered during his term of employment with plaintiff that might be subject to attorney-client or other privileges.\textsuperscript{772}

\textbf{b. Turncoat Agreements}

It is not unusual for a person terminated from employment (either voluntarily or otherwise) to secure a position with a business rival of the former employer or to establish a new company that competes with the former employer. As discussed previously, this often leads to litigation centering on the former employee’s alleged improper use or disclosure of trade secrets and other confidential information to the new employer.\textsuperscript{773} This heated litigation commonly results in counterclaims by the former employee claiming wrongful termination or other actionable wrongs allegedly committed by the former employer.

\textsuperscript{764} This case is also a classic example of “Turncoat Agreements” discussed infra subsection VI.F.2.b.
\textsuperscript{765} 179 F.R.D. 69 (D. Conn. 1997).
\textsuperscript{766} See id. at 73.
\textsuperscript{767} Id. (citation to record omitted).
\textsuperscript{768} Id. at 72.
\textsuperscript{769} See id.
\textsuperscript{770} See id. at 73.
\textsuperscript{771} See id. at 72, 73.
\textsuperscript{772} See id. at 75.
\textsuperscript{773} See supra section VI.C (Trade Secrets and Confidential Commercial Information).
Former employees who are not parties to this litigation may play key roles in resolving such disputes. The involvement of these non-party former employees may be voluntary, mandated by subpoena or other court order, or, in the most controversial manner, through recruitment by the former employer's adversary. Creation of a “turncoat” consulting agreement between the former employee and an adversary of the former employer may have significant rewards, but it is also skates on thin ethical ice.774

In Biocore Medical Technologies, Inc. v. Khosrowshahi,776 for example, a battle raged between plaintiff, a corporation that researched and marketed medical products, and a rival company that hired several of plaintiff's former employees.777 Plaintiff former employer claimed wrongful acts by the defendant former employees while employed and improper revelation of trade secrets after being hired by the defendant new employer.778 In a separate suit, the former employees claimed wrongful acts by plaintiff during the course of their employment.779 The cases were consolidated.780

Plaintiff sought to disqualify defense counsel, Timothy Butler, on a variety of grounds. The primary charge was that Butler had inappropriately recruited as a consultant a former executive administrative assistant of plaintiff, Marilyn Johnson, who had worked for several of plaintiff's highest ranking officials and had exposure to significant confidential information.781 Butler hired Johnson at $10 an hour to organize and discuss documents produced by plaintiff.782 Johnson spent forty hours consulting with Butler.783 Butler also agreed to represent Johnson free of charge during her deposition by plaintiff's counsel.784

The court characterized Butler’s relationship with Johnson as “unwise”785 and bordering so “closely on incompetence”786 that “it reflects

774. See, e.g., Carnival Corp. v. Romero, 710 So. 2d 690 (Fla. Dist. Ct. App. 1998) (finding no ethical violations warranting disqualification in plaintiff's counsel's retention of defendant's former security officers who had knowledge of defendant's safety policies and procedures as consulting and testifying experts).
775. Bole, supra note 731, at 3, 11 (advising that turncoat agreements may violate attorney-client privilege, work product doctrine, confidentiality agreements, court orders from previous litigation, and various ethical rules).
776. 181 F.R.D. 660 (D. Kan. 1998); see also supra text accompanying notes 274–84 (discussing Biocore).
778. See id.
779. See id.
780. See id.
781. See id. at 665.
782. See id.
783. See id.
784. See id.
785. Id. at 671.
786. Id. at 674.
adversely on his fitness to practice before this Court.” The court also held that an attorney creates an appearance of impropriety “when he hires a witness who has been exposed to substantial confidential information, to assist in litigation against a former employer.” In soundly rejecting Butler’s claim that his hiring of Johnson comported with all relevant ethical standards, the court stated that “at best, he has waded in the murky waters which separate right from wrong” and had “both violated procedural and ethical rules” in the process.

While finding “that Butler has walked a fine line regarding his privilege to remain as counsel in this case,” the court declined to disqualify him. In recognition of the defendants’ desire to retain Butler as counsel, and plaintiff’s inability to demonstrate specific harm from Butler’s consulting arrangement with Johnson, the court held “that defendants’ right to choose their own counsel outweighs the need for disqualification.

In refusing the “blunt remedy” of disqualification, the court recognized that Butler’s deeds would not go unpunished. First, the court noted that the testimonial credibility of Butler’s consultant, Johnson, “is seriously diminished by the fact that plaintiffs can obviously use her employment with Butler as evidence of bias in favor of defendants.” Second, the court ordered Butler to produce a mailing list for every court in which he had been admitted so that the Clerk of Courts could send a copy of the court’s decision to each one of them. Finally, the court stated that any further violations would result in disqualification, “because they will show that Butler has surpassed ignorance and acted either incompetently . . . or with a complete disregard for the rules of this Court.”

Similarly, in Valassis v. Samelson, a former employee of defendant’s affiliate corporation, Mary Baer, obtained significant confidential and sensitive financial information during her six years with defendant in positions ranging from accounting manager to control-

787. In this respect Butler’s actions violated the ethical rules that define “professional misconduct” as any conduct “that adversely reflects on the lawyer’s fitness to practice law.” Model Code of Prof’l Responsibility DR. 1-102(A)(6) (1980).
789. Id. at 675.
790. See id.
791. Id.
792. See id.
793. See id.
794. Id.
795. Id. at 663.
796. Id. at 671.
797. Id. at 676.
798. Id. at 675.
Plaintiffs counsel offered Baer a job organizing and reviewing documents produced by the defendant, her former employer. Defendant asked the court to condemn the employment relationship, arguing that plaintiff's use of Baer to review documents produced by defendant constituted an improper attempt to elevate Baer to an expert witness. Defendant then cited cases prohibiting an expert who has obtained confidential information from one corporation from being subsequently retained by an adversary corporation.

The court rejected defendant’s argument by distinguishing the decisions governing experts from the case before it. In the “expert” cases, the Valassis court reasoned, the experts were exposed not only to privileged factual information but also to litigation strategies. In contrast, “a former employee like Ms. Baer, unlike an expert, possesses a plethora of information, only a portion of which may be privileged.” Viewed in this light, the Valassis court concluded that “[t]he goals of open discovery and attorney client privilege can be much better addressed through the entry of a particularized protective order covering only privileged information.”

In sharp contrast to Biocore and Valassis, the court did not hesitate to disqualify the offending attorneys who initiated a turncoat agreement in Rentclub, Inc. v. Transamerica Rental Finance Corp. In this breach of contract litigation, defendant financial corporation Transamerica counterclaimed against the plaintiff corporation Rentclub and against Michael and Maria McCaskey, two individuals who executed unconditional guarantees of Rentclub’s financial obligation to Transamerica. The case was stayed due to Rentclub’s bankruptcy, but the court reopened the matter as to the McCaskeys’ liability and to defendant’s motion to disqualify McCaskey’s attorneys due to allegedly improper contact with Rafael Canales, Jr., a former Transamerica employee.

Attorneys for Transamerica’s adversaries, the McCaskeys, retained former Transamerica employee Canales as a “trial consultant,” paying him $50 an hour with an advance payment of $5000. In its motion to disqualify McCaskeys’ counsel, Transamerica averred that Canales had been employed for more than a decade as the chief financial officer (“CFO”) of a division of Transamerica. As CFO, Canales

800. Id. at 120.
801. See id. at 124.
802. See id.
803. Id.
804. Id.
805. 811 F. Supp. 651 (M.D. Fla. 1992), aff’d, 43 F.3d 1439 (11th Cir. 1995).
806. Id. at 652–53.
807. Id. at 653.
808. See id.
809. See id.
was privy to business information and documents that were both confidential and propriety to Transamerica, and he retained some of those documents after being discharged by Transamerica.\textsuperscript{810} Canales also participated in company communications concerning Transamerica's relationship with Rentclub and had been deposed while still employed by Transamerica in a lawsuit substantially related to the current litigation.\textsuperscript{811}

The trial court found numerous reasons to disqualify counsel. The court held that the paid consulting agreement between Canales and counsel for his former employer's adversary violated numerous ethical rules, including the prohibition of creating even an "appearance of impropriety," the proscription against conduct "prejudicial to the administration of justice," and the ban on ex parte contact with an adversary's former employee under Florida's version of Model Rule 4.2.\textsuperscript{812}

The court found the payments to Canales especially offensive, as they provided evidence that the attorneys were encouraging Canales to disclose confidential information belonging to his former employer in contravention of ethical rules requiring attorneys to respect the confidential relationships created by others.\textsuperscript{813} In addition, the payments suggested that Canales was paid not for his consulting work, but rather for factual testimony favorable to his benefactors.\textsuperscript{814} This heightened the possibility that the attorney's relationship with their adversary's former employee also violated the interdiction on attorneys "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation."\textsuperscript{815}

The Rentclub court realized that disqualification is a sanction not lightly imposed. Indeed, the trial court was bound by the Eleventh Circuit's robust two-prong test for disqualification: "First, although no proof of actual wrongdoing is required, there must exist a reasonable possibility that some specifically identifiable impropriety in fact occurred. Second, the likelihood of public suspicion must outweigh the social interest that will be served by counsel's continued participation."\textsuperscript{816} The court had no difficulty, however, in concluding that the laundry list of ethical violations committed by McCaskey's attorneys constituted more than "a reasonable possibility" that improprieties had occurred.\textsuperscript{817}

\begin{itemize}
\item 810. See id.
\item 811. See id.
\item 812. Id. at 654 (citation omitted).
\item 813. See id.
\item 814. See id.
\item 815. Id.
\item 816. Id. (citing Norton v. Tallahassee Mem'l Hosp., 689 F.2d 938, 931 (11th Cir. 1982)).
\item 817. Id. at 655–57.
\end{itemize}
In addition, the court found that the probability that Canales had improperly disclosed confidential material gave counsel an unfair advantage that significantly tainted the entire proceedings.\footnote{\emph{Id.} at 655–56.} Thus, the "public suspicion" arising from the relationship between counsel for plaintiff and defendant's former employee "necessarily outweighed the social interest that would be served by counsel's continued participation" in the case.\footnote{See \emph{id.} at 657. The Eleventh Circuit affirmed disqualification of counsel in a short per curiam opinion in which the court concluded that "the district court did not abuse its discretion in finding that there was the appearance of impropriety in the payment to Canales." 43 F.3d at 1440.}

In sum, a turncoat consultant or witness may be a "uniquely credible expert or fact witnesses,"\footnote{Bole, \emph{supra} note 731, at 3.} but the first-hand knowledge that makes the turncoat so attractive is also what makes retaining the turncoat so dangerous.\footnote{See \emph{id.}} At a minimum, an attorney considering forming an allegiance with a turncoat should ask the individual about any express agreements entered with the former employer during or upon termination of employment that require continuing confidentiality, and any injunctions or settlement agreements prohibiting the turncoat from revealing information about the former employer.\footnote{See \emph{id.} at 11.}

Even where no such agreements bind the former employee, care must be taken to avoid encroaching on any privileged information belonging to the former employer.\footnote{See \emph{id.}}

c. \textit{Defector Agreements}

The pretrial slugfest that occurred in \textit{Centennial Management Services, Inc. v. Axa Re Vie}\footnote{193 F.R.D. 671 (D. Kan. 2000).} highlights the many ethical and legal issues arising when a former employee/consultant defects to an adversary's camp. Plaintiff Centennial Management was the sole shareholder of an insurer that filed a breach of contract action against three closely related reinsurers.\footnote{See \emph{id.} at 672.} The reinsurers/defendants filed counterclaims against the plaintiff and brought a third-party claim against two reinsurance brokers.\footnote{See \emph{id.}}

\footnote{See \emph{id.}} In addition to a former employee of a litigant, an individual who offered professional services to a party may be recruited to testify adversary to that party. This also raises ethical implications for the recruiting attorney as well as the professional. \textit{See, e.g.,} Carson \textit{v. Fine}, 836 P.2d 223 (Wash. Ct. App. 1992) (reversing jury verdict for defendant in medical malpractice action where plaintiff's former treating physician's testified for the defense).
During discovery, a significant controversy arose regarding a defendant/reinsurer's former employee, Daniel Grao.\footnote{See id. at 673.} As a senior-vice president of defendant, Grao negotiated the contested reinsurance agreements and had direct supervision over defendant's reinsurance program until defendant terminated Grao's employment in 1997.\footnote{See id.} Grao "vigorously protested his dismissal."\footnote{Id. at 674.} Litigation between the plaintiff insurer and Grao's former employer (a reinsurer) commenced shortly after Grao was terminated.\footnote{See id. at 674.}

When contacted by his former employer's defense counsel, Grao refused to help with matters related to the litigation absent a consulting agreement.\footnote{See id.} The ensuing agreement required defendant to pay Grao an hourly rate, ranging from $125 to $200 depending on the task, to review documents, prepare for his deposition, testify at deposition, and provide other litigation related services.\footnote{See id. at 674-76.}

After receiving more than $43,000 for his services,\footnote{See id. at 677.} and while bound by the consulting agreement with his former employer,\footnote{See id. at 677.} Grao contacted a third-party defendant.\footnote{See id.} Unhappy with his former employer for allegedly interfering with his other business prospects, Grao offered to sell to the third-party defendant and the plaintiff information Grao believed would damage his former employer's case.\footnote{See id. at 674-76.} Grao also claimed that his former employer's counsel paid him to keep quiet, coached him to limit his deposition testimony, and withheld important documents during Grao's deposition.\footnote{See id. at 677-78.} Grao said he would provide testimony adverse to his former employer, but only if a deal could be struck providing Grao with financial compensation from plaintiff and the third-party defendants.\footnote{See id. at 677.}

Armed with the information Grao had revealed in his sales pitch to them, plaintiff and third-party defendants moved for sanctions including entry of default judgment against the defendant, Grao's former employer.\footnote{See id. at 677.} Movants claimed that defendant had schemed to buy favorable testimony of its former employee, who was a critical witness in the case, and that such conduct contravened common law and public policy, the federal anti-gratuity statute, and Model Rule 3.4(b)'s
prohibition against providing or offering "an inducement to a witness that is prohibited by law." 840

Defendant vigorously denied that it (or its counsel) had engaged in wrongful conduct and asked the court to impose substantial sanctions against the plaintiff and third-party defendants. Defendant claimed that its adversaries' communications with Grao and merely entertaining Grao's offer to defect violated the attorney-client privilege between Grao and defense counsel, Model Rule 4.2, and federal rules of procedure governing discovery of trial consultants and expert witnesses. 841

After allowing additional discovery regarding the consulting agreement between Grao and his former employer, and after considering extensive briefs, affidavits, and other materials submitted by the parties, the court denied all requests for sanctions. The court rejected all the grounds offered to support the claim that the consulting contract between Grao and his former employer constituted serious breaches of ethics rules.

While agreeing that public policy forbids any litigant from paying a fact witness for his testimony, 842 the court concluded that the fees defendant paid its former employee Grao pursuant to the consulting agreement were appropriate based on the time commitment required by Grao to assist defendant with the litigation. 843 Specifically, the court found "that the payments made to Mr. Grao were made solely for the purpose of compensating Mr. Grao for the time he lost in order to give testimony in the litigation, review documents produced in the litigation, and otherwise consult with defendant Axa and its counsel on matters related to the litigation." 844 The court's factual conclusion that the consulting fees defendant paid its former employee were proper supported the court's further holdings that the defendant did not violate the federal anti-gratuity statute 845 or Model Rule 3.4(b). 846

The court found equally unpersuasive the former employer/defendant's argument that the plaintiff and third-party defendant had engaged in sanctionable conduct by entertaining Grao's offer to defect. The court relied on Kansas district court precedent and an ABA Formal Opinion to conclude that Grao, as a former employee of a party, was not a "party" to the litigation. 847 Thus, Model Rule 4.2's prohibi-

840. Id.
841. See id. at 672–73.
842. See id. at 679.
843. See id. at 679–81.
844. Id. at 679.
845. Id. at 681. The Federal Anti-Gratuity Statute, 18 U.S.C. § 210 (c)(2) (2001), states in relevant part: "Whoever ... gives, offers or promises anything of value to any person, for or because of the testimony given under oath ... shall be fined under this title for not more than two years, or both."
847. Id. at 683.
tion of contact between a “represented party” and adverse counsel was not implicated.848 The court further rejected defendant’s contention that Model Rule 4.2 applied because defense counsel had formed an independent attorney-client relationship with Grao. The court found that defense counsel represented Grao only when Grao testified during deposition or at trial, and not for all matters related to the current reinsurance litigation.849

The court also extensively examined, but again rejected, defendant’s argument that opposing counsel’s contact with the defecting Grao violated Fed. R. Civ. P. 26(b)(4)(B)’s prohibition against obtaining discovery from an opponent’s non-testifying expert/consultant.850 Defendant initially designated its former employee Grao as an expert witness who would testify at trial, but later withdrew that designation.851 Defendant argued that its withdrawal of Grao’s expert witness designation put opposing counsel on notice that Grao’s status had changed to that of a non-testifying consultant.852 Thus, defendant’s argued, opposing counselors’ contact with Grao violated Fed. R. Civ. P. 26(b)(4)(B).853 The court concluded that the defendant’s mere withdrawal of Grao as an expert witness did not provide sufficient notice to opposing counsel that Grao should be considered anything other than “a fact witness compensated for his time.”854 Therefore, no Rule 26(b)(4)(B) sanctions were appropriate.

The Centennial Management decision is reasonable, based in large part on credibility determinations by the court855 that all lawyers acted in good faith in the case and that Grao, as a disgruntled former employee of defendant, was inappropriately offering to defect from one

848. *Id.*. See generally *supra* sections IV.A–D (discussing Model Rule 4.2).
850. Fed. R. Civ. P. 26 allows a party to obtain information through interrogatories or depositions from a non-testifying expert “who has been retained or specially employed by another party in anticipation of litigation or preparation for trial” only in situations related to a Fed. R. Civ. P. 35 medical examination of a party “or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Fed. R. Civ. P. 26(b)(4)(B).
852. See *id*.
853. See *id*.
854. *Id.* at 687–88. Because the court rejected all of defendant’s grounds for imposing sanctions on opposing counsel, it also rejected defendant’s request that it be awarded costs and attorneys fees pursuant to 28 U.S.C. § 1927. *Id.*. Sanctions can be imposed under that statute against an attorney “who so multiplies the proceedings in any case unreasonably and vexatiously.” 28 U.S.C. § 1927 (2001).
855. Because parties submitted briefs and supporting materials to the court but did not request an evidentiary hearing, the court was required to “make certain factual findings and credibility assessments based on the record before it.” 193 F.R.D. at 673 (citing *In re Cascade Energy & Metals Corp.*, 87 F.3d 1146, 1149 (10th Cir. 1996)).
side to the other to maximize his financial compensation. But even though the attorneys escaped potentially devastating sanctions in that case, not all litigants have enjoyed such a result.856 When one considers the considerable time and expense of litigating the parties' cross motions for sanctions and the ultimate holdings that rendered further testimony by Grao inherently suspect—whether submitted via an affidavit, in deposition, or at trial—it becomes clear that retaining former employees as consultants or experts is not always a wise tactical decision.857 Entertaining an offer from an opponent's former employee/consultant to defect is equally ill advised.

G. Court Settlements Mandating Confidentiality

For better or worse, lawsuits in this country are frequently litigated and settled pursuant to confidentiality agreements.858 Courts frequently issue protective orders requiring parties to maintain strict confidentiality of documents, testimony, and other evidence exchanged during discovery.859 Courts routinely approve settlement agreements negotiated by the parties that prohibit the parties from disclosing the details of the settlement.860 Parties also enter private

856. See, e.g., Goldstein v. Exxon Research & Eng'g Co., No. 95-2410, 1997 U.S. Dist. LEXIS 146000 (D.N.J. Feb. 28, 1997) (determining that an agreement between a key fact witness and the witness’s former employer was improper, and imposing sanctions that include revealing terms of agreement to jury, declaring the former employee a hostile witness as to the plaintiff, and allowing cross examination regarding the agreement).

857. The controversy over Grao also aptly illustrates the breadth of legal authorities involved in this type of dispute, as the court wrested with procedural rules, ethical standards, evidentiary concerns, and case law. See also Goldstein, 1997 U.S. Dist. LEXIS 146000 (utilizing a variety of legal authorities to conclude that consulting agreement between a witness and his former employer was improper).

858. Although protective orders are still frequently issued, judges have become increasingly reluctant to approve expansive protective orders that create barriers to the public's right to know about the litigation and the facts giving rise to it. See, e.g., John Kiernan, Confidentiality Agreements that Work, 20 LITIG. 18 (1994) (recognizing courts' heightened scrutiny of protective orders and providing suggestions on how to negotiate a confidentiality agreement that satisfies the parties' objectives and meets the court's approval); see also Paul F. Eckstein, Can Product Liability Cases Be Secret, 20 LITIG. 22 (1994) (presenting the conflicting legal doctrines and public policies that allow for and that reject the use of protective orders to cloak litigation in secrecy, with focus on product liability cases involving claims of defective products that pose harm to the public).

859. FED. R. CIV. P. 26(c) and analogous state rules empower trial courts to fashion protective orders appropriate for the particulars of the cases before them.

860. Submission of the settlement agreement for a judge's approval may result in the document becoming part of the judicial record. The Seventh Circuit recently held that such documents are presumptively subject to public disclosure, even though the parties intended for the settlement to be a private contract not available to the public. Jessup v. Luther, 277 F.3d 926 (7th Cir. 2002). Judges of the U.S. District Court for the District of South Carolina are considering a local rule that would prohibit sealing of settlement agreements filed with the court. South Car-
settlements containing confidentiality provisions without asking for the court's endorsement. 861

At a minimum, an existing confidential settlement agreement can result in substantial pretrial battles that consume considerable time and other resources in subsequent cases. Such pretrial skirmishes are often a waste of those resources, but this is not always true. Battles over the validity and scope of confidential settlements may be outcome determinative since they delineate the testimony and other evidence that will be available to parties when litigating the merits of the lawsuit. This is especially true when a party to pending litigation seeks information from an adversary's former employee whose pivotal testimony is prohibited or limited due to a settlement agreement in a previous case.

As a threshold matter, settlement agreements are contracts. 862 In both state and federal courts, "[i]ssues involving the formation and construction of a purported settlement agreement are resolved by applying state contract law, even when there are federal causes of action in the underlying litigation." 863 Thus, when a party or potential witness seeks refuge from discovery behind the confidentiality terms of a settlement agreement, the issue is relatively simple: Does the settlement agreement constitute an enforceable contract? Key contract considerations include determining whether the parties intended to enter a binding agreement and determining whether the terms are sufficiently specific to constitute a contract. 864 An equally important concern is whether enforcement of the contract violates common law principles, statutory prohibitions, or public policy. 865


861. Remedies available for breach of a confidentiality agreement depend on the degree of court involvement and timing of the breach. Violation of a court-issued confidentiality order while the litigation is pending may result in a finding of contempt and possible imposition of sanctions available under both Fed. R. Civ. P. 37 and the court's inherent power to sanction. These sanctions range from prohibiting a party from introducing certain evidence to entering default judgment against the violator. Violations of a confidentiality provision in a court-approved settlement may result in contempt of court sanctions. Violations of a confidentiality provision in a privately settled matter ignite the right of the injured party to pursue private contract remedies.


863. See id. at 670.

864. See id.

865. See id. at 686 (citing Fox v. I-10, Ltd., 957 P.2d 1018, 1022 (Colo. 1998) (en banc); see also Uniroyal Goodrich Tire Co. v Hudson, 856 F. Supp. 348, 353 (E.D. Mich. 1994), aff'd, 97 F.3d 1452 (6th Cir. 1996) (holding that a party cannot enforce a confidentiality clause in a manner that violates public policy).
Kalinauskas v. Wong demonstrates the clash of contract principles and public policy when a former employee is purportedly silenced by a settlement agreement. The Kalinauskas dispute arose in the context of formal discovery, but the competing policies the court weighed to resolve the dispute are equally applicable to informal discovery.

Kalinauskas sued her former employer, Caesars Palace, and others for sexual discrimination. Her attorney sought to depose Donna Thomas, also a former Caesars employee, who had sued Caesars for sexual harassment the previous year and settled her claim pursuant to a court-sealed, confidential settlement agreement. The settlement agreement and related documents expressly forbade Thomas from disclosing any aspect of her employment with Caesars except the dates of her employment and job title. Caesars’ attorney sought a protective order, claiming that the deposition of Thomas should not be allowed because it would violate the confidential settlement agreement.

The Kalinauskas court identified sound legal principles and public policy in support of and inimical to enforcement of the settlement agreement to prevent plaintiff’s deposition of defendant’s former employee. Legal principles supporting enforcement of the agreement included the sanctity of contracts and the finality of previous litigation. Public policy also favored enforcement as a means of encouraging relatively quick resolution of disputes with minimal judicial intervention, creating a “form of alternative dispute resolution” which could “presumably result in greater satisfaction to the parties.”

But the court found the flip side of the Caesars’ coin equally compelling. As to legal principles, the applicable procedural rules called for extremely broad discovery in an effort “to secure the just, speedy and inexpensive determination” of the case before the court. In this case, denying the deposition of Thomas “could lead to wasteful efforts to generate discovery already in existence.” Public policy cautioned against the “disturbing consequences” of letting a party buy the silence of potential witnesses in other cases against the same defendant pursuant to a confidential settlement agreement. “[T]he courts must carefully police the circumstances under which litigants

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867. Id. at 365.
868. See id.
869. See id.
870. See id.
871. See id.
872. See id.
873. See id. (citing FED. R. CIV. P. 26(a)).
874. See id. (quoting FED. R. CIV. P. 1).
875. Id. at 366.
876. See id. at 365.
seek to protect their interests while concealing legitimate areas of public concern," the court explained. "This concern grows more pressing as additional individuals are harmed by identical or similar action." 

Faced with these competing legal and policy concerns, the court ruled in favor of allowing discovery of the former employee. Relying on a roughly analogous situation resolved by the Seventh Circuit, the Kalinauskas court held that where modification of a confidentiality agreement would "place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification." Even if prejudice is shown, the court retains "broad discretion in judging whether the injury outweighs the benefits of any possible modification."

Applying this Seventh Circuit standard, the court rejected the former employer's arguments that Kalinauskas had to formally intervene in the now-settled case between Thomas and Caesars to obtain modification of the confidentiality order and that any third party, including Kalinauskas, had to present "extraordinary circumstances" or show a "compelling need" to defeat the confidentiality clause in a settlement agreement between an employer and former employee.

The court rejected the formal intervention requirement because the judge who settled the Thomas case did not retain supervisory jurisdiction over the agreement; thus, any court had "inherent authority to order disclosure." In rejecting the compelling need requirement, the court concluded that "Caesars should not be able to conceal basic facts of concern to Kalinauskas in her case, and of legitimate public concern, regarding employment at its place of business." The Kalinauskas court also relied on the basic contract principle that parties to a contract cannot bind non-parties and on the overriding policy concern that settlement agreements that suppress evidence do not serve the greater public good.

Accordingly, the Kalinauskas court allowed Thomas to be deposed regarding her experiences as an employee of Caesars, including any information she had concerning sexual harassment, but prohibited inquiry into the specific terms of Thomas's settlement agreement with Caesars.
While most discovery disputes involving former employees are, like \textit{Kalinauskas}, resolved by interlocutory trial court orders, the consequences of a court-approved settlement purporting to silence a former employee were deemed of constitutional magnitude by the United States Supreme Court in \textit{Baker v. General Motors}.887

The \textit{Baker} case arose from the ashes of a wrongful termination lawsuit. That case involved claims and counterclaims stemming from GM's discharge of forty-year employee Ronald Elwell, who spent the last fifteen years working in GM's Engineering Analysis Group.888 While in that group from 1974 to 1989, Elwell studied performances of GM vehicles involved in product liability suits, with concentration on the relationship between the placement of fuel lines and vehicle fires.889 He frequently worked with GM lawyers defending product liability actions.890

In 1987, the relationship between GM and Elwell deteriorated. The parties failed to reach an agreement on a retirement and consulting package for Elwell. That disagreement remained unresolved in 1991, even though Elwell's employment had been terminated two years earlier.891

In May 1991, plaintiffs in a Georgia product liability case deposed Elwell concerning a GM pickup truck that caught on fire following a collision.892 Contrary to previous cases where Elwell had, as GM's in-house expert witness, vouched for the pickup truck's safety, Elwell testified in Georgia that GM's fuel system was not as good as those produced by other truck manufacturers.893 Shortly after that testimony, Elwell sued GM in Michigan state court, alleging various tort and contracts claims related to the termination of his employment.894 GM's counterclaim was based on allegations that Elwell had misappropriated GM documents, breached his fiduciary duty to his former employer, and disclosed privileged information belonging to GM.895

Upon GM's motion, the state trial court preliminarily enjoined Elwell from “consulting or discussing with or disclosing to any person any of General Motors Corporation's trade secrets, confidential infor-

\begin{footnotes}
886. \textit{See id.}
888. \textit{See id.} at 226.
889. \textit{See id.} at 226–27.
890. \textit{See id.} at 227.
891. \textit{See id.}
892. \textit{See id.}
893. \textit{See id.}
894. \textit{See id.}
895. \textit{See id.}
\end{footnotes}
When settling the lawsuit for an undisclosed amount in August 1992, the parties stipulated that the trial court's injunction would be permanent. In addition, they stipulated that Elwell would not testify as a fact witness or expert witness or serve as a trial consultant in any product liability litigation involving GM products. Exceptions to this broad prohibition on Elwell's consulting and testimony were (1) situations in which GM consented to Elwell's participation in testimony or consulting and (2) the still-pending litigation in Georgia involving a GM pickup truck. The Michigan trial court entered the injunction as stipulated by the parties. In a separate settlement agreement, the parties included a third exception: Elwell would not violate the agreement if ordered to testify by a court or other tribunal.

In the six years following the court-approved GM-Elwell settlement, the former GM employee testified as to non-privileged and non-trade-secret information in the Georgia case and in many other jurisdictions pursuant to subpoenas. The case garnering Supreme Court attention was a Missouri wrongful death action brought by brothers Kenneth and Steven Baker following their mother's death in a Chevrolet Blazer that caught fire after a collision.

The plaintiffs in Baker v. GM claimed the fire resulted from a faulty fuel pump. GM denied liability and objected to the plaintiffs' plan to subpoena Elwell to testify in deposition and at trial, asserting that the Michigan court's injunction barred Elwell's testimony in federal court in Missouri. Plaintiff's countered that the Michigan state court's injunction could not trump the Missouri Federal District Court's subpoena, and in any event, the private settlement agreement between Baker and Elwell allowed Elwell's testimony when compelled by subpoena.

The federal court in Missouri allowed Elwell's testimony, reasoning that giving the Michigan injunction full faith and credit would violate Missouri public policy limiting the types of information shielded

896. Id.
897. Id.
898. See id. at 228.
899. See id.
900. See id.
901. See id.
902. See id. at 228–29.
903. See id. at 229, 231, n.2.
904. See id. at 229.
905. See id.
906. See id.
907. See id. at 230. The Bakers filed in state court but GM removed the case to federal court based on diversity jurisdiction. Id. at 229.
908. See id. at 230.
from disclosure, and because the federal court had the power to modify the Michigan injunction if necessary. The appeals tribunal found an equally strong Missouri public policy supporting the liberal exercise of full faith and credit and found insufficient evidence that the Michigan court would have modified its injunction if cognizant of the Missouri case. The Supreme Court granted certiorari to decide an issue with major implications to the enforceability of settlement agreements with former employees that purport to buy their silence: Whether the Full Faith and Credit Clause prevents the plaintiffs, who were not parties to the Michigan state court litigation, from obtaining Elwell’s testimony in their wrongful death action in a federal court sitting in Missouri.

A unanimous Supreme Court determined that Elwell’s testimony was properly admitted in the Baker case, although the Justices differed in their rationale for this conclusion. The majority opinion, penned by Justice Ginsburg, recognized the respect states traditionally afford judgments rendered by courts in other states pursuant to the Full Faith and Credit Clause of the U.S. Constitution. Unlike legislation that a party seeks to use in another state, the Court declared, “our decisions support no roving ‘public policy exception’ to the full faith and credit due judgments.”

The Court identified three overriding principles guiding application of full faith and credit in the Baker case. First, “[e]nforcement

909. See id.
910. See id.
911. See id. at 230–31.
912. See id. at 231.
913. Id. at 226.
914. The five-person majority consisted of Justices Ginsburg, Stevens, Souter, Breyer, and Chief Justice Rehnquist. See id. at 225.
915. See id. at 232–33. The Constitution provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. Const., art. IV, § 1. Additional language in the clause empowers Congress to prescribe the manner and conditions under which full faith and credit are given. Baker, 522 U.S. at 231–32. Congress exercised that power to enact legislation requiring federal courts to provide full faith and credit to state laws and decisions. 28 U.S.C. § 1738 (2002). The purpose of the full faith and credit clause “was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of origin.” Milwaukee County v. M.E. White Co., 296 U.S. 268, 277 (1935), quoted with approval in Baker, 522 U.S. at 232.
916. Baker, 522 U.S. at 233 (citation omitted).
measures do not travel with the sister state judgment as preclusive effects do;\textsuperscript{917} therefore, any sanctions for breach of the injunction are assessed by the issuing court rather than the court in which the offending action occurs. Second, although entitled to deferential treatment, judicial decrees “commanding action or inaction have been denied enforcement in a sister state when they . . . interfered with litigation over which the ordering State had no authority.”\textsuperscript{918} Third, “anti-suit injunctions regarding litigation elsewhere, even if compatible with due process as a direction constraining parties to the decree, . . . in fact have not controlled the second court’s action regarding litigation in that court.”\textsuperscript{919} The Baker Court also noted that these maxims must be applied in light of the imperative that “[e]xceptions to the demand for every man's evidence are not created lightly nor expansively construed, for they are in derogation of the search for the truth.”\textsuperscript{920}

By placing the Michigan decree under these three lenses of the constitutional microscope, the Court concluded that the Michigan injunction entered to resolve Elwell’s wrongful termination case against GM could not nullify the Missouri district court’s power to subpoena Elwell in the Bakers’ product liability lawsuit against GM. The Court explained: “Most essentially, Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.”\textsuperscript{921}

While affirming that other states must give faith and credit to orders and judgments that Michigan courts have authority to issue,\textsuperscript{922} the Baker Court’s five Justice majority acknowledged truth in the converse rule. Simply put, “a Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve,”\textsuperscript{923} including a sister state’s power to command a witness to testify through its subpoena powers.

Although the four other Justices offered differing rationales for allowing Elwell to testify in Missouri,\textsuperscript{924} the Baker decision leaves little

\textsuperscript{917} Id. at 235.
\textsuperscript{918} Id.
\textsuperscript{919} Id. at 236 (citations omitted) (emphasis added).
\textsuperscript{920} Id. at 239 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).
\textsuperscript{921} Id. at 238.
\textsuperscript{922} See id. at 240-41.
\textsuperscript{923} Id. at 241.
\textsuperscript{924} The concurrence, written by Justice Kennedy, and joined by Justices O’Connor and Thomas, suggested that the majority’s full faith and credit analysis was unnecessary because the matter could be resolved under the theory of issue preclusion. Id. at 243–51. That is, since the Bakers were neither parties nor in privity with parties in the Elwell v. GM litigation, they could not be bound by the injunction.
hope for a former employer who pursues an injunction to prevent a former employee from testifying in other jurisdictions, at least where the former employee's appearance is commanded by the court. Indeed, the Baker Court was unmoved by GM's plight even when it argued that Elwell's testimony "is pervasively and uncontrollably leavened with" GM's attorney-client, work product, and trade secrets privileged information. As is standard practice where privilege doctrines are invoked without clear proof of violations, GM's failure to pinpoint instances where confidential matters had actually been revealed caused the Court to reject these grounds of protest.

Cases such as Baker and Kalinauskas demonstrate courts' reluctance to enforce confidentiality provisions in settlement agreements, even when those settlements received the presiding judge's imprimatur. The confidentiality provisions will not be honored when enforcement interferes with a current litigant's search for the ever-elusive "truth" about her case or where it impinges on the public right to know of matters ranging from automobile safety to an employer's record on sexual harassment.

VII. CONCLUDING WITH A MODEST PROPOSAL

The challenge inherent in any proposal for remedying dilemmas surrounding formal and informal discovery of litigants' former employees is comprehensiveness. The myriad legal authorities that govern discovery of former employees and the attendant lack of uniformity in interpretation and application within each category sabotage any effort to construct a universal solution. Such an effort also demands the fortitude and foresight to envision the multiple moving targets created by the new rules borne of the civil justice reform movement. And, while the simplicity of uniform bright line rules is always attractive, such rules are unavailing for situations involving discovery of former employees. Indeed, "seldom do such categorical pronouncements survive variant factual applications."

So in closing, two simple proposals are offered.
First, attorneys must routinely and thoroughly scrutinize the roles that former employees may play in anticipated or pending litigation before engaging the discovery engine. A well-worn sports cliché is worth taking to heart: The best defense is a good offense. Attorneys should commandeer the rules at their disposal to develop, through negotiation with opposing counsel, a fair discovery plan that includes discovery of former employees. Counsel must be flexible and realistic, and seek the court’s guidance when necessary.929 Remember that “the attorney who seeks court approval before contact does not risk an ethical violation, but one who does not acts at his or her own peril.”930

The element of surprise is no doubt lost by this open and considered strategy, but the norms of the profession are changing. Cooperation is being rewarded more than combativeness. Simply put, the rules have changed, and so must counsels’ game plans. And if, in hindsight, an attorney realizes that she has overstepped appropriate boundaries in obtaining discovery from former employees, she should admit that to the court and ask forgiveness.931 Trying to hide behind the blurry lines of the discordant rules is not, as noted repeatedly throughout this Article, a fail-safe tactic.

Second, additional reflection followed by action is also required of the persons empowered to create, amend, and apply the many existing standards applicable to discovery of former employees. Greater clarity is needed when drafting court rules, amending ethics standards, developing case law, and issuing ethics committee opinions that impact, either directly or by analogy, the discovery of former employees of a party. One wonders, for example, why the ABA choose to amend its

929. This approach was successfully used by both counsel in a case where plaintiff’s attorney feared violating Model Rule 4.2 by contacting defendant’s former employees ex parte, and defense counsel feared invading attorney-client privilege because some former employees might become class members and thus form an attorney-client relationship with plaintiff’s counsel. EEOC v. Dana Corp., 202 F. Supp. 827 (N.D. Ind. 2002). Of course, judicial intervention does not guarantee the outcome or clarity desired by the movant. See, e.g., Rogosin v. Mayor & City Council of Baltimore, 164 F. Supp. 2d 684 (D. Md. 2001) (declining to approve or to prohibit plan by plaintiff’s counsel to interview defendant’s former employees due to the uncertainty of the applicable law and the variations in factual situations relating to possible privileged information to which each former employee might have been exposed).

930. McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 110 (M.D.N.C. 1993). Even when the court refused to rule on the propriety of ex parte contacts between plaintiff’s counsel and defendant’s former employees, the court opined that sanctions for such contact would be unlikely because of the court’s awareness of the unsettled nature of the law governing such contacts. Rogosin v. Mayor and City Council of Baltimore, 164 F. Supp. 2d 684, 687–88 (D. Md. 2001).

931. See, e.g., In re Air Crash Disaster, 909 F. Supp. 1116, 1120, 1124 (N.D. Ill. 1995) (recognizing counsel’s contriteness and imposing less serious sanctions that it otherwise would if counsel’s acts were intentional and the law more clearly defined).
comment to Model Rule 4.2 to make clear the rule's inapplicability to former employees, but did not change the text of the rule. This is especially curious in light of the long-litigated conundrums resulting from the ambiguity of the text of Model Rule 4.2 and the non-authoritarian status of the comments.

This is indeed a planet populated by former employees, and these individuals hold the keys to numerous disputes in need of efficient and fair resolution. Counsel, the courts, former employees, litigants, and the rule makers must acknowledge this reality and work cooperatively to delineate, in each case, the appropriate boundaries of discovery of former employees. This Article offers an initial step in creating a common knowledge base on the current status of the law, and providing some modest suggestions as to where it should be headed.