



6-1-1999

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## Recommended Citation

John E. Iole & John D. Goetz, *Ethics of Procedure A Discovery-Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary*, 68 Notre Dame L. Rev. 81 (1992).

Available at: <http://scholarship.law.nd.edu/ndlr/vol68/iss1/5>

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# Ethics or Procedure? A Discovery-Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary

*John E. Iole*  
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## I. INTRODUCTION

May an attorney involved in litigation against a corporation ethically interview a former employee of the corporation without the knowledge or permission of the corporation's counsel? The potential benefits—and significant dangers—of such interviews are immediately apparent.

The following example illustrates the issue. After working fourteen years as an engineer at National Motors Corporation, John Jones leaves. During his employment, Jones worked as an engineer in National's design department and metallurgy laboratory. His duties included designing and testing the suspension and "crashworthiness" of a four-wheel drive vehicle that later becomes the subject of nationwide product liability litigation. After leaving the company, Jones opens a consulting business and offers to sell his experience to plaintiff's lawyers with cases against National. He suggests that there are defects in the suspension system, and possesses copies of National documents that allegedly support this claim. Jones knows the safety features, alternative suspension designs, and safety test results for the vehicle. May plaintiff's counsel informally contact Jones?<sup>1</sup> Although most cases do not present facts as dramatic as these, courts and ethics committees have reached confusing and inconsistent answers to similar questions.

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1 A similar scenario actually occurred with one of American Motors Corporation's ("AMC") engineers, who also received a law degree while working for AMC. AMC obtained an injunction barring the engineer from discussing with plaintiffs' counsel any aspects of his AMC work that might involve trade secrets, confidential information, attorney-client privileged information, or attorney work product. See *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116 (Ohio 1991); Amy Singer, *The Privilege is Ours*, AM. LAW., Dec. 1991, at 40.

This Article first explores the ethics standards and key court and ethics decisions addressing the propriety of ex parte contacts with former employees of a corporate adversary.<sup>2</sup> In particular, it analyzes the recent American Bar Association ethics opinion, Formal Opinion 91-359,<sup>3</sup> which concludes that such contacts are not ethically prohibited. This Article identifies ex parte contacts with former employees as an issue meriting special attention in the absence of regulation by an ethics standard.<sup>4</sup> It concludes that the

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2 By "ex parte contacts with former employees of a corporate adversary," this Article refers to any communication between counsel for one party to a dispute (the "contacting party") and a former employee of another, corporate party to the dispute (the "target party"), when the communication relates to a matter in which the contacting party's attorney has been retained, and the contacting attorney has not received permission of the target party. Although the target party's interests in litigation normally will be adverse to the contacting party's, the interests need not actually be adverse for Model Rule of Professional Conduct 4.2 to apply because the Rule prohibits ex parte communication with any other party represented by counsel. See *infra* Part II.

3 ABA Comm. on Professional Ethics, Formal Op. 91-359 (1991).

4 Most commentators who have written in this area have addressed the former employee question only as a subsidiary of the larger issue of whether contacts with current employees of a corporate adversary are proper. See, e.g., 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 436 (Supp. 1988) (Model Rule of Professional Conduct 4.2 does not address communications with former agents and employees, "and technically there should be no bar, since former employees cannot bind the organization, and their statements cannot be introduced as admissions of the organization."); Matthew D. Keenan & Jeffrey A. Chanay, *Ex Parte Communications by Counsel with Existing and Former Employees of Adverse Party: An Analysis of the Issues*, J. KAN. B. ASS'N, Apr. 1989, at 35, 43 (with regard to former employees, courts should construe the ethics rules and attorney-client and work product privileges "in a manner that permits informal discovery to the greatest extent possible"); Samuel R. Miller & Angelo J. Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 BUS. LAW. 1053, 1072-73 (1987) (arguing that court authorization or opposing counsel's consent should be required to contact a former employee who was "highly-placed" in the company or if the former employee's actions "are precisely those sought to be imputed to the corporation"); George B. Wyeth, *Talking to the Other Side's Employees and Ex-Employees*, LITIG., Summer 1989, at 8. Indeed, courts, ethics tribunals, and commentators continue to grapple with the permissible scope of ex parte contacts with current employees of a corporate adversary. See, e.g., Felicia Ruth Reid, Comment, *Ethical Limitations on Investigation of Employment Discrimination Claims: The Prohibition on Ex Parte Contact with a Defendant's Employees*, 24 U.C. DAVIS L. REV. 1243 (1991) (contending that Rule 4.2 should be amended to more clearly separate "alter egos" of corporation (who may not be contacted ex parte), and "witnesses" (who may be contacted informally)); Stephen M. Sinaiko, Note, *Ex Parte Communication and the Corporate Adversary*, 66 N.Y.U. L. REV. 1456 (1991) (contending that Federal Rule of Evidence 801(d)(2) should be amended to remove the risk of evidentiary admissions through statements made by corporate employees in an ex parte contact situation, and therefore that greater informal access to corporate employees should be allowed); Theodore Sonde & Gary S. Kaminsky, *Wading Through the Waters of Conducting Ex Parte Interviews of Current and Former Employees of a Corporate Adversary: A Litigator's Dilemma*, C520 ALI-ABA 1053 (1990). The special interests involved in contacts with former employees, however, war-

problems surrounding these contacts are, both in theory and practice, discovery problems rather than ethics problems.

The extensive litigation in the ex parte contact area, not all of which can be attributed to the uncertainty over the governing standards that existed before Formal Opinion 91-359, indicates a fundamental clash between the interests of the contacting and target parties.<sup>5</sup> Based on its examination of the decisional authority, this Article distills the underlying interests that animate the parties' conduct. These interests bear directly on the parties' ability to prepare their cases and defenses. Indeed, these interests often are incompatible and involve zero-sum propositions—one party's realization of an interest means that the other is disappointed.

Because of the parties' strongly held and antagonistic interests, this Article suggests that an absence of standards governing ex parte contacts will lead to conflict and chaos. Accordingly, this area should be governed by a rule or some other means of guiding litigants. This Article concludes that an amendment to Rule 26 of the Federal Rules of Civil Procedure is the best means of addressing the concerns accompanying ex parte contacts with former employees.<sup>6</sup>

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rant separate treatment. See *infra* note 6 and Part VI. Furthermore, in light of the American Bar Association's Formal Opinion 91-359, a fresh perspective on this issue and its ramifications for the discovery process is needed. See *infra* Part IIIA-B.

5 See *infra* Part VI.

6 Although the underlying thesis of this Article arguably extends beyond the relatively modest sphere of ex parte contacts with former employees, there are good reasons why former employees deserve separate treatment:

1. After the recent ABA opinion, ex parte contacts with former employees are not governed by any rule of ethics or procedure. See *infra* Part IIIA.
2. Because former employees are not "party" to the litigation, discovery regarding them is in some senses more restrictive (e.g., no interrogatories or requests for admission, see FED. R. CIV. P. 33, 36), yet more open in other senses (e.g., after ABA Formal Opinion 91-359, information can be gathered through interviews instead of depositions).
3. Corporations and organizations need to obtain the effective assistance of counsel and to maintain the confidentiality of communications with former employees who are subject to the attorney-client privilege.
4. Former employees may be more susceptible to suggestion, influence, or abuse by the contacting party than current employees.
5. Corporations cannot compel former employees to cooperate as readily as current employees.
6. The information held by former employees is less likely to be known by others at the corporation as information known by current employees.
7. Former employees may hold grudges against the corporation.

## II. THE RELEVANT ETHICS STANDARD UNDER MODEL RULE OF PROFESSIONAL CONDUCT 4.2

Historically, rules of ethics have prohibited attorneys from contacting an adverse party without the consent of the party's counsel.<sup>7</sup> Under a broad reading of this ethical prohibition, ex parte contacts with former employees of a corporate party have been restricted because courts or ethics committees deemed such employees to be included within the represented "party." Until recently, Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct was the starting point for the courts' or ethics committees' analyses.<sup>8</sup> Rule 4.2 provides:

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.<sup>9</sup>

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8. The location of a former employee is less likely to be known by the corporation than that of a current employee.

9. Former employees have an interest in not being inconvenienced by unregulated ex parte contacts.

10. Former employees may not understand that they have a right to request that the target party's attorney be present during a contact.

11. Former employees may not adequately understand the legal significance of the facts.

7 HENRY S. DRINKER, *LEGAL ETHICS* 201-03 (1953); 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 771 (2d ed. 1836) ("I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent *and* in the presence of his counsel.").

8 The ABA House of Delegates adopted Rule 4.2 in August 1983.

9 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). Forty states and the District of Columbia have adopted the Model Rules or their substantial equivalent: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Law. Man. Prof. Conduct (ABA/BNAL) 01:3-4 (1990). Of the states that have adopted the Model Rules, only a few have altered the ABA version of Rule 4.2:

Louisiana and Oklahoma specifically prohibit using another individual to bring about a prohibited communication.

Florida replaces "party" with "person" to avoid limiting the rule's application to parties in litigation, and it deletes the reference to communications authorized by law.

Prior to the Model Rules, Disciplinary Rule 7-104(A)(1) of the American Bar Association's Model Code of Professional Responsibility set forth an equivalent standard. The language of DR 7-104(A)(1) is nearly identical to that of Rule 4.2:

During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is autho-

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New Mexico adds language to the rule to cover communications with employees of corporations.

*Id.* at 71:301.

The District of Columbia has adopted perhaps the most unique version of Rule 4.2. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1991) ("D.C. Rule 4.2"). D.C. Rule 4.2 first repeats substantially the same version of ABA Rule 4.2 in its subsection (a). D.C. Rule 4.2 then codifies several additional paragraphs addressing the employees of an organization:

(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer.

(c) For purposes of this rule, the term "party" includes any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates.

*Id.*

The official comment to D.C. Rule 4.2 makes clear that a lawyer may communicate with employees of an organization who have authority to bind the organization with respect to matters underlying the representation "if they do not also have authority to make binding decisions regarding the representation itself." D.C. RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1991). Because *former* employees cannot make such binding decisions, D.C. Rule 4.2 does not prohibit ex parte contacts with these individuals. Interpreting DR 7-104(A)(1), D.C. Rule 4.2's predecessor, the D.C. Bar similarly concluded that the Disciplinary Rule does not prohibit ex parte contacts with *former* employees because these individuals cannot make such binding decisions. D.C. Bar Ethics Comm., Op. No. 129 (1983) (interpreting DR 7-104(a)(1)). The Committee concluded that DR 7-104(A)(1) requires consent of opposing counsel only for contacts with employees of an opponent organization who have "authority to bind the organization with respect to pending litigation." *Id.* However, two members dissented from the opinion, contending that the Committee had read the Rule "too narrow[ly]." *Id.*

Ten states have not adopted Rule 4.2 of the Model Rules. Presumably, these states have chosen to rely on the Model Code of Professional Responsibility standard in DR 7-104(A)(1). Although discussions of the ethics standard in this Article focus primarily on Model Rule 4.2, the analysis and conclusions are equally applicable to DR 7-104(A)(1).

rized by law to do so.<sup>10</sup>

Rule 4.2 and DR 7-104(A)(1) are easily applied to individual litigants because it is simple to identify represented "parties" who are intended to be protected. Matters become less clear, however, when the adverse party is a corporation because an organization can only act through natural persons. Neither Rule 4.2 nor DR 7-104(A)(1) explicitly defines which natural persons acting on behalf of a corporation should be considered part of the represented corporate party. The official comment to Rule 4.2 attempts to explain the Rule's application to a corporation:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation [1] with persons having a managerial responsibility on behalf of the organization, and with any other person [2] whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or [3] whose statement may constitute an admission on the part of the organization.<sup>11</sup>

The phrase "persons having a managerial responsibility on behalf of the organization" appears to contemplate a *present* agent or employee relationship with the target corporation at the time of the contact. The phrase "any other person," however, seems to extend protection to former employees, especially if their acts or omissions could be imputed to the organization. Therefore, although the comment is moderately helpful in defining Rule 4.2 as it applies to current employees, it provides vague guidance with respect to former employees. Until the ABA's formal opinion on Rule 4.2, ex parte contacts with former employees were regulated, albeit imperfectly, both by Rule 4.2 and DR 7-104(A)(1).

These ethics rules, and the cases and ethics opinions decided under them, gave parties indications of both proper and improper contacts. The very presence of that body of law undoubtedly led some parties to adjust their behavior so that conflicts did not occur. The many reported cases and ethics opinions hopefully represent a minority of instances in which the parties could not reach an accord and needed a specific determination of how the ethics rule applied to a case at hand.<sup>12</sup>

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10 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1980).

11 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983).

12 See *infra* Part V.

### III. ABA FORMAL OPINION 91-359

#### A. *Discussion of Formal Opinion 91-359.*

On March 22, 1991, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 91-359, which addressed "whether a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without the consent of the corporation's lawyer, communicate about the subject of the representation with an unrepresented former employee of the corporate party."<sup>13</sup> In a brief opinion, the Committee concluded that such contacts are not prohibited by Rule 4.2. The Committee grounded its decision simply on the fact that the Rule and its comment do not *expressly* mention former employees.<sup>14</sup>

With respect to organizations, the Committee stated that not only does Rule 4.2 include corporations within the meaning of the term "party," it also includes three categories of individuals who are employees of a corporate party. The Committee opined that by defining three categories of unrepresented employees with whom communication is prohibited, the comment to Rule 4.2 "clearly implies that communication with all *other* employees on 'the matter in representation' is permissible without consent, subject only to such other rules and other law as may be applicable."<sup>15</sup>

With respect to former employees, the Committee acknowledged that the concerns reflected in Rule 4.2 may survive the termination of the employment relationship. It then cited court decisions interpreting Rule 4.2 and DR 7-104(A)(1) in various

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<sup>13</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991) [hereinafter Formal Op. 91-359], *reprinted in* Law. Man. Prof. Conduct (ABA/BNA) 901:140 (1991).

<sup>14</sup> The Committee first recognized that Rule 4.2 was formulated to preserve the proper functioning of the legal system and to shield adverse parties from improper approaches by opposing counsel. *Id.* at 901:141 ("The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law."). *See also* Meat Price Investigators Ass'n v. Iowa Beef Processors, 448 F. Supp. 1, 3 (S.D. Iowa 1977), *aff'd*, 572 F.2d 163 (8th Cir. 1978); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1980) ("The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.").

<sup>15</sup> Formal Op. 91-359, *supra* note 13, at 901:142.



ways.<sup>16</sup> For example, the Committee referred to the decisions of *Niesig v. Team I*<sup>17</sup> and *Wright v. Group Health Hospital*<sup>18</sup> as precedents for the view that Rule 4.2 applies only to current employees, not to former employees. The Committee also cited *Polycast Technology Corp. v. Uniroyal, Inc.*,<sup>19</sup> which held that DR 7-104(A)(1) does not bar contacts with former corporate employees unless the employee possesses privileged information. On the other hand, the Committee noted that some courts have held that Rule 4.2 restricts<sup>20</sup> or even prohibits ex parte contacts with former employees.<sup>21</sup> Finally, the Committee reviewed commentators' suggestions that ex parte contacts with former employees be restricted.<sup>22</sup>

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16 *Id.* at 901:143.

17 545 N.Y.S.2d 153 (App. Div. 1989), *modified*, 558 N.E.2d 1030 (N.Y. 1990).

18 691 P.2d 564 (Wash. 1984).

19 129 F.R.D. 621 (S.D.N.Y.), *aff'd*, No. 87 Civ. 3297, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. Nov. 15, 1990).

20 Formal Op. 91-359, *supra* note 13, at 901:143; *see In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (noting that rationale of *Upjohn v. United States*, 449 U.S. 383 (1981), with respect to corporate attorney-client privilege, applies to former as well as current corporate employees), *cert. denied*, 455 U.S. 990 (1982); *Amarin Plastics v. Maryland Cup Corp.*, 116 F.R.D. 36, 41 (D. Mass. 1987) (recognizing possibility that communications between a former employee and his former corporate employer's counsel may be privileged); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986) (barring ex parte contacts with former employees who had "managerial responsibilities concerning the matter in litigation").

21 Formal Op. 91-359, *supra* note 13, at 901:143; *see Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037 (D.N.J. 1990) (interpreting Rule 4.2 to cover all former employees).

22 Formal Op. 91-359, *supra* note 13, at 901:143. *See Miller & Calfo, supra* note 4, at 1072-73 (court authorization for ex parte contact with former employees should be required if employee was "highly placed" or if the individual's actions are those sought to be imputed to the corporation); Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181, 1227 (1987) (deeming all former employees who are "identified with an enterprise," either for purposes of resolving disputed issues or effective representation of the enterprise, to be a party representative for discovery purposes).

While recognizing that "persuasive policy arguments" can be made for applying Rule 4.2 to former employees,<sup>23</sup> the Committee refused to extend the Rule beyond its literal meaning:

[T]he fact remains that the text of the Rule does not [cover former employees] and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, this Committee is loathe, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.<sup>24</sup>

Accordingly, the Committee concluded that Rule 4.2 does not prohibit counsel from communicating with an otherwise unrepresented former employee of a target party without the consent of the target's lawyer.

The Committee placed two limitations on its decision. First, it cautioned that contacting attorneys must be careful not to induce unrepresented former employees to disclose information protected by the target's attorney-client privilege. Second, the Committee warned that contacting lawyers must comply with Rule 4.3, which requires a contacting attorney to disclose the identity of his client, the fact that the target party may be adverse to the contacting lawyer's client, and the nature of the contacting lawyer's role in the matter.<sup>25</sup>

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23 The Committee did not expressly list these policy arguments in its opinion. Instead, it implicitly acknowledged that former employees arguably warrant protection under Rule 4.2 because their statements could constitute admissions by the corporation or be imputed to the corporation for purposes of civil liability. Law. Man. Prof. Conduct (ABA/BNA) 901:143 (1991). The Committee referred to three categories of former employees to whom this reasoning could apply: (1) former employees who, when employed, had managerial responsibilities concerning the matter in litigation, *id.* (citing *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986)); (2) former employees who are identified with an enterprise, either for purposes of resolving disputed issues or effective representation of the enterprise, *id.* (citing *Stahl*, *supra* note 22, at 1227); and (3) former employees who were "highly placed" in the company (such as a former officer or director) or whose actions are precisely those sought to be imputed to the corporation, *id.* (citing *Miller & Calfo*, *supra* note 4, at 1072-73). The Committee implied that the potential impact of these employees' statements on a corporate litigant support extending Rule 4.2's coverage to former employees.

24 Formal Op. 91-359, *supra* note 13, at 901:143-44.

25 *Id.* at 901:144 (citing *Brown v. Peninsula Hosp. Ctr.*, 407 N.Y.S.2d 586 (App. Div. 1978)); see ABA Comm. on Professional Ethics and Grievances, Informal Op. 908 (1966).

### B. Criticism of Formal Opinion 91-359

The ultimate effect of the ABA's formal opinion currently is unclear. To begin with, the opinion is merely persuasive, and not controlling, authority on how Rule 4.2 should be interpreted.<sup>26</sup> Various state bar associations and courts already have handed down a patchwork of interpretations of DR 7-104(A)(1) and Rule 4.2 (or their state equivalents) with respect to former employees. Nevertheless, although the issue is not yet settled, the ABA's opinion has been given substantial weight by courts that have considered it.<sup>27</sup>

It should be apparent from the preceding section that the ABA Committee employed a shallow analysis in reaching its decision. While recognizing that there are substantial policy arguments in favor of applying Rule 4.2 to former employees in some contexts,<sup>28</sup> the Committee quickly dismissed these arguments simply because the Rule and its comment do not explicitly mention former employees. The Committee's wooden interpretation of Rule 4.2 will result in more questions than answers because of the substantial interests of the parties involved and the amount of litigation the Rule has caused. Indeed, the Committee itself recognized

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26 This is because state courts usually claim inherent power, under their state constitutions, to regulate the legal profession. See, e.g., *In re Stephenson*, 511 P.2d 136 (Alaska 1973); *Taylor v. Hoboken Bd. of Educ.*, 455 A.2d 552 (N.J. Super. Ct. App. Div.), cert. denied, 470 A.2d 441 (N.J. 1983); *State v. Cook*, 525 P.2d 761 (Wash. 1974) (en banc); *Mendicino v. Whitchurch*, 565 P.2d 460 (Wyo. 1977). As the court stated in *In re Integration of State Bar of Oklahoma*, 95 P.2d 113, 114 (Okla. 1939), "the very fact that the Supreme Court was created by the Constitution gives it the right to regulate the matter of who shall be admitted to practice law . . . and also gives the right to regulate and control the practice of law within its jurisdiction."

The inherent power to regulate the legal profession is generally held exclusively by a state's highest court. *Esch v. Superior Court*, 577 P.2d 1039 (Alaska 1978); *Burns v. Huffstader*, 433 So. 2d 964 (Fla. 1983); *Brown v. Oregon State Bar*, 648 P.2d 1289 (Or. 1982); *Laffey v. Court of Common Pleas*, 468 A.2d 1084 (Pa. 1983); *Hahn v. Boeing Co.*, 621 P.2d 1263 (Wash. 1980); *State ex rel. Askin v. Dostert*, 295 S.E.2d 271 (W. Va. 1982). This power has in some states been delegated to bar associations or grievance committees, which adopt rules governing the conduct of lawyers. *Simpson v. Alabama State Bar*, 311 So. 2d 307 (Ala. 1975); *Gipson v. Supreme Ct. of N.J.*, 416 F. Supp. 1129 (D.N.J.), *aff'd*, 558 F.2d 701 (3d Cir. 1976); see Law. Man. on Prof. Conduct (ABA/BNA) 201:103 (1984). While bar association rulings usually are accorded great weight by the state courts, they are viewed as advisory and not binding. See Law. Man. on Prof. Conduct (ABA/BNA) 201:103 (1984) (citing cases). The courts retain power to approve or disapprove any rule adopted by the bar association. *Id.*; see *Simpson*; *Gipson*.

27 See *infra* notes 56-60 and accompanying text.

28 See *supra* note 23 and accompanying text.

that "the concerns reflected in the comment to Rule 4.2 may survive the termination of the employment relationship."<sup>29</sup>

The Committee also dealt with ex parte contacts purely as an issue of legal ethics. It considered only whether such contacts fall within the scope of Rule 4.2. It gave scant attention to the discovery setting in which such contacts occur or the discovery disputes they have engendered. This seems odd, especially considering the Committee's numerous references to cases and other authorities interpreting Rule 4.2 in discovery settings.<sup>30</sup>

Finally, in reaching its decision, the Committee did not consider the underlying interests of the contacting party, the target party, or the former employee. The manner in which these interests ultimately should be accommodated is open to debate, yet it seems obvious that these interests should have been an express factor in the Committee's calculus.<sup>31</sup>

In light of the limitations of the ABA's formal opinion and the above criticisms, the following section will analyze the manner in which to fill the vacuum left in the opinion's wake.

#### IV. RECONCILIATION OF ETHICS WITH PROCEDURE

Prior to the ABA opinion, ex parte contacts with former employees were assumed to be governed by an ethics rule—Rule 4.2 (and formerly DR 7-104(A)(1)). Now that the ABA has declared this assumption to be false, the legal profession must address the question of how best to regulate this area. Two primary alternatives exist: a rule of ethics or a rule of procedure. Each alternative has its own apparent benefits.<sup>32</sup> On balance, however, the theoretical basis and practical applications for such a rule are more soundly grounded in civil procedure than in ethics.

A rule for ex parte contacts would function best as a procedural rule because the conduct to be governed is more a method of discovery than an aspect of attorney behavior. In the ordinary case of an ethics transgression, the primary questions are whether

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29 Formal Op. 91-359, *supra* note 13, at 901:142.

30 See *supra* notes 16-22 and accompanying text.

31 See discussion of these interests *infra* Part VI.

32 The primary benefit of using an ethics rule is perhaps tradition—this area long has been considered part of attorney ethics. See *supra* note 7. A rule of ethics also might have an advantage in promoting or deterring conduct before it occurs. However, certain discovery rules, such as Rule 11 of the Federal Rules of Civil Procedure, also seek to achieve such effects.

an ethics violation has occurred and, if so, the censure to be accorded to the transgressor. In contrast, questions of improper ex parte contacts usually involve matters of litigation or discovery strategy masquerading as ethics disputes. The parties almost exclusively are contesting each other's right to obtain information or to shield it from discovery. As discussed below, the interests affected are fundamental to the discovery process. Accordingly, it is more appropriate to govern these interests as a matter of discovery than as a matter of ethics. Indeed, in several instances, courts have expressly recognized that Rule 4.2 is an ethics rule that is not meant to control discovery.<sup>33</sup>

The foundation for applying Rule 4.2 to ex parte contacts no longer exists after Formal Opinion 91-359. As the ABA opinion held, Rule 4.2 applies only to "parties" represented by counsel, and former employees are not part of the corporate "party."<sup>34</sup> Accordingly, the theoretical basis underlying Rule 4.2—an ethical restraint on one attorney's ability to contact another attorney's client ex parte—does not apply to former employees.

There are two practical reasons why a rule of procedure should govern ex parte contacts: (1) it will be easier for courts to interpret; and (2) it will be easier for attorneys to understand. Because ex parte contacts are primarily a matter of discovery, to classify the rule in the discovery section of the Federal Rules of Civil Procedure will increase attorneys' familiarity with the rule and its application in the discovery setting. A rule of federal civil procedure also would apply uniformly in federal courts, removing the choice of law determinations that federal courts confront when applying rules of ethics.<sup>35</sup>

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33 In *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 82-83 (D.N.J. 1991), the court expressly acknowledged that Rule 4.2 "is designed to protect the attorney-client relationship, not to control the flow of information relevant to a lawsuit." See also *id.* at 82 ("It must be recalled that [Rule] 4.2 is an *ethical* rule, not a rule through which corporate parties gain the ability to control the flow of information to opposing parties.").

34 See *supra* text accompanying notes 23-24.

35 Federal courts usually adopt and apply rules of ethics identical to the courts of the state in which they sit. See, e.g., *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 624 (S.D.N.Y.), *aff'd*, No. 87 Civ. 3297, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. Nov. 15, 1990). A federal court applying an ethics rule must sort out state court and ethics committee opinions interpreting that rule, and decide how the rule should be applied in federal court. In situations involving conduct in multiple jurisdictions, the federal court also must decide which state's ethics rules to apply. *Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 902 (E.D. Pa. 1991) (conducting choice of law inquiry in ex parte contact setting), *appeal dismissed*, 961 F.2d 207 (3d Cir. 1992); see also *infra* note 49.

Procedural rules that govern discovery in analogous settings already exist. Rule 26 of the Federal Rules of Civil Procedure protects the manner in which information can be acquired in the similarly sensitive areas of discovery regarding testifying expert witnesses,<sup>36</sup> nontestifying experts,<sup>37</sup> and attorney work product.<sup>38</sup> In these instances, the drafters of the federal rules recognized that the parties' competing interests in developing their cases or defenses, and in discovering information held by their opponents, required rules allowing discovery under controlled conditions. This Article proposes that, in the same way, ex parte contacts with former employees can and should be governed by Rule 26.

Before the interests underlying the parties' conduct can be understood, and before a rule governing ex parte contacts can be proposed, it is necessary to explore the ways in which courts and ethics committees have treated this area in the past.

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36 Under Rule 26(b)(4)(A)(i), discovery of information on testifying experts is limited to four narrow topics, unless the court on motion permits broader discovery. It states:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

FED. R. CIV. P. 26(b)(4)(A)(i).

37 Under Rule 26(b)(4)(B), one can discover information regarding a nontestifying expert only upon a showing of "exceptional circumstances:"

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) 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).

38 Under Rule 26(b)(3), attorney work product is shielded from discovery except upon a showing of "substantial need." Even then, core work product is protected.

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3).

## V. SUMMARY OF DECISIONAL AUTHORITY

The propriety of ex parte contacts with former employees has been vigorously litigated across the country, both in case law and in ethics opinions of state and local bar associations. Together, this body of authority has produced a jumbled mix of rulings and interpretations of Rule 4.2 and its predecessor, DR 7-104(A)(1).

Three basic approaches can be discerned from existing authority. First, a majority of courts and ethics panels have concluded that ex parte contacts with former employees do not violate Rule 4.2 or DR 7-104(A)(1) because those rules do not expressly apply. Other courts and panels have permitted such contacts in certain circumstances, depending on the position the former employee held with the target company and the subjects broached by the contacting party. These authorities have adopted various flexible approaches in attempting to resolve the issue. Finally, a small body of authority has concluded that such contacts violate Rule 4.2 or DR 7-104(A)(1) and therefore are prohibited in all circumstances. This section will explain each of these approaches, and then conclude with a discussion of cases that have attempted to establish discovery standards for ex parte contacts.

### A. *Authority Allowing Ex Parte Contacts with Former Employees*

A significant number of courts and ethics panels have held that Rule 4.2 and DR 7-104(A)(1) do not prohibit ex parte contacts with former employees. Most of these rulings occurred when counsel for the target party sought a protective order, disqualification, or sanctions for the alleged unethical behavior of the contacting counsel. In adopting a "bright line" rule, this body of authority recognizes only two limitations on ex parte interviews: (1) contacting counsel may not divulge or seek to divulge communications that are subject to the target's attorney-client privilege;<sup>39</sup>

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39 See, e.g., *Kishaba v. Hilton Hotels Corp.*, 936 F.2d 578 (9th Cir. 1991) (text in WESTLAW) (affirming district court's grant of protective order prohibiting plaintiff's counsel from contacting former corporate employees who possessed privileged information); *Stabilus v. Haynsworth, Baldwin, Johnson & Greaves*, No. CIV.A.91-6184, 1992 WL 68563 (E.D. Pa. Mar. 31, 1992) (defense counsel's interview of former vice president who communicated with plaintiff's counsel during negotiations at issue violated Rule 4.2; court ordered production of notes memorializing interview); *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712 (D. Conn. 1991) (ex parte contact with former employee required disqualification when employee, as member of contacting party's litigation team, disclosed confidential and privileged information); *American Motors Corp. v. Huffstuder*, 575 N.E.2d 116 (Ohio 1991) (former employee-attorney enjoined from dis-

and (2) contacting counsel may not interview former employees ex parte if they are personally represented by counsel. Subject to these limitations, contacting counsel may contact former employees unabashedly without prior notice to, or the consent of, the target's counsel.

The most prominent case adopting a bright line rule is *Wright v. Group Health Hospital*.<sup>40</sup> In *Wright*, the court decided that only employees with authority to speak for and bind the company are part of the target corporation "party" for purposes of DR 7-104(A)(1).<sup>41</sup> The court concluded that "[s]ince former employees cannot possibly speak for the corporation, we hold that CPR DR 7-104(A)(1) does not apply to them."<sup>42</sup> In reaching its decision, the court stated that DR 7-104 was designed to: (1) protect the proper functioning of the legal system; (2) shield the target party from improper approaches; (3) protect the target party from being taken advantage of by contacting counsel; (4) protect the target corporation by shielding employees with the power to speak for and bind it from unethical influences; and (5) prevent the theft of clients.<sup>43</sup>

The *Wright* court held that former employees do not warrant protection under these categories and therefore refused to prohibit ex parte contacts. It noted that protection is not appropriate merely "to protect a corporate party from the revelation of prejudicial facts."<sup>44</sup> Issues of economy also favor such contacts because

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closing trade secrets and other information subject to attorney-client privilege to plaintiff's counsel).

40 691 P.2d 564 (Wash. 1984).

41 *Id.* at 569; accord *Shealy v. Laidlaw Bros., Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 1223, 1225 (D.S.C. 1984) (former employees are "obviously exempt" from DR 7-104); *Triple A Mach. Shop, Inc. v. California*, 261 Cal. Rptr. 493 (Ct. App. 1989) (CALIFORNIA RULES OF PROFESSIONAL CONDUCT 2-100 unequivocally permits contacts with former employees); *Nieseg v. Team I*, 545 N.Y.S.2d 153, 155 (App. Div. 1989) (DR 7-104 does not preclude contacts with individuals no longer employed by corporation "and who therefore cannot be considered parties to the present action"), modified on other grounds, 558 N.E.2d 1030 (N.Y. 1990); see *United States v. Western Elec. Co.*, No. CIV.A.82-0192, 1990 WL 39129, at \*2 (D.D.C. Feb. 28, 1990) (court stated in dictum that a former employee is not a "party" under Rule 4.2 or DR 7-104 because he lacks authority to bind the company); cf. *Mills Land & Water Co. v. Golden West Ref. Co.*, 230 Cal. Rptr. 461 (Ct. App. 1986) (ex parte contact with former officer, but current director, violates California Rules of Professional Conduct 7-103; court implies that if former officer was not a director, contact would be permissible).

42 *Wright*, 691 P.2d at 569.

43 *Id.* at 567.

44 *Id.* at 569.



of the expense of proceeding solely through formal discovery. Other courts have reached similar results.<sup>45</sup>

Recent cases have also adopted a bright line rule in interpreting Rule 4.2. In *Polycast Technology Corp. v. Uniroyal, Inc.*,<sup>46</sup> the court held that neither Rule 4.2 nor DR 7-104(A)(1) barred ex parte communications with former employees. It reasoned that nothing in the Rule or its comment justified departing from "the traditional view" that the term "party" does not encompass former employees. "Whatever the right of the corporation to 'barricade' against ex parte contact those potential witnesses who are current employees, former employees are outside the ramparts."<sup>47</sup>

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45 In *Oak Industries v. Zenith Industries*, No. 86-C-4302, 1988 U.S. Dist. LEXIS 7985 (N.D. Ill. July 25, 1988), the court held that "[t]he plain meaning of the word 'party,' as used in DR 7-104 and Model Rule 4.2, does not include persons who are no longer associated with the employer at the time of the litigation." *Id.* at \*6. The court reasoned that to hold otherwise would unduly hinder contacting attorneys' ability to conduct informal discovery, increase the costs of litigation, and possibly decrease the willingness of former employees to provide information. *Id.* The fact that a former employee may have information damaging to the target company "has nothing to do with the question of whether the employee should be considered an alter ego of the employer." *Id.* In *Siguel v. Trustees of Tufts College*, No. 88-0626-Y, 1990 WL 29199 (D. Mass. Mar. 12, 1990), the court determined that the contacting party's "substantial" need to gather information for its case outweighed the target's desire to shield its former employees from ex parte contacts. "DR 7-104(A)(1) simply does not apply in this context, because a former employee enjoys no present, ongoing agency relationship with the corporate party that would make her statements binding on the corporation under Rule 801(d)(2)(D)." *Id.* at \*4 (citing FED. R. EVID. 801(d)(2)(D)); see also Massachusetts Bar Ass'n Comm. on Professional Ethics, Formal Op. 82-7 (1987). Interestingly, the court stated that it had announced "a case-by-case balancing test without announcing a general rule." *Siguel*, 1990 WL 29199 at \*5. However, its order allowed plaintiff "to interview, without prior notice to or consent from defendant's counsel, current and former employees who are not named as individual defendants." *Id.* at \*7.

In *Bobele v. Superior Court*, 245 Cal. Rptr. 144, 147 (Ct. App. 1988), the court held that DR 7-103 does not extend to former employees who are not members of the target corporation's "control group." See *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (definition of "control group"). The cost of formal discovery was an important factor in the court's decision. "Not every witness' testimony is worth the price of a deposition; in fact, many of the former employees which plaintiffs want to interview may not be able to provide any relevant information at all." *Bobele*, 245 Cal. Rptr. at 148. The court concluded that the "minimal risk" of privileged communications being disclosed did not justify placing restrictions on ex parte contacts. *Id.*

46 129 F.R.D. 621 (S.D.N.Y.), *aff'd*, No. 87 Civ. 3297, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. Nov. 15, 1990).

47 *Id.* at 628 (citations omitted). In *Sherrod v. Furniture Center*, 769 F. Supp. 1021 (W.D. Tenn. 1991), the court ruled that ex parte contacts with former employees do not violate Rule 4.2 because the employees have no authority to bind the corporation by their current deeds and statements. In reaching its holding, the court recognized the need to protect less expensive, informal discovery of corporate witnesses. It determined that the best resolution of the issue was to allow all parties "broad latitude" to investigate

In *Action Air Freight, Inc. v. Pilot Air Freight Corp.*,<sup>48</sup> the target contended that contacting counsel violated Rule 4.2 by engaging in ex parte communications with former managers of the target, even though the managers were employed by the *contacting party* at the time of the communication. The court disagreed.<sup>49</sup> It initially stated that former employees lack an existing agency relationship with the former employer and therefore cannot bind it. The court noted that, for the same reason, a statement by a former employee may not be introduced as an admission of the target under Federal Rule of Evidence 801(d)(2)(D).<sup>50</sup>

The court then focused on whether the final category of Rule 4.2, relating to persons whose acts may be imputed to the target corporation, applies to former employees. Recognizing that courts have struggled with this prong of the Rule,<sup>51</sup> the court concluded that contacting counsel may inquire into the facts giving rise to the dispute. Contacting counsel must refrain, however, from soliciting information protected by the target's attorney-client relationship.

The court offered three reasons for its ruling. First, it stated that Rule 4.2's underlying policies do not justify the wholesale exclusion of former employees from the discovery process and should not necessarily chill the flow of harmful information.<sup>52</sup>

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their case.

48 769 F. Supp. 899 (E.D. Pa. 1991), *appeal dismissed*, 961 F.2d 207 (3d Cir. 1992).

49 In reaching its decision, the court first dealt with an interesting conflict of laws question. Defense counsel, a member of the California bar, argued that he should be bound by California's ethical guidelines, not Pennsylvania's. The court first noted that California allowed rules of conduct followed by outside jurisdictions to supplement its own rules. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT 1-100. The court then observed that the California counsel represented a client from Pennsylvania in an arbitration proceeding to be held in Pennsylvania. The court concluded: "Under these circumstances, we find that defense counsel practices in Pennsylvania within the meaning of Rule 1-100. Accordingly, Pennsylvania's professional code governs counsel's conduct." *Action Air Freight*, 769 F. Supp. at 902.

50 *Action Air Freight*, 769 F. Supp. at 903.

51 Compare *Hantz v. Shiley, Inc.*, 766 F. Supp. 258 (D.N.J. 1991) (allowing such contacts with any former employee) and *Curley v. Cumberland Farms*, 134 F.R.D. 77 (D.N.J. 1991) (contacts allowed provided counsel avoids inquiries into information imputable to corporation) and *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 329 (E.D. Pa. 1990), with *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 745 F. Supp. 1037 (D.N.J. 1990) (Rule 4.2 prohibits *all* ex parte contacts with former employees).

52 The court noted that "[t]he interest in preventing inadvertent disclosure of privileged material does not justify a blanket ban on communication with the opposing party's former employees." *Action Air Freight*, 769 F. Supp. at 903 (citing *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 627-28 (S.D.N.Y. 1990), *aff'd*, No. 87 Civ.

Second, the court stated that the Standing Committee of the American Bar Association probably intended the phrase "any other person" in the official comment to apply to *current* agents and servants of the target. The court observed: "Preliminary drafts limited the scope of a Rule 4.2 'party' to managerial employees. The ABA, however, later expanded the definition to include lower level employees and agents involved in the transaction at issue."<sup>53</sup>

Finally, the court decided that the official comment reads most consistently if the phrase "any other person whose act . . . may be imputed to the corporation" imputes liability based on the agency principle. Because former employees do not qualify as agents of the target corporation, the court held, they do not fall within the comment's imputation language.<sup>54</sup> Numerous other courts, writing before ABA Formal Opinion 91-359, similarly adopted a bright line rule permitting *ex parte* contacts with former employees.<sup>55</sup>

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3297, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. Nov. 15, 1990)).

53 *Action Air Freight*, 769 F. Supp. at 904 (citing *Hannitz*, 766 F. Supp. at 264; *Polycast Technology Corp.*, 129 F.R.D. at 627-28).

54 *Id.* at 904. In reaching its decision, the *Action Air Freight* court relied heavily on *Hannitz v. Shiley, Inc.*, 766 F. Supp. 258 (D.N.J. 1991). In *Hannitz*, the court held that Rule 4.2 permits counsel to contact *ex parte* former employees of a corporate target subject to the attorney-client privilege. *Id.* at 265-69. *Hannitz* interpreted the purpose and policies underlying Rule 4.2 to proscribe the type of questioning of former employees, not the contact itself. *Id.* at 271.

In *University Patents, Inc. v. Kligman*, 737 F. Supp. 325 (E.D. Pa. 1990), the court concluded that Rule 4.2 does not appear generally to encompass *ex parte* contacts with former employees, but recognized that some courts prohibit such contacts if the employees held "confidential" positions or their conduct is the subject of the litigation in question. *Id.* at 328 (citing *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 251-53 (D. Kan. 1988); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 40 (D. Mass. 1987)). The court noted that

[t]he underlying policy and Official Comment to the Rule make clear that it was intended to forbid *ex parte* communications with all institutional employees whose acts or omissions could bind or impute liability to the organization or whose statements could be used as admissions against the organization, presumably pursuant to Federal Rule of Evidence 801(d)(2)(D).

*University Patents*, 737 F.Supp. at 328.

55 For example, a trilogy of Delaware courts held in 1990 that such contacts are not prohibited under Rule 4.2. The court in *Diossi v. Edison*, 583 A.2d 1343 (Del. Super. Ct. 1990), decided the issue for the first time in Delaware. The *Diossi* court concluded that the Rule relates only to *present* principals, officers, employees, agents, etc. of a represented entity. "Its clear purpose is to foster and protect the attorney-client relationship and not to provide protection to a party in civil litigation nor to place a limit on discoverable material." *Id.* at 1345. The *Diossi* holding was subsequently reaffirmed by two other Delaware courts. *Monsanto Co. v. Aetna Casualty and Sur. Co.*, 593 A.2d 1013, 1016 (Del. Super. Ct. 1990) ("Rule of Professional Conduct 4.2 does not prohibit contacts with former employees since the former employees are not 'parties' to the litigation and cannot bind their former employers."); *National Union Fire Ins. Co. v. Stauffer Chem. Co.*,

Federal district courts that have considered ABA Formal Opinion 91-359 largely have adopted it. In *Shearson Lehman Bros. v. Wasatch Bank*,<sup>56</sup> the court "join[ed] the ranks" of those who have held that former employees do not fall within the scope of Rule 4.2. In relying on the conclusion of the ABA, the court held that Rule 4.2 and its comment "act[] as a limitation on present corporate employees covered by the rule."<sup>57</sup>

Similarly, in *Dubois v. Gradco System, Inc.*,<sup>58</sup> the court relied in part on ABA Formal Opinion 91-359 in holding that Connecticut's analogue to Rule 4.2 does not prohibit ex parte contacts with former employees. The court reasoned that if the "other person" language in the official comment was meant to refer to former employees, then the drafters very easily could have made that reference explicit. The court noted that "there seems little doubt that the drafters would have been explicit had they intended, as defendants claim they did intend, to overturn the traditional view that former employees are not encompassed within the term 'party.'"<sup>59</sup> Most other courts that have considered ABA Formal Opinion 91-359 have adopted it.<sup>60</sup>

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No. 87C-SE-11, 1990 WL 161717 (Del. Super. Ct. Oct. 16, 1990) (allowing former employees of a corporate adversary to be interviewed ex parte if the party's counsel identifies himself or herself, advises that a controversy exists between the parties, and ensures that the former employees are not represented by counsel). Other courts have handed down similar holdings. See *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992) ("Because former employees may not speak for or bind the corporation, ex parte communications with former employees are not prohibited."); *Amland Properties v. Alcoa*, 711 F. Supp. 784 (D.N.J. 1989) (Rule 4.2 and its comment offer "no indication whatsoever" that the Rule was intended to apply to former employees).

56 139 F.R.D. 412 (D. Utah 1991).

57 *Id.* at 417. In a preview to its holding in *Wasatch Bank*, the court ruled in *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560 (D. Utah 1990), that the relevant Utah ethics rules did not prohibit an attorney from communicating with low level current employees of a corporate adversary. Citing DR 7-104(A)(1), the court reasoned that direct communications were prohibited only with those currently employed officials who had legal power to bind the corporation or who were responsible for implementing the advice of the corporation's lawyer.

58 136 F.R.D. 341 (D. Conn. 1991).

59 *Id.* at 345. Another Connecticut court has adopted the reasoning of *Dubois*. In *Carrier Corp. v. Home Insurance Co.*, No. 35-23-83, 1992 Conn. Super. LEXIS 326 (Conn. App. Ct. June 10, 1992), the court held that the target did not meet its burden of showing good cause for a protective order restricting contacting counsel from conducting ex parte interviews of the target's former employees. Citing *Dubois*, the court ruled that contacts with former employees are not prohibited under Rule 4.2. The court noted that the "traditional view" is that former employees are not encompassed within the term "party." *Id.* at \*2.

60 Based on Formal Opinion 91-359, the court in *In re Domestic Air Transportation*

Based on reasoning identical to that relied on by the court decisions, many state ethics panels have concluded that Rule 4.2 and DR 7-104(A)(1) do not prohibit ex parte contacts with former corporate employees. The state bar associations of Alaska, California, Colorado, Connecticut, Florida, Illinois, Maryland, Massachusetts, Minnesota, and Virginia have ruled that such contacts are not prohibited, regardless of the position the individual formerly held with the target corporation.<sup>61</sup> Various city and county bar

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Litigation, 141 F.R.D. 556, 561 (N.D. Ga. 1992), held that "Rule 4.2 does not prohibit communications with former employees of a defendant corporation as long as the former employees are not in fact represented by the corporation's attorney." In *Aamco Transmissions, Inc. v. Marino*, Nos. 88-5522, 88-6197, 1991 WL 193502 (E.D. Pa. Sept. 24, 1991), the court relied on a Pennsylvania Bar Association formal ethics opinion and ABA Formal Opinion 91-359 in holding that Rule 4.2 permits an attorney to communicate ex parte with any former employee, provided that certain conditions are followed. See *infra* notes 85-87 and accompanying text.

The court in *In re Environmental Insurance Declaratory Judgment Actions*, 600 A.2d 165 (N.J. Super. 1991), also cited ABA Formal Opinion 91-359 in holding that it was permissible under Rule 4.2 for attorneys and their investigators to contact former employees of an adversary, provided that they identified themselves and informed the employees of the lawsuit. The court reasoned that Rule 4.2 applies only "to those who continue to be employed by the organization who may have relevant knowledge important to the case." *Id.* at 168. In concluding that the Rule was intended to preclude communications with only those who could currently bind or admit liability for the represented entity, the court emphasized the great value of informal interviews in the discovery process. It noted that "[i]nterviews, as discovery tools, provide an attorney with the opportunity to informally contact adverse witnesses and other non-parties in an effort to discover the truth." *Id.* at 170. The court in *Neil S. Sullivan Associates, Inc. v. Medco*, 607 A.2d 1386 (N.J. Super. 1992), cited the *In re Environmental* decision and ABA Formal Opinion 91-359 as persuasive in holding that contacting counsel was permitted to conduct an ex parte telephone interview with a corporate target's former employee. The *Sullivan* court concluded that these authorities "reflect the proper interpretation of [Rule] 4.2." *Id.* at 1389 (also citing *Hannitz v. Shiley, Inc.*, 766 F. Supp. 258 (D.N.J. 1991) (permitting ex parte contacts with former employees)).

Finally, the court in *Valassis v. Samelson*, No. 91-CV-74029, 1992 WL 158720 (E.D. Mich. July 2, 1992) relied on ABA Formal Opinion 91-359. In *Valassis*, the court ruled that a former corporate employee is not a "party" to a lawsuit for purposes of Rule 4.2. The court thus refused to enjoin contacting lawyers from communicating ex parte with a corporate target's former controller, who at the time of suit worked for the contacting party. The court reasoned that because the former employee was not an "agent" for the target, she was not a "party" under Rule 4.2. The court concluded that if an individual is not such an agent, then she cannot be a party because she "lacks any relevant connection to the organization which could reasonably place [her] in the role of the party." *Id.* at \*4. After considering ABA Formal Opinion 91-359, the court in *Lang v. Superior Court*, 826 P.2d 1228 (Ariz. Ct. App. 1992), decided to adopt a more narrow approach. The court refused to adopt the ABA's per se rule because it concluded that such a rule would not comply with Rule 4.2's prohibition of contacts with persons whose acts or omissions in connection with the matter in litigation might be imputed to the target. See *infra* notes 63-91 and accompanying text.

61 Ethics Comm. of the Alaska Bar Ass'n, Op. 88-3 (1988); Ethics Comm. of the

associations have adopted the same approach.<sup>62</sup> Just as with the courts allowing ex parte contacts, these bar associations have recognized only two limitations: (1) the lawyer may not divulge or seek to divulge information protected by the attorney-client privilege; and (2) the lawyer may not contact the former employee ex parte if he is represented by counsel.

### B. Authority Adopting a Flexible Approach

Some courts and ethics panels have adopted a flexible approach to ex parte contacts with former employees. This approach permits such contacts if the target cannot demonstrate that the acts or omissions of the former employee will be imputed to the organization.

The most frequently cited decision adopting a flexible approach is *Amarin Plastics, Inc. v. Maryland Cup Corp.*<sup>63</sup> In *Amarin Plastics*, the court held that informal contact with former employees generally is permissible under DR 7-104(A)(1) absent a showing that the acts or omissions of the former employee are imputable to the target.<sup>64</sup> The court assumed that the "imputation" language in the comment to DR 7-104(A)(1) applies to former employees and noted that the target, in this case, did not meet the required burden.<sup>65</sup>

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Alaska Bar Ass'n, Op. 91-1 (1991) (reaffirming Ethics Op. 88-3); CALIFORNIA RULES OF PROFESSIONAL CONDUCT 2-100 (and drafter's notes regarding Paragraph (B))(1989); Colorado Bar Ass'n, Revised Ethics Op. 69 (1987); Connecticut Bar Ass'n, Informal Op. 88-17 (1988); Professional Ethics Comm. of the Florida Bar Ass'n, Proposed Advisory Op. 88-14 (1988); Comm. on Professional Ethics of the Illinois State Bar Ass'n, Op. 85-12 (1985); Comm. on Ethics of the Maryland State Bar Ass'n, Op. 86-13 (1986); Ethics Comm. of the Massachusetts Bar Ass'n, Formal Op. 82-7 (1987); Ethics Comm. of the Massachusetts Bar Ass'n, Formal Op. 88-5 (1988) (reaffirming Formal Op. 82-7); Minnesota Lawyers Professional Responsibility Bd., Op. 4 (1986); Standing Comm. on Legal Ethics of the Virginia State Bar, Op. 533 (1983); Standing Comm. on Legal Ethics of the Virginia State Bar, Op. 905 (1987). *But see* Standing Comm. on Legal Ethics of the Virginia State Bar, Op. 651 (1985) (improper for attorney to obtain information or documents from former employee by conduct "involving dishonesty, fraud, deceit or misrepresentation").

62 See, e.g., Legal Ethics Comm. of the District of Columbia Bar, Op. 129 (1983); Comm. on Professional Ethics of the Bar Ass'n of Nassau County, Op. 86-33 (1986); Comm. on Professional Ethics of the Ass'n of the Bar of City of New York, Op. 80-46 (1982); Comm. on Professional Ethics of the Ass'n of the Bar of City of New York, Op. 528 (1964).

63 116 F.R.D. 36 (D. Mass. 1987).

64 In reaching its decision, the court relied on the Massachusetts Bar Ass'n Comm. on Professional Ethics, Formal Op. 82-7 (1982), which held that DR 7-104(A)(1) "applies only to present, not former, employees of the corporation." *Amarin Plastics*, 116 F.R.D. at 39.

65 *Amarin Plastics*, 116 F.R.D. at 40. The *Amarin Plastics* court recognized that the

The court in *Lang v. Superior Court*<sup>66</sup> also adopted a flexible approach. The court held that, generally speaking, counsel may contact former employees of a corporate adversary *ex parte*. The court stated, however, that counsel cannot contact a former employee *ex parte* if that employee's acts or omissions give rise to the underlying litigation or if that employee has an ongoing relationship with the target in connection with the litigation.<sup>67</sup> While the court stated that "the better approach" under the rules of ethics is to permit *ex parte* contacts,<sup>68</sup> it refused to adopt a per

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attorney-client privilege and work product exception further narrow the scope of permissible *ex parte* contacts with former employees. *Id.* The court warned that if contacting counsel seeks in any way to cause the former employee to divulge confidential attorney-client communications or work product, "such conduct will constitute sufficiently abusive conduct to impose discovery sanctions." *Id.* at 42. The court made clear, however, that contacting counsel could freely question former employees about the facts surrounding the dispute without implicating privilege concerns. *Id.* at 41.

Another court has indicated, albeit in dictum, that *ex parte* contacts with former employees are generally permissible absent a showing that the acts or omissions of the particular former employee are imputable to the corporation. *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988). The employees at issue, however, were present employees.

66 826 P.2d 1228 (Ariz. Ct. App. 1992).

67 *Id.* at 1233. In reaching its holding, the court recognized that no Arizona case had addressed this issue and no definitive ethics opinion had decided this question. *Id.* at 1230. In fact, it recognized that Arizona ethics committees had issued conflicting opinions on the issue. *Id.* It noted that in one alternative opinion, the Ethics Committee allowed *ex parte* contacts with a former employee regardless of the employee's former position in the organization and regardless of whether the employee's acts or omissions were at issue in the litigation. *Id.* at 1232 (citing Arizona Comm. on the Rules of Professional Conduct, Formal Op. 89-05, Alternative Op. (A) (1989)). By contrast, the same Committee issued an alternative opinion prohibiting such contacts only if the employee's acts or omissions could be imputed to the target for purposes of establishing liability, or if the employee engaged in privileged communications with the target's counsel. *Id.* (citing Arizona Formal Op. 89-05, Alternative Op. (B)).

68 The court offered three reasons why it thought this approach to be better:

First, neither the rule nor its comments specifically mention former employees. Had the rule been intended to cover former employees, it could have explicitly said so. Second, the rule does not ban all *ex parte* contacts, but only those with individuals listed in the comments. There is no reason to expand the scope of the ban once the employment relationship ends. Third, we agree with the *Polycast Technology* court that neither the threat of disclosure of confidential information nor the desire to protect the organization from liability-creating statements justifies a blanket ban on *ex parte* communications. These concerns are best dealt with on a case-by-case basis. Also, any movement away from informal discovery procedures will greatly increase the cost of litigation.

*Id.* at 1233 (citing *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y.), *aff'd*, No. 87 Civ. 3297, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. Nov. 15, 1990)); see also *supra* notes 46-47 and accompanying text.

se rule "simply because the individual is a former employee."<sup>69</sup> In approving the distinction drawn in *Amarin Plastics*, the *Lang* court reasoned that a per se rule "does not comply with the requirement of ER 4.2 of prohibiting *ex parte* contacts with persons whose acts or omissions in connection with the matter may be imputed to the organization."<sup>70</sup>

After weighing the alternatives, a court in another recent case applied a flexible approach as well. In *Curley v. Cumberland Farms, Inc.*,<sup>71</sup> the court held that Rule 4.2 did not under the circumstances preclude the target's eighty low-level former employees from being contacted *ex parte*.<sup>72</sup> The court reasoned that if the target party could show that the former employees could impute civil or criminal liability to the target, then Rule 4.2 might limit such contacts. The court concluded that a possibility of imputation was not enough.<sup>73</sup>

The court grounded its holding on the dichotomy between ethics and discovery, stating:

RPC 4.2 is designed to protect the attorney-client relationship, not to control the flow of information relevant to a lawsuit. The courts cannot permit ethical rules to be used by a party to chill the flow of potentially harmful information to opposing counsel where the danger of an ethical violation is minute.<sup>74</sup>

The court recognized that barring such contacts based on a hypothetical possibility of harm to a corporate party would cause the "already substantial costs of litigation to skyrocket and would result in an enormous expenditure of time not mandated by the ethical rule contained in [Rule] 4.2."<sup>75</sup> To protect the interests of the

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69 *Lang v. Superior Court*, 826 P.2d 1228, 1233 (Ariz. Ct. App. 1992).

70 *Id.* As an example, the court noted that if an employee truck driver is involved in an accident during the course and scope of his employment, the fact that the employee subsequently leaves his employment should not determine the propriety of *ex parte* communications. *Id.* "Clearly, the employee's acts or omissions in connection with any litigation that arises out of the accident can be imputed to the former employer for purposes of civil liability. Obviously, the former employer's lawyer should be given the opportunity to consent to an *ex parte* contact with that employee." *Id.*

71 134 F.R.D. 77 (D.N.J. 1991).

72 *Id.* at 82. In so holding, the court refused to follow an opinion in the same district that prohibited all contacts with former employees of a corporate party. *Public Servs. Elec. & Gas v. Associated Elec. & Gas Ins. Servs.*, 745 F. Supp. 1037 (D.N.J. 1990); see *infra* Part VC.

73 *Curley*, 134 F.R.D. at 82.

74 *Id.* at 82-83 (citing *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 326 (E.D. Pa. 1990); *Frey v. Dep't of Health & Human Servs.*, 106 F.R.D. 32, 34 (E.D.N.Y. 1985); *Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984)).

75 *Curley*, 134 F.R.D. at 82. In reaching its result, the court was especially interested



target, however, the court approved certain guidelines for ex parte contacts with former employees.<sup>76</sup>

The court in *PPG Industries, Inc. v. BASF Corp.*<sup>77</sup> also employed a balancing approach that provided some protection for the target. In *PPG Industries*, an employee who was instrumental in developing a trade secret for PPG left that company to join a competitor, BASF. In subsequent trade secret litigation, PPG contended that BASF's contact with the "crossover" employee violated Rule 4.2. The court held, however, that BASF's interest in communicating with its current employee was stronger than PPG's interest in protecting communications with its former employee.<sup>78</sup> The court did not want to restrict BASF's right to conduct informal discovery because PPG's interest in protecting its trade secret did not outweigh BASF's interest in defending itself, especially where PPG admitted that the secret already had been lost to BASF.<sup>79</sup>

The court further opined that the former employee's statements were not binding on PPG so as to come within Rule 4.2's

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in saving the parties "the considerable time and expense of perhaps 80 discovery depositions, many of which may be of little or no usefulness to either side." *Id.* at 95.

76 *Id.* at 94. For example, the court required the contacting counsel to log efforts to contact former employees by date, time, effort undertaken, result, and person sought or contacted. Additionally, the contacting counsel had to determine whether the individual contacted was represented by counsel, had to maintain notes of such contacts detailing the facts obtained, and had to memorialize any statements in their entirety. *Id.* Upon request, the contacting counsel had to provide the target with the log entries, counsel notes, and witness statements. *Id.* Moreover, the court stated that "[p]laintiffs' counsel shall seasonably supplement these items as they accrue, and shall serve copies of same with respect to each month's activities not later than the 7th day of the month following such contact." *Id.* at 94. The court concluded that these procedures would adequately inform the target of the contacting party's informal discovery efforts. *Id.* at 95. For a more detailed discussion of the *Curley* court's guidelines for ex parte contacts, see *infra* Part VD.

77 134 F.R.D. 118 (W.D. Pa. 1990).

78 *PPG Industries*, 134 F.R.D. at 123. For another case involving a "crossover" employee situation, see *Valassis v. Samelson*, No. 91-CV-74029, 1992 WL 158720 (E.D. Mich. July 2, 1991) (holding that Rule 4.2 does not prohibit lawyer from communicating ex parte with target's former controller, who worked for contacting party, regarding non-privileged information); see *supra* note 60.

79 The court recognized PPG's strong interest in protecting the confidentiality of communications between the former employee and PPG's counsel that took place before the employee joined BASF. To guard PPG's interest, the court required counsel for BASF to provide the former employee with a copy of the court's opinion and instruct him to read it prior to any informal meeting between counsel and the former employee. *PPG Industries*, 134 F.R.D. at 123. The court further required counsel for BASF to advise the employee that he could not disclose any communications between PPG's counsel and himself. The court permitted BASF's counsel to question the employee about facts, but not privileged communications with PPG's counsel. *Id.* at 123-24.

comment because Federal Rule of Evidence 801(d)(2)(D) applies only to statements made during the existence of the employment relationship.<sup>80</sup> While it recognized that a former employee's past acts could be imputed to the corporate employer under certain circumstances,<sup>81</sup> the court determined that the case at hand did not present this possibility.

In *Porter v. Arco Metals*,<sup>82</sup> the court interpreted the word "party" to encompass only those employees who have legal authority to bind the corporation in an evidentiary sense, that is, those employees who have "speaking authority" for the corporation.<sup>83</sup> The court held that ex parte contacts were permissible so long as the plaintiff did not inquire into privileged areas of communication and did not interview present or former employees with "managerial responsibilities concerning the matter in litigation."<sup>84</sup>

Several state ethics committees have adopted flexible approaches to determine whether ex parte contacts with former employees are permissible. For example, the Pennsylvania Bar Association's Committee on Legal Ethics recognized that an orga-

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80 *Id.* at 121. The court overlooked statements originally made *during* employment that were repeated or revealed *after* employment ceased. Arguably, one could treat such statements as admissions because the individual was an employee when he made the statements originally. The comment to Rule 4.2, however, may not encompass this scenario because it speaks in terms of a *present* ability to make admissions. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983).

81 The court cited the following example: Plaintiff sues corporation X for wrongful discharge, alleging that Y, a former supervisory employee of corporation X, actually did the firing. Even though Y is no longer an employee of corporation X, "it is his act which may be imputed to the corporation for purposes of its liability." *PPG Industries*, 134 F.R.D. at 121. Given these circumstances, the court would extend the prohibition against ex parte communications to individual Y. *Id.* at 121.

82 642 F. Supp. 1116 (D. Mont. 1986).

83 *Id.* at 1118. In reaching this decision, the court was influenced by *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984).

84 *Porter*, 642 F. Supp. at 1118. In *Erickson v. Winthrop Laboratories*, 592 A.2d 33, 36 (N.J. Super. Ct. Law Div. 1991), the court similarly held that ex parte contacts with former employees were improper under Rule 4.2 when, *inter alia*, the individual contacted was in a managerial, directorial, or high level position in a corporation or when the employee's act or omission could be imputed to a defendant for civil or criminal liability.

The *Erickson* court refused to adopt a "bright line" approach prohibiting ex parte contacts, stating that Rule 4.2 "was simply not drafted in such a manner." *Id.* at 36. However, the court did recognize the corporate adversary's interest in shielding its former managerial or directorial employees from informal discovery: "Plaintiffs' counsel shall determine whether the person contacted was a manager, director or high-level employee and, if so, shall terminate the contact before discussing the subject matter of this case and shall release the name and address of said person to defendants." *Id.* The court further stated that this protection "will serve to prevent any prejudice to the defendants while allowing the plaintiff to conduct discovery in an efficient manner." *Id.*

nization has a proprietary interest in controlling the testimony of former employees, but deemed it less significant than an opposing party's discovery rights.<sup>85</sup> The Committee concluded: "With appropriate safeguards, the risk of overreaching by the investigating party should be minimized, while at the same time protecting an attorney's right to learn and assemble information off-the-record without fear of facing disciplinary action or disqualification."<sup>86</sup>

The Committee devised the following safeguards:

(1) the attorney (or anyone under her direction) is prohibited from eliciting or using information that may be protected by the attorney-client privilege;

(2) the attorney immediately must disclose her capacity to the former employee;

(3) if the person contacted requests that her personal attorney or the company's attorney be present for the interview, the request must be honored; and

(4) the attorney should advise such persons that they have the right to refuse to be interviewed or, if they wish, to be interviewed with the company's counsel present.<sup>87</sup>

Ethics committees in other states have adopted similar balancing approaches. For example, in Informal Ethics Opinion CI-597, the State Bar of Michigan ruled that counsel can communicate with a former employee when the employee is not represented by counsel, and when there is no reasonable possibility to believe that

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85 Pennsylvania Bar Ass'n Comm. on Legal Ethics, Formal Op. 90-142 (1990). The Committee first reviewed the current standards for determining who is a "party" under Rule 4.2. The standards include: (1) the "control group" test, most recently applied in *Fair Automotive Repair, Inc. v. Car-X Service System, Inc.*, 471 N.E.2d 554 (Ill. Ct. App. 1984); see *Upjohn Co. v. United States*, 449 U.S. 383, 395-97 (1981) (definition of "control group"); (2) the "managing-speaking agent" test of *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984); (3) the "scope of employment" test as illustrated in *Morrison v. Brandeis University*, 125 F.R.D. 14, 17 (D. Mass. 1989); (4) the "interest balancing test" also illustrated in *Morrison*; and (5) the approach adopted by the court in *Niesig v. Team I*, 545 N.Y.S.2d 153 (App. Div. 1989), *modified*, 558 N.E.2d 1030 (N.Y. 1990). See generally Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Formal Op. 90-142 (1990) at 5-9.

86 Pennsylvania Bar Ass'n Comm. on Legal Ethics, Formal Op. 90-142 (1990) at 12.

87 *Id.* at 12-13. The Committee concluded that when an attorney is in doubt about whether she is authorized to pursue informal discovery of current or former employees, she should seek the consent of opposing counsel or court approval prior to any contact.

One court, in applying the Pennsylvania Bar Association's opinion, denied a motion in limine to exclude documents obtained informally from a former employee of a target. *Aamco Transmissions, Inc. v. Marino*, Civ. A. Nos. 88-5522, 88-6197, 1991 WL 193502 (E.D. Pa. Sept. 24, 1991) (noting that the Pennsylvania Bar Association opinion permits ex parte contacts with any former employee, provided that the contacting attorney follows specified conditions).

the employee's interest will conflict with the interest of the client.<sup>88</sup> In reaching this result, the Committee balanced "the need for proper ethical conduct against the efficient operation of the adversary system."<sup>89</sup> Moreover, the West Virginia<sup>90</sup> and Wisconsin<sup>91</sup> state bar associations also have adopted balancing approach-

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88 Michigan Bar Ass'n Comm. on Ethics and Professional Responsibility, Formal Op. CI-597 (1990). The Committee recommended that the lawyer advise the witness to seek counsel if it becomes apparent that the interests of the witness and client may be adverse. *Id.* at 1. Furthermore, the Committee stated that the interview should be adjourned until the witness has an opportunity to consult counsel. *Id.* at 3 ("All doubts on this subject should be resolved in favor of non-communication unless otherwise authorized by law or Court Order.").

89 *Id.* at 4. The Committee required contacting counsel, at the outset of the interview with the former employee, to: (1) determine that the person is not a party to the litigation; (2) ensure that the person is not represented by an attorney; (3) identify himself as an attorney for the adverse party in pending litigation involving a former corporate employer; and (4) state the purpose of the communication to the person. *Id.*

In applying these guidelines, one court suppressed the work product of a contacting attorney's investigators because the investigators failed to identify themselves before interviewing the target's former employees. *Upjohn Co. v. Aetna Casualty & Surety Co.*, 768 F. Supp. 1186, 1196 (W.D. Mich. 1990); *see also* Valassis v. Samelson, No. 91-CV-74029, 1992 WL 158720 (E.D. Mich. July 2, 1992) (holding that Rule 4.2 does not prohibit lawyer from communicating ex parte with corporate opponent's former controller regarding non-privileged information); *supra* note 60.

90 The West Virginia State Bar concluded in Legal Ethics Inquiry 87-1 (1987) that all directors, officers, and managing agents employed by the target at the time of the incident that gave rise to the lawsuit are not subject to inquiry absent approval by the target's attorney or as otherwise authorized by law. *Id.* However, the Committee stated that former employees or directors, officers, and managing agents from other time periods are subject to such inquiry. *Id.*

Consistent with Legal Ethics Inquiry 87-1, the court in *Dent v. Kaufman*, 406 S.E.2d 68 (W. Va. 1991), defined the term "party" in Rule 4.2 "to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." *Id.* at 72. The court held that the Rule "would permit direct access to all other employees," including former employees. *Id.* (citing *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990)). The *Dent* court noted that this test best balances the competing interests and incorporates the most desirable elements of the other approaches. *Id.* Furthermore, the court stated that it is important to remember that rules of professional conduct, not rules of evidence, are at issue and rules of conduct do not protect corporate parties from the revelation of prejudicial facts. *Id.* (citing *Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984)).

91 In Ethics Opinion E-82-10, the State Bar of Wisconsin ruled that it is improper to interview any officer or employee of a corporate adversary who has the authority to "commit" the corporation. State Bar of Wisconsin, Ethics Op. E-82-10 (1982). However, the Committee determined that a former managing officer may be interviewed as a prospective witness if that individual has severed all ties with the corporation so that he would not be a party by implication. Still, the Committee instructed that the contacting attorney should first advise the former employee that he may have a continuing duty to the target corporation not to reveal any confidential information that he may have acquired during the course of his employment. *Id.* at 2.

es for determining the propriety of ex parte contacts with former employees.

*C. Authority Prohibiting Ex Parte Contacts with Former Employees*

Only one court has ruled that ex parte contacts with former employees are prohibited in all circumstances. In *Public Service Electric & Gas Co. v. Associated Electric & Gas Insurance Services, Ltd.*,<sup>92</sup> the district court reviewed a magistrate's decision that required the contacting counsel to give the target party two days notice before he approached any of the target's former employees.<sup>93</sup> The magistrate further required the contacting counsel to send a warning letter to the employee delineating the nature of the lawsuit and the purpose of the requested interview.<sup>94</sup>

The district court reversed the magistrate's decision and held that Rule 4.2 prohibits all informal contacts with a target's former employees.<sup>95</sup> To reach its conclusion, the court relied on the Rule's dual purpose: (1) to preserve the integrity of the lawyer-client relationship; and (2) to prevent lawyers from extracting damaging concessions from laymen.<sup>96</sup> The court recognized the difficulty of applying Rule 4.2 to a corporation, and instead focused on whether a former employee's act or omission may be imputed to the organization.<sup>97</sup>

Curiously, the court in *Public Service Electric & Gas* heavily relied on the vacated decision of *Sperber v. Washington Heights-West Harlem-Inwood Mental Health Counsel*.<sup>98</sup> In *Sperber*, the district court held that the phrase "any other person" in the official comment to Rule 4.2 "is plainly broad enough to cover certain former em-

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The State Bar of Wisconsin supplemented Opinion E-82-10 with Opinion E-91-1. Although the later opinion dealt with communications with an opposing party's present agents or employees, a portion of it arguably applies to former employees as well. State Bar of Wisconsin, Ethics Op. E-91-1 (1991). In relevant part, the Committee noted that "[i]f the statements of these employees cannot constitute admissions on the part of the organization, attorney A may communicate with these employees regarding the representation." *Id.* at 1.

92 745 F. Supp. 1037 (D.N.J. 1990).

93 *Id.* at 1038, 1043-44.

94 *Id.*

95 *Id.*

96 *Id.* at 1042.

97 *Id.*

98 No. 82 Civ. 7428 (S.D.N.Y. Nov. 21, 1983), *vacated and withdrawn* (Dec. 13, 1988); see also *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988) ("When a former employee's acts or omissions in connection with the matter in representation may be imputed to the corporation, then he or she may be a 'party.'").

ployees."<sup>99</sup> The *Public Service Electric & Gas* court agreed with the *Sperber* court's interpretation and noted that the dispositive inquiry is "whether, in this case, a former employee's acts or omissions could be imputed, *under any factual scenario*, to the organization."<sup>100</sup>

The *Public Service Electric & Gas* court emphasized that the harm caused by an imputable act is the same whether the witness is a present or former employee. It stated that a change in employment status does not affect whether the act is imputable to the target.<sup>101</sup> The court further recognized the following paradox: One can determine whether an individual's acts or omissions will be imputable to the target only after that individual has testified about those acts or omissions.<sup>102</sup> The court deemed it unworkable to require the target "to make a showing concerning an individual's projected testimony prior to prohibiting *ex parte* contact with the individual."<sup>103</sup>

The court also rejected as unworkable the notion of allowing *ex parte* contacts on the condition that the contacting attorney cease questioning if it appeared that the former employees were divulging imputable information. This, the court believed, would spawn needless procedural litigation and place undue faith in the contacting party.<sup>104</sup> Therefore, the court held that the best resolution was to make former employees off limits for *ex parte* contacts.<sup>105</sup> By prohibiting contacts with former employees, the court reconciled its decision with the dual policy goals of Rule 4.2. Specifically, the court nullified the opportunity for overreaching by

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99 *Sperber*, slip op. at 3.

100 *Public Serv. Elec. & Gas v. Assoc. Elec. & Gas Ins. Servs. Ltd.*, 745 F. Supp. 1037, 1040 (D.N.J. 1990) (emphasis added). In concluding that this aspect of the comment is "expansive," the court rejected the argument that the Rule does not apply to former employees because they cannot bind or make admissions on behalf of their former employer. *Id.* The court noted that "Section Two applies in the far broader context of any individual whose acts or omissions 'may' be imputed to the organization." *Id.* at 1041. The court also rejected the argument that former employees are free parties because they cannot make statements admissible against a former principal or employer under hearsay rules exceptions. *Id.* "While it is true that a former employee witness cannot testify clear of the hearsay rule on all aspects of his employment, this fact does not *ipso facto* establish that his hearsay free testimony will not be imputed to the organization." *Id.*

101 *Id.* at 1042.

102 *Id.*

103 *Id.* Such a procedure would, according to the court, require the target to divulge facts which would ordinarily be developed through the deposition process. *Id.*

104 *Id.*

105 *Id.*

the contacting party and also protected the target's interest in knowing the acts, omissions, or transactions at issue. The court then concluded that its approach would be easy to apply and would give clear guidance to the bar.<sup>106</sup>

Attempting to diffuse potential criticism of its bright line approach, the court down played the importance of informal interviews and the hardship caused by requiring the contacting parties to depose former employees. The court stated:

In the context of litigation involving an organization, the importance of the informal interview is greatly exaggerated, particularly when its use threatens to produce needless and costly procedural litigation. Today's result eliminates this hydra without foreclosing [a] litigant's access to vital factual information. Indeed, prompt use of the deposition process will ultimately produce less procedural haggling and thus may be, in the long run, more cost efficient.<sup>107</sup>

Besides the *Sperber* opinion, which the court subsequently withdrew, few other courts have indicated a willingness to shield former employees from ex parte contacts under all circumstances.<sup>108</sup>

#### D. Authority Establishing Discovery Standards

Notwithstanding the numerous decisions in this area, the tribunals only occasionally fashioned discovery procedures governing ex parte contacts and always did so on an ad hoc basis.<sup>109</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1043. In reaching its decision, the court therefore demonstrated a bias toward the deposition process, considering it the "best method" for developing a factual record and for protecting the rights of all parties equally. *Id.*

<sup>108</sup> In *American Protection Insurance Co. v. MGM Grand Hotel-Las Vegas*, Nos. CV-LV-82-26-HDM, CV-LV-82-96-HDM (D. Nev. March 11, 1986), *vacated and withdrawn*, (LEXIS Genfed. library, Dist. file), a former employee and consultant for MGM, who was privy to confidential information surrounding the dispute, sought to become a consultant for American Protection. The court disqualified American Protection's counsel for talking to the former employee and held that former employees should not be permitted to sell their allegiance to the highest bidder. *Id.* The fact that the former employee had initiated the contact with American Protection's counsel was immaterial. *Id.*; see also *Kitchen v. Aristech Chem.*, 769 F. Supp. 254 (S.D. Ohio 1991) (assuming arguendo that plaintiffs' attorney violated Ohio Code of Professional Responsibility DR 7-104(A)(1) by communicating with former employee of the defendant, disqualification not warranted because no showing of prejudice); *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116 (Ohio 1991) (reinstating an injunction barring a former engineer, who had received law degree while working for company, from discussing confidential and privileged information received during that employment).

<sup>109</sup> See, e.g., *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 82-83 (D.N.J. 1991)

Moreover, some courts and ethics committees articulated the interests to be protected during ex parte contacts, but then incompletely described the steps by which the parties should achieve that result.<sup>110</sup> Nevertheless, the cases that attempted to establish ad hoc discovery standards are instructive for developing a rule for all cases.

In *PPG Industries, Inc. v. BASF Corp.*,<sup>111</sup> the court endeavored to provide safeguards against the potential problems surrounding ex parte contacts. It required the contacting party to provide a copy of the court's opinion to the former employee, instruct him to read it, and further instruct him not to disclose any prior communications he had with the target party's counsel.<sup>112</sup> Similarly, in *Oak Industries v. Zenith Industries*,<sup>113</sup> the court required the contacting party to give its interview notes to the target party.<sup>114</sup> Other courts have required that the contacting attorney, at a minimum: (1) identify himself and the capacity in which he has been retained; (2) identify the litigation and the purpose of the contact; (3) ask whether the interviewee is represented by counsel; and (4) ask for permission from the target to inquire into issues raised in the litigation.<sup>115</sup>

The most thorough effort to control discovery in a former employee setting appeared in *Curley v. Cumberland Farms, Inc.*<sup>116</sup>

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(holding that Rule 4.2 is a rule of ethics, not a rule of procedure); Pennsylvania Bar Ass'n Comm. on Legal Ethics, Formal Op. 90-142 (Dec. 7, 1990) (target party's proprietary interest in controlling former employee's testimony counterbalanced by contacting party's discovery rights).

110 For example, a common exhortation by courts and ethics committees is that, when interviewing a former employee in an ex parte situation, the contacting party should refrain from inquiring into privileged information. See, e.g., *Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 904 (E.D. Pa. 1991) ("[Contacting] counsel may inquire into the underlying facts giving rise to the dispute but must refrain from soliciting information protected by the [target's] attorney-client relationship."); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36, 42 (D. Mass. 1987); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986); *Nassau County Bar Ass'n Professional Ethics Comm.*, Op. 86-33 (1986); *New York County Lawyers Ass'n Comm. on Professional Ethics*, Op. 528 (1964).

111 134 F.R.D. 118 (W.D. Pa. 1990).

112 *Id.* at 123-24.

113 No. 86-C-4302, 1988 U.S. Dist. LEXIS 7985 (N.D. Ill. July 27, 1988).

114 *Id.* at \*6.

115 See, e.g., *Siguel v. Tufts College*, No. 88-0626-Y, 1990 WL 29199 (D. Mass. March 12, 1990); *Upjohn Co. v. Aetna Cas. & Sur. Co.*, 768 F. Supp. 1186 (W.D. Mich. 1990); *Morrison v. Brandeis Univ.*, 125 F.R.D. 14 (D. Mass. 1989); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013 (Del. Super. Ct. 1990); *In re Environmental Ins. Declaratory Judgment Actions*, 600 A.2d 165 (N.J. Super. Law Div. 1991).

116 134 F.R.D. 77 (D.N.J. 1991).



In *Curley*, the court set forth the following requirements for contacting the target party's former employees:

1. The contacting party was required to maintain a log of its efforts to contact the former employees, including the identity of the former employee sought or contacted, the date and time of the attempted contact, the efforts undertaken to make the contact, and the result of the efforts.
2. The contacting party was required to determine whether the former employee was personally represented by legal counsel and, if so, to terminate the contact and indicate this information in the contact log.
3. The contacting party was required to make and maintain notes reflecting the substance of the facts acquired from each former employee contacted.
4. The contacting party was required to memorialize any written or oral statement given by the former employee.
5. Within seven days of a request by the target party, the contacting party was required to produce to the target party the materials created under paragraphs (1) through (4) and to continue to supplement these productions. The court expressly did not require, however, the production of core work product, such as tactics or impressions obtained through the contacts.
6. The court expressly reserved the parties' rights to depose any former employee.<sup>117</sup>

In setting forth these guidelines, the *Curley* court sought to reconcile the contacting party's desire to inexpensively gain potentially relevant information from a large pool of former employees (the location of whom were not always known by the target party itself) with the target party's interest in protecting privileged communications and in learning what the former employees revealed to the contacting party.<sup>118</sup> The *Curley* court made great

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117 *Id.* at 94-95 (adopting guidelines previously set forth by magistrate).

118 Several courts have found the *Curley* court's balancing of interests to be persuasive. In *Erickson v. Winthrop Laboratories*, 592 A.2d 33, 36 (N.J. Super. Ct. Law Div. 1991), the court adopted the *Curley* holding in ruling that Rule 4.2 prohibits ex parte contacts with a former employee if the employee had a managerial, directorial, or high-level position in the corporation; if employee's acts or omissions could be imputed to the corporation; or if the employee's statements could constitute admissions of the corporation. The court noted that "[t]hese protective measures will serve to prevent any prejudice to the defendants while allowing the plaintiff to conduct discovery in an efficient manner." *Id.* For a discussion of *Curley*, see *supra* notes 71-76, and accompanying text.

Similarly, in adopting a rule allowing ex parte contacts, the court in *In re Environmental Insurance Declaratory Judgment Actions*, 600 A.2d 165, 168, 170 (N.J. Super. Law Div. 1991), cited the *Curley* holding and its emphasis on discovery issues as persuasive.

progress toward recognizing that ex parte contacts primarily implicate discovery issues rather than ethics issues. After the relevant interests of the parties in an ex parte contact situation are fully identified, the *Curley* case can provide a basis for a new rule of civil procedure to govern all cases.<sup>119</sup>

## VI. UNDERLYING INTERESTS OF THE ACTORS IN AN EX PARTE CONTACT SITUATION

A simple interest classification scheme helps to explain the ex parte contact litigation phenomenon that existed before ABA Formal Opinion 91-359.<sup>120</sup> By recognizing these interests, we may fashion a discovery rule to prevent this phenomenon from continuing in the opinion's wake.<sup>121</sup> The interests can be classified into two primary groups: (1) the interests of the contacting party; and (2) the interests of the target party. The interests of the former employee also should be considered.<sup>122</sup>

Many of the contacting party's interests are analogous to the target party's interests. For example, the contacting party's interest

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The court emphasized that informal interviews had too high a value in the discovery process and depositions cost too much to prohibit former employee contacts. *Id.* It concluded that "[a] rule that prevents opposing counsel from informally interviewing a possible witness because the witness is considered a 'party' to the suit frustrates the search for truth." *Id.* at 170 (quoting Jerome N. Krulewitch, Comment, *Ex Parte Communication with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest*, 82 NW. U. L. REV. 1274, 1278 (1988) (footnotes omitted)).

119 See *infra* Part VII.

120 See *supra* text accompanying notes 39-108. Much litigation in the ex parte setting likely resulted from Rule 4.2's lack of clarity and the different ways courts and ethics committees applied the rule to former employees. Now that the ABA has "settled" this issue, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991), the amount of litigation surrounding this Rule will likely decrease. This Article hypothesizes, however, that only a new discovery rule will effectively reduce the number and intensity of disputes in this area. Even with such a rule, the focus of litigation might shift to alternative methods for protecting former employees from discovery, such as joint representation of targets and former employees, or target party retention of former employees as paid consultants.

121 Many similar interests are present in the context of ex parte contacts with current employees. See, e.g., Reid, *supra* note 4, at 1253 (describing policies surrounding ex parte contacts with current employees, with particular focus on employment discrimination context); Sinaiko, *supra* note 4, at 1463-81 (discussing interests in favor of and against ex parte contacts, and concluding that the need for truth and inexpensive access to evidence require that ex parte contacts be allowed except for members of "corporate control group"). For the reasons listed *supra* note 6, ex parte contacts with former employees implicate special interests and deserve special consideration.

122 However, the former employee's interests should have a lesser impact on the formulation of an ex parte contact rule. See *infra* Part VIC.

in surprise, gained by secretly interviewing a former employee, correlates with the target party's interest in learning the facts held by that individual. Similarly, the contacting party's interest in ease of access to information relates to the target party's interest in burdening its opponent. Likewise, the contacting party's interests in candor and breadth of information are linked to the target party's interests in protecting privileged facts and withholding facts from discovery.

### A. *Interests of the Contacting Party*

Interests of the contacting party include both the interests of the party represented by the contacting attorney as well as the interests of the contacting attorney himself. These interests, however, always should be identical.

#### 1. Interest in Candor

Arguably, the most compelling reason for allowing the contacting party to have unfettered ex parte access to a former employee is that the contacting party will have an opportunity to learn the facts known by the witness without the influence of the witness's former employer. In most cases, a former employee will talk more candidly about his former employer if a representative of the former employer is not present.<sup>123</sup> This assumption is reasonable for two related reasons. First, the mere presence of the former employer at an interview with the contacting party likely will chill the former employee's willingness to engage in frank conversation, especially when the contacting party attempts to

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123 See, e.g., *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 18 (D. Mass. 1989) (stating that presence of opposing counsel tends to "inhibit the free and open discussion which an attorney seeks to achieve at [ex parte] interviews"); *Oak Indus. v. Zenith Indus.*, Civ. No. 86-C-4302, 1988 U.S. Dist. LEXIS 7985, at \*6 (N.D. Ill. July 25, 1988) (ex parte contacts allowed in part to ensure that former employee would willingly provide information); see also *Siguel v. Trustees of Tufts College*, No. 88-0626-Y, 1990 WL 29199, at \*3 (D. Mass. Mar. 12, 1990) (ex parte contacts with current employees permitted in part because target party controlled information necessary to plaintiff's case); *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 565 (D. Utah 1990) ("[W]itnesses may be more willing to discuss a matter informally than in the adversarial context of formal discovery."); *Bruce v. Silber*, Civ. A. No. 88-2588-H, 1989 WL 206452, at \*2 (D. Mass. 1989) (informal discovery methods especially important to contacting party where individual is attempting to confront entire university); *Henderson v. National R.R. Passenger Corp.*, 113 F.R.D. 502, 508 (N.D. Ill. 1986) (ex parte contacts with former employee in Title VII action permitted despite existence of termination agreement prohibiting such contacts because contrary result would seriously impede contacting party's ability to discover all relevant information).

elicit information unfavorable to the target corporation. The former employee naturally might be reluctant to appear traitorous to the former employer, or to impair his own image in the former employer's eyes, by admitting to wrongdoing either not known or imperfectly appreciated by the former employer.

Second, the target party might prepare the former employee prior to the contact and might even suggest answers to the contacting party's anticipated questions. The former employee might agree with those answers, even though he would provide a more complete or slightly different answer if the target's attorney were not present or did not prepare him for the interview.

## 2. Interest in Ease of Access to Information

An ex parte contact is an efficient means of gathering information. Because ex parte contacts need not be orchestrated through opposing counsel, they present far fewer potential obstacles or expenses than contacts with opposing counsel present.

Merely as a matter of scheduling, the contacting party can more easily arrange a meeting with the former employee when the target party is not involved. Once involved, however, the target party will have input as to the date and time of the contact, the duration of the contact, the venue for the contact, and the frequency of contacts.<sup>124</sup> Furthermore, the target party might use its participation in these procedural matters to influence the actual substance of the contact. For example, the target party might schedule the contact to occur only after the former employee is thoroughly prepared by the target party's counsel, might attempt to strictly limit the duration of the contact, or might arrange for the contact to occur in a location that is geographically inconvenient (such as a city where the target's corporate headquarters exist, but where the former employee does not live) or environ-

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<sup>124</sup> In an ex parte interview, the contacting party and the patience of the former employee determine the length of the interview and the breadth of topics covered. An interview can last an entire day or several days, or can occur by telephone calls and meetings several times during the course of a case. See *Sperber v. Washington Heights-West Harlem-Inwood Mental Health Council*, No. 82 Civ. 7428 (S.D.N.Y. Nov. 21, 1983) (contacting party interviewed former employee even though contacting party already had deposed former employee for eight hours), *vacated and withdrawn* (Dec. 13, 1988) (LEXIS, Genfed library, Dist. file). Limited only by its own zeal and the cooperation of the former employee, the contacting party can inquire into broad-ranging topics that have little or no relationship to the dispute between the parties, but nevertheless hold interest for the contacting party.

mentally inhospitable (such as target counsel's law firm) to the contacting party.

A separate but related consideration is expense.<sup>125</sup> Ex parte contacts ordinarily are informal and do not involve subpoenas for testimony and documents, witness and mileage fees, court reporters, or process servers. Although these expenses are not normally great when a single contact is considered, they can quickly add up when multiplied by several former employees.<sup>126</sup>

An ancillary expense is the potential litigation related to the contact itself. Depositions sometimes result in motions to compel testimony or documents, to quash subpoenas, or for protective orders.<sup>127</sup>

### 3. Interest in Surprise

Proponents of ex parte contacts do not tout the surprise factor, but it plays a far greater role than they publicly acknowledge.

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125 The expense of formal discovery is one of the most frequently given reasons for allowing ex parte contacts. See, e.g., *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 82 (D.N.J. 1991) ("To disallow ex parte contacts . . . would cause the already substantial costs of litigation to skyrocket . . ."). The courts, however, have reached different conclusions as to the importance of this interest. Compare *Oak Indus.*, 1988 U.S. Dist. LEXIS at \*6 (requiring target party's consent to ex parte contact would increase the costs of litigation) and *Frey v. Dep't of Health & Human Servs.*, 106 F.R.D. 32 (E.D.N.Y. 1988) (formal discovery might prejudice litigants with limited resources) and *Shealy v. Laidlaw Bros.*, 34 Fair Empl. Prac. Cas. (BNA) 1223, 1224 (D.S.C. 1984) (time and expense savings justified ex parte contacts) and *Bobele v. Superior Court*, 245 Cal. Rptr. 144, 148 (Ct. App. 1988) (contacting party's interest in inexpensive and practical discovery from former employees required ex parte contacts) with *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 (9th Cir. 1981) (insulation of former employees from ex parte contacts results in inconvenience and frustration, but this does not warrant "interference with the right to counsel"), cert. denied, 455 U.S. 990 (1982) and *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 745 F. Supp. 1037, 1043 (D.N.J. 1990) (increases in cost and time resulting from formal discovery through depositions is not particularly onerous, and importance of informal discovery is greatly exaggerated).

126 *Bouge*, 132 F.R.D. at 565 ("[I]t must be recognized that contemporary litigation is costly and often the 'little guy,' plaintiff or defendant is at a distinct disadvantage in the process."); *Bobele*, 245 Cal. Rptr. at 148 (to require contacting party's counsel to pursue formal discovery procedures for all former employees would make litigation too costly).

127 The attorney and court time related to litigation over depositions can take on proportions equal to an entire case in itself. Cf. *Public Serv. Elec. & Gas Co.*, 745 F. Supp. at 1043 (litigation regarding ex parte contacts would outstrip cost savings of using informal discovery over deposition process). At present, the expense of litigation attached to formal discovery involving former employees is counterbalanced by the expense of litigation over the propriety of ex parte contacts. Hopefully, this Article will provide a framework for resolving this problem by removing or minimizing this second aspect of litigation.

Since the advent of the Federal Rules of Civil Procedure, the philosophy of the federal and many state discovery systems has been to promote wide-ranging and open discovery.<sup>128</sup> The discovery rules purposely attempt to eliminate "trial by ambush."<sup>129</sup> Yet, the American tradition of gamesmanship dies hard. Perhaps spurred on by images traditionally evoked by "Perry Mason" and, more recently, "Matlock," lawyers always delight in surprising their opponents. The ex parte contact holds the promise of a hidden document, an unknown witness, and the final piece of the puzzle to spring on an unsuspecting adversary.<sup>130</sup>

Surprise has legitimate and illegitimate facets. No impropriety exists in capitalizing on surprise when it results from unequal trial preparation. A party that works harder and better at preparing a case deserves to benefit from that labor, even if it jeopardizes the opposing party.<sup>131</sup> But surprise can be illegitimate when a party violates a duty to provide information, such as by failing to identify witnesses with knowledge of discoverable matters.<sup>132</sup> Surprise

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128 J. Milton Pollack, *Discovery—Its Abuse And Correction*, 80 F.R.D. 219, 220 (1978) ("A new horizon was proclaimed [by the Federal Rules of Civil Procedure]. Civil litigation would thenceforth be a search for the truth and this would best be served by a full development of all the facts prior to the trial presentation.").

129 *Id.* ("In the days before the Federal Rules of Civil Procedure, trial by ambush and secrecy was considered normal in the courts of law."); see also *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 253 (1978) (Federal Rules of Civil Procedure express congressional judgment that "'trial by ambush,' . . . well may deserve the cause of truth . . .") (citations omitted) (Powell, J., concurring in part, dissenting in part).

130 Unbeknown to the target, the contacting party may learn about a former employee who has relevant or perhaps even crucial information regarding the case. The name may surface in documents produced in discovery, in the course of consulting with the contacting party's own witnesses, or the former employee may come forth on his own. This risk is greatest in cases involving long lapses of time between the relevant events and the time of suit, cases with many potential witnesses, and cases in which there is uncertainty over the persons who possess relevant knowledge. Although, in theory, procedural devices such as interrogatories, exchanges of witness lists, and final pretrial orders prevent the occurrence of surprises, in practice they only temper the surprise. Consequently, parties still seek out and exploit potentials for surprise, and the ex parte contact situation is an ideal opportunity for the acquisition of knowledge that will lead to surprise.

131 For example, if a party fails to request information in interrogatories, or fails to discover information about a witness identified on a witness list, it does not reflect poorly on the opponent who did not volunteer the information. Our adversary system necessarily assumes a parity of competence and diligence. As the Supreme Court stated in *Hickman v. Taylor*, 329 U.S. 495, 516 (1947): "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."

132 Rule 26(e)'s failure to create a general duty to supplement discovery responses, while creating a special duty to supplement with respect to the identity of witnesses,

also is illegitimate when it results from a suggestion to a nonclient former employee that he refrain from providing information to the target party.<sup>133</sup>

#### 4. Interest in Influencing the Facts

Like the interest in surprise, the interest in influencing the facts is not readily acknowledged by proponents of *ex parte* contacts. Yet, this interest nevertheless arises in all *ex parte* contact situations.<sup>134</sup> Like the interest in surprise, the interest in influencing the facts has dimensions that are legitimate and illegitimate.

As a result of our adversary system, each party has counsel charged with the duty to vigorously champion his client's cause. With few exceptions, every litigated case has as many viewpoints as parties. Consequently, parties rarely agree on the fine distinction between competing factual possibilities and the legal conclusions to be drawn from them. In legal theory, facts are facts—something either happened, or it did not. In legal practice, however, the reconstruction of events depends on documents and, most importantly, the recollection of persons who observed or participated in the events at issue.

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illustrates the heightened importance of disclosing such information:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows: (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters . . . .

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

133 Rule 3.4 forbids a lawyer from requesting "a person other than a client to refrain from voluntarily giving relevant information to another party," with an exception in certain cases for relatives, employees and agents of a client. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.4 (1983). This Rule is more extensively discussed in connection with the interests of the target party. See *infra* note 148.

134 In *Niesig v. Team I*, 545 N.Y.S.2d 153 (App. Div. 1989), *modified*, 558 N.E.2d 1030 (N.Y. 1990), the court stated that the contacting party's desire for *ex parte* contacts was not motivated by a quest for the truth, but in part by a desire to gain a tactical advantage over the target party. The court observed that "the likelihood that a witness will, in response to an improperly phrased or leading question, make an improvident response prejudicial either to his employer or to himself is greater when that witness has no counsel present." *Niesig*, 545 N.Y.S.2d at 160. See also *Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984) (en banc) (a purpose behind prohibition on *ex parte* interviews is to prevent the contacting party's counsel from taking advantage of the target party); Colorado Bar Ass'n Ethics Comm., Revised Op. 69 (1987) (even well-intended *ex parte* contact can have coercive effect on unrepresented witness).

The development of facts through discovery is never content-neutral. A party always attempts to develop the record in a light most favorable to its own position. Accordingly, in an ex parte contact situation, the contacting attorney will attempt to elicit facts most favorable to his client's position. Depending on the approach of the contacting party and the clarity of the former employee's recollection, this elicitation may occur through gentle prompting or outright suggestion.

Because the former employee normally will not appreciate the legally significant factual subtleties involved in a dispute, an ex parte interview might result in a swaying of the former employee's recollection in the contacting party's favor.<sup>135</sup> Once a former employee forms a recollection cast in the contacting party's mold, he might later persist in that recollection in the face of seemingly inconsistent facts. Moreover, after the contacting party elicits a favorable recollection, the former employee might provide a written or testimonial statement to which he will feel a strong pressure to adhere.

##### 5. Interest in Obtaining Privileged Information

Because the forbidden fruit is always sweetest, the contacting party might have an unspoken and illegitimate interest in obtaining confidential or privileged information from the former employee.<sup>136</sup> Except in an unusual case, the former employee will not be qualified to distinguish between privileged and nonprivileged communications related to the matter in dispute. Instead, the former employee mentally will classify his knowledge by subject matter without regard to the distinctions that privilege may

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135 The potential for influence over recollection is most obvious when the ex parte contact occurs many years after the events at issue, and when the former employee's recollection is selectively refreshed only with information favorable to the contacting party's position.

136 In *American Protection Insurance Co. v. MGM Grand Hotel-Las Vegas*, Civ. Nos. CV-LV-82-26-HDM, CV-LV-82-96-HDM (D. Nev. Mar. 11, 1986), *vacated and withdrawn*, (LEXIS, Genfed library, Dist. file), a former employee who was centrally involved with the facts in litigation sought to become a consultant to the contacting party and to disclose privileged and confidential information. The court condemned the contacting party's attempt to gain access to protected information in this way and disqualified counsel for the contacting party. See also *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116 (Ohio 1991) (former employee possessing privileged information hired himself out to plaintiffs' attorneys suing former employer); *Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987) (contacting party would be sanctioned if it sought to obtain privileged or confidential information through ex parte contacts).



create. Consequently, the former employee might unknowingly reveal a privileged communication to the contacting party.<sup>137</sup>

### B. *Interests of the Target Party*

Just as with the contacting party's interests, the interests of the target party include the interests of the target party's counsel.

#### 1. Interest in Protecting Privileged Information from Disclosure

A central purpose of the *ex parte* contact rule is the interest in protecting against the unwitting disclosure of privileged information.<sup>138</sup> When a party is a corporation, privileged communications obviously must be made or received by individuals acting on behalf of the corporation.<sup>139</sup> This in no way lessens the protection accorded to the corporation's privilege, but does make the privilege more difficult to protect. When a former employee possesses privileged information, the termination of the employment relationship has no impact on the privilege—the privilege remains with the corporation and can be waived by the corporation alone.<sup>140</sup> Accordingly, the corporation possesses a great interest

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137 Although courts, ethics committees, and ABA Formal Opinion 91-359 attempt to guard against such revelations by cautioning the contacting attorney, *see supra* text accompanying notes 25, 85-91, such measures might not provide significant protection. This is because, in the course of discussing the subject matter involved in the case, the former employee is likely to reveal privileged information unless he has been specifically advised that such information is privileged and protected from disclosure.

138 *See, e.g.,* Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037, 1039 (D.N.J. 1990); *Bobele v. Superior Court*, 245 Cal. Rptr. 444 (Ct. App. 1988) (target's interest in preventing disclosure of privileged information must be weighed against contacting party's interest in inexpensive and convenient discovery; with respect to former employees, contacting party's interests were greater); *Stahl, supra* note 22 (contending that the prohibition on *ex parte* contacts should be coextensive with the attorney-client privilege); *Krulewitch, supra* note 118, at 1277, 1280-83.

139 *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981). In *Upjohn*, the Supreme Court held that communications made to or from corporate employees, when made for the purpose of obtaining or rendering legal advice, were protected by the corporation's attorney-client privilege. *Id.* at 390. In so holding, the Court rejected the argument that only communications with the "control group" of the corporation were entitled to the privilege.

Although a substantial number of the communications involved in *Upjohn* were communications to or from former employees, the Court did not reach the issue whether such communications were entitled to privileged treatment. *Id.* at 394 n.3. This Article focuses on persons who were employed at the time they became privy to the target's protected information, but thereafter left the target's employ.

140 *CFTC v. Weintraub*, 471 U.S. 343, 348-56 (1985) (implicitly holding that current corporate management is authorized to waive corporation's privilege); *Polycast Technology Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 49 (S.D.N.Y. 1989) (corporation controls its priv-

in ensuring that former employees will not, through ex parte contacts with contacting lawyers, reveal privileged information.<sup>141</sup>

With the target party's counsel present during any ex parte contact, inadvertent disclosures of privileged matters are not likely to occur. The target party's counsel ordinarily will have had an opportunity to discuss issues of privilege with the former employee prior to the contact. By doing so, the target party's counsel not only can sensitize the former employee to the existence of the attorney-client privilege, but target counsel can also learn what privileged information the former employee possesses. By being present during the contact itself, target counsel can alert the contacting attorney and the former employee alike that privileged areas are being broached, and can assert the target's privilege when necessary. Finally, if privileged matters are inadvertently disclosed, the target party knows the nature and extent of the disclosure so that it can prepare to protect itself from any damage that could result.

## 2. Interest in Learning the Facts

A corporation embroiled in litigation necessarily will desire to learn the relevant facts from the most knowledgeable persons. A former employee might be the person with the best, or only, information regarding the matter at issue. A former employee also might have a perspective, either because of length of tenure or detachment from the fray, that current employees do not have. At the very least, the target party will be interested in a former employee's knowledge for the sheer reason that contacting counsel desires to interview the former employee. Therefore, the target party always will have an interest in learning what the former employee knows.

Except in the case of a former employee who obviously has knowledge relevant to the case, the target party always is at risk that its opponent might locate a knowledgeable former employee

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ilege), *aff'd*, No. 87 Civ. 3297, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. Nov. 15, 1990).

141 The interest in protecting privileged information from disclosure is arguably more important in a former employee context than otherwise. The former employee might feel little or no loyalty to his former employer and might even knowingly divulge privileged information. Furthermore, a former employee situation presents more potential for disclosure of privileged information because a former employee might not have the same opportunity to consult with corporate management or counsel over the significance, confidentiality, or discoverability of matters within the former employee's knowledge.

whose knowledge the target does not appreciate. If the contacting party interviews such a person, it may learn important information about the target that the target does not know about itself. A corollary to the target's interest in learning the facts thus is its interest in avoiding surprise.

### 3. Interest in Ensuring the Accurate Description of Events

The target party has an interest in ensuring that its former employees accurately describe the relevant events when contacted by the contacting party.<sup>142</sup> If the target party's counsel is not present during (or does not even have notice of) the contact, the target is open to the risk that the former employee will have inadequate firsthand information regarding an event, but nevertheless will purport to describe it, or will have a faulty recollection of the event. Faced with the contacting party's interest in influencing the facts, the former employee might agree to a version of the facts that is adverse to the target party, without appreciating the legal difference that minor factual distinctions can make.

Once a former employee reveals or agrees with inaccurate or slanted information, the target party will have extreme difficulty in curing the damage. The target party either must convince the former employee to recant or modify his description of events, or must contradict the former employee's description based on documents or other witnesses. If the former employee's testimony is crucial, the target party could be irreparably harmed at trial by attacking its witness on some matters while relying on that testimony for others.

If the target party is present during a contact, it can guard against the former employee's providing information based on hearsay, opinion, or outright speculation. The target party can object to questions that call for this information, fall outside the former employee's sphere of responsibility, or assume the existence of inaccurate or contested facts. The target party also normally will have had a previous opportunity to discuss the relevant

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142 See New York Comm. on Professional Ethics, Op. 80-46 (1982) (ex parte interviews of corporate employees may undermine effective representation because employee may make statements that do not accurately or fairly represent target's position; target's interest in effective representation outweighs contacting party's interest in informal discovery) (current employee); Maryland State Bar Ass'n, Ethics Op. 86-13 (1986) (in order to represent the target party, its counsel must be able to control the flow of information from certain corporate employees, but this does not apply to former employees because they cannot bind the corporation).

facts with the former employee, and refresh his recollection based on what other witnesses can recall or important documents depict.<sup>143</sup>

#### 4. Interest in Influencing the Facts

As discussed in connection with the contacting party's companion interest in influencing the facts, there never will be only one side to a matter in litigation. Accordingly, a target party will have an interest in seeing that its former employees depict the facts in a light most favorable to the target party.<sup>144</sup> Depending on the degree to which the target party seeks to influence the facts, this interest can be legitimate or illegitimate.

The target party might only advise the former employee of legally significant distinctions between similar fact patterns and allow the individual to choose the one he thinks best comports with his recollection. The corporation might, however, already have determined the position it will take and then seek to have the former employee confirm this predetermined position. To accomplish this, the target party might conduct interviews and preparation sessions with the former employee and, with varying degrees of suggestion and emphasis, mold his partially conflicting or incomplete recollection into the target's otherwise solid defense.<sup>145</sup> Furthermore, the target party's counsel may want to be present during the contact to ensure that the former employee maintains his story and is not influenced by the contacting attorney to change it.

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143 The target party has a corollary interest in learning the facts before its opponent. Unlike an individual, a corporation is limited to its employees and other agents as sources of facts. An individual knows facts as they occur; a corporation must collect facts from initial observers and compile them into a cohesive body of information. In this way, a corporation can begin to understand and prepare its own case before its former employees are subjected to contacts by opponents. By learning the facts first, the target party not only can prepare to defend against harmful facts, but also can avoid being surprised by its adversary. Therefore, the interest in learning the facts first is related to the target party's interest in both influencing the facts and in withholding facts from discovery. See *infra* text accompanying notes 144-48.

144 Massachusetts Bar Ass'n, Formal Op. 82-87 (1987) (target party's counsel must be able to control flow of information to adversary and to present truthful statements in the most effective manner) (current employee).

145 To best advance this interest, the target party must have an opportunity to discuss the matters with the former employee before he is contacted by the opponent. In this way, the target party's interest in influencing the facts dovetails with its interest in learning the facts first.

## 5. Interest in Withholding Facts from Discovery

Except in cases of privilege or other legitimate protections from discovery,<sup>146</sup> withholding facts never will be a legitimate interest. This interest is likely to be present, however, in almost every case. The target party understandably will desire that its opponent not learn facts harmful to the target party's position.<sup>147</sup>

For the target party to shield facts from disclosure, it will need opportunities to reach witnesses before the opposing party and to be present during the contact with opposing counsel. After meeting with a former employee with relevant but harmful knowledge, the target party might attempt to shield that information in several ways. For example, it might identify in discovery only those former employees who will be testifying witnesses (omitting nontestifying persons with disadvantageous information), convince its opponent that the former employee is not worth pursuing, or discourage the former employee from cooperating with the opposing party.<sup>148</sup>

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146 Such protections may be afforded to attorney work product, expert materials, and trade secrets. See FED. R. CIV. P. 26(b)(3), (b)(4), and (c)(7).

147 In the case of former employees, this interest sometimes appears as an asserted interest in preventing the disclosure of privileged information, and can be mingled with that interest. See *Oak Indus. v. Zenith Indus.*, No. 86-C4302, 1988 U.S. Dist. LEXIS 7985, at \*6 (N.D. Ill. July 27, 1988) (fact that former employee may relate damaging information is not sufficient to prevent ex parte contact); *Shealy v. Laidlaw Bros.*, 34 Fair. Empl. Prac. Cas. (BNA) 1223, 1225 (D.S.C. 1984) (party has no right to prevent development of facts adverse to its position); *Bobele v. Superior Court*, 245 Cal. Rptr. 144, 147 (Ct. App. 1988) (target cannot block ex parte contacts merely because former employee might disclose unfavorable facts); *Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984) (protection of prejudicial facts is not a purpose of prohibition of ex parte contacts); *Dent v. Kaufman*, 406 S.E.2d 68, 72 (W. Va. 1991) (same). It is well-established, however, that facts are never privileged, and so the interest in protecting privileged information can never be a justification for withholding facts. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts . . .").

148 See *Siguel v. Trustees of Tufts College*, No. CIV.A.88-0626-4, 1990 WL 29199 (D. Mass. Mar. 12, 1990) (ex parte contact permitted for current employees because traditional discovery would be unlikely to result in target party's volunteering the identity of witnesses with information favorable to contacting party). These actions have different levels of ethical propriety. For example, it is not improper to convince an opponent that all former employees need not be identified or contacted, so long as the target party's counsel does not breach its duty of truthfulness in statements to others. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1983) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . ."). The target party's counsel cannot properly suggest, however, that a former employee refuse to talk to an opposing party. The counsel's duty of fairness to

## 6. Interest in Burdening the Opponent

The target party will have an interest, albeit potentially illegitimate, in making each step of its opponent's case as expensive and inconvenient as possible. Although it is unethical under Rule 3.1 of the Model Rules<sup>149</sup> and improper under Rules 11 and 26(g) of the Federal Rules of Civil Procedure<sup>150</sup> to file a pleading or to conduct discovery solely for the purpose of delay or inconvenience, this factor might be taken into account as an incidental effect of one's litigation strategies. In the case of ex parte contacts, the target party can burden its opponent by orchestrating depositions or interviews at inconvenient times and places, and by requiring the contacting party to comply with the formalities and expense of subpoenas and court reporters.

### *C. Interests of the Former Employee*

Although they rarely become significant in the parties' dispute over ex parte contacts, the former employee usually will have personal interests affected by such contacts.

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the opposing party and counsel under Rule 3.4 of the Model Rules specifically prohibits it from "request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983). Although Rule 3.4 exempts current employees from this requirement (and the target party's counsel therefore can request current employees not to voluntarily cooperate with the contacting party), former employees are not exempted. Thus, it would be unethical for the target party's counsel to suggest that a former employee refuse to cooperate with the contacting party.

149 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

150 FED. R. CIV. P. 11 ("The signature of an attorney or party constitutes a certificate by the signer . . . that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."); FED. R. CIV. P. 26(g):

The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: . . .

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

*Id.*

## 1. Interest in Avoiding Personal Liability

During any *ex parte* contact, the former employee will have an interest in ensuring that whatever he relates to the contacting party will not expose him to personal liability. In many cases, however, the former employee will not appreciate the extent to which he might be personally liable.

A former employee who has relevant, firsthand knowledge regarding a matter is likely to have played an active role in that matter. Because the former employee was actively involved in the matter being litigated, an *ex parte* contact will focus on actions taken by the employee but attributable to the employer. The potential for imputed conduct to the employer and consequent employer liability for the acts of its former employee, however, does not negate the potential for personal liability of the employee. For example, if the employer can prove that the employee's actions were taken outside the scope of his employment, and were not authorized by the employer, the employer might escape liability. By the same token, the former employee might be at risk for personal liability because of his unauthorized actions.<sup>151</sup>

In any case in which the former employee is potentially liable, the former employee's interests usually will be adverse to both the contacting party and the target party. Accordingly, it is unsatisfactory to allow *ex parte* contacts or to permit the contact to take place with the target party's counsel present. Instead, the former employee's interests usually can be accommodated only by requiring that he be given the option of personal representation.<sup>152</sup>

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151 This could be the case if, for example, the former employee's conduct that results in a plaintiff's wrongful discharge also is actionable under the forum's defamation laws. Another example that shows the former employee's interest in nonliability is in the case of a former employee who, contrary to corporate policy and instructions, directs that hazardous waste be disposed in an unlawful manner, which later results in clean-up costs to third parties. The employee will have information relevant to an action brought by an affected third party for recovery of the costs it had to expend in cleaning up the improperly disposed waste. Also, the former employee may face personal civil or criminal liability.

152 Indeed, under Rule 4.3(b), the contacting party has a duty to inform the former employee that he should seek counsel. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 cmt. (1983) ("During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."); *see also* Alaska Bar Ass'n Ethics Comm., Op. 88-3 (1988) (if former employee has personal representation, *ex parte* contact is not proper); Michigan Comm. on Professional & Judicial Ethics, Informal Op. CI-597 (1980) (when interests of contacting party and former employee may be adverse, contacting attorney has obligation to advise former

## 2. Interest in Convenience

The former employee will have an interest in minimal disruption of his personal and business affairs by the litigation.<sup>153</sup> Because the target party is no longer his employer, the former employee is likely to have little incentive to spend significant time participating in the discovery process. The former employee also has an interest in having the contact occur under circumstances comfortable and convenient to him.<sup>154</sup>

## VII. A PROPOSED SOLUTION FOR EX PARTE CONTACTS WITH FORMER EMPLOYEES OF A CORPORATE ADVERSARY

The myriad of competing interests that populate the field of ex parte contacts are not entitled to the same degree of protection; some of them are not entitled to any protection. The contacting party's interests in candor and ease of access to information appear most worthy of protection. Similarly, the target party's interests in shielding privileged information from disclosure, learning the facts, and ensuring the accurate description of events also

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employee to seek legal counsel and to adjourn interview until former employee has an opportunity to do so). If the former employee does obtain counsel, then the contact becomes a Rule 4.2 question.

In some cases, the target party's counsel will jointly represent the target party and the former employee. In this way, the target party may seek to advance its own interests under the guise of protecting the former employee's interests. See *In re Coordinated Pre-trial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982). When there is a possibility that the former employee's interests will diverge from the target party's, joint representation raises difficult conflict of interest problems. *Id.*; State Bar of Wisconsin, Op. E-82-10 (1982) (target party cannot contact former employee to offer joint representation unless former employee requests representation, no conflict exists, and target party consents).

153 Several courts have recognized a former employee's interest in convenience and have mandated rules to minimize disruption and the potential for the individual to be deceived. For example, these courts have required the interviewer to identify himself and the capacity in which he has been retained, to identify the litigation and the purpose of the contact, to ask whether the individual is represented by counsel, and to ask permission to interview the individual about issues relevant to the litigation. See *supra* note 115 and accompanying text.

154 In *Santiago v. Sherwin-Williams Co.*, C.A. No. 87-2799-T (D. Mass. Oct. 18, 1990), the court permitted the contacting party to communicate with the targets' former employees by a prescribed form letter. The form letter, *inter alia*, advised the former employees that they could decline to be interviewed by indicating this on a response card sent to them with a stamped, addressed envelope. For the sole purpose of confirming a former employee's identity when necessary, the court permitted telephone contacts pursuant to a sharply limited script. *Id.*



deserve protection. The contacting party's interest in obtaining privileged information and the target party's interest in withholding facts from discovery obviously should be discouraged. At the same time, the contacting party's interests in surprise and influencing the facts, and the target party's interests in influencing the facts and in burdening its opponent should be controlled to ensure that these interests are not pursued illegitimately.

*A. Proposed Amendment to Rule 26 of the Federal Rules  
of Civil Procedure*

In order to efficiently accommodate the parties' competing interests, a discovery rule governing ex parte contacts should, at minimum: (1) promote efficient access to relevant, accurate information; (2) protect against disclosure of privileged communications; and (3) prevent unfair surprise.<sup>155</sup> No court has attempted to fashion a rule governing ex parte contacts in all cases. This is not surprising, for rule-making of this type is a legislative rather than judicial function. Accordingly, a new amendment to Rule 26 of the Federal Rules of Civil Procedure should be adopted:

**Rule 26. GENERAL PROVISIONS GOVERNING DISCOVERY.**

. . . .

(b) **DISCOVERY SCOPE AND LIMITS.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . . .

(5) **FORMER EMPLOYEES.** Discovery of information otherwise discoverable under the provisions of subdivision (b)(1) of this rule, when sought from a nonparty former employee of a party, may be obtained only as follows:

(A) Through a deposition conducted pursuant to Rules 30 or 31.

(B) Upon written consent of the former employer of the person to be contacted, through an interview outside the presence of counsel for the former employer.

(C) In the absence of written consent of the former employer of the person to be contacted, through an interview outside the presence of counsel for the former employer upon the following conditions:

(i) Written notice of all contacts with a former employee shall be provided to the former employer within eleven (11)

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<sup>155</sup> As an ethics rule, Rule 4.2 concerns itself only with item (2)—its effect on items (1) and (3) has, to date, been only incidental.

days after any such contact, without the need for a request for such notice by the former employer. No contact may be made prior to the expiration of 45 days after service of the complaint.

(ii) The notice shall include the name of the former employee; his residence address (if known); his telephone number (if known); the dates and times, including duration, of each contact; and whether such contact was in person, by telephone, or otherwise.

(iii) For any contact that results in a discussion of the subject matter of the pending action, all communications shall be recorded verbatim by stenographic means or, upon election of the party conducting the interview, as provided in subdivision (iv) of this rule.

(iv) An interview required to be recorded under this rule may be recorded by nonstenographic means that ensure an accurate and trustworthy verbatim record. Examples of such means include but are not limited to audio and audio-visual tape recording. The party conducting the interview shall bear the risk, including exclusion from evidence at trial of information learned or flowing from any such interview, that any means employed under this subdivision is not accurate and trustworthy.

(v) The record of any interview required to be recorded under this rule shall be promptly filed with the court under seal. The record need not be transcribed unless ordered by the court.

(vi) Subject to subdivision (b)(3) of this rule (requiring production of statements to persons making them), the record of any interview required to be recorded under this rule need not be produced to any party unless ordered by the court.

### *B. A Defense of the Proposed Amendment*

The proposed rule seeks to achieve the ideal result<sup>156</sup> by permitting ex parte contacts with all former employees, so long as the contacting party both gives notice to the target party of former employees who have been contacted and preserves the ex parte communications.

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156 As discussed *supra* Part VIIA., the goals of the rule should be to: (1) promote efficient access to relevant, accurate information; (2) protect against disclosure of privileged communications; and (3) prevent unfair surprise.

## 1. Notice to the Target Party

The contacting party should inform the target party of the identity of former employees who have been contacted. This will maintain the target party's interest in learning the facts by identifying former employees who have information relevant to the action and who may be witnesses.<sup>157</sup> A rule not requiring such notice would unfairly limit the target from knowing what its own former employees said. Conversely, no legitimate interest would be advanced by totally shielding this information from disclosure to the target.<sup>157</sup>

The timing of disclosure is crucial. In order to protect the contacting party's interests in candor and ease of access to relevant information, the target party should not be given notice of the contact until *after* it has occurred. In this way, the danger of the target party procuring "coached" or uncooperative former employees will be minimized. To minimize the danger of surprise to the target party, however, the contacting party must disclose far enough in advance of trial to permit the target party ample opportunity to interview or depose the former employee.

Targets who do not have advance notice might not be able to fully protect against disclosure of privileged communications. This Article concludes, however, that the contacting party's interest in candor and the target's interest in protecting privileged information are best accommodated by a general rule that does not require advance notice. A motion for a protective order at the beginning of the lawsuit is the best means to handle a claim by the target that it needs advance notice to prevent disclosure of information.<sup>158</sup> The corporation likely will know the identity and

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157 Shielding this information would, in some cases, forward the contacting party's interest in surprise. As discussed *supra* Part VI, however, this interest does not deserve protection.

158 The proposed rule prohibits interviews until 45 days after the complaint is served in order to permit the target to move for a protective order. See *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 629 (S.D.N.Y.) (stating that employer could seek a protective order in appropriate cases because "the former employer is well aware of the existence of the privileged communications"), *aff'd*, 1990 U.S. Dist. LEXIS 15382 (S.D.N.Y. 1990); *Bobele v. Superior Court*, 245 Cal. Rptr. 144 (Ct. App. 1988) (target party could seek protective order barring ex parte contacts as to any employee who knows or is privy to privileged information); *Nolen v. National R.R. Passenger Corp.*, No. 85-C-6778, 1986 WL 13217, at \*1 (N.D. Ill. Nov. 17, 1986) (granting protective order barring ex parte contacts).

location of former employees who actually hold privileged information.

There are numerous ways to implement the notice requirement. Although the requirement itself is hard to dispute on principled grounds, it is easy to envision arguments for and against specific notice requirements. For example, should the notice include the date and time of the contact? Should the contacting party give notice automatically, or only upon written request? Should the contacting party give notice within a short time after the contact, or is notice any time during the discovery period adequate? We have suggested answers to these questions, but realize that reasonable minds may differ.

## 2. Preservation of the Communications Between the Contacting Party and the Former Employee

The contacting party should create a record to preserve any communications with former employees that take place in an ex parte setting.<sup>159</sup> Preservation of the communications simultaneously achieves several important ends. First, knowledge that the communication will be preserved will deter the contacting party from seeking to coerce or distort the former employee's testimony, and also from inquiring into potentially privileged matters. Preservation of the communications also will deter the former employee from telling a different version of events to the contacting party and the target party. Moreover, if a dispute about the ex parte contact later arises, preservation of the communications will provide the court with a solid basis upon which to rule.<sup>160</sup>

Just as with the notice feature of the rule, there are obviously many ways to implement the preservation feature. For example, the rule could require the parties to preserve the communication verbatim or merely the substance of it. A verbatim record will best protect the interests involved. This type of record avoids the problems of having the contacting party make subjective judgments as to what part of the interview to memorialize. A summary of the

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159 *But see* IBM Corp. v. Edelstein, 526 F.2d 37 (2d Cir. 1975) (issuing writ of mandamus against district court's order that ex parte interviews be transcribed and be made available to the court).

160 For example, if the target party claims that the contacting party improperly elicited privileged information from the former employee, the court will have a record upon which to determine this issue. If the target party's claim is upheld, the court also will have a basis upon which to determine the scope of any preclusion or other order.

substance of the communication potentially would disclose the contacting party's work product, or provide a means for concealing improper tactics during the interview. The proposed rule eliminates these problems by requiring verbatim transcription while at the same time proposing limiting factors that avoid saddling the interview process with unnecessary expense. Filing the record with the court provides an additional safeguard by maintaining the integrity of the record.

Finally, under what circumstances should a contacting party disclose the record to the court or the target party? If a legitimate dispute arises over either the matters discussed during the contact or the interviewing techniques employed by the contacting party, transcription and production of the record might be warranted. For example, if the disclosure of privileged communications becomes an issue, transcription and production of the record would allow the court (possibly through an in camera inspection) or the target to address the matter. Beyond this limited scope, however, production of the record should not be ordered, because the transcript should not become a substitute for formal discovery by the target party.

### VIII. CONCLUSION

The issue whether counsel can informally contact former employees of a corporate adversary has spawned a tremendous amount of litigation nationwide, due in part to a pronounced lack of uniformity and predictability. The ABA formal opinion provides a clear answer from the standpoint of legal ethics, but does not accommodate the deeply held and antagonistic interests from the standpoint of pretrial discovery. As a result of these interests and the absence of any governing standard, this Article predicts that litigation over this issue will continue unabated.

For the ABA simply to declare the issue not to be a matter of ethics will not work. The legal profession requires a fresh perspective. This Article has attempted to provide this perspective by addressing ex parte contacts as a discovery issue, and by proposing an amendment to the Federal Rules of Civil Procedure. The proposed amendment accounts for the parties' relevant interests and the best approaches suggested by courts. Most importantly, it provides a discovery-based approach to a discovery problem.