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CONDUCTING INFORMAL DISCOVERY OF A PARTY'S FORMER EMPLOYEES: LEGAL AND ETHICAL CONCERNS AND CONSTRAINTS

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INTRODUCTION

Former employees often possess information that can be helpful and even vital to the resolution of anticipated or pending litigation involving the employer. Seemingly routine ex parte contact with ex-employees by counsel on either side of the dispute may, however, propel the attorney into a twilight zone of legal and ethical uncertainty. An attorney's plight in negotiating this unsettled territory stems from the ill-defined, conflicting law governing two important aspects of informal discovery of a corporate party's former employees:[1] the initial propriety of such ex parte contacts, and the subsequent discoverability by opposing counsel of the content of information exchanged during these contacts. This Article identifies and critiques existing sources of confusion in the law and proposes revised and alternative discovery procedures to provide equal access to information possessed by ex-employees, while simultaneously

1. In the context of this Article, "informal discovery" means the collection of information, either by attorneys or their subordinates, during telephone or personal interviews of former employees, that occur without participation by, or consent of, opposing counsel. "Formal discovery" refers to the fact-gathering methods available pursuant to Rule 26 of the Federal Rules of Civil Procedure, such as depositions. The terms "corporate party" and "corporate counsel" are used throughout this Article, although in fact the employer could be another party, such as a sole proprietorship, unincorporated association, or the like.

safeguarding the integrity of that information. Its primary emphasis is on federal jurisprudence, although important points of consensus and departure between state and federal law are noted, as appropriate.[2]

Part I explains the issues that arise in informal discovery, and the difficulties with clearly resolving those issues given the conflicting state of the law. Part II discusses application of the attorney-client privilege to communications between corporate counsel and former employees, concluding that the privilege should not shield the content of such communications from discovery by opposing counsel. Because the attorney-client privilege issue and the debate over ex parte contact both turn on whether a former employee is a "party" to the litigation, an exposition of the ethical concerns of ex parte contact follows in Part III, which concludes that ex parte contact by opposing counsel should be allowed. Part IV examines the applicability of the work product doctrine in shielding from discovery certain tangible materials related to the interview. This Article advocates absolute immunity from discovery for attorney notes and memoranda, and for collections of documents selected by counsel for discussion with former employees; limited discovery of signed witness statements generated pursuant to the interview; and fairly broad discovery of the content of counsel's questions and statements during the interview.

The proposed discovery guidelines in the Conclusion are offered with the ambitious, if not elusive, goal of reconciling the competing interests and policies that rouse litigants to battle when informal discovery is conducted of former employees, while simultaneously giving due regard to the pragmatic impact that new or re-

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2. States enjoy autonomy to enact or adopt their own standards defining the attorney-client privilege, work product doctrine, and ethical conduct of lawyers. Federal courts for the most part are also empowered to develop their own body of common law on work product and attorney-client privilege issues. *See generally* EDNA S. EPSTEIN & MICHAEL M. MARTIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 7-10 (2d ed. 1989).

Ethical standards are often embodied in local district court rules. *See, e.g.*, Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 624 (S.D.N.Y. 1990). Despite the appearance of independence of the state and federal systems, there is substantial overlap and, in many instances, consistency. For example, Rule 501 of the Federal Rules of Evidence requires federal courts to apply state law on attorney-client privilege when a state law claim is being adjudicated. EPSTEIN & MARTIN, *supra*, at 8-9; *see also* Command Transp., Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94, 95 (D. Mass. 1987) (recognizing that state law applied to an attorney-client privilege dispute in a diversity suit, but finding no Massachusetts precedent on point and applying federal common law because Massachusetts' highest court had previously "demonstrated its willingness to follow federal precedent concerning the nature of the attorney-client privilege").

vised rules may have on the litigants and the adversarial process. The overriding objective is to provide equal access by all parties to the information possessed by former employees, while at the same time providing mechanisms to deter, and if necessary to reveal, inappropriate manipulation of these potential witnesses by counsel.[3]

I. ISSUES PRESENTED BY INFORMAL DISCOVERY

In *Upjohn Co. v. United States*,[4] the Supreme Court held that the attorney-client privilege shields from discovery the content of communications between corporate counsel and both lower- and higher-echelon employees who possess knowledge relevant to anticipated or pending litigation.[5] While acknowledging the existence of numerous related concerns beyond the scope of its narrow, case-specific holding, the *Upjohn* Court declined "to lay down a broad rule or series of rules to govern all conceivable questions in this area."[6] In particular, the Court expressly declined to determine whether the attorney-client privilege extends to communications between corporate counsel and former employees of the corporate party.[7]

More than a decade has passed since the *Upjohn* Court deferred resolution of this issue, and no clear consensus has emerged as to whether corporate counsel's discourse with former employees is im-

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3. In addition to the external controls advocated in this Article, there are self-imposed limits on attorney conduct during ex parte interviews. One hopes this self-restraint stems from a respect for the legal system. Perhaps more realistically, temperance is born of the fear that overt coaching will undermine the witness's credibility. Professor McElhaney describes an attorney's worst nightmare in this regard: "The witness who is told what to say is the one who is likely to blurt out, 'That's what the lawyer told me to say' when he is attacked on cross-examination." James W. McElhaney, *Horse-Shedding the Witness*, TRIAL, Oct. 1987, at 80, 84. Many legalists believe that the prosecutor's excessive coaching of a key witness so undermined the witness's credibility that it resulted in the acquittal of the owners of the infamous Triangle Waist Company on manslaughter charges. The charges were based on the deaths of 146 garment factory workers whose exit from the fiery inferno consuming their workplace was blocked by doors locked in violation of safety regulations. *See* Stephan Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547, 547-48 (1984).

4. 449 U.S. 383 (1981).

5. *See id.* at 396. The Court of Appeals for the Sixth Circuit's decision under review held that the privilege only covered exchanges between upper-level managers and corporate attorneys. *See* United States v. Upjohn Co., 600 F.2d 1223, 1225 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

6. 449 U.S. at 386.

7. *See id.* at 394 n.3. The Court purportedly declined to address this point because neither of the courts below had addressed it, even though interviews with former employees were at issue in the case. *See id.*

munized from discovery by the attorney-client privilege.[8] An attorney's attempt to discover information held by a party's (or potential party's) former employees also implicates the work product doctrine,[9] as well as ethical rules prohibiting ex parte contact with persons represented by legal counsel.[10] Therefore, courts and litigants repeatedly grapple with a trilogy of issues when informal discovery is sought of former employees:

1. Whether the attorney-client privilege erects an impenetrable barrier around communications between corporate counsel and the corporation's former employees, repelling all attempts by opposing counsel to discover the contents of those communications;

2. Whether contact by opposing counsel with a corporate party's former employees transgresses the ethical prohibition against ex parte contact with a party represented by counsel; and

3. Whether the work product doctrine immunizes from discovery by opposing counsel the communications between counsel for either party and former employees, as well as materials memorializing those communications.

Case law is clear that if nonparties to the litigation are willing,[11]

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8. The long-standing nature of the confusion surrounding discovery of information held by current employees of a corporate client is evidenced by the several decades of scholarship focusing on these issues; however, the discovery of former employees, especially in the context of informal ex parte interviews, has not been thoroughly addressed. *See, e.g.*, David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970) [hereinafter *Attorney-Client Privilege for Corporate Clients*]; R. Scott McGrew, Note, Upjohn Co. v. United States: *Death Knell for the Control Group Test and a Plea for a Policy-Oriented Standard to Corporate Discovery*, 31 SYRACUSE L. REV. 1043 (1980).

9. The attorney-client privilege and work product doctrine are related but distinct concepts that shield certain communications and tangible materials from discovery by opposing counsel. The attorney-client privilege belongs to the client, is absolute in its protection, and covers oral as well as written communications. *See infra* Part II. The work product doctrine can be asserted by the attorney, provides qualified rather than absolute immunity from discovery, and primarily applies to tangible materials. *See infra* Part IV; *see also* John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 292 (1989) (explaining differences between attorney-client privilege and work product doctrine, but acknowledging the argument that the two concepts have been largely synthesized by Supreme Court decisions).

10. This prohibition is set forth in various codes of attorney ethics including those promulgated by the American Bar Association (ABA). *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1980) [hereinafter MODEL CODE]; *see also infra* Part III.

11. *See, e.g.*, Mompoint v. Lotus Dev. Corp., 110 F.R.D. 414, 419 (D. Mass. 1986) (The decision to consent to an interview with counsel "is entirely up to the particular employee."); Johnston v. National Broadcasting Co., 356 F. Supp. 904, 910 (E.D.N.Y. 1973) ("[A]ny witness has the right to refuse to be interviewed if he so desires."). In

counsel for all parties have the right to interview them "in private, without the presence or consent of opposing counsel, and without a transcript being made."[12] In fact, efforts to restrict an attorney's use of informal interviews of nonparties traditionally have been disfavored by the courts.[13] However, no procedural, ethical, or evidentiary rule explicitly condones, condemns, or establishes guidelines for such informal discovery of nonparties,[14] making resolution of the issues above extremely difficult.

Further, this unsettled state of the law is unacceptable, in light of the potent utility of the ex parte interview as a discovery device,[15] the potential for abuse of this tool,[16] and the time and expense consumed in pretrial battles over informal discovery.[17]

A. The Potent Utility of Informal Discovery

The usefulness and cost effectiveness of informal interviews with former employees is beyond dispute. From corporate counsel's perspective, the ex parte meeting provides the opportunity to explain the status of the pending or anticipated litigation, to determine whether opposing counsel has already contacted the interviewee,[18] to ascertain the former employee's current attitude toward

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fact, it has been suggested that motivating a nonparty witness to talk to an attorney is not always an easy task. *See* R. LAWRENCE DESSEM, PRETRIAL LITIGATION: LAW, POLICY & PRACTICE 71 (1991).

12. IBM v. Edelstein, 526 F.2d 37, 42 (2d Cir. 1975) (holding that trial judge exceeded his authority by requiring witness interviews to be held with either opposing counsel or a stenographer present, because such conditions "unduly infringed upon counsels' ability to prepare their case for trial, and have . . . lessened the effectiveness of that trial by placing before the Court, not the case as finally prepared and refined by counsel, but rather a hodgepodge of information accumulated in the early stages of counsel's preparation"); *see also* Gregory v. United States, 369 F.2d 185, 188-89 (D.C. Cir. 1966) (holding that prosecutor's instruction to witnesses not to talk to anyone unless prosecutor was present impermissibly interfered with defendant's ability to prepare defense), *cert. denied*, 396 U.S. 865 (1969); D'Amico v. Cox Creek Refining Co., 126 F.R.D. 501, 507 (D. Md. 1989) (citing *Edelstein* as persuasive).

13. *See Mompoint*, 110 F.R.D. at 417; *Edelstein*, 526 F.2d at 41-42.

14. The trial court's regulation of informal discovery is authorized by the court's inherent power to control litigation practices. Bougé v. Smith's Management Corp., 132 F.R.D. 560, 564 (C.D. Utah 1990) (conduct of ex parte interviews controlled by court rather than by Federal Rules of Civil Procedure); Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988).

15. *See infra* Subpart I.A.

16. *See infra* Subpart I.B.

17. *See infra* Subpart I.C.

18. If opposing counsel has made contact, corporate counsel will explore the nature and content of the communication. If no contact has occurred, counsel in all probability will explain that the individual is not obligated to talk to anyone about the litigation unless he so desires.

the corporation, and to probe the extent of the former employee's knowledge of facts relevant to the lawsuit. It also gives counsel latitude to determine the former employee's familiarity with documents that have or may become points of contention in the litigation, to persuade the former employee to execute a written statement or affidavit that embodies his current recollection about the matter in controversy,[19] and to test counsel's own theories and opinions about the case.[20] Allowing corporate counsel freely to pursue these objectives permits a more realistic assessment by counsel of whether an early settlement would best serve his client's interests.[21] Depending on the tone and quality of information conveyed during the interview, corporate counsel might also offer to represent the former employee if the need for legal counsel arises.[22] Should the former employee prove uncooperative, or even hostile, counsel will attempt to unearth the origin of the animosity and diffuse the individual's anger, or risk that the cause of the individual's rancor becomes apparent at trial and damages his client.[23]

Opposing counsel's goals for engaging former employees in ex parte communications are often the same as those sought by corporate counsel. In addition, opposing counsel's initial contact with former employees may play a critical role in her determination of whether a complaint should be filed in the first place, and in identification of the individuals or entities to be named as parties. In some instances, informal interviews provide a cost-effective mechanism that allows plaintiffs fully to investigate and litigate a case that they

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19. The future utility of such sworn statements includes providing support for factual assertions made in discovery or dispositive motions, refreshing the employee's memory prior to testifying in a deposition or at trial, and impeaching the employee should his recollection of events change. Such statements can be problematic because "decisions whether to ask witnesses to sign statements often must be made on the spot and without the opportunity to reflect on the precise language in the witness statement." DESSEM, *supra* note 11, at 72.

20. Sharing legal theories in this context has at least two consequences: obtaining the former employee's evaluation of the viability of the theories when tested against the "hard facts" of the case, and subtly persuading the former employee that the positions taken by the corporation are correct.

21. Informal investigations are valuable not only for the favorable information they yield, but also because they reveal unfavorable information useful in preparing challenges to the adversary's theories. *See* DESSEM, *supra* note 11, at 69; Stephen McG. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 315, 327 (1991). Interviews that produce a bountiful harvest of adverse facts no doubt would inspire settlement.

22. The former employee may perceive a need for legal counsel if his deposition is formally noticed or even if opposing counsel schedules an informal interview.

23. For example, the former employee might have been involuntarily terminated or denied a promotion.

might not pursue if only formal discovery were allowed.[24]

B. The Potential for Abuse

The number and validity of counsel's reasons for conducting informal interviews of a corporate party's former employees may make the process appear routine and innocuous. In fact, an attorney's failure to conduct preliminary interviews with ex-employees might be construed as neglect of her duty to prosecute her client's claim zealously or to fashion a vigorous defense. Yet, the potential for abuse of this vital discovery tool demands court intervention and monitoring. Of foremost concern is the possibility that counsel will, either through subtle suggestions or unabashed indoctrination, manipulate the former employee's recollection of key events.[25] Ex parte contact with a witness or potential witness has been aptly characterized as representing "the worst qualities of the legal system" because "the temptation to invent or embellish a story can be very strong."[26] Such contacts "substantially increase the risk of testimonial distortion through the substitution of the attorney's suggestions for the witness's perceptions."[27] Also, ex parte contact "may boost a witness's confidence" in the accuracy of his recollection without in truth improving it, an impact that is "most disturbing because both courts and psychologists have observed that fact-finders are keenly aware of witness confidence and depend on it in making judgments about testimonial reliability."[28] Finally, the initial contact may so intimidate the ex-employee that she will refuse to participate in the factfinding process absent a court order, and even if so ordered, will not be entirely forthcoming regarding the information she

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24. *See, e.g.*, Bobele v. Superior Court, 245 Cal. Rptr. 144, 148 (Cal. Ct. App. 1988) (noting that requiring plaintiffs to depose all former employees rather than using ex parte interviews as a screening device will prevent plaintiffs from pursuing their case). Corporate defendants may be in a better position than plaintiffs to absorb the costs of a system requiring formal discovery of ex-employees, but there is no justification for mandating such economic waste. As the *Bobele* court observed, "[n]ot 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." *Id.*

25. *See generally* Applegate, *supra* note 9 (discussing doctrinal and ethical problems of witness preparation); Landsman, *supra* note 3 (proposing limits on attorney contact with disinterested witnesses in civil cases).

26. Applegate, *supra* note 9, at 279. Professor Applegate observes that "coaching" by counsel can be inadvertent as well as intentional, due to the "enormous pressure on a partisan advocate to produce a story favorable to the client." *Id.* at 328.

27. Landsman, *supra* note 3, at 555. Such substitution extinguishes any hope of retrieving the individual's original perceptions. *See id.*

28. *Id.* at 556.

possesses.[29]

Clearly, application of any privilege or doctrine to shroud the content of these interviews in secrecy not only tempts an attorney to engage a former employee in revisionist history, but also prevents opposing counsel from exposing this powerful source of bias. The taint caused by counsel's coaching of an ex-employee is intensified by the inclination of the factfinder to view any nonparty as an independent witness, and thus accord considerable credibility to her testimony.[30]

The courts' task of refereeing litigants' disputes over access to a corporate party's former employees, as well as the subsequent discoverability of the content of ex parte communications resulting from that access, is further complicated by the somewhat incongruous representations that counsel for each litigant offers to the court regarding the former employees. Depending on the particular point in the litigation, corporate counsel will inconsistently attempt to portray the former employees as: (1) alter egos or compatriots of his corporate client whose communications with corporate counsel come within the attorney-client privilege, (2) unaffiliated witnesses whose independence renders any testimony favorable to the corporation particularly credible, or (3) malcontents whose negative testimony is inspired by ill-will toward the corporation rather than based upon an honest recollection of the facts. Opposing counsel also walks a fine line: she must convince the court that her adversary's former employees fully support her view of relevant events, while at the same time she must eschew any impression that her communications with the former employees have strayed over the boundaries of appropriate ethical conduct set forth in the rules governing ex parte contact, conflicts of interest, and client solicitation.[31]

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29. An ex-employee may insulate herself from ex parte contact by refusing to consent to an interview or retaining independent legal counsel and referring all inquiries to that attorney. This latter technique was successfully employed by two reluctant witnesses in United States v. Jones, 542 F.2d 186, 209 (4th Cir. 1976). In *Jones*, both the trial court and the appellate court rejected the defendants' claim of prejudice based on the unavailability of pretrial interviews with these two witnesses. *See id.* at 209-10.

30. "Both courts and psychologists have observed that the testimony of disinterested witnesses is one of the most persuasive sources of evidence in a lawsuit. Such testimony . . . is decisive in a large percentage of the cases in which it is offered." Landsman, *supra* note 3, at 549. Because termination of the employment relationship intuitively demands a presumption that the former employee is no longer aligned with the corporate party, application of the attorney-client privilege or ethical rules to limit access to former employees only to corporate counsel is inherently inequitable.

31. Ex parte contact with a represented party is prohibited by Model Rule 4.2 and DR 7-104(A)(1). *See supra* note 10. Representing parties with conflicting interests is proscribed by Model Rule 1.7 and DR 5-105, and solicitation of clients is barred by

C. *Time and Expense of Pretrial Battles*

The first Federal Rule of Civil Procedure articulates the expectation that every action be resolved in a "just, speedy, and inexpensive" manner.[32] Modern pretrial practices have fallen far short of that laudable goal. As one judge has observed, "[d]iscovery, originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens. Often it is conducted so aggressively and abusively that it frustrates the objectives of the Federal Rules."[33] Indeed, the President has taken note of this untenable situation and has issued an Executive Order[34] aimed at curbing "the harmful consequences of these litigation practices."[35] The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has also circulated, for discussion purposes, a number of proposed amendments to streamline discovery.[36] Unfortunately, it is difficult to predict when, if at all, these

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Model Rule 7.3 and DR 2-104(A). For a comprehensive discussion of these rules and variations of them adopted in various jurisdictions, see generally STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS (1991).

32. FED. R. CIV. P. 1.

33. William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 703 (1989). Judge Schwarzer advocates a procedural rule whereby all parties would be required automatically to exchange basic information, including the identity of parties with knowledge and production of relevant documents. *See id.* at 721-22.

34. Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

35. *Id.* The preamble to Executive Order Number 12,778 states as its inspiration "the tremendous growth of litigation [that] has burdened the American court system and has imposed high costs on American individuals, small businesses, industry, professionals, and government at all levels" paired with "several current litigation practices [that] add to these burdens and cost by prolonging the resolution of disputes." *Id.* Section 1(d)(1) of the Order requires all litigation counsel who represent the federal government to follow a number of procedures, including the automatic disclosure of "core information" to the adversary, with that term defined as the names and addresses of persons with relevant information and the location of relevant documents. The Order also mandates a thorough evaluation of any document request issued by government attorneys "to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive" in view of all the circumstances of the dispute. *See id.* § 1(d)(2).

36. The Committee's August 1991 proposed amendments to the federal rules incorporate substantial revisions to the discovery process as advocated by Judge Schwarzer and others. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (1991). Rule 16 would be expanded to allow more detailed planning of discovery during the initial pretrial conference. *Id.* at 9. Rule 26(a) would require automatic disclosure of certain information routinely requested by opposing counsel, including the identity of all persons with knowledge of relevant facts, production or description of all "docu-

proposed procedural reforms will be in place.[37] Moreover, discovery orders are interlocutory in nature and therefore are not immediately appealable; thus, litigants dissatisfied with the trial court's ruling on the discoverability of certain materials are forced to abide by the ruling and proceed through a trial that may be tainted by inadequate or inappropriate discovery, or seek immediate appeal pursuant to an extraordinary writ such as mandamus. The latter alternative is disfavored by the courts and is expensive and time consuming for the parties.[38]

D. An Attempt to Articulate Clearer Standards

Because of the significant stakes involved, the development of consistent, comprehensive guidelines governing the discoverability of information held by former employees is critical to the effective and appropriate use of informal, ex parte interviews as a valid discovery tool.[39] The Supreme Court's observation in *Upjohn* that the purpose of the attorney-client privilege can be served only if litigants are able "to predict with some degree of certainty whether particular discussions will be protected"[40] applies equally to the

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ments, data compilations, and tangible things," a computation of damages claimed, and a comprehensive report by all expert witnesses. *Id.* at 14. The proposed amendment to Rule 33(a) limits each party to 15 interrogatories, *id.* at 49, while Rules 30(a)(2)(A) and 30(d) would limit each party to 10 depositions of 6 hours each, *id.* at 33. As with the current rules, however, the amendments allow for modifications of the rules by agreement of the parties, leave of the court, or both.

37. The Advisory Committee has solicited comments and held several public hearings on the August 1991 draft of the proposed amendments. The Committee will reconsider its draft in light of these comments, and then forward its proposed revisions to the Judicial Conference Standing Committee on Rules of Practice and Procedure. If the Standing Committee approves, the revisions will be sent to the Judicial Conference for possible consideration at the September 1992 meeting. The Conference will then forward the draft to the United States Supreme Court, which in turn will issue a recommendation to Congress regarding enactment of the amendments. *See Federal Rules: Major Changes Sought by Judicial Conference Working Group*, 60 U.S.L.W. 2158 (Sept. 10, 1991).

38. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 690-91 (1974) (citing strong public policy disfavoring piecemeal, interlocutory review of discovery orders); Admiral Ins. Co. v. United States District Court, 881 F.2d 1486, 1490 (9th Cir. 1989).

39. Most, if not all, of the potential for abuse could be eliminated by adoption of Professor Landsman's suggestion that all pretrial contacts with disinterested witnesses be recorded and that opposing counsel be given the opportunity to attend. *See* Landsman, *supra* note 3, at 558. But the utility of the informal, ex parte interview as a legitimate screening device for potential witnesses is lost in a system that elevates the informal interview to a procedure mirroring a formal deposition. Professor Landsman concedes that ex parte interviews may be appropriate where such "contacts are truly likely to increase the volume of reliable information or enhance the prospects of efficient inquiry." *Id.* at 559.

40. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

protections and prohibitions conferred by the work product doctrine and by ethical rules of conduct. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[41]

II. THE ATTORNEY-CLIENT PRIVILEGE AND COMMUNICATIONS BETWEEN CORPORATE COUNSEL AND FORMER EMPLOYEES

A. The Attorney-Client Privilege in the Corporate Context

The origins of the attorney-client privilege can be traced to ancient Roman law, which prohibited a slave from revealing his master's secrets.[42] In its modern form, the attorney-client privilege shields from discovery the content of a communication[43] made in confidence[44] between a client (or potential client[45]) and a licensed attorney or her subordinate, where the communication was made for the purpose of obtaining legal advice,[46] has not been waived,[47]

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41. *Id.* While this Article narrowly focuses upon the informal interviews conducted prior to designation of a former employee as a witness, Professor Applegate's comments on the related area of witness preparation ring true here: "Witness preparation is treated as one of the dark secrets of the legal profession. The resulting lack of rules, guidelines and scholarship has created significant uncertainty about the permissible types and methods of witness preparation." Applegate, *supra* note 9, at 279.

42. Marshall Williams, *The Scope of the Corporate Attorney-Client Privilege in View of Reason and Experience*, 25 How. L.J. 425, 426 (1982).

43. The privilege does not shield from discovery the facts underlying the communication, but only the communication itself. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

44. Generally, the client must manifest an expectation that the communication was made in confidence for the privilege to apply. *See, e.g.*, United States v. Gann, 732 F.2d 714, 723 (9th Cir.) (reflecting general rule that exposure of third party to communications between attorney and client destroys expectation of privacy, thus defeating claim of attorney-client privilege), *cert. denied*, 469 U.S. 1034 (1984); Odmark v. Westside Bancorp., Inc., 636 F. Supp. 552, 556 (W.D. Wash. 1986) (finding that failure of officers and directors to request confidentiality of corporate attorneys negated essential element of attorney-client privilege).

45. If the other criteria are met, the privilege extends to a preliminary consultation between a lawyer and a potential client, even though actual employment of the attorney does not result. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). The obvious reason for extending the privilege to initial consultations is that "no person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of the facts decided to accept the employment or decline it." *In re* Dupont's Estate, 140 P.2d 866, 873 (Cal. Ct. App. 1943).

46. *See* 8 JOHN H. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961).

47. The privilege belongs to the client and thus only the client may waive it. *See, e.g.*, *In re* von Bulow, 828 F.2d 94, 100 (2d Cir. 1987). Accompanying the ownership of the privilege is the responsibility to maintain continued confidentiality of the communications to ensure that a waiver does not occur, through either the client's express consent or implied consent through conduct. *Id.* at 101.

and is not made for the purpose of committing a tort or a crime.[48] Admittedly, application of the privilege has the undesirable effect of withholding relevant information from the factfinder.[49] Nevertheless, full disclosure of information by the client to the attorney is critical to the attorney's responsibility to provide fully informed legal advice, and such disclosure will only take place where confidentiality is guaranteed.[50] The *Upjohn* Court summed up this rationale: "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[51]

It has been proposed that where the information sought is unavailable from other sources, an exception to the privilege should be recognized. As one court rejecting this proposal explained:

> The attorney-client privilege, like all other evidentiary privileges, may obstruct a party's access to the truth. Although it may be inequitable that information contained in privileged materials is available to only one side in a dispute, a determination that communications or materials are privileged is simply a choice to protect the communication and relationship against claims of competing interests. Any inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege. An unavailability exception is, therefore, inconsistent with the nature and the purpose of the privilege.[52]

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48. *See, e.g., In re* Grand Jury Investigation, 575 F. Supp. 777, 780 n.2 (N.D. Ga. 1983). One of the cases most frequently cited for its comprehensive definition of attorney-client privilege is United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). See also EPSTEIN & MARTIN, *supra* note 2, for a comprehensive discussion of the attorney-client privilege.

49. *See* Fisher v. United States, 425 U.S. 391, 403 (1976); United States v. Nixon, 418 U.S. 683, 710 (1974); American Nat'l Watermattress Corp. v. Manville, 642 P.2d 1330, 1333 (Alaska 1982).

50. The historic context and modern rationale for the privilege was stated by the district court in *In re* Colton, 201 F. Supp. 13 (S.D.N.Y. 1961), *aff'd*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963):

> In the eighteenth century, when the desire for the truth overcame the wish to protect the honor of witnesses and several testimonial privileges disappeared, the attorney-client privilege was retained, on the new theory that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter properly to advise the clients. This is the basis of the privilege today.

Id. at 15; *see also* cases cited *supra* note 49. Despite its retained prestige, courts often strictly construe the scope of the attorney-client privilege to avoid impairment of the factfinding process. *See, e.g., American Nat'l Watermattress Corp.*, 642 P.2d at 1333; cases cited *infra* note 54.

51. *Upjohn*, 449 U.S. at 389.

52. Admiral Ins. Co. v. United States District Court, 881 F.2d 1486, 1494 (9th Cir.

In view of the menace to the factfinding process posed by any withholding of information, it has repeatedly been said that the privilege should be applied " 'only where necessary to achieve its purpose,' "[53] and that when applied, the privilege must be narrowly tailored.[54]

While neither the basic definition of the attorney-client privilege nor the elementary rationale offered for its existence suggest difficulty in its interpretation, the application of the privilege has proven especially cumbersome when the client is a corporation.[55] Due to the nature of a corporation as an amorphous legal fiction, application of the attorney-client privilege to corporate entities traditionally focuses on attempts to identify the person or persons who constitute the corporate client.[56] Courts have resolved this issue in-

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1989) (footnote omitted). The communication sought in this case was a transcribed interview, conducted in anticipation of litigation, between counsel for a parent corporation and a subsidiary's employee, who resigned shortly after the interview. After litigation commenced, the former employee, in response to the plaintiffs' notice of deposition, informed the plaintiffs' counsel that he would refuse to answer questions on Fifth Amendment self-incrimination grounds. The plaintiffs sought discovery of the interview transcript on the theory that the attorney-client privilege should not protect information that is unavailable from other sources. The court rejected the plaintiffs' arguments because such an exception would "force counsel to warn their clients against communicating sensitive information for fear of subsequent forced disclosure," thereby negating the goal of promoting full and open disclosure between attorney and client. *See id.*

53. United States v. Zolin, 491 U.S. 554, 562 (1989) (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)).

54. *See, e.g.*, *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979); Garner v. Wolfenbarger, 430 F.2d 1093, 1101 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *In re* Sunrise Securities Litigation, 130 F.R.D. 560, 570 (E.D. Pa. 1989); Odmark v. Westside Bancorp., Inc., 636 F. Supp. 552, 555 (W.D. Wash. 1986); 8 WIGMORE, *supra* note 46, § 2291, at 545 (explaining that because the privilege's "obstruction is plain and concrete" and its benefits are "indirect and speculative," its coverage must be "strictly confined within the narrowest possible limits consistent with the logic of its principle"). Despite the history and continued vitality of the attorney-client privilege, not everyone remains convinced of its virtues. *See, e.g.*, Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51 (1982).

55. *See generally* Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279 (1984); Williams, *supra* note 42.

56. An early effort to exclude corporations from the attorney-client privilege protections afforded individual litigants was resoundingly unsuccessful. In Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N.D. Ill.), *aff'd on reh'g*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963), the trial court held that the privilege was personal in nature and that the confidentiality required for application of the privilege was incompatible with the exchange of information in a corporate setting. *See* 207 F. Supp. at 773-75. The Seventh Circuit unanimously reversed, stating in its en banc decision that "[a] corporation is entitled to the same treatment as any other 'client'—no more and no less." 320 F.2d at 324. The Supreme Court declined further review. *See* 375 U.S. 929. For an argument that *Radiant*

consistently, with three primary tests emerging over time.

In the narrowest of the three approaches, courts limited coverage of the attorney-client privilege to communications between corporate counsel and a limited pool of officers and employees, characterized as the "control group," who were empowered to make decisions on behalf of the corporation in response to legal advice.[57] This test was criticized for ignoring the realities of corporate life, because often the lower echelon employees possess the information relevant to resolution of a corporate legal problem.[58] Other courts embraced a more expansive definition of the term "client" that included any employees, regardless of rank, who possessed knowledge relevant to the litigation.[59] Under this standard, the privilege attached only where the communication was made to corporate counsel at the instruction of the employee's supervisor and concerned subject matter within the scope of the employee's duties. These criteria, often referred to as the "subject matter" test,[60] were criticized as being too broad.[61] A modified version of the subject matter test further narrowed the privilege. It limited application of the privilege to communications between employees and corporate counsel that had been disseminated beyond those persons who, because of the corporate structure, needed to know of its contents.[62]

Burners continues to affect the modern laws of privilege, see R. David White, *Radiant Burners Still Radiating: Attorney-Client Privilege for the Corporation*, 23 S. TEX. L.J. 293 (1982).

57. The genesis for the control group test is City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). The control group test was embraced by at least three circuit courts of appeals, as well as several district courts outside of those circuits. *See In re* Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979); United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981); Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968); Virginia Elec. & Power Co. v. Sun Shipping & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963).

58. *See* Lance J. Madden, Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 762, 767 (1971).

59. *See, e.g.*, Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971) (equally divided Court); *see also infra* note 64.

60. For the seminal case for the subject matter or scope of employment test, see *Harper & Row*, 423 F.2d at 491-92.

61. *See, e.g.*, Note, *Attorney-Client Privilege for Corporate Clients*, *supra* note 8, at 432-34.

62. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, para. 503(b)[04], at 503-66 to 503-70 (1991); *see also* Diversified Indus. v. Meredith, Inc., 572 F.2d 596, 609 (8th Cir. 1987). The Eighth Circuit's test, announced in *Diversified Industries*, applied the attorney-client privilege to a communication between corporate counsel and an employee where the following conditions were met:

(1) the communication was made for the purpose of securing legal advice; (2)

Numerous other standards have been proposed but have not been widely accepted.[63]

Unfortunately, the Supreme Court has not rushed to reconcile the conflicting standards. The Court declined an opportunity to address the controversy surrounding the attorney-client privilege in the corporate context in 1971.[64] A decade later, the Court finally confronted the issue in *Upjohn Co. v. United States*[65] and eliminated some, but hardly all, of the confusion.[66] A brief discussion of pre-*Upjohn* case law is helpful in identifying the issues that survived that decision and continue to confront litigants and courts today.

*1. Pre-*Upjohn *Cases and Former Employees.*—While the debate raged over which *current* corporate employees came within the privilege, few reported decisions addressed the further issue of whether *former* employees were sufficiently aligned with the corporate client so that communications between corporate counsel and the former employee would be protected by the attorney-client privilege. In one instance, a federal district court used the subject matter test to determine that a corporate attorney's notes of communications between corporate counsel and current employees were shielded from

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the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of corporate structure, need to know its contents.

Id.

63. The California Supreme Court, for example, has incorporated elements of the control group and subject matter tests in 11 principles it has identified as relevant to determining which current employees enjoy privileged communications with corporate counsel. *See* D.I. Chadbourne, Inc. v. Superior Court, 388 P.2d 700, 709-10 (Cal. 1964). The California standard also has been applied to bring communications with former employees within the scope of the privilege. *See* Connolly Data Sys., Inc. v. Victor Technologies, Inc., 114 F.R.D. 89, 93 (S.D. Cal. 1987). For a comprehensive discussion of alternative tests proposed by courts and scholars, see Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 254-56 (Ill. 1982). *See also* Williams, *supra* note 42.

64. The *Harper & Row* case, in which the Seventh Circuit adopted the subject matter test, was affirmed by an equally divided Supreme Court in 1971. 400 U.S. 348 (1971). According to one commentator, there is no way to tell if the four justices who favored reversal did so because they believed the Seventh Circuit's interpretation of the privilege was erroneous or because they thought the use of the extraordinary writ of mandamus was inappropriate to determine such an issue. *See* John E. Sexton, *A Post-*Upjohn *Consideration of the Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 453 n.38 (1982).

65. 449 U.S. 383 (1981).

66. *See generally* Michael L. Waldman, *Beyond* Upjohn: *The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473 (1987); Sexton, *supra* note 64; Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After* Upjohn?, 81 MICH. L. REV. 665 (1983).

discovery by both the attorney-client privilege and the work product doctrine, while similar materials generated by communications with former employees were protected by the work product doctrine alone.[67]

The dearth of decisions regarding former employees and the attorney-client privilege does not necessarily mean that the issue was not prevalent; rather, it may mean that it was frequently resolved through terse, interlocutory discovery orders or private agreements between counsel that are not memorialized in reported cases or electronic databases.[68] One may surmise that any court that strictly adhered to the control group test would hold that no privilege existed, because a former employee is not in a position to exert any control over the corporation's decision-making process. On the other hand, a court that applied the more expansive "subject matter" test would be more inclined to include the former employee in the definition of "client." But even this test arguably prevented the attorney-client privilege from attaching to communication between corporate counsel and former employees, due to its requirement that the employee be under orders from her supervisor to communicate with corporate counsel. Thus, the control group, subject matter, and even hybrid tests offered no definitive standards for application of the attorney-client privilege to former employees of a party.

2. The Upjohn *Decision.*—Recognizing that lower courts were using conflicting standards for determining the scope of the attorney-client privilege in the corporate context, the Supreme Court in 1981 granted certiorari in *Upjohn*[69] to resolve this debate. The Court rejected the control group test, but it did so without expressly adopting either the subject matter or any other previously articulated test.[70] The Court also expressly declined to address the issue of whether the attorney-client privilege extends to communications between a former employee and counsel for the employer.[71] Be-

67. *See In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 373-75 (E.D. Wis. 1979).

68. The absence of appellate court decisions may also be attributable to hesitation by counsel to file, and reluctance of the courts to entertain, expensive and time-consuming interlocutory appeals of discovery orders pursuant to a writ of mandamus or other extraordinary writ. *See, e.g.*, Admiral Ins. Co. v. United States District Court, 881 F.2d 1486, 1490 (9th Cir. 1989); *In re* von Bulow, 828 F.2d 94, 96-97 (2d Cir. 1987); Sporck v. Peil, 759 F.2d 312, 314-25 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985).

69. 449 U.S. 383, 386 (1981).

70. *See id.* at 392-97.

71. *See id.* at 394 n.3.

cause the Court's decision involves a detailed analysis of the attorney-client privilege in the corporate sphere, *Upjohn* naturally serves as the point of departure for courts struggling to apply the privilege in that context, whether to current or former employees.

Upjohn's general counsel was informed that one of its subsidiaries might have made illegal payments to a foreign government to secure business.[72] An internal investigation of the matter was conducted under the supervision of the general counsel; the first phase consisted of sending questionnaires to all foreign managers.[73] In addition to being instructed to provide detailed information in response to the inquiries posed, respondents were told to treat the investigation as highly confidential and to return their completed forms directly to corporate counsel. The second part of the investigation involved interviews by corporate and outside counsel of seventy-nine current and seven former company officers and employees.[74]

Upjohn voluntarily submitted a report containing the results of its investigation to the Internal Revenue Service (IRS) and the Securities Exchange Commission (SEC), triggering further investigation by the IRS. The company provided the IRS with a list of all former and current employees interviewed by corporate counsel, but refused, on attorney-client privilege and work product grounds, to comply with an IRS summons that sought production of all files of corporate counsel, including the questionnaire responses and the attorneys' notes and memoranda from the interviews.[75] The district court ordered the materials produced on the grounds that the corporation had waived the attorney-client privilege by making some disclosures to the SEC and the IRS.[76] The Court of Appeals for the Sixth Circuit reversed the district court's ruling on waiver, but limited the applicable privilege to communications between counsel and officers and agents responsible for directing the corporation's actions in response to legal advice—i.e., the "control group."[77]

Although cognizant of the many "important questions concerning the scope of the attorney-client privilege in the corporate context,"[78] a virtually unanimous Supreme Court expressly declined to

72. *Id.* at 386-87.
73. *Id.* at 387.
74. *Id.* at 394 n.3.
75. *Id.* at 387-88.
76. *See id.* at 388.
77. *Id.* at 388-89; *see also* United States v. Upjohn Co., 600 F.2d 1223, 1225 (1979).
78. *Upjohn*, 449 U.S. at 386.

furnish comprehensive guidance on these questions.[79] One of the key issues the Court explicitly declined to address was whether a former employee of a corporation would be covered by the attorney-client privilege.[80] True to its declared intent to issue a narrow opinion, the Court focused primarily upon whether the attorney-client privilege should be defined in the corporate context by the "control group" test.[81]

In rejecting the control group definition, the Court first observed that an advocate's ability to provide meaningful legal advice is premised "upon being fully informed by the client."[82] Limiting the attorney-client privilege to those in the upper echelons of management, the Court reasoned,

> overlooks the fact that the privilege seeks to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye toward the legally relevant.[83]

A further justification offered by the Court for rejecting the control group test was that middle- and lower-level employees are often responsible for embroiling the corporation in serious legal difficulties in the first instance; thus, their input is needed for corporate counsel to provide fully informed legal advice.[84] The Court also perceived the control group test as difficult to apply[85] and as inappropriately limiting the flow of information between lower-level employees and corporate counsel charged with ensuring the corporation's compliance with various laws and regulations governing corporate action.[86]

In response to the concern that expansion of the privilege to

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79. *See id.* Chief Justice Burger wrote a concurring opinion agreeing with the Court's rejection of the control group test, but advocating a more expansive opinion by the Court to provide guidance to attorneys and the courts regarding the scope of the attorney-client privilege in the corporate universe. *See id.* at 402-04 (Burger, C.J., concurring).

80. The Court reasoned that neither court below had addressed the issue. *See id.* at 394 n.3.

81. The Court also addressed work product issues raised by the IRS summons. *See id.* at 397-402. For this aspect of the decision, see *infra* Part IV.

82. 449 U.S. at 389.

83. *Id.* at 390-91 (citations omitted).

84. *See id.* at 391.

85. *See id.* at 393.

86. *See id.* at 392.

those outside the control group would create an impenetrable "zone of silence" shielding critical information from discovery, the Court noted that the privilege only protects the content of the communications between corporate counsel and employees, and not the facts underlying those communications.[87] Thus, because the IRS had a list of Upjohn employees interviewed by corporate counsel, the IRS could interview them to obtain relevant facts; the convenience to the IRS of obtaining corporate counsel's questionnaires and interview notes for these employees did not, in the Court's view, "overcome the policies served by the attorney-client privilege."[88]

The Court was also impressed by the precise circumstances surrounding the gathering of the information by Upjohn's counsel. The communications between employees and counsel were made at the direction of corporate superiors for the purpose of securing legal advice; relevant information was possessed by those who were not within upper-level management; the information sought concerned actions that were within the scope of the employees' respective duties; the employees knew that they were being questioned so that the corporation could obtain legal advice; and the employees were advised that the communications, especially questionnaire responses, were classified as "highly confidential."[89] By articulating these factors as relevant to its decision, the Court implicitly approved the modified subject matter test, including the caveat that the communications be treated as confidential within the corporation.

Chief Justice Burger, in his lone concurrence, stated that the Court's opinion failed to afford sufficient guidance "to corporations, counsel advising them, and federal courts" confronted with attorney-client privilege issues.[90] The Chief Justice preferred to articulate a general rule that "a communication is privileged at least when, as here, an employee or former employee speaks at the direction of management with an attorney regarding conduct within the scope of employment."[91]

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87. *See id.* at 395.

88. *Id.* at 396.

89. *Id.* at 394.

90. *Id.* at 402 (Burger, C.J., concurring).

91. *Id.* at 403 (Burger, C.J., concurring). Chief Justice Burger further suggested that:

> [t]he attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has

*3. Post-*Upjohn *Decisions.*—The major impact of *Upjohn* has been the abandonment of the control group test by federal courts.[92] Yet, the Court's articulated rationale for its narrow holding has resulted in an expansive interpretation of the decision by lower courts. Specifically, the Court's emphasis on the purpose of the attorney-client privilege as an important implement for encouraging the flow of information to the attorney[93] has resulted in a broad application of the attorney-client privilege.[94] Carried to its logical conclusion, however, attaching undue significance to this single rationale for the privilege would shield from discovery any communication between corporate counsel and other individuals—even persons possessing no current or former affiliation with the corporation—provided that the other individuals were supplying information necessary to enable the attorney "to give sound and informed advice"[95] to her client.[96] Allowing the privilege to cast such a wide net would, of course, eliminate the traditional requirement that only communica-

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bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct, or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

Id.

The Chief Justice's proposed rule is in accord with the majority's holding in *Upjohn* with two important exceptions: the addition of "former employees" to the scope of the privilege, and the omission of a requirement that the confidentiality of the communications be maintained by the corporation.

92. Most courts have concluded that *Upjohn* rejected the control group test. *But see* Henderson v. National R.R. Passenger Corp., 113 F.R.D. 502, 510 (N.D. Ill. 1986) (interpreting *Upjohn* as "broadening" rather than rejecting the control group test); Wright v. Group Health Hosp., 691 P.2d 564, 570 (Wash. 1984) (en banc) (interpreting *Upjohn* as adopting "a flexible 'client' test extending coverage to many nonmanagerial employees").

93. *See Upjohn*, 449 U.S. at 390.

94. *See, e.g.*, United States v. El Paso Co., 682 F.2d 530, 538 n.8 (5th Cir. 1982) (viewing *Upjohn* as holding that flow of information to attorney is a critical function of attorney-client privilege), *cert. denied*, 466 U.S. 944 (1984); *In re* John Doe Corp. v. United States, 675 F.2d 482, 487 (2d Cir. 1982); Command Transp. Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94, 96-97 (D. Mass. 1987) (noting that *Upjohn* did not address the former employee situation, but citing the *Upjohn* Court's emphasis on fostering the flow of information to corporate counsel as supporting its conclusion that communications between former employee and corporate party's counsel were privileged); *see also* Sexton, *supra* note 64, at 459 (characterizing the *Upjohn* test as asking whether "application of the privilege under the circumstances of this particular case foster the flow of information to corporate counsel regarding issues about which corporations seek legal advice").

95. *Upjohn*, 449 U.S. at 390.

96. The *Upjohn* Court elaborated: "The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye toward the legally relevant." *Id.* at 390-91.

tions between an attorney and her client are privileged, and effectively create an "attorney communication privilege."

Although courts have not stretched *Upjohn* to such an extreme, it is ironic that while the *Upjohn* Court unequivocally refused to "lay down a broad rule or series of rules to govern all conceivable questions,"[97] and in fact expressly declined to determine whether former employees fell within the scope of the privilege, lower courts immediately began to read *Upjohn* as allowing for a more expansive scope of the privilege in the corporate context. Indeed, once freed from the restrictive shackles of the control group test, many federal courts did not hesitate to include communications between corporate counsel and former employees within the attorney-client privilege.[98] Whether such a broad reading of *Upjohn* misconstrues the proper scope of the attorney-client privilege requires an assessment of post-*Upjohn* case law.

a. Federal Law.—The broadening of the attorney-client privilege resulting from *Upjohn* is dramatically illustrated by opinions filed by a California federal district court and the Court of Appeals for the Ninth Circuit, in a series of cases, consolidated for discovery purposes, involving allegations of an antitrust conspiracy by major oil companies.[99] These petroleum antitrust decisions did not

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97. *Id.* at 386.

98. *See, e.g.*, Admiral Ins. Co. v. United States District Court, 881 F.2d 1486, 1493 (9th Cir. 1989) (reaffirming *In re* Coordinated Pretrial Proceedings, 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982), which extended *Upjohn* to former employees and further expanded scope of privilege to communications between employee of subsidiary and counsel of parent corporation); Smith v. MCI Telecomm. Corp., 124 F.R.D. 665, 687 (D. Kan. 1989) (making no distinction between communications between corporate counsel and current and former employees and holding that all such communications are "doubly nondiscoverable" under the attorney-client privilege and work product doctrine); Amarin Plastics Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 41 (D. Mass. 1987) (noting that "the communications between a former employee and a corporate party's counsel may be privileged" and that no cases had come to the court's attention that held a contrary view); Command Transp., 116 F.R.D. at 96-97 (stating that the *Upjohn* rationale of fostering flow of information to corporate counsel justified extension of privilege to communications between corporate party counsel and former employee); Mickel v. Huntington Bank of Toledo, No. L-82-099, slip op. at 3 (Ohio Ct. App. July 2, 1982) (citing *Upjohn* as clearly indicating that the attorney-client privilege extends to communications between former employee and corporate counsel). *But see* Henderson v. National R.R. Passenger Corp., 113 F.R.D. 502, 510 (N.D. Ill. 1986) (viewing *Upjohn* as expanding rather than rejecting the control group test, and holding that former employee was not covered by the privilege because she could not bind the corporation when employed, or after termination).

99. *See In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 502 F. Supp. 1092 (C.D. Cal. 1980), *vacated*, 658 F.2d 1355 (9th Cir. 1981), *cert. denied sub nom.* California v. Standard Oil Co., 455 U.S. 990 (1982).

squarely confront the issue of informal discovery of former employees; facially, the decisions only resolve plaintiffs' motion to disqualify corporate defense counsel from representing current and former employees whose formal depositions plaintiffs had noticed. However, these opinions provide insights into the competing interests at stake when discovery is sought from current and former employees, as well as the impact of *Upjohn* on the appellate court's decision.

The district court first set the stage for its discourse on the applicability of the attorney-client privilege:

> In these cases, which charge major oil companies with having conspired to violate the antitrust laws of the United States, the plaintiffs (Attorneys General of several states) currently are in the process of noticing the depositions of employees and retired employees of the defendant corporations. It often happens that when such a prospective deponent receives a subpoena for his deposition, or otherwise learns he is a target of inquiry, he, understandably, contacts an appropriate representative of his employer (or former employer) and inquires as to what the dispute is all about and where he fits into the picture. He promptly is referred to the firm of attorneys that are representing the company in these actions and, from the first interview, it is mutually and tacitly inferred that an attorney-client relationship had been established, at no cost to him, which carries through the preparation for the deposition and its accomplishment.[100]

After classifying the current and former oil company employees as nonparty, independent witnesses "whose duty and only appropriate objective is to tell 'the truth, the whole truth, and nothing but the truth,' "[101] the district court articulated numerous reasons for sustaining plaintiffs' motion, predicated on the argument that plaintiffs were impermissibly prejudiced by a process that allowed defense counsel to establish an attorney-client relationship with, and represent during depositions, the corporation's current and former employees. The court's primary concern was that a conflict would arise during an employee's deposition because the employee witness's desire to tell the truth would not harmonize with the attorney's objective of creating a favorable record for the client corporation; thus, "the possibility cannot be discounted that the attorney may become faced with the need to impeach the testimony of

100. *Petroleum Products*, 502 F. Supp. at 1095.
101. *Id.*

his own client."[102]

The court expressed additional ethical and pragmatic concerns militating against allowing corporate counsel to represent current and former employees of a party. These included: (1) the potential for explicit or implicit solicitation of the employees as clients by corporate counsel;[103] (2) insulation of the employees by corporate counsel, preventing plaintiffs' attorneys from informally contacting the employees to identify individuals who possessed sufficient information to warrant the scheduling of a deposition;[104] (3) the bar that application of an attorney-client privilege would create to inquiries of plaintiffs' counsel into the contents of discussions between corporate counsel and employees, including discourse stemming from the review of documents during predeposition "orientation sessions;"[105] and (4) the possibility of excessive disruptions during the employees' depositions resulting from corporate counsel's objections made primarily to protect the corporate client.[106] Considering the above factors, the court decided that representation of current and former employees by corporate counsel would, at a minimum, include inherent conflicts of interest that could create the appearance of professional impropriety.[107] Accordingly, the court disqualified corporate defense counsel from representing defendants' current and former employees during depositions.[108]

The petroleum antitrust defendants pursued an interlocutory appeal on the disqualification issue, and the Supreme Court's *Upjohn* decision was released while the appeal was pending. Although the Ninth Circuit agreed with the district court that the appearance of impropriety could serve as a basis to disqualify counsel,[109] it disagreed with the trial court's conclusion that the spectre of inappropriate conduct automatically accompanied corporate

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102. *Id.*

103. *See id.* at 1096. The court further explained that because the initial contact between the employee and corporate counsel might take place before the employee even realizes the need to seek legal counsel, the contact might be viewed as solicitation. *See id.*

104. *See id.* at 1096-97.

105. *See id.* at 1097. The court noted that corporate counsel could still prepare employees for their depositions, but found the shielding of these orientation sessions by the attorney-client privilege inappropriate: "[I]t must be remembered that they are not parties, and it is in the interests of justice that both sides be entitled to their testimony and be able to make full inquiry into any influences that may have affected such testimony." *Id.*

106. *See id.* at 1097-98.

107. *See id.* at 1098.

108. *See id.*

109. *See Petroleum Products*, 658 F.2d at 1361.

counsels' representation during depositions of defendants' current and former employees.[110] The circuit court reached this result by interpreting *Upjohn* as virtually eliminating all of the trial court's concerns; in fact, it hypothesized that "the district court would have ruled the other way if *Upjohn* had been decided before the district court had to act"[111] on the disqualification motion.

More precisely, the Ninth Circuit rejected the reasons articulated by the trial court for prohibiting corporate counsel from representing the employees during their respective depositions. Regarding the potential for solicitation of clients by corporate counsel, it stated that such solicitation,

> even if it could be substantiated, does not cut to the heart of the integrity of the system so as to require the court to take drastic steps to safeguard the image of the judicial process in the eyes of the public. Moreover, we note that in light of *Upjohn*, the definition of solicitation in the corporate-counsel context is altered.[112]

The court conceded that corporate counsel's "pre-deposition insulation" of the employees caused inconvenience and frustration, but found this ground insufficient to "warrant interference with a right to counsel."[113] The potential disruption caused by corporate counsel's instruction to an employee to refuse to answer a question during a deposition could be resolved, according to the circuit court, through "judicious use of sanctions" or predeposition instructions from the trial court on how to conduct the depositions.[114]

Regarding the trial court's concern that whatever transpired between corporate counsel and current and former employees during the predeposition "orientation sessions" would be inappropriately shielded from discovery, the circuit court found no difficulty in extending *Upjohn*'s scope of attorney-client privilege to former employees as well as current ones.[115] The court reasoned:

> Although *Upjohn* was specifically limited to current employees, the same rationale applies to the ex-employees. . . . Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or poten-

110. *See id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *See id.* at 1361 n.7.

> tial difficulties. Again, the attorney-client privilege is served by the certainty that conversations will remain privileged after the employee leaves. Although no findings were made, it is clear that at least some of the conversations referred to by the district court were made to counsel for the companies in order to secure legal advice for the company. The orientation sessions undoubtedly provided information which will be used by corporate counsel in advising the companies how to handle the pending lawsuit.[116]

The Ninth Circuit's cavalier conclusion that *Upjohn* eliminated all of the possible ethical and pragmatic ramifications that arise when corporate defense counsel prepare former corporate employees for their depositions and represent them during the depositions presents problems on several levels. The court's summary disposal of the many issues involved without mention of countervailing considerations causes immediate concern. The court relied to a disturbing degree upon the relative value to the attorney of the information that the former employees possess as determinative of whether the attorney-client privilege attaches. As previously noted, *Upjohn* specifically cited the free flow of information to the attorney as a reason to reject the narrow constraints of the control group test;[117] however, *Upjohn* cannot be read, as the Ninth Circuit decision implies, as extending the privilege to communications between corporate counsel and anyone who possesses factual information that the attorney finds helpful in advising the corporation.

In truth, *Upjohn* does not even begin to reach all the issues illuminated by the district court in the petroleum antitrust disqualification opinion. Contrary to the circuit court's reading, *Upjohn* does not even mention, much less resolve, the solicitation issue.[118] *Upjohn* does not address any issues relating to former employees, such as the pragmatic and ethical concern that corporate counsel may intentionally or unintentionally coach the former employees during informal interviews or deposition preparation sessions, selectively refreshing the individual's recollections and suggesting responses to anticipated questions in a manner consistent with the

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116. *Id.* (citation omitted).

117. 499 U.S. 383, 390-91 (1981); *see supra* text accompanying note 85.

118. It is clear that the concern expressed by the district court in the petroleum antitrust litigation regarding solicitation by corporate counsel survived *Upjohn*. *See, e.g.*, United States v. Occidental Chem. Corp., 606 F. Supp. 1470, 1474-77 (W.D.N.Y. 1985) (allowing counsel for corporate party to represent nonparty former employees during depositions, but prohibiting corporate counsel from initiating contact with former employees for the purpose of offering legal services).

corporation's theories of defense. While this same situation can no doubt occur when current employees are represented by defense counsel, often a significant amount of time has elapsed since the former employees have experienced day-to-day familiarity with the corporation's operations, thus making them even more vulnerable to suggestion. Because the purpose of discovery is to establish the relevant facts as the witnesses recall them, rather than recreate the facts as the attorneys desire them to be, the importance of reexamining these questions, rather than prematurely attributing their demise to *Upjohn*, cannot be underestimated.

b. State Law.—Uninhibited by the Supreme Court's decisions on issues involving the attorney-client privilege,[119] post-*Upjohn* decisions of state courts and actions of state legislatures have reflected less willingness to expand the attorney-client privilege past the control group in the corporate setting.[120] In *State v. Jancsek*,[121] for ex-

119. *See, e.g.*, Consolidation Coal Co. v. Bucyrus-Erie, 432 N.E.2d 250 (Ill. 1982) (comparing federal jurisprudence of attorney-client privilege in corporate context, including Supreme Court's *Upjohn* decision, to Illinois precedent, and reaffirming control group test as law of Illinois).

120. *See, e.g.*, Langdon v. Champion, 752 P.2d 999, 1001-02 nn.4-5 (Alaska 1988) (noting that the definition of "representative of a client" contained in Alaska's codified version of the attorney-client privilege limits coverage of the privilege to the control group in the corporate setting); Connolly Data Sys., Inc. v. Victor Technologies, Inc., 114 F.R.D. 89, 93-94 (S.D. Cal. 1987) (finding that California Evidence Code requires showing that individual must be "authorized representative" of the corporation for communications between that individual and corporate counsel to be privileged, and former employee is not an "authorized representative"); Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 27 Env't Rep. Cas. (BNA) 1745, 1759 (D.D.C. 1986) (requiring showing that communications for which attorney-client privilege is claimed were part of control group efforts to secure legal advice; contrary ruling would mean that "every memorandum and conversation between a corporate employee and corporate counsel could be confidential, which would expand the privilege far beyond its bounds and unnecessarily frustrate the efforts of others to discover corporate activity"); *Consolidation Coal Co.*, 432 N.E.2d at 258 (retaining control group test despite Supreme Court's criticisms in *Upjohn*); *see also* Leer v. Chicago, M., St. P. & Pac. Ry., 308 N.W.2d 305, 308-09 (Minn. 1981) (discussing control group, subject matter, and Weinstein tests, but not adopting a particular test; however, court's holding that "[t]he attorney client privilege does not encompass communications which are within an employee's knowledge solely because he witnessed an accident" at work appears to align most closely with control group test), *cert. denied*, 455 U.S. 939 (1982); United States Ins. Group v. T.B. Campbell Inc., No. 01-90-00754-CV, 1990 Tex. App. LEXIS 3047, at *7 (Tex. Ct. App. Dec. 12, 1990) (observing that "[n]o Texas court has decided whether Texas follows the subject matter or control group test," and declining to make that decision because the communication at issue failed to meet the criteria for privilege under either test). *But see* Denver Post Corp. v. University of Colo., 739 P.2d 874, 880 (Colo. Ct. App. 1987) ("We apply the Supreme Court's rationale in *Upjohn* to cover communications between counsel and former employees of the client which concern activities during their period of employment.").

ample, the Oregon Supreme Court recounted the extensive debate between members of state committees charged with evidentiary reform on the issue of whether the statutory phrase "representative of the client" should carry with it a control group or subject matter definition in the corporate attorney-client privilege context.[122] The control group test ultimately was selected based upon the rationale that "the restrictive view brings the corporate privilege more in line with the privilege available to unincorporated business concerns," and because "[a] more permissive privilege would result in suppression of information conveyed to attorneys by employees who are more like witnesses than clients and who have no personal desire for confidentiality."[123]

Like the Oregon legislature, the Illinois Supreme Court was not sufficiently impressed by *Upjohn* to extend the attorney-client privilege to employees outside the control group. In *Consolidation Coal Co. v. Bucyrus-Erie Co.*,[124] the Illinois Supreme Court recognized the competing social policies in force when the attorney-client privilege is examined in the corporate context. Of the two primary policies at stake—encouraging full and frank communication between a client and his legal advisor, and providing for liberal discovery—the court viewed unhampered discovery as the more compelling policy. Allowing the privilege to create a bar to discovery of masses of corporate documents and information possessed by numerous employees, the court opined, "is fundamentally incompatible with this State's broad discovery policies looking to the ultimate ascertainment of the truth, which we continue to find essential to the fair disposition of a lawsuit."[125] In the eyes of the judges deciding *Consolidation Coal*, the control group test strikes "a reasonable balance by protecting consultations with counsel by those who are the decision makers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery."[126]

Contrary to *Upjohn*'s characterization of the control group test as "difficult to apply in practice,"[127] Illinois' highest court praised the control group test for its "predictability and ease of applica-

121. 730 P.2d 14 (Or. 1986).
122. *See id.* at 18-21.
123. *Id.* at 20.
124. 432 N.E.2d 250 (Ill. 1982).
125. *Id.* at 257 (citations omitted).
126. *Id.*
127. *Upjohn*, 449 U.S. at 393.

tion."[128] The court further observed that the labels or titles of employees are not determinative: the actual duties and responsibilities of the employees dictate their status as decision makers who are members of the control group.[129] Recognizing "that decisionmaking within a corporation is a process rather than a final act,"[130] the *Consolidation Coal* court offered further clarification of which employees fall within the control group:

> [A]n employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms that basis of any final decision by those with actual authority, is properly within the control group. However, the individuals upon whom he may rely on for information are not members of the control group. Thus, if an employee is consulted for the purpose of determining what legal action the corporation will pursue, his communication is protected from disclosure.[131]

The focus of the *Consolidation Coal* control group test, then, is "on individual people who substantially influenced decisions, not on facts that substantially influenced decisions."[132] In effect, the control group test recognizes two tiers of corporate employees whose communications with counsel are not discoverable: top management decisionmakers comprise the first tier, while employees who directly advise top management, and upon whose advice top management relies in making its decision, comprise the second tier.[133] Employees' communications that consist of purely factual data are excluded if the communications contain no suggestions on how the decisionmakers should act in response to such information.[134] Presumably, other communications would also be excluded, including those that are primarily factual in nature but that contain merely

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128. *Consolidation Coal*, 432 N.E.2d at 257.

129. *See id.*

130. *Id.* at 258.

131. *Id.*

132. Archer Daniels Midland Co. v. Koppers Co., 485 N.E.2d 1301, 1304 (Ill. App. Ct. 1985).

133. *See* Mlynarski v. Rush Presbyterian—St. Luke's Medical Ctr., No. 1-90-0778, slip op. at 3 (Ill. App. Ct. Apr. 29, 1991).

134. *See Archer Daniels Midland Co.*, 485 N.E.2d at 1304 (holding that Illinois attorney-client privilege did not bar production of report, prepared by senior corporate engineer at the request of counsel, that addressed the structural strengths of a storage facility manufactured by the corporation, because engineer merely supplied factual data to top management and had no role in management's decision to send notices to customers based on results of report).

gratuitous advice from an employee who is neither in top management nor one upon whom top management normally relies for advice in making decisions.

The *Consolidation Coal* court's formulation of the control group test leaves little doubt that the privilege does not shield communications between former employees and corporate counsel from discovery in any jurisdiction that embraces that test, because a former employee would not be in a position to guide management's decisions. As one court observed, ruling that even communications between a former employee retained as a consultant to the litigation and corporate counsel were not privileged:

> Former employees are not the client. They share no identity of interest in the outcome of the litigation. Their willingness to provide information is unrelated to the directions of their former corporate superiors, and they have no duty to their former employer to provide such information. It is virtually impossible to distinguish the position of an employee from any other third party who might have pertinent information about one or more corporate parties to the lawsuit.[135]

B. A Proposal for a Bright Line Test

In light of the foregoing discussion, a general rule excluding communications between former employees and a corporate party's counsel from the attorney-client privilege appears to be an appropriate means for reconciling the conflicting state and federal jurisprudence on the issue.[136] In addition to the inherent value and ease of a bright line test,[137] numerous other substantive reasons support

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135. Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 517 (N.D. Ill. 1990) (quoting Clark Equip. Co. v. Lift Parts Mfg. Co., No. 82-C-4585, slip op. at 12 (N.D. Ill. Oct. 1, 1985)).

136. The proposed rule would not necessarily prohibit a former employee from retaining the same counsel representing the former employer and thus creating a separate attorney-client relationship on which assertions of the privilege legitimately could be based. Courts might, however, carefully scrutinize such situations to determine whether the former employee sought the representation (rather than being solicited by corporate counsel), whether conflicts of interests exist or may arise during the course of the litigation, and whether circumstances suggest that any other appearance of impropriety may attach to corporate counsel's dual representation. The conflicts that may surface due to dual representation may not be apparent at the outset of the litigation. *See, e.g., In re* Grand Jury Investigation, 575 F. Supp. 777 (N.D. Ga. 1983) (conflict arose when corporation wished to waive privilege regarding communications between employees and corporate counsel, and employees wished to maintain the privilege).

137. *See* James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 436 (1985) (arguing that in comparison to use of balancing tests, bright line standards "are easier to

the validity of such a test.[138]

First, excluding former employees from the privilege does not inhibit the objective of encouraging a freely flowing stream of information to the corporate attorney. Absent potential individual liability on the part of the former employee,[139] there is no reason to suspect that the former employee will not be candid regarding her knowledge of relevant facts due to a fear that the content of her communications with corporate counsel will be disclosed in the future.

Second, shielding communications between the former employee and the corporate party's counsel under the attorney-client privilege creates a problematic, absolute bar to ascertaining the degree of intentional or unintentional "coaching" of the former em-

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administer, afford greater predictability, limit unwanted discretion, and provide greater certainty and thus better notice").

138. There may be some wisdom in adopting a rule prohibiting a corporate party's counsel from representing former employees during depositions. A conflict between the corporation's theory of the case and the testimony of the former employee may arise during the deposition. When this occurs, corporate counsel's method of dealing with such a situation is often to fire a string of (arguably unfounded) objections in an effort to derail the line of inquiry. As explained *supra* note 136, conflicts of interest can also surface regarding waiver of the attorney-client privilege. Because the privilege belongs to the client, the former employee has the right to waive the privilege regarding communications with his attorney that occurred, for example, during deposition preparation. It is doubtful that the former employee's amenability to waiving the privilege and discussing the details of the deposition preparation sessions would be in the best interest of the corporate client. On the other hand, a rule prohibiting a former employee from being represented by corporate counsel may present a substantial economic burden on the employee by forcing him to retain independent counsel. Absence of legal counsel might result in the ex-employee making unintended admissions due to his lack of sophistication in the deposition process, or it could intimidate him into silence.

139. If a former employee faces individual liability relating to the events or transaction underlying the litigation, that individual may be or become a party whose interests are directly contrary to those of the corporate party. In this situation, the former employee would be forced to retain counsel separate from corporate counsel and could not, by any stretch of the imagination, be considered a client or representative of the corporate client for the purpose of the attorney-client privilege. If, however, the former employee is named as a party and no conflict exists, then the former employee could retain the corporate counsel or her own counsel. Even if she retains separate counsel, communications between the former employee and corporate counsel may be shielded from discovery under what is routinely referred to as the "joint defense privilege." *See generally* Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981); Susan V. Rushing, Note, *Separating the Joint Defense Doctrine From the Attorney-Client Privilege*, 68 TEX. L. REV. 1273 (1989). Although this privilege originated in the criminal context, it has also been applied in civil cases involving multiple counsel for plaintiffs as well as multiple defense counsel. *See, e.g.*, Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187, 192-93 (N.D. Ill. 1985) (bringing within the joint privilege confidential communications between parties with common interests as plaintiffs).

ployee by corporate counsel. As previously noted, a substantial amount of time may have passed since the events at issue occurred.[140] The former employee may also have a strong desire to aid his former employer in the litigation, stemming either from a sense of loyalty to friends and acquaintances currently employed by the corporation or from pecuniary considerations, such as pension and health benefits, still provided by the corporation, or both. Such factors make the former employee especially susceptible to subtle (and not so subtle) "gap-filling" suggestions offered by corporate counsel. If the attorney-client privilege does not attach, opposing counsel may freely inquire into the content of the exchanges between corporate counsel and the former employee, thus revealing the extent, if any, to which counsel has coached or even coerced the witness.

Third, the ethical clouds surrounding the potential solicitation of the former employee by counsel for the corporate party evaporate if the bright line test is adopted. Under the murky standards now governing the application of the attorney-client privilege to former employees, a corporate attorney conceivably may initiate contact with the former employee, conduct an interview, and then, if the interview is favorable, extend an offer to represent the employee in any matter related to the litigation. If the former employee accepts the offer, the content of the communications between the former employee and corporate counsel—including the communication in which the attorney actually solicited the employee—is insulated from discovery because of the attorney-client relationship created at that meeting.[141] At a minimum, adoption of the proposed rule would eliminate the spectre of improper solicitation that arises in such situations, because the content of the communications would be fully discoverable.[142]

Fourth, the policy goal of narrowly tailoring the attorney-client privilege will be well-served by a rule refusing to extend the privi-

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140. *See supra* text accompanying notes 118-119.

141. In fact, the meeting can be covered by the privilege even if the employee declines representation by corporate counsel, as long as the employee was considering seeking corporate counsel's legal advice when the meeting occurred. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978) ("The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.").

142. No ethical violation occurs where the former employee actually initiated contact with corporate counsel for the purpose of seeking legal advice. *See* D.S. Magazines, Inc. v. Warner Publisher Servs., Inc., 623 F. Supp. 624, 624 (S.D.N.Y. 1985). In the author's experience, this scenario is extremely rare.

lege to a former employee who, as discussed above, cannot be fairly viewed as either a "client" or a "representative of a client."[143]

Finally, the exclusion of communications between corporate counsel and a former employee from the attorney-client privilege will not leave the corporate attorney's theory of the case and general strategy completely open for inquiry by the other side. To the contrary, the work product doctrine still shields from discovery the notes, memoranda, and other documents prepared by the attorney during or after meetings with the former employees.[144] Further, certain facts known by the former employee that come to light during an interview between corporate counsel and the former employee are shielded from discovery if they consist of trade secrets or other material proprietary to the corporation.[145]

III. ETHICAL CONSTRAINTS ON OPPOSING COUNSEL'S COMMUNICATIONS WITH A PARTY'S FORMER EMPLOYEES

A. The Current Dilemma

At the same time that corporate counsel wrestles with whether the content of her communication with former employees is shielded by the attorney-client privilege, opposing counsel faces an equally contentious dilemma: Is he ethically constrained from consulting former employees at all? The correct response to this inquiry has been widely debated, providing opposite judicial pronouncements even within the same jurisdiction.[146] The weight

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143. *See supra* notes 120-123 and accompanying text. The narrowly tailored approach is favored not only in the attorney-client context, but also in the context of privileges covering communications between spouses, priest and penitent, and doctor and patient. *See* United States v. Davies, 768 F.2d 893, 898 (7th Cir. 1985).

144. *See infra* Part IV.

145. *See* American Motors Corp. v. Huffstutler, 575 N.E.2d 116, 120 (Ohio 1991) (enjoining former employee from divulging information classified as "trade secrets" under Ohio statute where he sought to exploit information gained during employment as engineer and attorney with American Motors Corporation (AMC) by marketing himself as an expert witness for plaintiffs in lawsuits involving AMC Jeeps); PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118, 122 (W.D. Pa. 1990) (recognizing that former employee's knowledge of trade secrets would in some cases be immune from discovery during informal ex parte interview, but former employer's claim that trade secrets had already been revealed rendered the need for such protection moot); *In re* Home Shopping Network, Inc. Securities Litigation, Fed. Sec. L. Rep. (CCH) ¶ 94,950, at 95,284 (M.D. Fla. 1989) (allowing ex parte interviews, but ordering plaintiff's counsel to remind former employees prior to interview that they remained bound by confidentiality agreement regarding trade secrets executed during employment).

146. *Compare* Public Serv. Elec. & Gas Co. (PSE&G) v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037, 1039 (D.N.J. 1990) (prohibiting informal contacts with party's former employees) *with* Curley v. Cumberland Farms, Inc., 134 F.R.D. 77 (D.N.J.

of authority interprets Model Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct,[147] or its predecessor, Disciplinary Rule 7-104(A)(1),[148] to hold that such contact is not per se improper.[149] Nonetheless, the validity of arguments supporting the opposite result also has been readily acknowledged.[150] Further, there is no uniform federal common law on this subject; rather, federal courts often apply the ethical rules and standards adopted by the state in which the court sits.[151]

1991) (permitting counsel's ex parte contact with opposing party's former employees under ethical rules). For further discussion of this disagreement, see *infra* Subpart III.D.

147. For the text of Model Rule 4.2, see *infra* text accompanying note 164.

148. The Disciplinary Rule requires that:

> (A) 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 authorized by law to do so.

MODEL CODE, *supra* note 10, DR 7-104(A)(1).

149. For decisions concluding that Model Rule 4.2 is not applicable to former employees, and that contact therefore may be made, see, e.g., University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990); Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 (D. Mont. 1986); Triple A Machine Shop, Inc. v. California, 261 Cal. Rptr. 493, 499 (Cal. Ct. App. 1989); Niesig v. Team I, 558 N.E.2d 1030, 1036 (N.Y. 1990) (interpreting DR 104(A)(1)). Other courts have held that contact with ex-employees is permissible unless the acts or omissions of the employee in question are imputable to the corporation. *See, e.g.*, Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 40-41 (D. Mass. 1987) (finding a former employer's "conclusory assertion" of imputation of liability insufficient to invoke Rule 4.2); Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988). Ex parte contacts have also been deemed improper where former employees possess privileged information. *See* Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 629 (S.D.N.Y. 1990). Extensive searches of electronic databases and hardcopy materials revealed no decisions rendered by federal circuit courts on the subject. In its unpublished decision, American Protective Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., Nos. 83-2674, 83-2728 (9th Cir. Dec. 3, 1984), the Ninth Circuit interpreted Model Rule 4.2 as a bar to ex parte contact with former employees. As noted in Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 86 (D.N.J. 1991), however, that decision was subsequently vacated by the deciding court, rendering it of no precedential value.

150. *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991) (recognizing "that persuasive policy arguments can be and have been made for extending" the rule prohibiting ex parte contact with a represented party to certain former employees of that party); *Polycast*, 129 F.R.D. at 626 (observing that several courts and commentators have suggested that ex parte contact with certain former employees may be improper).

151. Federal law governs the conduct of attorneys in federal courts, *In re* Snyder, 472 U.S. 634, 645 n.6 (1985), and that law is usually elucidated in the local rules of each federal district court. *Polycast*, 129 F.R.D. at 624. Rather than authoring a distinct code of conduct, however, many local rules incorporate by reference model codes adopted by the state in which the court sits or the model codes promulgated by the ABA, or both. *See, e.g.*, *id.* (deciding that conduct of attorneys practicing before courts in Southern and Eastern District of New York was governed by ABA or New York Bar Association). Fed-

The significance of this matter to litigants and their counsel cannot be overestimated. From the perspective of the attorney representing a corporate party, giving opposing counsel free ex parte access to the client's former employees is clearly undesirable. The potential naiveté of the former employees in legal matters renders them vulnerable to opposing counsel's manipulations. This vulnerability may be especially intense where the individual bears animosity toward the former employer due to the circumstances surrounding the cessation of employment. Indeed, the former employee may perceive opposing counsel as a kindred spirit, whose interests, like his own, are directly adverse to that of the former employer. Even where the former employee maintains a neutral or positive attitude regarding the former employer, the frailties of human memory,[152] paired with the passage of time, render the individual fair game for the manipulative tactic employed by opposing counsel of coaching the individual on key facts under the guise of "helping" him to remember.[153]

Despite the foregoing, corporate counsel's desire to protect the corporation's former employees from exposure to and potential exploitation by opposing counsel is often counterbalanced by the need to distance the corporation from negative information and testimony that ex-employees may offer regardless of opposing counsel's influence. One indeed, testimony that runs contrary to the corporation's theory of the case may necessitate corporate counsel's attack on the credibility of the individual's testimony by characterizing it as that of a disgruntled former employee. One instance where corporate counsel desired both to control and disassociate former employees occurred in *Dubois v. Gradco Systems, Inc.*,[154] where corporate counsel first informed plaintiff's counsel that it could not produce seven employees for deposition because they were no longer employed by the company; corporate counsel filed a motion *in limine* arguing that plaintiff's counsel should be prohibited by ethical con-

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eral courts, however, are not bound by state interpretations of the applicable code. *Id.* at 625.

152. As one scholar observes, "[m]emory is not like a phonograph record; the perception of an event does not leave a single, clear imprint that can be replayed precisely and at will." Applegate, *supra* note 9, at 329; *see also* ISRAEL ROSENFIELD, THE INVENTION OF MEMORY: A NEW VIEW OF THE BRAIN 3 (1988) (labeling as a "myth" the long-held belief that people possess accurate memories).

153. Clearly, the potential for manipulation of any witness is not a concern just for corporate counsel; rather, its repercussions resound to the very heart of the integrity of our system of justice.

154. 136 F.R.D. 341 (D. Conn. 1991).

straints from conducting informal interviews of the defendant's former employees.[155]

Corporate counsel's efforts to protect the corporation's former employees from exposure to opposing counsel should not, however, be immediately construed as an attempt improperly to shield the individuals from discovery because corporate counsel knows that the testimony will be adverse to his client; rather, it is often corporate counsel's lack of knowledge regarding the former employee's testimony, combined with a duty zealously to safeguard his corporate client's interests, that inspires a motion for a protective order. Similarly, opposing counsel's decision to conduct ex parte interviews should not necessarily be construed as part of a sinister plot to manipulate and coerce the testimony of interviewees. Rather, many legitimate objectives can be accomplished during informal ex parte interviews, including determining whether formal discovery is warranted and obtaining a statement from the witness that later can be used to refresh his memory or, in the extreme case, to impeach his testimony. Opposing counsel's desire to conduct initial screening interviews outside the presence of corporate counsel also reflects another legitimate concern: "Former employees often have emotional or economic ties to their former employer and would sometimes be reluctant to come forward with potentially damaging information if they could only do so in the presence of the corporation's attorney."[156]

B. Opposing Counsel's Unsatisfactory Options

The current state of the law provides at least four options to counsel desiring to interview an opposing party's former employees, and none is completely satisfactory. First, counsel can err on the side of caution by conducting only formal discovery of an opposing party's former employees, with the cost of the litigation increasing substantially, both in attorney time and fees associated with the taking of depositions. This extra expense may in many instances be ill spent, since one of the objectives of conducting informal interviews is to determine which individuals possess knowledge that makes taking their depositions worthwhile. Second, counsel can ask corporate counsel's consent to conduct the interviews. In view of the adversarial nature of litigation, as well as corporate counsel's duty to protect her client's interests, such permission would rarely be forth-

155. *See id.* at 342-43.

156. Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 628 (S.D.N.Y. 1990).

coming.[157] Third, the attorney can seek the court's approval of the ex parte contacts prior to taking any action. As with the first option, the additional time and expense involved in obtaining court intervention on this discovery issue can be considerable,[158] and the results unsatisfactory. For example, a California trial court entered an order forbidding ex parte contacts with former employees who had been within the employer's control group. In response to counsel's motion seeking clarification of which former employees fit within the control group, the court dumped the dilemma back on the attorney's doorstep by responding: "You have a choice. If you are sure they are not [within the control group], you can interview them. If you are wrong, you get sanctioned."[159]

Finally, there is the option that is routinely, yet perhaps improvidently, exercised: the attorney can conduct the interviews without court approval or opposing counsel's knowledge or consent. As discussed more fully below, counsel choosing this option may find herself facing allegations that her actions constituted unethical and unprofessional conduct, with the party or the attorney pressing the charges seeking sanctions ranging from disqualification from repre-

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157. Corporate counsel's reticence regarding ex parte contacts of a client's former employees is undoubtedly based in part on the fear that opposing counsel will tape record the interviews or obtain written statements from the former employees that can be used as impeachment evidence if the employees change their respective stories at trial. *See, e.g.*, Bougé v. Smith's Management Corp., 132 F.R.D. 560, 562 (D. Utah 1990). Even minor deviations between the story as told in the interview and the story as retold at trial can be made to appear significant by a skilled trial attorney, thus seriously undermining the witness's credibility.

158. Under the authority delegated by the 1976 Amendments to the Magistrates Act and local rules of court, discovery disputes are often adjudicated by a magistrate, whose decisions can be appealed to the district court. *See* 28 U.S.C. § 636(b)(1)(A) (1976) (stating that "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court"; the trial court can reconsider the magistrate's decision on a pretrial issue only when it is "clearly erroneous or contrary to law"); Public Serv. Elec. & Gas Co. (PSE&G) v. Associated Elec. & Gas Ins. Servs., Inc., 745 F. Supp. 1037, 1038 (D.N.J. 1990) (citing the Magistrates Act and a local rule of court as authority for magistrate's resolution of discovery disputes and further providing that such resolutions will not be set aside unless clearly erroneous or contrary to law).

159. Triple A Machine Shop, Inc. v. California, 261 Cal. Rptr. 493, 497 (Cal. Ct. App. 1989). An advisory opinion issued by the Board of Commissioners on Grievances and Discipline for the Supreme Court of Ohio was similarly unhelpful; it condones ex parte contacts with former employees unless the former employees "were privy to privileged communications with the corporation's counsel," or were persons whose conduct "[gave] rise to the claim against the corporation." 20 Op. Bd. of Comm'rs on Grievances and Discipline for the Supreme Court of Ohio 4 (Aug. 17, 1990). While opposing counsel's pre-suit investigation might well identify former employees falling within the latter category, the question of whether a particular employee possesses privileged information arguably cannot be assessed without an interview.

senting any of the parties in a particular case to a citation for contempt of court.[160]

C. *The Impact of Model Rule 4.2*

Counsel's routine use of informal discovery of a party's former employees presents special dangers because the ethical constraints on ex parte contact with nonparties vary from jurisdiction to jurisdiction.[161] While no uniform rule has emerged that explicitly governs ex parte contact with a corporate party's former employees by opposing counsel,[162] a challenge to the propriety of ex parte com-

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160. *See, e.g.*, Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 37 (D. Mass. 1987) (in addition to a protective order governing opposing counsel's future conduct, corporate counsel sought sanctions against opposing counsel for previous ex parte contacts with corporate party's former employee); Massa v. Eaton Corp., 109 F.R.D. 312, 313 (W.D. Mich. 1985) (corporate counsel sought contempt citation against opposing counsel based on ex parte interviews that alleged he "breached his ethical duties and disrupted the discovery process"); Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990) (noting that a lawyer may "risk disqualification or discipline because of uncertainty as to which employees are covered by the rule and which not").

161. The State Bar Association of Alabama in 1887 was the first to draft and implement a professional code of attorney ethics. HENRY S. DRINKER, LEGAL ETHICS 23 (1953). The Supreme Court has long respected a state's important interest in regulating the professional conduct of the attorneys whom it licenses, and thus has been extremely hesitant to allow federal courts to interfere with state disciplinary rules and proceedings. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434-35 (1982). Even though states are free to develop their own codes of attorney conduct, the American Bar Association (ABA) has been one of the strongest forces in shaping the state ethical codes. The ABA adopted the Canons of Professional Ethics in 1908; those rules were replaced in 1970 with the Disciplinary Rules and Ethical Considerations, which were collectively referred to as the Model Code of Professional Responsibility. GILLERS & SIMON, *supra* note 31, at xiii. With the exception of California, every state adopted the Model Code of Professional Responsibility, often with variations that were more form than substance. *Id.* In 1977, the ABA's "Kutak Commission" began the formidable task of preparing a new set of rules. *Id.* On August 2, 1983, the ABA approved the version of the Model Rules of Professional Conduct that had been hammered out by the Commission. *Id.* As of Fall, 1990, more than 30 states as well as the District of Columbia had adopted all or part of the Model Rules. *Id.* at xiii-xiv. Some states, including Vermont, Massachusetts, and New York, have specifically rejected the Model Rules; other jurisdictions, like California and North Carolina, have incorporated some of the Model Rules into their respective codes of conduct. *Id.* at xiv. In sum, while the Model Rules have proven influential, the rules governing attorney conduct continue to vary widely. *Id.*

162. Although the subject of ex-employees is not directly mentioned, the ethical rules of certain jurisdictions expressly allow opposing counsel to contact a party's current employees if certain conditions are met. It is unlikely that ex parte contact with former employees would be viewed as problematic in those jurisdictions, although the issue of whether the same prerequisites must be followed might be an issue. In the District of Columbia, for example, counsel may speak with a current, nonparty employee of an opposing party, but 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";

municications with former employees often engenders debate as to the applicability (or lack thereof) of Model Rule 4.2 or Disciplinary Rule 7-104(A)(1).[163] Model 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."[164]

The oft-stated justifications for a rule prohibiting opposing counsel's ex parte contacts with a represented party include preserving the integrity of the party's relationship with her own legal counsel, preventing opposing counsel from taking unfair advantage of a represented party by obtaining or even coercing admissions during the ex parte contact, and generally promoting ethical behavior by attorneys.[165] But like the attorney-client privilege, the prohibition of ex parte contacts also has been criticized as protecting the interests of the attorneys rather than those of the clients.[166] One of the more undesirable effects of the rule "is to inhibit the acquisition of

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moreover, current employees who possess "the authority to bind the corporation" are considered parties rather than nonparties. GILLERS & SIMON, *supra* note 31, at 163 (citing District of Columbia Rule 4.2). New Mexico allows communication between opposing counsel and current employees of an adversary "[e]xcept for persons having a managerial responsibility on behalf of the organization." *Id.* (citing New Mexico Rule 4.2). The Discussion accompanying Rule 2-100 of the California Rules of Professional Conduct expressly limits the rule's prohibition of ex parte contacts "to persons employed at the time of the communication," thus eliminating the former employee problem. *Id.* at 532-33; *see also* Triple A Machine Shop, Inc. v. California, 261 Cal. Rptr. 493, 499 (Cal. Ct. App. 1989).

163. *See generally* Jerome N. Krulewitch, Comment, *Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest*, 82 NW. U. L. REV. 1274 (1988) (discussing the extent of the rules' applicability in a corporate context). For a thoughtful discussion of the potential impact of DR 7-104(A)(1) on the corporate attorney's moral and ethical obligations to current (and arguably former) employees of his corporate client, see Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 348-55 (1988).

164. MODEL RULES, *supra* note 10, Rule 4.2. Rule 4.2 is substantially identical to its ABA predecessor, Disciplinary Rule 7-104(A)(1), which is still effective in some jurisdictions. *See supra* note 161. For the text of DR 7-104(A)(1), see *supra* note 148. DR 7-104, in turn, finds its roots in Canon 9 of the Canons of Professional Ethics promulgated by the ABA in 1908, which provided in relevant part:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

CANONS OF PROFESSIONAL ETHICS Canon 9 (1908).

165. *See* Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 87 (D.N.J. 1991); Public Serv. Elec. & Gas Co. (PSE&G) v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037, 1039 (D.N.J. 1990). *See generally* Krulewitch, *supra* note 163.

166. *See* John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 686-93 (1979).

information about one's case."[167]

Application of the literal language of Model Rule 4.2 or Disciplinary Rule 7-104(A)(1) to the former employee situation at first appears to generate a bright line test. If the former employee is a named party represented by counsel, then ex parte communications are prohibited; if the former employee does not have such status, ex parte communications are allowed. The apparent straightforward nature of Model Rule 4.2, however, belies the complexity of its application to a corporate party. This difficulty lies in the nature of the corporate entity as a fictional creation that can only act and speak through "natural persons."[168] Courts repeatedly face the specific question of whether former employees, although not technically "parties" to the litigation, come within the class of persons that Model Rule 4.2 was enacted to protect. Answering this question is made more difficult by the fact that courts are not in accord regarding even which *current* employees fit within Model Rule 4.2.[169] The Comment accompanying Model Rule 4.2[170] suggests an expansive application in the corporate context:

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

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167. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991); *see also* Bougé v. Smith's Management Corp., 132 F.R.D. 560, 563 (D. Utah 1990) ("To [the] extent the ethical rule frustrates the search for the truth by preventing an opposing party from obtaining reasonable access to admissible evidence, it does not assist in the fair and accurate resolution of disputes." (footnote omitted)).

168. *PSE&G*, 745 F. Supp. at 1039.

169. The debate often focuses upon whether Model Rule 4.2 limits ex parte contacts only with those current employees within the "control group," or whether a more expansive definition is required. *Compare* Massa v. Eaton Corp., 109 F.R.D. 312, 314 (W.D. Mich. 1985) (stating that the Supreme Court's *Upjohn* decision compels rejection of the control group test for determination of employees with whom ex parte contacts are prohibited in favor of a much broader class of protected individuals) *with* Bobele v. Superior Court, 245 Cal. Rptr. 144, 147 (Cal. Ct. App. 1988) (adhering to control group definition for purposes of determining propriety of ex parte contacts). For a comprehensive discussion of the conflicting authority on this issue, see Suggs v. Capital Cities/ABC, Inc., 52 Fair Empl. Prac. Cas. (BNA) 1842 (S.D.N.Y. 1990).

170. While "[t]he Rules are . . . obligatory and disciplinary," the "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." MODEL RULES, *supra* note 10, Scope of the Rules; *see also Bougé*, 132 F.R.D. at 564 (stating that "the comments may be helpful to a proper resolution of a specific issue," but do not provide "a binding construction" of the rules).

an admission on the part of the organization.[171]

Unfortunately, the Comment to Model Rule 4.2 does not remove all uncertainty surrounding the rule's application to communications with an opposing party's former employees.[172] On one hand, the Comment's inclusion of managerial personnel and persons whose statements may bind an organization—sometimes referred to as the "managing-speaking agent test"[173]—seems to suggest that only those in the "control group" are within the protected class of Model Rule 4.2; former employees would rarely, if ever, be so categorized.[174] On the other hand, the Comment's identification of persons whose acts or omissions may result in corporate liability casts a much wider net, because the activities of even lower-echelon employees can impugn the corporation pursuant to theories such as respondeat superior.[175] Moreover, further definition of the category of persons "whose statement may constitute an admission on the part of the organization" necessitates cross reference to the rules of evidence governing admissions.[176] And while the ABA

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171. MODEL RULES, *supra* note 10, Rule 4.2 cmt. 2 (emphasis added).

172. In fact, the application of Model Rule 4.2 or DR 7-104(A)(1) to current employees of a corporate party continues to generate controversy. Some courts read the rule as prohibiting all ex parte contact with current employees; others interpret it as prohibiting contact only with members of the corporation's "control group." *See Niesig*, 558 N.E.2d at 1035; *Bougé*, 132 F.R.D. at 571; Wright v. Group Health Hosp., 691 P.2d 564, 567 (Wash. 1984). *See generally* Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-*Upjohn *Analysis*, 44 WASH. & LEE L. REV. 1181 (1987) (discussing contemporary definitions of "party" and application of the rule); Leubsdorf, *supra* note 166 (discussing application of the rule to protect lawyers' and clients' interests).

173. *See Wright*, 691 P.2d at 569; Chancellor v. Boeing Co., 678 F. Supp. 250, 252-53 (D. Kan. 1988).

174. *See, e.g.*, Bobele v. Superior Court, 245 Cal. Rptr. 144, 148 (Cal. Ct. App. 1988) (holding that prohibition against ex parte contact with a party represented by counsel does not extend to former corporate employees who were not and are not members of the control group).

175. In fact, one of *Upjohn*'s reasons for rejecting the "control group" test as it applied to the attorney-client privilege was that "[m]iddle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties." 449 U.S. 383, 391 (1981).

176. The primary rule of evidence drawn into the Model Rule 4.2 fray is Rule 801(d)(2) of the Federal Rules of Evidence, which allows into evidence testimony, otherwise excludable as hearsay, because it constitutes an "admission" by a party-opponent. Rule 801(d)(2) provides that such evidence is not excluded if it

> is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Standing Committee on Ethics and Professional Responsibility has recently issued a formal opinion, which concludes that Model Rule 4.2 should not be construed as an absolute bar to ex parte contact by an attorney and unrepresented former employees of an opposing party,[177] the opinion is not binding on the judiciary.[178]

D. Conflicting Interpretations of Model Rule 4.2

Two decisions in the same court, issued just a few months apart, reflect opposing perspectives on whether Model Rule 4.2 prohibits contact by opposing counsel of a corporate party's former employees: *Public Service Electric & Gas Co. (PSE&G) v. Associated Electric & Gas Insurance Services Ltd.*,[179] and *Curley v. Cumberland Farms*.[180]

In *PSE&G*, the utility sought declaratory relief and monetary damages from several of its excess liability insurance carriers for property damage claims relating to alleged environmental contamination at sites owned or used by the utility.[181] One of the defendant insurers hired a private investigator to locate and interview the utility's former employees. The utility's objection to this informal discovery method required the magistrate to determine whether such ex parte contact by an agent of opposing counsel was appropriate.[182] In an order the trial court later characterized as an attempt "to strike a Solomonic balance between two extremes,"[183] the magistrate allowed the contact, but with severe restrictions. First, the insurance carrier was required to disclose to the utility the names of any former employees its investigator planned to interview at least

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FED. R. EVID. 801(d)(2). Most courts have found it implausible that an ex-employee could make a statement that would be binding on a former employer under any scenario imagined by Rule 801(d)(2). *See, e.g.*, PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118, 121 (W.D. Pa. 1990); Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 (D. Mont. 1986); *Wright*, 691 P.2d at 569.

177. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991). The opinion readily acknowledges that "[n]either the Rule nor its comment purports to deal with former employees of a corporate party." *Id.* It further concedes that because a corporation "necessarily acts through others, . . . the concerns reflected in the Comment to Rule 4.2 may survive the termination of the employment relationship." *Id.*

178. Although opinions issued by the ABA and state ethics committees do not constitute binding precedent, the courts often find the reasoning of such opinions compelling. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 463 n.20 (1978); Kessenich v. Commodity Futures Trading Comm'n, 684 F.2d 88, 96 (D.C. Cir. 1982); United States v. Caggiano, 660 F.2d 184, 190-91 (6th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

179. 745 F. Supp. 1037 (D.N.J. 1990) (Politan, J.).

180. 134 F.R.D. 77 (D.N.J. 1991) (Brotman, J.).

181. 745 F. Supp. at 1038.

182. *See id.*

183. *Id.* at 1039.

two days before he contacted the individual;[184] second, any former employee with whom the utility had already spoken could not be contacted by the insurance carrier;[185] and finally, the insurance carrier was required to provide a "warning letter" to former employees that described the nature of the lawsuit, outlined the purpose of the interview as marshalling facts regarding the utility's actions at the sites in question, and informed former employees that the decision to participate in the interview was theirs alone.[186] Further, the court required the letter to indicate that the utility would provide legal counsel upon request.[187]

Believing the order too restrictive, the insurance carrier asked the district court to reverse the magistrate's order. Joined in its cause by another major insurance carrier, which participated as amicus curiae,[188] the defendant urged that Rule 4.2 had no application to ex parte contacts with a party's former employees in general, that it had no application to the former employees in the declaratory judgment at hand in particular because no civil liability could accrue to the utility based on the employees' statements, and that policy grounds dictated a "party neutral" interpretation of the ethical rules.[189] The insurance carrier complained that the magistrate's regulation of contact with former employees provided the utility with "preferential access" to vital information, and allowed an opportunity for the utility's counsel to manipulate the testimony of the former employees, thus "filtering" the truth.[190] The district court agreed with the insurance carrier's argument that the magistrate's order was in error, but the court's ruling did not endorse the insurance carrier's desired result of allowing its counsel free reign with the utility's former employees. To the contrary, the court held that Model Rule 4.2 prohibited *any* informal contacts between the insurance carrier's counsel and the utility's former employees.[191]

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184. *Id.* at 1038.

185. *Id.*

186. *Id.*

187. *See id.*

188. *See id.* The amicus curiae brief submitted by The Travelers Indemnity Company was largely based on affidavits submitted by Professor Geoffrey Hazard, Reporter for the ABA Special Commission on the Evaluation of Professional Standards ("Kutak Commission"), and New York University Professor Stephen Gillers, a recognized authority in legal ethics. *See id.* at 1041. The court did not embrace the arguments offered by the professors that former employees, or at least those who were not in management, do not fall within the scope of Model Rule 4.2. *See id.* at 1041-42.

189. *See id.* at 1038-39.

190. *See id.* at 1039.

191. *See id.*

In support of its absolutist position, the *PSE&G* court focused upon the language of the Comment to Model Rule 4.2, which prohibits contact "with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability."[192] Stressing the importance of the word "may" in the Comment, the court opined that the "dispositive inquiry" is "whether . . . a former employee's acts or omissions could be imputed, under any factual scenario, to the organization."[193]

In holding that a former employee's acts or omissions could be imputed to the former employer, the court first rejected the insurance carrier's argument for declaratory judgment that no "liability" could be imputed to the utility.[194] Rather, a finding that the insurance coverage did not include environmental contamination would result in the utility being held liable for the entire cost of remediation.[195] The court then noted that testimony by an employee that he personally dumped toxic wastes into the ground could impute liability to the utility.[196] The court continued:

> The principle that must be emphasized is that the harm caused by the imputable act is the same whether the witness is a present or former employee. The change in employment status does not effect [sic] the nature of his or her actions vis-a-vis whether they are imputable to the employer. The impact of the acts and factual testimony remains the same. The Rule, as described in the Comment, . . . protects the organizations [sic] interests in the *acts* and *omissions*. Therefore, both the present and former employee should be a party considered represented by the corporate attorney. As such, each individual can not be the subject of informal *ex parte* investigative fact finding.[197]

The *PSE&G* court further deemed "unworkable" a requirement either that an organization show that an individual's acts or omissions may impute liability to the organization before Model Rule 4.2

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192. *Id.* at 1039-42.

193. *Id.* at 1040.

194. *See id.* at 1039.

195. *Id.* The court defined a declaratory judgment as "a binding adjudication on the rights and *liabilities* of the parties," and observed that "the prevailing party in this action will be straddled with the enormous liability of funding the cleanup of the various polluted sites at issue." *Id.*

196. *See id.* at 1042.

197. *Id.*

applies,[198] or that a decision to permit ex parte contact be conditioned on the understanding that counsel will cease questioning "if it appears that imputable information is being divulged."[199] In addition to the "benefit of simplicity," the court reasoned that application of Model Rule 4.2 to former employees furthered the rule's policy goals by protecting both the former employee from "overreaching" by the investigative party and the former employer by limiting the potential for imputed liability.[200] Finally, the court did not find compelling the arguments regarding the increased costs attendant to formal discovery of a party's former employees, stating that "prompt use of the deposition process will ultimately produce less procedural haggling and thus may be, in the long run, more cost efficient."[201]

Just four months later, a judge sitting in the same federal district court found the *PSE&G* court's rationale unpersuasive. In *Curley v. Cumberland Farms*,[202] former convenience store employees pursued a class action asserting that their former employer engaged in a pattern of extortion by using the company's Loss Prevention Specialists ("Specialists") to coerce false confessions from employees to cover store losses.[203] The former employees sought discovery of the names and addresses of Cumberland Farms's current and former Specialists, and agreed not to attempt to contact (1) Specialists currently employed by Cumberland Farms and (2) former Specialists with whom the former employees had actual contact during their periods of employment. Cumberland Farms moved for a protective order prohibiting the former employees' counsel from communicating ex parte even with the former Specialists who had *not* had previous contact with the former employees.[204] The magistrate denied Cumberland Farms's motion, holding that the former employees in question were not within the scope of Model Rule 4.2.[205] Cumberland Farms appealed the magistrate's ruling, which was subsequently affirmed by the district court.[206]

Like the *PSE&G* court, the *Curley* court focused upon language in the Comment to Model Rule 4.2 suggesting that the rule bars ex

198. *See id.*
199. *Id.*
200. *See id.*
201. *Id.* at 1043.
202. 134 F.R.D. 77 (D.N.J. 1991).
203. *See id.* at 79.
204. *Id.*
205. *See id.*
206. *See id.* at 83.

parte contact with any person whose act or omission could impute civil or criminal liability to the party.[207] The court acknowledged a possible scenario where a former Specialist revealed to the plaintiffs' counsel that he had, at management's direction, extorted confessions from individuals he believed to be innocent; such a concession would result in an imputation of liability to Cumberland Farms.[208] But the persuasiveness of this argument pales, the court noted, "when one recalls that this purported imputation of liability is entirely hypothetical" because it is equally possible that the former Specialists "have no relevant information concerning the dispute in this case, or that they possess information which bolsters defendant's case."[209] Having classified the imputation of liability as "wholly hypothetical," the *Curley* court affirmed the magistrate's holding that Cumberland Farms had not met its burden of providing sufficient facts to compel the conclusion that the former employees at issue came within the parameters of Model Rule 4.2.[210]

Further assessing the impact that its decision might have on the policy underlying Model Rule 4.2, the *Curley* court noted that its ruling caused no harm to the goal of preserving the integrity of the attorney-client relationship, which it viewed as the raison d'être of Rule 4.2.[211] Moreover, the court expressed confidence that the "guidelines" set by the magistrate for the ex parte contacts, which included keeping a detailed log of the contacts and making available to defense counsel memoranda and witnesses' statements stemming from the interviews, would substantially curtail, if not eliminate, the potential for unethical conduct during the interviews.[212] The court offered "one final and very practical reason"[213] for its holding:

To disallow ex parte contacts with all former employees

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207. *See id.* at 81.

208. *See id.*

209. *Id.* The court also noted that liability for racketeering "cannot be imposed on a corporation merely by imputing the predicate acts of low-level corporate employees upon the corporation under a respondeat superior theory," and that even the plaintiffs' common-law claims of criminal or malicious conduct cannot be imputed to a defendant absent a showing that "the conduct was directed or ratified by defendants." *Id.*

210. *See id.* at 82.

211. *See id.*

212. *Id.*; *see also id.* at 94-95 (setting forth the magistrate's guidelines for the ex parte interviews). Certain conditions imposed by the magistrate and approved by the district court, specifically the providing of plaintiffs' counsel's interview notes and witness statements to defense counsel, were initially suggested by plaintiffs' counsel and offered pursuant to an express waiver of the work product protection that would normally shield such materials from discovery. *See id.* at 94; *see also infra* Part IV.

213. 134 F.R.D. at 82.

> pursuant to [Model Rule] 4.2 based on a hypothetical possibility that such employees could impute liability on a party corporation 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 [Model Rule] 4.2. It must be recalled that [Model Rule] 4.2 is designed to protect the attorney-client relationship, not to control the flow of information relevant to a lawsuit. The court 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. To preclude the informal contacts sought by plaintiffs in this action would be overly burdensome.[214]

The ABA's Standing Committee on Ethics and Professional Responsibility attempted to resolve the applicability of Model Rule 4.2 and Disciplinary Rule 7-104(A)(1) to former employees,[215] but it did so without providing any new insight into the competing interests at stake. In Formal Opinion 359, issued in March 1991, the Committee recounted the split of authority on the matter, including the *PSE&G* decision, and held:

> While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employees, the fact remains that the text of the Rule does not do so 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, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.
>
> Accordingly, . . . a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.[216]

At least eight state bar associations have reached a similar result.[217]

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214. *Id.* at 82-83.

215. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991).

216. *Id.* at 4.

217. These states are Colorado, Florida, Illinois, Massachusetts, Minnesota, New

E. Reconciling Competing Interests

Analysis of the interests competing for dominance in the determination of the propriety of ex parte contact between counsel and an opposing party's former employees pits philosophical against practical considerations.[218] On the philosophical side, the protection of the legal system's integrity is emphasized in the claim that ex parte contact allows excessive opportunity for manipulation of testimony by sophisticated counsel and results in a distortion of the relevant facts. On the practical side, the extraordinary costs associated with requiring formal discovery of ex-employees make meaningful discovery and case preparation prohibitive in many cases, especially because no alternative mechanism exists for preliminarily assessing whether an ex-employee possesses sufficient knowledge of the matter in dispute to make a deposition feasible.[219]

Although the choice is a difficult one, the better rule is a bright line test that permits ex parte access to former employees. The support for such a rule, however, is hardly limited to practical considerations. Perhaps the most persuasive reasons for allowing ex parte contact of an opposing party's former employees is that neither

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York, Pennsylvania, and Virginia. *See* Dubois v. Gradco Sys., Inc., 136 F.R.D. 341, 345 n.4 (D. Conn. 1991).

218. One court identified 12 separate interests affected when the propriety of ex parte interviews is debated. *See* Bougé v. Smith's Management Corp., 132 F.R.D. 560, 565 (D. Utah 1990).

219. The efficiency of ex parte interviews to determine whom to depose becomes critical in cases such as Curley v. Cumberland Farms, 134 F.R.D. 77 (D.N.J. 1991), where the plaintiff had identified over 80 former employees who might possess information relevant to the lawsuit. *See supra* notes 202-214 and accompanying text. Even if the plaintiff prevailed and the relevant procedural rules allowed for assessing the cost of the depositions against the former employer, the inefficiency would merely be shifted from one party to the other rather than eliminated. With or without the potential for reimbursement upon prevailing, the cost of conducting numerous depositions may be prohibitive to a party of modest resources, thereby preventing the thorough factfinding necessary to adjudicate a dispute fairly. *See Bougé*, 132 F.R.D. at 562 (If a party is limited to "depositions or other formal discovery," then "[t]he cost . . . may be prohibitive and contrary to efforts to reduce the costs which the burden of formal discovery places on litigants, counsel and the courts." (citing Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17 (1988))); Bobele v. Superior Court, 245 Cal. Rptr. 144, 148 (Cal. Ct. App. 1988) (noting that the trial court's ruling requiring plaintiffs to limit contact with defendant's former employees to formal discovery channels "has made this litigation so costly for plaintiffs that they cannot pursue their case"). The costs associated with the screening interviews can be further decreased by delegating the task to paralegals. *See, e.g.*, *Bougé*, 132 F.R.D. at 563 (finding nothing "overreaching or inherently abusive" in a process where a paralegal conducted initial screening interviews of corporate party's nonmanagerial employees and then sent letters to employees asking the employees to advise counsel if the letter "misstates the conversation").

Model Rule 4.2 nor its Comment truly applies to the former employee situation.[220] A former employee is not a represented party or managerial member of an organization; furthermore, the termination of an individual's employment relationship with a party negates the possibility that the individual's statement could constitute a binding admission.[221] The question that troubled the *PSE&G* court—whether a former employee's acts or omissions may impute liability to the former employer[222]—is admittedly a closer call. However, the court's reasoning in *PSE&G* is fundamentally flawed. The court found that because an ex parte contact may reveal testimony regarding acts or omissions of the former employee that occurred during his period of employment, and because such acts or omissions might reflect culpability on the part of the employer,[223] such an "individual can not be the subject of informal ex parte investigative fact finding."[224] Thus, the court incorrectly focused on the potential ramifications of the individual's knowledge as the determining factor, rather than on whether the former employee constituted a "party" with whom ex parte interviews are inappropriate under Model Rule 4.2.[225] Perhaps inadvertently, the court applied Model Rule 4.2 to protect certain facts from disclosure, which in any event would have been fully discoverable with the use of a formal

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220. As explained by Professor Geoffrey Hazard, Jr., the Reporter for the ABA Commission on Evaluation of Professional Standards at the time the Model Rules were drafted:

> This regime 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. Speaking with a former employee therefore does not do damage to the policy underlying Rule 4.2—undercutting or 'end running' an on-going lawyer-client relationship.

GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 436 (1988 Supp.) (citation omitted).

221. *See* Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984) (reasoning that because former employees "cannot possibly speak for the corporation," DR 7-104(A)(1) does not prohibit ex parte contact with them).

222. 745 F. Supp. 1037, 1042 (D.N.J. 1990).

223. *Id.* (stating that employee could reveal to opposing counsel "that over a period of years he personally dumped toxic waste into the ground," and reasoning that because this fact could impute liability to the former employer for costs of environmental remediation of the site, Rule 4.2 prohibited ex parte contact with the former employee).

224. *Id.*

225. The same flaw permeated the court's holding concerning ex parte contacts with current employees in Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988), where the court prohibited "ex parte interviews by plaintiff's counsel of any . . . of the named employees who may have been involved in [the conduct] at issue in any way that their actions as agents may be imputed to defendant corporation for purposes of civil liability." *Id.* at 253.

discovery device such as a deposition.[226] Because it is impossible to discern which former employees possess relevant (and potentially damaging) facts until an informal interview is conducted, the *PSE&G* court places the cart before the horse.[227]

In addition to respecting the literal language of Model Rule 4.2, permitting ex parte contact with former employees has the additional benefit of not contradicting the rationale that inspired the rule's enactment. Certainly the rule's historical and oft-stated purpose of preserving the integrity of the attorney-client relationship[228] cannot be defeated where the former employee is not even represented by legal counsel.[229] Moreover, a contrary interpretation of the ethical rules to prevent one party from contacting nonparties who may possess relevant data essentially creates a new "privilege." Such a privilege has no place in a system striving to construe narrowly existing privileges that serve to frustrate the factfinding process.[230]

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226. Carried to its logical conclusion, *PSE&G* would prohibit ex parte contacts with any eyewitness to any event that resulted in litigation, because the eyewitness would provide the factual basis for assessing liability against a party. *See also* Oak Indus. v. Zenith Indus., No. 86-C-4302, slip op. at 3 (N.D. Ill. July 27, 1988) ("The fact that former employees may have information damaging to the employer has nothing to do with the question of whether the employee should be considered an alter ego of the employer."); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 40 (D. Mass. 1987) (holding that "[t]he mere fact that [the former employee] may be a prospective witness, even a critical one, does not trigger the prohibitions of DR 7-104(A)(1)").

227. The difficulty of shielding all former employees who possess facts adverse to the former employer is demonstrated in a case involving current employees, Chancellor v. Boeing Co., 678 F. Supp. 250 (D. Kan. 1988). In that case, where plaintiff alleged wrongful denials of promotions, the court prohibited plaintiff's counsel from conducting ex parte interviews of any employees "who may have been involved in the denial of promotions at issue in any way that their actions as agents may be imputed to defendant corporation for purposes of civil liability." *Id.* at 253. The court readily admitted that it was "without sufficient facts" to determine which individuals fell within that category, and left resolution of the matter to plaintiff's counsel. *See id.* at 253-54. This ruling left little resolved because the very purpose of the interviews that plaintiff's counsel wished to conduct was the determination of which employees possessed relevant facts.

228. *See, e.g.*, University Patents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990); Frey v. Department of Health & Human Servs., 106 F.R.D. 32, 34 (E.D.N.Y. 1985) (addressing text of DR 7-104(A)(1)); Wright v. Group Health Hosp., 691 P.2d 564, 567 (Wash. 1984) (also addressing DR 7-104(A)(1) and its predecessor Canon 9).

229. *See* Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (finding that ex-employee has no attorney-client relationship with corporate counsel that would be "jeopardized" by ex parte communication).

230. In Bougé v. Smith's Management Corp., 132 F.R.D. 560 (D. Utah 1990), the court opined that such a privilege should not be recognized even with regard to communications with current low-level employees of a corporate party, reasoning that "[i]f the employee has information adverse to corporate policy or practice which is at issue in any litigation, the employee must be free to speak and the courts should have access to the evidence." *Id.* at 566.

Certainly, the broader concerns regarding potential manipulation of a witness during an ex parte interview should not be lightly dismissed. Existing practical, ethical, and legal mechanisms, however, serve to deter such conduct. On a practical level, the corporate attorney will no doubt have "the earliest and best opportunity" to identify former employees who may possess relevant information.[231] Provided that the corporate attorney does not improperly solicit representation of the former employee or overstep the bounds of other ethical rules,[232] there is no prohibition against the attorney promptly contacting the former employees "to elicit information . . . and to counsel and prepare them"[233] for interviews with opposing counsel. When the anticipated interviews do occur, Model Rule 4.3 and its Comment place an affirmative duty on opposing counsel to ascertain that the unrepresented party fully understands both the lawyer's role in the matter and the lawyer's bias.[234] The attorney also may not inquire into areas where disclosure would violate the attorney-client privilege[235] or the work product doctrine,[236] or would divulge trade secrets.[237] Further, if

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231. Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990).

232. *See, e.g.*, MODEL RULES, *supra* note 10, Rule 4.3 (addressing attorney dealings with unrepresented individuals).

233. *See Niesig*, 558 N.E.2d at 1034.

234. Model Rules of Professional Conduct Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

MODEL RULES, *supra* note 10, Rule 4.3. The comment accompanying Model Rule 4.3 states:

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than advice to obtain counsel.

Id., Rule 4.3 cmt.

235. Even when a former employee is currently unrepresented by counsel, certain communications between the employee and corporate counsel, including those that occurred prior to termination of employment, remain privileged. *See* PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118, 123-24 (W.D. Pa. 1990) (requiring opposing counsel to advise former employee that he may not disclose prior communications between himself and corporate counsel); Triple A Machine Shop, Inc. v. California, 261 Cal. Rptr. 493, 499 (Cal. Ct. App. 1989) (attorney-client privilege shields "all confidential communications encompassed therein"); HAZARD & HODES, *supra* note 220, at 436-436.1 (recognizing situations where a former employee may be privy to information shielded from discovery by the work product doctrine or attorney-client privilege).

236. *See infra* Part IV.

237. *See supra* note 145.

specific circumstances indicate abuse of informal discovery, court intervention can provide structure and control over the interviewing process.[238] Parties are also free to enter into their own agreement outlining not only the terms and conditions of ex parte contacts, but also limiting the uses of witness statements and information gathered during the interviews.[239] Finally, if the former employee does possess knowledge that makes his deposition or trial testimony or both necessary, any bias resulting from improper coaching by counsel during ex parte interviews can be fully explored by opposing counsel during cross examination.[240]

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238. Based on his more than four decades of legal experience, United States District Judge Jack Weinstein concluded that "almost all discovery abuse can be controlled or prevented" by "attentive and firm management by a judge or magistrate." Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1915 (1989). Other judges obviously agree. *See, e.g.*, Curley v. Cumberland Farms, 134 F.R.D. 77, 82, 94-95 (D.N.J. 1991) (adopting procedure established by magistrate requiring counsel to keep log of contacts with opposing party's former employees and to share interview notes with opposing counsel); Bougé v. Smith's Management Corp., 132 F.R.D. 560, 564 (D. Utah 1990) (noting that court's power to control ex parte interviews is not limited by Rule 26(c) of the Federal Rules of Civil Procedure, but rather that it is within court's inherent authority to control litigation practices); Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988) (asserting court's inherent authority); Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 628 (S.D.N.Y. 1990) (holding that where "a strong likelihood" exists that a former employee possesses privileged information, "an appropriately tailored order can be issued" to prevent disclosure); Amarin Plastics, Inc., v. Maryland Cup Corp., 116 F.R.D. 36, 39 (D. Mass. 1987) (holding that court has "inherent" authority "to issue appropriate orders to prohibit or remedy litigation practices which raise ethical concerns," including the use of informal interviews not expressly mentioned in Federal Rules of Civil Procedure governing discovery); *accord Mompoint*, 110 F.R.D. at 420 (establishing guidelines for plaintiff's counsel to conduct ex parte interviews of defendant's current employees).

239. After counsel have negotiated an agreement governing the terms and conditions of discovery and subsequent use of the discovered information, the parties may submit to the trial court, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, a stipulated protective order that incorporates their agreement. *See* FED. R. CIV. P. 26(c). If the court approves the order, a party who violates the agreement may be held in contempt of court and subjected to a number of sanctions, including the entry of an order prohibiting the offending party from supporting or defending against certain claims or defenses and from introducing certain matters into evidence. *See* FED. R. CIV. P. 37(b).

240. *See, e.g.*, FED. R. EVID. 611(b) (stating that "matters affecting the credibility of the witness" are within the proper scope of cross examination); *see also* FED. R. CIV. P. 30(c) (providing that Federal Rules of Evidence govern examination and cross examination of witnesses during depositions).

IV. THE WORK PRODUCT DOCTRINE AND INFORMAL DISCOVERY OF A PARTY'S FORMER EMPLOYEES

A. An Overview of the Work Product Doctrine

While communications covered by the attorney-client privilege are virtually impenetrable,[241] the work product doctrine offers a more limited but nonetheless effective mechanism for shielding certain aspects of the exchange of information between a corporate party's former employees and counsel for either party.[242] Born of the wrongful death case of *Hickman v. Taylor*,[243] the doctrine is currently codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[244]

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241. As a general rule, the protection afforded to communications by the attorney-client privilege is absolute. *See* Upjohn Co. v. United States, 449 U.S. 383, 396 (1981) (holding that "considerations of convenience do not overcome the policies served by the attorney-client privilege"); Admiral Ins. Co. v. United States District Court, 881 F.2d 1486, 1494 (9th Cir. 1989) (refusing to recognize an "unavailability exception" to obtain material otherwise covered by attorney-client privilege). Very narrow exceptions do exist, allowing for discovery of attorney-client privileged materials in shareholder derivative suits where claims of corporate mismanagement are alleged, *see* Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), in situations where the attorney's advice is solicited for the purpose of committing "crime, fraud or other misconduct," *see In re* Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985), and in cases where the attorney's own conduct is at issue, as in legal malpractice litigation and collection actions brought by attorneys against their clients, *see* Dodd v. Williams, 560 F. Supp. 372, 377 n.3 (N.D. Ga. 1983). For a discussion of these limited exceptions, see generally EPSTEIN & MARTIN, *supra* note 2, at 82-98.

242. "The work-product rule is not a privilege but a qualified immunity . . . . [W]ork-product materials may . . . be ordered produced upon an adverse party's demonstration of substantial need or ability to obtain the equivalent without undue hardship." *Admiral Ins. Co.*, 881 F.2d at 1494 (citing *Upjohn*, 449 U.S. at 401). For an excellent overview of the doctrine, see Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917 (1983).

243. 329 U.S. 495 (1947). The *Hickman* litigation arose from the sinking of a tugboat. Relatives of a deceased crew member sought materials, including written reports taken from survivors and witnesses, detailed notes from oral statements, and any related "records, reports, statements or other memoranda." *Id.* at 498-99. The district court rejected the defendant's claim of privilege, *see* Hickman v. Taylor, 4 F.R.D. 479, 482 (E.D. Pa. 1945) (en banc), and when the defendant refused to release the material, both he and his attorney were found in criminal contempt. *See* Hickman v. Taylor, 153 F.2d 212 (3d Cir. 1945) (en banc). The Third Circuit's reversal of the contempt holding was affirmed by the Supreme Court, which concluded that ordering the release of the materials "contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." 329 U.S. at 510.

244. This Rule provides:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under . . . this rule and 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 . . .) only upon a showing that the party

The boundaries of the work product doctrine are apparent on the face of the Rule: it prohibits discovery of (a) tangible documents and materials (b) that are prepared for or in anticipation of litigation (c) by or for a party or that party's representative (d) that reflect the legal theories and thought processes of legal counsel. When these criteria are met, the discovery of certain types of work product may still be compelled, but only where the party seeking discovery demonstrates a "substantial need" for the materials to prepare his case for trial and satisfies the court that equivalent materials cannot be obtained elsewhere without "undue hardship" on the party seeking them.[245] Moreover, the rule mandates heightened protection of "opinion work product,"[246] that is, any material that reveals "the mental impressions, conclusions, opinions, or legal theories of an attorney."[247]

The rationale for according special treatment to materials that incorporate and reflect the attorney's view of a case, first articulated

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> 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 . . . , 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). Although most frequently asserted in civil matters, the work product doctrine has been characterized as playing an "even more vital" role "in assuring the proper functioning of the criminal justice system." United States v. Nobles, 422 U.S. 225, 238 (1975); *see* FED. R. CRIM. P. 16 (criminal procedure work product doctrine).

245. For a comprehensive explanation of the nuances associated with the work product doctrine, see EPSTEIN & MARTIN, *supra* note 2, at 99-164.

246. See Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985), in which the Third Circuit distinguished opinion work product: "Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses."

247. FED. R. CIV. P. 26(b)(3). Work product discovery limitations set forth in Rule 26 of the Federal Rules of Civil Procedure are subject to conflicting interpretations when attorneys' notes and memoranda from witness interviews are at issue. Some courts hold that Rule 26 absolutely bars discovery of this category of opinion work product. *See, e.g., In re* Grand Jury Investigation, 412 F. Supp. 943, 949 (E.D. Pa. 1976); FDIC v. Cherry, Bekaert & Holland, 131 F.R.D. 596, 600 (M.D. Fla. 1990). Those courts declining to adopt an absolute rule nonetheless recognize that such work product is deserving of special protection. *See, e.g., In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981) (permitting discovery of opinion work product only in extraordinary circumstances, such as those involving fraud); *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977) ("[O]pinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances."); Connolly Data Sys. v. Victor Technologies, Inc., 114 F.R.D. 89, 95 (S.D. Cal. 1989) ("[T]he materials containing the mental impressions, conclusions, opinions and legal theories of an attorney are discoverable only in rare and extraordinary circumstances."). In *Upjohn*, the Supreme Court recognized these divergent views but did not resolve the issue. *See* 449 U.S. at 401.

in *Hickman* and more recently affirmed in *Upjohn*, is the essential need "that a lawyer work with a certain degree of privacy."[248] In the Court's view, allowing discovery of such material would discourage attorneys from collecting their thoughts on paper.[249] *Hickman* expressed additional public policy concerns:

> An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal system would be demoralizing. And the interests of the clients and the course of justice would be poorly served.[250]

B. Relevance of the Work Product Doctrine to Informal Discovery of Former Employees

The work product doctrine is relevant to informal discovery of former employees in at least four major respects. The traditional application of the doctrine shields from discovery notes and memoranda related to the interview prepared by the attorney; it also protects signed witness statements obtained during or after the interview. A third application of the doctrine, more contemporary and controversial than the first two, prevents opposing counsel from discovering the identity of documents selected by counsel and discussed during the interview. Finally, the work product doctrine may bar discovery of the substance of the questions asked by counsel during the interview.[251] Each application is discussed below.

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248. *Hickman*, 329 U.S. at 511 (*quoted with approval in Upjohn*, 449 U.S. at 397-98).

249. *Id.* (*quoted with approval in Upjohn*, 449 U.S. at 398).

250. *Id.* In his concurring opinion, Justice Jackson synopsized the doctrine's rationale in eloquent but simple terms: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Id.* at 516 (Jackson, J., concurring).

251. The work product doctrine also has been successfully cited as grounds for refusal to furnish the names and addresses of witnesses interviewed as part of the litigation preparation process. *Compare* Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1467 (11th Cir. 1984) (holding that the names and addresses of witnesses interviewed by the plaintiff are subject to discovery) *with* Board of Educ. v. Admiral Heating & Ventilating, 104 F.R.D. 23, 32 (N.D. Ill. 1984) (noting that interview lists contain no "substantive relevant facts" and denying discovery because to do so would afford plaintiffs "the potential for significant insights into the defense lawyers' preparation of their case"). *See also* Massachusetts v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149 (D. Mass. 1986) (discussing authority on both sides of the issue and concluding that while discovery of names and addresses of "persons with knowledge" was permissible, list of witnesses interviewed by defense counsel was protected by work product doctrine).

1. Notes and Memoranda Prepared During and After Interviews.— The work product doctrine, long embraced by both federal and state courts,[252] does not provide attorney's notes and memoranda absolute immunity from discovery, but does place rigorous obstacles in the path of counsel seeking such work product. Courts have interpreted the doctrine, both prior and subsequent to its codification as a Federal Rule of Civil Procedure, as establishing a strong presumption against discovery of notes and memoranda that contain oral statements made by a witness during an interview conducted by a lawyer.[253] Such a presumption exists because notes containing a witness's answers necessarily reveal the questions that the attorney thought relevant.[254] The questions, in turn, sketch a road map of counsel's mental processes regarding his or her theory of the case.[255] Indeed, the Supreme Court's decision in *Hickman* suggested that opposing counsel might never be able to make a showing of necessity sufficient to justify production of attorney memoranda that contain "oral statements made by witnesses."[256]

The *Upjohn* Court was hesitant to adopt the near-absolutist perspective implicit in *Hickman*, but it nonetheless interpreted the work product doctrine as mandating the highest level of privacy for work product consisting of an attorney's notes and memoranda from non-party interviews.[257] The *Hickman* Court had implied that production of "relevant and non-privileged facts . . . hidden in an attorney's file," including those facts recorded in an attorney's interview notes, is allowed only where "production of those facts is *essential* to the preparation of one's case."[258] The *Hickman* Court's illustration of a unique situation justifying breach of work product barricades is a case "where the witnesses are no longer available or can be reached

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252. *See* EPSTEIN & MARTIN, *supra* note 2, at 107 ("Most states have adopted discovery procedures similar to those applied in the federal courts, and they tend to provide similar protection for attorney work product.").

253. *See, e.g.*, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980) (recognizing a "zone of privacy" afforded to an attorney by the work product doctrine within which to think, plan, weigh facts and evidence, and prepare strategy); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 142-43 (D. Del. 1982) (recognizing a similar protected area). *See generally* EPSTEIN & MARTIN, *supra* note 2, at 130-45.

254. *Upjohn*, 449 U.S. at 400 & n.8.

255. *Id.* at 399-400 (disclosing notes "tends to reveal the attorney's mental processes").

256. *Hickman*, 329 U.S. at 511.

257. *Upjohn*, 449 U.S. at 401-02 ("[A] far stronger showing of necessity and unavailability by other means . . . would be necessary . . . .").

258. *Hickman*, 329 U.S. at 511 (emphasis added).

only with great difficulty."[259] Although it acknowledged the validity of this "unavailable witness" example,[260] the Court in *Upjohn* refused to compel production of attorney memoranda and notes containing witness statements, even where the interviewees were "scattered across the globe" and where Upjohn had "forbidden its employees to answer questions it considers irrelevant."[261] While it did not conclude, as *Hickman* implied and some lower courts have held,[262] that a showing of necessity could *never* overcome the doctrine's protection of attorney notes and memoranda that recorded oral statements from witnesses,[263] the Court in *Upjohn* advised:

> To the extent that [such notes] do not reveal [attorney-client] communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.[264]

In short, the formidable (if not insurmountable) burden placed on counsel seeking to unearth an adversary's opinion work product relegates to a safe harbor the notes and memoranda compiled by counsel during or after an interview of former employees.[265] In view of the symmetrical application of restrictions and protections provided by the work product doctrine for counsel on both sides of the table regarding the notes and memoranda prepared during or after interviews of nonparties, its application need not and should not be modified as it relates to informal discovery of a party's former employees.

2. Signed Witness Statements.—A signed statement from a former employee that purports to memorialize his recollection of key events

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259. *Id.* Finding no such situation in the case before it, the Court in *Hickman* denied opposing counsel access to the defendant's attorney's notes containing oral statements of survivors or witnesses. *See id.* at 512-13.

260. *See Upjohn*, 449 U.S. at 399.

261. *Id.*

262. *See supra* note 247.

263. 449 U.S. at 401.

264. *Id.*

265. *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979) (finding that memos prepared in anticipation of litigation by corporation's outside counsel following interviews with employees constitute protected work product); Smith v. MCI Telecomm. Corp., 124 F.R.D. 665, 687 (D. Kan. 1989) (observing that notes of corporate counsel made while interviewing current and former employees are covered by both work product and attorney-client privilege; thus they are "doubly-non-discoverable"); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 142-44 (D. Del. 1982) (applying a similar rationale).

as it exists at the time of the informal interview may prove useful in several respects. First, the statement serves the same record-keeping function as the attorney's own notes regarding the content of the interview. Later review of the statement, especially when a significant number of statements have been obtained, will aid the attorney's determination as to what role, if any, a particular interviewee will play in advancing either party's theory of the case. Second, if the individual is willing to execute a sworn statement, the document can provide support for the factual allegations made in a summary judgment or other pretrial motion.[266] Finally, the written statement helps a great deal where either party has designated the ex-employee as a potential trial witness. If the ex-employee recants or significantly alters his story on the stand, the statement provides powerful impeachment material.[267] If the ex-employee remains basically true to his original recitation of the facts but his memory of certain details has become clouded, the statement can be used to refresh his recollection prior to or during a deposition or trial.[268]

Depending on the ultimate use of a former employee's statement, a discussion of the discoverability of the statements may prove to be much ado about nothing. If the statement is cited to support a summary judgment motion, for example, opposing counsel must be served with a copy of the statement along with his adversary's brief.[269] If the document is used to refresh the former employee's recollection to testify at deposition or at trial, the adverse party may be entitled to production of the writing pursuant to the Federal Rules of Evidence.[270] If opposing counsel curries favor with the former employees who have been interviewed, the individuals may request copies of their statements and voluntarily provide them to opposing counsel.[271] The discussion thus narrows to

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266. *See* FED. R. CIV. P. 56(e) (allowing submission of affidavits in support of a summary judgment motion, provided that the affidavits are made on personal knowledge of the affiant, contain facts which would be admissible in evidence, and contain an averment of competency to testify). Submission of supporting affidavits is not mandatory, but if provided by the movant, opposing counsel must submit similar sworn materials demonstrating a genuine issue for trial. *Id.*

267. The Federal Rules of Evidence permit examination of a witness regarding a prior statement without showing the statement to the witness, *see* FED. R. EVID. 613(a), and provide that any party may impeach the credibility of a witness, "including the party calling the witness," FED. R. EVID. 607.

268. *See* FED. R. EVID. 612.

269. FED. R. CIV. P. 56(e).

270. *See* FED. R. EVID. 612 (leaving the decision to allow disclosure to the court's discretion). Rule 30(c) of the Federal Rules of Civil Procedure provides for application of the Federal Rules of Evidence to depositions. *See* FED. R. CIV. P. 30(c).

271. Rule 26(b)(3) of the Federal Rules of Civil Procedure grants a nonparty an abso-

whether counsel can compel disclosure of statements of ex-employees gathered by opposing counsel prior to, or in lieu of, the occurrence of any of the above events.

Witness statements of nonparties traditionally have been categorized as work product,[272] subject to discovery only where counsel has demonstrated "substantial need of the materials" to prepare his case and has shown that he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means."[273] In light of *Hickman* and *Upjohn*, this is a very difficult standard to satisfy.[274] Some courts have refused to compel production of witness statements until opposing counsel has made an unsuccessful effort to depose or interview the authors of the statements sought.[275]

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lute right to obtain a copy of any statement "concerning the action or its subject matter previously made by that person." Until recently, neither federal procedural rules nor case law restricted the nonparty's conveyance of her statement to opposing counsel. *See* DESSEM, *supra* note 11, at 73; Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305, 336 n.153 (citing David J. Blair, *A Guide to the New Federal Discovery Practice*, 21 DRAKE L. REV. 58, 63 n.25 (1971) (predicting that the practical result of the Rule will be that parties "urg[e] friendly witnesses to request their own statements for delivery to the party")). In 1988, however, one district court held that allowing a nonparty witness to obtain a copy of a statement originally given at the request of plaintiffs' counsel, for the purpose of disclosing it to defense counsel, would violate the spirit and the letter of the work product doctrine. Accordingly, the court held that the individual was entitled to the statement, but that defense counsel could not receive a copy or otherwise review its contents until the individual offered deposition or trial testimony "on the basis of a memory refreshed by his statement or until plaintiffs' counsel cross-examines any such witness on the basis of his statement." *In re* Convergent Technologies Second Half 1984 Sec. Litig., 122 F.R.D. 555, 567 (N.D. Cal. 1988). To the extent that a controversy exists on this point, it is rendered moot by the author's recommendation at the conclusion of this section that counsel would be required to produce statements of nonparty ex-employees only if opposing counsel had also attempted to interview the former employees and obtain statements from them.

272. *See, e.g.*, Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971); D'Amico v. Cox Creek Refining Co., 126 F.R.D. 501, 506 (D. Md. 1989); *Convergent Technologies*, 122 F.R.D. at 556; Colorado v. Schmidt-Tiago Constr. Co., 108 F.R.D. 731, 735 (D. Colo. 1985); Thorton v. Continental Grain Co., 103 F.R.D. 605, 606 (S.D. Ill. 1984).

273. FED. R. CIV. P. 26(b)(3); *see D'Amico*, 126 F.R.D. at 506. As Professors Wright and Miller observe, Rule 26(b)(3) "creates no right in a party to the litigation to obtain a copy of a statement of an ordinary witness without the usual showing required for work product." 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2028 (1970).

274. *See supra* text accompanying notes 252-264.

275. *See, e.g.*, Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1467 (11th Cir. 1984); FDIC v. Cherry, Bekaert & Holland, 131 F.R.D. 596, 605 (M.D. Fla. 1990). The argument that the "substantial need" requirement is met when the passage of time may have affected the witness's memory is also suspect. *See id.* at 604. In the related context of attorneys' interview notes of present and former employees, the *Upjohn* Court held that

Although application of the doctrine to nonparty witness statements remains firmly entrenched,[276] forceful arguments have been made for abolishing the work product doctrine's protection for nonparty witness statements.[277] It is argued, for example, that the costs of the application of the doctrine to witness statements far exceed the benefits.[278] While one can argue convincingly that statements of former employees obtained by counsel pursuant to ex parte, informal interviews should be discoverable relatively early in the discovery process, such discovery should be had only under limited conditions. Specifically, the statements should not be ordered or permitted to be disclosed unless opposing counsel has independently conducted interviews or scheduled depositions of the ex-employees.[279] If the informal interview route is taken, and the interviewees are agreeable, counsel would be required to obtain statements himself. After counsel for both sides have conducted interviews and obtained, or at least attempted to obtain, statements from the ex-employees, an exchange of the statements is appropriate pursuant to mutual requests for production of such documents.[280] If counsel chooses to depose rather than interview the former employees who have provided statements to his adversary, the existing statements should be produced shortly before the deposition is commenced.[281]

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neither substantial need nor undue hardship was sufficiently established even though the party seeking discovery would have had to traverse the globe to replicate the interviews. 449 U.S. at 399-401.

276. *See* Henderson v. Zurn Indus., 131 F.R.D. 560, 569 (S.D. Ind. 1990); *see also Convergent Technologies*, 122 F.R.D. at 558 (rejecting defense counsel's argument that statements of two former employees obtained by plaintiff's counsel do not constitute work product because they only contain facts or verbatim accounts of relevant events provided by the ex-employees).

277. *See generally* Waits, *supra* note 271.

278. *See id.* at 313. In Professor Waits's view, the unacceptably high costs "include the mandatory duplication of investigative time and effort, the injury to justice when information hidden in witness statements is not revealed from alternative sources, and the astronomical expense of the battles which the doctrine itself guarantees." *Id.* at 307.

279. This proposal addresses and eliminates the concern set forth above, *see supra* note 271, that an ex-employee would request her statement for the purpose of voluntarily disclosing it to opposing counsel.

280. Under this proposed rule, an attorney could discover the statement of a former employee obtained by his adversary if the former employee refused the second interview or agreed to the interview but refused to provide a second statement. If, however, the attorney did not interview or depose the individual, or conducted an interview and did not request a statement, then the original statements would remain shielded from discovery under the work product doctrine.

281. A number of factors will affect how far in advance of the depositions the statements should be produced. For example, if depositions of 10 former employees are scheduled over several consecutive days, fairness would dictate that the deposing attor-

Such a rule allowing discovery of witness statements, but only under limited circumstances, serves the equally important but potentially conflicting goals of (1) furthering the policy justification of the work product doctrine by protecting from discovery the tangible results of the attorney's labor and his thought processes[282] and (2) not allowing application of the doctrine to provide immunity for the attorney who has improperly manipulated an individual's recollection of events.

Admittedly, the form and content of a former employee's statement will inadvertently reveal certain theories and opinions of the attorney who sought the statement. On the other hand, the ex-employee's statement is substantially different from other tangible work product traditionally covered by the doctrine. The statement is, or at least purports to be, the former employee's own recitation of the relevant facts. If the statement is used to support a brief, the attorney will represent to the court that these are the words of an independent witness with personal knowledge of relevant events. If the statement is used to refresh the ex-employee's recollection while testifying, or to impeach his testimony, the attorney will represent that the "original" statement of the facts, told in the witness's own words, is the true one.

Regardless of when or how the statements are called into service, counsel for both sides should have the opportunity, relatively early in the litigation, to compare the statements obtained from the same ex-employees. Comparison will inevitably reveal some discrepancies. These differences may simply be a matter of semantics that can be resolved by further contact with the ex-employee, or they may be directly attributable to overreaching by one or both counsel. In any event, counsel will know that the statements will be subject to scrutiny by opposing counsel, and that any overreaching on his part that results in conflicting statements from the same individual will substantially undermine the credibility, and thus the util-

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ney receive the statements at least a week in advance to prepare adequately. If, however, only one ex-employee is being deposed, delivery of the statement 24 hours prior to the deposition might be appropriate. If an attorney obtains the statements and cancels, and does not reschedule the depositions, sanctions might include prohibiting the attorney from using the statement for impeachment or any other purpose if the ex-employees testify at trial.

282. The practical effect of not shielding the witness statements is fairly predictable. As two legal scholars recently opined, "confidentiality is the handmaiden of effective fact-development: if the law instead compelled lawyers to disclose the results of their investigations, it would weaken the incentive to investigate." Bundy & Elhauge, *supra* note 21, at 317 (footnote omitted).

ity, of the statements, and also of live testimony from the former employees. Counsel will thus be encouraged to exercise self restraint when "helping" the former employees prepare their respective statements.

3. Identity of Documents Discussed at Interviews.—Determining the breadth of a former employee's knowledge of facts relevant to the litigation often spurs inquiry during the informal interview into the person's familiarity with certain documents. Of special interest to the attorney are documents authored by, directly addressed or circulated to, or otherwise seen by the employee during her period of employment. Such documents can be as seemingly innocuous as a time card indicating an employee's absence on a day when events occurred that precipitated the litigation, or as momentous as an accident report in which a party (or a party's agent) acknowledges culpability.

An attorney's preparation for this aspect of the interview may prove a time-consuming and tedious task, as "witness-specific" materials often must be culled from among the hundreds or thousands of pages produced by the opposing party[283] or from the files of the attorney's own client.[284] More importantly, the selection process may reveal the "mental impressions, conclusions, opinions, or legal theories"[285] of an attorney that Rule 26 deems deserving of special safeguarding.[286] Does the work product doctrine bar counsel from discovering—either during a subsequent informal interview or by written interrogatories or oral deposition—the specific identity of documents that her adversary discussed with a party's former employee during an informal interview?

If Rule 26(b)(3) does not literally address the discoverability of

283. In one securities fraud class action, the court noted that "defendants produced hundreds of thousands of documents, from which [plaintiff's] attorneys selected more than 100,000 for copying." Sporck v. Peil, 759 F.2d 312, 313 (3d Cir. 1985).

284. *See* Shelton v. American Motors Corp., 805 F.2d 1323, 1326 (8th Cir. 1986) (finding that where opposing counsel was the deponent, the work product doctrine prohibited discovery of specific documents she had compiled "from among voluminous files in preparation for litigation").

285. Barrett Indus. Trucks v. Old Republic Ins. Co., 129 F.R.D. 515, 518 (N.D. Ill. 1990).

286. Professor Applegate believes that "[t]he collection of these documents implicates the core work-product privilege for lawyers' mental impressions and thought processes, even though each individual document is discoverable." Applegate, *supra* note 9, at 315 (footnotes omitted); *see also* Shelton, 805 F.2d at 1329 (compilation of documents reflected attorney's "legal theories and thought processes, which are protected as work product"); *Sporck*, 759 F.2d at 316 (concluding that selection of documents comes within "the highly protected category of opinion work product").

document selection,[287] the rationale underlying the work product doctrine certainly advocates its extension to this aspect of the trial preparation process. As previously noted,[288] the heightened protection accorded opinion work product that reveals the attorney's mental impressions and theories of a case "reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side."[289] Certainly, the selection of documents constitutes "detailed preparatory work" that results in "tangible material"—that is, a binder or file containing copies of the documents designated relevant by the attorney. Moreover, refusing to require that the attorney reveal the specific documents she deemed worthy of discussing with the former employee does not shield the documents themselves from discovery. Most often, the selected documents are culled from those that have been or most likely will be produced by both parties pursuant to a document production request. Thus, protecting the identity of the set of chosen documents neither immunizes the discovery of each individual document in the set, nor prevents the facts contained in the documents from being revealed pursuant to depositions or other discovery devices.[290] Rather, the invocation of the work product doctrine in this instance merely forbids opposing counsel from preparing his case "on wits borrowed from the adversary"[291] by obtaining an exhaustive list of the documents that counsel deemed worthy of discussing with the former employees.

In the context of documents used to prepare a witness for deposition, courts have not hesitated to classify the selection of docu-

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287. An argument could be advanced that the limitation of Rule 26(b)(3) to "documents and tangible things" precludes the Rule's direct application to an attorney's selection of pre-existing documents. However, "the courts have rejected an interpretation of Rule 26(b)(3) that provides protection only for an attorney's mental impressions that are contained in 'documents and tangible things.' " Connolly Data Sys. v. Victor Technologies, Inc., 114 F.R.D. 89, 96 (S.D. Cal. 1987), and cases cited therein. In addition, the selection and compilation of a subset of documents from among the hundreds or thousands produced and placement of the chosen documents in a file or binder yields a "tangible" result.

288. *See supra* Subpart IV.A.

289. FED. R. CIV. P. 26(b)(3) advisory committee's notes for 1970 amendments.

290. *See, e.g., Barrett Indus. Trucks*, 129 F.R.D. at 518 ("[T]he work product doctrine does not protect discovery of the underlying facts of a particular dispute."); 8 WRIGHT & MILLER, *supra* note 273, § 2023, at 194 ("[T]he work product doctrine concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned . . . .").

291. *Hickman*, 329 U.S. at 516 (Jackson, J., concurring).

ments as core work product.[292] In an antitrust and labor dispute, for example, the plaintiff's counsel prepared a binder of documents and used the binder to prepare current employees for deposition. In rejecting the defense counsel's arguments that the binder did not constitute work product, the court instructed:

> The binder contains a small percentage of the extensive documents reviewed by plaintiff's counsel. In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.[293]

A further and more critical point of contention confronts courts in deciding whether waiver of the work product protection occurs when an attorney shows the selected documents to a witness, consequently making the documents fair game for discovery when the witness is deposed.[294] At the heart of this controversy is Federal Rule of Evidence 612. Made applicable to discovery matters by Federal Rule of Civil Procedure 30(c),[295] Rule 612 provides in relevant part:

> [I]f a witness uses a writing to refresh memory for the purpose of testifying, either—
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> (1) while testifying, or
>
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
>
> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which

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292. The leading case in this area is Berkey Photo Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 615-16 (S.D.N.Y. 1977). *See also* cases cited *infra* notes 293, 294.

293. James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982) (citing *Berkey Photo Inc.*, 74 F.R.D. 613); *see also* Sporck v. Peil, 759 F.2d 312, 315 (3d Cir. 1985) (holding that documents grouped by counsel for use in preparing defendant for deposition constitute work product "[b]ecause identification of the documents as a group will reveal defense counsel's selection process, and thus his mental impressions" of the case).

294. *See James Julian*, 93 F.R.D. at 144-46; *Sporck*, 759 F.2d at 318; Omaha Pub. Power Dist. v. Foster Wheel Corp., 109 F.R.D. 615, 616-17 (D. Neb. 1986).

295. Rule 30(c), governing discovery depositions, provides that "[e]xamination and cross-examination of witnesses may proceed as permitted at trial under the provisions of the Federal Rules of Evidence." *Id.*

relate to the testimony of the witness.[296]

Relying on Rule 612(2), one court concluded that the corporate attorney waived work product protection when he showed the select group of documents to employees in preparation for their depositions; accordingly, the court ordered production of the entire binder of documents.[297]

For a number of reasons, however, Rule 612 should not be relied upon to order production of deposition preparation materials recognized as core work product. First, as one commentator has noted, "Rule 612 is actually a poor candidate for a general waiver rule. The language of the rule is silent on its relation to privilege, and the rule's history lends no support to an expansive reading."[298] Irrespective of the wisdom of this particular interpretation of Rule 612, the rule does not, by its owns terms, apply to documents shown by either counsel to a party's former employee during an informal interview. Indeed, Rule 612 applies to a "witness." Assuming that no deposition notice has been served prior to the interview, the ex-employee has not yet attained that status.

Second, Rule 612 applies when the document is shown "to refresh memory for the purpose of testifying."[299] The purpose of the informal interview is to determine which individuals possess knowl-

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296. FED. R. EVID. 612. The rule became effective July 1, 1975, and represented a substantial departure from previous practice, which limited discovery of documents used for refreshing recollection to those used while testifying. *See* H.R. REP. No. 650, 93d Cong., 2d Sess. 13 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7086. For a comprehensive discussion of the legislative history of the expansion of the rule to include documents used to refresh recollection before testifying, see *James Julian*, 93 F.R.D. at 144-46.

297. *See James Julian*, 93 F.R.D. at 144-45; *see also In re* Joint Eastern & Southern District Asbestos Litigation, 119 F.R.D. 4 (E.D.N.Y., S.D.N.Y. 1988). The New York court acknowledged the work product nature of a book prepared by plaintiffs' counsel that contained photographs of the defendants' products, logos, boxes, containers, and trade dress as well as corporate histories of the defendants. *See id.* at 6. However, the court ordered production of portions of the book that had been shown to persons designated to testify at trial on the issue of product identification. *See id.* at 6-7. In so doing, the court held that the defendants had established a substantial need for the materials, because "[d]efendants cannot by other means learn whether the book was used in a suggestive fashion so as to encourage plaintiff[ ] to recognize items he would not otherwise recognize." *Id.* at 6.

298. Applegate, *supra* note 9, at 318. Professor Applegate explains that other courts have refused to require wholesale disclosure of the documents shown to a witness in preparation for deposition absent a showing by opposing counsel of "substantial need," as required to overcome the work product doctrine pursuant to Rule 26(b)(3) of the Federal Rules of Civil Procedure, or a demonstration that each document meets Rule 612's foundational requirement of actually influencing the witness's recollection. *Id.* at 319-22.

299. FED. R. EVID. 612.

edge that would make formal discovery worthwhile; querying the ex-employee about select documents is an integral part of the screening process.[300] Stated differently, counsel's intent in showing the ex-employee select documents is not to refresh his memory per se, but rather to determine whether he has any memory that may eventually need refreshing.

Third, when production is sought pursuant to Rule 612, the court must determine that production "is necessary in the interests of justice."[301] In the informal interview stage, no grave injustice will befall counsel in denying him access to the work product of opposing counsel; however, handing him on a silver platter the documents selected by his adversary would hardly further the interests of justice that gave rise to the work product doctrine in the first instance and continue to provide validity for its existence.

Further, if the former employee is subsequently elevated to witness status and deposed, deposing counsel is free to inquire as to whether any specific documents that the witness reviewed with opposing counsel served to refresh the witness's memory on certain subjects. If the answer is affirmative, then production of those particular documents may be warranted pursuant to Rule 612.[302] Such limited production, however, is a far cry from requiring counsel to produce a comprehensive list of the documents discussed during the informal interview.[303]

> [B]ecause identification of such documents would relate to specific substantive areas raised by respondent's counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on. The fear that counsel for petitioner's work product would be revealed would thus become groundless.[304]

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300. The author's view of the informal interview as an important screening mechanism to determine what role, if any, a particular former employee will play in the litigation prevents her from agreeing with Professor Landsman's position that written materials should never be shown to disinterested witnesses. *See* Landsman, *supra* note 3, at 558-59.

301. FED. R. EVID. 612.

302. *See, e.g.*, *Sporck*, 759 F.2d at 318 (holding that Rule 612 requires a threshold showing that a witness relied on or was influenced by documents before inquiring into content of those documents used to refresh witness's testimony).

303. *See Sporck*, 759 F.2d at 318; *see also* Omaha Pub. Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 605, 617 (D. Neb. 1986) (citing *Sporck*).

304. *Sporck*, 759 F.2d at 318; *see also* Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii) Ltd., 85 F.R.D. 118, 120 (W.D. Mo. 1980) (holding that discovery of documents reviewed prior to deposition was not compelled by Rule 612 due to "insufficient estab-

Of course, there are costs associated with denying opposing counsel's request for wholesale discovery of the documents discussed during an informal interview between a party's ex-employee and opposing counsel. Denial requires opposing counsel to reinvent the wheel by independently reviewing the hundreds or perhaps thousands of documents to postulate which of the documents the other side deemed relevant to a particular former employee. Requiring counsel to reconstruct the set of documents that his adversary viewed as relevant may also substantially lengthen depositions, as counsel painstakingly inquires whether each of the documents on his (probably over-inclusive) list were discussed with the witness. Furthermore, compelling counsel to reveal the document set may well identify the potential "smoking guns," thus allowing litigants the opportunity realistically to assess their respective allegations and defenses at an earlier stage of the litigation. Armed with more complete information, litigants could negotiate equitable settlements before significant sums are spent pursuing extensive formal discovery and preparing pretrial motions.

If increased efficiency were the sole objective of assessing and revising the current discovery rules on this point, the preceding points would provide sufficient reasons for allowing discovery of the documents selected by counsel for review with a former employee.[305] But any efficiency gained must be weighed against the interests sacrificed. In this instance, it is the work product doctrine itself that is endangered, if not extinguished, by a rule that provides counsel with a set of documents mapping his adversary's mental impressions and theories of the case. Compelling an attorney to reveal opinion work product further undermines a primary benefit of an adversarial system of adjudication—encouraging adversaries "to find and present their most persuasive evidence."[306]

In sum, the document review and selection process undertaken

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lishment of actual use [to refresh memory] of any of the various documents" contained in the file at issue).

305. If efficiency were the overriding concern, American legalists might be persuaded to cast aside the existing pretrial discovery procedures in favor of a system involving minimal pretrial preparation, as is found in Germany. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826-30 (1985). For a thoughtful treatment of the argument that efficiency is not a proper cornerstone of a system of adjudication, see Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 748-57 (1987).

306. STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 4 (1984). Furthermore, "[a]dherence to th[e] principle [of requiring independent preparation] affords the decision maker the advantage of seeing what each litigant believes to be his most consequential proof. It also focuses the litigation upon the questions of

by counsel in anticipation of conducting an informal interview of an individual formerly employed by a party must constitute opinion work product. As such, documents at issue because of that process should be protected from discovery.

4. Content of Oral Communications.—Some courts have further extended the work product doctrine to protect from discovery the substance of oral communications between corporate counsel and a nonparty, which are not otherwise protected by the attorney-client privilege.[307] The federal district court in *Ford v. Philips Electronics Instruments Co.*[308] was at the forefront in attempting to draw the line between permissible and impermissible avenues of inquiry as determined by application of the work product doctrine. During the deposition of a nonparty witness, plaintiff's counsel objected to defense counsel's inquiries about a predeposition conversation between the witness and plaintiff's counsel. The court overruled the objection, holding that:

> Insofar as defendant's questions attempted to elicit from the witness the specific questions that plaintiff's counsel posed to him, or even the area of the case to which he directed the majority of his questions, it exceeds the permissible bounds of discovery and begins to infringe on plaintiff's counsel's evaluation of the case. However, insofar as it was directed to the substance of the witness' knowledge of relevant facts, it is clearly an acceptable line of inquiry.[309]

Several courts have extended the *Ford* court's rationale to limit the areas of inquiry in depositions of a party's former employee. In one instance, the *Ford* court was cited as persuasive by a court disallowing defense counsel's attempt to inquire into the specific questions that plaintiff's counsel had posed to a former employee, after the plaintiff had retained the former employee as a consultant. Questioning was also forbidden on the general area of the case to which plaintiff's counsel had directed the former employee's atten-

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greatest importance to the parties, making more likely a decision tailored to their needs." *Id.*

307. *See, e.g.*, IBM v. Edelstein, 526 F.2d 37, 41 (2d Cir. 1975); Connolly Data Sys. v. Victor Technologies, Inc., 114 F.R.D. 89, 96 (S.D. Cal. 1987); Phoenix Nat'l Corp. v. Bowater United Kingdom Paper Ltd., 98 F.R.D. 669 (N.D. Ga. 1983); Ford v. Philips Elec. Instruments Co., 82 F.R.D. 359, 360 (E.D. Pa. 1979); United States v. IBM, 79 F.R.D. 378, 379-80 (S.D.N.Y. 1978).

308. 82 F.R.D. 359 (E.D. Pa. 1979).

309. *Id.* at 360.

tion.[310] While holding that no attorney-client relationship existed between the former employee-consultant and corporate counsel,[311] the court opined that such "questions are improper as tending to disclose the mental impressions, conclusions, opinions, or legal theories of [plaintiff's] attorneys."[312]

In a case where no "consulting" or other continuing relationship existed, defense counsel telephoned a former employee of her client several times in order to elicit the former employee's knowledge of the facts involved in the litigation.[313] Counsel decided to take the former employee's deposition to preserve his testimony; thereafter, she and the former employee had several other telephone and face-to-face conversations "relating to his recollection of relevant facts and the preparation of his deposition."[314] Questioning of the deponent by plaintiff's counsel regarding the substance of the initial conversations and subsequent deposition preparation sessions drew an objection from defense counsel. Although the court rejected the plaintiff's claims that the conversations were protected by the attorney-client umbrella,[315] it cited the *Ford* analysis of the work product doctrine as grounds for sustaining the plaintiff's objection.[316] The "guidelines" provided by the court for additional questioning of the defendant's former employee by plaintiff's counsel allowed liberal inquiries into the deponent's knowledge of factual matters relevant to the litigation, but prohibited any probing of the specific questions that defense counsel had asked of the former employee, the general line of inquiry counsel had pursued, and "the facts to which [defendant's] attorney appeared to attach significance or any other matter that reveals [defendant's] attorney's mental impressions, theories, conclusions or opinions concerning the case."[317]

These courts demonstrate the view that lengthening the work product doctrine's shadow to eclipse even preliminary and informal

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310. *See* Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 518 (N.D. Ill. 1990).

311. *See id.* at 518.

312. *Id.* at 519 (citing *Ford*, 82 F.R.D. at 360).

313. *See* Connolly Data Sys. v. Victor Technologies, Inc., 114 F.R.D. 89, 90 (S.D. Cal. 1987).

314. *Id.* Corporate counsel also sent a set of documents to the former employee prior to his deposition; any debate over the discoverability of the documents was short circuited by corporate counsel's voluntary relinquishment of the same materials to opposing counsel. *See id.*

315. *See id.* at 94.

316. *See id.* at 96.

317. *Id.* (citing *Ford v. Philips Electronics Instruments Co.*, 82 F.R.D. 359 (E.D. Pa. 1979)).

conversations between counsel and former employees is logical and desirable. Such an extension, however, should be seriously scrutinized. By its literal terms, the work product doctrine as set forth in Rule 26 of the Federal Rules of Civil Procedure is limited to "documents and other tangible things," with special care given to material that reflects an attorney's opinions on the case. Stretching the doctrine to cover the content of every *oral* communication between counsel and a nonparty witness redefines the doctrine as an "attorney opinion doctrine." That is, every time an attorney utters a thought or opinion on a matter, it becomes privileged. In practice, such a rule renders the attorney-client privilege useless; indeed, many of the decisions that have extended work product protection to conversations between counsel and a nonparty witness did so after holding that such conversations do not qualify under the attorney-client privilege.[318] Perhaps more importantly, extension of the doctrine to cover every comment made by counsel during an informal screening interview with a former employee prevents opposing counsel from conducting meaningful inquiry into the seeds of bias that counsel may have intentionally or inadvertently planted during that interview.

Furthermore, determining permissible and inappropriate inquiries by applying the standards set forth in *Ford* and its progeny presents self-evident difficulties. The *Ford* court's "split-the-baby" approach interprets the work product doctrine as opening a window for discovery of any facts communicated by counsel to the interviewee, while at the same time slamming the door shut on even the general subject area of the case to which counsel directed the interviewee's attention. But inquiry as to the facts communicated inevitably reveals the subject matter of the case that counsel discussed with the former employee, as well as suggesting the possible questions posed by counsel; thus, a permissible line of exploration as to what occurred during the interview must be carved with an almost impossible degree of surgical precision. One predictable (and highly undesirable) consequence of such a standard will be repeated requests for judicial intervention to determine whether particular questions transgress the evasive line of impermissible inquiries drawn by *Ford* and like-minded courts.

For these reasons, the better-reasoned approach recognizes the applicability of the work product doctrine to prohibit discovery of

318. *See, e.g., Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 518 (N.D. Ill. 1990); *Connolly Data Sys.*, 114 F.R.D. at 89.

tangible materials resulting from the attorney's work on the case, including memoranda and notes drafted during or after interviews with former employees, and collections of documents assembled specifically for discussion with a particular former employee, but allows disclosure of oral communications between counsel for either party and a party's former employees. Thus, counsel should be permitted to ask a former employee—either during an informal interview or a deposition, held subsequent to the individual's ex parte interview with opposing counsel—about the specific questions asked by opposing counsel as well as the general subject matter discussed. Stated differently, "[t]he opposing party will have full access to the underlying information through substantive discovery, but the burden remains on the questioner to select topics and documents to ask about."[319]

Admittedly, this position may appear contrary to the argument advanced in the preceding sections—that the advantages of maintaining the adversarial system outweigh the efficiency gained by compelling disclosure of witness statements and of sets of documents assembled by counsel for review with a former employee. Similar arguments regarding the value of preserving the adversarial nature of litigation undoubtedly would support a rule prohibiting discovery of the content of all ex parte oral communications between counsel and a former employee. Indeed, denying discovery of these communications would mandate additional efforts by counsel to prepare her case without any hint whatsoever of her adversary's perspective on a former employee's potential role in the litigation.

But again, a benefit gained must always be balanced against the cost. Denying counsel the opportunity to question a former employee on the content of oral communications between the ex-employee and opposing counsel would place the final brick in the wall surrounding the ex parte interview. An attorney protected by this unyielding barricade would be tempted to engage in blatant manipulation of the ex-employee's recollection, and if he did succumb to such temptation, opposing counsel would be powerless to penetrate the work product barrier to reveal this source of intense bias. The cost of such a rule is simply too great.

Although approaching a bright line test, the suggested application of the work product doctrine to allow inquiry into oral communications between counsel and a former employee does not purport

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319. Applegate, *supra* note 9, at 347.

to provide perfect demarcation of acceptable interview or deposition questions regarding the content of prior informal interviews conducted by opposing counsel. Inquiries regarding documents discussed during the informal interview may continue to prove especially problematic. The attorney interviewing or deposing the former employee should be permitted to ask a former employee whether a particular document that counsel had independently identified as potentially relevant was discussed during the informal interview with opposing counsel. If the document has been discussed, counsel should be permitted to inquire extensively into the content of the communication between opposing counsel and the former employee concerning the document. Counsel interviewing or deposing a former employee may not, however, ask for wholesale identification of every document reviewed with opposing counsel.

CONCLUSION

The determination of whether factual information in the possession of certain individuals is discoverable usually necessitates the balancing of various interests. In the case of former employees, persuasive arguments can be made for shielding the communications with corporate counsel under the attorney-client privilege and for piercing that shield, for prohibiting ex parte contacts with opposing counsel and for promoting such contacts, and for providing limited protection from discovery for certain attorney-generated materials under the work product doctrine and for holding the doctrine inapplicable. Even if the arguments on each side of these issues attained perfect equilibrium, however, the scales must tip in favor of disclosure if the informal discovery process is to provide a meaningful mechanism for uncovering all of the facts relevant to the litigation. Accordingly, the following rules governing the informal discovery of information held by former employees of a party are advocated:

1. Communications between corporate counsel and former corporate employees that occur after termination of the employment relationship are not shielded from discovery by the attorney-client privilege.

2. Discovery of information acquired by a party's former employees through ex parte, informal interviews is not precluded by the ethical rules prohibiting contact of a represented party.

3. Notes, memoranda, and other tangible materials prepared by counsel for either party during or following communications with a party's former employees are immunized from discovery by application of the work product doctrine. This rule prevents discovery of

the identity of any compilation of documents shown by counsel to a former employee, but does not bar discovery of the content of oral communications between counsel and the former employee. Signed witness statements are subject to discovery only where opposing counsel has interviewed or has attempted to interview or depose the former employee.

It seems inevitable that even before the ink dries on any proposed black letter law, the need for exceptions to that law emerges. The infinite number of variations in the responsibilities assigned, the roles played, and the nature of the information held by former employees, both during and after employment, virtually guarantees that exceptions will be warranted if the general rules articulated above are adopted. Those variations also preclude any attempt to set forth a comprehensive listing of such exceptions at this time. With that limitation in mind, the guidelines set forth above are not offered as an end in themselves, but rather as one step in the development of a comprehensive, practical, and fair body of law governing the informal discovery of information held by a party's former employees.