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Ethical Considerations concerning Contacts by Counsel or Investigators with Present and Former Employees of an Opposing Party The Sixth Annual Symposium on Legal Malpractice and Professional Responsibility.

James L. Burt

Jeremy J. Cook

ETHICAL CONSIDERATIONS CONCERNING CONTACTS BY COUNSEL OR INVESTIGATORS WITH PRESENT AND FORMER EMPLOYEES OF AN OPPOSING PARTY

JAMES L. BURT*
JEREMY J. COOK**

* James L. Burt is a partner with Maloney, Bean, Horn & Hull, P.C. practicing in aviation, insurance defense, product liability, business and commercial counseling, and commercial and general civil litigation.

** Jeremy J. Cook is an associate with Maloney, Bean, Horn & Hull, P.C. practicing in aviation, insurance defense, and products liability.

I. INTRODUCTION

Present and former employees of an opposing party are logically the best source of information concerning the activities and transactions of that party. Contact with these employees or their representatives may be considered ethical or unethical depending upon the circumstances. Unfortunately, the rules governing such contacts are neither clear nor consistent. Thus, they present an ethical minefield prompting some veterans of this process to complain.

This Article will examine the ethical rules applicable when contacting employees, both former and present, of an opposing party. In part II of this Article, the Model Rules and its variations are explored. These variations make compliance difficult and problematic. Part III of this Article addresses contact between retained investigators and the opposing party's employees. The first key issue lawyers must resolve is whether the present or former employee is considered "represented" under Rule 4.2 of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules).[1] If the relevant employee is "unrepresented" for purposes of Rule 4.2, the issue then becomes whether

1. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2005); *see also* American Bar Association (ABA) Center for Prof'l Responsibility, *Preface* to MODEL RULES OF PROF'L CONDUCT, http://www.abanet.org/cpr/mrpc/preface.html (last visited Mar. 19, 2007) (tracing the history of the rules of legal ethics) (on file with the *St. Mary's Law Journal*).

Model Rule 4.3 applies, which prohibits a lawyer (and perhaps an undercover investigator) from stating or implying that he is "disinterested."[2] Of grave importance are the potential sanctions, which include the exclusion of unlawfully and unethically obtained evidence[3] and—the harshest penalty of all—lawyer disqualification.[4]

Part IV of this Article addresses the ethical issues that arise when lawyers hire the opposing party's former employees as experts. This Article revisits the seminal case, *In re Bell Helicopter Textron, Inc.*,[5] in which one of Bell's former employees was hired as a consultant by the plaintiff's firm following the 1997 crash of one of Bell's helicopters.[6] *In re Bell* serves as a reminder that it is dangerous to utilize an opposing party's former employee as an expert because of the high probability that a conflict of interest will arise and potentially lead to severe sanctions.[7]

II. CHOICE OF LAW CONSIDERATIONS

As a matter of law, if not of ethics, the acceptable limits of contact with present and former employees of the opposing party appear to vary according to jurisdiction. Therefore, before discussing the major topics at hand, this Article will first illustrate that legal ethics issues are quite complex given the various bodies of law involved.

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2. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2005).

3. *See* Faison v. Thornton, 863 F. Supp. 1204, 1216 (D. Nev. 1993) (excluding evidence as sanction for ex parte communications); Cagguila v. Wyeth Labs. Inc., 127 F.R.D. 653, 654 (E.D. Pa. 1989) (prohibiting use at trial of ex parte statements); Chancellor v. Boeing Co., 678 F. Supp. 250, 254 (D. Kan. 1988) (denying the use at trial of ex parte statements).

4. *See* Snider v. Super. Ct., 7 Cal. Rptr. 3d 119, 125 (Cal. Ct. App. 2003) (stating that violations could result in disqualification); *cf.* Cronin v. Eighth Judicial Dist. Ct., 781 P.2d 1150, 1154 (Nev. 1989) (approving disqualification of attorney for ex parte communications with employees), *overruled on other grounds by* Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Ct., No. 46579, 2007 WL 686100 (Nev. Mar. 8, 2007) (establishing manifest abuse of discretion as the appropriate standard of review in mandamus actions); *Faison*, 863 F. Supp. at 1217-18 (disqualifying counsel as sanctions for ex parte communications).

5. 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

6. *In re* Bell Helicopter Textron, Inc., 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

7. *Id.* at 151 (disqualifying counsel for hiring a former employee of Bell as an expert).

A. *Multi-State Practice*

Most states have adopted the Model Rules, but some states still maintain certain portions and interpretations from the ABA Model Code, its predecessor.[8] At least twenty-five states have adopted the latest amendments to the Model Rules, the product of an ABA project called "Ethics 2000" or "E2K."[9] Additionally, multiple variations between the Model Rules and different jurisdictional interpretations of these rules make ethical compliance in this area difficult, especially in multi-state practice. Adding to the confusion, many courts use their own local rules to govern attorney conduct which only escalates the confusion.[10]

B. *Federal Court Practice*

A similar minefield awaits the federal practitioner, even when there is only one district or state involved. While some federal courts have adopted the ethical rules of the states in which they sit,[11] federal interpretations of these state rules will likely guide the district courts whenever they consider ethical issues.[12] In addition, attorneys in federal cases must be aware of so-called national ethi-

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8. *See* ABA Center for Prof'l Responsibility, Dates of Adoption of the Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/chron_states.html (last visited Mar. 19, 2007) (listing forty-eight states plus the District of Columbia and providing the dates that each adopted the Model Rules) (on file with the *St. Mary's Law Journal*).

9. *See* ABA Center for Prof'l Responsibility, Status of State Review of Professional Conduct Rules, http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (last visited Mar. 19, 2007) (displaying a status report indicating each State's progress in adopting the Ethics 2000 amendments to the Model Rules, updated and maintained by the ABA Joint Committee on Lawyer Regulation) (on file with the *St. Mary's Law Journal*).

10. *See* United States v. W.R. Grace, 401 F. Supp. 2d 1065, 1068 (D. Mont. 2005) (stating that the court is free to establish its own standards of conduct).

11. *See* Weibrecht v. S. Ill. Transfer, Inc., 241 F.3d 875, 878 (7th Cir. 2001) (noting the court's adoption of state rules); Faison v. Thornton, 863 F. Supp. 1204, 1213 (D. Nev. 1993) (adopting the state rule); *see also Grace*, 401 F. Supp. 2d at 1068 (explaining that the local rule followed is based on national and state rules of conduct).

12. *See* World Food Sys., Inc. v. BID Holdings, Ltd., No. 98 CIV 8515 VM KNF, 2001 WL 246372, at *3 (S.D.N.Y. Mar. 12, 2001) (not designated for publication) (stating that the local court rules require the state's professional responsibility code, "'as adopted from time to time by the Appellate Divisions of the State of New York, and as interpreted and applied by' . . . [federal appellate courts to] govern the performance of attorneys in this court"); *see also In re* Am. Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992) (noting that whether state or national standards are adopted is a question of federal law); Suggs v. Capital Cities/ABC, Inc., No. 86 Civ. 2774 (JMM), 1990 WL 182314, at *2 (S.D.N.Y Apr. 24, 1990) (mem.) (applying the model code but noting the availability of either state or national bar rules).

cal standards when litigating in jurisdictions such as the Fifth Circuit that do not bind themselves solely to a certain state's set of rules.[13] "National standards" apparently can involve the Model Code, the Model Rules, the applicable state's disciplinary rules, and perhaps "the ethical rules announced by the national profession in the light of the public interest and the litigant's rights."[14] Therefore, lawyers must often consult several sets of laws and rules before choosing a course of action. As this Article explores the ethical issues that arise when hiring and using experts and investigators, the reader is cautioned to keep in mind the added wrinkle of choice of law concerns.

III. Ethical Considerations of Contacting Current and Former Employees of the Opposing Party

To assess whether it is permissible to use undercover investigators in conducting ex parte communications with present and former employees of an opposing party, this Article begins by discussing the rules regarding attorney contact with such persons. After all, if the attorney cannot ethically make such contact, then the investigator, acting as the attorney's agent, certainly cannot.[15]

A. *Contact with Current Employees*

1. "Represented" or "Unrepresented"?

ABA Model Rule 4.2 (2005), "Communication With Person Represented by Counsel" states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[16]

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13. *See* FDIC v. U.S. Fire Ins. Co., 50 F.3d 1304, 1311-12 (5th Cir. 1995) (quoting *In re Am. Airlines*, 972 F.2d at 610) (reiterating that local rules alone are not the only authority relevant to disqualification of counsel motions; rather, federal law must be considered).

14. *FDIC*, 50 F.3d at 1311-12 (quoting *In re* Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992)).

15. *See* Model Rules of Prof'l Conduct R. 8.4(a) (2005) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.").

16. Model Rules of Prof'l Conduct R. 4.2 (2005).

The predecessor rule to Rule 4.2, ABA Model Code DR 7-104(A)(1), "Communicating With One of Adverse Interest," stated:

> 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.[17]

Despite the clarity of these rules, when corporations or companies are participants in litigation, it is often difficult to ascertain whether a current employee of the organization will be considered "represented," and thus "off-limits" to attorneys seeking information about the organization.[18] Because jurisdictions vary greatly on this issue, choice of law becomes extremely important to consider, especially since the information involved may be outcome-determinative and the potential sanctions—including disqualification of counsel—devastating. As the next section illustrates, a spectrum of views exists among the jurisdictions.

2. Control Group/Permissive View

Under the control group, or permissive view, courts have maintained that current employees who are not within the control group may be contacted without consent from the organization's counsel.[19] Only those current employees who have the power to control the organization's actions are unreachable without such consent.[20]

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17. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104 (1979).

18. MODEL RULES OF PROF'L CONDUCT R. 1.13(g) (2005) (allowing a lawyer who represents an organization to also represent any of its constituents).

19. *See* Fair Auto. Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 561 (Ill. App. Ct. 1984) (applying the "control group test" to hold that "plaintiffs did not violate Rule 7-104 because the persons contacted by their investigators, the employees at the Car-X shops, were not shown to have sufficient decision-making or advisory responsibilities within the corporate defendant"); Ala. Ethics. Op., RO-94-11, at 18 (1994), *reprinted in* NAT'L REP. ON LEGAL ETHICS AND PROF'L RESPONSIBILITY n.2 (1995) (stating that only the employees "authorized to speak for the organization in an official sense" fall under the "control group" test).

20. *See Fair Auto. Repair*, 471 N.E.2d at 561 (reiterating that the "control group" within a corporation "is defined as those top management persons who had the responsibility of making final decisions"); Ala. Ethics. Op., RO-94-11, at 18 (1994), *reprinted in* NAT'L REP. ON LEGAL ETHICS AND PROF'L RESPONSIBILITY n.2 (1995) (defining the "control group" as "employees who have been given the authority to formally act or speak for the organization, and can legally bind it").

Jurisdictions that have employed this view include New Jersey,[21] Alabama,[22] Utah,[23] and Montana.[24]

3. Blanket Test/Restrictive View

A minority of jurisdictions have adopted the blanket test, or restrictive view, which requires consent before contacting *any employee* regarding matters within the scope of the employment.[25] This view is based on Rule 801(d)(2)(D) of the Federal Rules of Evidence, which states, "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relation-

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21. *See* N.J. RULES OF PROF'L CONDUCT R. 1.13(a), 4.2 (2006) (defining litigation control group and prohibiting ex parte communication with its members).

22. Ala. Ethics. Op., RO-94-11, at 17 (1994), *reprinted in* NAT'L REP. ON LEGAL ETHICS AND PROF'L RESPONSIBILITY n.2 (1995).

23. *See* Bouge v. Smith's Mgmt. Corp., 132 F.R.D. 560, 569 (D. Utah 1990), *superseded by* UTAH RULES OF PROF'L CONDUCT R. 4.2 (1991) (agreeing with the approach taken by other courts, stating, "[t]his seems to be in keeping with [the] standard of most court decisions which have limited the use of ex parte inquiries to instances where the interviews were with control group, managerial level, or speaking agents but not with general status employees").

> As of the time of the dispute in *Bouge*, the Utah Supreme Court had adopted the Model Rules of Professional Conduct. Nevertheless, Magistrate Boyce determined that the district court continued to adhere to the Code of Professional Responsibility because the local rule was enacted before the adoption of the Model Rules. In 1991, however, the local rules were amended to adopt the Utah Rules of Professional Conduct and the ABA Model Rules of Professional Conduct.

Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412, 415 n.2 (D. Utah 1991) (citation omitted).

24. *See* Porter v. Arco Metals Co., 642 F. Supp. 1116, 1118 (D. Mont. 1986), *superseded by* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002) (concluding "that plaintiff's ex parte conduct is prohibited neither by Rule 4.2 nor by the attorney-client privilege, so long as plaintiff does not attempt to interview present or former employees with managerial responsibilities concerning the matter in litigation, and does not inquire into privileged areas of communication"). "At the time *Porter* was decided, the text of Model Rule 4.2 was nearly identical to the current version. The only difference is that the current Model Rule 4.2 adds that ex parte contact with a represented party is permissible if authorized by a court order." United States v. W.R. Grace, 401 F. Supp. 2d 1065, 1067 n.2 (D. Mont. 2005).

25. *See* Lewis v. CSX Transp., Inc., 202 F.R.D. 464, 467 (W.D. Va. 2001) (prohibiting ex parte contact as a violation of ethics); Tucker v. Norfolk & W. Ry., 849 F. Supp. 1096, 1101 (E.D. Va. 1994) (denying ex parte communications with employees once litigation begins); *see also* Cagguila v. Wyeth Labs. Inc., 127 F.R.D. 653, 654 (E.D. Pa. 1989) (indicating that the prudent attorney will notify opposing counsel before contacting an employee).

ship."[26] Courts that have adopted this test point to its clarity and effectiveness and also tend to favor deposition testimony over informally obtained information.[27] The trouble with this rule, however, is that it cuts squarely against the goal of broad discovery.[28] Regardless, when litigating in jurisdictions that observe this interpretation of Rule 4.2, lawyers seeking information about the actions or policies of a corporation or business from its current employees should obtain consent from the entity's counsel before making contact in order to avoid potential sanctions.[29]

4. Intermediate Views

There are several intermediate views that represent the middle ground regarding the scope of employees that may be contacted. They have been met with varying degrees of acceptance.

a. Binding Admission View

Prior to the Ethics 2000 amendments to the Model Rules, Comment 4 to Rule 4.2 stated:

> In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or *whose statement may constitute an admission on the part of the organization.*[30]

Furthermore, section 100 of the Restatement (Third) of the Law Governing Lawyers disallows nonconsensual ex parte contact with:

> (2) a current employee or other agent of an organization represented by a lawyer:

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26. FED. R. EVID. 801(d)(2)(D).

27. *See Tucker*, 849 F. Supp. at 1099 ("[Federal Rule of Evidence] 801(d)(2)(D) [] does not 'present an insurmountable barrier to ascertaining an appropriate code of conduct.'" (quoting Queensberry v. Norfolk & W. Ry., 157 F.R.D. 21, 23 (E.D. Va. 1993) (mem.))).

28. *See* Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990) (noting that a blanket rule thwarts justice by impeding expeditious resolution of disputes).

29. *See Cagguila*, 127 F.R.D. at 654 (explaining that careful attorneys will obtain opposing counsel's consent before making contact with an employee).

30. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 4 (2001) (emphasis added).

> (a) if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;
> (b) if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or
> (c) if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.[31]

Given the language of subsection (2)(c), Comment (e) to section 100 states: "Employees or agents are not included within [s]ubsection (2)(c) solely on the basis that their statements are admissible evidence [under Rule 801(d)(2)(D)]. A contrary rule would essentially mean that most employees and agents with relevant information would be within the anti-contact rule, contrary to the policies described in Comment *b* [of Section 100]."[32]

In a series of decisions in the mid-1990s, the Northern District of Illinois struggled to resolve whether Rule 801(d)(2)(D) was the ethical standard for evaluating ex parte contact with a current employee.[33] In *In re Air Crash Disaster Near Roselawn*,[34] the court maintained a broad prohibition against contact with current employees, reasoning:

> Rule 4.2 unquestionably restricts a party's ability to conduct low cost, informal discovery. However, such a restriction is necessary because the provisions of Fed.R.Evid. [sic] 801(d)(2)(D) allow an employee's statement to be used against the employer as an admission so long as it is made during the existence of the relationship and concerns a matter within his agency or employment. Under Fed.R.Evid. [sic] 801(d)(2)(D), virtually every employee may conceivably make admissions binding on his or her employer. The *Chancellor* court noted:
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> > Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corpo-

31. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100(2) (1998).

32. *Id.* § 100(2) cmt. e.

33. *See* Orlowski v. Dominick's Finer Foods, Inc., 937 F. Supp. 723, 730 (N.D. Ill. 1996) (finding that plaintiffs have a choice to communicate informally with employees or use their statements, but they may not do both); *see also In re* Air Crash Disaster Near Roselawn, 909 F. Supp. 1116, 1121-22 (N.D. Ill. 1995) (discussing Federal Rule of Evidence 801(d)(2)(D) and its application with regard to contacting employees).

34. 909 F. Supp. 1116 (N.D. Ill. 1995).

> ration in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.
>
> Since an employee could potentially bind the corporation pursuant to Fed.R.Evid. [sic] 801(d)(2)(D), it is fair to require that the employer's attorney be present. Nevertheless, this Court recognizes that it may be difficult to determine which employees fit into the category prior to attempting discovery. This difficulty, however, does not justify an aggressive approach that results in ethical violations. Instead, counsel, when confronted with a need to obtain information from witnesses that might reasonably lead to ethical problems, must take a conservative rather than aggressive approach.[35]

The following year, in *Orlowski v. Dominick's Finer Foods, Inc.*,[36] the Northern District of Illinois revisited the issue, taking a less paternalistic approach.[37] In resolving the issue, the *Orlowski* court looked to the dichotomy between its decision in *In re Air Crash* and its earlier decision in *B.H. by Monahan v. Johnson*,[38] and stated:

> [T]he court in *B.H. by Monahan* held that the plaintiffs' counsel could conduct interviews with the employees, but could not offer "such informally gathered evidence as admissions of party-opponents." The decision in *In re Air Crash* is the flip side of the same coin, where the court pronounced that the plaintiff could not communicate directly with employees because, under Rule 801(d)(2)(D), "virtually every employee may conceivably make admissions binding on his or her employer."
>
> This Court finds that the best reconciliation of Rule 4.2 and Rule 801(d)(2)(D) results in a choice for [p]laintiff's counsel . . . [p]laintiffs may *either* communicate informally with assistant managers, department managers, and supervisors, *or* use statements from these individuals—but they may not do both. Thus, the Court holds that [p]laintiffs may not obtain statements from current employees, through informal contacts, then use those statements as admissions

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35. *In re Air Crash*, 909 F. Supp. at 1121-22 (quoting Chancellor v. Boeing Co., 678 F. Supp. 250, 251 (D. Kan. 1988)) (citations omitted).

36. 937 F. Supp. 723 (N.D. Ill. 1996).

37. *See Orlowski*, 937 F. Supp. at 730 (reconciling Rule 4.2 with the hearsay rule in favor of plaintiff).

38. 128 F.R.D. 659 (N.D. Ill. 1989).

> against [defendant]. Conversely, the Court holds that, for any informal communication with the aforementioned types of employees to result in a binding admission, [defendant's] counsel must have consented prior to the communication.[39]

Therefore, under the binding admissions view, contact with current employees may be prohibited because their statements could potentially be binding against their employer. Attorneys may be allowed, however, to communicate with current employees after receiving prior consent from the employer's counsel.

b. Ethics 2000 Comment 7 View

In 2002, the ABA's House of Delegates adopted the E2K Commission's suggested changes to Rule 4.2 and its comments.[40] To date, twenty-five states have also adopted these changes.[41] Amended Rule 4.2 allows a lawyer to choose whether to obtain the consent of an organization's counsel or seek an order from the court that allows ex parte contact with a potentially "represented" person.[42] In addition, new Comment 7 (previously Comment 4) does not include the phrase "or whose statement may constitute an admission on the part of the organization."[43] The amended comment now reads in part:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[44]

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39. *Orlowski*, 937 F. Supp. at 730-31.

40. *See* ABA Center for Prof'l Responsibility, Summary of House Delegates Action on Ethics 2000 Commission Report, http://www.abanet.org/cpr/e2k/e2k-summary_2002.html (last visited Mar. 20, 2007) (discussing the adopted amendments) (on file with the *St. Mary's Law Journal*).

41. ABA Center for Prof'l Responsibility, Status of State Review of Prof'l Conduct Rules, http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (last visited Mar. 20, 2007) (on file with the *St. Mary's Law Journal*).

42. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2005).

43. *Id.* at cmt. 7 (deleting the quoted statement); MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 4 (2001) (containing the statement "whose statement may constitute an admission on the part of the organization").

44. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2005).

In revising the comment, the ABA Reporter's observations stated:

> [T]he Commission deleted the broad and potentially open-ended reference to "any other person . . . whose statement may constitute an admission on the part of the organization." This reference has been read by some as prohibiting communication with any person whose testimony would be admissible against the organization as an exception to the hearsay rule.[45]

An article written by Ellen J. Messing and James S. Weliky for the July 2004 Association of Trial Lawyers of America (ATLA)[46] Annual Convention further explains:

> As the Reporter to the Ethics 2000 Commission had explained earlier in the course of the Commission's deliberations, such a reading misinterpreted the original intent of the "admissions" language. The intent had never been to track the hearsay exclusion, but rather to preclude contact only with the far narrower set of employees authorized by some local evidence laws to make *binding* admissions against an organization. Conflating the hearsay exclusion with the ethical bar, as so many courts had done up until then, was described by the Reporter as creating "confusion," and necessitated the remedy embodied in the Comment [7] rewrite.[47]

For states and jurisdictions that have adopted amended Rule 4.2 and its revised comment, the realm of employees now available for ex parte contact without prior consent from the employer's counsel is expanded significantly. Only time will tell how many more states will adopt the amended rule or something substantially similar.

c. Managing/Speaking Agent View

The managing/speaking agent view has been adopted in two recent and significant opinions, *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*[48] and *Palmer v. Pioneer*

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45. ABA Center for Prof'l Responsibility, Model Rule 4.2: Reporter's Explanation of Changes, http://www.abanet.org/cpr/e2k/e2k-rule42rem.html (last visited Mar. 20, 2007) (on file with the *St. Mary's Law Journal*); *see also* Ellen J. Messing & James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View*, 19 LAB. LAW. 353, 358 (2004) (quoting the ABA Reporter's observations).

46. ATLA changed its name to the American Association for Justice (AAJ) in 2006. *See* AAJ, About AAJ, http://www.atla.org/about/index.aspx (last visited Mar. 20, 2007) (discussing the history of the organization) (on file with the *St. Mary's Law Journal*).

47. Ellen J. Messing & James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View*, 19 LAB. LAW. 353, 358 (2004).

48. 764 N.E.2d 825 (Mass. 2002).

Inn Associates.[49] The *Messing* court explained that under this view, Rule 4.2 only prohibits ex parte contact with "employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation."[50] Notably, this standard is closely aligned with that of Comment (e) of the Restatement (Third), stated above.[51]

In *Palmer*, the Nevada Supreme Court rejected both the old Comment 4 and the new Comment 7 of Rule 4.2.[52] After reviewing the various tests that exist for determining whether ex parte contact with a current employee is permissible without consent, the court adopted the "managing-speaking agent" test, stating:

> In embracing the managing-speaking agent test, we do not adopt Model Rule 4.2's former comment. Also, we do not follow the 2002 comment . . . . Rather, [Rule 4.2] should be interpreted according to the managing-speaking agent test as set forth by the Washington Supreme Court in *Wright by Wright v. Group Health Hospital*:
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> > [T]he best interpretation of "party" in litigation involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, *i.e.*, those employees who have "speaking authority" for the corporation . . . . It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts. Rather, the rule's function is to preclude the interviewing of those corporate employees who have the authority to *bind* the corporation.
> >
> > . . . [E]mployees should be considered "parties" for the purposes of the disciplinary rule if . . . they have managing authority sufficient to give them the right to speak for, and bind, the corporation.[53]

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49. 59 P.3d 1237 (Nev. 2002).

50. Messing, Rudavsky, & Weliky, P.C. v. President & Fellows of Harv. Coll., 764 N.E.2d 825, 833 (Mass. 2002) (recognizing that the test narrows the scope of prohibited employee contact).

51. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100(2) cmt. e (1998) (explaining that employees whose statements are admissible into evidence are not necessarily included within subsection (2)(c), as this would be contrary to the policies set forth in section 100).

52. Palmer v. Pioneer Inn Assocs., 59 P.3d 1237, 1248 (Nev. 2002).

53. *Id.* at 1247-48 (quoting Wright by Wright v. Group Health Hosp., 103 Wash.2d 192, 691 P.2d 564, 569 (1984)) (citations omitted).

d. Case-by-Case Balancing Test

There are courts that have refused to adopt the tests discussed so far in this Article.[54] Rather, these courts attempt to balance the needs of the party seeking discovery with the goal of protecting the organization from unfairness.[55] The *Palmer* court summarized the case-by-case balancing test as follows:

> Under this test, the particular facts of the case must be examined to determine what informal contacts may be appropriate in light of the parties' specific needs. Factors to be considered are the claims asserted, the employee's position and duties, the employer's interests in protecting itself, and the alternatives available to the party seeking an informal interview.[56]

The *Palmer* court further stated that the case-by-case balancing test was difficult to apply and had varied results.[57] It seems that this test has only been applied when counsel asks for "prospective guidance from [the] court." Alternatively, the test has not been used to find whether an attorney committed an ethical violation after-the-fact.[58] The *Palmer* court went on to state:

> [The case-by-case test] is not at all predictable and does not have a sound analytical basis. . . . [E]x parte contact is most useful and necessary in the pre-litigation stage, when counsel is complying with his or her Rule 11 obligation to investigate whether a valid claim exists. A test that requires court intervention before contact may be made does not further the purpose of permitting an adequate investigation under Rule 11. Accordingly, while the balancing approach may be useful in certain limited situations, it cannot feasibly be applied as a universal standard for interpreting [Rule 4.2].[59]

In short, there has been a substantial evolution in the written rules concerning contact with the opposing party's employees, but an insubstantial and highly variable evolution in the practical aspects of this issue. The wise practitioner will become thoroughly

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54. *Id.* at 1242-47 (providing a detailed analysis of the various tests used and providing reasons why the court chose not to follow these tests).

55. *Id.* at 1247-48 ("[T]he managing-speaking agent test . . . best balances the policies at stake when considering what contact with an organization's representative is appropriate.").

56. *Id.* at 1245-46.

57. *Palmer*, 59 P.3d at 1245-46.

58. *Id.*

59. *Id.*

informed regarding the particular interpretation of those rules and also take precautionary measures to prevent a wrong guess or a judicial change of mind from resulting in disaster.

B. *Contact with Former Employees*

1. Permissive View

Under the permissive view, Rule 4.2 does not prohibit ex parte contact with former employees.[60] Following the 2002 adoption of the E2K Commission's proposed amendments to Rule 4.2, Comment 7 (old Comment 4) now states explicitly: "Consent of the organization's lawyer is not required for communication with a former constituent."[61] The Reporter's observations state that this language was added to clarify that no consent is necessary when dealing with former employees of a corporation.[62] Comment 7, however, warns against certain discovery from former employees, stating, "[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization."[63]

2. Intermediate View

In their article, Messing and Weliky summarize the various examples wherein courts have restricted ex parte contact with former employees:

> Counsel may conduct ex parte interviews of former employees unless the person's act or omission may be imputed to the corporation, or in instances where the former employee has an ongoing agency or fiduciary relationship with the corporation. [Additionally,] [s]ome authorities have added a restriction on ex parte communications where the statements of the former employee can be construed as a party admission under the rules of evidence.[64]

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60. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2005) (declaring that consent need not be obtained before making contact with former employees).

61. *Id.*

62. ABA Center for Prof'l Responsibility, Model Rule 4.2: Reporter's Explanation of Changes, http://www.abanet.org/cpr/e2k/e2k-rule42rem.html (last visited Mar. 20, 2007) (on file with the *St. Mary's Law Journal*).

63. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2005).

64. Ellen J. Messing & James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View*, 19 LAB. LAW. 353, 363-65 (2004).

Messing and Weliky also discuss former employees who fall "within the 'litigation control group'" and those who hold privileged information.[65]

> [F]ormer employees who [are] within the "litigation control group" are presumptively represented by the organization even after the employment relationship ends, and ex parte contact is not allowed unless the former employee has disavowed that representation. Others have restricted communications where there is a risk of disclosure of privileged information. These courts hold further that if a former employee's acts can still be imputed to the corporation notwithstanding the end of the employment relationship, then the former employee should remain within the definition of "person" or "party."[66]

Under these intermediate views, communication with former employees may be possible. It is important, however, for an attorney to determine whether a former employee falls within one of these views before making contact. This contact may potentially be an ethical violation depending on whether the former employee fits within one of these categories.

3. Restrictive View

A small minority of courts have held that Rule 4.2 disallows ex parte communications with former employees of a corporation when the discovering attorney "knows or should know that the former employee[s] [have] been extensively exposed to confidential client information of the [corporation]."[67] In *G-I Holdings, Inc. v. Baron & Budd*,[68] the United States District Court for the Southern District of New York granted a protective order to several law firm defendants against an asbestos holdings company that was attempting to conduct ex parte interviews with the law firms' former employees.[69] Although the opinion did not incorporate Rule 4.2, and

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65. *Id.*

66. *Id.*

67. Camden v. State, 910 F. Supp. 1115, 1116 (D. Md. 1996). The *Camden* court further elaborated that ex parte communication with such former employees "may occur only with the consent of the other interested party's lawyer or approval of the court." *Id.*

68. 199 F.R.D. 529 (S.D.N.Y. 2001).

69. *See* G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529, 535 (S.D.N.Y. 2001) (finding that "given the importance of the attorney-client privilege and the potential impact of its breach on the" law firm defendants' clients, the dangers of ex parte communications with defendants' former employees outweighs G-I Holding's fact-finding rights).

instead involved Rule 26(b) of the Federal Rules of Civil Procedure, the court stated:

> [F]ormer employees who possess knowledge regarding privileged communications do present a "distinct problem" where *ex parte* interviews are concerned. One aspect of this problem is that, where the former employee is a lay person, it is unrealistic to think that he will know what information or communications are privileged, so that even where disclosure of such matters is not intended it may well occur inadvertently. . . . [I]t is unrealistic to expect even the best-intentioned lay person to be able to safeguard the attorney-client privilege.[70]

Obviously, the court's concern is the protection of privileged information.[71] The opinion does not seem to adopt a broad prohibition on ex parte interviews with former employees.[72] It does, however, suggest that when former employees are privy to confidential information related to the subject matter of the ongoing litigation, such employees should not be contacted ex parte by the opposing party without the consent of that party or court approval.[73]

C. *Applicability of Model Rule 4.3 to Attorneys Contacting Employees*

Prior to the 2002 amendments, Model Rule 4.3 "Dealing with Unrepresented Person" stated:

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

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70. *Id.* at 533, 535.

71. *See id.* at 535 (stating that even if "G-I Holdings does not actually seek to invade the [attorney-client] privilege, the fact remains that some of the areas of inquiry . . . come dangerously close to such matters"). The court in *G-I Holdings* also notes that "[t]he danger of inadvertent disclosure is compounded by the fact that the investigators [may] themselves [be] lay persons and, thus, are in little better position than the interviewees to assess whether privileged material is being disclosed." *Id.*

72. *See id.* at 533 (explaining that generally, ex parte communications with "former employees of an adverse party" serve an important role in gathering information, which otherwise would not be revealed in the presence of the former employer's attorney).

73. *See G-I Holdings*, 199 F.R.D. at 534 (noting that a court may issue a protective order to prevent ex parte communication with a party's former employees when that party can show that such "employees were privy to privileged information").

> matter, the lawyer shall make reasonable efforts to correct the misunderstanding.[74]

The 2002 amendments modified the last portion of the rule by adding a new last sentence that states: "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[75] Additionally, in *McCallum v. CSX Transportation, Inc.*,[76] the United States District Court for the Middle District of North Carolina explained the procedures an attorney must take before and while conducting an ex parte interview of an unrepresented former or current employee:

> When contact is made, certain precautions need to be observed. The ABA Model Rule 4.3 imposes an obligation on an attorney to convey to the unrepresented witness the truth about the lawyer's role, representative capacity, and that he is not disinterested. And . . . the employee must be *willing* to be interviewed. Consequently, prior to the interview, the attorney or investigator must (1) fully disclose their representative capacity to the employee, (2) state the reason for seeking the interview as it concerns the attorney's client and the employer, (3) inform the individual of his or her right to refuse to be interviewed, (4) inform the person that he or she has the right to have their own counsel present, and finally (5) may not under any circumstances seek to obtain attorney-client or work product information from the employee.[77]

Thus, it is important to remember that in the event a particular jurisdiction allows an attorney to conduct an ex parte interview with a current or former employee, the attorney is still obligated to conform to Model Rule 4.3 because such current or former employees are presumed to be "unrepresented."[78]

D. *Applicability of Model Rule 4.2 to Undercover Investigators*

Model Rule 8.4 states, in pertinent part: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules

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74. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2001).
75. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2002).
76. 149 F.R.D. 104 (M.D.N.C. 1993).
77. McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 112 (M.D.N.C. 1993).
78. *See* MODEL RULES OF PROF'L CONDUCT R. 4.3 (2005) (mandating conduct when dealing with an unrepresented person).

of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . . ."[79] Therefore, it would seem that if an attorney hires an undercover investigator to gather information by making contact with a current or former employee of an opposing party, who is "off limits" under the relevant jurisdiction's interpretation of Rule 4.2, the lawyer violates Rule 8.4 and is subject to sanctions.[80] This is precisely what occurred in *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*,[81] in which defendant's counsel "hir[ed] a private investigator to pose as a consumer, along with his wife or daughter, in visits to [plaintiffs'] franchisees, for the purpose of making secret audiotape recordings of conversations [with current employees] in anticipation of trial."[82] After adopting the binding admissions view for Rule 4.2,[83] the court found that defendant's use of the undercover investigator was "an attempt to elicit admissions against [the] employer[-plaintiff]."[84] Further, the court held that "[b]ecause the lawyer may not contact a current employee of an organization or corporation who[se]" statements constitute admissions on the part of the organization, "the attorney may not avoid the rule by directing an investigator or anyone else to contact those employees."[85] Finding this a violation of the rules of professional conduct, the court imposed sanctions, which included "exclud[ing] from evidence at trial the audiotaped recordings made by the investigator, any testimony from the investigator, his wife and his daughter, and any other evidence obtained by the defense as a result of the audiotaped conver-

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79. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2002).

80. *See id.* (prohibiting an attorney from hiring or inducing a third person to do that which the rules prohibit the attorney from doing himself).

81. 144 F. Supp. 2d 1147 (D.S.D. 2001).

82. Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 144 F. Supp. 2d 1147, 1149 (D.S.D. 2001).

83. *See Midwest Motor Sports*, 144 F. Supp. 2d at 1156 (discussing the "concern[ ] about attorneys circumventing the formal discovery [and evidentiary] rules through surreptitious means to produce evidence that will be admissible at trial as admissions against interest of the [other] party"). The *Midwest Motor Sports* court also considered the potentially harmful consequences that result when "corporate employees mak[e] damaging statements which later, at trial, constitute admissions against employers under Rule of Evidence 801(d)(2)(D)." *Id.* Other courts have taken up this issue as well. *See, e.g.*, Cole v. Appalachian Power Co., 903 F. Supp. 975, 977-79 (S.D. W. Va. 1995) (contemplating the dangers of party admissions made by corporate employees).

84. *Midwest Motor Sports*, 144 F. Supp. 2d at 1158.

85. *Id.* at 1157.

sations."[86] While the court considered these sanctions "sufficient to prevent prejudice to [the plaintiffs,]" the court warned others:

> If counsel practicing before this Court commit similar ethical violations in the future, . . . the sanctions imposed will not be so lenient. . . . [T]hese lawyers and others practicing before the Court must be aware of and observe the ethical requirements by which they are bound, so that the practice of law remains an honored profession, not only in our eyes, but in the eyes of the public as well.[87]

Midwest Motor Sports appears to be a rarity. Other courts that have considered whether Rule 4.2 applies to undercover investigations have concluded that it does not.[88] For example, in *Hill v. Shell Oil Co.*,[89] plaintiffs brought a putative class action suit against Shell Oil Company (Shell), alleging Shell more frequently required African-American customers to prepay for gasoline than its white customers.[90] Plaintiffs elicited several multi-racial test subjects to purchase fuel at Shell gasoline stations, and videotaped the purchases.[91] When Shell became aware of the videotaping, it sought a protective order to prevent further taping, claiming such practices were in violation of Model Rules of Professional Conduct 4.2 and 4.3.[92] After discussing *Midwest Motor Sports* and *Gidatex v. Campaniello Imports, Inc.*,[93] the court stated:

> Although *Midwest Motor Sports* is considerably more restrictive than *Gidatex*, we think there is a discernable continuum in the cases from clearly impermissible to clearly permissible conduct. Lawyers (and

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86. *Id.* at 1160.

87. *Id.*

88. *See* Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 877 (N.D. Ill. 2002) (mem.) (finding that undercover investigators acting in the role of customers were not prohibited by Rule 4.2).

89. 209 F. Supp. 2d 876 (N.D. Ill. 2002) (mem.).

90. *Shell Oil Co.*, 209 F. Supp. 2d at 877.

91. *See id.* (recounting how, "as part of their investigation of alleged discrimination," plaintiffs videotaped interactions between white and African-American test subjects and Shell employees).

92. *See id.* (describing defendant's efforts to obtain a protective order from the trial court to prevent plaintiffs from continuing to investigate by videotaping encounters at defendant's gas stations).

93. 82 F. Supp. 2d 119 (S.D.N.Y. 1999). The *Gidatex* court held secretly taped conversations with salespersons not to be in violation of Rule 4.2 despite the fact that the salespersons were considered to be represented. *See* Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 125-26 (S.D.N.Y. 1999) (postulating that the recordation of the defendant's "normal business routine" was not in violation of the rules of professional conduct).

> investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. They cannot normally interview protected employees or ask them to fill out questionnaires. They probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course. That is akin to surveillance videos routinely admitted.[94]

The court applied this line of reasoning to the facts of *Hill*, and denied the protective order, reasoning:

> Here we have secret videotapes of station employees reacting (or not reacting) to plaintiffs and other persons posing as consumers. Most of the interactions that occurred in the videotapes do not involve any questioning of the employees other than asking if a gas pump is prepay or not, and as far as we can tell these conversations are not within the audio range of the video camera. These interactions do not rise to the level of communication protected by Rule 4.2. To the extent that employees and plaintiffs have substantive conversations outside of normal business transactions, we will consider whether to bar that evidence when and if it is offered at trial.[95]

Additionally, in *Apple Corps Limited v. International Collectors Society*,[96] the court considered the applicability of Rule 4.2 to an undercover investigation.[97] In *Apple Corps Ltd.*, the plaintiffs sought to hold the defendants in civil contempt for violating a consent decree under which the defendants agreed not to sell any postage stamps that bore the name or likeness of Yoko Ono or the Beatles.[98] In order to determine whether the defendants were violating the decree, the plaintiffs had several persons contact the defendants and attempt to purchase items covered by the decree.[99]

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94. *Shell Oil Co.*, 209 F. Supp. 2d at 880.

95. *Id.* at 877.

96. 15 F. Supp. 2d 456 (D.N.J. 1998).

97. *See* Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (concluding that "[p]laintiffs' investigators' communications with [d]efendants' sales representatives did not violate [Rule] 4.2").

98. *See id.* at 458-59 (stating that "[p]laintiffs alleged that [d]efendants were unlawfully trading off the good will associated with the legendary rock-n-roll band, The Beatles").

99. *See id.* at 462 (listing the various parties enlisted to contact defendant in an attempt to purchase from them the items prohibited from sale by the consent order).

The defendants violated the decree on several occasions.[100] Ultimately, the court held such investigative phone purchases not to be in violation of Rule 4.2 because the defendants' phone sales representatives did not fall within the "litigation control group."[101] Furthermore, the court ruled that such investigative phone purchases did not violate Rule 4.2 stating:

> The investigators did not ask any substantive questions other than whether they could order the Sell-Off Stamps. The only misrepresentations made were as to the callers' purpose in calling and their identities. . . . [Rule] 4.2 cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule. Accordingly, . . .[p]laintiffs' investigators' communications with [d]efendants' sales representatives did not violate [Rule] 4.2.[102]

Therefore, although this may not be true in every jurisdiction, it appears that it is not a violation under Rule 4.2 to hire an undercover investigator. As the courts above discussed, ex parte contact with undercover investigators simply does not rise to the substantive level necessary to cause a Rule 4.2 violation.

E. *Applicability of Model Rule 4.3 to Undercover Investigators*

While the *Midwest Motor Sports* court held that Rule 4.3 prohibited investigators as well as attorneys from attempting to communicate ex parte with the opposing party's employees,[103] two other courts support the opposite result.[104] In *Weider Sports Equipment*

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100. *See id.* at 464 (enumerating several instances wherein defendants sold or attempted to sell items prohibited from sale by the consent order).

101. *See id.* at 473 (explaining that the disciplinary rules of New Jersey consider only those persons within a corporation who are vested with decision-making authority to be represented by that corporation's legal counsel).

102. *See Apple Corps Ltd.*, 15 F. Supp. 2d at 474-75.

103. *See* Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., 144 F. Supp. 2d 1147, 1157 (D.S.D. 2001) (stating that "[w]hen an attorney or an investigator or other agent for the attorney attempts to conduct an *ex parte* interview with a current employee . . . Rule 4.3 . . . controls").

104. *See Apple Corps Ltd.*, 15 F. Supp. 2d at 476 (finding that investigators "were not acting in the capacity of lawyers"); *see also* Weider Sports Equip. Co., v. Fitness First, Inc.,

Co. v. Fitness First, Inc.,[105] the United States District Court for the District of Utah stated, albeit in dicta:

> Under Rule 4.3 the lawyer, in dealing with [an unrepresented person], is not to imply that the lawyer is not disinterested. However, Rule 4.3 may apply only to lawyers[,] not investigators[,] since the expectations are those of the unrepresented person dealing with a lawyer. . . . No unrepresented person is realistically likely to apply his or her expectations of lawyers to an investigator or tester. Rule 4.3 could apply, however, to the activities of an investigator who represented himself as acting on behalf of a lawyer.[106]

In *Apple Corps Ltd.*, the United States District Court for the District of New Jersey similarly stated:

> It is clear from the language of [Rule] 4.3 that it is limited to circumstances where an attorney is acting in his capacity as a lawyer—"dealing on behalf of a client." Therefore, its prohibitions on allowing the unrepresented person to misunderstand that the lawyer is disinterested only apply to a lawyer who is acting as a lawyer. Like [Rule] 4.2, [Rule] 4.3 was intended to prevent a lawyer who fails to disclose his role in a matter from taking advantage of an unrepresented third party.
>
> Plaintiff's counsel and investigators in testing compliance were not acting in the capacity of lawyers. Therefore, the prohibitions of [Rule] 4.3 do not apply here. [Rule] 4.3 does not apply to straightforward transactions undertaken solely to determine in accordance with Rule 11 of the Federal Rules of Civil Procedure, the existence of a well-founded claim—in this case a claim of contempt.[107]

F. *Summary of Part III*

Based on the foregoing case law, it is clear that before an attorney attempts to make personal contact with a present or former employee of an opposing party, or attempts to have an undercover investigator accomplish the same, the attorney must become familiar with the established boundaries that exist within the jurisdiction in which the attorney practices. This is especially true given the drastic variations of interpretations of the rules existing among ju-

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912 F. Supp. 502, 511-12 (D. Utah 1996) (opining that unrepresented people are unlikely to have the same expectations of a lawyer as they would for an investigator).

105. 912 F. Supp. 502 (D. Utah 1996).

106. *Weider Sports Equip. Co.*, 912 F. Supp. at 511-12.

107. *Apple Corps Ltd.*, 15 F. Supp. 2d at 476.

risdictions.[108] Often the sanctions for violating the ethical rules involve the exclusion of evidence that the court deems unlawfully or unethically obtained.[109] As seen in the multiple cases above, however, attorneys and entire law firms have been disqualified from representing their clients for committing infractions of the rules or guidelines.[110]

IV. Hiring Opposing Party's Former Employee as an Expert

A. *In re Bell Helicopter Textron, Inc.*[111]

Following the August 1997 crash involving a Bell 412 helicopter, plaintiffs sued Bell Helicopter Textron, Inc.; Bell Helicopter Textron, a division of Textron Canada Ltd.; and Textron Inc. (collectively, "Bell") for damages.[112] During the litigation, plaintiffs hired Caren Vale, a former employee who had worked with Bell for over ten years, as a consulting expert.[113] Vale had "worked as an engineer in Bell's System Safety Group," which means that she participated in the "development of safety systems for [Bell] aircraft . . . including crash-resistant fuel systems and energy-attenuating seats."[114] Some of these items were used in the Bell 412 helicopter.[115] Vale eventually worked for Bell as an accident investigator

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108. *Compare Midwest Motor Sports*, 144 F. Supp. 2d at 1157 (stating that Rule 4.3 operates to prevent attorneys from personally contacting ex parte an opponent's employees, while also forbidding attorneys from hiring or inducing a third party to do the same), *with Apple Corps Ltd.*, 15 F. Supp. 2d at 476 (contending that Rule 4.3 only prohibits an attorney from personally contacting ex parte an opponent's employees, or hiring or inducing another to do the same, when the lawyer is acting in the capacity as an adverse legal representative).

109. *See Midwest Motor Sports*, 144 F. Supp. 2d at 1160 (finding the exclusion of evidence, such as unethically obtained videotapes, to be an adequate sanction).

110. *See* Snider v. Super. Ct., 7 Cal. Rptr. 3d 119, 125 (Cal. Ct. App. 2003) (stating that violations could result in disqualification); *see also* Faison v. Thornton, 863 F. Supp. 1204, 1217-18 (D. Nev. 1993) (disqualifying counsel as sanctions for ex parte communications); Cronin v. Eighth Judicial Dist. Ct., 781 P.2d 1150, 1154 (Nev. 1989) *overruled on other grounds by* Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Ct., No. 46579, 2007 WL 686100 (Nev. Mar. 8, 2007) (approving disqualification of attorney for ex parte communications with employees).

111. 87 S.W.3d 139 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

112. *In re* Bell Helicopter Textron, Inc., 87 S.W.3d 139, 144 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

113. *In re Bell*, 87 S.W.3d at 144.

114. *Id.*

115. *Id.*

and later as "Chief of Flight Safety," both of which caused her to "work[ ] with Bell's inhouse and outside counsel to develop legal strategies" for defense against lawsuits arising from helicopter crashes, including some involving Bell 412.[116]

After discovering that Vale had been retained by plaintiffs, Bell moved to disqualify the plaintiffs' attorneys arguing that, due to her employment at Bell, Vale was "privy to Bell's confidential information, trial strategy, work product, and attorney-client communications that arose in matters substantially related to those in the underlying case."[117] Furthermore, Bell argued that plaintiffs "could not effectively screen Vale's work . . . so that there was no threat that she would divulge Bell's confidential information."[118]

1. Legal Presumptions

On mandamus, the Texas Court of Appeals began its analysis by recognizing that lawyers are subject to different legal presumptions than non-lawyers whenever they: (1) perform work for a new client that has adverse interests to a former client, or (2) change employment from one firm to another—known as a "lateral hire"—and begin to work for a former client's adversary.[119] When a lawyer begins to work for a new client whose interests are adverse to those of a former client, it is conclusively presumed that the lawyer received confidential information while representing the former client.[120] Also, it is presumed that when lawyers move to a new firm, they share confidential information obtained while employed with the first firm with members of the new firm.[121]

The first presumption, that an attorney acquired confidential information while representing a former client, "has also been ap-

116. *Id.*

117. *Id.*

118. *In re Bell*, 87 S.W.3d at 144.

119. *See id.* at 145 (discussing the "conclusive presumption that confidences" learned by an attorney in the course of his prior employment will remain and carry over to his subsequent employment with another firm).

120. *See id.* (reiterating that confidences shared by an attorney and a former client follow an attorney to subsequent employment and representation of new clients); *see also* Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 833 (Tex. 1994) (announcing that disqualification of an attorney who represents a new client with adverse interests to a former client is "based on a conclusive presumption that confidences and secrets were imparted to the attorney during the prior representation").

121. *Phoenix Founders*, 887 S.W.2d at 834; *In re Bell*, 87 S.W.3d at 145.

plied to [non-lawyers, such as] legal secretaries, paralegals, legal assistants and freelance consultants."[122] In addition, while the second presumption—that confidential information obtained during past employment is imputed to a new firm—has also been applied to non-lawyers, this presumption is rebuttable.[123] "[T]he new firm [employing the non-lawyer] can rebut application of the presumption if (1) it strictly adheres to a screening process[,] and (2) the nonlawyer does not reveal any" confidential information of a former client with anyone in the new firm.[124]

2. Effective Screening Required

The court then listed the required steps the new firm must take in screening the non-lawyer:

- The newly hired nonlawyer must be cautioned not to disclose any information relating to the representation of a client of the former employer.
- The nonlawyer must be instructed not to work on any matter on which she worked during the prior employment, or regarding which she has information relating to the former employer's representation.
- The new firm should take other reasonable steps to ensure that the nonlawyer does not work in connection with matters on which she worked during the prior employment, absent client consent after consultation.[125]

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122. *In re Bell*, 87 S.W.3d at 145; *see also In re* Am. Home Prods. Corp., 985 S.W.2d 68, 75 (Tex. 1998) (noting that "[w]hile the presumption that a legal assistant obtained confidential information is not rebuttable, the presumption that information was shared with a new employer may be overcome"); *Phoenix Founders*, 887 S.W.2d at 834 (agreeing "that a paralegal who has actually worked on a case must be subject to the . . . conclusive presumption that confidences and secrets were imparted during the course of the paralegal's work on the case").

123. *See Phoenix Founders*, 887 S.W.2d at 834-35 (concurring with the ABA that "client confidences may be adequately safeguarded if . . . a firm takes appropriate steps"); *In re Bell*, 87 S.W.3d at 145 (reporting that the presumption of imputation of confidential information may be rebuttable if the new law firm takes certain precautions).

124. *In re* Bell Helicopter Textron, Inc., 87 S.W.3d 139, 145 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]); *see Phoenix Founders*, 887 S.W.2d at 834-35 (outlining the cautionary measures a law firm must take to ensure that it will not be disqualified because of confidential information possessed by new non-lawyer employees).

125. *In re Bell*, 87 S.W.3d at 145-46; *see Phoenix Founders*, 887 S.W.2d at 834-35 (listing the required precautions a law firm must take to screen off a new non-lawyer employee where that employee may possess confidential information about a former client of the old firm and the new firm represents a client with adverse interests).

The court further explained the factors courts should evaluate when determining the effectiveness of the screening process, stating:

> [C]ourts should consider: the substantiality of the relationship between the former and current matters; the time elapsed between the matters; the size of the firm; the number of individuals presumed to have confidential information; the nature of their involvement in the former matter; and the timing and features of any measures taken to reduce the danger of disclosure. Also, if the old firm and the new firm represent adverse parties in the same proceeding, rather than in different proceedings, the danger of improper disclosure by the non-lawyer is increased.[126]

The court made it clear, however, that even if screening is utilized, "disqualification will always be required . . . under some circumstances."[127]

Applying the law to the facts, the court found "ample evidence that Vale was privy to confidential information about matters substantially similar to the matters involved in the underlying lawsuit."[128] Therefore, the court applied the first of the two presumptions to Vale, stating: "Vale is clearly subject to the conclusive presumption that confidences and secrets about Bell's cases involving model 412 aircraft were imparted to her."[129] However, because Vale was a non-lawyer, the court did not apply the second conclusive presumption to her; rather, it set out to determine whether plaintiffs could effectively screen her work "so that there is no threat that [she] may reveal any of Bell's confidential information to [plaintiffs]."[130]

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126. *In re Bell*, 87 S.W.3d at 146; *see Phoenix Founders*, 887 S.W.2d at 834-35 (enumerating a list of factors that a court should take into account when deciding whether or not to impute a non-lawyer's disqualification in a particular matter to one's new law firm).

127. *In re Bell*, 87 S.W.3d at 145-46; *see Phoenix Founders*, 887 S.W.2d at 835 (declaring that "[a]bsent consent of the former employer's client, disqualification will always be required" in certain situations).

128. *In re Bell*, 87 S.W.3d at 147.

129. *Id.* (explaining that Vale's previous job with Bell likely gave her access to secret material on the aircraft model in the lawsuit she was working on as an expert).

130. *Id.* (noting that because Vale was not a lawyer, the court was unable to be completely sure that she would not share or had not shared information on Bell aircraft, which Vale might have obtained when she was an employee at Bell); *see also* Tex. Comm. on Prof'l Ethics Op. 472, 55 TEX. B.J. 520 (1992), *available at* http://www.txethics.org/reference_opinions.asp?opinionnum=472 (explaining that "the new Rules do not require auto-

In order to determine the effectiveness of plaintiffs' screening process, the court addressed two affidavits the plaintiffs submitted in an effort to convince the court that they could effectively screen Vale.[131] In the end, the court simply dismissed the statements averred in the affidavits stating, "[t]hese representations about Vale's working arrangement with [plaintiffs] or [Bell's] stipulation are not evidence of effective screening."[132]

Plaintiffs, however, also argued that because Bell had previously designated Vale as a testifying expert in previous cases against Bell involving the fuel system of the 412, it had waived its rights of privilege regarding her confidential information.[133] Relying on Rules 192.3(e) and 194.2(f) of the Texas Rules of Civil Procedure and the Supreme Court of Texas's decision in *In re American Home Products Corp.*,[134] plaintiffs argued that because Vale's knowledge was discoverable in previous cases involving the 412, it remained discoverable in the present case.[135] The court rejected this view, stating:

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matic disqualification [of a non-lawyer] to avoid the appearance of impropriety," but the non-lawyer's supervising lawyer must ensure that the rules of professional conduct are complied with).

131. *In re Bell*, 87 S.W.3d at 147 (reviewing the two affidavits submitted by plaintiffs, amounting to two statements from Vale that she (1) did not disclose trade secrets or other confidential information, and (2) that she had not and would not provide plaintiffs with any information she received from Bell). Additionally, the *Bell* court noted that "Vale also states that she has agreed not to disclose to [plaintiffs] any information regarding legal representation of Bell that she acquired while associated with Bell . . . and not to work on any 'legal matter' she worked on while associated with Bell." *Id.*

132. *Id.* at 148 (stating that Bell "stipulated in the trial court that, at the time they moved to disqualify [plaintiff's] counsel, they had no direct evidence that Vale had shared any privileged or confidential information with" the plaintiff's attorneys). Furthermore, the court in *Bell* concluded that Vale's affidavit statements were conclusory and "not probative evidence on the disqualification issue." *Id.* at 147; *see also In re* Am. Home Prods. Corp., 985 S.W.2d 68, 74 (Tex. 1998) (stating that an employee's opinions do not offer any tangible evidence on disqualifying legal representation). The court, however, also asserted that "Vale's actual disclosure of confidences need not be proven before disqualification is required." *In re* Bell Helicopter Textron, Inc., 87 S.W.3d 139, 148 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]).

133. *In re Bell*, 87 S.W.3d at 148.

134. 985 S.W.2d 68 (Tex. 1998).

135. *In re Bell*, 87 S.W.3d at 148-49 (citing *In re Am. Home Prods. Corp.*, 985 S.W.2d at 73-74) (explaining that "[t]he supreme court has held that if communications with an expert may be discovered during the course of litigation by opposing counsel, that information cannot be considered confidential, and the fact that it has been shared with opposing counsel cannot be the basis for disqualification").

> We do not read the discovery rules this broadly. Rule 192.3(e) provides only that the testifying expert's mental impressions and opinions *concerning the case,* and the facts known by the expert that relate to or form the basis for the expert's mental impressions and opinions *formed or made in connection with the case in which discovery is sought,* are discoverable. Accordingly, the facts known to Vale concerning the model 412 aircraft and its safety systems are discoverable based on her status as a former testifying expert for Bell only if she has been designated as a testifying expert with regard to those matters.[136]

Applying this standard to the facts, the court held that Bell had not waived its rights to protect the confidential information held by Vale because there was no evidence that Vale actually served as a testifying expert in cases involving the 412 or "substantially similar" aircraft.[137]

Plaintiffs' final argument asserted that Vale's first-hand factual knowledge gained while employed at Bell is discoverable, and that Bell cannot "shield" her by designating her as a consulting-only expert.[138] While both the court and Bell agreed with this argument, the court explained:

> Information that may be discovered from a fact witness does not, however, include information about an opponent's litigation strategies, attorney work product, or other information exempted from discovery by the attorney-client privilege. Accordingly, while factual information about the model 412 aircraft that Vale knows first-hand because of her employment with Bell may be discoverable because she has been or should be designated as a fact witness, *Vale's knowledge about Bell's litigation strategies, attorney work product, and priv-*

136. *Id.* at 149 (citations omitted); *see also* Aetna Cas. & Sur. Co. v. Blackmon, 810 S.W.2d 438, 440 (Tex. App.—Corpus Christi 1991, orig. proceeding [mand. denied]) (explaining that the only waived material resulting from a party being listed as a testifying expert is privileged information that the expert actually relied upon in forming his opinions and impressions in the prior case).

137. *In re Bell*, 87 S.W.3d at 150.

138. *Id.* (citing Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 554-55 (Tex. 1990) (orig. proceeding) (explaining that "[t]he supreme court has held that a party cannot shield its employees who have knowledge of facts relevant to a case from the discovery process simply by designating them as consulting-only experts").

ileged communications is not discoverable based on her fact-witness status.[139]

3. Plaintiffs' Counsel Disqualified

Perhaps the most important portion of this opinion involves the standard used by courts whenever a party moves to disqualify not only the other side's legal support staff or witnesses, but opposing counsel as well. The *Bell* court stated:

> [T]he party seeking disqualification must prove that the facts and issues involved in both the former and present litigation are so similar that there is a genuine threat that confidences revealed to the party's former counsel will be divulged to his present adversary. To meet its burden of proof, the movant must provide evidence of specific similarities capable of being recited in the disqualification order. If this burden is met, the movant is entitled to a conclusive presumption that confidences and secrets were imparted to the former attorney. The actual disclosure of confidences need not be proven; the issue is whether a genuine threat of disclosure exists because of the similarity of the matters.[140]

Having found that "Vale will be required to work on the other side of a litigation matter that is substantially related to other litigation on which she has previously worked for Bell," the court disqualified plaintiffs' counsel from representing plaintiffs in the underlying suit.[141] Clearly, from this decision, there are several lessons for attorneys who practice in Texas courts. The most important of these lessons is the need to exercise extreme caution when

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139. *Id.* at 151 (emphasis added) (citations omitted); *see also* TEX. R. CIV. P. 192.3(c) (mandating that "[a] person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter").

140. *In re Bell*, 87 S.W.3d at 146 (citations omitted); *see also In re* EPIC Holdings, Inc., 985 S.W.2d 41, 51 (Tex. 1998) (orig. proceeding) (holding that where there is a threat that a lawyer may disclose secret information in one matter because the issues and facts are so closely alike, the matters are substantially related); Texaco, Inc. v. Garcia, 891 S.W.2d 255, 257 (Tex. 1995) (orig. proceeding) (per curiam) (asserting that a substantial relationship is found where the "case involve[s] similar liability issues, similar scientific issues, and similar defenses and strategies"); NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399-400 (Tex. 1989) (asserting that "[w]hen contemplating whether disqualification of counsel is proper, the court must determine whether the matters embraced within the pending suit are *substantially related* to the factual matters involved in the previous suit").

141. *In re Bell*, 87 S.W.3d at 148.

considering the employment of an adversary's former employee as an expert in civil litigation.[142]

In *Leibowitz v. Eighth Judicial District Court*,[143] the Supreme Court of Nevada adopted the standards discussed and applied in *In re Bell*.[144] Some jurisdictions utilize the two-part test for "side-switching" expert cases in order to determine whether a former employee may serve as an expert in litigation against the former employer.[145] Other jurisdictions disqualify former employees from serving as experts based on confidentiality agreements formed between the employee and their previous employer.[146] As one author points out:

> Parties have sought to enjoin their former employees from consulting with their adversaries in litigation by alleging obligations of confidentiality, basing their claims on common law trade secret protection, employment confidentiality agreements, and attorney-client privilege and work product doctrine. Although there exists precedent to support an injunction on any of these bases, the cases tend to illuminate the most viable under given circumstances.[147]

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142. *See generally* Grant v. Thirteenth Ct. App., 888 S.W.2d 466, 467 (Tex. 1994) (orig. proceeding) (per curiam) (asserting that "[t]he test for disqualification is met by demonstrating a genuine *threat* of disclosure, not an actual materialized disclosure").

143. 78 P.3d 515 (Nev. 2003).

144. *See* Leibowitz v. Eighth Judicial Dist. Ct., 78 P.3d 515, 521-22 (Nev. 2003) (discussing the standards behind disqualification and the ability of new employers to screen their potentially adverse employees).

145. *See, e.g.*, Green, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 426, 428 (E.D. Pa. 2001) (employing the two-part test to determine "whether to disqualify an expert based on a prior relationship with the adversary"); Space Sys./Loral v. Martin Marietta Corp., Civ. No. 95-20122 SW, 1995 WL 686369, at *2 (N.D. Cal. Nov. 15, 1995) (not designated for publication) (stating that "whether disqualification of an expert is warranted based on a prior relationship with the adversary, the court must undertake a two part inquiry: (1) Did the adversary have a confidential relationship with the expert?; and (2) Did the adversary disclose confidential information to the expert that is relevant to the current litigation?"); Viskase Corp. v. W.R. Grace & Co., No. 90 C 7515, 1992 WL 13679, at *3 (N.D. Ill. Jan. 24, 1992) (mem.) (not designated for publication) (using the two-part test to uphold disqualification).

146. *See, e.g.*, Uniroyal Goodrich Tire Co. v. Hudson, 873 F. Supp. 1037, 1044 (E.D. Mich. 1994), *aff'd*, 97 F.3d 1452 (6th Cir. 1996) (illustrating that former employer agreements restricting disclosure are broadly enforceable and may disqualify past employees from serving as expert witnesses against their old companies); Wang Labs., Inc. v. CFR Assocs., Inc., 125 F.R.D. 10, 13 (D. Mass. 1989) (relying on an employment agreement to bar a previous employee from serving as an expert against former employer).

147. Brian Burke, *Disqualifying an Opponent's Expert When the Expert Is Your Client's Former Employee*, 66 DEF. COUNS. J. 69, 72 (1999) (explaining that courts tend to use

Clearly, there are many ways in which courts will determine whether to disqualify a former employee from being an expert in civil litigation. Attorneys must, therefore, take care not to offend any of the overriding principles recognized by the courts.[148] In sum, these concerns include whether, and if so, to what extent: (1) the former employee-turned-expert has gained privileged confidential information; (2) any information gained is similar to the material issues in the case at hand; and (3) the former employee has previously agreed not to work against the former employee.[149] These concerns are seemingly balanced against the quest for allowing the truth to be heard. "On the one hand, 'when experts are retained in connection with litigation, they must operate within the constraints of, and consistent with, the adversary process.'"[150] "On the other [hand, however], 'exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'"[151]

B. *Identity of Experts*

The practical, as opposed to ethical, problems associated with retention of a former employee of an opposing party emerge only if the retained expert must be disclosed.[152] In most cases, there is a substantial risk of all retained experts, including consultants, becoming known. Accordingly, as a practical and ethical matter, one

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more practical and feasible ways of enjoining former employees from testifying, such as, reliance on confidentiality agreements).

148. *See generally id.* (showing that precedent does exist among courts for disqualifying parties in many ways, including, but not limited to, common law protections, privileges, and work product claims).

149. *See generally Wang Labs.*, 125 F.R.D. at 13 (demonstrating that a court will use previous confidentiality agreements with the former employer to disqualify a potential expert witness from testifying or working against the old employer); *Space Sys./Loral*, 1995 WL 686369, at *2 (announcing that the primary rationale against disqualification is the importance of access to experts having the necessary information to ensure a fair trial).

150. Brian Burke, *Disqualifying an Opponent's Expert When the Expert Is Your Client's Former Employee*, 66 DEF. COUNS. J. 69, 78 (1999) (quoting Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1250 (E.D. Va. 1991)) (arguing that experts must be aware of what they can and cannot disclose because they are the only source of information and not a supporter of any particular side).

151. *Id.*

152. *See* FED. R. CIV. P. 26(a)(2)(A) (requiring disclosure of those persons who may present evidence).

should analyze the retention of any such person for possible ethical violations.

Retention of an opponent's former employees as testifying experts cannot be concealed.[153] Without question, the identity of any expert who will testify in court must be disclosed.[154] Rule 26(a)(2)(A) requires parties to disclose the "identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence."[155] According to case law, this requirement includes disclosure of the name, present address, current occupation or profession, and specialty of the expert, as well as the subject matter upon which the expert is expected to testify. In addition, the expert's conclusions and the bases for those conclusions must be disclosed.[156]

Discovery of the identity of consulting experts is less certain.[157] In *Baki v. B.F. Diamond Construction Co.*,[158] the "leading case for liberal discovery of the identification of non-testifying experts,"[159] the United States District Court for the District of Maryland concluded:

> Rule 26(b)(1) requires that the identity and location of persons having knowledge of any discoverable matter be supplied. This provision [includes] . . . the category of experts, who have been retained or specially employed in anticipation of litigation or preparation for trial and who are not expected to be called as witnesses at trial . . . .
>
> [T]he word 'identify' as used in Rule 26(b)(4)(A)(i), is meant to require that a person to whom that section of the Rule applies be designated as a person who is expected to be called as an expert witness at trial even though he may previously have been named and

153. *See id.* (mandating that the identity of *any* person to be disclosed).

154. *Id.*

155. *Id.*

156. *See* Olmert v. Nelson, 60 F.R.D. 369, 371-72 (D.D.C. 1973) (citing Rupp v. Vock & Weiderhold, Inc., 52 F.R.D. 111, 112 (N.D. Ohio 1971) (requiring that the opposing party disclose all requested information, including the substance of the opinions and facts that the expert planned to use in his testimony)).

157. *See* Baki v. B.F. Diamond Const. Co., 71 F.R.D. 179, 181-82 (D. Md. 1976) (providing a discussion of Rule 26 and finding that the identity of experts who will not to be called to testify needs to be disclosed).

158. 71 F.R.D. 179 (D. Md. 1976).

159. James L. Hayes & Paul T. Ryder, Jr., *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. MIAMI L. REV. 1101, 1143 (1988) (describing the importance of the *Baki* case for discovering the identity of an expert who is not testifying).

> his location given as a person having knowledge of discoverable matter under the requirements of Rule 26(b)(1). . . . Significantly, this section of Rule 26, . . . is the only one which requires that persons who are expected to testify be designated as such anticipated witnesses.
>
> In contrast, Rule 26(b)(4)(B) does not contain the word 'identify'. . . . The reason that the word 'identify' is not used in this section is that the authority for obtaining the name and address of such a person is found in another section, Rule 26(b)(1), there being no need to designate someone who is not expected to be called as a witness at trial.
>
> This court, . . . concludes that the names and addresses, and other identifying information, of experts, who have been retained or specially employed in anticipation of litigation or preparation for trial and who are not expected to be called as witnesses at trial, may be obtained through properly framed interrogatories without any special showing of exceptional circumstances in the absence of some indication that such information by reason of facts peculiar to the case at issue, is irrelevant, privileged, or for some other reason should not be disclosed.[160]

The leading case for the restrictive view is *Ager v. Jane C. Stormont Hospital & Training School.*[161] In *Ager*, the court stated:

> We hold that the "proper showing" required to compel discovery of a non-witness expert retained or specially employed in anticipation of litigation corresponds to a showing of "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."
>
> There are several policy considerations supporting our view. . . . [O]nce the identities of retained or specially employed experts are disclosed, the protective provisions of the rule concerning facts known or opinions held by such experts are subverted. The expert may be contacted or his records obtained and information normally non-discoverable, under [R]ule 26(b)(4)(B), revealed. Similarly, . . .

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160. *Baki*, 71 F.R.D. at 181-82 (interpreting sections of Rule 26 that contain the word "identify" as requiring a listing of persons who may be called to testify as well as any other information required of them). The *Baki* court used this interpretation to conclude that additional information about experts who are employed in preparation of a suit can be obtained even if they are not expected to be called at trial. *Id.*

161. 622 F.2d 496 (10th Cir. 1980); James L. Hayes & Paul T. Ryder, Jr., *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. MIAMI L. REV. 1101, 1143-44 (1988) (citing Ager v. Jane C. Stormont Hosp. & Training Sch., 622 F.2d 496 (10th Cir. 1980)).

> the opponent may attempt to compel an expert retained or specially employed by an adverse party in anticipation of trial, but whom the adverse party does not intend to call, to testify at trial. The possibility also exists, . . . that a party may call his opponent to the stand and ask if certain experts were retained in anticipation of trial, but not called as a witness, thereby leaving with the jury an inference that the retaining party is attempting to suppress adverse facts or opinions.[162]

Subsequent to the *Ager* decision, in *In re Pizza Time Theatre Securities Litigation*,[163] the United States District Court for the Northern District of California offered an additional reason for rejecting *Baki* and allowing the discovery of a consulting expert's identity only upon a showing of "exceptional circumstances."[164] The court in *In re Pizza Time* explained:

> One additional reason for preferring this view is that I believe that a lawyer's decision about which experts to consult, but not to call as a witness, also is a matter that implicates values that the work product doctrine was designed to protect. . . . [I]t seems to me that a *lawyer's decision* about which people to use in which capacities in preparing a case for trial is right at the center of the kind of material protected by subparagraph (3) of Rule 26(b). In other words, courts should be careful to distinguish between (1) information known and opinions held by experts[,] and (2) trial preparation decisions made by lawyers.[165]

There remains a split among the federal courts as to what must be shown in order to discover the identity of a consulting expert.[166] However, at least one court has concluded "that the view expressed in *Ager* has become the prevailing one in the years since *Ager* was decided."[167] In addition, one law review article states:

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162. *Ager*, 622 F.2d at 503.

163. 113 F.R.D. 94 (N.D. Cal. 1986).

164. *In re* Pizza Time Theater Sec. Litig., 113 F.R.D. 94, 97 (N.D. Cal. 1986) (concluding "that discovery of the identities of non-testifying experts should be subject to the same standard as discovery of their opinions").

165. *Id.* at 98.

166. *Id.* at 97 (stating that "[t]here is a division in the authorities about whether the 'exceptional circumstances' requirement applies to efforts to discover only the identities of non-testifying experts, as opposed to the relevant facts they know and opinions they hold").

167. Kuster v. Harner, 109 F.R.D. 372, 374 (D. Minn. 1986).

> The policy arguments of *Ager* as well as the subsequent interpretations of the relationship between Rules 26(b)(1) and 26(b)(4) refute the analysis of the *Baki* court and combine to make a more compelling argument in favor of the application of the exceptional circumstances requirement for discovery of non-testifying expert's identities.[168]

As previously mentioned, the federal jurisdiction in which one litigates will dictate whether a consulting expert's identity is easily discoverable or subject to the more restrictive exceptional circumstances view. Additionally, the states are perhaps even more unpredictable on this issue. For example, while Texas bars the discovery of a consulting expert's identity unless his mental impressions and opinions were reviewed by a testifying expert,[169] states such as Colorado and Iowa allow the discovery of a consulting expert's identity upon a showing of "exceptional circumstances."[170] Where the consultant is a former employee of an opposing party, the identity of the consultant is discoverable and the necessary requirements to force such a disclosure become more important to the parties. If the former employee is discovered as a consulting expert for the other side, the former employer's attorneys will seek to ensure that the appropriate precautions are exercised and the attorneys utilizing the former employee will attempt to avoid sanctions, which could include disqualification.

C. *Facts or Information Held by Consulting Expert Prior to Retention*

In *In re Shell Oil Refinery*,[171] Shell moved to quash the depositions of several of its employees on the ground that the employees

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168. James L. Hayes & Paul T. Ryder, Jr., *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. MIAMI L. REV. 1101, 1145 (1988) (describing the importance of the *Ager* case and the restrictive interpretation advocated when discovering the identity of an expert who is not testifying).

169. TEX. R. CIV. P. 192.3(e).

170. *See, e.g.*, IOWA CODE § 1.508(2) (2007) (stating that "[t]he disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness"); Phillips v. Dist. Ct., 573 P.2d 553, 555-56 (Colo. 1978) (en banc) (describing the standard of "exceptional circumstances" used by the jurisdiction in determining the requirement for identifying non-testifying expert witnesses).

171. 134 F.R.D. 148 (E.D. La. 1990).

were "all non-testifying, in-house experts, who were retained or specially employed members of Shell's post-accident investigation team."[172] Following an explosion at one of Shell's oil refineries, these employees were hired to use their individual "fields of expertise" to aid Shell's investigation team in defending the lawsuit.[173] Each of these employees, "through their regular duties[,] ha[d] knowledge about pre-explosion refinery activities [that were] in issue in [the] litigation."[174] When denying Shell's motion to quash, the court stated:

> [T]he employees in question wear two hats: one of a specially employed expert in anticipation of litigation with Rule 26(b)(4)(B) protection; and one of an ordinary witness protected only by the standards of relevancy. Which hat they wear depends on whether their knowledge was gained in the course of their special employment as members of the investigation team or in the course of their regular duties. Accordingly, the Court finds the [plaintiffs] may depose these ten employees only about facts known and opinions held prior to being specially employed in preparation for trial.[175]

Obviously, consulting experts can be called to testify as to facts known and opinions held prior to being retained as an expert by a party in litigation. By the same token, any prior knowledge which presents a risk of an ethical conflict places that consultant and the attorney who retains the consultant at risk.

D. *Measures to Avoid Ethical Violations Regarding the Use of Experts*

In one of his many articles discussing legal ethics, Associate Professor David Hricik of Mercer University School of Law provides attorneys with a series of steps that should be taken in order to avoid ethical violations and the resultant sanctions involved with experts, including:

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172. *In re* Shell Oil Refinery, 134 F.R.D. 148, 150 (E.D. La. 1990) (explaining Shell's reasoning for wanting to prevent the depositions of its employees).

173. *Id.* (noting that employees did not receive any additional information beyond their proficiency from previous work experience).

174. *Id.* (commenting that the employees plaintiffs sought to depose were regular Shell employees who had knowledge of refinery explosions only from their regular duties as employees).

175. *Id.* (acknowledging that the role employees play depends on how they obtained their knowledge regarding the issue in question).

- Make sure that employee confidentiality agreements are broad and enforceable.
- Before hiring a would-be expert, ask them about prior employment with your adversary.
- Have the expert sign a confidentiality agreement to ensure that a confidential relationship exists and is intended.
- Formalize the relationship with a contract or otherwise.
- Disclose information and have the expert commence working for your client as soon as possible.
- Identify any confidential disclosures as soon as possible and label them as such.
- Advise the client often and in writing not to talk about or listen to confidential information.
- If a conflict of interest arises, notify opposing counsel immediately.
- If the conflict isn't remedied soon, notify the court.
- If you lose a motion to disqualify, move *in Limine* to exclude any reference to the fact that the expert had once agreed to work for your party.
- If you hire an expert at a firm, and successfully disqualify an expert in the same firm from working for opposing counsel, move *in Limine* to exclude any reference to the fact that your expert's firm also agreed to offer advice to your opposing counsel.[176]

While not exhaustive, this list is a good start in selecting and managing experts. Furthermore, an attorney should consider retaining separate counsel to screen experts for confidential knowledge which, if unscreened, could result in disqualification.

From the employer's perspective, a broad and enforceable nondisclosure agreement with every current employee and departing employee is valuable. This offers the opportunity to seek injunctive relief based on contract, and even to proceed against opposing counsel for tortiously interfering in the employer's or former employer's contractual relations. To be enforceable, such an agreement must be tied to some other enforceable agreement and carry adequate consideration. In the case of departing employees, severance agreements with compensation that comports with the value of their knowledge can supply such consideration.

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176. David Hricik, *Conflicts of Interests and Confidentiality Compromised: Consulting and Testifying Experts in Civil Litigation*, at 57-59 (2003), http://www.cleonline.com (available for a fee) (last visited Jan. 31, 2007) (on file with the *St. Mary's Law Journal*).

V. CONCLUSION

In conclusion, it must be observed that even though the knowledge held by present and former employees can be a goldmine, attempting to obtain that knowledge outside the formal discovery process can be dangerous. Thus, the result of such risky behavior can potentially be more of a minefield rather than a goldmine. Attorneys must keep the above-mentioned rules and court decisions in mind when participating in such a treacherous game. Although the payoff may be great, the consequences could be disastrous.