GETTING THE WINNING EDGE: Appreciating The Permissible Boundaries, in *Qui Tam* and Other Litigation Contexts, For Contacting Your Adversary's Current & Former Employees

*Dean S. Rauchwerger, Shawn K. Jones & Allison K. Baten**

> *Perseverance is a great element of success. If you knock long enough and loud enough at the gate, you are sure to wake up somebody.*
>
> —Henry Wadsworth Longfellow

To say the least, litigation is frequently competitive, hard-fought and fraught with many hurdles. Developing a winning case requires that you seek the edge at every step in the journey. Big opportunities for marshalling critical testimony and evidence exist by pursuing permissible *ex parte* contacts with your adversary's current and former employees. Below is a general discussion of the ethical boundaries and practical tips for effectively contacting and interviewing such witnesses.

The first step is to understand the proscriptions of ABA Model Rule 4.2 of the Rules of Professional Conduct, ABA Rules of Conduct, Disciplinary Rule 7-104,[1] state equivalents and your jurisdiction's applicable case law. Model Rule 4.2, Communication With Person Represented by Counsel, provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person[2] 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.[3]

* Partner Dean S. Rauchwerger and Associates Shawn K. Jones and Allison K. Baten are attorneys at Clausen Miller PC in Chicago, Illinois. The views and comments expressed in this article are for educational purposes and do not necessarily represent those of the authors, Clausen Miller P.C. or its clients.

1. This version of the Rule—actively serving as a model for the ethics rules of most states between 1969 and 1983—is still in place in some jurisdictions. It is entitled "Communicating With One of Adverse Interest" and states that "(A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

2. The newest version of the ABA Rule reaffirms the ABA's decision in 1995 to replace the 1983 Rule's reference to a "party" with the more inclusive reference to a "person"; thus, the choice for states became one where they could choose between one that more broadly prohibits communication with a represented "person" or one that prohibits communication with a represented "party." Some decisions bear on a state's view of the desired breadth of that jurisdiction's no-contact rule. *See also* Informational Report of the Standing Comm. on Ethics & Prof'l Responsibility, 120 Reports of the Am. Bar Ass'n 92 (1995) (House's action was in response to a recommendation from the Ethics Committee, which proposed a change to conform the text of the rule to its opinion that the reference to "party" in the 1983 Rule should be interpreted to cover anyone who was represented by counsel in a matter, not just those who were parties to a lawsuit or transaction; *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995)).

3. Model Rules of Prof'l Conduct (2004), *at* http://www.abanet.org/cpr/mrpc/model_rules.html.

Although Model Rule 4.2 was amended in 1995 to substitute "person" in the place of "party," *supra* note 2, many courts find that the rationale for this substitution was to show the rule's applicability to circumstances pre-petition as well as those after a complaint is filed.[4] Despite the ABA Model Rule's revision to "person" in 1995, many states' rules still retain their pre-1995 reference to "party."[5] Additionally, in line with the body of attorney-client privilege case law, various courts have observed that any "protection of privilege extends only to *communications* and not to facts" that may have been communicated.[6]

A. In Search of the Talkative Employee Witness: Contacting Current Employees

Certain employees of a represented corporation or other organizational entity are considered to be represented by the corporation's or organization's lawyer for purposes of Rule 4.2 and are off-limits.[7] The hook, however, is that a corporation or organization may not assert blanket representation for all of its constituent employees[8] or request "across the board noncooperation" by its employees.[9]

In the case of current employees, rules regarding *ex parte* contacts range from "blanket" bars, to the "scope of the employment" test, the "managing-speaking-agent" test and its variant, the "alter-ego" test, the "control group" test, and the "case-by-case

4. Penda Corp. v. STK, LLC, No. Civ. A. 03-5578, Civ. A. 03-6240, 2004 WL 1628907 (E.D. Pa. 2004) (rule applies to pre-complaint contacts); *see also* United States v. Grass, 239 F. Supp. 2d 535, 540–41 (M.D. Pa. 2003) (although Pennsylvania utilizes the "party" version of rule 4.2, the court found that the rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question based on the official comment to the rule); Inorganic Coatings, Inc. v. Falberg, 926 F. Supp. 517, 519–20, 521 (E.D. Pa. 1995) (finding that *ex parte* communications with a person the attorney knows to have representation in a matter and is likely to be a named party-defendant in the resultant litigation, despite the contact being within the pre-petition timeframe, are prohibited by Rule 4.2).

5. *See, e.g.,* Stahl v. Wal-Mart Stores, Inc., 47 F. Supp. 2d 783 (S.D. Miss. 2000); *see also, e.g.,* Kan. S. Ct. R. 226: 4.2 (1999); Wis. S. Ct. R. 20:4.2; Cal. R. of Prof'l Conduct 2-100 (2005); Me. Bar R. 3.6(f); Mich. R. Prof'l Conduct 4.2 (*see* Smith v. Kalamazoo Opthalmology, 322 F. Supp. 2d 883 (W.D. Mich. 2004)); *but see* S.D. Rules of Prof'l Conduct R. 4.2 (identical to the amended ABA Model Rule).

6. Infosystems, Inc. v. Ceridian Corp., 197 F.R.D. 303, 306 (E.D. Mich. 2000), *quoting* Upjohn Co. v. United States, 449 U.S. 383, 395–96 (1981) and *citing* Valassis v. Samuelson, 143 F.R.D. 118, 123 (E.D. Mich. 1992).

7. *See, e.g.,* Groppo v. Zappa, Inc., 03-CV-10384-MEL, 2005 U.S. Dist. LEXIS 5651, at *3–4 (D. Mass. 2005) (examining the Massachusetts Supreme Judicial Court rule that "only certain kinds of current employees properly fall within the prohibitions of [Rule 4.2]: those agents or employees (1) who exercise managerial responsibility in the matter, (2) who are alleged to have committed the wrongful acts at issue in the litigation, or (3) who have authority on behalf of the organization to make decisions about the course of the litigation," and holding that *ex parte* contact is prohibited with the principal of the defendant corporation (and Captain of the vessel where the injury occurred) and the employee who allegedly caused the injury).

8. *See* Banks v. Office of Senate Sergeant-at-Arms, 222 F.R.D. 1, 6 (D.D.C. 2004) (holding that counsel for defendant may not use their concomitant right to withhold their consent as a means to prevent plaintiff's counsel from interviewing present or former employees); Michaels v. Woodland, 988 F. Supp. 468 (D.N.J. 1997) (holding that an employer cannot unilaterally impose its counsel's representation on all employees); Harry A. v. Duncan, 330 F. Supp. 2d 1133 (D. Mont. 2004) (holding a school district's blanket letter to its employees advising that the district's counsel represented each of them did not create a lawyer-client relationship for the purposes of the anti-contact rule, nor would individual employee's failure to respond and opt out constitute manifestation to assent); Terra Int'l, Inc. v. Miss. Chem. Corp., 913 F. Supp. 1306, 1319–21 (N.D. Iowa 1996) (rejecting automatic representation by virtue of an employee's employment in favor of examining an employee's nature or status of employment).

9. G.C. Hazard, Jr. & W. Hodes, The Law of Lawyering § 38.7 (3d Ed. 2005-2 Supp.).

balancing" test.[10] While a small minority of jurisdictions have imposed a blanket prohibition on contact with current managerial employees of an organization,[11] in light of Comment [7] to Model Rule 4.2, as amended in 2002, more jurisdictions are considering the articulated formula for assessing the employee's role and authority to determine which employees are considered off-limits.[12] Comment [7] explains that *ex parte* communications are prohibited with an employee[13] 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." Thus, those current employees tied to the corporate attorney-client relationship, who can bind the company or whose acts and/or omissions give rise to vicarious liability, are deemed off-limits. The wording of the comments to the newest version of Model Rule 4.2 implies a current relationship (by replacing "person" with "constituent") and thus courts may be more likely to find the no contact rule applicable to current employees of a certain significance than to former employees.

10. Brown v. St. Joseph County, 148 F.R.D. 246, 253–54 (N.D. Ind. 1993) (referencing the various tests utilized by courts, applying the test embodied in the official Comment to Rule 4.2, and holding "that a lawyer representing a client in a matter adverse to a corporate party may, without violating Rule 4.2, communicate about the subject of the representation with an unrepresented current employee, provided that the employee does not have the managing authority to speak for and 'bind' the corporation, is not an employee whose acts or omissions in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability, and is not a person whose statement may constitute an admission on the part of the corporation").

11. *See* Bobele v. Super. Ct., 199 Cal. App. 3d 708, 714 (1988) (finding the ethical rule prohibits contact with any current employees of the defendant corporation and any former employees who remain members of the corporation's "control group" as defined in *Upjohn*); Lang v. Reedy Creek Improvement Dist., 888 F. Supp. 1143 (M.D. Fla. 1995) (holding that *ex parte* communications with current employees was impermissible absent prior consent of the employers' counsel or the court because of the increased risks of prejudice to the employers that would arise, the plain language of the ethical rules, and the employers' opposition to such contact); *see also* Pub. Serv. Elec. & Gas. Co. v. Assoc. Elec. & Gas. Ins. Servs. Ltd., 745 F. Supp. 1037 (D.N.J. 1990) (extending a blanket prohibition against contacting current employees to former employees as well when holding erroneous an order which provided that defendant's counsel could contact former employees of the plaintiff only after notifying plaintiff corporation and employee in advance and finding that the rules of professional conduct prohibited any informal contact with plaintiff's former employees).

12. *See, e.g.,* Snider v. Super. Ct., 113 Cal. App. 4th 1187 (2003) (providing an exhaustive analysis of what kinds of employees should be off-limits); Patriarca v. Ctr. for Living & Working, Inc., 778 N.E.2d 877, 884 n. 10 (Mass. 2002) (citing to Comment [7] in holding that all current and former employees were not represented for purposes of rule barring *ex parte* contact); United States v. W.R. Grace, No. CR 05-07-M-DWM, 2005 WL 3149342 (D. Mont. 2005) (analyzing Comment [7] when granting the government's motion for an order authorizing *ex parte* contact with former employees of defendant); Clark v. Beverly Health & Rehab. Serv., Inc., 797 N.E.2d 905, 911 n. 10 (Mass. 2003) (considering the language of proposed Comment [7] and holding that the no-contact rule of professional conduct did not prohibit private contacts between counsel and defendant's former employees); *see also* Palmer v. Pioneer Inn Assoc., Ltd., 59 P.3d 1237, 1242 (Nev. 2002) (noting that the revisions to the comment were meant "to 'clarif[y] application of the Rule to organizational clients'" and acknowledging that the ABA rules are guidance, but adopting the managing-agent speaking test as its preferred approach).

13. Comment [7] uses the term "constituent" - Rule 1.13 uses the term to refer to various persons with whom a lawyer may interact while representing an organizational client, some of whom will be "duly authorized" to act on behalf of the organization in its status as the lawyer's client. As used in Rule 1.13, "constituent" includes corporate directors, officers, employees, shareholders, and "positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizations clients that are not corporations." Model Rules of Prof'l Conduct R. 1.13 cmt. [1] (1995).

The judicial goal is to ensure that a corporation's legal rights, including the attorney-client privilege and work product doctrine, are protected.[14] Still, the fact that a current member of an organization may possess privileged information or general information about the entity does not in itself make an *ex parte* contact with that individual unethical under Rule 4.2. Some courts have held that in order to be subject to the no contact rule, an employee must be a member of the "control group"—for example, those employees who manage and speak for a corporation.[15] In contrast, a small but important minority of courts have barred attorneys from interviewing current employees of a corporate defendant without consent of opposing counsel whenever the interview concerns matters within the scope of the employee's employment based on the structure of Federal Rule of Evidence 801(d)(2)(D), which permits admission into evidence against a corporation its employee's out-of-court statements concerning matters within the scope of the employee's employment.[16] Still other courts have declined to create or apply any general rule defining categories of current employees who may be contacted, instead adopting intermediate case-by-case fact-specific balancing tests in which one party's need to gather information informally is balanced against the other party's need for effective representation. The results of this test generally favor broad access to witnesses, while requiring some procedural safeguards.[17] The key to opening the door to *ex parte* contacts is understanding how the ethical rules apply, the governing jurisdiction's law and the appropriate practical steps to follow.

14. *See* Orlowski v. Dominick's Finer Foods, Inc., 937 F. Supp. 723, 728–31 (N.D. Ill. 1996) (holding that "not all employees with supervisory or manager-type positions, or titles, fall into the category of 'managerial' employees" for purposes of Rule 4.2 and allowing contact with certain employees but barring any discussion of privileged information).

15. *See, e.g., Upjohn*, 449 U.S. 383; Wright v. Group Health Hosp., 691 P.2d 564, 566 (Wash. 1984) (holding that employees who do not have managing authority sufficient to speak for and bind the corporation are not subject to the "no contact" rule).

16. *E.g.* Lewis v. CSX Transp., Inc., 202 F.R.D. 464 (W.D. Va. 2001) (relying heavily on the admission of an employee being used against an employer for its rationale, the court barred *ex parte* contacts with the railroad's current employees, finding them "represented persons" under Rule 4.2); Chambers v. Capital Cities/ABC, 159 F.R.D. 441 (S.D.N.Y. 1995) (noting that unsupervised *ex parte* interviews conducted by adversary's counsel with current employees is likely to produce employer-employee distrust with unfavorable implications for the employee and difficulty in determining whether confidential information was revealed; also holding that current employees should not be interviewed *ex parte* but that if they are, only nonmanagerial personnel); *Lang*, 888 F. Supp. 1143; *Terra Int'l*, 913 F. Supp. at 1319–21 (noting the validity of the argument against allowing *ex parte* communications with current employees of a nonmanagerial nature based on the possibility of admissions against the corporation but failing to reach that issue as Terra obviated the need by offering certain employees for *ex parte* contact); *but see* EEOC v. Ill. Dep't of Employment Sec., 6 F. Supp. 2d 784, 789 (N.D. Ill. 1998), citing *Orlowski*, 937 F. Supp. at 730 (*Ill. Dep't of Employment Sec.* notes that *Orlowski* stands for the proposition that a party can either conduct informal interviews with corporate defendant's employees or use statements from these individuals at trial, which would be admitted under Rule 801(d)(2)(D), but a party cannot do both of the above because an employee cannot simultaneously be an agent under Rule 801(d)(2)(D) but not an agent under Rule 4.2).

17. *See, e.g.*, NAACP v. Florida, 122 F. Supp. 2d 1335, 1341 (M.D. Fla. 2000) (holding that plaintiffs and their counsel may conduct *ex parte* communications with current employees under guidelines including, but not limited to: (1) not interviewing "managerial" or "control group" employees without permission of defendant's counsel; (2) identifying themselves immediately upon contact, their role and purpose of the contact; (3) advise the current employee to avoid disclosure of privileged material; (4) do not attempt to solicit privileged information; and (5) terminate the conversation should it appear that the current employee may reveal privileged matters); B.H. v. Johnson, 128 F.R.D. 659, 661 (N.D. Ill. 1989) (allowing plaintiffs to conduct interviews of agents or servants of defendant and offering such statements in evidence without calling the persons as witnesses, but not permitting plaintiffs to use such informally gathered evidence obtained from agents, who were not a "party" for purposes of the Model Code of Professional Responsibility DR 7-104, as admissions of party-opponents); PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118, 122 (W.D. Pa. 1990) (allowing contact with the employee subject to counsel providing the employee, and instructing him to read, a copy of the court's memorandum and thereafter avoiding the disclosure of privileged matter and advising the employee that he may not disclose any prior communication between himself and corporate counsel).

Bottom line—proceed with caution before contacting a current employee of an opposing party and, generally speaking, diligently observe the ground rules:

- Key points:

  a. Avoid speaking with current employees who regularly consult with the organization's lawyer regarding the matter;
  b. Avoid speaking with current employees who have the authority to obligate the organization with respect to the matter; and
  c. Avoid speaking with current employees whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

- If you contact a current employee:

  a. Do not use methods of obtaining evidence that violate the corporation's legal rights; and
  b. Do not probe into areas subject to attorney-client privilege or work-product doctrine.

- Preliminary questions should cover:

  a. What is your status at the organization?
  b. Are you represented by counsel?
  c. Have you spoken to the organization's counsel concerning the matter at issue?
  d. Evaluate whether the employee witness was personally involved in the underlying events that may give rise to the employer's vicarious liability for the employee's acts and/or omissions, imputable to the employer.

B. In Search of Burned Bridges: Contacting Former Employees

The majority of courts, including those of at least thirty states, allow lawyers to interview *ex parte* all former employees, including managers, of corporate parties as former employees are no longer agents, cannot bind or speak for the organization, and their statements cannot be introduced as admissions of the organization.[18] Professor Geoffrey C. Hazard Jr., in the treatise *The Law of Lawyering*, keenly sums up the gist of

18. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. Nos. 95-393 and 91-359 and numerous court decisions have held that an attorney may communicate *ex parte* with unrepresentative former employees of a corporate party. *See, e.g.*, EEOC v. Dana Corp., 202 F. Supp. 2d 827 (N.D. Ind. 2002); ABA Formal Ethics Op. 95-396 (1995) (no blanket ban against contact); Utah Ethics Op. 04-04 (2004) (former employee cannot be considered a representative of an organization or a member of the control group); *See* Aiken v. Bus. & Indus. Health Group, Inc., 885 F. Supp. 1474 (D. Kan. 1995) (rejecting the "management-speaking agent" test and adopting a bright-line rule allowing lawyers to interview *ex parte* all former employees of corporate parties); *Infosystems*, 197 F.R.D. at 306 (finding that the general rule is that "communications with a former employee of the client corporation . . . should be treated no differently from communications with any other third-party fact witness" while noting that "privileged communications which occur during the period of employment do not lose their protection when the employee leaves the client corporation"); *Clark*, 797 N.E.2d 905; Cont'l

the rationale for rejecting the no contact framework for former employees: "Speaking with a former employee therefore does not do damage to the policy underlying Rule 4.2—undercutting or 'end-running' an ongoing lawyer-client relationship."[19] The ABA Committee cautions that when communicating with such persons, counsel must be careful not to induce the former employee to violate any attorney-client privilege that the former employee may have incurred, or been privy to, during the course of his or her former employment.[20] Counsel must also comply with ABA Model Rule of Professional Conduct 4.3, requiring the attorney to identify the nature of his or her role in the matter for which counsel is contacting the person. Specifically, Rule 4.3 requires that the attorney identify his or her client and that the client is an adverse party to the unrepresented person's former employer. One must also ensure that the former employee is not represented by his or her own counsel or by the former employer's counsel.[21]

Ins. Co. v. Super. Ct., 32 Cal. App. 4th 94 (1995) (holding that *ex parte* contacts with former employees who were not being represented by the corporation's counsel were not prohibited by California Rule of Professional Conduct 2-100 and noting that "[s]everal problems inhere in an approach that prohibits *ex parte* communications with former employees of a corporate adversary": (1) contacts with former employees do not end-run around protections afforded by the corporate attorney-client relationship since the former employee is not involved in the corporation's attorney-client relationship; (2) former employees are no longer agents of the corporation and cannot bind the corporation as evidentiary admissions; and (3) blanket prohibition on contacting former employees unduly and unnecessarily impedes the flow of information and increases the cost of litigation (much like the prohibition against *ex parte* contacts with current employees)); Centennial Mgmt. Servs., Inc., v. Axa Re Vie, 193 F.R.D. 671 (D. Kan. 2000) (holding that Rule 4.2 is inapplicable to the context of contacting former employees); *see also, Bobele*, 199 Cal. App. 3d at 713–14 (noting that a former employee is not an employee, but a third-party witness and "fair game" for opposing counsel because they are not considered "parties" for the purposes of the rule but also commenting that former employees who remain members of the corporation's "control group" would be off-limits); *Valassis*, 143 F.R.D. at 123 (a former employee is no longer an agent of the company); Polycast Tech. Corp. v. Uniroyal Inc., 129 F.R.D. 621 (S.D.N.Y. 1990) (corporation cannot barricade former employees against *ex parte* contacts); H.B.A. Mgmt. Inc. v. Estate of Schwartz, 693 So. 2d 541 (Fla. 1997) (when the employer-employee relationship is dissolved, Rule 4.2 no longer applies); Humco Inc. v. Noble, 31 S.W.3d 916 (Ky. 2000) (former employee is no longer under company's control, in position to speak for it or make admissions on its behalf); Smith v. Kan. City S. Ry. Co., 87 S.W.3d 266 (Mo. Ct. App. 2002) (rejecting blanket prohibition against contacting former employees); FleetBoston Robertson Stephens Inc. v. Innovex Inc., 172 F. Supp. 2d 1190, 1195 (D. Minn. 2001) (rule is not violated where counsel interviewing former managerial employee did not solicit, and employee did not relate, any privileged information); *Orlowski*, 937 F. Supp. at 728 (holding that former employees, including former managers, are not encompassed by Rule 4.2 and may freely engage in communications with plaintiff's counsel regarding all information except for privileged information to which they were privy during their employment); Cram v. Lamson & Sessions Co., 148 F.R.D. 259, 266 (S.D. Iowa 1993) (finding *ex parte* communications with former employees permissible under Rule 4.2 even if damaging information may arise); Dubois v. Gradco Sys. Inc., 136 F.R.D. 341, 346 (D. Conn. 1991) (finding *ex parte* interviews with former employees of opposing party permissible under Rule 4.2); *Smith*, 322 F. Supp. 2d at 888–89 (holding that "[a] majority of courts that have considered the issue have held that Rule 4.2 [of the Michigan Rules of Professional Conduct] does not bar *ex parte* communications with an adversary's former employees who are not themselves represented in the matter."); P.T. Barnum's Nightclub v. Duhamell, 766 N.E.2d 729, 733 (Ct. App. Ind. 2002) (holding that a lawyer may have *ex parte* contact with a corporate party's former employees and allowing such contact with defendant's former general manager with no restrictions).

19. G.C. Hazard, Jr. & W. Hodes, The Law of Lawyering § 38.7 (3d Ed. 2005-2 Supp.), citing ABA Formal Op. 91-359 and Formal Op. 95-396, 11 Law. Man. Prof. Conduct 226 (1995); *see also* Carnival Corp. v. Romero, 710 So. 2d 690, 692–94 (Fla. App. 5th Dist. 1998) (no violation to hire opponent's former employees as expert witnesses or trial consultants where they were not employed by the adversary at the time of the incident giving rise to the lawsuit, neither were high-ranking, managerial employees, and it was not shown that either had access to any confidential or privileged attorney-client or work-product doctrine information).

20. ABA Formal Op. 91-359.

21. *See ABA/BNA Lawyer's Manual on Professional Conduct*, § 71:313.

Some courts have adopted an intermediate approach to determining the propriety of contacting former employees. For example, in 1998, the District Court for the Eastern District of Pennsylvania explained that the middle ground included:

> [an] assessment [that] would depend upon weighing such factors as the positions of the former employees in relation to the issues in the suit; whether they were privy to communications between the former employer and its counsel concerning the subject matter of the litigation, or otherwise; the nature of the inquiry by opposing counsel; and how much time had elapsed between the end of the employment relationship and the questioning by opposing counsel.[22]

The court noted that the goal of weighing these factors was to establish whether there was a substantial risk that the *ex parte* communications will delve into privileged matters; if so, then former employees should be given appropriate notice against *ex parte* communications with opposing counsel.[23] Additionally, a few courts have held that Rule 4.2 prohibits *ex parte* communication with former employees whose acts or omissions in connection with the matter may be imputed to the corporation, or who had access to corporate confidences.[24]

Other courts have disagreed on the rationale to support allowing open-access to former employees and the applicable boundaries. For instance, a Louisiana district court identified a three-part policy-based rationale to support its decision:

> 1. Rule 4.2's policies do not justify exclusion of former employees from discovery, and the flow of information, even if harmful, should only be stopped to preserve attorney-client privilege;
>
> 2. Former employees are probably not included in the Rule; and
>
> 3. Since former employees do not qualify as agents of the corporation, they do not fall within the imputation language of Rule 4.2.[25]

However, that rationale was called into question by a Maryland court decision that same year, on unique facts, where the court held it was proper to disqualify a lawyer for

22. Spencer v. Steinman, 179 F.R.D. 484 (E.D. Pa. 1998); *see also, e.g.*, Olson v. Snap Prod., Inc., 183 F.R.D. 539, 544–45 (D. Minn. 1998) (adopting a flexible approach by recognizing that the underlying policy of Minnesota Rules of Professional Conduct 4.3 and 4.4 is "prohibiting an attorney from unfairly taking advantage of unrepresented parties when acting on behalf of a client, while still allowing leeway for the proper search for truth," and adopting a flexible analysis of Rule 4.2 noting that the key factor in evaluating the propriety of a lawyer's contact with a former unrepresented employee of an adverse party is the likelihood that privileged information will be disclosed to an opponent in litigation).

23. *Spencer*, 179 F.R.D. at 491.

24. *See, e.g.*, Lang v. Super. Court, 826 P.2d 1228, 1233–35 (Ariz. Ct. App. 1992) (holding that attorney was prohibited from contacting former employee of corporate party, which is represented by counsel, if: (a) the acts or omission of the former employee gave rise to the underlying litigation; or (b) the former employee has an ongoing relationship with the employer in connection with the litigation).

25. Contact with former employees is generally acceptable but counsel must not delve into areas protected by attorney-client privilege. Barron Builders & Mgmt. Co. v. J & A Air Conditioning & Refrigeration, Inc., 1997 U.S. Dist. LEXIS 17407 (E.D. La. 1997) (basing its decision on the reasons and considerations utilized by the court for *In Re* Torch, Inc., 1996 U.S. Dist. LEXIS 5053 (E.D. La. 1996).

engaging in *ex parte* contacts with a former employee (a lawyer) who had been exposed to confidential client information during the course of his representation of other interested parties.[26] The Maryland court went on to find that the disqualified counsel knew or should have known that the former employee had been exposed to confidential information.[27] Federal courts in Maryland have, however, limited the importance of this "confidential client information" consideration to only information concerning the case sub judice.[28] Yet other courts have concentrated on the distinction between a "party" and a "non party" and the broader language regarding a "person" represented by counsel.[29]

While the majority of courts allow lawyers to interview *ex parte* all former employees, subject to certain precautions, the lessons to be learned regarding contacting former employees are to know the ins and outs of the respective rules of the applicable jurisdictions. Although two rules could be verbatim the same, the courts in those jurisdictions may interpret them differently based on precedent, an ethics committee's written or inferred intent, or any other varied reasons. Ultimately, it is paramount to appreciate the governing laws of the applicable jurisdictions to ensure adherence to the appropriate prophylactic measures designed to be on safe ground, as noted *supra* regarding Rule 4.3.

C. In the *Qui Tam* Context

Although the ethical issue of communicating with former or current employees of an adversary often appears in the False Claims Act ("FCA")[30] arena, not many courts have dealt directly with the issue in published decisions. Three illustrative cases, out of District Courts for the Eastern District of Missouri, the Northern District of Ohio and the Eastern District of Pennsylvania, have grappled with the issue of *ex parte* contacts with current and former employees of an adversary in the FCA context.

26. Zachair, Ltd. v. Driggs, 965 F. Supp. 741 (D. Md. 1997).

27. *Id.* The Model Rules define "knows" as "actual knowledge" rather than "reasonably knows or should know;" thus, a lawyer should not be faulted (or worse, sanctioned), for interviewing current or former employees not yet known to come within the rule's prohibitions. Model Rules of Prof'l Conduct, *Terminology* (1995). However, the lawyer must terminate the interview when he or she learns through inquiry, such as that suggested above, that the employee falls within a prohibited category. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) (no bar to communicating with represented person absent actual knowledge of representation); *See also* Gaylard v. Homemakers of Montgomery, Inc., 675 So. 2d 363 (Ala. 1996) (no sanction where no litigation had commenced and no reason to believe that potential defendant had retained counsel).

28. For example, the court in Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956 (D. Md. 1997), held that the *ex parte* contact rule did not apply to a former employee whose access to trade secrets and confidential information was not related to the claim at hand; *See also* Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996).

29. *See, e.g.*, State ex rel. Charleston Med. Ctr. V. Zakaib, 437 S.E.2d 759, 762 (W. Va. 1993) (holding that the no contact rule only applies to parties and since former employees are not "parties," they are not subject to the rule unless they have secured counsel for legal advice); *See also* Dent v. Kaufman, 406 S.E.2d 68 (W. Va. 1991).

30. The False Claims Act, 31 U.S.C. 3729–3733, generally prohibits certain acts designed to defraud the federal government. A private person may bring a civil action, called a *qui tam* action, for a violation of the act for him or herself and the U.S. government. The person is called the relator, and the Act provides that his or her complaint not be served on the defendant, and be filed and kept under seal for 60 days while the government decides whether to intervene and take over the prosecution of the action. After the government decides whether to intervene, the complaint is unsealed and served on the defendant.

1. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*

In 1997, the District Court for the Eastern District of Missouri dealt with the ethical parameters of contacting an adversary's current and former employees in *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*[31] The issue arose in the context of a *qui tam*[32] case in which the government intervened and sought information from current and former employees of defendant McDonnell Douglas Corp. regarding overcharging for work performed on Air Force and Navy aircraft. The *ex parte* contacts at issue involved a questionnaire issued by the Inspector General of the Department of Defense at the direction of the Justice Department.[33] That questionnaire asked whether the employees had ever engaged in mischarging of labor and, if so, at whose direction.[34] The key discovery motion before the court was defendant's request for a protective order: (1) barring the Government from contacting its current employees *ex parte* about the subject matter of the litigation; (2) requiring the Government to give defendant ten days notice before contacting any former employee concerning the subject matter of the action; (3) requiring the Government to provide defendant with a list of all employees it had contacted *ex parte* since intervening in the *qui tam* action; (4) requiring the Government to provide defendant with all information obtained from its employees; and (5) barring the Government from using any documents or information obtained through *ex parte* contacts.[35]

McDonnell Douglas argued that the Government's *ex parte* contacts violated Missouri Supreme Court Rule 4-4.2 (fashioned after ABA Model Rule 4.2), which states that "a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[36] According to the comment to Missouri Supreme Court Rule 4-4.2, when an organization is involved, a lawyer is prohibited from communicating with a person with managerial responsibility in the organization, and with any other person whose act or omission may be imputed to the organization for purposes of civil or criminal liability, or whose statement may constitute an admission by the organization.[37] The Government countered that Rule 4-4.2 does not encompass all employees whose conduct may be imputed to the organization.[38] The court rejected the Government's position as inconsistent with the plain language of the rule and its comment.[39]

31. United States ex rel. O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288 (E.D. Mo. 1997).

32. *Qui tam* comes from the Latin expression *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which in translation means "who brings the action for the king as well as for himself."

33. *O'Keefe*, 961 F. Supp. at 1291.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1292.

39. *Id.* (the court also found that Department of Justice attorneys are bound by Missouri Rules of Professional Responsibility).

The *O'Keefe* court found that, under the FCA, defendant may be held liable for the acts or omissions of its current employees who were involved in the alleged mischarging.[40] Accordingly, the court ruled that the Government may not make *ex parte* contact with defendant's current employees who were allegedly involved in the wrongdoing.[41] The court noted, however, that some current employees may be only "fact witnesses" (i.e., they hold factual information about what they observed others doing).[42] As such, the court found that these employees would not be considered "parties" under Rule 4-4.2 and ruled that the Government may conduct *ex parte* contacts with employee "fact witnesses."[43]

Regarding former employees, *O'Keefe* agreed with the Government that Rule 4-4.2 does not prohibit all *ex parte* contacts but only as to former employees who are represented by counsel.[44] However, because some former employees may subject an organization to liability, the court agreed with defendant that some limits should be placed on the Government's access to them. The court ruled that the Government could contact former employees of the defendant *ex parte* but would have to maintain a list of the names of those contacted and contact dates.[45] The Government was also required to preserve statements, notes, and answers to questionnaires obtained so that defendant could review the lists and notes, subject to work product limitations.[46]

A. INSIGHTS FROM O'*KEEFE*: CURRENT EMPLOYEES

As to current employees, this case is significant because it stands with other decisions and ethics authorities permitting *ex parte* communications with fact witnesses. Along with many courts, *O'Keefe* drew the line to bar contact only with employees whose acts or omissions could be imputed to the organization for purposes of civil liability. One may anticipate that future courts, in the *qui tam* litigation context, may draw a similar line. Accordingly, there is *qui tam* precedent for allowing *ex parte* communications with current employees who were not involved with the suspected misconduct but who hold relevant factual information.

B. INSIGHTS FROM O'*KEEFE*: FORMER EMPLOYEES

As to former employees, *O'Keefe* follows the majority position that only former employees who are, in fact represented by counsel, are off-limits. However, in keeping with its view that, under the FCA context, the statements of some employees may subject

40. *Id.*

41. *Id.* at 1293.

42. *Id.*

43. *Id.*

44. *Id.* at 1295.

45. *Id.*

46. *Id.* This case was decided under unique circumstances, involving the use of questionnaires, in which the court granted defendant's request for an order that the Government provide it with a list of all current and former employees it had already contacted *ex parte* in the case, and with all information obtained from those contacts. The court, however, denied the defendant's request to prohibit the Government from using the information it had obtained through the *ex parte* contacts at trial, finding that any advantage the Government may have gained from those contacts would be vitiated when the defendant received the information about the contacts. *Id.*

the defendant to liability, the court applied the following limits and requirements: (1) that plaintiff provide defendant with a list of all current and former employees already contacted *ex parte* and all information obtained from such contacts; (2) that plaintiff maintain a list of the names of former employees contacted and dates of contact; and (3) that plaintiff preserve statements, notes, and answers to questionnaires obtained so that defendant could potentially review such, subject to work product limitations. The court's ruling, if viewed beyond its unique context, exceeds the requirements imposed by other courts that have allowed *ex parte* contacts and cuts against the *sine qua non* of the work product doctrine—"[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[47] This point is particularly significant because of the principle that no party get a "free-ride" by unduly taking advantage of an adversary's own work product efforts.

2. *United States v. Beiersdorf-Jobst, Inc.*

That same year, 1997, the issue of *ex parte* contacts with former employees was decided soundly in favor of the Government in *United States v. Beiersdorf-Jobst, Inc.*[48] This FCA case involved a manufacturer of, among other things, heart pumps for home use. Under the Medicare program, patients are reimbursed for purchase of certain medically necessary devices, including heart pumps.[49] The United States claimed that defendant Jobst misrepresented the capabilities of its Extremity Pump System 7500 in order to obtain inflated reimbursement. Jobst sought a protective order that would require Government notification to and approval from Jobst before interviewing any of its former employees.

Jobst analyzed DR 7-104(A)(1), Ohio's counterpart to Rule 4.2, and held that the purpose of the bar against communication with represented parties is "to safeguard a party's right to counsel by preventing an opposing party from obtaining uncounseled admissions from a represented party."[50] The court held that "the majority of jurisdictions . . . allow attorneys to contact former employees without notification of or approval by the former employer."[51] *Jobst* followed the majority position and held that the bar against communications with represented parties does not extend to former employees of a represented corporation and denied defendant's motion for a protective order.[52]

The court's rationale is insightful: "the underlying rationale behind the rule, *i.e.*, maintaining the integrity of the attorney-client relationship, is not undermined by al-

47. Hickman v. Taylor, 329 U.S. 495, 510 (1947). Federal Rule of Civil Procedure 26(b)(3) codifies the *Hickman* decision and creates a qualified immunity, allowing discovery of work product material only after the adversary has met his or her burden by showing a "substantial need of the materials in the preparation of [his or her] case and ... is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

48. United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257 (N.D. Ohio 1997).

49. *Id.* at 259.

50. *Id.* (citing Insituform of N. Am., Inc. v. Midwest Pipeliners, Inc., 139 F.R.D. 622, 625 (S.D. Ohio 1991)).

51. *Id.* at 260.

52. *Id.* at 262.

lowing uncounseled interviews with former employees who have no existing relationship with, and therefore cannot bind, a represented corporation."[53] *Jobst* also reasoned that policy considerations favor communications with former employees because a "basic cornerstone of our judicial system is the unimpeded flow of information between adversaries to encourage the early detection and elimination of both undisputed and meritless claims."[54] The court further observed, "requiring the approval and the presence of corporate counsel would have the inevitable effect of chilling the exchange of information. . . ."[55] *Jobst* provides an example of the permissive majority position in the *qui tam* litigation context.

3. *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*

In 2004, the District Court for the Eastern District of Pennsylvania also tackled the *ex parte* contact issue in *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*.[56] This opinion was issued after consideration of a Motion to Compel Testimony of a former employee of Medco defendants filed by plaintiffs.[57] At the time the former employee was deposed, she asserted that she was not represented by her own counsel nor that of Medco defendants.[58] However, in spite of her representations to the contrary, counsel for the Medco defendants asserted attorney-client privilege and instructed the witness to not answer any questions concerning communications between Medco defendants and herself in preparation for her deposition or concerning communications occurring during breaks in her deposition, and the witness complied with all of the Medco counsel's instructions.[59]

The fuel behind plaintiffs' Motion to Compel Testimony was that statements made under oath by the former employee witness at her deposition *clearly differed* from material statements she previously made in the Medco defendants' Final Report regarding the investigation.[60] Thus, as a result, plaintiffs sought additional testimony by the former employee regarding four specific categories: (1) statements made by Medco defendants' counsel to the witness regarding the nature of the case; (2) statements made by the witness to Medco defendants' counsel regarding her conversations with Government investigators; (3) descriptions and/or summaries of witness testimony provided to the witness by counsel for Medco defendants; and (4) conversations between counsel for Medco defendants and the witness while she was under oath during her deposition.[61] Plaintiffs argued that they were entitled to question the former employee witness about these topics because her communications with corpo-

53. *Id.*

54. *Id.*

55. *Id.*

56. United States *ex rel.* Hunt v. Merck-Medco Managed Care, LLC, 340 F. Supp. 2d 554 (E.D. Pa. 2004).

57. *Id.* at 555–56.

58. *Id.* at 556.

59. *Id.*

60. *Id.*

61. *Id.*

rate counsel had the potential to "affect, influence or change" the witness' testimony.[62] Medco defendants opposed the Motion to Compel Testimony on the basis that the communications between the former employee witness and counsel should be protected by attorney-client privilege because the privilege should be applied to former employees as it is for current employees.[63]

The *Merck-Medco* court cited *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981), where the Supreme Court held that a corporation's attorneys' conversations with *current* corporate employees could be covered by attorney-client privilege; however, the *Merck-Medco* court, also citing *Upjohn*, noted that the privilege applies only when conversations: (1) were made to corporate counsel, acting as such; (2) at the direction of corporate supervisors for the purpose of securing counsel's legal advice; (3) concerning matters within the scope of the employees' corporate duties; and (4) to employees that were amply aware that they were being questioned so the corporation could obtain legal advice.[64]

When the court decided *Merck-Medco* in 2004, the Third Circuit had not yet directly addressed the question left open by the Supreme Court in 1981 of whether the *Upjohn* privilege applies to former as well as current employees.[65] Therefore, the court cited to cases of other jurisdictions that were decided under factually similar circumstances although not in an FCA context.[66] The court was persuaded by the reasoning expressed in these cases, including the reasoning and practical solutions described by district courts in *Peralta* and *Coastal Oil*. In deciding to grant plaintiffs' Motion to Compel Testimony for the four specific avenues of inquiry, the *Merck-Medco* court acknowledged that although there are potential difficulties in separating facts developed during litigation, which are not privileged under the case law, from facts known by the

62. *Id.*

63. *Id.*

64. *Id.* at 556–57.

65. *But see* Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, No. Civ. A. No. 91-6184, 1992 WL 68563 (E.D. Pa. 1992) (district court had noted in this 1992 case that a former employee was privy to communications with the organization's counsel regarding the lawsuit and was a key participant in union contract negotiations such that there was a risk of disclosure of protected confidential information, found that opposing counsel should not have sought an *ex parte* interview, provided that opposing counsel produce copies of all statements or other documents memorializing the *ex parte* interview, but declining to ban the use of the evidence in the litigation). *Stabilus* was factually distinguished by the *Merck-Medco* court because it did not specifically address whether corporate counsel's communications with a former employee are privileged as to the four discrete topics at issue in the Motion to Compel Testimony.

66. *See Infosystems*, 197 F.R.D. at 305–07 (affidavit of former employee was not protected by either attorney-client privilege or the work product doctrine based on the corporate counsel's assertion that communications with the former employee in advance of his deposition concerned the former employee's conduct and knowledge during his employment, finding that *Peralta* "sweeps too broadly" because protection of privilege does not extend to facts such as those contained in the affidavit); City of New York v. Coastal Oil New York, Inc., No. 96 Civ. 8667(RPP), 2000 WL 145748, at *2 (S.D.N.Y. 2000) (court addressed the same issue presented in *Merck-Medco Managed Care* and concluded that because corporate counsel did not represent the former employee and there was no evidence that the conversations occurred for the purpose of legal advice, record did not contain any basis for assertion of attorney-client privilege); Peralta v. Cendant Corp., 190 F.R.D. 38, 40–41 (D. Conn. 1999) (court rejected defendant corporation's attempt to utilize attorney-client privilege to block all questions about communications between corporate counsel and a former employee and limited the privilege to communications concerning either knowledge obtained or conduct that occurred during the course of the former employee's employment or related to communications which were themselves privileged and which occurred during the employment relationship; the court also specified that the privilege would not apply to information given by corporate counsel to former employees about testimony of other witnesses or discussions between former employees and corporate counsel during breaks in a deposition).

employee as a result of her employment, which may be privileged, the line-drawing is not difficult: if the communication sought to be elicited related to the former employee's conduct or knowledge *during* her employment or if it concerns conversations with corporate counsel that occurred *during* her employment, the communication is privileged; if not, the attorney-client privilege does not apply.[67]

The precedential value of *Merck-Medco* may be somewhat limited as it contains an abbreviated discussion under a unique set of circumstances. Additionally, it seems to mischaracterize the holding of *Peralta* by loosely noting the following statement:

> [t]he distinction drawn by the Court between attorney-client privileged and non-privileged communications with former employees should not be difficult to apply if the essential point is kept in mind: did the communication relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment? If so, such communication is protected from disclosure by defendant's attorney-client privilege under *Upjohn*.[68]

The *Peralta* court found that any privileged information obtained by former employee during her employment with employer, including information conveyed by employer's counsel during that period, remained privileged upon termination of employment but that the privilege did not extend to any communications between employer's counsel and the former employee, whom counsel does not represent, which bears on or otherwise potentially affect the witness' testimony, consciously or unconsciously.[69] By subtly altering the paradoxical language of *Peralta*, the *Merck-Medco* court mischaracterized the holding of *Peralta* which is that "privilege may extend to *communications between corporate counsel and a former employee*, where *these communications* either (i) concern knowledge obtained or conduct occurring during the course of the former employee's employment with the corporation, or (ii) relate to communications which themselves were privileged and which occurred during the employment relationship."[70]

4. False Claims Act Policy Considerations Support Challenging Blanket Assertions of Representation & Noncooperation

The False Claims Act has strong public policy principles that support challenging a corporation or organizational entity's blanket assertion of legal representation for all employees, current and/or former, and any request by the entity for noncooperation of its employees. An FCA violation occurs when a person, *inter alia*, "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval,"[71] or "knowingly makes, uses, or causes to be made or used, a

67. *Merck-Medco Managed Care*, 340 F. Supp. 2d at 558, *citing Peralta*, 190 F.R.D. at 41–42.

68. *Peralta*, 190 F.R.D. at 41–42.

69. *Id.*

70. *See Infosystems*, 197 F.R.D. at 304–05 (emphasis added).

71. 31 U.S.C. § 3729(a)(1).

false record or statement to get a false or fraudulent claim paid or approved by the Government."[72] Even where there is nothing false on the face of the claim submitted to the government, courts have repeatedly stated that "withholding of such information—information critical to the decision to pay - is the essence of a false claim."[73] FCA lawsuits are filed by the United States, utilizing taxpayer funds to litigate the case, or by whistleblowers/relators investing their own time, resources and monies, and often involve taking on large powerhouse corporate entities that enlist multiple litigation counsel "teams" deep and have the advantage of boundless war-chests. Thus, in order to have a level playing field, relators must seek alternative discovery avenues to adequately prepare for battle without leaving "justice" to only those who can afford costly and time-consuming formal discovery, including depositions, and who have the resources to overcome the plethora of discovery objections and extensive motion practice. As Justice Douglas pointed out, the breadth of discovery must be broad in order to ensure that civil trials are "less a game of blindman's bluff and more a fair contest."[74] It is important to recognize that, in the current era, depositions and written discovery requests are often limited by rules and court orders; thus, informal discovery becomes crucial in uncovering the truth, properly preparing your case, and discovering all relevant facts without the endless hurdles, substantial costs and protracted delays of formal discovery.

A close review of the case law on informal discovery and *ex parte* communications supports the road to "justice" being paved with less costly (and frequently higher-impact) informal discovery methods. Because most jurisdictions provide that blanket, tactical assertions of representation, or automatic representation, and requests for noncooperation are not proper, counsel may have the opportunity to contact an adversary's employees if they are fact witnesses and if the attorney ensures that all are legal and ethical rules are followed. If counsel is in doubt as to the proper course of conduct, counsel should consider seeking guidance from the court, highlighting the applicable authorities. However, if unnecessary, be mindful that doing so would potentially apprise your adversary of your strategic game plan and insights into your attorney work product strategies.

D. Conclusion

The strategic benefits of obtaining valuable evidence and information through informal discovery focusing on permissible contacts with your adversary's current and former employees cannot be overestimated. Amazingly, these are powerful opportunities that are often overlooked and not pursued because of the mistaken perception that they are not ethically allowed or pose too many landmines. While important boundaries do exist, if you proceed prudently by assiduously following the ethical rules and governing law of your jurisdiction, you have the opportunity to score big points by developing your case through permissible *ex parte* contacts with your adversary's cur-

72. 31 U.S.C. § 3729(a)(2).

73. United States v. TDC Mgmt. Corp., Inc., 288 F.3d 421, 426 (D.C. Cir. 2002).

74. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

rent and former employees. This type of informal case development will significantly bolster the strength of your case, undercut your adversary's positions and go beyond the typical costly deposition process—all of which enables your side to "Getting the Winning Edge!"