

**Can We Talk?:
Removing Counterproductive Ethical
Restraints Upon Ex Parte Communication
Between Attorneys and Adverse
Expert Witnesses**

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I. INTRODUCTION

You are sweating bullets. It is a few days before trial in the biggest civil case you have ever handled. You believe the outcome of the trial will hinge upon whether you can effectively cross-examine your opponent's key witness. As you prepare your cross-examination outline, you identify a potentially critical area of inquiry that was not fully covered in the witness's deposition or other formal discovery, due to circumstances that you could not control.¹ You are keenly aware of the well-known trial attorney's maxim that you should not ask a cross-examination question when you

1. There are many reasons why an issue that an attorney wishes to discuss with a witness did not come to light until after the close of the discovery period, through circumstances that the attorney could not control. For example, perhaps an interrogatory answer or other discovery response served by the opposing party at the end of the discovery period first identified a question that requires further investigation. Alternatively, a witness who could not be deposed before the end of the discovery period might testify during the deposition about a new matter. Also, a witness deposed near the end of the discovery period might change her earlier answer to a deposition question after the close of the discovery period, thereby raising a new matter. See FED. R. CIV. P. 30(e) (giving a witness thirty days from the completion of the deposition transcript to identify necessary "changes in form or substance"). Any of these circumstances might lead to follow-up investigation, all of it necessarily coming after the close of the period for formal discovery, which itself reveals new evidence or new issues that require further investigation. Many similar circumstances could be imagined.

If the matter requiring further investigation concerns an expert witness, one or more of the circumstances in the previous paragraph could present the need for fact gathering after the close of the discovery period. In addition, it is easy to imagine circumstances for experts that are not likely to exist for fact witnesses. After all, witnesses are experts because they possess special "knowledge, skill, experience, training, or education." FED. R. EVID. 702. An expert can, and often does, acquire additional knowledge, skill, experience, training, or education after the close of the formal discovery period. For example, a scientist might complete her research on an area related to the matter at issue in a civil suit and publish an article about this research after the end of the discovery period. Also, an attorney might refrain from identifying an expert until just before, or even during, trial, thereby restricting her opponent's ability to prepare for cross-examination. Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, an Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169, 186-87 (referring to "'Saturday Night' experts"); 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, 1138 n.235 (1988).

do not know how the witness will answer it.² But how can you possibly find out what the witness's answer will be? The court's discovery deadline³ expired three weeks ago, so you cannot schedule another deposition or send your opponent an interrogatory. Is there any way out of this mess?

After lots of stewing about the limits of formal discovery, the answer finally hits you. Why not go straight to the source? You decide to pick up the telephone and call the witness.⁴

Something seems a bit odd, though. As an attorney who specializes in civil litigation, you have come to rely upon formal discovery as the means to acquire information about your opponents' witnesses.⁵ Is it okay to call them?

Just as your law school professional responsibility professor taught you to do in moments like this, you reach for your state's ethics rules, which, like those in most states,⁶ are based upon the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules"). Sure enough, there is a provision, Rule 4.2,⁷ that outlines when attorneys cannot contact persons without the consent of opposing counsel. However, this rule is quite clear: It only prohibits *ex parte* contact with persons "represented by another lawyer."⁸ While the key witness in question will be called by opposing counsel, she is not represented by her. Therefore, you conclude, there is no ethical restriction prohibiting you from making the call. In fact, because you have determined that you will be able to better represent your client at trial if you do indeed speak with the witness, you are arguably ethically required to make the phone call. After all, the rules provide that competent representation "requires the . . . thoroughness and preparation reasonably necessary for the representation" of your

2. *E.g.*, Peter M. Burke & Gianfranco A. Pietrafesa, *An Introduction to Cross-Examination*, N.J. LAW., Dec. 1998, at 28, 29; Robert S. Campbell, Jr., *Cross Examination*, UTAH B.J., Nov. 1995, at 35, 36.

3. In most federal civil cases, the court sets a deadline for the completion of discovery. FED. R. CIV. P. 16(b)(3). Many state courts also set deadlines for the completion of discovery. *See, e.g.*, Polly Jessica Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 ST. MARY'S L.J. 997, 1056 (1999); Garrett P. Hoerner & Stephen R. Wigginton, *Survey of Illinois Law: Civil Procedure*, 23 S. ILL. U. L.J. 859, 875 (1999); Margo Ahern, Comment, *Agreements in Crisis: The Stinging Effects of Texas Rule of Civil Procedure 11 on Settlement Agreements and the Alternative Dispute Resolution Process*, 31 TEX. TECH L. REV. 87, 88 (2000).

4. As an alternative, an attorney might have an investigator or legal assistant make the call. *See infra* note 101. For purposes of professional responsibility law, however, directing someone to make the call will not change the attorney's obligations, because the attorney will be responsible for actions taken at her direction. *See infra* note 101.

5. *See infra* note 293.

6. Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 323 n.18 (1996).

7. The state's rule would presumably be based upon Model Rule 4.2 or its predecessor provision. *See infra* note 110 (listing state professional responsibility rules).

8. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1999) [hereinafter MODEL RULES].

client.⁹ That settles it.¹⁰ You pick up the phone and dial the witness's number.

Voila! In the opinion of several courts and other ethics authorities, if that key witness is an expert¹¹ who was retained by your opponent, you have just committed an ethical breach,¹² and a very serious one at that. You may face substantial consequences for your supposedly overzealous cross-examination preparation, including not only disciplinary proceedings against you but also the possible exclusion of your own expert testimony, the disqualification of you and perhaps your entire firm from the case, and a variety of other court-enforced sanctions.¹³

Remarkably, if that key witness is a fact witness, nobody will suggest that your mere contacting of her was an ethical breach.¹⁴ This is true even if the fact witness is someone who is very loyal to the opposing party, such as the opposing party's best friend, parent, or spouse.¹⁵

When you prepare to defend yourself against allegations of ethical violations, you

9. *Id.* R. 1.1; *see also infra* note 202 (discussing an attorney's duty to engage in conduct permitted by the Model Rules when the attorney has concluded that the conduct may benefit her client).

10. An attorney considering *ex parte* communications with an adverse retained expert who has consulted the Model Rules is arguably not even confronted by an "ethical dilemma." In the classic sense of the term, an ethical dilemma exists when one ethical mandate suggests one course of conduct, while another ethical mandate suggests another course of conduct. For example, the classic ethical dilemma of the client who plans to commit perjury while testifying often presents a conflict between the duty to keep information about a client confidential under Model Rule 1.6 and the duty of candor to the court under Model Rule 3.3. MODEL RULES, *supra* note 8, R. 1.6, 3.3. In contrast, an attorney who reviews the Model Rules will find no provision requiring her to avoid *ex parte* communications with retained experts. *See infra* notes 110-17 and accompanying text. Therefore, once she concludes that such communications are in the best interest of her client, she has but one ethical duty to follow, pursuing those interests. *See supra* note 9.

11. Although expert witnesses are often critical both in criminal and civil trials, this Article will focus upon civil litigation. For a discussion of *ex parte* contact with adverse expert witnesses in criminal cases, see Or. State Bar Legal Ethics Comm., Formal Op. 1992-131 (1992), summarized in [1991-1995 Ethics Opinions] Laws. Man. on Prof. Conduct (ABA/BNA) 1001:7121 (1996) [hereinafter ABA/BNA Manual, 1991-1995 Ethics Opinions].

12. *See infra* notes 118-26 and accompanying text.

13. *See infra* notes 129-32 and accompanying text.

14. *See infra* notes 110-14 and accompanying text.

Of course, this does not mean that there are no ethical restrictions whatsoever regarding *ex parte* contact with fact witnesses. *See infra* Part IV. It simply means that such contact is not unethical *per se*.

15. This discussion assumes that the witness is not represented by an attorney, because Model Rule 4.2 does prohibit *ex parte* contact with persons who are represented by counsel in the matter at hand. MODEL RULES, *supra* note 8, R. 4.2. If, for example, the spouse was a coplaintiff or a codefendant and was represented either by the attorney representing the other party or by some other attorney, *ex parte* contact by the opposing attorney would not be allowed.

Also, it is perhaps important to note that, although an attorney is free to contact an unrepresented relative of the represented party, in some circumstances the represented party's attorney would be allowed to ask the unrepresented relative not to communicate with the adverse attorney. *See infra* text accompanying note 341.

might find yourself scrutinizing your state's professional responsibility rules again, thinking that you surely must have missed something that says that contact with retained experts is not allowed. You will search the Model Rules in vain for such a provision, however, because it does not exist. Neither the "no contact" rule that you reviewed before you decided to telephone the witness nor any other relevant Model Rules provision distinguishes between fact witnesses and experts.¹⁶ How can it be that ex parte contact with some important witnesses is allowed and perhaps even required,¹⁷ while contact with other important witnesses¹⁸ is unethical, even though the rules say nothing about such a distinction?

The answer lies in a common, but nonetheless erroneous, resolution of the inherent tension between the two roles that expert witnesses occupy in the modern American trial. To some extent, retained experts are members of trial teams who are expected to serve as advocates for "their" side's case at trial.¹⁹ On the other hand, experts are witnesses who will present sworn testimony to jurors, just like fact witnesses.²⁰ As a result of an overemphasis on the first of these two roles, several professional responsibility decisionmakers have incorrectly placed restrictions on attorneys' attempts to contact their opponents' experts.²¹

This Article examines and critiques the ethical²² restrictions that some would

16. With one exception, the Model Rules do not distinguish between fact and expert witnesses. *See infra* notes 110-17 and accompanying text. The only distinction in the Model Rules between fact and expert witnesses concerns the amount that they can be paid. *See infra* note 111.

17. *See supra* note 9 and accompanying text.

18. The key witness in a given civil trial may very well be an expert, because the outcomes of trials can hinge upon the jury's determinations about the diametrically opposed opinions of experts hired by attorneys and the parties they represent. *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) ("[T]he impact of expert witnesses on modern-day litigation cannot be overstated . . ."); KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS I* (1997) ("In the courtroom, the outcomes of criminal, paternity, first amendment, and civil liability cases (among others) often turn on scientific evidence, the reliability of which may be hotly contested."); Stephen D. Easton, "Yer Outta Here!" *A Framework for Analyzing the Potential Exclusion of Expert Testimony Under the Federal Rules of Evidence*, 32 U. RICH. L. REV. 1, 1-2 (1998); James A. Gardner, *Agency Problems in the Law of Attorney-Client Privilege: The Expert Witness*, 42 U. DET. L.J. 473, 475 (1965) ("Despite the weaknesses which exist in this form of evidence, expert testimony frequently constitutes the most important item of proof or the decisive element upon which the case actually turns.").

19. *See infra* Part II.A.

20. *See infra* Part II.B.

21. *See infra* notes 118-26 and accompanying text.

22. The term "legal ethics" itself is subject to several definitions and interpretations. Some argue that attorneys should not refer to the restrictions upon their practices contained in rules and other law as ethical constraints, because the term "ethics" should refer to moral values. Hellman, *supra* note 6, at 318-19. In this Article, however, the term "legal ethics" will indeed be used to refer to the constraints placed by law, particularly professional responsibility rules, upon lawyers' conduct. *Id.* at 319-21. Therefore, the terms "ethics" and "professional responsibility" will be essentially interchangeable in this Article.

place upon an attorney's²³ ex parte²⁴ contact with an expert who has been retained by opposing counsel to present testimony at trial.²⁵

23. In some instances, it may be the attorney's client, rather than the attorney herself, who technically retains and pays the expert witness. As a practical matter, however, the trial attorney still controls the retained expert witness to a significant extent, even if the expert is technically hired and paid by the client, because it is the trial attorney who usually finds the expert, chooses to hire her, directs the flow of information to her, controls the stream of money to her by deciding whether she will continue to serve as an expert witness, brings her onto the trial team, directs or alters her analysis, and ultimately decides whether she will testify at trial. Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 492-99 (2000). When the client or a representative of the client takes an active role in managing the litigation, this does not mean that the trial attorney does not also control the expert. Instead, the presence of an active client or client representative means that the expert will have to continue to please both the trial attorney and the client or client representative. *Id.* at 494 n.88. For purposes of convenience, this Article will refer to the attorney as the person who retains and controls the expert witness. The careful reader will want to remember that a reference to an attorney who retains an expert witness should be read to include the retaining attorney's client.

In addition, trial attorneys often accomplish their work with the assistance of others, including associates, legal assistants, secretaries, investigators, other aides, and clients or client representatives. *See infra* note 101. Therefore, a reference to an attorney, whether an attorney retaining an expert or an attorney opposing an expert, should be read to include such persons acting at the direction of, on behalf of, or in concert with, the attorney.

24. In this Article, the term "ex parte" does not refer to communications with the court outside the presence of opposing counsel. Instead, it refers to communications with witnesses outside the presence of, and without securing the consent of, opposing counsel.

Because repetition of the phrase "ex parte communications with adverse retained experts" could rather quickly become annoying to the reader, this Article will sometimes use the terms "ex parte communications" and "ex parte contact." Except where the context indicates a discussion of communications or contact with fact witnesses, the reader can assume that these terms refer to communications or contact with retained expert witnesses.

25. This Article explores ex parte contact by an attorney with experts who have been both retained and identified as possible trial witnesses by the opposing attorney. If either of these two conditions is not present, much of the discussion in this Article is not applicable.

If the adverse party did not retain the expert to assist in the litigation, she generally cannot control access to the witness or attempt to prevent ex parte contact. *See infra* notes 341-42 and accompanying text. There is a limited, but not universally recognized, exception. In some jurisdictions, courts have held that the physician-patient privilege prohibits doctors who have treated injured plaintiffs from communicating ex parte with defense attorneys in personal injury cases. John L. Ropiequet, *Ex Parte Communications with Defense Counsel: Hidden Dangers of the Physician-Patient Privilege*, FOR DEF., June 1995, at 16, 23. However, courts in roughly the same number of jurisdictions have allowed ex parte communications between defense attorneys and treating physicians. *Id.* at 22. Unlike the issues discussed in this Article regarding ex parte contact with retained experts, the issues related to ex parte communications between defense attorneys and treating physicians have received substantial attention from scholars and practitioners. *See, e.g.*, Jacqueline M. Asher et al., *Ex Parte Interviews with Plaintiff's Treating Physicians—the Offensive Use of the Physician-Patient Privilege*, 67 U. DET. L. REV. 501 (1990); Tomie T. Green & Winston L. Kidd, *Prognosis of the Physician-Patient Privilege: Guarded or Fatal?*, 15 TRIAL DIPL. J. 243 (1992); William E. Whitfield, III, *Mississippi Medical Privilege: Blessing or Curse?*, 12 MISS. C. L. REV. 461 (1992); Elizabeth Eggleston

Drigotas, Note, *Restricting Ex Parte Interviews with Nonparty Treating Physicians: Crist v. Moffat*, 69 N.C. L. REV. 1381 (1991); John Jennings, Note, *The Physician-Patient Relationship: The Permissibility of Ex Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441 (1994); J. Christopher Smith, Comment, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact with Plaintiff's Treating Physician*, 23 J. LEGAL PROF. 247 (1998-99); David L. Woodard, Comment, *Shielding the Plaintiff and Physician: The Prohibition of Ex Parte Contacts with a Plaintiff's Treating Physician*, 13 CAMPBELL L. REV. 233 (1991); Christine L. Companion, *Fairness Demands Equal Access*, S.C. LAW., Oct. 1997, at 37; Mary Droll Feighny, *The Physician-Patient Privilege: May Defense Counsel Conduct Ex Parte Interviews with Plaintiff's Treating Physician?*, J. KAN. BAR ASS'N, Sept./Oct. 1992, at 36; Ropiequet, *supra*; Colleen K. Schierer, *May Defense Counsel Conduct Ex Parte Interviews of Plaintiff's Treating Physicians?*, WYO. LAW., June 1998, at 21. As a result, although much of this Article's analysis regarding the value of ex parte communications with retained experts might be applicable to the controversy regarding ex parte communications with treating physicians, the latter controversy will not be considered here.

With the possible exception of treating physicians, an attorney can communicate ex parte with other nonretained experts, such as highway patrol officers, medical examiners, and fire marshals, even if they are identified by opposing parties as probable trial witnesses. *Cf.* *Wakeford v. Rodehouse Restaurants of Mo., Inc.*, 584 N.E.2d 963, 969 (Ill. App. Ct. 1991) (“[T]he appropriate way to proceed with nonretained experts is to allow the opposing party to proceed with whatever discovery it deems appropriate once disclosure is made.”), *aff'd*, 610 N.E.2d 638 (Ill. 1993), *discussed in* Charles W. Chapman, *Jaws XVI: The Exceptions That Ate Rule 220*, 26 J. MARSHALL L. REV. 189, 217 (1993); Douglas M. Schwab et al., *Scope of Discovery Against Expert Witnesses Under the Federal Rules*, in *USE OF EXPERTS IN COMMERCIAL LITIGATION: DISCOVERY AND TRIAL TECHNIQUES* 9, 20 (PLI Litig. & Admin. Practice Course, Handbook Series No. 345, 1988) (“Courts generally have held that such an [unretained] expert is an ordinary ‘fact witness’ . . .”). Therefore, the issues discussed in this Article are not directly applicable to nonretained experts who will be called as witnesses at trial.

In the main, this Article also does not deal with experts who are employees of parties, rather than independent contractors retained to work on a specific case. For a brief discussion of issues related to employees who are also experts, see *infra* note 116.

In addition, this Article does not address ex parte communication with (or, for that matter, formal discovery regarding) experts who are merely consulted by opposing attorneys, but not listed or called as witnesses. These “consultant only” experts present different concerns that are outside the scope of this Article. FED. R. CIV. P. 26(b)(4)(B) (addressing discovery regarding “an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial”); see also *Emergency Care Dynamics, Ltd. v. Superior Court*, 932 P.2d 297, 298-99 (Ariz. Ct. App. 1997) (discussing consulting experts in Arizona). For examples of cases involving consultants and related issues, see *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984); *Centennial Management Servs., Inc. v. Axa Re Vie*, 193 F.R.D. 671, 684-87 (D. Kan. 2000); *Crowe v. Nivison*, 145 F.R.D. 657 (D. Md. 1993); *Healy v. Counts*, 100 F.R.D. 493 (D. Colo. 1984); *Granger v. Wisner*, 656 P.2d 1238, 1241-43 (Ariz. 1982); *Jones & Laughlin Steel, Inc. v. Schattman*, 667 S.W.2d 352 (Tex. Ct. App. 1984). See also Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U.L.Q. 19 (1990) (discussing information disclosed to or acquired by experts who serve as consultants in criminal cases); Douglas Alan Emerick, Note, *Discovery of the Nontestifying*

Part II explores the expert's dual role from the perspectives of three groups of people who interact with experts—clients, jurors, and adverse attorneys. It argues that, to the extent that the expert's role as a trial-team member conflicts with her role as a witness who assists the jury in its quest for the truth, the judicial system should treat the witness role as the dominant one. Part III reviews the law of *ex parte* contact and establishes that *ex parte* contact neither is nor should be prohibited, because a prohibition of *ex parte* contact would inhibit the truth-seeking process. Part IV discusses the ethical restrictions that should and do apply to limit, but not prohibit, *ex parte* contact. It argues that the ethical restrictions that apply to an attorney's contact with fact witnesses are sufficient to control contact with expert witnesses. Part V discusses a related issue, the professional responsibility limits on attorneys who wish to advise witnesses not to participate in *ex parte* communications, and advocates a modest change that would increase the effectiveness of *ex parte* communications with adverse retained experts.

II. THE EXPERT AS TRIAL-TEAM MEMBER AND WITNESS

Experienced trial attorneys tend to place witnesses into two categories: fact witnesses and experts. A more cynical and perhaps more honest categorization would differentiate between the witnesses an attorney is stuck with and those she buys on the open market. While the second categorization appears at first blush simply to be a repeat of the first with less delicate language, it is not. Although the retained expert has become so commonplace that attorneys sometimes think of all experts as witnesses who are retained and paid by one of the parties, experts who are not retained by either party do still testify in trials on occasion.²⁶ Examples of nonretained

Expert Witness' Identity Under the Federal Rules of Civil Procedure: You Can't Tell the Players Without a Program, 37 HASTINGS L.J. 201 (1985).

Finally, this Article also does not deal with the interesting issues created by the "side switching" expert who is initially retained by one party who later decides not to call her as a witness at trial and then objects to the attempt by an opposing party to call the expert as a trial witness. For a discussion of these issues, see Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 475-77 (1999).

26. Evidence law does not distinguish between witnesses who are retained and paid and those who are not retained and paid by either party. Instead, it distinguishes lay witnesses from experts or, more precisely, because a single witness could present both expert and lay testimony, see H.R. DOC. NO. 106-225, at 38 (2000), between expert testimony and lay testimony. Under the Federal Rules of Evidence, an expert is "a witness qualified . . . by knowledge, skill, experience, training, or education" to offer "scientific, technical, or other specialized knowledge [that] will assist the trier of fact . . . to determine a fact in issue." FED. R. EVID. 702. Many states have statutes or rules that are similar to Federal Rule of Evidence 702. See *infra* note 49.

Those who are not qualified to serve as expert witnesses can testify only to matters within their own observations. See *infra* note 44 and accompanying text. Those who qualify as expert witnesses are entitled to present opinions based upon not only their own observations, but also upon data outside of their own personal knowledge. See *infra* notes 45-48 and accompanying text.

For purposes of convenience, this Article will follow the lead of the drafters of Federal Rule of Civil Procedure 26(a)(1)(A) and ignore the possibility that one witness could present both

expert witnesses include physicians who treat injured plaintiffs²⁷ and various civil servants who testify in civil trials between private parties, including highway patrol officers who investigate traffic accidents,²⁸ fire marshals who determine the causes of fires,²⁹ and coroners and state medical examiners who opine about the causes of deaths and related matters.³⁰

Notwithstanding the occasional appearance of experts who are not financially and strategically aligned with parties, however, it is now commonplace for parties or their attorneys to hire and pay expert witnesses.³¹ These retained experts, who are the subject of this Article, have two different and at least somewhat conflicting roles. First, they are members of the trial teams of the attorneys who hire them. Second, they are witnesses who present testimony for the jury's consideration. Because the ethical issues presented by attorney contact with adverse experts often result from the conflict between these two roles,³² each of them should be fully understood. Perhaps this conflict can be best understood by examining the perspectives of three groups of people who interact with experts—their clients, jurors, and opposing attorneys.

fact and expert testimony. Following the provisions of Rule 26(a)(1)(A), this Article will refer to those who "may be used at trial to present evidence under Rules 702, 703, and 705 of the Federal Rules of Evidence" (or similar state evidence law provisions, *see infra* notes 45, 49) as expert witnesses. The Article will use the term "fact witness" to refer to a person who is not qualified to serve as an expert.

27. *E.g.*, *Tzystuck v. Chicago Transit Auth.*, 529 N.E.2d 525, 527 (Ill. 1988); Eugene I. Pavalon & Gary K. Laatsch, *Use of Discovery in Product Liability Cases*, in ILLINOIS PRODUCT LIABILITY PRACTICE ch. 6 (Ill. Inst. for Continuing Legal Educ. ed., 1999); *see also supra* note 25 (noting controversy regarding ex parte contact between defense attorneys and physicians who treated injured plaintiffs).

28. *E.g.*, *Martin v. Pride Offshore Co.*, No. CIV. A.97-3754, 1999 WL 4921, at *1 (E.D. La. Jan. 6, 1999), *aff'd*, 198 F.3d 241 (5th Cir. 1999); *Scirrilla v. Osborne*, 946 S.W.2d 919 (Tex. Ct. App. 1997); *Runnion v. Kitts*, 531 P.2d 1307, 1310 (Wyo. 1975).

29. *E.g.*, *United Servs. Auto. Ass'n v. Wade*, 544 So. 2d 906, 908-09 (Ala. 1989); *DeYoung v. Alpha Constr. Co.*, 542 N.E.2d 859, 861 (Ill. App. Ct. 1989); *Parker v. Dubus Engine Co.*, 563 So. 2d 355, 357 (La. Ct. App. 1990); *Kalmm, Inc. v. Empiregas Corp.*, 406 So. 2d 276, 279 (La. Ct. App. 1981); *Marketos v. Am. Employers Ins. Co.*, 612 N.W.2d 848, 851 (Mich. Ct. App. 2000).

30. *E.g.*, *Boyd v. Baeppler*, 215 F.3d 594, 603 (6th Cir. 2000); *Russ v. Ratliff*, 538 F.2d 799, 805 n.12 (8th Cir. 1976); *Touchette v. Dots, Inc.*, 1995 WL 592475, at *1 (Conn. Super. Ct. Sept. 29, 1995); *Osborne v. Cambridge Township*, 736 A.2d 715, 716 n.1 (Pa. Commw. Ct. 1999); *Wangness v. Aldinger*, 598 N.W.2d 221, 226-27 (S.D. 1999).

31. *See infra* note 111.

32. In an article regarding formal discovery issues related to the work product doctrine, Professor Kathleen Waits similarly recognized that understanding and properly resolving these issues required an understanding and proper resolution of the expert witness's two conflicting roles. *See Kathleen Waits, Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 OR. L. REV. 385, 442-44 (1994); *see also John S. Applegate, Witness Preparation*, 68 TEX. L. REV. 277, 295 (1989) ("The function of the expert witness is both the most neutral and the most partisan.").

*A. The Client's Perspective: The Expert as
Paid Member of the Trial Team*

With regard to the expert's role as an advocate for one party and a member of that party's trial team, the expert occupies a role that is arguably similar to that of an attorney, legal assistant, investigator, or legal secretary. From the perspective of the client who pays the tab for the expert just as she does for the attorney, legal assistant, investigator, and legal secretary, it may seem like there is and should be little or no distinction between the expert and other members of the trial team.³³ If the client expects to get what she pays for, she may expect the same type of loyalty (with attendant confidentiality) from "her" expert witness as she does from her attorney and the other members of the trial team that will do battle with their adversaries during the litigation.³⁴

In this Article, the term "trial-team-model advocates" shall refer to those who believe that the expert's role as a member of the trial team should predominate her role as a witness at trial.³⁵ Because they value the loyalty of an expert to her trial team over any possible benefits to the trial process from ex parte contact between the expert and the adverse attorney, trial-team-model advocates would prohibit such ex parte contact.³⁶ Many trial-team-model advocates also believe that a close and closed working relationship between the retaining attorney and her expert witness is required for the proper functioning of the adversary system.³⁷

B. The Juror's Perspective: The Expert as Witness

From the jury box,³⁸ the view is quite different than the view from the chairs occupied by the client and attorney who retained the expert. From the perspective of the jurors, the expert's job is to serve as a witness, not an aide to one of the parties.³⁹ Like any other witness, the expert climbs into the witness box, swears to tell the truth,⁴⁰ and presents evidence for the jury's consideration. Like any other witness, she

33. Cf. *W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 WL 1843258, at *4 (W.D.N.Y. Nov. 2, 2000) (noting that defendant argued that its expert should be treated as "part of the (defense) 'team'").

34. See *Easton*, *supra* note 23, at 497.

35. On some occasions, a phrase like "ex-parte-contact opponents" will be used to refer to those holding this view. Neither this term nor the term "trial-team-model advocates" should be read as implying that those opposing ex parte contact are an organized or coordinated group. Instead, the various attorneys, judges, and scholars who are trial-team-model advocates have presumably come to their views independently.

As this Article makes clear, I disagree with trial-team-model advocates. See *infra* note 55. Of course, in an area as significant, vast, and varied as expert witnesses and their effect on civil litigation, there is plenty of room for reasonable and well-informed minds to disagree.

36. See *infra* notes 118-26 and accompanying text.

37. See *infra* notes 220-23 and accompanying text.

38. For convenience, this Article assumes that the fact finder is a jury. In a bench trial, the judge will face issues similar to those faced by the jury in a jury trial.

39. *Easton*, *supra* note 23, at 476-77.

40. Witnesses commonly swear to tell "the truth, the whole truth, and nothing but the

is called to the stand by an attorney who often attempts to suggest that she is both believable and relatively unbiased⁴¹ and hopes that her testimony therefore will persuade the jurors on one or more disputed issues. Like any other witness (or perhaps even more so than fact witnesses in many instances),⁴² the expert is cross-examined by the attorney representing the other party. As with any other witness, the jurors will be called upon to evaluate the veracity and knowledge of the expert. The adverse attorney's success (or lack thereof) in impeaching the expert during cross-examination is often critical to the jurors' determinations regarding these matters.⁴³

In fact, the expert is not only a witness, she is a "super witness" who is given broad latitude to attempt to persuade the jurors in ways that are forbidden for fact witnesses. The Federal Rules of Evidence allow a lay witness to testify about her opinions only when they are "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."⁴⁴

truth." *E.g.*, CAL. CIV. PROC. CODE § 2094 (West 2000); CONN. GEN. STAT. ANN. § 1-25 (West Supp. 2000); FLA. STAT. ANN. § 90.605(1) (West 1999); IDAHO CODE § 9-1402 (Michie 1998); OR. EVID. CODE R. 603(2), (3); WIS. STAT. ANN. § 906.03(2), (3) (West 1993).

41. *See Easton, supra* note 23, at 476; Terry Christovich Gay, *Pseudo-scientists at the Gate: The New FJC Manual Will Help*, 63 DEF. COUNS. J. 331, 331 (1996) ("Critics have objected that . . . jurors do not comprehend . . . that the expert witnesses upon whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations." (quoting William W. Schwarzer, *Introduction to FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 2* (1994))); J. Seymour Benson, *The Care and Feeding of an Expert Witness*, FLA. B.J., July/Aug. 1996, at 44, 44-45; Tim Hallahan, *Everything You Need to Know About Expert Witnesses*, PRAC. LITIGATOR, Sept. 1997, at 41, 44, 60; W. Brent Wilcox, *Plaintiff's Experts: Finding, Preparing and Presenting an Expert Witness*, UTAH B.J., Nov. 1995, at 38, 40.

Of course, it is not always actually the case that a witness is unbiased. Both experts, *see infra* notes 297-303 and accompanying text, and fact witnesses, *see infra* notes 315-17, 369 and accompanying text, can be quite biased.

42. Wise trial attorneys are reluctant to conduct searing cross-examinations of fact witnesses, because they realize that jurors often relate more to a person who is on the stand simply by a twist of fate that made them a witness to important facts than to the trial attorney who is permitted to cross-examine her. *See THOMAS A. MAUET, TRIAL TECHNIQUES 248-49* (5th ed. 2000). The same logic does not apply to a retained expert witness, because she, like the trial attorney who cross-examines her, is in the courtroom to earn money. As a result, trial attorneys are often more aggressive in cross-examining expert witnesses than they are in cross-examining fact witnesses.

43. *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 394 (N.D. Cal. 1991); *Easton, supra* note 23, at 504-05.

44. FED. R. EVID. 701(a), (b). Pursuant to a 2000 amendment to Rule 701, the opinion testimony of a lay witness cannot be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701(c); H.R. DOC. NO. 106-225, at 8, 37 (2000). This new provision was added to eliminate any risk that expert witnesses would avoid the requirements of Rule 702 by claiming to be offering lay opinions, rather than expert opinions. FED. R. EVID. 701 advisory committee's note (2000 amendments).

Many states have lay opinion rules that are identical or almost identical to the pre-2000 version of Federal Rule 701. *See ALA. R. EVID. 701; ALASKA R. EVID. 701; ARIZ. R. EVID. 701; ARK. UNIF. R. EVID. 701; COLO. R. EVID. 701; HAW. R. EVID. 701; IDAHO R. EVID. 701; IND.*

R. EVID. 701; IOWA R. EVID. 701; KY. R. EVID. 701; LA. CODE EVID. ANN. art. 701 (West 1995); ME. R. EVID. 701; MICH. R. EVID. 701; MINN. R. EVID. 701; MISS. R. EVID. 701; MONT. R. EVID. 701; NEB. REV. STAT. § 27-701 (1995); N.H. R. EVID. 701; N.J. R. EVID. 701; N.M. R. EVID. 11-701; N.C. R. EVID. 701; N.D. R. EVID. 701; OHIO R. EVID. 701; OKLA. STAT. ANN. tit. 12, § 2701 (West 1993); OR. EVID. CODE R. 701; PA. R. EVID. 701; R.I. R. EVID. 701; S.D. CODIFIED LAWS § 19-15-1 (Michie 1995); *see also* UNIF. R. EVID. 701.

Other states have provisions of evidence law that are quite close to the pre-2000 version of Federal Rule 701, but with relatively minor differences. *See* CAL. EVID. CODE § 800 (West 2000) (permitting lay opinions when they are "(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of his testimony"); KAN. STAT. ANN. § 60-456(a) (1994) (permitting lay opinions that "(a) [are] rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony"); TENN. R. EVID. 701 (adding subsection (b), which provides that "[a] witness may testify to the value of the witness's own property or services"); *cf.* *Atwood v. Atwood*, 79 A. 59, 60 (Conn. 1911) ("An opinion of a nonexpert witness which does not rest upon facts stated by him, or is not acquired through the use of his senses, may not be laid in evidence."); *Missouri v. Gardner*, 955 S.W.2d 819, 823 (Mo. Ct. App. 1997). In Missouri, a state that does not have a comprehensive code of evidence statutes or rules, a court observed:

[L]ay opinion testimony has generally been allowed in two circumstances: (1) to provide the jury with descriptive facts that otherwise could not be detailed or reproduced for the jury; and (2) to give a judgment on matters where [a] witness is shown to have an opinion which would aid the jury.

Id. at 823.

In three states, the relevant evidence law includes provisions like the one added to Federal Rule 701 in 2000. In two states, the law provides:

If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of facts without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

FLA. STAT. ANN. § 90.701 (1999); *accord* DEL. UNIF. R. EVID. 701. A third state's law more closely corresponds to the post-2000 version of Federal Rule 701. *See* S.C. R. EVID. 701 (tracking the language of pre-2000 Federal Rule 701, then adding the restriction that the opinions or inferences "(c) do not require special knowledge, skill, experience or training").

Rule 701 of the Federal Rules of Evidence is complemented by Rule 602's personal knowledge requirement for fact witnesses, which states, "A [fact] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602.

Many states have evidence-law provisions that are virtually or wholly identical to Rule 602 of the Federal Rules. *See* ALA. R. EVID. 602; ALASKA R. EVID. 602; ARIZ. R. EVID. 602; ARK. UNIF. R. EVID. 602; COLO. R. EVID. 602; DEL. UNIF. R. EVID. 602; HAW. R. EVID. 602; IDAHO R. EVID. 602; IOWA R. EVID. 602; KY. R. EVID. 602; LA. CODE EVID. ANN. art. 602 (West 1995); ME. R. EVID. 602; MD. R. EVID. 5-602; MICH. R. EVID. 602; MINN. R. EVID. 602; MONT. R. EVID. 602; NEB. REV. STAT. § 27-602 (1995); N.H. R. EVID. 602; N.J. R. EVID. 602; N.M. R. EVID. 11-602; N.C. R. EVID. 602; N.D. R. EVID. 602; OHIO R. EVID. 602; OKLA. STAT. ANN. tit. 12, § 2602 (West 1993); OR. EVID. CODE R. 602; PA. R. EVID. 602; R.I. R. EVID. 602; S.C. R. EVID. 602; TENN. R. EVID. 602; TEX. R. EVID. 602; UTAH R. EVID. 602; WASH. R. EVID.

In contrast, an expert need not limit her opinions to matters related to her own observations. Instead, Rule 703⁴⁵ allows her to base her opinions and inferences upon

602; W. VA. R. EVID. 602; WIS. STAT. ANN. § 906.02 (West 1993); WYO. R. EVID. 602; *see also* UNIF. R. EVID. 602.

Other states have somewhat different rule, statutory, or case-law language outlining the personal knowledge requirement for lay witnesses. *See, e.g.*, CAL. EVID. CODE § 702 (West 1990); FLA. STAT. ANN. § 90.604 (West 1999); *Gray v. Mossman*, 99 A. 1062, 1065 (Conn. 1917) (“The witness possessed no competent knowledge from which he could testify, and the court properly struck this out.”).

45. Before a recent amendment, Federal Rule 703 provided:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703, 28 U.S.C. app. (1994) (amended 2000).

Many states have evidence-law provisions identical or substantially similar to the pre-2000 version of Federal Rule 703. *See* ALASKA R. EVID. 703; ARIZ. R. EVID. 703; COLO. R. EVID. 703; DEL. UNIF. R. EVID. 703; FLA. STAT. ANN. § 90.704 (West 1999); IDAHO R. EVID. 703; IND. R. EVID. 703; IOWA R. EVID. 703; LA. CODE EVID. ANN. art. 703 (West 1995); ME. R. EVID. 703; MISS. R. EVID. 703; MO. ANN. STAT. § 490.065(3) (West 1996); MONT. R. EVID. 703; NEB. REV. STAT. § 27-703 (1995); N.H. R. EVID. 703; N.J. R. EVID. 703; N.M. R. EVID. 11-703; N.C. R. EVID. 703; N.D. R. EVID. 703; OKLA. STAT. ANN. tit. 12, § 2703 (West 1993); OR. EVID. CODE 703; PA. R. EVID. 703; S.C. R. EVID. 703; S.D. CODIFIED LAWS § 19-15-3 (Michie 1995); TEX. R. EVID. 703; UTAH R. EVID. 703; VT. R. EVID. 703; VA. CODE ANN. § 8.01-401.1(a) (Michie 2000); WASH. R. EVID. 703; W. VA. R. EVID. 703; WYO. R. EVID. 703; *see also* UNIF. R. EVID. 703; *cf.* CAL. EVID. CODE § 801(b) (West 2000). In California, an expert’s opinion may be

[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Id.

Alabama law is even more favorable for experts, because it does not contain the “of a type reasonably relied upon by experts in the particular field” requirement. ALA. R. EVID. 703. On the other hand, Ohio allows only those expert opinions that are based on admissible evidence or facts or data perceived by the expert. OHIO R. EVID. 703; *see also* R.I. R. EVID. 703 (containing language similar to Ohio, but also allowing expert opinions based on hypothetical questions); *cf.* MICH. R. EVID. 703 (“The court may require that underlying facts or data essential to an opinion or inference be in evidence.”).

Other states have added a provision explicitly giving courts the authority to exclude unreliable testimony. *See* HAW. R. EVID. 703 (“The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.”); TENN. R. EVID. 703 (“The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.”).

Under the pre-2000 version of Federal Rule 703, courts disagreed regarding whether inadmissible data relied upon by experts was itself admissible along with the expert’s opinion. FED. R. EVID. 703 advisory committee’s note (2000 amendments). As a result, Federal Rule

facts or data “perceived by or made known to the expert at or before” her testimony.⁴⁶ Furthermore, the facts or data upon which an expert witness bases her opinions and inferences do not even have to be admissible in evidence.⁴⁷ Therefore, it is perfectly permissible (and quite common) for an attorney to make inadmissible “facts or data” known to her retained expert witness in communications that do not involve their adversaries and for the expert to base her opinions upon these inadmissible “facts or data.”⁴⁸

Furthermore, the Federal Rules allow an expert to “assist the trier of fact to understand the evidence or to determine a fact in issue.”⁴⁹ This expansive outline of

703 was amended in 2000, to add provisions establishing that the authority given to experts to rely upon inadmissible data did not necessarily render that data itself admissible. FED. R. EVID. 703 (“Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”); H.R. DOC. NO. 106-225, at 10, 53-54 (2000).

Two states foreshadowed the controversy that led to the recent amendment to Federal Rule 703 by adopting pre-2000 language, supplemented with additional provisions concerning whether the party introducing the expert testimony can make the jury aware of inadmissible bases of the expert’s testimony. *See* KY. R. EVID. 703; MINN. R. EVID. 703.

The 2000 addition to Federal Rule 703 may be less significant than it first appears, because a cross-examination attack upon the bases of an expert’s opinion “will often open the door to a proponent’s rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment.” FED. R. EVID. 703 advisory committee’s note (2000 amendments).

46. FED. R. EVID. 703.

47. *Id.*; *see also supra* note 45 (citing similar state provisions).

The Federal Rules do contain one “restriction” upon the use of inadmissible facts or data. Under Federal Rule 703, the expert can base her opinions and inferences upon inadmissible facts or data only when they are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” FED. R. EVID. 703; *see also supra* note 45. This would-be restriction is often of little note, because experts commonly bootstrap themselves past this requirement by testifying that the information is of the type relied upon by others within their profession. Challenging this proposition is expensive and often futile. Easton, *supra* note 23, at 488 & n.70.

48. Easton, *supra* note 23, at 495-96; Lubet, *supra* note 25, at 469 (“To one degree or another, all experts depend upon retaining counsel for the information necessary to do their work.”); Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 788-89 (1993-94).

49. FED. R. EVID. 702. Prior to a 2000 amendment, Federal Rule 702 stated:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702, 28 U.S.C. app. (1994) (amended 2000).

Several states’ expert witness provisions mirror the pre-2000 version of Federal Rule 702. *See* ALA. R. EVID. 702; ARIZ. R. EVID. 702; ARK. UNIF. R. EVID. 702; COLO. R. EVID. 702; DEL. UNIF. R. EVID. 702; IDAHO R. EVID. 702; IOWA R. EVID. 702; KY. R. EVID. 702; LA. CODE EVID. ANN. art. 702 (West 1995); ME. R. EVID. 702; MINN. R. EVID. 702; MISS. R. EVID. 702; MONT.

the scope of allowable expert testimony gives the expert and the attorney who retained her plenty of room to submit a wide range of testimony "in the form of . . . opinion[s] or otherwise."⁵⁰

Finally, the witness presents this testimony with the considerable benefit of the judge's declaration that she is an "expert" worthy of the jurors' special attention.⁵¹ Of course, this declaration follows the expert's recitation of her impressive background and achievements.⁵²

The well-credentialed retained expert witness (a term that is probably grossly redundant, given the trial attorney's motivation to hire experts who will impress jurors)⁵³ therefore has significant advantages over fact witnesses in her effort to

R. EVID. 702; NEB. REV. STAT. § 27-702 (1995); N.H. R. EVID. 702; N.J. R. EVID. 702; N.M. R. EVID. 11-702; N.D. R. EVID. 702; OKLA. STAT. ANN. tit. 12, § 2702 (West 1993); OR. EVID. CODE 702; R.I. R. EVID. 702; S.C. R. EVID. 702; S.D. CODIFIED LAWS § 19-15-2 (Michie 1995); TEX. R. EVID. 702; UTAH R. EVID. 702; VT. R. EVID. 702; WASH. R. EVID. 702; W. VA. R. EVID. 702; WYO. R. EVID. 702; *see also* UNIF. R. EVID. 702; *cf.* *Siladi v. McNamara*, 325 A.2d 277, 279 (Conn. 1973) ("Generally, expert testimony may be admitted if the witness has a special skill or knowledge, beyond the ken of the average juror, that, as properly applied, would be helpful to the determination of an ultimate issue.").

Other states have rules that are somewhat similar to the pre-2000 version of Federal Rule 702, with additional provisions not found in the federal rule. *See* ALASKA R. EVID. 702; FLA. STAT. ANN. § 90.702 (West 1999); HAW. R. EVID. 702; IND. R. EVID. 702; MO. ANN. STAT. § 490.065(1), (2) (West 1996); N.C. R. EVID. 702; OHIO R. EVID. 702; VA. CODE ANN. § 8.01-401.3 (Michie 2000).

California only allows expert witness testimony regarding matters outside the jury's knowledge and experience but uses different language in outlining this requirement. CAL. EVID. CODE § 801 (West 2000). In contrast, the Kansas statute provides that all expert opinions must be "within the scope of the special knowledge, skill, experience or training possessed by the witness," but it does not include an explicit requirement that the testimony be outside the jury's knowledge and experience. KAN. STAT. ANN. § 60-456(b)(2) (1994).

The 2000 amendment to Federal Rule 702 added provisions stating that expert testimony was admissible only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702; H.R. DOC. NO. 106-225, at 9, 42 (2000). This provision incorporated, to some extent, the Supreme Court's holdings regarding the parameters of acceptable expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). FED. R. EVID. 702 advisory committee's note (2000 amendments).

50. FED. R. EVID. 702; *see supra* note 49 (citing similar state provisions).

51. *Eymard v. Pan Am. World Airways (In re Air Crash Disaster)*, 795 F.2d 1230, 1234 (5th Cir. 1986) (referring to "the imprimatur of the trial judge's decision that he [a witness] is an 'expert'"); Easton, *supra* note 23, at 480 & nn.43-44.

52. Easton, *supra* note 23, at 478-79.

In the nomenclature of one experienced trial attorney, an expert is an "academically endowed superwitness." Terry O'Reilly, *Ethics and Experts*, 59 J. AIR L. & COM. 113, 113 (1993).

53. Selection and retention of impressive expert witnesses is one of a trial attorney's most important tasks. One somewhat weary, but realistic, trial attorney has described this process as follows:

Good lawyers "win" cases by obtaining the best result for their clients. Less

persuade jurors.⁵⁴ Nonetheless, the jurors will be called upon to decide whether the expert is to be believed. Those who reject the views of trial-team-model advocates believe that the jurors should be given every reasonable tool to make this determination, including a cross-examination of the expert that benefits from all reasonable information-gathering techniques.⁵⁵

successful lawyers fade from the arena. We accept this as the harsh code of trial work. Inevitably this requires the search for the most persuasive experts and their early retention, regardless of the costs. If this is now a lumbering Frankenstein, the truth is that you and I tightened the screws and turned on the electricity.

O'Reilly, *supra* note 52, at 117.

54. See, e.g., *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975) (stating that allegedly scientific (polygraph) evidence "is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi"); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (finding that expert testimony may "assume a posture of mystic infallibility in the eyes of a jury of laymen"); *White v. Estelle*, 554 F. Supp. 851, 858 (S.D. Tex. 1982) (stating when a psychiatrist's opinion "is proffered by a witness bearing the title of 'Doctor,' its impact on the jury is much greater than if it were not masquerading as something it is not"), *aff'd*, 720 F.2d 415 (5th Cir. 1983).

According to a leading evidence scholar:

Scientific evidence impresses lay jurors. They tend to assume it is more accurate and objective than lay testimony. A juror who thinks of scientific evidence visualizes instruments capable of amazingly precise measurement, of findings arrived at by dispassionate scientific tests. In short, in the mind of the typical lay juror, a scientific witness has a special aura of credibility.

Edward J. Inwinkelried, *Evidence Law and Tactics for the Proponents of Scientific Evidence*, in *SCIENTIFIC AND EXPERT EVIDENCE* 33, 37 (Edward J. Inwinkelried ed., 1981), *quoted in* *Barefoot v. Estelle*, 463 U.S. 880, 926 n.8 (1983) (Blackmun, J., dissenting).

55. My own rejection of the trial-team model results in part from my experience as a trial attorney and litigator. Because my biases regarding expert witnesses result at least in part from those experiences, a brief discussion of those experiences and biases perhaps is appropriate.

Before a relatively recent move to the academic world, I spent almost fifteen years in practice as a trial attorney. Except for a three-year stint as a prosecutor, my trial and related experience primarily involved representing defendants in civil trials, arbitration hearings, and administrative agency proceedings. In my practice, I came into contact with hundreds of retained expert witnesses (working both for me and against me) in many dozens of cases. As I cross-examined experts, presented expert testimony on direct examination, deposed experts, and watched the interaction between experts and attorneys (including me), I came to be quite suspicious of retained expert witnesses and the testimony they presented in civil cases. In my view, this often flawed testimony is almost always shaped, and at least sometimes tainted, by the overly comfortable relationship between expert witnesses and the attorneys who retain and pay them.

I therefore believe the judicial system should take reasonable steps to make this relationship less cozy and to subject the expert's analysis and work to scrutiny whenever possible. *Easton*, *supra* note 23. Because that recently published article concerns an issue closely related to the issue discussed here, this Article often relies upon and cites that article's discussions of related matters, instead of repeating these discussions at length. In that recent article, I argued that a party should be entitled to discovery and disclosure of all materials reviewed by an adverse retained expert witness and all communications in which the expert participated, including communications with the attorney who retained her. *Id.* at 544. That article and the instant one are shaped by a belief that the flaws in an expert's analysis will be exposed, if at all, only when

The realities of testimony presented by retained expert witnesses support this approach. The "opinion[s] and inference[s]"⁵⁶ of an expert witness usually are not created in a vacuum where an unbiased specialist dispassionately studies independently gathered, wholly neutral, and entirely relevant evidence and reaches conclusions unaffected by her patrons. Instead, an attorney who has a very real interest⁵⁷ in the expert reaching a predetermined outcome chooses the expert,⁵⁸ hires

the attorney who will conduct the cross-examination of the expert is given every reasonable opportunity to acquire information that she can use to establish the problems with the expert's analysis, including the retaining attorney's influence on that analysis.

In the instant Article, I argue for another process that would make the relationship between the expert and the attorney who employs her less comfortable and render the expert's work subject to more scrutiny by opposing counsel. This process is the direct contact by an attorney of expert witnesses retained by her opponent, without concern that such contact might be viewed as impermissible. My enthusiasm for this position results in part from my practice experience. Because I knew that some viewed *ex parte* communications between attorneys and adverse retained experts as unethical, I always chose not to engage in such contact, even though there were several circumstances in which I believed that such contact might have assisted my preparation for cross-examination of the expert and, therefore, enhanced both my client's chances of success and the truth-seeking process. I therefore believe that removing the suggestion that such contact is impermissible would have substantial benefits, because it would remove a disincentive for such contact by trial attorneys who are aware of this suggestion and are currently unwilling to risk sanction by making *ex parte* contact. In light of the recent changes to the Federal Rules of Civil Procedure that make it even more clear that *ex parte* contact is permissible, *see infra* notes 215-16 and accompanying text, now is a particularly good time to remove the taint from *ex parte* contact.

Those who are less troubled than I about the dollar-stoked loyalty of expert witnesses to the attorneys who retain them and its effect on their testimony will find the arguments outlined here unpersuasive, because these arguments are based in significant part upon skepticism about experts and their relationships with their employers. Also, those who put less emphasis on the cross-examination aspects of the adversary system than I and believe more than I do that attorney work product must be zealously protected will be concerned about the possibility that *ex parte* communications might invade the attorney's zone of privacy.

56. FED. R. EVID. 703.

57. *See* STEVEN LUBET, *EXPERT TESTIMONY: A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM* 171 (1998) ("After all, advocates typically retain experts with one purpose in mind: to win the case.").

58. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 12.4.6, at 652 (1986) ("Lawyers are expected to seek out experts whose testimony will favor their side . . ."); Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 93 (1998) ("[A]n expert selected by a party [is] someone who will make the strongest possible statement on the party's behalf . . ."); Easton, *supra* note 23, at 492-94; John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985) ("The more measured and impartial an expert is, the less likely he is to be used by either side.").

An attorney who needs expert testimony to advance a proposition at trial generally can find an expert to testify to that proposition. *See, e.g.,* *Chaulk ex rel. Murphy v. Volkswagen of Am., Inc.*, 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting) ("There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'") (quoting *Keegan v. Minneapolis & St. Louis R.R.*, 78 N.W. 965, 966 (Minn. 1899)); *TV-3, Inc. v.*

her,⁵⁹ channels selected information about the case to her,⁶⁰ decides whether the expert's conclusions are satisfactory enough to continue employing and paying her,⁶¹ makes the expert a member of the party's trial team,⁶² directs and sometimes alters the expert's analysis,⁶³ and decides whether she will testify at trial.⁶⁴ These activities

Royal Ins. Co., 193 F.R.D. 490, 492 (S.D. Miss. 2000) (“[O]nly the most naive of experienced lawyers or judges could fail to realize that in our present legal culture money plus the proper ‘marching orders’ will get an ‘expert’ witness who will undertake to prove almost anything.”); Margaret A. Berger, *A Relevancy Approach to Novel Scientific Evidence*, 115 F.R.D. 89, 91 (1987) (“It is quite apparent that experts are readily available to present essentially frivolous theories . . .”); Mickus, *supra* note 48, at 792 n.87 (“Certain experts are willing to advocate, in court, scientific conclusions that fly in the face of an entire body of scientific literature.”); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 482 (1986) (“An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous . . .”); Joel DeVore, *The New Discovery Battle*, OR. ST. B. BULL., Apr. 1999, at 15, 15 (“[Y]ou can hire a medical expert who will testify to almost anything’ . . .” (quoting Chris Ludgate, *Doctors for Sale*, WILLAMETTE WK., Nov. 13, 1996)).

59. Easton, *supra* note 23, at 494.

60. LUBET, *supra* note 57, at 172-73; Easton, *supra* note 23, at 494-95; Mickus, *supra* note 48, at 791.

61. Easton, *supra* note 23, at 496; Langbein, *supra* note 58, at 835 (“Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune.”).

The power to influence the expert's opinion that the retaining attorney derives from her ability to cut off the flow of fees to the expert is perhaps particularly significant when the expert is one of the many persons who derives a substantial portion of her income from providing expert testimony. As many courts and commentators have observed, it is not unusual for “hired-gun” expert witnesses, *see, e.g.*, WOLFRAM, *supra* note 58, § 12.4.6, at 652, to build their careers and fortunes by offering to testify to whatever proposition an attorney needs to “prove,” regardless of its lack of foundation. *See, e.g.*, *Eymard v. Pan Am. World Airways (In re Air Crash Disaster)*, 795 F.2d 1230, 1234 (5th Cir. 1986) (“[T]he professional expert is now commonplace. That a person spends substantially all of his time consulting with attorneys and testifying is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury . . .”); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1407 (D. Or. 1996) (finding that an expert's “well-traveled opinions are no more than educated guesses dressed up in evening clothes”); *In re Aluminum Phosphide Antitrust Litig.*, 893 F. Supp. 1497, 1506-07 (D. Kan. 1995) (“Dr. Hoyt's analysis is driven by a desire to enhance the measure of plaintiffs' damages, even at the expense of well-accepted scientific principles and methodology.”); *Lipsett v. Univ. of P.R.*, 740 F. Supp. 921, 924 (D.P.R. 1990) (quoting *Eymard*, 795 F.2d at 1234 (regarding experts who were “available to the highest bidder”)); REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 35 (Feb. 1986) (“It has become all too common for ‘experts’ or ‘studies’ on the fringes of or even well beyond the outer parameters of mainstream scientific or medical views to be presented to juries as valid evidence from which conclusions may be drawn.”), *quoted in* Michael C. McCarthy, Note, “Helpful” or “Reasonably Reliable”? *Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 and 703*, 77 CORNELL L. REV. 350, 351 n.1 (1992).

62. Easton, *supra* note 23, at 497; Langbein, *supra* note 58, at 835; Mickus, *supra* note 48, at 779.

63. *See W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 WL 1843258,

shape the testimony ultimately given at trial by the expert.⁶⁵ Therefore, the influence of the trial team and its leader provide a need for additional information-gathering devices for the adverse attorney, not a justification for further shielding the expert witness from scrutiny. Cross-examination, after all, is the only realistic opportunity for the jurors to learn about problems with the expert's testimony.⁶⁶ If the retaining

at *4 (W.D.N.Y. Nov. 2, 2000) (observing that an attorney's consultation with her expert "may . . . influence the expert's consideration of the issues in matters of substance as well as form"); *Kennedy v. Baptist Mem'l Hosp.-Booneville, Inc.*, 179 F.R.D. 520, 521 (N.D. Miss. 1998) (outlining an attorney's apparently successful effort to change an expert's opinion); *Musselman v. Phillips*, 176 F.R.D. 194, 201 (D. Md. 1997) (outlining an example of attorney guidance to an expert); *Oneida, Ltd. v. United States*, 43 Fed. Cl. 611, 619 (Ct. Fed. Cl. 1999) ("Opinions or instructions made by an attorney to his expert may include . . . suggestions—perhaps strong suggestions—on what conclusions should be drawn and in what terms."); Applegate, *supra* note 32, at 297 ("Practical guides for litigators emphasize that lawyers must . . . carefully prepare experts . . . to minimize any doubts, uncertainties, or unfavorable views."); Easton, *supra* note 23, at 497-99; Mickus, *supra* note 48, at 790 (recognizing attorneys' "overt or covert suggestions about how the expert should structure his opinion"); Michael E. Plunkett, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 TEMP. L. REV. 451, 482 (1996) ("Attorneys may seek to . . . redirect[] the expert's emphasis . . .").

The process by which an attorney directs a witness's testimony is sometimes referred to as preparing, coaching, or even "horseshedding" the witness. See W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1349 (1999). When conducted properly, witness coaching is not prohibited. See *Musselman*, 176 F.R.D. at 201 ("[I]t is not improper for an attorney to assist a retained expert in developing opinion testimony for trial . . ."); LUBET, *supra* note 57, at 173-74; Easton, *supra* note 23, at 502; Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1645 (1986). Indeed, coaching of important witnesses, including experts, is arguably a required practice for trial attorneys who must conduct a direct examination of these witnesses. See Hodes, *supra*, at 1350; Marcus, *supra*, at 1645; Richard H. Underwood, *The Professional and the Liar*, 87 KY. L.J. 919, 954 & n.122 (1998-99). Contrary to what trial-team-model advocates might suggest, the fact that coaching is common, permitted, and perhaps even required does not somehow establish that an attorney should be free to coach with no fear that a witness will discuss that coaching with opposing counsel. Instead, an attorney's coaching of a witness presents the possibility that the witness's testimony will be influenced by that coaching. See Easton, *supra* note 23, at 502-04. If the truth-seeking process is to work, the jurors who must evaluate a witness's testimony deserve to know when it was influenced by the retaining attorney. Cf. Hodes, *supra*, at 1354 ("[The] algebraic sum of credibility plays out *after* the horseshedding has taken place, and we all are entitled to take that into account and impose a large or a small discount on coached testimony, as we see fit." (emphasis in original)). Because ex parte communications between the adverse attorney and the witness create one way for the cross-examiner to make the jurors aware of this influence, they should be allowed. Perhaps this is at least one reason why ex parte communications between a future cross-examiner and a witness are allowed under Model Rule 4.2, except when the witness is represented by counsel. See *infra* notes 110-17 and accompanying text.

64. Easton, *supra* note 23, at 499.

65. *Id.* at 499-504.

66. *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 394 (N.D. Cal. 1991); Easton, *supra* note 23, at 504, 505 n.130.

attorney has created, changed, or in some way influenced the expert's testimony, the cross-examining attorney should be given every reasonable opportunity to illuminate the retaining attorney's shaping of the testimony for the jurors who must evaluate it,⁶⁷ including ex parte communications with the expert.⁶⁸

The modern litigation landscape is dominated by trials in which expert witnesses for opposing parties claim similar expertise, but nonetheless testify to diametrically opposed opinions based on that expertise.⁶⁹ In many, if not most, of these trials, where the question at hand can have only one correct answer, one of these experts is testifying to an incorrect opinion.⁷⁰ If jurors believe that incorrect opinion, they will in all likelihood return an incorrect verdict.⁷¹ The jurors who are required to determine which of two experts to believe (or, perhaps more precisely, which of two experts to disbelieve) deserve all information that can be reasonably presented by the

67. See *W.R. Grace & Co.*, 2000 WL 1843258, at *4; *Barna v. United States*, No. 95 C 6552, 1997 WL 417847, at *2 (N.D. Ill. July 18, 1997); *Intermedics*, 139 F.R.D. at 395-96 (maintaining that the jury "has a right to know *who* is [really] testifying" (emphasis in original)); Easton, *supra* note 23, at 504-08.

68. Mr. Hodes is one of the most prominent opponents of ex parte communications between attorneys and adverse expert witnesses. See *infra* text accompanying note 126. At the same time, he recognizes that when

sitting in a jury box [and in other situations], everyone is called upon to make judgments about credibility. But that judgment must be based on the totality of the clues that are available, both positive and negative, rather than the facile assumption that everyone with an incentive to lie will actually lie.

Hodes, *supra* note 63, at 1353. On that score, he and I agree. Realistically, however, usually it is the retaining attorney who will bring forth the "positive" information and the cross-examining attorney who is responsible for bringing forth the "negative" information. As Mr. Hodes seems to recognize, that information can reasonably include proof that the witness is not "disinterested," including evidence about the coaching of the witness. See *id.* at 1351-52. Ex parte communications between the attorney and the expert witness can help the cross-examining attorney establish that the expert is not disinterested. See *infra* notes 357-64 and accompanying text. Therefore, they are a valuable potential source of the negative information that the jury needs to balance against the positive information provided by the retaining attorney when making required determinations about the witness's credibility.

69. WOLFRAM, *supra* note 58, § 12.4.6, at 652 ("Lawyers are expected to seek out experts whose testimony will favor their side, secure in the knowledge that their opponents will probably find an opposing expert view."); Easton, *supra* note 23, at 509 & n.145.

There are instances where an expert's testimony is not countered by the testimony of an expert for the opposing party, even though the opposing party disputes the expert's testimony. Easton, *supra* note 23, at 506. Because cross-examination will be the only viable opportunity for the jurors to learn about problems with the expert's testimony in such a case, it is perhaps even more important to provide every reasonable opportunity for an effective cross-examination in these circumstances.

70. See Easton, *supra* note 23, at 509-26.

Even when the question addressed by the experts is one on which there is arguably more than one correct answer, see *id.* at 524-25, the jurors will ultimately be asked to determine which of the two experts should not be believed, see *id.* at 526. Jurors who face the task of making this difficult decision deserve all reasonably available information.

71. See *id.* at 516 & n.160.

attorneys cross-examining the experts,⁷² including information acquired through ex parte communications between a cross-examining attorney and an adverse expert.⁷³

*C. The Adverse Attorney's Perspective: The Expert
as Cross-Examination Foe*

Because an expert witness has such "wide latitude"⁷⁴ and such overwhelming potential influence,⁷⁵ including the potential for causing the jurors to return an incorrect verdict,⁷⁶ the adverse attorney's cross-examination is even more critical than the cross-examination of most fact witnesses.⁷⁷ If an expert testifies persuasively on

72. See *Intermedics*, 139 F.R.D. at 394; *Easton*, *supra* note 23, at 504-08, 517-20, 522-23.

Information that can help the cross-examining attorney establish the influence of the retaining attorney over the expert witness can be particularly helpful to the jurors who must evaluate the reliability of that expert's testimony. See *Johnson v. Gmeinder*, 191 F.R.D. 638, 646 (D. Kan. 2000) (noting the importance of a party's opportunity to "determine the extent to which the opinion of the expert may have been influenced by counsel" in order to prepare for an effective cross-examination); *Musselman v. Phillips*, 176 F.R.D. 194, 201 (D. Md. 1997) ("[A]llowing the [retaining] attorney to effectively construct the retained expert's opinion testimony to support the attorney's theory of the case, while blocking opposing counsel from learning of, or exposing, this influence[,] . . . would seriously undermine the integrity of the truth finding process at trial."); *Barna*, 1997 WL 417847, at *2 ("[E]xpert testimony [is] another way in which counsel places his view of the case or the evidence in front of the jury. The real danger is that . . . opposing counsel [is] left without a solid basis for cross-examination."); *Intermedics*, 139 F.R.D. at 395-96; *Occulto v. Adamar of N.J., Inc.*, 125 F.R.D. 611, 616 (D.N.J. 1989) ("[A]n expert who can be shown to have adopted the attorney's opinion as his own stands less tall before the jury than an expert who has engaged in painstaking inquiry and analysis before arriving at an opinion."); Christine D. Bakeis, *Selecting and Handling Expert Witnesses in Litigation*, FOR DEF., Jan. 1997, at 15, 19 ("[I]t can be very effective to imply that the expert has tailored his or her testimony to fit the [opposing party's] needs."). If ex parte communications are allowed, the jurors will often receive some information about the attorney's influence over the expert, even when the expert decides not to participate in ex parte communications. See *infra* notes 357-63 and accompanying text.

73. Although ex parte contact between the cross-examining attorney and the expert would sometimes result in the attorney acquiring new information, see *infra* text accompanying notes 364-65, this will not always be the case, see *infra* notes 341-49 and accompanying text. Even when the attorney initiating ex parte communications with the expert does not acquire new information, however, the ex parte communications may provide the attorney with cross-examination questions that will provide the jurors with information about the biases of the witness that the jurors would otherwise not obtain. See *infra* notes 357-63 and accompanying text.

74. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993); accord *Lamonds v. Gen. Motors Corp.*, 180 F.R.D. 302, 305 (W.D. Va. 1998) (noting that experts "are, in a sense, privileged").

75. See, e.g., *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996); *Wroblecki v. Nora de Lara*, 727 A.2d 930, 933-34 (Md. 1999) ("Expert opinion testimony can be powerful evidence."); KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS I* (1997).

76. See *supra* text accompanying note 71.

77. Cf. *Johnson v. Gmeinder*, 191 F.R.D. 638, 646 (D. Kan. 2000) (discussing a party's

a critical issue during direct examination and survives cross-examination with her credibility intact, the adverse attorney is well on her way to a losing verdict.⁷⁸ Of course, preparing for the cross-examination of a well-educated, persuasive, often highly experienced witness is no easy task.⁷⁹

Given the importance and difficulty of an effective expert witness cross-examination, it is not surprising that some trial attorneys are willing to take whatever steps the limitations of professional responsibility allow to prepare for that cross-examination.⁸⁰ Indeed, one could argue that any attorney who fails to take ethical,

right "to a full and fair cross-examination of the expert witness"); *Intermedics*, 139 F.R.D. at 394 ("[A]ssertive, probing, coherent, and well-informed cross-examination [is] essential to equipping the trier of fact to judge the persuasive power and reliability of such testimony and to determine which of competing expert views should be credited . . ."); *Wroblewski*, 727 A.2d at 933.

78. As one commentator has noted, trial attorneys "carefully prepare experts to ensure that their testimony is comprehensible and to minimize any doubts, uncertainties, or unfavorable views." Applegate, *supra* note 32, at 297. If the opposing counsel has done this job well and also did a good job of selecting an expert in the first instance, an attorney who fails to cross-examine the expert effectively faces a high probability of an adverse verdict.

79. See *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 596 (D. Md. 1963) ("[I]t needs no citation of authority to say that an expert is the most difficult witness to cross-examine, particularly if one is unaware until trial of the substance of his testimony."); *Wroblewski*, 727 A.2d at 934.

80. For over thirty years, the drafters of the Federal Rules of Civil Procedure have recognized the importance of gathering information to prepare for effective cross-examination and impeachment of expert witnesses. In its notes regarding the 1970 amendments to Rule 26 that first provided for formal expert witness discovery, the Advisory Committee on Civil Rules of the U.S. Judicial Conference Committee on Rules of Practice and Procedure ("Advisory Committee") observed:

Effective cross-examination of an expert witness requires advance preparation.

The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side.

FED. R. CIV. P. 26(b)(4) advisory committee's notes (1970 amendments).

In like fashion, the drafters of the Federal Rules of Evidence recognized the need for attorneys to arm themselves with as much information as they can to conduct an adequate cross-examination. In defending the 1972 changes in Rule 702, which eliminated the hypothetical question requirement for expert testimony and allowed an expert to testify about her opinions and inferences "without first testifying to the underlying facts or data," FED. R. EVID. 705, the Advisory Committee on the Federal Rules of Evidence stated:

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination.

FED. R. EVID. 705 advisory committee's notes (1972 amendments).

The Advisory Committee on the Federal Rules of Evidence is not alone in its views regarding the importance of providing attorneys access to the information they need to prepare for expert witness cross-examination. Applegate, *supra* note 32, at 349 ("The more we accept

reasonable, cost-effective steps to prepare for cross-examination is not giving her client the representation she deserves.⁸¹ Therefore, the boundaries of permissible cross-examination preparation are a matter of substantial interest to trial attorneys.

In addition, the proper ethical boundaries of contact with adverse experts should be of significant academic and systemic interest. Given the importance of expert witness testimony and cross-examination in many trials, any unnecessary ethical restrictions that limit the effectiveness of cross-examination undermine the effectiveness of the judicial system.⁸² If, in Wigmore's well-worn words, cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth,"⁸³ anything that unnecessarily limits the effectiveness of the cross-examination engine limits its ability to lead jurors to the truth.⁸⁴

To adopt another well-known phrase, a trial is designed to be a "search for the truth."⁸⁵ If so, anything that interferes with the ability of the jurors to find the truth

the idea that scientific conclusions are not inevitable, the more important it is to know precisely how experts reach their conclusions—only then can opponents effectively challenge them.").

81. See *supra* note 9 and accompanying text; *infra* note 202.

82. See *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (stating "full, effective cross examination [of expert witnesses] is critical to the integrity of the truth-finding process"); *Healy v. Counts*, 100 F.R.D. 493 (D. Colo. 1984); *Emergency Care Dynamics v. Superior Court*, 932 P.2d 297, 300 (Ariz. Ct. App. 1997).

83. 2 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 1697-98 (1904), quoted in FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 103 (1993). Wigmore went on to assert that "cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure." *Id.*

84. See *Applegate*, *supra* note 32, at 349. "Whatever its faults, cross-examination is the main tool for achieving the accuracy goals of the advocacy system. Accordingly, there is no sound reason to protect factual information provided to testifying experts from early and complete disclosure." *Id.*

85. See *Felder v. Wyman*, 139 F.R.D. 85, 90 (D.S.C. 1991); see also, e.g., *Musselman v. Phillips*, 176 F.R.D. 194, 201 (D. Md. 1997) (noting "the integrity of the truth finding process at trial"); *Oneida, Ltd. v. United States*, 43 Fed. Cl. 611, 619 (Ct. Fed. Cl. 1999) (discussing "the integrity and reliability of the truth finding process in a case"); *Reilley v. Keswani*, 350 A.2d 74, 75 (N.J. Super. Ct. App. Div. 1975) ("Fundamental to, if not the sole purpose of, the administration of our system of justice is the search for truth."); *Daisy Hurst Floyd, A "Delicate and Difficult Task": Balancing the Competing Interests of Federal Rule of Evidence 612, the Work Product Doctrine, and the Attorney-Client Privilege*, 44 BUFF. L. REV. 101, 101 (1996).

The Federal Rules of Evidence themselves echo the view that a trial is a truth-seeking mechanism. Rule 102 states that the rules should be applied "to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. Another Rule tells judges to manage the presentation of evidence "so as to . . . make the interrogation and presentation effective for the ascertainment of the truth." FED. R. EVID. 611.

Although statements about the truth-seeking goal of trials are common, they are not universally accepted. Some commentators believe that trials are more properly characterized as vehicles for assertion of individual rights than as searches for truth. *Applegate*, *supra* note 32, at 324-26. It could also be argued that a trial cannot hope to ascertain the entire truth about a past event. See *Hodes*, *supra* note 63, at 1360 (noting that the "'courtroom truth' need not match every chapter and every verse of objective truth"). Those who do not share the belief that a trial is or should be a search for the truth may not find the arguments in this Article

detracts from the fundamental purpose of the trial. Such hindrances should be tolerated only if they are needed to protect another fundamental value of the justice system. In other words, the search for truth is most effective when all parties and their attorneys are free to use reasonable means to attempt to acquire information for trial, including information that will lead to forceful impeachment of expert testimony.⁸⁶

While formal discovery is one way to gather information about an expert who has been retained and identified as a likely trial witness,⁸⁷ it has significant limitations. Chief among these limitations is the involvement of the other attorney.⁸⁸ An attorney

persuasive, because these arguments stem from a belief that the civil justice system should enhance the truth-seeking process.

On the other hand, even those whose view of the trial is based more upon the adversaries' rights than upon the correctness of the outcome might find some value in the arguments pressed here. If a chief concern in a trial is the opportunity of each party to present her best argument, that concern can be met, with respect to cross-examination of expert testimony, only when the cross-examiner is given every reasonable opportunity to acquire information that will make her cross-examination effective. *See id.* (observing that each party is responsible for bringing forth evidence that weakens the case made by the opposing party); *infra* note 86 and accompanying text.

86. *See Kaveney v. Murphy*, 97 F. Supp. 2d 88, 95 (D. Mass. 2000) (barring *ex parte* communication with witnesses would frustrate the search for truth); *Frey v. Dep't of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985) (*ex parte* interviews with witnesses "will aid in the search for truth"); *Domako v. Rowe*, 475 N.W.2d 30, 36 (Mich. 1991) (similar); *cf. Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966) (reversing criminal conviction due to prosecutor's advice to witnesses that they should avoid speaking to defense counsel outside the prosecutor's presence). According to one circuit court, the "quest [for truth] will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined." *Id.*

87. *See, e.g.,* FED. R. CIV. P. 26(a)(2) advisory committee's note (1993 amendments) (noting that disclosure requirements are designed to give "opposing parties . . . a reasonable opportunity to prepare for effective cross examination"); *United States v. Meyer*, 398 F.2d 66, 70 (9th Cir. 1968); *Musselman*, 176 F.R.D. at 200; *Franks v. Nat'l Dairy Prods. Corp.*, 41 F.R.D. 234, 237 (W.D. Tex. 1966); *Oneida*, 43 Fed. Cl. at 618-19.

88. *Cf. Kaveney*, 97 F. Supp. 2d at 95 (formal discovery is an "inadequate substitute" for *ex parte* interviews, because the presence of opposing counsel will influence the witness's responses); *Felder*, 139 F.R.D. at 90 (*ex parte* interviews would allow a party to explore factual issues "without [the opposing party] unnecessarily intruding into the process and exerting undue pressure upon witnesses to censor their speech"); David L. Lillehaug, *Ex Parte Interviews with "Two-Hatted" Witnesses*, 21 TORT & INS. L.J. 441, 444-45 (1986) ("[I]nformal discovery is easier [than formal discovery and] is conducive to spontaneity and candor Also, it promotes fairness because the party not directly connected to the witness has, at least theoretically, an equal chance to speak with the witness."); Lubet, *supra* note 25, at 480 ("Discovery requests to experts are channeled through retaining counsel."); Bruce P. Moran, *Ex Parte Contacts*, in 28TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 989, 991 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-615, 1999) (noting that an attorney might prefer *ex parte* interviews of fact witnesses over depositions because the lawyer "may also avoid the chilling effect the presence of opposing counsel may have on the witness"); Feighny, *supra* note 25, at 38 ("[I]nterviews [of doctors] are conducive to more candor and spontaneity than depositions . . .").

prepares answers to interrogatories about the expert⁸⁹ and responses to requests for production relating to the expert.⁹⁰ An attorney almost always “assists” in the preparation of expert witness reports.⁹¹ An attorney prepares the witness for her deposition⁹² and then attends and “defends” the deposition.⁹³ In performing these

89. Graham, *supra* note 1, at 174 (quoting an attorney who stated that expert witness interrogatory answers are “drafted by opposing counsel” to “conceal more than they disclose”); Hayes & Ryder, *supra* note 1, at 1123 & n.116, 1138 (noting that the evasive expert witness interrogatory answers were often written in the language of lawyers, rather than experts); Robert Matthew Lovein, Note, *A Practitioner’s Guide: Federal Rule of Civil Procedure 26(a)—Automatic Disclosure*, 47 SYRACUSE L. REV. 225, 258 (1996) (“Prior to the 1993 amendments, information concerning expert witnesses and their opinions [was] made available through the use of interrogatories. However, the information obtained through interrogatories was consistently vague”); *cf.* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1323 (1978) (“There are many standard devices used by litigators to resist the disclosure of information and to mislead the opponent through their responses to interrogatories, requests for admissions, and demands for documents.”).

90. See Brazil, *supra* note 89, at 1323-25; Lubet, *supra* note 25, at 481.

91. See Hayes & Ryder, *supra* note 1, at 1138 (“[E]vasiveness is encountered in the [pre-1993] discovery of expert reports. Expert reports often progress through a series of changes by the expert and the attorney. Therefore, there is an obvious temptation to purge the report of any information that may be unfavorable to the client’s case.”); *cf.* Saul Nirenberg, *Getting the Most Out of Your Expert Witness*, in 2 SECURITIES ARBITRATION 49, 53 (PLI Corp. Law & Practice Course, Handbook Series No. 782, 1992) (advising attorneys to have expert witness reports “tailored” to their presentations).

Attorney participation in the preparation of an expert’s report is permissible. The Advisory Committee, which promulgated the 1993 Federal Rules of Civil Procedure amendments requiring expert witness reports, stated, “Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed.” FED. R. CIV. P. 26(a)(2) advisory committee’s note (1993 amendments).

92. In an observation that still rings true, one scholar noted:

Aggressive litigators can also limit and distort the flow of information during discovery through the manner in which they prepare their clients and witnesses to be deposed. The adversarial objective of attorneys whose clients or witnesses are being deposed is to limit to the greatest extent possible the information divulged.

Brazil, *supra* note 89, at 1330-31.

93. See *Kaveney*, 97 F. Supp. 2d at 95 (the presence of opposing counsel at depositions inhibits the attorney’s open discussion with the witness); John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 525 (2000) (listing techniques used by attorneys at depositions to limit the information acquired by the attorney taking the deposition, including instructing the witness not to answer questions and “coaching witnesses by making as extensive ‘speaking objections’” as the attorney defending the deposition “can get away with”); Brazil, *supra* note 89, at 1331 (discussing the “many . . . devices” used by counsel “to regulate and restrict the evidence their client or witness provides during deposition”); Lubet, *supra* note 25, at 481-85 (discussing the efforts of retaining counsel at depositions of expert witnesses); *cf.* A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273 (1998) (discussing several tactics employed by attorneys at depositions, including tactics employed by attorneys defending depositions who seek to limit the information received by the

tasks, the attorney will often do everything she ethically can do to limit the amount of information that flows to her opponent.⁹⁴ She will be especially attentive to anything that might be used to successfully impeach the expert on cross-examination.⁹⁵ Formal discovery is also quite expensive,⁹⁶ because it requires

deposing attorney).

94. See *Kaveney*, 97 F. Supp. 2d at 89 (suggesting that “any lawyer” will “want to control the flow of information” to her opponent); cf. Brazil, *supra* note 89, at 1299 (“Minimal reflection reveals a fundamental antagonism between the [formal discovery system’s] goal of truth through disclosure and the protective and competitive impulses that are at the center of the traditional adversary system of dispute resolution.”); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—“Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 699-700 (1995) (“Among the more commonly mentioned activities used to resist legitimate discovery are refusing to provide information, hiding information, raising frivolous privilege claims, disingenuously construing discovery requests narrowly, destroying documents, assisting in perjury, coaching witnesses to avoid disclosing information, and providing deliberately evasive answers to discovery requests.”); Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305, 339 (stating “the adversary system is a lousy method of information development”); *infra* note 356.

Professor Beckerman enumerated several of the techniques used by lawyers to limit the information disclosed in response to discovery requests:

Proficient advocates . . . minimiz[e] information and admissions obtained by or given to the adversary. Lawyers endeavor to achieve this end in many ways including: . . . asserting all possible objections in response to adversaries’ requests, including those of irrelevance, excessive scope and undue burden; construing all of the opponents’ requests narrowly and excluding everything not directly responsive to them; asserting on the client’s behalf all available privileges as excuses for non-production of documents, failure to answer interrogatories or instructions not to answer questions on depositions; and seeking protective orders to validate any decisions not to answer or produce. Unscrupulous lawyers go further, crossing into rule violations and illegal behaviors. Examples are . . . “dirty tricks” such as scrambling the order of documents produced for inspection and copying and hiding critical documents in unrelated files, to say nothing of downright falsification of discovery responses, or suppression or destruction of relevant evidence.

Beckerman, *supra* note 93, at 525.

The Advisory Committee, which is responsible for reviewing and proposing amendments to the Federal Rules of Civil Procedure, observed a phenomenon well known to litigating attorneys when it noted that information provided in formal discovery before 1993 “was frequently . . . sketchy and vague.” FED. R. CIV. P. 26(a)(2) advisory committee’s notes (1993 amendments).

95. See Hayes & Ryder, *supra* note 1, at 1138 (discussing the efforts of attorneys to remove potentially unfavorable information from expert reports); Waits, *supra* note 94, at 339 (“[W]hen assembling information, advocates do not merely attempt to expose all the evidence which is good for their side; they work equally hard to suppress negative information.”).

96. In summarizing the comments on the proposed amendments to Rule 26 that were ultimately adopted in 2000, the Advisory Committee said:

[D]iscovery was often thought to be too expensive, and concerns about undue expense were expressed by both plaintiffs’ and defendants’ attorneys. The Committee learned that the cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases

somewhat formalized drafting of requests⁹⁷ and, in many instances, motions to compel production and related legal research, negotiations, and brief writing.⁹⁸ In addition, substantial time may pass between the request for information and the acquisition of that information.⁹⁹ Finally, when the court's discovery deadline has passed, formal discovery is probably not even an option for an attorney who seeks information relating to an expert.¹⁰⁰

As a result of these and other limitations of formal discovery, trial attorneys¹⁰¹

where discovery is actively employed.

H.R. DOC. NO. 106-228, at 53 (2000); cf. Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 809 (1991) ("The prevalent critique of civil discovery under the federal rules is that it is inefficient, wasteful, costly, and subject to precisely the kind of gamesmanship that the drafters of the rules sought to eliminate.").

Formal discovery is often a more expensive means to acquire information than attorney-initiated independent efforts to gather information. See *Frey v. Dep't of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985) (ex parte interviews are more viable for parties with limited resources than "costly discovery procedures"); Companion, *supra* note 25, at 38 (citing an unpublished state court decision where the court "found that requiring all contact be made by formal discovery methods would increase substantially the costs of litigation"); Feighny, *supra* note 25, at 38; Lillehaug, *supra* note 88, at 444; McMoran, *supra* note 88, at 995 (noting that ex parte interviews with fact witnesses are often "easier and more economical" than formal discovery); C. Evan Stewart, *General Thoughts to Inform a Party's Deposition Strategy*, in TAKING AND DEFENDING DEPOSITIONS IN COMMERCIAL CASES 23, 26 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-611, 1999) ("Depositions, especially these days, are an extremely costly and often inefficient way of getting information . . .").

97. Interrogatories, requests for production, and requests for admissions must be drafted and served upon parties, see FED. R. CIV. P. 33, 34, 36, or, in some instances, upon nonparties, see FED. R. CIV. P. 34(c), 45.

Depositions require the drafting and service of a formal notice, see FED. R. CIV. P. 30(b), and the preparation of either written questions, see FED. R. CIV. P. 31, or, more commonly, an outline of questions to be asked by the attorney orally at the deposition, see FED. R. CIV. P. 30(c). Depositions may also entail other expenses, including the fees of a court reporter or other officer, see FED. R. CIV. P. 28, travel or telephone expenses, see FED. R. CIV. P. 30(b)(7), subpoena expenses and witness fees for nonparty witnesses, see FED. R. CIV. P. 30(g)(2), 45, and considerable attorneys' fees for preparation and participation in the deposition. See Graham, *supra* note 1, at 186.

98. FED. R. CIV. P. 37 (outlining procedures for motions to compel discovery); Lubet, *supra* note 25, at 481 (noting that discovery requests can lead to objections and efforts to quash subpoenas); Mullenix, *supra* note 96, at 803 (quoting the observation of the Advisory Committee Reporter's observation that "[d]iscovery practice has become encumbered with excess motion practice").

99. The Federal Rules give parties thirty days to respond to interrogatories, requests for admissions, and requests for production. FED. R. CIV. P. 33(b)(3), 34(b), 36(a). The parties can agree to extend this time period. FED. R. CIV. P. 29, 33(b)(3), 34(b), 36(a). Even if there is no such agreement, the court can lengthen the time for discovery responses. FED. R. CIV. P. 33(b)(3), 34(b), 36(a).

100. See *supra* note 3 and accompanying text.

101. Of course, interviews of experts and other witnesses will often be conducted not by attorneys themselves, but by legal assistants or investigators working for attorneys. See

sometimes believe it is in the best interest of their clients¹⁰² for the attorneys to contact adverse experts directly.¹⁰³ In almost all circumstances, the attorney's goal in contacting an expert (or a fact witness), like her aim in conducting formal discovery regarding an expert (or a fact witness),¹⁰⁴ is the acquisition of information that will help her to learn more about the witness's testimony, so she can evaluate the case for settlement¹⁰⁵ or better prepare for a cross-examination of the witness that will limit the impact of the witness's testimony.¹⁰⁶ Given the difficulties confronting attorneys

McMoran, *supra* note 88, at 991. If an attorney conducts an interview, the attorney runs the risk of becoming a witness in the case. If a person other than the trial attorney conducts or at least observes the interview, that person can testify, if necessary, regarding statements made by the witness. One commentator observed:

A problem that may be encountered when a lawyer interviews any potential witness is the avoidance of the necessity for the lawyer-interviewer to appear later as a witness in order to impeach the witness if the witness changes stories in trial testimony. The major complication is the rule that a lawyer may not conduct a trial if the lawyer should be called as a witness In order to avoid the problem, a sound practice is to conduct interviews (at least with hostile or evasive witnesses) through an investigator or with a third person present who can be called as an impeachment witness at trial.

WOLFRAM, *supra* note 58, § 12.4, at 646.

The fact that an investigator or legal assistant conducts an interview does not absolve the attorney of ethical restrictions on the interview. As the ABA Committee on Ethics and Professional Responsibility noted with respect to the restrictions upon contact with represented parties, "Whether in a civil or criminal matter, if the investigator acts as the lawyer's 'alter-ego,' the lawyer is ethically responsible for the investigator's conduct." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, 1001:290, :304. The same reasoning would presumably apply to ethical restrictions upon contact with expert witnesses, because the Model Rules make an attorney responsible for conduct of subordinates acting within the attorney's direction. MODEL RULES, *supra* note 8, R. 5.3, *discussed in* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:303-:304; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5(2) & cmt. f (2000) [hereinafter RESTATEMENT].

102. *Cf.* David S. Day, *Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study in South Dakota*, 31 S.D. L. REV. 40, 56 (1985) (stating that "in order to advance the interests of clients, attorneys will" use informal discovery to acquire information about expert witnesses).

103. *See* Lubet, *supra* note 25, at 480; *cf.* Companion, *supra* note 25, at 37 (asserting that an ex parte interview can be "[t]he most efficient and cost effective method of learning about a witness's intended testimony"); Garrett Hodes, *Ex Parte Contacts with Organizational Employees in Missouri*, J. MO. B., Mar./Apr. 1998, at 83, 87 ("The plaintiff's attorney must be able to investigate his case and minimize the costs and expenses of litigation"); McMoran, *supra* note 88, at 991 ("Many lawyers prefer informal ex parte interviews [of fact witnesses] to depositions.").

104. *See infra* note 186.

105. *See* Lillehaug, *supra* note 88, at 444.

106. There are several ways in which direct communications with an adverse expert witness could help an attorney prepare to cross-examine the expert. First, by acquiring information about a matter that might be in issue, the attorney could avoid asking questions that have

in preparing for cross-examination of experts, reasonable efforts to gather information for this task, including ex parte contact, should not seem unusual and should not be prohibited.

Those responsible for drafting, interpreting, and applying the professional responsibility rules respect the goal of information gathering, as well as the resultant benefits to the adversarial truth-seeking system that result from effective cross-examinations, enough to allow ex parte contact with unrepresented fact witnesses, even when they are very loyal to a represented party.¹⁰⁷ In fact, adverse attorney contact with unrepresented, but loyal, fact witnesses is valued so highly that the attorney for the client to whom a fact witness is loyal is not allowed to interfere with her opponent's opportunity to communicate ex parte by advising the witness not to engage in such communications, except in limited circumstances.¹⁰⁸ The same principles should control when the witness is an unrepresented, but highly loyal, expert.¹⁰⁹

III. THE LAW OF EX PARTE CONTACT

Although no Model Rules provision prohibits ex parte contact with adverse retained experts, several courts and other professional responsibility authorities have attempted to stretch inapplicable provisions to ban such contact. Examined carefully, none of these provisions can legitimately be the basis for such a ban. Professional responsibility law does not, and should not, ban ex parte contact.

A. The ABA Model Rules: No Prohibition of Ex Parte Communications

An attorney reviewing the Model Rules would presumably conclude that ex parte contact with adverse, retained expert witnesses is permissible. One of the Model Rules deals explicitly with persons that an attorney may not contact without the consent of opposing counsel. Model Rule 4.2 prohibits ex parte contact with persons who are represented by counsel,¹¹⁰ but it does not prohibit contact with retained

answers that had been unknown to her. *See supra* text accompanying note 2. After discussing the matter with the expert, the attorney could decide to either not ask certain questions and thereby not dispute certain issues or to structure her questions about an issue that she does dispute in a way that is helpful to her client. In addition, the attorney may acquire information that will help her to impeach the expert by creating doubt about the validity of her analysis. The attorney might also acquire information that will help her to establish that the attorney retaining the expert has exerted too much influence over the expert's work.

Even if the expert witness refuses to communicate with the adverse attorney, the attorney may be able to use her attempts to communicate ex parte to establish the retaining attorney's influence over the expert. *See infra* notes 357-63 and accompanying text.

107. *See supra* notes 110-17 and accompanying text.

108. *See infra* notes 315-21 and accompanying text.

109. *See infra* Part III.B.3.b.

110. Model Rule 4.2 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 by

law to do so." MODEL RULES, *supra* note 8, R. 4.2.

This Model Rules provision was preceded by DR 7-104(A)(1) of the ABA's Model Code of Professional Responsibility. See MODEL RULES, *supra* note 8, R. 4.2, Model Code Comparison. These two provisions are "substantially identical," except that the Model Rule provision refers to a "person" represented by a lawyer, while the Model Code provision referred to a "party" represented by a lawyer. *Id.* But see Hellman, *supra* note 6, at 351-59 (noting the significance of the difference between "person" and "party" in some circumstances). In the civil litigation context that is the subject of this Article, there is often little or no practical difference between the Model Code's reference to a represented party and the Model Rule's reference to a represented person. In litigation, although it is certainly possible for nonparty witnesses, including experts, to be represented regarding the case that is the subject of the litigation, this is rather unusual. Most represented persons in civil cases are parties. In the relatively unusual circumstance where a retained expert witness is herself represented by an attorney, an attorney representing one of the parties to the underlying case would be required to acquire the consent of the expert's attorney, but Model Rule 4.2 and DR 7-104(A)(1) still would not require the consent of the attorney retaining the expert, because that attorney would not be the one representing the expert. See *infra* note 115.

Every state has adopted some form of Model Rule 4.2 or DR 7-104, and no state has added a provision prohibiting contact with adverse expert witnesses. See ALA. RULES OF PROF'L CONDUCT R. 4.2 (1997); ALASKA RULES OF PROF'L CONDUCT R. 4.2 (2000); ARIZ. RULES OF PROF'L CONDUCT R. 4.2 (1994); ARK. RULES OF PROF'L CONDUCT R. 4.2 (2000); CAL. RULES OF PROF'L CONDUCT R. 2-100 (1999); COLO. RULES OF PROF'L CONDUCT R. 4.2 (2000); CONN. RULES OF PROF'L CONDUCT R. 4.2 (2000); DEL. RULES OF PROF'L CONDUCT R. 4.2 (1999); D.C. RULES OF PROF'L CONDUCT R. 4.2 (2000); FLA. RULES OF PROF'L CONDUCT R. 4-4.2 (1999); GA. RULES OF PROF'L CONDUCT R. 4.2 (2001); HAW. RULES OF PROF'L CONDUCT R. 4.2 (2000); IDAHO RULES OF PROF'L CONDUCT R. 4.2 (1999); ILL. RULES OF PROF'L CONDUCT R. 4.2 (2000); IND. RULES OF PROF'L CONDUCT R. 4.2 (1999); IOWA CODE OF PROF'L RESPONSIBILITY DR 7-104 (2000); KAN. RULES OF PROF'L CONDUCT R. 4.2 (1999); KY. RULES OF PROF'L CONDUCT R. 4.2 (1998); LA. RULES OF PROF'L CONDUCT R. 4.2 (1997); ME. CODE OF PROF'L RESPONSIBILITY R. 3.6(f) (1999); MD. RULES OF PROF'L CONDUCT R. 4.2 (2000); MASS. RULES OF PROF'L CONDUCT R. 4.2 (2000); MICH. RULES OF PROF'L CONDUCT R. 4.2 (1998); MINN. RULES OF PROF'L CONDUCT R. 4.2 (2000); MISS. RULES OF PROF'L CONDUCT R. 4.2 (1999); MO. RULES OF PROF'L CONDUCT R. 4-4.2 (2000); MONT. RULES OF PROF'L CONDUCT R. 4.2 (2000); NEB. CODE OF PROF'L RESPONSIBILITY DR 7-104 (2000); NEV. SUP. CT. R. 182; N.H. RULES OF PROF'L CONDUCT R. 4.2 (1999); N.J. RULES OF PROF'L CONDUCT R. 4.2 (1998); N.M. RULES OF PROF'L CONDUCT R. 16-402 (2000); N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-104 (1999); N.C. RULES OF PROF'L CONDUCT R. 4.2 (1999); N.D. RULES OF PROF'L CONDUCT R. 4.2 (1999); OHIO CODE OF PROF'L RESPONSIBILITY DR 7-104 (2000); OKLA. RULES OF PROF'L CONDUCT R. 4.2 (1998); OR. CODE OF PROF'L RESPONSIBILITY DR 7-104 (2000); PA. RULES OF PROF'L CONDUCT R. 4.2 (1998); R.I. RULES OF PROF'L CONDUCT R. 4.2 (1998); S.C. RULES OF PROF'L CONDUCT R. 4.2 (1998); S.D. RULES OF PROF'L CONDUCT R. 4.2 (1999); TENN. CODE OF PROF'L RESPONSIBILITY DR 7-104 (2000); TEX. RULES OF PROF'L CONDUCT R. 4.02 (1998); UTAH RULES OF PROF'L CONDUCT R. 4.2 (1999); VT. RULES OF PROF'L CONDUCT R. 4.2 (1999); VA. RULES OF PROF'L CONDUCT R. 4.2 (2000); WASH. RULES OF PROF'L CONDUCT R. 4.2 (1998); W. VA. RULES OF PROF'L CONDUCT R. 4.2 (1998); WIS. SUP. CT. R. 20:4.2 (2000); WYO. RULES OF PROF'L CONDUCT R. 4.2 (1997).

The Ethics 2000 Commission that proposed possible changes in the Model Rules suggested changing the last phrase in Model Rule 4.2 from the current "or is authorized by law to do so" to "or is authorized to do so by law or a court order." MODEL RULES OF PROF'L CONDUCT R. 4.2 (Final Draft Nov. 2000), <http://www.abanet.org/cpr/e2k-rule42.html> [hereinafter MODEL

expert witnesses.¹¹¹ Indeed, neither Model Rule 4.2¹¹² nor any other Model Rules provision¹¹³ prohibits contact with nonparty witnesses.¹¹⁴ In most circumstances, expert witnesses are working with and for attorneys, but they are not parties who are represented by attorneys.¹¹⁵ Therefore, as long as the expert is not a represented party,¹¹⁶ the Model Rules do not contain any

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111. With one exception, the Model Rules do not distinguish between fact and expert witnesses. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208 ("No Model Rule . . . explicitly treats expert witnesses differently from fact witnesses.").

The one provision of the Model Rules that does result in a distinction between the treatment of experts and the treatment of fact witnesses is Model Rule 3.4(b), which provides that a lawyer cannot offer "an inducement to a witness that is prohibited by law." MODEL RULES, *supra* note 8, R. 3.4(b). State law generally bans payments other than standard appearance fees and expenses for fact witnesses, but experts can receive more substantial fees, often paid on an hourly basis, as long as the fees are not contingent upon the outcome of a case. *See id.* R. 3.4 cmt. [3]; J. Anthony McLain, *Payment of Expert and Lay Witnesses*, ALA. LAW., Jan. 1998, at 55; Curtright C. Truitt, *The Rising Cost of Discovery from Expert Witnesses: Problems and Solutions*, FLA. B.J., Mar. 2000, at 89, 90.

112. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208-:209 ("Rule 4.2 only prohibits a lawyer from communicating with a party who is represented by another lawyer in the matter without consent. No Model Rule extends this protection to witnesses . . .").

113. The recent *Restatement* similarly does not prohibit contact with expert witnesses, except when they are represented by counsel. *See* RESTATEMENT, *supra* note 101, § 99. In relevant part, the *Restatement* provides, "A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100 . . ." *Id.* § 99(1).

114. Courts and other ethics authorities have repeatedly found that ex parte communications with fact witnesses are permissible. *See, e.g.,* *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, 1293 (E.D. Mo. 1997), *aff'd*, 132 F.3d 1252 (8th Cir. 1998); *Felder v. Wyman*, 139 F.R.D. 85, 91 (D.S.C. 1991) ("Private interviews by attorneys have been recognized as a 'time-honored' method for conducting discovery."); *McKitty v. Bd. of Educ., Nyack Union Free Sch. Dist.*, No. 86 Civ. 3176 (PKL), 1987 WL 28791, at *4 (S.D.N.Y. Dec. 16, 1987); *Amarin Plastics, Inc. v. Md. Cup Corp.*, 116 F.R.D. 36, 40 (D. Mass. 1987) (noting that even a "critical" witness may be interviewed ex parte); *Trans-World Invs. v. Drobny*, 554 P.2d 1148, 1151 (Alaska 1976); *Domako v. Rowe*, 475 N.W.2d 30, 35 (Mich. 1991) (referring to ex parte interviews as "routine practice"); *Flamma v. Atlantic City Fire Dep't*, 573 A.2d 158, 161 (N.J. 1990); *Ethics Digest*, PA. LAW., Sept. 1994, at 10, ¶ 94-48; *see also* Hodes, *supra* note 103, at 87 (stating that fact witnesses can be contacted ex parte); Lillehaug, *supra* note 88, at 446; McMoran, *supra* note 88, at 995, 998.

115. *See* Lubet, *supra* note 25, at 485 ("Retaining counsel is not the [expert] witness's lawyer. . . . Since the expert is not a party to the case, the expert is not represented by either of the attorneys.").

116. If the witness is both an expert and an employee of the opposing party, Rule 4.2 may treat her as a represented party and therefore prohibit an attorney from contacting her without the consent of the opposing party's counsel. Ex parte contact is not allowed when the contacted employee is a manager, agent, or a member of the group that controls or is able to bind the

represented party. MODEL RULES, *supra* note 8, R. 4.2 cmt. [4]. The comment states:

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.

Id.; see also *O'Keefe*, 961 F. Supp. at 1292 (opposing counsel cannot contact employees "whose acts or omissions could be imputed to the organization for purposes of civil liability"); *McKitty*, 1987 WL 28791, at *1-*4; *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514 (Ky. 1994) (attorney disqualified for obtaining sworn statements from managers for potentially adverse corporation); *Dent v. Kaufman*, 406 S.E.2d 68, 72 (W. Va. 1991) (allowing nonmanagerial employees to be informally interviewed); Mo. Chief Disciplinary Counsel, Informal Op. 960085 (1997), summarized in [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 1101:5227 (2000) [hereinafter ABA/BNA Manual]; Hodes, *supra* note 103, at 87. The Ethics 2000 Commission has proposed the following change to the language in the relevant comment to Model Rule 4.2:

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.

MODEL RULES (Final Draft), *supra* note 110, R. 4.2 cmt. [7], <http://www.abanet.org/cpr/e2k-rule42.html>.

If the witness is a former employee of the opposing party, rather than a current employee, the permissibility of ex parte contact is unclear. *Amarin*, 116 F.R.D. at 39. Some ethics authorities have determined that restrictions on contact with managers, agents, and control group members are essentially the same for former and current employees. Kan. Bar Ass'n Ethics/Advisory Servs. Comm., Op. 92-07 (1992), discussed in ABA/BNA Manual 1991-1995 Ethics Opinions, *supra* note 11, at 1001:3803; Mo. Chief Disciplinary Counsel, Informal Op. 960085 (1997), summarized in ABA/BNA Manual, *supra*, at 1101:5227; Mo. Chief Disciplinary Counsel, Informal Op. 960099 (1997), summarized in ABA/BNA Manual, *supra*, at 1101:5227; S.C. Bar Ethics Advisory Comm., Op. 97-36 (1997), summarized in ABA/BNA Manual, *supra*, at 1101:7906; S.C. Bar Ethics Advisory Comm., Op. 92-31 (1992), discussed in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7911. However, other ethics authorities have reached the opposite determination. In their view, once a person leaves the employment of a party, any restrictions related to her former status as an employee end and attorneys are free to contact her to discuss nonprivileged matters. *Valassis v. Samelson*, 143 F.R.D. 118 (E.D. Mich. 1992); *West Virginia ex rel. Charleston Area Med. Ctr. v. Zakaib*, 437 S.E.2d 759, 763 (W. Va. 1993) (finding that former employees are distinguishable from current employees, because former employees cannot bind the corporation with their statements); Alaska Bar Ass'n Ethics Comm., Op. 88-3 (1988), summarized in [1986-1990 Ethics Opinions] Laws. Man. on Prof. Conduct (ABA/BNA) 901:1303 (1991) [hereinafter ABA/BNA Manual, 1986-1990 Ethics Opinions]; Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 96-1 (1996), summarized in ABA/BNA Manual, *supra*, at 1101:6851; Va. State Bar Standing Comm. on Legal Ethics, Op. 1670 (1996), summarized in ABA/BNA Manual, *supra*, at 1101:8707; see also Hodes, *supra* note 103, at 86-87 (discussing ex parte contact with former employees). Under the comment to Model Rule 4.2 proposed by the Ethics 2000 Commission, attorneys would be allowed to communicate ex

provision that expressly prohibits an adverse attorney from contacting her.¹¹⁷

B. Bans on Ex Parte Communications: Flawed Reasoning

Despite the absence of any such prohibition, a United States Court of Appeals,¹¹⁸

parte with former agents and employees. MODEL RULES (Final Draft), *supra* note 110, R. 4.2 cmt. [7] (“Consent of the organization’s lawyer is not required for communication with a former constituent.”), <http://www.abanet.org/cpr/e2k-rule42.html>; *see also* RESTATEMENT, *supra* note 101, §§ 99, 100; Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 770-81 (1997) (discussing the *Restatement* and related subjects).

Ethics authorities are also split regarding whether attorneys can contact employees of government agencies. There is some support for the proposition that government agency employees can be contacted *ex parte*, because citizens have the right to petition their government. Ky. Bar Ass’n Ethics Comm., Op. 332 (1988), *summarized in* ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra*, at 901:3905 (attorney representing government agency may not impede opposing counsel’s efforts to contact agency employees). Other ethics authorities have opined that restrictions upon contact with a represented party’s managers, control-group members, and agents apply to represented government agencies. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 (1997), *reprinted in* ABA/BNA Manual, *supra*, at 1101:139, :143; *cf.* Ass’n of the Bar of the City of N. Y. Comm. on Prof’l and Judicial Ethics, Formal Op. 1988-8 (1988) (opining that attorney must notify opposing agency’s attorney and provide her with copies when submitting comments to head of agency), *discussed in* ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra*, at 901:6409. For discourse regarding contact with government employees, *see* RESTATEMENT, *supra* note 101, §§ 99, 101; ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 (1997); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics, Formal Op. 1991-4 (1991), *discussed in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:6401-02.

117. John Freeman, *Ex Parte Contacts with Potential Witnesses*, S.C. LAW., Mar./Apr. 1997, at 11 (“No express ethical rule prohibits *ex parte* contact with the other side’s expert witness.”); *cf.* Woodruff v. Tomlin, 593 F.2d 33, 42 (6th Cir. 1979) (“[Attorney malpractice defendant] Tomlin did not even interview Col. Dawson, claiming it would be unethical for him to interview defendant’s expert witness. We see nothing unethical for a lawyer to interview a state police officer.”).

118. On three occasions, three-judge panels of the Ninth Circuit have held that *ex parte* contact with an adverse expert is impermissible. Two of these opinions remain final decisions. Erickson v. Newmar Corp., 87 F.3d 298, 302 (9th Cir. 1996); Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980). The third decision was withdrawn after it was initially entered, upon the panel’s determination that the district court order appealed from was not a final judgment and therefore not subject to appellate review. Am. Prot. Ins. Co. v. MGM Grand Hotel—Las Vegas, Inc., 765 F.2d 925 (9th Cir. 1985), *withdrawing* 748 F.2d 1293 (9th Cir. 1984); *cf.* Alaska Bar Ass’n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *1 & n.1 (summarizing original Ninth Circuit opinion in *MGM Grand*).

Another circuit reached a similar result in a case involving an expert that had been identified as a “probable witness.” Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984). However, the Tenth Circuit’s holding rested upon a finding that, despite a party’s listing of the expert as a probable witness, the expert was a nontestifying consultant for purposes of Rule 26. *See id.* Therefore, the Tenth Circuit case probably should be considered a “consultant only” decision that is outside the scope of this Article. *See supra* note 25.

A third circuit indicated that it was “troubled” by *ex parte* contact. Koch Ref. Co. v. Jennifer

a state supreme court,¹¹⁹ two state appellate courts,¹²⁰ and two state bar¹²¹ ethics committees¹²² have determined that any attempt to contact experts retained by the opposing party outside of formal discovery is improper.¹²³ In addition, no less an ethics authority¹²⁴ than the ABA Standing Committee on Ethics and Professional Responsibility has suggested that, in some circumstances, these determinations are correct.¹²⁵ Two prominent legal ethics scholars concurred in their leading

L. Boudreaux MV, 85 F.3d 1178, 1183 (5th Cir. 1996).

119. *In re Firestorm*, 916 P.2d 411, 419 (Wash. 1996) (holding that attorney's ex parte interview with expert who consulted with opposing counsel was impermissible, but reversing sanction of disqualification of counsel and remanding to trial court for determination of an appropriate remedy).

120. *Shadow Traffic Network v. Superior Court*, 29 Cal. Rptr. 2d 693, 699 (Cal. Ct. App. 1994); *Heyde v. Xtraman, Inc.*, 404 S.E.2d 607, 611 (Ga. Ct. App. 1991).

121. Most state bar associations, and even some local bar associations, have ethics committees that are responsible for issuing advisory opinions concerning ethical issues. See Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 69 n.4 (1981) (explaining the work of state and local bar ethics committees); Hellman, *supra* note 6, at 324-25.

122. Alaska Bar Ass'n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273; Or. State Bar Legal Ethics Comm., Op. 530 (1990), summarized in ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106; see also Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 96-6 (1996) (finding that it is acceptable for an attorney to write an adverse expert a letter outlining his client's position, as long as the attorney did not seek information from the expert), summarized in ABA/BNA Manual, *supra* note 116, at 1101:2025.

The Oregon committee initially determined, categorically, that ex parte contact with adverse experts in all civil cases was impermissible. See Or. State Bar Legal Ethics Comm., Op. 530 (1990); accord Or. State Bar Ass'n Bd. of Governors, Formal Op. 1991-118 (1991), superceded by Or. State Bar Legal Ethics Comm., Formal Op. 1992-132 (1992). Two years later, the Oregon committee revised and refined this position by stating that ex parte contact was impermissible in federal civil cases, but not in state civil cases. Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 3-4 (1992), summarized in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122; accord Or. State Bar Legal Ethics Comm., Formal Op. 1998-154 (1998), 1998 WL 717729, at *1-*2 (ex parte contact allowed in state worker's compensation case, but not allowed under the Federal Rules of Civil Procedure); see also *infra* note 219.

123. Lubet, *supra* note 25, at 473, 480 ("[T]he majority view is that such contacts are prohibited in the case of . . . testifying experts.").

124. Finman & Schneyer, *supra* note 121, at 71 ("The country's most important ethics committee is the ABA Standing Committee on Ethics and Professional Responsibility . . ."); Hellman, *supra* note 6, at 325 ("Because most states' ethics rules are derived from an ABA-promulgated document, either the Model Rules or the Model Code, state ethics authorities frequently rely on the ABA Ethics Committee's construction of the rules.").

125. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), reprinted in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, -209. At least one state ethics authority has reached a conclusion similar to that of the ABA committee. See Mo. Chief Disciplinary Counsel, Informal Op. 960286 (1997), summarized in ABA/BNA Manual, *supra* note 116, at 1101:5235.

In their important article regarding the work of the ABA committee, Professors Ted Finman

professional responsibility handbook.¹²⁶

Although these determinations are not universally accepted,¹²⁷ their existence is

and Theodore Schneyer bemoan the lack of scholarly criticism of the committee's opinions and the committee's resultant lack of accountability for rendering opinions inconsistent with the ethics rules it is charged with interpreting. *See* Finman & Schneyer, *supra* note 121, at 150, *discussed in* Hellman, *supra* note 6, at 334. In a small way, this Article attempts to respond to this challenge by highlighting an ABA committee opinion that misconstrues the Model Rules. Because it also critiques the opinions of state bar ethics committees, it also responds in a small way to the observation by Professors Finman and Schneyer that the work of all ethics committees has been "largely neglected" by scholars. *See* Finman & Schneyer, *supra* note 121, at 70-71.

126. *See* I GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 3.4:402, at 637-38 (2d ed. Supp. 1998).

Although this Article disagrees with the opinion of Professor Hazard and Mr. Hodes regarding the permissibility of ex parte communications with expert witnesses, it concurs in and relies upon Mr. Hodes's more general views about a lawyer's duties to engage in conduct beneficial to her clients. *See infra* note 202.

127. *See* Lubet, *supra* note 25, at 473, 480.

At least two state bar ethics committees have determined that attorneys may communicate ex parte with experts retained by their adversaries. *See* Md. State Bar Ass'n Comm. on Ethics, Op. 85-29 (1984), *summarized in* [1980-1985 Ethics Opinions] *Laws. Man. on Prof. Conduct (ABA/BNA) 801:4352* (1986) [hereinafter *ABA/BNA Manual, 1980-1985 Ethics Opinions*]; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 577 (1986), 1986 WL 68786, at *1; *accord* Pa. Bar Ass'n Legal Ethics and Prof'l Responsibility Comm., Informal Op. 99-30 (1999), 1999 WL 516432, at *2 ("In the event the mediator is deemed, however, to be wife's expert witness, there also does not appear to be any express prohibition in contacting the expert witness of an opposing party, directly."). *But see* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 577 (1986), 1986 WL 68786, at *2 (declining to render an opinion regarding whether ex parte contact was prohibited by New York or federal discovery rules).

In Wisconsin, the State Bar Committee on Ethics originally determined that ex parte contact is permissible, but later revised this determination to reflect a judicial decision that prohibited ex parte contact with treating physicians. *Compare* Wis. State Bar Comm. on Prof'l Ethics, Op. E-83-13 (1983), *summarized in* *ABA/BNA Manual, 1980-1985 Ethics Opinions, supra*, at 801:9110, *with* Wis. State Bar Comm. on Prof'l Ethics, Op. E-91-4 (1991), *summarized in* *ABA/BNA Manual, 1991-1995 Ethics Opinions, supra* note 11, at 1001:9101. *But see* Terry E. Nilles, *Ex Parte Contacts with Expert Witnesses*, *WIS. LAW.*, Dec. 1994, at 18, 20. Mr. Nilles contends:

In Wisconsin, and in most other jurisdictions, the lack of an express ethical prohibition on ex parte contacts with an adversary's expert should not be viewed as an invitation to engage in such activities. Discovery rules will prohibit such contacts in most cases and violating those discovery rules usually will constitute an ethical violation. Even if the discovery rules permit the contact, an attorney is likely to violate other ethical rules unless extreme caution is exercised.

Id.

In Virginia, the Standing Committee on Legal Ethics discussed ex parte contact by attorneys in an opinion that directly addressed the issue of whether an attorney could retain an expert from the same medical firm as the opposing expert and, if so, whether the attorney would be required to instruct the expert not to cause the opposing expert to withdraw from the case. *See* Va. State Bar Standing Comm. on Legal Ethics, Op. 1678 (1996), *summarized in* *ABA/BNA*

enough to give an ethical trial attorney serious concern about the propriety of any attempt to contact retained adverse experts.¹²⁸ This concern is magnified by the severity of sanctions imposed against attorneys who contacted adverse experts *ex parte*.¹²⁹ Three courts excluded expert testimony as a sanction for an attorney's *ex parte* contact.¹³⁰ The Ninth Circuit reversed a judgment because an attorney engaged in an *ex parte* conversation with an adverse expert, then remanded the case for retrial and for a determination of sanctions to be entered against the contacting attorney.¹³¹ A California state court disqualified not just the attorneys who made *ex parte* contact with experts, but their entire law firm, even though the contacted expert was not even retained by opposing counsel, but instead was merely interviewed as a potential expert in a one-hour meeting.¹³² Given these decisions, an ethical trial attorney who

Manual, *supra* note 116, at I101:8703. In a statement that would be considered *dicta* in a court opinion, because it did not directly decide the issues before the committee, the committee said, "That is not to say . . . that a lawyer is barred from interviewing witnesses where permissible . . ." *Id.* at 2.

Finally, a widely consulted but now somewhat out-of-date professional responsibility hornbook suggests that "the general view [is] that it is permissible for an advocate to contact without consent an expert witness retained by an adversary." WOLFRAM, *supra* note 58, § 12.4.6, at 652-53. However, this hornbook was written before several of the cases and ethics committee opinions cited in this Article. To support his conclusion about the "general view," Professor Wolfram cited an ethics canon written in 1908 and a 1929 ABA formal opinion. *See id.* at 653 n.31. While Professor Wolfram's statement is consistent with the position advocated in this Article, his assessment that this position reflects the "general view," while presumably accurate at the time it was published, is now out of date.

128. Even in a jurisdiction where an ethics committee has determined that an attorney can contact adverse experts *ex parte*, a trial attorney cannot make such contacts without risking a later finding that the contacts were unethical. In Alaska, the Bar Association Ethics Committee initially concluded that *ex parte* contact with adverse experts was permissible. *See Alaska Bar Ass'n Ethics Comm., Op. 84-8 (1984), summarized in ABA/BNA Manual, 1980-1985 Ethics Opinions, supra* note 118, at 801:1203. After the Ninth Circuit's decisions to the contrary, *see supra* note 118 and accompanying text, the ethics committee reconsidered its finding, and issued an opinion stating that *ex parte* contact with adverse experts is unethical. *See Alaska Bar Ass'n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *2* ("[U]pon reconsideration in light of subsequent events, Ethics Opinion 84-8 is vacated. *Ex parte* contacts should not be made with expert witnesses retained by an opposing counsel or party."). Therefore, the existence of holdings by courts and other ethics authorities disallowing *ex parte* contact with adverse experts could significantly chill a trial attorney's enthusiasm for making such contacts, even if the attorney can point to a finding allowing such contacts in her jurisdiction.

129. *Cf. Lubet, supra* note 25, at 473 ("At the extreme, unauthorized contact with an adverse party's expert may be considered witness tampering, perhaps leading to disqualification of the lawyer or witness, or other sanctions.").

130. *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1183 (5th Cir. 1996); *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 26 (9th Cir. 1980); *Heyde v. Xtraman, Inc.*, 404 S.E.2d 607, 611-12 (Ga. Ct. App. 1991). In each of these cases, the excluded expert was initially retained by the attorney's adversary, but the contacting attorney later wished to call the witness at trial. Except for *ex parte* communications matters, issues related to "side switching" experts are beyond the scope of this Article. *See supra* note 25.

131. *Erickson v. Newmar Corp.*, 87 F.3d 298, 304 (9th Cir. 1996).

132. *Sbadow Traffic Network v. Superior Court*, 29 Cal. Rptr. 2d 693 (Cal. Ct. App. 1994).

undertakes even a preliminary cost-benefit analysis¹³³ ordinarily will not be willing to risk the adverse consequences that could result from an effort to contact an expert retained by her opponent.¹³⁴

An examination of the determinations forbidding such contact reveals that they are based upon a flawed reading of the rules of discovery, an overemphasis on confidentiality concerns that are best addressed by other means, and an implicit belief that an expert's loyalty to one party supercedes the search for truth.

Other courts have reached similar results, though these results have not survived the appellate process. The Ninth Circuit originally held that a law firm could be disqualified for engaging in *ex parte* contacts, but later withdrew its opinion on the ground that the order of disqualification was not appealable. *See Am. Prot. Ins. Co. v. MGM Grand Hotel—Las Vegas, Inc.*, 765 F.2d 925 (9th Cir. 1985), *withdrawing* 748 F.2d 1293 (9th Cir. 1984); Alaska Bar Ass'n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *1 (summarizing original Ninth Circuit opinion in *MGM Grand*); 1 HAZARD & HODES, *supra* note 126, § 3.4:402 n.1.1 (noting that the "offending lawyers" in the *MGM Grand* case were disqualified). The withdrawal of the initial Ninth Circuit opinion provided precious little comfort to the law firm, because the order that was left intact disqualified it from representing its client. For other attorneys, the original opinion's statement that trial courts should resolve doubts in favor of disqualification, *see* Alaska Bar Ass'n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *1, may chill any desire they would otherwise have to engage in *ex parte* contact.

In a Washington case, the trial court disqualified an attorney who engaged in an *ex parte* interview with an expert who had previously consulted with the attorney's adversary, even though the expert initiated the contact and the attorney advised his adversary of the interview the day after it occurred and provided the adversary a transcript of the interview. *In re Firestorm*, 916 P.2d 411, 412-13 (Wash. 1996). On appeal, the Washington Supreme Court affirmed the trial court's determination that the *ex parte* contact was impermissible, but reversed the disqualification of the attorney and remanded for a determination of the appropriate sanction. *Id.* at 419. Although the reversal of the disqualification sanction was undoubtedly welcomed by the attorney, he had to endure an appeal to acquire this result, and he faced sanctions even after obtaining the reversal of his disqualification. Given these results in a case where the expert initiated the contact with the attorney, it is unlikely that a Washington attorney or an attorney in another jurisdiction who was aware of this decision would be willing to initiate *ex parte* contact with an expert.

133. An analysis of the risks and potential benefits associated with contacting adverse experts should factor in the reality that *ex parte* contact with an adverse expert will sometimes result in the acquisition of little or no new information. *See infra* notes 350-56 and accompanying text. Given the often limited probability of substantial gain from *ex parte* contact, the potential costs in the form of sanctions will often lead to a decision not to attempt such contact. When the costs can be as severe as removal from the case in a published opinion impugning the integrity of the attorney, *see supra* notes 129-32 and accompanying text, few attorneys will be bold enough to attempt contact. Therefore, the current state of the law, although it is not unanimous, acts as a major deterrent to *ex parte* communications.

134. *See* Freeman, *supra* note 117, at 11 (warning lawyers not to attempt to communicate *ex parte* with adverse experts, because such attempts could result in charges of witness tampering and sanctions). *But cf.* Hodes, *supra* note 63, at 1366 ("Professional lawyers must not only have the courage to make hard and close choices, but also the courage to stand up for the choices that they made.").

1. The "Discovery as the Sole Source of Expert Information" Supposition

As noted above,¹³⁵ the Model Rules explicitly identify the persons that an attorney cannot contact outside the presence of opposing counsel. Indeed, an entire rule is dedicated to this subject. Model Rule 4.2 prohibits an attorney from contacting persons who are represented by counsel,¹³⁶ but it does not prohibit an attorney from contacting adverse expert witnesses.¹³⁷ Many states have adopted this rule, sometimes with some revisions but always without provisions prohibiting ex parte contact with adverse expert witnesses.¹³⁸ In the absence of provisions adding expert witnesses to Model Rule 4.2's list of persons who cannot be contacted, which this Model Rule's drafters could have easily included if they intended to ban ex parte contact with expert witnesses,¹³⁹ this Model Rule does not ban such contact.

a. The Search for a Nonexistent Prohibition

Because the Model Rules' explicit outline of "off limits" persons does not prohibit ex parte contact with adverse experts, those who seek to prohibit ex parte contact with experts must try to find some other, less directly applicable, provision of the Model Rules to support their position.¹⁴⁰ This search for an arguably applicable rule has

135. See *supra* notes 110-14 and accompanying text.

136. MODEL RULES, *supra* note 8, R. 4.2.

137. ABA/BNA Manual, *supra* note 116, at 61:717. The authors state:

Model Rule 4.2 prohibits ex parte interviews with witnesses who are represented by counsel, but the Model Rules do not extend the protection against ex parte interviews to witnesses who are not represented by counsel. Therefore, ex parte communications between a lawyer and an opposing party's expert generally do not violate Rule 4.2.

Id.

138. See *supra* note 110.

139. The predecessor to the Model Rules, the ABA's Model Code of Professional Responsibility ("Model Code"), did include provisions that explicitly referred to expert witnesses. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-28, DR 7-109(C)(3) (1983) [hereinafter MODEL CODE]. In addition, the comments to one of the Model Rules also make specific reference to expert witnesses. See MODEL RULES, *supra* note 8, R 3.4 cmt. [3]. Therefore, those who drafted Model Rule 4.2 were certainly aware of how to draft a model rule or comment provision that covered expert witnesses when they so desired.

140. Unfortunately, this effort by ethics authorities to try to stretch an inapplicable provision of ethics law beyond its provisions is not unique or even particularly unusual. Almost two decades ago, Professors Finman and Schneyer studied opinions by the ABA Standing Committee on Ethics and Professional Responsibility and found that on seven occasions the committee essentially determined that the ethics rules (from the then-prevalent Model Code) the committee was interpreting "did not actually mean what they said." Hellman, *supra* note 6, at 333 (summarizing Finman & Schneyer, *supra* note 121). In his update of this study, Dean Hellman thoroughly analyzed four such instances and observed:

[T]he last fifteen years have not witnessed any decrease in the Committee's penchant for concluding that the words used in the influential model codes do not always mean what they say. The Committee is still producing opinions that, rather

focused upon Model Rule 3.4(c), which states that a lawyer shall not “knowingly disobey an obligation under the rules of a tribunal.”¹⁴¹ The professional responsibility authorities who maintain that *ex parte* contact is unacceptable¹⁴² often claim to be basing this determination upon this prohibition or its predecessors.¹⁴³

than engaging in a straightforward exercise of interpretation according to accepted canons of statutory construction, set forth the Committee’s view of what the rules *should say or were meant to say.*

Hellman, *supra* note 6, at 334 (emphasis in original).

141. Model Rule 3.4(c) provides, “A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.” MODEL RULES, *supra* note 8, R. 3.4(c).

An *ex parte* contact, by its very nature, will not ordinarily involve an “open” assertion that a right to an *ex parte* contact exists, because such an assertion would often destroy the opportunity to make the *ex parte* contact. An attorney who advised her adversary that she planned to contact an expert witness *ex parte* because she thought she had the right to do so would be announcing her intention to make the contact. In many instances, the opposing attorney would immediately instruct her expert not to discuss the case with the attorney who planned to make the contact. *See Hodes, supra* note 103, at 87; *infra* notes 341-45 and accompanying text (discussing an attorney’s right to advise her experts not to discuss matters with opposing counsel).

142. *Erickson v. Newmar, Corp.*, 87 F.3d 298, 301 & n.4 (9th Cir. 1996) (applying the Nevada version of Model Rule 3.4(c)); Or. State Bar Legal Ethics Comm., Op. 530 (1990) (applying Oregon DR 7-106(C)(7), which provided, “[i]n appearing in the lawyer’s professional capacity before a tribunal, a lawyer shall not . . . [i]ntentionally or habitually violate any established rule of procedure or of evidence”), *summarized in* ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106; Nilles, *supra* note 127, at 19 (“As the ABA opinion notes, ABA Model rule 3.4(c) prohibits a lawyer from knowingly and secretly violating the rules of a tribunal.”); *cf.* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208 (“Rule 3.4(c) requires a lawyer to conform to the rules of a tribunal before which a particular matter is pending, and it is under this Rule that the matter of expert witnesses comes into particular focus.”).

143. The Model Code contained a “substantially similar” provision, DR 7-106(A). *See* MODEL RULES, *supra* note 8, R. 3.4, Model Code Comparison; MODEL CODE, *supra* note 139, DR 7-106(a) (“A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.”).

Every state has adopted some form of Model Rule 3.4 or Disciplinary Rule 7-106. *See* ALA. RULES OF PROF’L CONDUCT R. 3.4 (1997); ALASKA RULES OF PROF’L CONDUCT R. 3.4(c) (2000); ARIZ. RULES OF PROF’L CONDUCT R. 3.4 (1994); ARK. RULES OF PROF’L CONDUCT R. 3.4 (2000); CAL. RULES OF PROF’L CONDUCT R. 5-200 (1999); COLO. RULES OF PROF’L CONDUCT R. 3.4 (2000); CONN. RULES OF PROF’L CONDUCT R. 3.4 (2000); DEL. RULES OF PROF’L CONDUCT R. 3.4 (1999); D.C. RULES OF PROF’L CONDUCT R. 3.4 (2000); FLA. RULES OF PROF’L CONDUCT R. 4-3.4 (1999); GA. RULES OF PROF’L CONDUCT R. 3.4 (2001); HAW. RULES OF PROF’L CONDUCT R. 3.4 (2000); IDAHO RULES OF PROF’L CONDUCT R. 3.4 (1999); ILL. RULES OF PROF’L CONDUCT R. 3.4 (2000); IND. RULES OF PROF’L CONDUCT R. 3.4 (1999); IOWA CODE OF PROF’L RESPONSIBILITY DR 7-106 (2000); KAN. RULES OF PROF’L CONDUCT R. 3.4 (1999); KY. RULES OF PROF’L CONDUCT R. 3.4 (1998); LA. RULES OF PROF’L CONDUCT R. 3.4 (1997); ME. CODE OF PROF’L RESPONSIBILITY R. 3.6(d) (1999); MD. RULES OF PROF’L CONDUCT R. 3.4 (2000); MASS. RULES OF PROF’L CONDUCT R. 3.4 (2000); MICH. RULES OF

Following this reasoning to its core, one would expect that there is some court rule stating that attorneys cannot make *ex parte* contact with adverse expert witnesses. Except in one state,¹⁴⁴ no such rule exists. None of the courts that have outlawed *ex parte* contact, or the ethics authorities that have found such contact impermissible have been able to quote a rule stating that attorneys cannot contact adverse experts without notifying opposing counsel.¹⁴⁵

b. Stretching Discovery Rules Beyond Recognition

Instead, these decisionmakers have been forced to try to expand provisions of discovery rules that say nothing whatsoever about what contacts an attorney can make outside the formal discovery process. This attempted expansion has stretched the formal discovery rules well beyond their proper scope.

Trial-team-model advocates have focused their efforts upon the pre-1993 version of the federal expert witness formal discovery rules and upon identical or similar state provisions. Prior to the amendment of the Federal Rules of Civil Procedure in 1993, Rule 26(b)(4)'s provisions regarding formal discovery of certain information regarding testifying experts stated:

Trial Preparation: [E]xperts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

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

PROF'L CONDUCT R. 3.4 (1998); MINN. RULES OF PROF'L CONDUCT R. 3.4 (2000); MISS. RULES OF PROF'L CONDUCT R. 3.4 (1999); MO. RULES OF PROF'L CONDUCT R. 4-3.4 (2000); MONT. RULES OF PROF'L CONDUCT R. 3.4 (2000); NEB. CODE OF PROF'L RESPONSIBILITY DR 7-106 (2000); NEV. SUP. CT. R. 173; N.H. RULES OF PROF'L CONDUCT R. 3.4 (1999); N.J. RULES OF PROF'L CONDUCT R. 3.4 (1998); N.M. RULES OF PROF'L CONDUCT R. 16-304 (2000); N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-106 (1999); N.C. RULES OF PROF'L CONDUCT R. 3.4 (1999); N.D. RULES OF PROF'L CONDUCT R. 3.4 (1999); OHIO CODE OF PROF'L RESPONSIBILITY DR 7-106 (2000); OKLA. RULES OF PROF'L CONDUCT R. 3.4 (1998); OR. CODE OF PROF'L RESPONSIBILITY DR 7-106 (2000); PA. RULES OF PROF'L CONDUCT R. 3.4 (1998); R.I. RULES OF PROF'L CONDUCT R. 3.4 (1998); S.C. RULES OF PROF'L CONDUCT R. 3.4 (1998); S.D. RULES OF PROF'L CONDUCT R. 3.4 (1999); TENN. CODE OF PROF'L RESPONSIBILITY DR 7-106 (2000); TEX. RULES OF PROF'L CONDUCT R. 3.04 (1998); UTAH RULES OF PROF'L CONDUCT R. 3.4 (1999); VT. RULES OF PROF'L CONDUCT R. 3.4 (1999); VA. RULES OF PROF'L CONDUCT R. 3.4 (2000); WASH. RULES OF PROF'L CONDUCT R. 3.4 (1998); W. VA. RULES OF PROF'L CONDUCT R. 3.4 (1998); WIS. SUP. CT. R. 20:3.4; WYO. RULES OF PROF'L CONDUCT R. 3.4 (1997).

The Ethics 2000 Commission did not propose any changes to the text of Model Rule 3.4. See MODEL RULES (Final Draft), *supra* note 110, R. 3.4, <http://www.abanet.org/cpr/e2k-rule34.html>.

144. See *infra* notes 197-98 and accompanying text.

145. See *supra* notes 118-20.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.¹⁴⁶

Before 1993, many states first adopted formal discovery rules patterned after the Federal Rules of Civil Procedure, and several states still have formal expert witness discovery provisions that parallel the "pre-1993" version of Federal Rule 26(b)(4) quoted above.¹⁴⁷ As a result, if the pre-1993 formal discovery provisions quoted above somehow prohibit *ex parte* contact, that prohibition would remain intact in several states.

Trial-team-model advocates have seized upon the rule's declaration that "[d]iscovery . . . may be obtained only" through the specified means, which consist

146. FED. R. CIV. P. 26(b)(4), 28 U.S.C. app. (1992) (amended 1993) (emphasis omitted), quoted in 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 14-15 (2d ed. 1994).

147. The 1993 amendments to the Federal Rules of Civil Procedure resulted in several changes regarding expert witnesses. See *infra* notes 203-07 and accompanying text. These amendments eliminated the language in pre-1993 Rule 26(b)(4) cited in the text regarding discovery of expert witness information and replaced it with a provision granting parties the right to depose expert witnesses. See FED. R. CIV. P. 26(b)(4)(A). In addition, the 1993 amendments require parties to disclose certain information regarding experts without waiting for their opponents to issue requests for this information. See FED. R. CIV. P. 26(a)(2).

The states have not universally embraced the 1993 changes. Several states retain expert witness discovery provisions that mirror the pre-1993 versions of Federal Rules 26(a) and 26(b)(4). See ALA. R. CIV. P. 26(a), (b)(4); ARK. R. CIV. P. 26(a), (b)(4); DEL. CT. C.P.R. 26(a), (b)(4); D.C. SCR-CIVIL 26(a), (b)(4); GA. CODE ANN. § 9-11-26(a), (b)(4) (Supp. 1998); HAW. R. CIV. P. 26(a), (b)(4); I.R.C.P. 26(a), (b)(4) (Idaho); IND. R. CIV. P. 26(a), (b)(4); KY. R. CIV. P. 26.02(1), (4); ME. R. CIV. P. 26(a), (b)(4); MASS. R. CIV. P. 26(a), (b)(4); MINN. R. CIV. P. 26.02(a), (d); M.R.C.P. 26(a), (b)(4) (Mississippi); MONT. R. CIV. P. 26(a), (b)(4); NEB. R. CIV. P. 26(a), (b)(4); N.H. R. CIV. P. 35(a), (b)(3); N.M. R. CIV. P. 1-026(A), (B)(5); N.C. R. CIV. P. 26(a), (b)(4); OHIO R. CIV. P. 26(A), (B)(4); PA. R.C.P. 4003.5; SUPER. R. CIV. P. 26(a), (b)(4) (Rhode Island); S.D. RCP § 15-6-26(a), (b)(4); UTAH R. CIV. P. 26(a), (b)(4); VA. R. CIV. P. 4:1(a), (b)(4).

A few states have adopted the 1993 amendments to Federal Rules 26(a)(2) and 26(b)(4). See ALASKA R. CIV. PROC. 26(a)(2), (b)(4); CAL. CIV. PROC. CODE § 2034 (West 1998); C.R.C.P. 26(a)(2), (b)(4) (Colorado); WASH. R. CIV. P. 26(a), (b)(4).

Some jurisdictions have provisions that track some, but not all, of the 1993 amendments to Federal Rules 26(a)(2) and 26(b)(4). Most of these jurisdictions allow depositions of expert witnesses as in Federal Rule 26(b)(4), but do not require expert witness reports as in Federal Rule 26(a)(2). See ARIZ. ST. R. C. P. 26(a), (b)(4); CONN. R. CIV. P. §§ 13-2, 13-4; FLA. R. CIV. P. 1-280(a), (b)(4); IOWA R. CIV. P. 125; KAN. STAT. ANN. § 60-226(a), (b)(5) (West 1997); LA. CODE CIV. PROC. ANN. art. 1422, 1425 (West 1998); MD. RULE 2-401(a), (e); M. C. R. 2.302(A), (B)(4) (Michigan); MO. R. CIV. P. 56.01(a), (b)(4); N.J. R. CIV. P. 4:10-2(a), (d); N.D. R. CIV. P. 26(a), (b)(4); OKLA. STAT. ANN. tit. 12, § 3226(A), (B)(3) (West 1993); S.C. R. CIV. P. 26(a), (b)(4); TENN. CIV. PROC. RULE 26.01, 26.02(4); TX. R. C. P. 195.1; VT. R. CIV. P. 26(a), (b)(4); WIS. R. CIV. P. 804.01(1), (2)(d); W. VA. R. CIV. P. 26(a), (b)(4); WYO. R. CIV. PROC. 26(a), (b)(4). In contrast, two states now provide for expert witness reports, but not expert witness depositions. See NEV. R. C. P. 26(b)(5); N.Y. C.P.L.R. 3101(d) (McKinney 1991 & Supp. 1999).

of limited interrogatories and other discovery specifically ordered by the court. According to the courts¹⁴⁸ and other ethics authorities¹⁴⁹ who have determined¹⁵⁰ that ex parte contact is impermissible, any such contact constitutes expert "discovery" that is outside pre-1993 Rule 26(b)(4) and, therefore, impliedly forbidden by this rule.¹⁵¹

148. *Erickson v. Newmar Corp.*, 87 F.3d 298, 301-02 (9th Cir. 1996); *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 26-27 (9th Cir. 1980); *Heyde v. Xtraman, Inc.*, 404 S.E.2d 607, 611 (Ga. Ct. App. 1991) ("OCGA § 9-11-26(b)(4) clearly sets forth the procedures a party must follow to obtain discovery from any expert Cross-appellants did not attempt to follow these procedures and should not now be allowed to circumvent them by engaging in ex parte communications with the opposing party's expert"); see also *Plasma Physics Corp. v. Sanyo Elec. Co.*, 123 F.R.D. 290, 291-92 (N.D. Ill. 1988) (holding that Rule 26(b)(4) limited ex parte contact, but finding that contact did not violate this Rule because evidence did not establish that party discussed prohibited issues with experts).

Interestingly, the first and often-cited court determination that ex parte contact was impermissible by the Ninth Circuit in *Campbell Industries*, see *Erickson*, 87 F.3d at 302; *Procter & Gamble Co. v. Haugen*, 184 F.R.D. 410, 412 (D. Utah 1999); *Xtraman*, 404 S.E.2d at 611-12; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), reprinted in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207; Comm. on Prof'l Ethics of the N.Y. State Bar Ass'n, Op. 577 (1986), 1986 WL 68786, at *2, resulted from a contacting party's concession that the ex parte contact was impermissible. *Campbell Indus.*, 619 F.2d at 27. Perhaps if the contacting party had analyzed the issues more carefully and vigorously defended its attorney's actions, the line of cases and decisions erroneously determining that ex parte contact is prohibited by the discovery rules and is therefore an ethical violation would have never developed, or would have developed in a different fashion.

149. Alaska Bar Ass'n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *2; Or. State Bar Legal Ethics Comm., Op. 530 (1990), summarized in ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106; Nilles, *supra* note 127, at 19; cf. Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 5-6 (1992) (finding ex parte contact impliedly impermissible in federal civil litigation, while only strongly cautioning practitioners against ex parte contact in state civil litigation), summarized in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122.

150. At least one ethics authority, the ABA Standing Committee on Ethics and Professional Responsibility, has refrained from making a definitive determination, but has strongly suggested that the existence of a formal discovery rule similar to the pre-1993 version of Federal Rule 26(b)(4) would render ex parte contact ethically impermissible. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), reprinted in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207-209; see also N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 577 (1986), 1986 WL 68786, at *2 (declining to determine whether ex parte communications violated formal discovery rules "[b]ecause matters of law are beyond the authority of this committee"); Mo. Chief Disciplinary Counsel, Informal Op. 960286 (1996) ("The Rules of Professional Conduct do not prevent an ex parte contact with the expert as long as such contact does not violate the rules of discovery."), summarized in ABA/BNA Manual, *supra* note 116, at 1101:5235; Mo. Chief Disciplinary Counsel, Informal Op. 960190 (1996) ("If a case is pending, the Rules do not prohibit Attorney from interviewing the expert as long as such an interview does not violate the rules of discovery."), summarized in ABA/BNA Manual, *supra* note 116, at 1101:5232.

151. According to Professor Geoffrey C. Hazard, Jr. and Mr. W. William Hodes, "Since existing rules of civil procedure carefully provide for limited and controlled discovery of an opposing party's expert witnesses, all other forms of contact are impliedly prohibited." 1

c. A Call for a Careful Reading of
the Discovery Rules

Any reading of pre-1993 Rule 26(b)(4) that includes ex parte contact within the term "discovery" stretches that term beyond its proper scope and ignores the realities of litigation practice. Therefore, unless the pre-1993 expert witness formal discovery rules are modified significantly, they cannot legitimately be used to prevent ex parte contact.

The analysis of trial-team-model advocates is, at best, tenuous. After all, pre-1993 Rule 26(b)(4) applies only to expert "discovery."¹⁵² Therefore, it applies to ex parte communications only if these communications are expert "discovery." They are not.¹⁵³

HAZARD & HODES, *supra* note 126, § 3.4:402. They also suggest, "Furthermore, since this practice norm is well established and well-known, [an attorney who conducted ex parte interviews] may be said to have violated [Model] Rule 8.4(d) as well (conduct prejudicial to the administration of justice)." *Id.* The suggestion that the "practice norm" of not making an ex parte contact is "well established" is at least somewhat at odds with the existence of contrary determinations finding that ex parte contact is acceptable. *See supra* note 127. Nonetheless, Professor Hazard and Mr. Hodes have been cited by ethics authorities in support of the proposition that ex parte interviews are prejudicial to the administration of justice. *See Erickson*, 87 F.3d at 302; Or. State Bar Legal Ethics Comm., Op. 530 (1990), summarized in ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106.

Another commentator also concluded that pre-1993 Rule 26(b)(4) forbade informal discovery efforts regarding adverse expert witnesses. *See Lillehaug, supra* note 88, at 441-42.

152. As noted previously, *see supra* note 25, this Article does not address issues related to experts who are used only as consultants by one of the parties and not as witnesses expected to testify at trial. In the pre-1993 version of Rule 26, subsection (b)(4)(B) dealt with such witnesses, while subsection (b)(4)(A) concerned experts who were expected to testify. FED. R. CIV. P. 26(b)(4)(B), 28 U.S.C. app. (1992) (amended 1993), quoted in 8 WRIGHT ET AL., *supra* note 146, at 22 n.2. Although the introductory "[d]iscovery . . . may be obtained only as follows" language presumably applied to both subsections, subsection (b)(4)(B) included a similar, and therefore possibly redundant, phrase:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, *only* as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Id. (emphasis added). In 1993, Rule 26(b)(4)(B)'s "[a] party may discover . . . only" language was changed to "[a] party may, through interrogatories or by deposition, discover . . . only." FED. R. CIV. P. 26(b)(4)(B), 28 U.S.C. app. (1992) (amended 1993); *see also* Supreme Court of the United States, Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 616 (1993) (identifying changes to Rule 26(b)(4)(B)). For cases applying the pre-1993 Rule 26(b)(4) language in the context of consultants who were not expected to testify at trial, *see Good v. GAF Corp.*, 1989 WL 54017, at *1-*3 (4th Cir. 1989); *Durflinger v. Artilles*, 727 F.2d 888, 891-92 (10th Cir. 1984).

153. The pre-1993 version of Rule 26, along with the remaining formal discovery rules, simply did not deal with informal discovery. *See Lillehaug, supra* note 88, at 446 ("[T]he fact that there is no specific provision in the rules suggests that their drafters did not intend to

i. The Many Ways to Gather Expert
Information Outside of Formal Discovery

Ex parte contact with expert witnesses is a means for attorneys to gather information about the expert. It is far from the only such method, however. To prepare for cross-examination of adverse experts, attorneys engage in a wide variety of information-gathering endeavors.¹⁵⁴ They contact other experts in the same field who may know about the expert, her experience, her research, or her reputation.¹⁵⁵ They talk to other attorneys who have faced the expert in other cases.¹⁵⁶ They search electronic¹⁵⁷ and paper¹⁵⁸ databases for articles, books, speeches, and reports by and about the expert.¹⁵⁹ They collect and read deposition and trial transcripts documenting the expert's previous testimony.¹⁶⁰ They investigate whether the credentials claimed by the expert on her curriculum vitae are legitimate and sufficient.¹⁶¹ They ask public licensing agencies whether the expert has been the subject of professional discipline.¹⁶² If they are bold enough to overcome the chilling effect of the decisions outlined above,¹⁶³ they may even call or write the expert herself.¹⁶⁴

Although there can be secondary purposes in some instances,¹⁶⁵ attorneys often undertake these and other information-seeking tasks for one basic purpose: gathering information that will help them impeach experts on cross-examination.¹⁶⁶ While formal expert discovery is also undertaken for the same purpose, it is distinct from

prohibit a traditional, inexpensive method of discovery.”).

154. Cf. Stewart, *supra* note 96, at 26 (“There are innumerable other [nondeposition] methods for fact gathering (e.g., informal interviews, use of private investigators, etc.) that should be considered.”).

155. See STEPHEN D. EASTON, HOW TO WIN JURY TRIALS: BUILDING CREDIBILITY WITH JUDGES AND JURORS § 12.01(c) (1998).

156. See *id.*

157. See Mark J. Heley & Jay A. Kopp, *Internet Resources for Lawyers Who Represent Design Professionals*, CONSTRUCTION LAW., Jan. 2000, at 12, 14.

158. See MAUET, *supra* note 42, at 378.

159. See EDWARD J. IMWINKELRIED, THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE § 9-8(a), at 258 (3d ed. 1997); MAUET, *supra* note 42, at 378 (advising attorneys to “obtain a copy of everything the expert has ever published”).

160. See IMWINKELRIED, *supra* note 159, § 9-8(a), at 258; MAUET, *supra* note 42, at 378; Heley & Kopp, *supra* note 157, at 14.

161. See EASTON, *supra* note 155, § 12.04(a); IMWINKELRIED *supra* note 159, §§ 9-11 to 9-12 (discussing cross-examination attacks based upon lack of adequate education and experience).

162. See EASTON, *supra* note 155, § 12.04(a).

163. See *supra* notes 118-34 and accompanying text.

164. Although this Article argues that an attorney should be allowed to initiate ex parte contact with adverse retained expert witnesses, an attorney initiating and pursuing such contact is nonetheless subject to several professional responsibility restrictions that prohibit certain practices during such contact. See *infra* Part IV.

165. See *supra* text accompanying note 105 (regarding the use of informal discovery to obtain information for evaluation of a case for settlement).

166. See Day, *supra* note 102, at 52.

nondiscovery information gathering (which is sometimes imprecisely¹⁶⁷ and therefore somewhat confusingly referred to as "informal discovery"¹⁶⁸) in one important respect. In formal discovery, the Federal Rules of Civil Procedure require a party or some other person or entity to respond to the opposing party's demands for information.¹⁶⁹ In contrast, an attorney engaged in informal information gathering cannot force the opposing party or, for that matter, anyone else, to provide information. In fact, many informal information-gathering efforts are undertaken by an attorney who does not even advise her opponent of her efforts to gather information.¹⁷⁰

Of course, it is also possible to engage in informal discovery that does depend upon the cooperation of opposing counsel. In such informal discovery, however, one attorney cannot demand the production of information by her adversary. Instead, production of expert information by parties in informal discovery is always voluntary and, therefore, usually mutual.¹⁷¹ Examples include voluntary exchanges of expert witness reports¹⁷² and oral agreements to permit depositions of experts.¹⁷³

167. Formal discovery and informal discovery both involve efforts to obtain information. However, informal discovery is not a subset of "discovery," as that term was used in pre-1993 Federal Rule 26(b)(4). Unlike the formal discovery referred to in pre-1993 Federal Rule 26(b)(4), informal discovery efforts do not necessarily require or even request a response from the opposing party. See *supra* notes 155-64 and accompanying text.

168. *E.g.*, *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983); *Trans-World Invs. v. Drobny*, 554 P.2d 1148, 1151 (Alaska 1976); *McMoran*, *supra* note 88, at 995; Daniel J. Lanahan & Cynthia Ribas Rosen, *Defendants' Indemnity Pact Enhances Cooperation in L-Tryptophan Litigation*, *INSIDE LITIG.*, May 1992, at 18, 21.

169. Parties and their attorneys can use formal discovery to require persons and entities other than their opponents to provide documents and information. Through subpoenas and other formal discovery mechanisms, attorneys can force nonparties to provide documents and other things, see FED. R. CIV. P. 34, 45, to allow access to property, see FED. R. CIV. P. 34, 45, and to answer questions at depositions, see FED. R. CIV. P. 27, 30, 31, 45. For an example of discussions of matters related to a party's power to use formal discovery to demand information from nonparties, see Jay C. Carlisle, *Nonparty Document Discovery from Corporations and Governmental Entities Under the Federal Rules of Civil Procedure*, 32 N.Y.L. SCH. L. REV. 9 (1987); Sarah N. Welling, *Discovery of Nonparties' Tangible Things Under the Federal Rules of Civil Procedure*, 59 NOTRE DAME L. REV. 110 (1983); David P. Brooks, Note, *In re United States Catholic Conference: Considering Non-Party Rights*, 1988 BYU L. REV. 89; Mark Labaton, Note, *Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas*, 1987 DUKE L.J. 140.

170. *Cf.* Mullenix, *supra* note 96, at 809 (describing informal discovery steps taken by attorneys that do not require contact with opposing counsel, in addition to informal discovery requests that do require the cooperation of opposing counsel).

171. See Day, *supra* note 102, at 46-47; Mullenix, *supra* note 96, at 809.

172. Under the post-1993 Federal Rules, expert witnesses must write reports and send these reports to opposing counsel. See FED. R. CIV. P. 26(a)(2)(B); *infra* note 207. Prior to the 1993 amendments to the Federal Rules, experts were not required to write reports, but parties occasionally agreed to exchange expert witness reports. See Day, *supra* note 102, at 50; Graham, *supra* note 1, at 175; *cf.* *Drobny*, 554 P.2d at 1151-52 (noting the "voluntary exchange of medical information by the parties"); Lanahan & Rosen, *supra* note 169, at 21 (noting the voluntary provision of information in informal discovery).

173. In jurisdictions where the 1993 changes to the Federal Rules or equivalent state formal

ii. The Inapplicability of Formal Discovery Rules to Informal Information Gathering

For trial-team-model advocates to be correct, pre-1993 Rule 26(b)(4)'s prohibition of "discovery" outside the formal discovery required by the rule must prohibit all informal expert discovery in the absence of a written stipulation altering the rules for formal discovery,¹⁷⁴ including both voluntary information exchanges between parties and all independent information gathering about an expert witness by one party.¹⁷⁵ After all, while the Federal Rules of Civil Procedure say nothing about ex parte communications with adverse experts, they also say nothing about any other informal

discovery rules are in effect, parties are allowed to demand expert witness depositions as a part of the formal discovery process. See FED. R. CIV. P. 26(b)(4). Before the 1993 changes, attorneys often agreed to allow depositions of experts. See *infra* note 178.

174. Rule 29 does provide a mechanism for turning informal discovery into formal discovery:

Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

FED. R. CIV. P. 29.

Prior to the 1993 amendments to the Federal Rules, Rule 29(2) stated that "stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court." FED. R. CIV. P. 29, 28 U.S.C. app. (1992) (amended 1993).

Attorneys at least occasionally have provided information in informal discovery, without always memorializing their arrangements in written stipulations. See Day, *supra* note 102, at 50 (referring to "demands" for expert witness reports and regular expert depositions); *id.* at 51 (noting that "practitioners regularly use other methods" of expert witness discovery); Graham, *supra* note 1, at 176 (explaining that in over half of the cases in which expert witness reports were produced, they were "[p]rovided, pursuant to local custom, in response to an informal request for a copy of the expert's report"). Therefore, although Rule 29 provides a mechanism for changing the rules of formal discovery, at least some informal discovery arrangements are not within the scope of this rule, if the rule is to be strictly interpreted. The rules contain no provisions governing these informal discovery arrangements that are not memorialized with written stipulations. If Rule 26(b)(4) prohibits all informal discovery, this prohibition applies to oral informal discovery agreements and even arrangements that may be discussed in documents, but not memorialized in formal written stipulations signed by all parties.

175. Trial-team-model advocates might initially be tempted to respond by arguing that the prohibition of other "discovery" applies more narrowly to efforts that request the participation of the opposing party, but not to one party's wholly independent attempts to acquire information. There are two problems with such a position for ex parte contact opponents, however. First, pre-1993 Federal Rule 26(b)(4) contains no language suggesting this distinction. More significantly, even if this distinction could be made, ex parte communications with adverse retained expert witnesses are not within the suggested scope of the term "discovery," because they do not involve requests for the participation of the opposing party.

discovery efforts regarding experts. Because there is no distinction between ex parte contact with experts and all other informal discovery, if pre-1993 Rule 26(b)(4) prohibits ex parte contact, it also prohibits all other informal expert discovery.

Therefore, if trial-team-model advocates are correct in their analysis of the professional responsibility rules, whenever attorneys verbally or otherwise informally agree to exchange expert information, they are agreeing to a knowing and therefore unethical disobedience of the rules of the tribunal. This suggestion flies in the face of common practice and thwarts the very purpose of the rules of formal discovery.¹⁷⁶ In many cases involving expert testimony under the pre-1993 version of Rule 26(b)(4), attorneys informally agreed to exchange expert witness reports¹⁷⁷ or to allow depositions of experts.¹⁷⁸ If those opposing ex parte contact are correct, these agreements were unethical. This would be both unrealistic and downright capricious, because agreements to exchange information promote the speedy exchange of information, at reduced cost to each of the parties.¹⁷⁹ If, as Rule 1 of the Federal Rules of Civil Procedure states, the rules "shall be construed . . . to secure the just, speedy, and inexpensive determination of every action,"¹⁸⁰ pre-1993 Rule 26(b)(4) should not be construed to prohibit such exchanges.¹⁸¹ Indeed, the 1993 amendments to Rule 26 were designed, in part, to formalize the common practice of expert witness depositions.¹⁸² If this practice was an outlaw conspiracy whereby attorneys were

176. See *Drobny*, 554 P.2d at 1152; *Domako v. Rowe*, 475 N.W.2d 30, 35-36 (Mich. 1991).

177. See *supra* note 172.

178. See *Day*, *supra* note 102, at 50; Laurence H. Pretty, *The Boundaries of Discovery in Patent Litigation: Privilege, Work Product and Other Limits*, 18 AIPLA Q.J. 101, 115 (1990) ("There is no right . . . to take a deposition of an expert witness. . . . Nonetheless, in patent litigation, it is fairly common for experts who will testify at trial to be deposed. Sometimes, this is by agreement . . ."); *Graham*, *supra* note 1, at 175.

179. See FED. R. CIV. P. 29 advisory committee's notes (1993 amendments) ("Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc."); *Drobny*, 554 P.2d at 1152 ("This court has . . . stressed that . . . information should be exchanged and requests complied with in a manner demonstrating candor and common sense."); *Mullenix*, *supra* note 96, at 810 ("[P]erceptions of [problems with] formal discovery have prompted a few judges, magistrates, academicians, and law reformers to propose that attorneys use informal discovery procedures more extensively to acquire fact information needed for trial."); cf. S.D. CAL. CIVLR 83.4(a)(1)(f) ("An attorney in practice before this court shall . . . attempt to establish . . . voluntary exchange of non-privileged information."); E.D. OKLA. L.R. 26.1(D) ("[P]arties are encouraged to cooperatively exchange materials and information clearly relevant to disputed facts at the earliest practical time . . .").

180. FED. R. CIV. P. 1.

181. See *Domako*, 475 N.W.2d at 36.

Prohibitions of informal discovery agreements also run counter to the Advisory Committee's suggestion that "[c]ounsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc." FED. R. CIV. P. 29 advisory committee's notes (1993 amendments).

182. See FED. R. CIV. P. 26(a)(2) advisory committee's notes (1993 amendments) ("The information disclosed under the former rule in answering interrogatories about the 'substance' of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need

engaging in rampant unethical conduct, it is doubtful that it would have been adopted into the formal discovery process through an amendment to the Federal Rules.¹⁸³

to depose the expert . . .”).

183. Even if the term “discovery” in the pre-1993 version of Rule 26(b)(4) could be read as expansively as trial-team-model advocates suggest, the Rule would not prohibit all ex parte communications with adverse experts. In other words, even if all of the analysis in this subsection is incorrect, the formal discovery rules do not preclude ex parte communications with experts.

Assuming arguendo that the “discovery” that pre-1993 Rule 26(b)(4) limits includes independent information gathering, the Rule does not outlaw independent gathering of all expert-related information. Instead, the Rule applies only to “facts known and opinions . . . acquired or developed in anticipation of litigation or for trial.” FED. R. CIV. P. 26(b)(4), 28 U.S.C. app. (1992) (amended 1993), *quoted in* 8 WRIGHT ET AL., *supra* note 146, at 416. Therefore, even if the Rule applies to independent information gathering, by its own terms it only applies to the gathering of some, but not all, information known to experts.

In a frequently cited opinion, *see* Easton, *supra* note 18, at 37 n.139, the Ninth Circuit indicated that the extent of an expert’s research outside of the litigation arena was a critical factor in determining the admissibility of expert testimony. *See* Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1317 (9th Cir. 1995). Therefore, it is not surprising that an attorney looking for an expert witness will often try to find someone who already has significant knowledge and experience in the relevant field. *See* Eliassen v. Hamilton, 111 F.R.D. 396, 403 (N.D. Ill. 1986) (“Experts are hired as experts because they know facts and hold opinions in a specific field prior to being retained.”); Mark S. Geraghty, *Some Thoughts on the Care, Feeding, and Preparation of Experts*, in FIFTH ANNUAL LITIGATION MANAGEMENT SUPERCOURSE 419, 423 (PLI Litig. & Admin. Practice Course, Handbook Series No. H4-5185, 1994) (recommending that trial attorneys looking for experts “[f]ind someone already familiar with issues”).

At the time that the expert is first contacted by the attorney who eventually retains her, none of that knowledge and experience was developed by her in anticipation of the litigation at hand. Therefore, as several courts have noted, pre-1993 Rule 26(b)(4) itself does not even limit formal discovery about matters known to the expert before she was retained. *See* Eliassen, 111 F.R.D. at 403 (allowing depositions for discovery of facts known and opinions held by a nontestifying expert before being retained); *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 992-94 (D.C. Cir. 1979) (permitting formal discovery of expert’s pre-suit information); *Norfin Inc., v. Int’l Bus. Mach., Corp.*, 74 F.R.D. 529, 532 (D.C. Colo. 1977) (“In the instant case, the facts sought to be discovered are other than those developed in anticipation of litigation. . . . Defendant has clearly indicated that it desires no information which was obtained in anticipation of litigation, but only seeks to question the expert on his ‘experience’ prior to being retained by Plaintiff.”); Hayes & Ryder, *supra* note 1, at 1173-78 (discussing information not acquired for litigation); Lillehaug, *supra* note 88, at 442-43 (discussing cases distinguishing between pre- and post-retention information); *cf.* *Procter & Gamble Co. v. Haugen*, 184 F.R.D. 410, 413 (D. Utah 1999) (stating that an expert’s “information . . . developed independent of this or other litigation based on his previous expert activities” is “outside the governance of Rule 26(b)(4)(B) or any other provision of the Federal Rules of Civil Procedure”). *But see* *Roberts v. Heim*, 130 F.R.D. 424, 428 (N.D. Cal. 1989) (questioning the *Marine Petroleum* holding).

In *Plasma Physics Corp. v. Sanyo Elec. Co.*, 123 F.R.D. 290 (N.D. Ill. 1998), a federal district court held that the pre-1993 version of Rule 26(b)(4) limited a party’s ex parte contact with adverse expert witnesses. *Id.* at 292. Although this finding is at odds with this Article’s interpretation of pre-1993 Rule 26(b)(4), it is important to note that even this court found that

A more reasonable interpretation of pre-1993 Rule 26(b)(4) would limit the term "discovery" to formal discovery that requires a response by the opposing party.¹⁸⁴ Furthermore, given that the formal discovery rules were adopted to increase the information available to each party and to provide each party with evidence that could be used at trial,¹⁸⁵ including information used to cross-examine adverse witnesses,¹⁸⁶ it would be rather counterproductive to interpret a formal discovery rule in a fashion that would restrict a party's other means of access to information and evidence.¹⁸⁷

pre-1993 Rule 26(b)(4) only limited the proper scope of ex parte contact, without prohibiting such contact in all instances. *Id.* The court held that ex parte contact communications between a party and adversarial expert witnesses concerning pre-suit facts and opinions were not precluded by pre-1993 Rule 26(b)(4). Because the party requesting sanctions failed to establish that the experts had any information developed in anticipation of litigation, as opposed to pre-suit information, the court denied the request for sanctions. *Id.*

In summary, even if the term "discovery" applies to independent information gathering by attorneys, including ex parte contact with expert witnesses, it does not prohibit all such efforts. Instead, the most that pre-1993 Rule 26(b)(4) can even arguably do is limit the scope of information that the attorney can discuss in her ex parte interviews with the expert witness. Ex parte contact opponents have not recognized this inherent limitation in pre-1993 Rule 26(b)(4) and its equivalent state counterparts.

184. See *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1053 (7th Cir. 1998) (holding that the Federal Rules of Civil Procedure do not prohibit a party from taking sworn statements from witnesses); *Felder v. Wyman*, 139 F.R.D. 85, 91 (D.S.C. 1991) ("Nothing in [the Federal Rules of Civil Procedure] prohibits informal interviews . . ."); *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983), discussed in Companion, *supra* note 25, at 38; cf. *Domako*, 475 N.W.2d at 36 (similar result under Michigan formal discovery rules); *Brazil*, *supra* note 89, at 1315 ("The first major component of the pretrial process of gathering and organizing evidentiary data consists of private investigations by counsel. The conduct of such investigations generally is not governed by the formal rules of discovery.").

185. See FED. R. CIV. P. 26(b) advisory committee's note (1946 amendments) ("The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.").

186. The evidence that can be gathered legitimately through formal discovery includes evidence that will be used for impeachment of adverse witnesses. *Norfin*, 74 F.R.D. at 533 ("In fact, one of the purposes of discovery is to obtain information for use on cross-examination and for the impeachment of witnesses." (quoting *United States v. Int'l Bus. Machs. Corp.*, 66 F.R.D. 215, 218 (S.D.N.Y. 1974))); Steven N. Peskind, *Investigation and Discovery*, in *CHILD CUSTODY LITIGATION* § 2.13 (Ill. Inst. for Continuing Legal Educ. ed., 1998); see also *Musselman v. Phillips*, 176 F.R.D. 194, 200 (D. Md. 1997) ("[T]he very purpose of the comprehensive disclosures required from retained experts by [Rule] 26(a)(2)(B) is to afford opposing counsel sufficient information to prepare for cross-examination."); *Floyd*, *supra* note 85, at 106 ("[I]n many instances disclosure of documents used to refresh memory is necessary to allow full cross-examination . . ."); *Hayes & Ryder*, *supra* note 1, at 1121 ("[T]he very purpose of allowing the discovery of expert information is to allow the opponent of the witness to prepare for cross-examination at trial."); Jan W. Henkel & O. Lee Reed, *Work Product Privilege and Discovery of Expert Testimony: Resolving the Conflict Between Federal Rules of Civil Procedure 26(b)(3) and 26(b)(4)*, 16 FLA. ST. U. L. REV. 313, 334 (1988) (stating that knowledge of items reviewed by an expert witness is "information necessary for a thorough cross-examination on the issue of witness credibility").

187. Cf. *Domako*, 475 N.W.2d at 35 ("It would be a regression to conclude that the

Perhaps as a result of a realization of the drawbacks of such an application of the discovery rules, courts have explicitly rejected suggestions that the formal discovery rules prevent parties from independently gathering information without using the discovery rules.¹⁸⁸

In the same manner, if trial-team-model advocates are correct in their analysis of the professional responsibility rules, whenever an attorney independently attempts to gather information about experts, whether by *ex parte* communications or any of the myriad of other techniques commonly available, her efforts are sanctionable. Again, this is rather capricious. Independent information gathering has many benefits. It is often less expensive than formal discovery. It can be more effective than formal discovery.¹⁸⁹ In addition to the acquisition of information that is potentially helpful on expert cross-examination, it sometimes leads to the acquisition of information that causes parties to attempt to settle cases.¹⁹⁰ In other words, to borrow a phrase from

Michigan Court Rules of 1985 operated to preclude a method of discovery acceptable under the [prior] General Court Rules.”).

188. See *Corley*, 142 F.3d at 1053 (“The Federal Rules of Civil Procedure do not prohibit [the plaintiff’s] chosen investigative method of taking sworn stenographic statements from potential non-party witnesses.”); *Felder*, 139 F.R.D. at 91 (“Cases implying that the methods of evidence gathering in the Rules are the sole means of conducting discovery find no support in the text of the Rules.”); *Eli Lilly & Co.*, 99 F.R.D. at 128 (“[W]hile the Federal Rules of Civil Procedure have provided certain specific formal methods of acquiring evidence from recalcitrant sources by compulsion, they have never been thought to preclude the use of such venerable, if informal, discovery techniques as the *ex parte* interview of a witness who is willing to speak.”); *Domako*, 475 N.W.2d at 36 (“The omission of [ex parte] interviews from the court rules does not mean that they are prohibited, because the rules are not meant to be exhaustive.”); *Stempler v. Speidell*, 495 A.2d 857, 864 (N.J. 1985) (“The rules regulating pretrial discovery do not purport to set forth the only methods by which information pertinent to the litigation may be obtained.”); *Companion*, *supra* note 25, at 38 (discussing *Eli Lilly & Co.*); *Feighny*, *supra* note 25, at 38.

The Oregon State Bar Legal Ethics Committee summarized the relevant case law as follows:

Current Oregon and federal statutes and court rules of procedure and evidence do not expressly prohibit an attorney engaged in investigation from making *ex parte* contact with unrepresented fact witnesses. Oregon and federal appellate cases have not interpreted existing statutes or rules so as to prohibit such contact. Rather, it is generally understood that the availability of formal civil discovery mechanisms does not impliedly prohibit attorneys from attempting, as part of the investigation of fact witnesses, to obtain information from such witnesses, such as signed witness statements that could be used for impeachment at trial.

Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 2 (1992) (citations omitted), summarized in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122. Unfortunately, the Oregon committee went on to suggest that experts could not be contacted in federal cases, apparently because federal “formal civil discovery mechanisms [do] impliedly prohibit” attorneys from engaging in independent information gathering when the information gathered concerns experts rather than fact witnesses. *Id.* at 2-3. This distinction between fact witnesses and expert witnesses cannot be justified.

189. See *supra* notes 87-99 and accompanying text.

190. *Trans-World Invs. v. Drobny*, 554 P.2d 1148, 1152 (Alaska 1976) (“In our opinion . . . informal methods are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent further the wise application

Rule 1, it can lead to "just, speedy, and inexpensive determination" of cases.¹⁹¹ These results can flow from all forms of informal discovery, including ex parte contact with adverse experts.¹⁹²

Indeed, an interpretation of formal procedural rules that would prohibit independent information gathering by attorneys interferes with, or at least restricts, a party's basic right to the assistance of counsel.¹⁹³ Attorneys engage in independent information gathering because it helps them represent their clients¹⁹⁴ effectively by, inter alia, increasing their effectiveness on cross-examination. If the formal discovery rules, which contain no prohibition of ex parte or other independent information gathering regarding experts, are nonetheless stretched into an unstated but potent ban of these activities, some parties might claim that they do not have effective representation.¹⁹⁵

iii. The (Almost Complete) Absence of Rules Banning Ex Parte Communications

This does not mean that it is inconceivable that ethical or discovery rules prohibiting certain informal discovery efforts, including ex parte contact, could be enacted. Although this Article contends that ex parte communications enhance the truth-seeking process, trial-team-model advocates can make legitimate arguments against them¹⁹⁶ and urge the adoption of rules of ethics or discovery that explicitly

of judicial resources."); *Domako*, 475 N.W.2d at 36; Feighny, *supra* note 25, at 38; Lanahan & Rosen, *supra* note 168, at 21; Lillehaug, *supra* note 88, at 444; *see also* *Franks v. Nat'l Dairy Prods. Corp.*, 41 F.R.D. 231, 237 (W.D. Tex. 1966) (referring to formal discovery regarding experts) ("[U]nless the position of each party is known along with the basis for taking such position, no intelligent evaluation can be made for settlement purposes.").

191. FED. R. CIV. P. 1.

192. In the view of a state bar ethics committee that had indicated opposition to ex parte contact, *see* Or. State Bar Legal Ethics Comm., Op. 530 (1990), *summarized in* ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106, independent gathering of information about experts is at least arguably consistent with the policy behind formal expert witness discovery. The committee noted:

Indeed, the same policies favoring formal discovery of expert witnesses, including facilitating the informed and effective cross-examination of expert witnesses at trial, are arguably advanced by ex parte investigation of adverse experts who have been formally designated as witnesses.

Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 4 (1992) (citations omitted), *summarized in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122.

193. *See Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19 (D. Mass. 1989) (describing "the function of interviewing witnesses without the presence of opposing counsel in order to gain information" as one of "two important functions which counsel traditionally play in litigation").

194. *See Kaveney v. Murphy*, 97 F. Supp. 2d 88, 89 (D. Mass. 2000) (noting that attorneys "conduct an informal investigation" for various purposes).

195. *Cf. Coppolino v. Helpern*, 266 F. Supp. 930, 936 (S.D.N.Y. 1967) (suggesting that disallowing ex parte interviews interferes with a criminal defendant's right to effective assistance of counsel), *quoted in Int'l Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 44 (2d Cir. 1975) (adopting the *Coppolino* view in a civil case).

196. Ex parte contact with adverse experts is arguably unseemly, because it involves an

ban ex parte contact.

In fact, one state has adopted just such a discovery rule. Idaho has an expert witness formal discovery rule that tracks the language of pre-1993 Federal Rule 26(b)(4).¹⁹⁷ At the end of its Rule 26(b)(4), however, Idaho has added a provision stating, "No party shall contact an expert witness of an opposing party without first obtaining the permission of the opposing party or the court."¹⁹⁸ Idaho's rule establishes that it is simple enough for a jurisdiction to outlaw ex parte contact by adopting an explicit ban in its procedural rules or its professional responsibility code. If such contact is to be banned, it should be, and it certainly can be, explicitly banned.¹⁹⁹

In the absence of a rule that bans ex parte communications, however, the existing rules of professional conduct and discovery in jurisdictions other than Idaho should not be stretched beyond recognition in a backdoor effort to ban a practice that these rules permit.²⁰⁰ Every attorney should have the right to consult the rules of professional conduct and rely upon them to define acceptable and unacceptable behavior. When those rules contain a provision specifically identifying the persons that an attorney may not contact ex parte, an attorney should not have to locate a different rule and anticipate an effort to stretch it to ban conduct the no-contact rule seems to permit. If the Model Rules and the states' adaptations of them are to have any beneficial effect,²⁰¹ it should be that an attorney who desires to operate within

attempt to acquire information from the person against whom this information will be used. As noted below, ex parte contact involves some concerns about previously confidential items. See *infra* notes 220-23 and accompanying text. Perhaps the often limited effectiveness of ex parte contact, see *infra* notes 341-56 and accompanying text, make such contacts unworthy of attorney resources.

197. I.R.C.P. 26(b)(4) (Idaho).

198. I.R.C.P. 26(b)(4)(iii) (Idaho).

199. It seems reasonable to assume that at least some of the opponents of ex parte contact in Idaho believed that a version of Rule 26(b)(4) that did not include an explicit ban on ex parte contact did not ban such contact. It appears that Idaho's Rule 26(b)(4) provisions regarding discovery of expert witness information were at one time identical to the pre-1993 version of Federal Rule 26(b)(4). See I.R.C.P. 26(b)(4), Federal Rules comparison note (incorrectly stating, apparently based upon an outdated comparison between the Idaho and Federal Rules of Civil Procedure, that "[t]his [Idaho] rule [26(b)(4)] is identical to the introductory paragraph and subdivision (A) of Federal Rule 26(b)(4)"). Idaho Rule 26(b)(4) was then apparently amended to add the language explicitly prohibiting ex parte contact with an adverse expert. *Id.* (noting amendments in 1995 and 1997). If the pre-amended Idaho Rule 26(b)(4) provision mirroring the pre-1993 Federal Rule 26(b)(4) language stating that discovery "may be obtained only as" outlined in the provisions of Rule 26(b)(4)(A) had been enough to ban ex parte contact, the Idaho amendment adding the provision explicitly banning this conduct would have been superfluous.

200. Cf. Hellman, *supra* note 6, at 362-65 (criticizing the ABA committee for creatively interpreting ethics rules to reach conclusions desired by the committee, rather than suggesting amendments to the rules); Finman & Schneyer, *supra* note 121, at 95 ("At the outset, one should note [the ABA committee's] limited authority: the Committee's mandate is not to legislate or develop common law rules, but, rather, to test lawyer conduct against the rules laid down in the [Model] Code.").

201. See Hellman, *supra* note 6, at 366 (concluding that efforts to stretch ethics rules beyond

their restrictions can consult them and conform her conduct to them with confidence.²⁰²

d. The Demise of the Life-Support System for
an Incorrect Supposition

Recent developments have not included adoption of a ban on ex parte contact or even debate about such a proposal. Instead, the most significant recent development has been the elimination of even the thin support in the Federal Rules of Civil Procedure for such a ban.

By tying their decisions banning ex parte contact to the pre-1993 version of Rule 26(b)(4) instead of attempting to enact an ethics or discovery rule prohibiting such contact, trial-team-model advocates tied the fate of their analysis to the language of Rule 26(b)(4). If the “[d]iscovery . . . may be obtained only as follows” language critical to their argument was ever removed from Rule 26(b)(4), the argument of trial-team-model advocates would expire with the critical language.

their terms may “[weaken] . . . the commitment of some lawyers to make the effort required to understand the regime sought to be established through the ‘ethics codes’ . . . [and] undercut[] the ability of rule enforcement agencies to mete out strict sanctions, thus weakening the deterrent effects sought to be generated by the disciplinary process”).

202. See *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 18 n.1 (D. Mass. 1989) (“The rules serve the important function of defining permissible conduct on the part of an attorney.”); Hellman, *supra* note 6, at 317 (declaring that “ABA ethics opinions tak[ing] strained positions that flout the language of the rules they purport to interpret . . . threaten[] to undercut the Bar’s respect for the legitimacy of the ‘ethics rules’ as binding constraints on the practice of law”); *id.* at 335-36 (noting the difficulty placed upon ethical lawyers by ethics authorities promulgating opinions that do not adhere to the ethics rules).

If an attorney has reviewed her state’s version of the Model Rules and determined that a particular course of conduct that would benefit her client is not prohibited by their provisions, she may be ethically required to engage in that course of conduct. One leading ethics scholar has observed:

Legal ethics is hard. You must *try* to find the line between what is permitted and what is not, and then get as *close* to that line as you can without crossing over to the bad side. Anything less is less than zealous representation—which *already* leaves you on the *bad* side of the line.

Hodes, *supra* note 63, at 1366 (emphasis in original); see also W. William Hodes, *Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?*, 87 KY. L.J. 1019, 1032 (1998-99) (“‘Zealousness within the bounds of the law’ is still the watchword that young lawyers ought to adopt as a mantra from their law school days and hold constant throughout their legal careers.”).

If Mr. Hodes is correct, and I for one believe that he is, a lawyer trying to determine where the line lies will have to look somewhere for guidance. It seems entirely reasonable for her to rely upon her state’s Model Rules provisions to draw the line for her. Cf. Finman & Schneyer, *supra* note 121, at 95 (“We will consider the holdings [of the ABA committee] to be correct if they follow logically from the unambiguous meaning of the [Model] Code . . .”). When the line drawn by the applicable Model Rules provision does not prohibit conduct that will, in the attorney’s judgment, advance the interests of the client, the attorney should engage in that conduct, even when doing so requires courage and a willingness to risk the future wrath of those who would prefer that attorneys avoid that conduct. See Hodes, *supra* note 63, at 1366.

This language was indeed removed from Rule 26(b)(4) in 1993.²⁰³ In its current form, Rule 26(b)(4) contains no language stating that even formal discovery is limited to the listed methods.²⁰⁴ Instead, the 1993 amendments eliminated the pre-1993 Rule 26(b)(4) language outlining expert witness interrogatories,²⁰⁵ replaced it with a provision allowing depositions of expert witnesses,²⁰⁶ and added a “disclosure” system requiring parties to provide information regarding expert witnesses, including expert witness reports, without waiting for interrogatories or other discovery requests from their opponents.²⁰⁷ Thus, the 1993 amendments destroyed any opportunity for

203. In 1993, all of the introductory language was removed from Rule 26(b)(4). Prior to 1993, the now-eliminated introduction to Rule 26(b)(4) stated, “Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows . . .” FED. R. CIV. P. 26(b)(4), 28 U.S.C. app. (1992) (amended 1993), *quoted in* 8 WRIGHT ET AL., *supra* note 146, at 21-22 n.2; *see also supra* text accompanying note 146. When this language was removed in its entirety, it perhaps reduced the import of the cases that relied upon the “acquired or developed in anticipation of litigation or for trial” provision to hold that even pre-1993 Rule 26(b)(4) did not prohibit formal discovery of information known to the expert before she was retained. *See supra* note 183. In contrast to the elimination of the “may be obtained only as follows” language, the elimination of the “acquired or developed in anticipation of litigation or for trial” language is not significant for disputes regarding independent information gathering like *ex parte* communications with experts, rather than formal discovery.

204. FED. R. CIV. P. 26(b)(4).

In its current form, Rule 26(b)(4) still concerns discovery of expert related information, but it is not the only portion of Rule 26 that outlines information parties must provide about expert witnesses. *See infra* note 207. The portion of Rule 26(b)(4) dealing with experts expected to testify at trial states, “A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.” FED. R. CIV. P. 26(b)(4)(A). Rule 26(b)(4) contains no language suggesting that discovery regarding experts is limited to its provisions.

205. *See* FED. R. CIV. P. 26(b)(4) advisory committee’s notes (1993 amendments).

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

207. Following the 1993 amendments, Federal Rule 26 compels a party to make “[r]equired [d]isclosures,” even in the absence of specific requests from the party’s opponent. With regard to experts, the required-disclosures provisions include the following:

(2) Disclosure of Expert Testimony.

(A) . . . [A] party shall disclose to the other parties 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.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; . . . the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study

trial-team-model advocates to suggest that the formal discovery rules prohibit these communications.²⁰⁸

Although some federal district courts attempted to avoid or minimize the 1993 changes regarding expert witnesses by adopting arguably invalid²⁰⁹ court orders or

and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

FED. R. CIV. P. 26(a)(2)(A)-(B).

When one compares the list of information now required in disclosures to the information parties were required to provide in interrogatory answers concerning expert witnesses before 1993, there is some overlap. Under both the pre-1993 and the post-1993 versions of Rule 26, parties are required to provide their opponents with a list of experts expected to testify, a statement of the expert's opinions, and information about the bases of these opinions. *See* FED. R. CIV. P. 26(a)(2); FED. R. CIV. P. 26(b)(4), 28 U.S.C. app. (1992) (amended 1993). On the other hand, the 1993 amendments added required information about the expert that a party did not have to provide in formal discovery before these amendments. *See* FED. R. CIV. P. 26(a)(2)(B). This new required information includes the expert's exhibits, the expert's qualifications, the expert's publications, and cases in which the expert testified previously. *Id.* This is precisely the type of information that attorneys have been gathering in informal discovery for years, with or without the cooperation of opposing counsel. *See supra* notes 157-61 and accompanying text. If an attorney's gathering of such information actually was unethical conduct that violated the formal discovery rules, as the reasoning of trial-team-model advocates suggests, *see supra* notes 174-75, it is unlikely that the Advisory Committee would recognize and authenticate such brazen behavior by requiring parties to disclose this information.

208. The elimination of any opportunity for a party to argue that pre-1993 Rule 26(b)(4) implicitly proscribed *ex parte* communications is consistent with the general purpose of the 1993 amendments to the federal discovery rules, which a leading federal procedure treatise described as "a large step . . . in the direction of unlimited discovery of expert witnesses." 8 WRIGHT ET AL., *supra* note 146, § 2029, at 417-18.

209. Although several federal district courts attempted to opt out of some or all of the 1993 amendments that added Rule 26(a)(2)'s expert witness disclosure requirements, *see infra* note 210, these district courts probably never had the authority to adopt these opt-out rules.

While the 1993 version of Rule 26 included language authorizing limited "opt outs" of some of the disclosure requirements, this language did not apply to the expert witness disclosure requirements. The opt-out language appeared not in the introductory portion of Rule 26(a) applicable to all of Rule 26(a), but in the introductory language in subsection (a)(1). Between 1993 and 2000, subsection (a)(1) began with the phrase, "Except to the extent otherwise stipulated or directed by order or local rule . . ." FED. R. CIV. P. 26(a)(1), 28 U.S.C. app. (1994) (amended 2000). The remainder of subsection (a)(1) outlined "[i]nitial [d]isclosures" that parties were required to make, in the absence of an order or local rule absolving them of this responsibility. *Id.*

Subsection (a)(2) of Rule 26 contained a separate set of disclosure requirements regarding "[e]xpert [t]estimony." FED. R. CIV. P. 26(a)(2), 28 U.S.C. app. (1994) (amended 2000). Subsection (a)(2) was not changed in the 2000 amendments to Rule 26. *See* H.R. DOC. NO. 106-228, at 15 (2000). Unlike subsection (a)(1), subsection (a)(2) did not and does not contain any language allowing district courts to opt out of its disclosure requirements through court orders or local rules. FED. R. CIV. P. 26(a)(2). According to the Advisory Committee, subsection (a)(2) "do[es] not authorize departure by local rule." Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure 7 (June 30, 1998), *reprinted in* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181

local rules “opting out” of the expert witness disclosure requirements,²¹⁰ these local rules did not preserve the pre-1993 Rule 26(b)(4) “[d]iscovery . . . may be obtained only”²¹¹ language relied upon by trial-team-model advocates.²¹² In the absence of this language, there has been no formal discovery rule or other “rule[] of a tribunal”²¹³ that, even stretched beyond its terms, suggests that ex parte contact cannot take place in federal cases since 1993. Even if one assumed *arguendo* that an implied ban on ex parte contact was nonetheless somehow preserved by local rules opting out of the 1993 expert witness disclosure requirements, the most recent changes to Rule 26 have terminated this assumption.²¹⁴ If federal district courts possessed the option to opt out

F.R.D. 19, 30 (proposed Aug. 1998).

210. See DONNA STIENSTRA, *FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS* (1998), reprinted in 8 WRIGHT ET AL., *supra* note 146, at XI-XXXVIII (2d ed. Supp. 2000) (charting each federal district’s rules, as of the date of publication).

Some of these local rules opted out of all of the expert witness disclosure requirements in Rule 26(a)(2). *E.g.* General Order No. 42 (E.D. & W.D. Ark. Feb. 22, 1994), ARK. CODE ANN. (COURT RULES) (2000) (withdrawn 2001); S.D. CAL. CIVLR 26.1(f), CALIFORNIA RULES OF COURT—FEDERAL (2000) (withdrawn 2001); S.D. FLA. L.R. 26.1(A), FLORIDA RULES OF COURT—FEDERAL (2000) (withdrawn 2001); M.D. GA. L.R. 33.2.1, GEORGIA RULES OF COURT ANNOTATED (2000) (withdrawn 2001); D. ME. R. 26(d), MAINE RULES OF COURT—STATE AND FEDERAL (2000) (withdrawn 2001); E.D. OKLA. L.R. 26.3(A), OKLAHOMA COURT RULES AND PROCEDURE—FEDERAL (2000) (withdrawn 2001); W.D. TEX. R. CV-16(c), TEXAS RULES OF COURT—FEDERAL (2000) (withdrawn 2001); Order (E.D. Wis. Jan. 7, 1994), WISCONSIN COURTS RULES AND PROCEDURE—FEDERAL (2000) (withdrawn 2001).

Other district courts left Rule 26(a)(2)(A)’s requirement of an identification of expert witnesses intact, but opted out of Rule 26(a)(2)(B)’s expert report requirement and/or Rule 26(a)(2)(C)’s provisions regarding the timing of expert witness disclosures. *See* E.D. CAL. R. 26-252(b) (opting out of Rule 26(a)(2)(B)), CALIFORNIA RULES OF COURT—FEDERAL (2000) (withdrawn 2001); N.D. & S.D. IOWA L.R. 26.1(b) (opting out of Rule 26(a)(2)(B) & (C)), IOWA RULES OF COURT—STATE AND FEDERAL (2000) (withdrawn 2001); D.S.C. L.R. 1.03, 16.01 (opting out of Rule 26(a)(2)(B) & (C)), SOUTH CAROLINA RULES OF COURT—STATE AND FEDERAL (2000) (withdrawn 2001).

211. *See supra* text accompanying note 146.

212. Some of the district courts opting out of the expert witness disclosure requirements adopted local rules allowing parties to demand interrogatory answers containing expert witness information similar to that required by pre-1993 Rule 26(b)(4), but these local rules did not contain provisions suggesting that interrogatories requesting this information were the only available means of formal discovery regarding expert witnesses. *E.g.* S.D. FLA. R. 26.1(G)(2), FLORIDA RULES OF COURT—FEDERAL (2000) (withdrawn 2001); M.D. GA. L.R. 33.2.2(4), 33.2.3(8), GEORGIA RULES OF COURT ANNOTATED (2000) (withdrawn 2001); D. S.C. L.R. 26.02, .03(D), .06(F), SOUTH CAROLINA RULES OF COURT—STATE AND FEDERAL (2000) (withdrawn 2001).

213. MODEL RULES, *supra* note 8, R. 3.4(c); *see supra* notes 141-43 and accompanying text.

214. According to those responsible for proposing the 2000 amendments to Rule 26, these amendments resulted largely from a desire to return to national uniformity in formal discovery and disclosure, by eliminating any authority the district courts possessed to opt out of Rule 26’s requirements. *See* H.R. DOC. NO. 106-228, at 53, 118-19 (2000); *see also* Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory of Optional Rules*, 14 REV. LITIG. 49, 59 (1994) (criticizing lack of national uniformity).

of the 1993 expert witness disclosure requirements before December 1, 2000,²¹⁵ the amendments that went into effect on that date eliminated this option.²¹⁶ Therefore, there is no longer any basis for arguing that the formal discovery rules somehow prohibit *ex parte* contact in federal cases.

Some states, however, still have formal discovery rules that include language similar to the “[d]iscovery . . . may be obtained only as follows” language in the pre-1993 version of the Federal Rules. In these states only, *ex-parte-contact* opponents can cling to this language critical to their position and continue to try to promote their flawed analysis. Even in these states though, the trend may be against them,²¹⁷ because many states eventually adopt rules or statutes that mirror the Federal Rules of Civil Procedure and Evidence.²¹⁸ Perhaps the slow death of even the opportunity to try to stretch a nonauthoritative phrase in the formal discovery rules simply underscores the dangers of trying to invent an ethical restriction based upon an inapplicable provision of law, instead of openly enacting an applicable professional responsibility rule.²¹⁹

215. *Supra* note 209.

216. Following the 2000 amendments, no portion of Rule 26(a) contains a provision authorizing district courts to adopt local rules opting out of any disclosure requirement. FED. R. CIV. P. 26(a); H.R. DOC. NO. 106-228, at 101, 118-19 (2000).

Rule 26(a) does now exempt certain proceedings from the initial disclosure requirements of subsection (a)(1), but this provision does not affect the expert witness disclosures required under subsection (a)(2). FED. R. CIV. P. 26(a)(1)(E).

217. The Alaska experience may be instructive. In 1985, the Alaska Bar Association Ethics Committee opined that Alaska Civil Rule 26(b)(4), which was similar to Federal Rule 26(b)(4), impliedly prohibited *ex parte* contact. *See* Alaska Bar Ass’n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *2. This provision of Alaska law was eliminated when Alaska adopted expert witness disclosure and discovery provisions paralleling the post-1993 version of Federal Rule 26(a)(2). *See* ALASKA R. CIV. P. 26(a)(2), (b)(4). Therefore, in Alaska, as in the federal system, the language that purportedly implied a prohibition on *ex parte* contact no longer exists.

218. *Supra* notes 44, 45, 49, 147.

219. Professor Hazard and Mr. Hodes, two opponents of *ex parte* contact whose zeal on this issue, like mine, *see supra* note 55, might stem in part from personal experience, apparently are not willing to abandon their opposition to *ex parte* contact entirely. *See* 1 HAZARD & HODES, *supra* note 126, § 3.4:402. Although their view of *ex parte* contact as unethical conduct is based upon pre-1993 Rule 26(b)(4)’s alleged implied prohibition of all “forms of contact” outside of formal discovery, they are unwilling to concede that the 1993 amendments removing this language removes the heart of their position. *Id.* § 3.4:402 n.1. Instead, they contend, “Although the new rules contemplate that parties will voluntarily disclose most information about their experts and the opinions they hold, they still do not contemplate ‘free form’ interviews . . .” *Id.* What Professor Hazard and Mr. Hodes fail to mention is that the revised Federal Rules also do not prohibit *ex parte* interviews, be they “free form” or some other variety. Without the formal discovery limiting language that previously was found in Federal Rule 26(b)(4), one can no longer argue that only those informal discovery efforts “contemplated” by the Rules are permissible.

Indeed, another opponent of *ex parte* contact of relatively long standing, the Oregon State Bar Legal Ethics Committee, admits that the presence of language outlining formal expert witness discovery provisions and identifying these provisions as the “only” acceptable methods of discovery is critical. In 1990, the Oregon committee opined that *ex parte* contact was

2. The "Protecting Information That Used to Be Confidential" Concern

As a secondary rationalization for banning *ex parte* contact, courts and other ethics authorities often discuss concerns for communications and materials that were confidential before the attorney hiring the expert revealed them to her.²²⁰ It is undoubtedly correct that materials that had been protected by the work product doctrine and communications that had been protected by the attorney-client privilege occasionally are disclosed to expert witnesses by the attorneys who retain them. Under the current rules, this voluntary sharing of these items²²¹ does not mean that *ex*

impermissible in civil cases. Or. State Bar Legal Ethics Comm., Op. 530 (1990), *summarized in* ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106. Two years later, the Oregon committee reexamined the issue and refined its position. In the 1992 opinion, the committee determined that Federal Rule 26(b)(4)'s identification of interrogatories as the "only" means of expert witness discovery rendered *ex parte* contact impermissible in federal civil cases. Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 3 (1992), *summarized in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122; *accord* Or. State Bar Legal Ethics Comm., Formal Op. 1998-154 (1998), 1998 WL 717729, at *1. Oregon's state formal discovery rules contain no provisions for expert witness discovery, *see* Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 3-4 (1992), *summarized in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122, and, therefore, no statement that is available to be stretched to forbid informal discovery. As a result of the absence of such provisions, the committee found that *ex parte* contact was permissible in Oregon state civil cases. *See id* at 5-6; *accord* Or. State Bar Legal Ethics Comm., Formal Op. 1998-154 (1998), 1998 WL 717729, at *1 ("Because there is no statute, administrative regulation, or court rule that restricts *ex parte* contact with an adverse expert in a workers' compensation proceeding, there is no ethical limitation on doing so, except as discussed below [regarding discussion of privileged and work product items]."). This differentiation between federal and state cases in Oregon demonstrates that the "ex parte contact as ethically impermissible" argument cannot be credibly advanced without at least a rule limiting formal discovery.

In the same manner, the ABA Standing Committee on Ethics and Professional Responsibility opined that whether *ex parte* contact was impermissible turned upon whether the relevant jurisdiction had a provision like the pre-1993 version of Rule 26(b)(4). The committee summarized its findings as follows:

The Committee . . . concludes that, although the Model Rules do not specifically prohibit a lawyer in a civil matter from making *ex parte* contact with the opposing party's expert witness, such contacts would probably constitute a violation of Rule 3.4(c) if the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule 26(b)(4)(A). Conversely, if the matter is *not* pending in such a jurisdiction, there would be no violation.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :209 (emphasis in original).

220. The issues discussed in this and related sections are considered in greater depth in Easton, *supra* note 23, at 576-605.

221. To avoid repeating the phrase "materials that had been protected by the work product doctrine and communications that had been protected by the attorney-client privilege," this Article will sometimes use the phrase "work product materials and attorney-client

parte communications are impermissible. It also does not justify enactment of a ban on ex parte communications.

a. Using Confidentiality Concerns to Attempt
to Justify Bans on Ex Parte Contact

Perhaps in recognition of the tenuous nature of the alleged discovery-rules-violation justification for decisions banning ex parte communications, several courts and ethics authorities have attempted to justify this ban with references to concern for attorney-client communications and attorney²²² work product material.²²³

b. Understanding the Limits of Confidentiality

Given the attention that the work product doctrine and the attorney-client privilege have received from trial-team-model advocates, one might conclude that expert witnesses are commonly in possession of material protected by one of these doctrines. This is not, or at least should not be, the case. While attorneys occasionally disclose communications and materials to experts that would otherwise be protected by attorney-client privilege and the work product doctrine, the limited reach of these doctrines makes them generally inapplicable to data forwarded by an attorney to her expert, at least when the attorney is careful in forwarding that data.

i. The Work Product Doctrine and the
Attorney-Client Privilege Usually Do Not
Apply to Data Disclosed to Expert Witnesses

In many instances, the data communicated by an attorney to her expert witness is not protected by either the work product doctrine or the attorney-client privilege. Both doctrines apply only in limited circumstances, and neither protects information just because that information is included in protected materials or communications. Instead, the work product doctrine outlined in the Federal Rules of Civil Procedure merely places "documents and tangible things"²²⁴ outside the scope of discovery,

communications" or the word "items."

222. See *infra* note 225.

223. See *Heyde v. Xtraman, Inc.*, 404 S.E.2d 607, 612 (Ga. Ct. App. 1991) (discussing expert's communications with attorney who originally retained him); Or. State Bar Legal Ethics Comm., Op. 530, at 627 (1990) (opining that an attorney who directly contacted adverse experts "interfered with the obligation of [opposing] counsel to maintain confidences and secrets of the client"), summarized in ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106; cf. *Shadow Traffic Network v. Superior Court*, 29 Cal. Rptr. 2d 693, 700-01 (Cal. Ct. App. 1994) (concerning experts who were interviewed briefly by attorneys, but not retained by them).

224. FED. R. CIV. P. 26(b)(3). Although Rule 26(b)(3)'s outline of the work product rule refers to "documents and tangible things," the work product doctrine has also been applied to communications that have not been reduced to writing or to another tangible format. In an example that is particularly relevant to the discussion at hand, courts have applied the work product doctrine and related waiver principles to conversations between attorneys and their

absent a showing of substantial need, when the documents and things were prepared by attorneys²²⁵ in anticipation of litigation or in preparation for trial.²²⁶ Most states

expert witnesses, even when these conversations have not been recorded anywhere but the memories of the attorneys and experts. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295-96 (W.D. Mich. 1995). Similarly, the work product doctrine has been applied to an attorney's thoughts and recollections. 8 WRIGHT ET AL., *supra* note 146, § 2024, at 337-38.

Therefore, the references to work product "materials" in the Article should be read to include materials, communications, and thoughts that have not been recorded in tangible form. Given the need to use the term "communications" in references to both attorney-client communications and *ex parte* communications, the shorthand term "materials" has been adopted simply for the sake of clarity.

225. As outlined in the Federal Rules of Civil Procedure, the work product doctrine covers materials prepared "by or for another party or by or for that other party's representative," not simply materials prepared by or under the direction of an attorney. FED. R. CIV. P. 26(b)(3); 8 WRIGHT ET AL., *supra* note 146, at 14-15. However, for purposes of the debate about whether work product protection has been waived and the work product materials are therefore obtainable in formal (and therefore informal, *see infra* notes 268-70 and accompanying text) discovery, work product issues often concern whether formal or informal discovery would result in "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3). In almost every dispute about whether work product protection has been waived by disclosure to an expert, the work product materials at issue were prepared by or under the direction of an attorney, and the concern is whether discovery of these materials by the opponent would expose an attorney's mental impressions or opinions. Therefore, for purposes of this section of the Article, the terms "attorney work product" and "work product" are essentially interchangeable.

226. The scope of the work product doctrine is defined by the Federal Rules of Civil Procedure and similar provisions in state discovery rules, statutes, and case law. Federal Rule 26(b)(3) states:

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

It is significant that the provisions of this federal work product rule are explicitly "[s]ubject to the provisions of subdivision (b)(4) of this Rule," *id.*, which outlines the scope of discovery regarding testifying experts. FED. R. CIV. P. 26(b)(4); *see B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 171 F.R.D. 57, 66-67 (S.D.N.Y. 1997) ("[T]he drafters of the rule understood the policies behind expert disclosure and the work product doctrine and have decided that disclosure of material generated or consulted by the expert is more important."); Applegate, *supra* note 32, at 297 ("By providing for discovery of expert opinions 'developed in anticipation of litigation,' [pre-1993] rule 26(b)(4) carves out an exception to rule 26(b)(3)

have similar work product rules.²²⁷ In a similar manner, the attorney-client privilege protects some communications between an attorney and a client from disclosure, but only when several conditions are met.²²⁸ Given the limited circumstances in which

for ordinary (nonopinion) work product. Some courts have interpreted rule 26(b)(4) as simply overriding rule 26(b)(3) for experts who will testify.” Furthermore, it is arguably significant that the list of party representatives in Rule 26(b)(3) does not include the term “expert.” These indications suggest that the work product doctrine should have little or no application to materials prepared by the expert or forwarded to the expert.

Rule 26(b)(3)’s outline of the work product doctrine traces its origin to the well-known Supreme Court case that first articulated the doctrine, *Hickman v. Taylor*, 329 U.S. 495 (1947). For discussions of *Hickman* and its effect on work product law, see generally 8 WRIGHT ET AL., *supra* note 146, § 2022, at 318-26. According to the authors, Rule 26(b)(3) “was designed as a largely accurate codification of the doctrine announced in the *Hickman* case and developed in later cases in the lower courts.” *Id.* § 2023. There is some room to argue that *Hickman* continues to define the scope of the work product doctrine in some situations not covered by Rule 26(b)(3). See generally *Easton*, *supra* note 23, at 541 n.235 (citing *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85 (S.D. W. Va. 1995) (stating that contours of the work product doctrine outside of those found in Rule 26(b)(3) are found in *Hickman*)). Others suggest that *Hickman* has been replaced by Rule 26(b)(3) as the outline of work product law for federal civil cases. See *Toledo Edison Co. v. G.A. Techs., Inc.*, 847 F.2d 335, 338 (6th Cir. 1988) (“The law relating to work product began with *Hickman v. Taylor* However, since 1970, all of the standards and procedures for making claims of work product are embraced in [Rule] 26(b)(3).” (citation omitted)); *Seal v. Univ. of Pittsburgh*, 135 F.R.D. 113, 114 (W.D. Pa. 1990) (“[T]he protection of work product arising from the case of *Hickman v. Taylor* has been supplanted by Rule 26(b)(3) of the Federal Rules of Civil Procedure” (citation omitted)); see also *Sherman L. Cohn, The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 921 (1983) (“The [*Hickman*] work-product doctrine was codified and incorporated in rule 26 of the revised Federal Rules of Civil Procedure.”); *Plunkett*, *supra* note 64, at 454.

227. According to Professors Wright, Miller, and Marcus, “34 states have adopted verbatim copies of Rule 26(b)(3), and ten others have provisions that differ but appear very similar in operation.” 8 WRIGHT ET AL., *supra* note 146, § 2023, at 334-35 (citations omitted).

228. In 1950, a federal judge outlined the attorney-client privilege in a passage that, according to a popular procedural treatise, has since been “widely quoted”:

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

United States v. United Shoe Mach. Co., 89 F. Supp. 357, 358 (D. Mass. 1950), *quoted in* 8 WRIGHT ET AL., *supra* note 146, § 2017, at 256 & n.6 (“Though favored by many courts, Judge Wyzanski’s formulation is only one of several.”).

Dean Wigmore articulated another popular outline of the attorney-client privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be

these doctrines apply, it can be safely assumed that most items considered by expert witnesses were not at any time protected by either the work product doctrine²²⁹ or the attorney-client privilege.²³⁰

It is important to remember that a given piece of information cannot be rendered either "work product information" or "attorney-client information" simply by incorporating that piece of information into work product materials or attorney-client communications, because the law does not protect the underlying information that is included within work product materials²³¹ or attorney-client communications.²³²

waived.

8 JOHN H. WIGMORE, EVIDENCE § 2292, at 554 (John T. McNaughton ed., 1961) (emphasis omitted), *quoted in* *Beal v. Washton*, 472 A.2d 812, 813 (Conn. Super. Ct. 1983); *see also* *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 718 A.2d 1129, 1138 (Md. 1998) (citing Wigmore).

For examples of discussions about the attorney-client privilege, see William V. Dorsaneo III & Elizabeth G. Thornburg, *Time Present, Time Past, Time Future: Understanding the Scope of Discovery in Texas Courts*, 29 HOUS. L. REV. 245, 284 (1992); Easton, *supra* note 23, at 592-97; Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682 (1999); Jason Marin, Note, *Invoking the U.S. Attorney-Client Privilege: Japanese Corporate Quasi-Lawyers Deserve Protection in U.S. Courts Too*, 21 FORDHAM INT'L L.J. 1558 (1998).

229. *See* Easton, *supra* note 23, at 577-79.

230. *See id.* at 594; Marcus, *supra* note 63, at 1605 ("[A]ttorney-client privilege is available only when an elaborate series of requirements is satisfied . . .").

231. *B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 171 F.R.D. 57, 62-63 (S.D.N.Y. 1997) ("There is ample authority that any facts provided to an expert, even if provided by an attorney, are required to be disclosed."); *cf.* 8 WRIGHT ET AL., *supra* note 146, § 2023, at 330-32, § 2024, at 337 ("Rule 26(b)(3) . . . does not bar discovery of facts a party may have learned from documents that are not themselves discoverable.").

Even the lead decision in the line of cases holding that disclosure of work product materials to an expert does not constitute a waiver of work product protection recognizes that the factual information contained within work product materials is discoverable. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984). The *Bogosian* decision states:

Of course, where the same [work product] document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts. It would represent a retreat from the philosophy underlying the Federal Rules of Civil Procedure if a party could shield facts from disclosure by the expedient of combining them or interlacing them with core work product.

Id.; *see also* *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995) (following *Bogosian*) ("[A]ll factual information considered by the expert must be disclosed in the [expert] report.").

Professor Sherman Cohn outlined the scope of the work product doctrine with a similar caution:

The work-product concept applies only to "documents and tangible things." Thus, a party's mental information is not protected by the work-product doctrine, even if that information was obtained by means that would normally fall under work-product protection. Obviously, whatever a party did, saw, heard, or felt may be investigated if relevant. Moreover, information known by a party, but acquired from another person, may be discovered, assuming, of course, that it is relevant and not privileged.

Cohn, *supra* note 226, at 923.

Work product decisions and commentary often distinguish between “core” or “opinion” work product materials—meaning those portions of materials reflecting an attorney’s “mental impressions, conclusions, opinions, or legal theories,” FED. R. CIV. P. 26(b)(3)—which are not discoverable absent a waiver of work product protection, and the portions of work product materials that contain factual information, which may be discoverable even without a waiver of work product protection. *See, e.g.*, *Smith v. Transducer Tech., Inc.*, 197 F.R.D. 260, 262 (D.V.I. 2000); *Johnson v. Gmeinder*, 191 F.R.D. 638, 644-45 (D. Kan. 2000); *Haworth*, 162 F.R.D. at 292 (referring to “attorney opinion work product” and “core work product”); 28 CHARLES A. WRIGHT & VICTOR J. GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 6188, at 482 (1993 & Supp. 2000); *Dorsaneo & Thornburg, supra* note 228, at 274 (referring to “pure opinion work product”); Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 102 (1996) (referring to “core work-product”); *Waits, supra* note 32, at 385 (discussing “opinion work product”); George E. Lieberman, *Experts and the Discovery/Disclosure of Protected Communication*, R.I. BAR J., Feb. 1995, at 7 (“This type of material has been referred to as ‘core’ or ‘opinion work product.’”). This Article is not primarily concerned with whether work product materials are discoverable absent a waiver under the provisions of Rule 26(b)(3) allowing for such discovery upon a “showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” FED. R. CIV. P. 26(b)(3). Instead, this section of the Article focuses upon those situations where an attorney has shown an expert witness “core” or “opinion” work product disclosing the attorney’s mental impressions and thereby, in some jurisdictions, waived work product protection.

Of course, the line between “fact” and “core”/“opinion” work product is not always easy to draw. Materials prepared by or under the direction of attorneys often include both facts and mental impressions of attorneys or their subordinates. Examples include statements taken from witnesses, attorneys’ notes of conversations with witnesses, attorney-authored excerpts of records or documents, and other “attorney-prepared compilations of facts.” Joseph, *supra*, at 102. As noted above and in the text, when the underlying facts are documented in sources other than materials prepared by or on behalf of an attorney, work product issues will generally not arise, because facts can be communicated to the expert witness without disclosure of work product materials. However, there may be instances when the fact is established only by the work product material, and the attorney cannot communicate it to the expert without exposing, at least to some extent, the attorney’s mental impressions. It is these circumstances when core work product must be disclosed to communicate underlying facts to an expert that are the sole legitimate concern in the *ex parte* communication debate. It is these circumstances that are explored, under the admittedly somewhat imprecise rubric of “work product materials,” in the remainder of this section of the Article.

232. An attorney cannot render information privileged simply by including it in a communication with her client. *See Magida ex rel. Vulcan Detinning Co. v. Continental Can Co.*, 12 F.R.D. 74, 76-77 (S.D.N.Y. 1951) (stating that an attorney cannot claim attorney-client protection by including independently obtained information in advice given to a client); *cf. Attorney General v. Covington & Burling*, 430 F. Supp. 1117, 1121-22 (D.D.C. 1977) (stating that because attorney-client privilege does not extend to information obtained by attorneys, attorneys who were lobbyists for foreign governments could be required to provide such information); *J.P. Foley & Co. v. Vanderbilt*, 65 F.R.D. 523, 526-28 (S.D.N.Y. 1974) (finding that when an attorney obtains information from a source other than client and then conveys it to the client, the information is “not based upon the confidential communications of the client”

Indeed, it is somewhat misleading to use the term “confidential information” when discussing concerns about work product materials and attorney-client communications, because the law does not give any protection to the underlying information contained in work product materials or attorney-client communications. Instead, in some instances, materials or communications that include underlying information, but not the information itself, may be protected by the work product doctrine or the attorney-client privilege. To clarify this potentially confusing matter, assume that a client tells her attorney “the light was already red before I got into the intersection,” and assume further that the attorney writes a file memorandum that memorializes this statement. If all of the conditions of the attorney-client privilege under the law of the relevant jurisdiction have been met,²³³ the fact that the client told her attorney that the light was red will be protected by the attorney-client privilege, unless and until there is a waiver.²³⁴ The attorney’s file memorandum may be protected by the work product doctrine,²³⁵ unless and until there is a waiver.²³⁶ However, the underlying information (i.e., the client’s memory regarding the status of the light when she entered the intersection) is not protected by either the attorney-client privilege or the work product doctrine, and the opposing party is entitled to obtain this information through discovery.²³⁷ Therefore, except in the relatively unusual circumstances where the work product material or the attorney-client communication is the only source of a particular piece of information,²³⁸ the attorney

and therefore not privileged); Jerald David August, *The Attorney-Client Privilege and Work-Product Doctrine in Federal Tax Controversies*, 83 J. TAX’N 197, 198 (1995) (stating that the attorney-client privilege “does not apply to information received by the attorney from third parties”).

In a similar vein, a client cannot render a piece of information privileged simply by including it in a communication with her attorney. The U.S. Supreme Court has observed:

[P]rotection of the privilege extends only to *communications* and not to the facts.

A fact is one thing and a communication concerning the fact is an entirely different thing. The client cannot be compelled to answer the question, “What did you say or write to the attorney?” but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981) (emphasis in original); *see also* 8 WRIGHT ET AL., *supra* note 146, § 2017, at 269 (“A document, which would be subject to discovery in the client’s possession, does not become privileged because the client sends it to the attorney.”).

233. *See supra* note 228.

234. *See infra* notes 248-70 and accompanying text.

235. *See supra* note 226.

236. *See infra* notes 248-70 and accompanying text.

237. The most apparent discovery devices for obtaining this information would be an interrogatory asking the party to state her recollection regarding the light at the time she entered the intersection under Rule 33 of the Federal Rules of Civil Procedure or a deposition question asking for the same information under Rule 30 or Rule 31.

238. Circumstances where attorney-client communications or work product materials are the only items documenting a particular piece of information are rare, but not difficult to imagine. For example, one could create such a scenario by assuming, in addition to the facts in the hypothetical outlined in the text, that the only time that the client ever told anybody about the

can make the expert aware of the underlying information without disclosing the work product material or attorney-client communication to the expert.²³⁹

Even in the relatively rare circumstances where an attorney must disclose work product materials or attorney-client communications to an expert witness to make her aware of some underlying information, there is no need to ban *ex parte* communications with the expert. After all, the only work product materials or attorney-client communications that an expert could possibly pass on to opposing counsel during *ex parte* contact are materials or communications that the expert received from the attorney or party that retained her.²⁴⁰ Once an attorney passes materials or communications on to a testifying expert, the materials and communications can no longer truly be called confidential.²⁴¹ The attorney's actions in passing the previously confidential materials and communications on to her expert does and should have consequences.

status of the light was the time she told her attorney and that the client is no longer able to state her recollection, due to death, amnesia, or some medical condition that renders her unable to communicate.

239. *See supra* note 231.

In many circumstances, the underlying fact will even be included in something other than (or, more precisely, in addition to) attorney-client communications or work product materials. For example, the client's recollection regarding the status of the light might be included in a police report regarding the accident, in her postaccident conversation with the other driver or someone else at the accident scene, in her conversations about the accident with various acquaintances, in her answers to interrogatories, and in her answers to deposition questions.

240. If a third party (i.e., a person other than the client, the attorney, and persons working for the attorney) is present when an attorney communicates with a client, the attorney-client privilege generally does not attach to the communication. *See supra* note 228. If portions of the information obtained in a privileged communication are disclosed to third parties in a nonprivileged communication, a waiver of the attorney-client privilege is generally found. 8 WRIGHT ET AL., *supra* note 146, § 2016.2, at 248-49; *see also* RESTATEMENT, *supra* note 101, § 79. Therefore, if a third party has a certain piece of information, it is not protected by the attorney-client communication. In order for the attorney-client privilege to attach to a certain communication and still exist at the time that the expert is made aware of the communication, the expert must be notified of the communication by the client, her attorney, or persons working with the attorney. If any other person is aware of the communication, as such a person would have to be in order to disclose it to the expert, the attorney-client privilege would have already been waived by virtue of the disclosure of the communication to this third person. *See supra* note 228.

241. At a minimum, the information is no longer as confidential as it was before the attorney passed it on to her expert. Therefore, it is not persuasive for trial-team-model advocates to simply label the materials passed on to expert witnesses "confidential" and then argue that a concern for the confidentiality of this material overrides the potential benefits of *ex parte* communications. As this section of the Article argues, work product and attorney-client law neither can nor should protect information about the formation of the expert's opinions from the cross-examiner and the jurors.

ii. The Model Rules Do Not Prohibit Informal Information-Gathering Efforts That Might Result in Disclosure of Previously Confidential Materials and Communications

Concern for the possibility that a witness, fact or expert, who has been advised of previously confidential materials or communication might disclose them to an attorney other than the one who disclosed them has not resulted in any ethical rule banning informal discovery that could lead to such disclosures. In the absence of such a rule, *ex parte* communications are ethically permissible.

While it is true that attorneys or parties may forward previously confidential materials and communications to expert witnesses, it is also true that attorneys or parties may forward previously confidential materials and communications to fact witnesses. Despite this possibility, courts and other ethics authorities have consistently determined that attorneys can conduct *ex parte* interviews of unrepresented fact witnesses.²⁴² There is no ethics rule prohibiting such contact.²⁴³

With regard to an attorney's right to conduct *ex parte* interviews, the Model Rules and their state incarnations do not contain any distinction between fact witnesses and expert witnesses. Instead, the only distinctions are between witnesses who are represented by counsel and unrepresented witnesses.²⁴⁴ In the absence of a distinction in the ethical rules between fact and expert witnesses, the repeated decisions allowing a party to interview witnesses *ex parte* are controlling, despite the possibility that such interviews could possibly result in disclosure of materials and communications that were confidential before the attorney forwarded them to the witness.²⁴⁵

242. See *supra* note 114.

243. See *supra* notes 110-17 and accompanying text.

In fact, the most relevant Model Rules provision regarding *ex parte* communications with witnesses restrains the conduct not of the attorney conducting the *ex parte* communications, but of the attorney who might consider asking witnesses not to participate in them. See *infra* Part V.

244. See *supra* notes 110-17 and accompanying text.

As an aspect of the distinction between persons, including entities, represented by counsel and unrepresented persons, some employees of represented entities are within the group of persons that an opposing attorney cannot contact. See *supra* note 116.

245. Courts have held that doctrines allowing a party to refrain from disclosing certain items, like the work product doctrine and the attorney-client privilege, should be narrowly confined and strictly construed. For example, the Fourth Circuit quoted Wigmore's warning about the privilege:

"[T]he [attorney-client] privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."

N.L.R.B. v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965) (quoting 8 WIGMORE, *supra* note 228, § 2292).

Even Professor Richard Marcus, who argues that waivers of privileges should be found only in substantially more limited circumstances than those outlined in current law and advocated

In reality, given the latitude that experts, but not fact witnesses, possess to form and testify to opinions based upon inadmissible data made known to them outside the trial,²⁴⁶ it is even more important for attorneys to be able to pursue reasonable efforts to obtain information about the data made known to experts than it is for them to pursue such efforts with regard to fact witnesses.²⁴⁷

iii. Disclosure of Previously Confidential
Materials and Communications to Testifying
Experts Should Be, and Often Is, Considered a
Waiver of Work Product and Attorney-Client
Protection

Although the law regarding waiver of work product and attorney-client protection is far from uniform,²⁴⁸ the precedent in some, though not all,²⁴⁹ jurisdictions

here, concedes, "Because the 'sacred' privileges contravene the maxim that the law has a right to every person's evidence, American law has set its head against them since the mid-nineteenth century." Marcus, *supra* note 63, at 1605.

For examples of similar statements about other privileges, see *United States v. Nixon*, 418 U.S. 683, 710 (1974) (stating that privileges are "exceptions to the demand for every man's evidence [that] are not lightly created nor expansively construed, for they are in derogation of the search for truth"); *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (L. Hand, J.) (declaring that the Fifth Amendment privilege against self-incrimination is a "privilege . . . to suppress the truth, but that does not mean that it is a privilege to garble it").

246. See *supra* notes 44-48 and accompanying text.

247. Professor Waits has noted that the argument for formal discovery of work product disclosed to expert witnesses is even stronger than the argument for formal discovery of work product disclosed to fact witnesses. Waits, *supra* note 32, at 441 n.198; see also *infra* note 268.

248. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997), reprinted in ABA/BNA MANUAL, *supra* note 116, at 1101:132, :134 n.2 (discussing varied court decisions regarding whether disclosure of work product to a testifying expert is a waiver of work product protection); Waits, *supra* note 32, at 391; Jeff A. Anderson et al., Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 763 (1983) ("[W]ork product protection is the most frequently litigated discovery issue." (citing 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.14, at 26-285 (2d ed. 1996))); Dan Nelson, Comment, *Discovery of Attorney-Expert Communications: Current State of, and Suggestions for, Federal and Missouri Practice*, 57 MO. L. REV. 247, 251 (1992).

Despite, or perhaps as a result of, the diversity of opinions and the unsettled state of work product doctrine and attorney-client privilege law, many have taken on the task of attempting to catalog or review the law. See, e.g., Alvin K. Hellerstein, *A Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine*, in CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 1996, at 589 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-540, 1996); see also August, *supra* note 232; Waits, *supra* note 32; Bryan Lewis, Note, *Discovery Under the Federal Rules of Civil Procedure of Attorney Work Product Provided to an Expert Witness*, 53 FORDHAM L. REV. 1159 (1985); Nelson, *supra*; Carlisle G. Packard, Case Note, *Opinion Work Product, Expert Witness Discovery, and the Interaction of Rules 26(b)(3) and 26(b)(4)(A): Bogosian v. Gulf Oil Corporation*, 1985 BYU L. REV. 573 (1985); Katherine A. Staton, Note, *Discovery of Attorney Work Product Reviewed by an Expert Witness*, 85 COLUM. L. REV. 812 (1985).

249. For cases holding that disclosure of attorney-client communications or work product

establishes that disclosure of materials or communications to a testifying expert constitutes a waiver of some or all of the protection that previously attached to them. In these jurisdictions, disclosure of work product or attorney-client items to a testifying expert results in allowing the opposing party to demand access to the items in the formal discovery process.²⁵⁰

The decisions holding that disclosure to an expert witness of items previously protected by the work product doctrine or attorney-client privilege constitutes a waiver are well reasoned²⁵¹ because the Federal Rules of Evidence²⁵² and similar state evidence-law provisions²⁵³ give expert witnesses tremendous leeway.²⁵⁴ Because Federal Rule of Evidence 703 allows an expert to base her opinions upon information that an attorney makes known to her,²⁵⁵ an attorney may ethically and legitimately provide her experts with most or all of the raw data that serves as the basis for her opinions, outside the presence of her opponent.²⁵⁶ This feeding of data by the attorney

material to an expert does not necessarily constitute a waiver of the protections of these doctrines, see *infra* notes 261, 267.

250. See *infra* notes 257-67 and accompanying text.

251. See Easton, *supra* note 23, at 579-83, 592-97.

252. See *supra* notes 44-60 and accompanying text.

253. See *supra* notes 44, 45, 49 and accompanying text.

254. See Easton, *supra* note 23, at 483-91; *supra* notes 44-54 and accompanying text.

In addition to the Rule 703 issues discussed in the text, there are discovery issues arising out of other Federal Rules of Evidence provisions. Under Rule 612(2), a court may provide for an adverse party to receive a document reviewed by a witness "to refresh memory for the purpose of testifying" if "the court in its discretion determines it is necessary in the interests of justice." FED. R. EVID. 612. For discussions of the waiver issues related to Rule 612, sometimes in a fact witness context rather than an expert witness context, see *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 386 n.1 (N.D. Cal. 1991); 28 WRIGHT & GOLD, *supra* note 231, § 6188; Applegate, *supra* note 32, at 314-22; George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637, 657-58 (1986); Floyd, *supra* note 85, at 118-35; Joseph, *supra* note 231, at 102-03; Mickus, *supra* note 48, at 801-02; Plunkett, *supra* note 63, at 462-64; William S. Blair, Comment, *Intellectual Property—the Pitfalls of Attorney-Client Privilege Waiver in Patent Law*, 39 S. TEX. L. REV. 769, 779 (1998); Megan McCrea, Case Note, *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985), 59 TEMP. L.Q. 1043 (1986). Rule 705 of the Federal Rules of Evidence, which permits the exploration of the basis for an expert's opinion during cross-examination, also has been cited by those considering issues regarding expert witness disclosure. See Easton, *supra* note 23, at 530 n.186.

255. See FED. R. EVID. 703; *supra* notes 45-48 and accompanying text.

256. Often, an attorney provides the data that ultimately becomes the basis for the expert's opinions in witness preparation meetings with the expert. As one observer noted:

[E]xpert witnesses require considerable preparation. They ordinarily lack the personal knowledge required of other witnesses; without preparation, they could not testify at all. Consequently, the Federal Rules of Evidence contemplate some degree of preparation by the sponsoring party. . . . The basis of the expert's testimony can be "facts or data . . . made known . . . at or before the hearing."

Witness preparation usually provides the foundational material for the testimony.

Applegate, *supra* note 32, at 295-96 (emphasis in original) (citations omitted) (quoting FED. R. EVID. 703); see also *In re Air Crash Disaster*, 720 F. Supp. 1442, 1444 (D. Colo. 1988); Easton, *supra* note 23, at 495-96; Mickus, *supra* note 48, at 788-89.

to her retained expert should not be without consequences, however.²⁵⁷ To adequately cross-examine an adverse expert, an attorney must be allowed to discover²⁵⁸ all of the data that the expert considered in forming her opinion, including that which was provided to her by the attorney who retained her.²⁵⁹ The data that the expert considered and “rejected” in the process of forming her opinion is often as important to an attorney preparing for cross-examination as the data that the expert used as the basis for her opinion.²⁶⁰

257. See *B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 171 F.R.D. 57, 67 (S.D.N.Y. 1997) (“[T]he adverse party needs to know the information [shared by an attorney with an expert witness] in order to conduct an effective cross examination.”); Applegate, *supra* note 32, at 296 (“Because the expert’s conclusions depend on the groundwork provided by the preparer, the cross-examiner’s access to the preparatory material is essential.”); Waits, *supra* note 32, at 440-41 (“The attorney’s opinions are irrelevant only as long as they remain in the attorney’s head or files. Once those thoughts are shared with an expert witness, they may well become part of the witness’s thoughts about the case, a highly relevant subject.” (emphasis in original)).

258. Preparation for expert witness cross-examination is widely recognized as a legitimate, if not necessary, reason to conduct formal expert discovery. See, e.g., *Vaughan Furniture Co. v. Featureline Mfg., Inc.*, 156 F.R.D. 123, 128 (M.D.N.C. 1994) (stating that opinion work product documents considered by an expert “are necessary for appropriate cross-examination and should be made available prior to trial because the pretrial deposition of expert witnesses can be used to explore the witnesses’ biases” (citations omitted)); *Occulto v. Adamar of N.J., Inc.*, 125 F.R.D. 611, 615 (D.N.J. 1989) (“Meaningful discovery of an expert’s opinions is necessary to foster effective cross-examination . . .” (citing FED. R. CIV. P. 26(b)(3) advisory committee’s notes (1970 amendments))); *Boring v. Keller*, 97 F.R.D. 404, 407-08 (D. Colo. 1983) (holding that pre-1993 Rule 26(b)(4) provided for formal expert discovery “so that a party may prepare for cross-examination and impeachment of any prospective witness”); *Nelson*, *supra* note 248, at 257 (“The fundamental purpose behind [pre-1993] Rule 26(b)(4) lies in the need for counsel to cross-examine expert witnesses effectively.” (citations omitted)).

259. See *Karn v. Rand*, 168 F.R.D. 633, 640 (N.D. Ind. 1996) (“Without pretrial access to attorney-expert communications, opposing counsel may not be able to effectively reveal the influence that counsel has achieved over the expert’s testimony.” (citations omitted)); *Intermedics*, 139 F.R.D. at 393-94; *In re Air Crash Disaster*, 720 F. Supp. at 1444 (holding that because experts often get facts from attorneys, opposing counsel must be allowed to discover attorney-provided data to effectively impeach them); *Boring*, 97 F.R.D. at 408; *Capalbo v. Balf Co.*, No. CV-90-0377507S, 1994 WL 65214, at *2 (Conn. Supcr. Ct. Feb. 23, 1994); Waits, *supra* note 32, at 441 (discussing a party’s interest in the work product documents provided by opposing counsel to her experts). As Professor Waits noted, “It can hardly be said that documents reviewed by the expert prior to his testimony are irrelevant, particularly when they were produced by someone so keenly interested in moving the witness’s testimony toward a particular conclusion.” *Id.*

260. Under the pre-1993 Federal Rules and equivalent state discovery provisions, some jurisdictions held that disclosure of work product to expert witnesses is a waiver of work product protection that renders all disclosed work product discoverable. See *infra* note 261. Other jurisdictions held that disclosure of work product to an expert is not necessarily a waiver of work product protections. See *infra* note 261.

There has been a third line of cases. Prior to the 1993 amendments to the Federal Rules of Civil Procedure, which expanded formal expert witness discovery, several courts held that disclosure of work product to an expert constituted a waiver of work product protection only

Even before the 1993 amendments to the Federal Rules of Civil Procedure and similar state discovery provisions expanding expert witness discovery, some jurisdictions considered an attorney's disclosure of work product materials²⁶¹ or

when the expert based her opinion on the disclosed work product. *See Dominguez v. Syntex Labs., Inc.*, 149 F.R.D. 158, 164 (S.D. Ind. 1993); *Occulto*, 125 F.R.D. at 615; *Aetna Cas. & Sur. Co. v. Blackmon*, 810 S.W.2d 438, 440 (Tex. Ct. App. 1991); Lieberman, *supra* note 231, at 7-8. Although this appears at first blush to be a compromise between work product concerns and an opposing party's need to prepare for expert cross-examination, in practice it severely handicapped the opposing party by allowing the hiding of problematic information. Under this system, an expert could ignore information in work product materials that was inconsistent with her opinions and thereby protect the inconsistent information from disclosure to the opposing attorney who could have used the information to impeach the expert during cross-examination. *See Joseph*, *supra* note 231, at 103-04 (noting "experts' burying relevant but adverse information through the mental gymnastic of deciding that they did not rely on it"); Easton, *supra* note 23, at 556-69.

In federal courts and state courts where the 1993 Federal Rules amendments expanding formal expert witness discovery or equivalent state provisions are now in effect, there should no longer be a distinction between work product and other information available to an expert that she relied upon in forming her opinions and work product and other information that she did not rely upon in forming her opinions. Easton, *supra* note 23, at 537-43. Under the post-1993 version of the Rules, "data or information considered by the [expert] witness" is discoverable. FED. R. CIV. P. 26(a)(2)(B) (emphasis added). As even a court that entered a decision that limited the effect of the 1993 amendments to formal expert discovery noted, "[Post-1993] Rule 26(a)(2) specifically requires disclosure of factual information considered *but not* relied upon, as well as information that was considered *and* relied upon." *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 296 (W.D. Mich. 1995) (emphasis in original); *see also W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 WL 1843258, at *8 (W.D.N.Y. Nov. 2, 2000) ("[A]ny information . . . provided to an expert for his consideration in forming an opinion for trial is subject to disclosure."); *Karn*, 168 F.R.D. at 635-36 ("'Considered,' which simply means 'to take into account,' clearly invokes a broader spectrum of thought than the phrase 'relied upon,' which requires dependence on the information. . . . In this case, the experts reviewed the documents in connection with forming their opinions. Thus, they 'considered' the information, mandating disclosure." (citations omitted)); *Vaughan Furniture*, 156 F.R.D. at 128 ("Opinion documents which could have an influence on the expert opinion could include ones discussing trial strategy, even if the opinions were rejected as a basis for the expert opinion." (citation omitted)). In addition, as one author noted:

No longer are the [discoverable] documents limited to those upon which the expert relied in forming her opinion, but, rather, also those merely 'considered' by the expert. 'Consider' is defined as 'to think about seriously,' 'to regard,' 'to take into account,' and/or 'to bear in mind.' Assuredly, 'to consider' is vastly broader and more encompassing than 'to rely upon.'

Lieberman, *supra* note 231, at 10 (citations omitted).

261. *See U.S. Energy Corp. v. Nukem, Inc.*, 163 F.R.D. 344, 348 (D. Colo. 1995) (decided under pre-1993 version of Rule 26(b)(4)); *William Penn Life Assurance Co. v. Brown Transfer & Storage Co.*, 141 F.R.D. 142, 143 (W.D. Mo. 1990); *Intermedics*, 139 F.R.D. at 397; *In re Air Crash Disaster*, 720 F. Supp. at 1444; *Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F. Supp. 1013, 1014 (S.D.N.Y. 1983); *Boring*, 97 F.R.D. at 407 ("[T]he opinion work product rule is no exception to discovery under circumstances where documents which contain mental impressions are examined and reviewed by expert witnesses before their expert opinions are formed." (citations omitted)); *Emergency Care Dynamics v. Superior Court*,

attorney-client communications²⁶² to an expert a waiver of protection. In jurisdictions with post-1993 Federal Rules or similarly expansive views of expert witness discovery,²⁶³ a party is now explicitly entitled to learn about all of the data that an

932 P.2d 297, 298 (Ariz. Ct. App. 1997) (decided under Arizona's pre-1993 version of Rule 26(b)(4)) ("We hold that a lawyer foregoes work-product protection for communications with an expert witness concerning the subject of the expert's testimony . . ."); *Stearrett v. Newcomb*, 521 A.2d 636, 638 (Del. Super. Ct. 1986) ("When plaintiffs forwarded those documents to a prospective expert with the expectation that that expert might testify at trial, plaintiffs waived any claim of privilege or benefit of work product."); *Applegate*, *supra* note 32, at 297 ("[T]he courts have been extremely reluctant to accord work-product protection to communications between a lawyer and an expert.").

Prior to the 1993 amendments to the Federal Rules of Civil Procedure, decisions holding that disclosure of work product to an expert constituted a waiver were far from universal. *See B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 64-65 (outlining the conflicting precedent under the pre-1993 Federal Rules); *Rail Intermodal Specialists, Inc. v. Gen. Elec. Capital Corp.*, 154 F.R.D. 218, 219-21 (N.D. Iowa 1994) (similar); *Waits*, *supra* note 32, at 397-408 (outlining the split in authority); *Pretty*, *supra* note 178, at 115-16 (similar); *Lewis*, *supra* note 248, at 1163-65 (similar); *Nelson*, *supra* note 248, at 258-63 (similar). Even after the 1993 amendments, some courts have not required disclosure of all work product materials that had been disclosed to a testifying expert. *See infra* note 267.

262. *See McCue v. Commissioner*, 46 T.C.M. (CCH) 1450, 1461 (T.C. 1983); *cf. Capalbo*, 1994 WL 65214, at *2 ("[A] waiver of the privilege exists where an agent of the attorney, here an expert, is to testify—the client has impliedly, if not actually, consented to disclosure of the information given to the attorney by way of the expert."); *Easton*, *supra* note 23, at 596-97 (discussing similar issues raised when a party's attorney later becomes a witness for that party).

It has been suggested that it is easier to waive the attorney-client privilege by disclosing documents to experts than it is to waive the work product privilege by similar actions. *See United States v. 499.472 Acres of Land*, CIV.A. H-79-1884, 1986 WL 13443, at *1-*2 (S.D. Tex. Nov. 21, 1986).

As with work product, the decisions regarding whether attorney-client communications shared with experts were discoverable under pre-1993 Rule 26(b)(4) and similar rules were not uniform. Some courts have found that disclosure of attorney-client communications to experts does not necessarily constitute a waiver. *See Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 638-39 (E.D.N.Y. 1997); *Palmer v. Farmers Ins. Exch.*, 861 P.2d 895, 907-08 (Mont. 1993). Other courts found waiver only to the extent that an expert relied upon the attorney-client communications in forming her opinions. *See, e.g., Coyle v. Estate of Simon*, 588 A.2d 1293, 1296 (N.J. Super. Ct. App. Div. 1991); *Aetna Cas. & Sur. Co.*, 810 S.W.2d at 440 ("[T]he designation of Fernandez as an expert witness on Aetna's claims handling procedure waived any privilege that Aetna might assert to the specific matters that Fernandez relied upon as the basis of his testimony."). *But see supra* note 260 (discussing the limited viability of precedent suggesting that waiver depends upon expert reliance following the 1993 amendments to the Federal Rules and similar state discovery provisions); *infra* note 266 and accompanying text.

263. The 1993 Federal Rules amendments and similar changes in state discovery rules significantly expanded the scope of information that a party could obtain in formal discovery about expert witnesses. *See supra* notes 205-07 and accompanying text. At a 1995 joint American Law Institute and American Bar Association conference, U.S. District Judge Sam C. Pointer, Jr. noted that the 1993 amendments provided for discovery of items provided to experts, regardless of work product or attorney-client arguments. Judge Pointer stated:

The rules [as amended in 1993] make it clear that whatever you give to the expert

expert received.²⁶⁴ Therefore, when an attorney provides work product materials²⁶⁵

is subject to being disclosed . . . [The rule says] whatever the expert relies upon or considers. The lawyer's obligation, in order to preserve work product or attorney-client privilege, is to not give it to the expert. If you give it to the expert you have waived the privilege.

Lovein, *supra* note 89, at 263 n.216 (omission in original) (quoting *Work Product Threatened by New Expert Disclosure Rule*, FED. DISCOVERY NEWS, Feb. 12, 1996 (quoting U.S. District Judge Sam Pointer, Jr.)).

264. The Advisory Committee, which drafted the 1993 amendments expanding the scope of expert witness discovery, made it clear that these amendments were written to give opposing parties access, through required disclosures, to items provided by attorneys to their experts, notwithstanding work product and attorney-client concerns. See FED. R. CIV. P. 26(a)(2) advisory committee's notes (1993 amendments). In its report concerning the 1993 amendments, the Advisory Committee explicitly addressed this issue:

The report [of the expert mandated under Rule 26(a)(2)(B)] is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Id. Professors Wright, Miller, and Marcus agree that the 1993 amendments “appear to require” disclosure of materials provided by attorneys to experts. 8 WRIGHT ET AL., *supra* note 146, § 2031, at 439; see also *W.R. Grace & Co.*, 2000 WL 1843258, at *4 (“It is illogical that such broad language, explicitly directed to privileges and other sources of protection against disclosure, was intended to exclude any form of attorney work product.”).

265. See *W.R. Grace & Co.*, 2000 WL 1843258, at *3 (“Courts have held that comments and questions from counsel to a testifying expert regarding the development of the expert's opinion and report must be disclosed regardless of whether such communications contain attorney work product.”); *TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585 (S.D. Miss. 2000); *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 63; *Karn*, 168 F.R.D. at 639 (stating that Rule 26(a)(2)(B) “‘trump[s]’ any assertion of work product or privilege” and “mandate[s] disclosure of all materials reviewed by an expert witness”); *Vaughan Furniture*, 156 F.R.D. at 128 (“[An expert] witness must produce all documents considered by him or her in the process of formulating the expert opinion, including documents containing [work product] opinions.” (citation omitted)); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997), reprinted in ABA/BNA MANUAL, *supra* note 116, at 1101:132, :134 n.2 (“Some courts require production of all oral and written communications by counsel with a testifying witness even though ordinarily protected as opinion work product.” (citing *Intermedics, Inc.*, 139 F.R.D. at 384)); Lovein, *supra* note 89, at 263 n.217 (stating that “‘if [work product] is given to the expert, the privilege is waived [to that information]’” (alterations in original) (quoting *Work Product Threatened by New Expert Disclosure Rule*, FED. DISCOVERY NEWS, Feb. 12, 1996 (quoting U.S. District Judge Sam Pointer, Jr.))); cf. *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 649 (S.D. Ind. 2000) (holding that intentional disclosure of work product materials to an expert witness is a waiver of work product protection, but inadvertent disclosure does not necessarily constitute a waiver, particularly when disclosed documents had “essentially nothing to do with” the expert's testimony); *Shadow Traffic Network v. Superior Court*, 29 Cal. Rptr. 693, 699 (Cal. Ct. App. 1994) (holding that documents prepared by an expert consultant lose their work product protection when expert is listed as a witness). *But cf. infra* note 267.

or attorney-client communications²⁶⁶ to her expert in jurisdictions with post-1993 Federal Rules or similarly modernized state discovery provisions, she waives any protection that previously attached to these items.²⁶⁷

266. See *Johnson v. Gmeinder*, 191 F.R.D. 638, 645-47 (D. Kan. 2000); *Georgou v. Fritzshall*, No. 93 C 997, 1996 WL 73592, at *2 (N.D. Ill. Feb. 20, 1996) (holding that because attorney-client privilege does not protect facts considered by an expert, these facts are discoverable); *Micron Separations, Inc. v. Pall Corp.*, 159 F.R.D. 361, 362-63 (D. Mass. 1995) (stating that, with regard to an attorney who allegedly provided advice relied upon by a party pursuing an advice of counsel defense, "there is a waiver of the attorney-client privilege and work-product protection at least to the extent of all information respecting communications between the client and attorney up until the time the opinion is rendered" (footnote and citation omitted)); see also 8 WRIGHT ET AL., *supra* note 146, § 2016.2, at 252 ("At least with respect to experts who testify at trial, the disclosure requirements of Rule 26(c)(2), adopted in 1993, were intended to permit further discussion and mandate disclosure despite privilege."); *supra* note 264 (quoting Advisory Committee comments regarding 1993 amendments to the Federal Rules); cf. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 685 (Iowa 1995) (holding that Iowa rule providing for broad expert discovery "requires disclosure of all facts *known* to the expert and which relate to his opinions, not just the facts which form the basis for the expert's opinion" (emphasis in original)); *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. 2000) (similar result under Missouri law).

267. Not all courts agree, however. Before the 1993 amendment to Rule 26, some courts held that providing attorney-client comments or attorney work product to an expert did not necessarily render those items discoverable. See *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593-96 (3d Cir. 1984); *All West Pet Supply Co. v. Hill's Pet Prods.*, 152 F.R.D. 634 (D. Kan. 1993) (decided just after 1993 amendments to Federal Rules, but based upon pre-1993 precedent); *Hamel v. Gen. Motors Corp.*, 128 F.R.D. 281, 284-85 (D. Kan. 1989); *Bethany Med. Ctr. v. Harder*, No. CIV.A. 85-2415, 1987 WL 47845 (D. Kan. Mar. 12, 1987); *McKinnon v. Smock*, 434 S.E.2d 92, 93 (Ga. Ct. App. 1993); *Grubbs v. K Mart Corp.*, 411 N.W.2d 477, 480 (Mich. Ct. App. 1987).

Civil procedure acers Wright, Miller, and Marcus have contended that *Bogosian* has been overruled by the 1993 Federal Rules amendments expanding expert witness disclosure and discovery. See 8 WRIGHT ET AL., *supra* note 146, § 2031, at 439 ("[T]he new disclosure provision appears to require disclosure in such circumstances."); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997), reprinted in ABA/BNA MANUAL, *supra* note 116, at 1101:132, :134 n.2 (citing Wright, Miller, and Marcus for the proposition that "Bogosian probably was overruled by the 1993 amendments"); *supra* notes 263-66 and accompanying text. This view is not universal, however. Several courts have refused to require disclosure of all items shown to expert witnesses. See *Krisa v. Equitable Life Assurance Soc'y*, 196 F.R.D. 254, 258-60 (M.D. Pa. 2000) (holding that *Bogosian* prohibited discovery of core work product, despite the 1993 amendment of Rule 26); *Estate of Chopper v. R.J. Reynolds Tobacco Co.*, 195 F.R.D. 648 (N.D. Iowa 2000); *Estate of Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659 (S.D. Iowa 2000); *Ladd Furniture, Inc. v. Ernst & Young*, No. 2:95CV00403, 1998 WL 1093901, at *12 (M.D.N.C. Aug. 27, 1998); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-43 (E.D.N.Y. 1997); *N.M. Tech Research Found. v. Ciba-Geigy Corp.*, 37 Fed. R. Serv. 3d (West) 971, 978-79 (D.R.I. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-95 (W.D. Mich. 1995) (reversing a magistrate judge's order requiring expert witness to answer deposition questions concerning expert's conversations with retaining attorney); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997), reprinted in ABA/BNA Manual, *supra* note 116, at 1001:132, :134 n.2 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 141 (Proposed Final Draft No.

If materials and communications previously protected by the attorney-client privilege and the work product doctrine can be obtained by a party in formal discovery, concerns about the possibility of disclosure of materials and communications in informal discovery cannot legitimately serve as the basis for a ban on informal information gathering, including *ex parte* communications. If a party is entitled to demand certain data in the formal discovery process, the party should be entitled to acquire it through her attorney's own efforts.²⁶⁸ Therefore, work product²⁶⁹ and attorney-client concerns cannot serve as the bases for a ban on *ex parte* communications in jurisdictions that consider disclosure to a testifying expert a waiver of work product and attorney-client protection.²⁷⁰

1, 1996) as "adopting the *Bogosian* approach"); *see also* *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85 (S.D. W. Va. 1995) (no discussion of Rule 26(A)(2)); *cf.* *Smith v. Transducer Tech., Inc.*, No. Civ. 1995-28, 2000 WL 1717333, at *3 (D.V.I. Nov. 2, 2000) (allowing redaction of core work product from communications between retaining attorney and experts); *Smith v. Transducer Tech., Inc.*, 197 F.R.D. 260, 262 (D.V.I. 2000) (allowing retaining party to redact attorney's legal theories from documents provided to experts); *Ambrose v. Southworth Prods. Corp.*, 38 Fed. R. Serv. 3d (West) 813 (W.D. Va. 1997) (warning parties that opinion work product may not be discoverable).

268. Several ethics authorities state, usually with little or no analysis or support, that attorneys must avoid discussion of work product and/or attorney-client information in *ex parte* conversations with experts. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1101:209; Or. State Bar Legal Ethics Comm., Formal Op. 1998-154 (1998), 1998 WL 717729, at *2; Nilles, *supra* note 127, at 20 ("Any discussion with an adverse expert of attorney-client communications or an adversary attorney's work product may constitute a violation of SCR 20:4.4.").

In any jurisdiction where formal discovery has evolved with the Federal Rules to provide for discovery of all information provided by an attorney to her testifying expert, the rote suggestion that *ex parte* communications cannot cover such information (including, where applicable, information that was protected by the attorney-client privilege and the work product doctrine) is no longer valid. *See supra* notes 248-66 and accompanying text.

269. One court has even maintained that prohibiting *ex parte* communications with witnesses would itself inhibit the principles behind the work product doctrine by requiring the attorney seeking information to do so in the presence of her opponent. *See Felder v. Wyman*, 139 F.R.D. 85, 90 (D.S.C. 1991).

270. In jurisdictions that do not consider disclosure to an expert a waiver of work product or attorney-client protection, *see supra* note 267, the same rule would presumably apply to fact witnesses. Actually, the argument for waiver of work product or attorney-client protection upon disclosure to a witness is stronger when the witness receiving the information is an expert, rather than a fact witness. An expert witness is allowed to base her opinions upon "facts or data . . . perceived by or made known to the expert at or before the hearing." FED. R. EVID. 703. A lay witness is only allowed to testify to opinions "rationally based upon the perception of the witness." FED. R. EVID. 701. Given the fact that an expert, but not a fact witness, is entitled to base opinions on information provided to her by counsel, the opposing party has a greater need to discover information that the retaining attorney has made known to an expert, rather than to a fact witness. Therefore, it is conceivable that a jurisdiction would allow formal discovery of previously confidential items that an attorney provides to an expert, but would not allow formal discovery of previously confidential items that an attorney provides to a fact witness.

The Model Rules and their state counterparts do not prohibit *ex parte* contact with fact

c. Requiring the Retaining Attorney to Choose the Course of Action That Appropriately Reflects Confidentiality Concerns

Indeed, the attorney²⁷¹ who controls the flow of data, confidential and otherwise, into (and, at least to some extent, out of) the expert's head is in the best position to manage the flow of that data.²⁷² Given the ability of the retaining attorney to make strategic decisions about the flow of data to the expert, there is no need to adopt ethical rules prohibiting *ex parte* contact by opposing counsel.

The attorney has at least three ways to eliminate or reduce the possibility that previously confidential materials or communications will be revealed by her expert during an *ex parte* communication with her opponent. The retaining attorney and her client are in the best position to evaluate the costs and benefits of these three options and one other option that will not reduce the risk of disclosure of previously confidential items. These four options will be discussed in descending order of effectiveness in reducing the possibility that previously confidential materials or communications will be revealed by the expert to opposing counsel in *ex parte* communications.

i. Refraining from Forwarding Confidential Materials and Communications to the Expert

The attorney's first option is not sharing confidential materials and communications with her expert.²⁷³ If the materials and communications are truly confidential, they

witnesses out of concern about the possibility of disclosure of work product materials or attorney-client communications. *See supra* notes 110-14 and accompanying text. Therefore, the ethical rules as written, without distinctions between fact and expert witnesses, do not prohibit *ex parte* contact with expert witnesses.

271. As noted previously, the term "attorney" is used as a shorthand term that includes both the attorney and the client. *See supra* note 23. An attorney would presumably choose among the options outlined here while consulting, or at least considering the wishes or needs of, her client.

272. It would be a curious result indeed to outlaw *ex parte* communications out of concern for the possibility of disclosure by an expert of work product materials or attorney-client communications revealed to her by the attorney retaining the expert. The attorney who is attempting to adequately prepare for cross-examination of an expert wants to know about all of the data that the expert reviewed, including the data provided by the retaining attorney. Under any analysis that overemphasizes work product and privilege concerns in these circumstances, the attorney seeking this data would be punished for the tactical decisions made by her adversary in forwarding previously confidential materials and communications to the expert.

273. In light of the 1993 amendments to the Federal Rules of Civil Procedure, which expanded the scope of formal expert discovery, this option has been recommended to trial attorneys who are concerned about protecting the confidentiality of work product materials and attorney-client communications. *See Lieberman, supra* note 231, at 7 ("I strongly suggest that you assume that whatever you give or disclose to your expert is subject to pretrial discovery and disclosure at trial and, therefore, limit any such communication to non-sensitive material, to the extent possible, and to communicate orally, rather than in writing."); *supra* note 263; *cf. Waits, supra* note 32, at 445 ("I believe we should follow the rule, often mentioned in other

should be known only to the party, her attorney, and persons working for the attorney. If none of these persons, all of whom are under the control of the party and the attorney, forwards confidential items to the expert, the expert should not learn about them. If the expert never learns about work product materials or attorney-client communications, she cannot possibly reveal them in her communications with opposing counsel, be they *ex parte* or in the presence of the retaining attorney.

Of course, this option is not without its downside for the retaining attorney.²⁷⁴ If the materials or communications contain information that would be useful to the expert in forming her opinions and attempting to persuade the jury, keeping that information from the expert carries a strategic price tag. Who is in a better position to evaluate the costs and benefits associated with forwarding otherwise confidential materials and communications to the expert than the retaining attorney, however? If confidentiality is more important than the potential benefit to be gained from forwarding the item to the expert, the attorney, acting on behalf of her client, can keep the item confidential, secure in the knowledge that their expert will not be able to reveal it. On the other hand, if the benefit to be gained from forwarding the item to the expert outweighs the cost of sacrificing the safeguards of confidentiality, the attorney can forward it to the expert.²⁷⁵

areas of legal ethics, that the lawyer should only use expert witness preparation techniques that she is willing to see exposed on the front page of the *New York Times* or revealed to her opponent.”).

274. Although withholding items from an expert to protect their confidential status has drawbacks for the attorney, it can benefit the system as a whole:

Both tangible and intangible direct opinion work product shared with expert witnesses should be discoverable . . . This rule is necessary to avoid the strategy of coaching/molding an expert witness through oral rather than written preparation. I propose that the entire process of expert witness preparation should be laid open to scrutiny. . . . [I]n Brandeis's words, “sunlight is . . . the best of disinfectants; electric light the most efficient policeman.” Discovery of opinion work product would help ensure that the testimony truly belongs to the expert witness and not the attorney.

Waits, *supra* note 32, at 444-45 (citations omitted) (quoting LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1st ed. 1914)).

275. As Magistrate Judge Wayne Brazil noted in his watershed *Intermedics* opinion, a bright-line rule that disclosure of work product to expert witnesses constitutes a waiver does not interfere with the interests the work product doctrine was designed to protect:

[W]e must ask: how much harm is likely to be caused to work product interests when lawyers know in advance that communications between them and testifying experts will be discoverable if those communications are related to the matters about which the experts will testify?

First, we note that such a rule would not interfere with counsel's capacity to think dispassionately and creatively about his client's case *in private*. Lawyers still would be able to ruminate and strategize freely, and to commit their impressions, opinions, analyses, and strategic options to paper, all in the security of confidentiality, as long as they did not share their thoughts with an expert they would call to testify. This is an important point. It means that lawyers would be able to preserve the privacy of their mental processes and to prevent others from “leeching” off their work. This capacity to preserve their privacy and to prevent

But fair is fair. The attorney cannot legitimately expect to have it both ways. Once the decision is made to sacrifice confidentiality for the potential benefits of forwarding the previously confidential item to the expert, the attorney should not be allowed to complain that the mere possibility of exposure of the previously confidential materials or communications precludes her opponent from contacting the expert *ex parte*.

It is important to remember that the attorney will face this dilemma only when making her expert aware of a certain piece of information would require her to reveal the underlying work product materials or attorney-client communication containing this information.²⁷⁶ Whenever the piece of information is documented in some source outside of work product materials or attorney-client communications,²⁷⁷ the attorney can forward that piece of information to the expert by referring to this nonconfidential source of information, without even letting the expert know that the work product material or attorney-client communication exists. The attorney will face the choice of preserving confidentiality or revealing the work product materials or attorney-client communication to the expert only when the underlying information is contained only within work product materials, such as reports from the attorney's investigator, or within an attorney-client communication.²⁷⁸ When this is the case, the attorney and her client are in the best position to balance confidentiality concerns against the potential benefit of forwarding the item to the expert. In these circumstances, the forwarding of the previously confidential item is not, and should not be, without cost.

ii. Instructing the Expert Not to Participate in Ex Parte Communications

Although an attorney should not expect that the mere possibility of exposure of previously confidential materials or communications precludes *ex parte* contact by her opponent, she may still try to prevent her opponent from learning about these items in *ex parte* communications. Under the current versions²⁷⁹ of the Model Rules and equivalent state ethics provisions, an attorney can instruct her client's agents not to participate in *ex parte* communications with opposing counsel.²⁸⁰ Ethics authorities

others from unfairly reaping benefits from their work should prevent the demoralization of the profession that the Court in *Hickman v. Taylor* appears to have feared.

Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 392 (N.D. Cal. 1991) (citation omitted); see also *Lamonds v. Gen. Motors Corp.*, 180 F.R.D. 302, 306 (W.D. Va. 1998); *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997); *Easton*, *supra* note 23, at 577-83; *Mickus*, *supra* note 48, at 785.

276. See *supra* notes 238-39 and accompanying text.

277. See *supra* note 239.

278. See *supra* notes 231-39 and accompanying text.

279. If the changes in the Model Rules advocated below, see *infra* Part V.B, are adopted, the retaining attorney would no longer be allowed to consider this option.

280. Attorneys generally cannot attempt to interfere with their opponent's attempts to interview witnesses. See *infra* note 341 and accompanying text. However, Model Rule 3.4(f) allows attorneys to advise agents, including retained expert witnesses, to refrain from

have generally interpreted the term “agent” to include experts retained by a party.²⁸¹ Therefore, an attorney can advise the experts she has retained to refrain from ex parte communications with opposing counsel.²⁸²

Once again, this option is not without potentially negative consequences because instructing an expert not to participate in ex parte contact does not absolutely guarantee that the expert will not participate in such contact. Like other human beings, experts do not always remember and follow the instructions they are given.²⁸³ If an expert talks to opposing counsel, it is possible that she will reveal previously confidential materials or communications.

Even if the expert follows the attorney’s instructions and informs opposing counsel that she will not participate in ex parte communications, the attorney’s forbiddance of communications with opposing counsel is not without cost. As will also be discussed more completely below, an attorney who is shunned in her attempts to communicate with an adverse expert can use this shunning to demonstrate for the jury that the expert is controlled by the attorney and therefore not credible.²⁸⁴

iii. Instructing the Expert Not to Disclose Previously Confidential Materials or Communications in Ex Parte Communications

The third option is to reveal the previously confidential materials or communications and instruct the expert that, if opposing counsel attempts to engage her in ex parte communications, she should avoid disclosing these previously confidential items.²⁸⁵

participating in ex parte communications with opposing counsel. *See infra* notes 341-45 and accompanying text.

281. *See infra* notes 341-49 and accompanying text.

282. *See Alaska Bar Ass’n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *1* (stating that under the committee’s previous opinion allowing ex parte contact, the retaining attorney “could protect against disclosure of information by directing the expert not to discuss the case with other persons”).

283. Of course, retained experts ordinarily will attempt to follow the instructions of retaining attorneys, due to the control that retaining attorneys exercise over their experts, *see supra* notes 56-65 and accompanying text, including the authority to continue or discontinue the flow of fees, *see supra* note 61. Failure to follow the instructions of an employer also perhaps could damage an expert’s reputation among fellow professionals and potential employers. It might even be possible that failure to follow the attorney’s instructions could result in a tort or contract lawsuit against the expert.

284. *See infra* notes 357-63 and accompanying text.

285. Any attorney who is considering this option needs to give precise instructions to the expert. Because it is permissible under the current ethics rules and interpretations to instruct expert witnesses to refrain from participating in ex parte communications with adverse attorneys, *see infra* notes 341-45 and accompanying text, it is presumably ethically permissible for an attorney to instruct an expert witness to limit her ex parte communications by refraining from discussing previously confidential (or other) items, as long as the attorney does not suggest that the expert engage in deception.

However, an attorney probably cannot advise an expert to destroy previously confidential items. The Model Rules provide: “A lawyer shall not . . . unlawfully obstruct another party’s

This option has rather obvious possible consequences. Despite, or in some instances because of, an expert's best efforts not to reveal the previously confidential materials or communications during *ex parte* communications,²⁸⁶ the expert may reveal them. It is also possible that an expert's refusal to answer certain questions will highlight the existence of confidential materials or communications and provide opposing counsel with clues regarding information to seek in formal discovery.²⁸⁷

access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." MODEL RULES, *supra* note 8, R. 3.4(a). Given the interest of a cross-examining attorney decided in all information considered by an adverse expert, *see supra* notes 258-60 and accompanying text, it would be difficult to argue that previously confidential items provided by the retaining attorney have no "potential evidentiary value." Therefore, the retaining attorney cannot advise an expert to destroy such materials if such advice is unlawful. In any jurisdiction that has decided or might decide that work product materials and attorney-client communications provided to an expert are discoverable, an attorney would be hard pressed to argue that destruction of discoverable evidence is lawful. Although there is disagreement on this issue, some have argued that destruction of evidence relevant to a pending proceeding, even if not technically in violation of a criminal statute, is unethical. *See* D.C. Comm. on Prof'l Ethics and Grievances, Op. 119, at 4 (1983) ("[S]o long as a case is pending, destroying a document which the lawyer knows is potentially evidence removes the judge's ability to determine whether the potential evidence should be produced. Such displacement of the court's authority would prejudice the administration of justice."), *quoted in* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 7.8, at 262 (1989); *see also* 1 HAZARD & HODES, *supra* note 126, § 3.4:201, at 626-28. The ethical and cautious attorney who wishes to withhold previously confidential documents from discovery would advise her expert not to destroy them, but to retain them in a separate file and refrain from discussing them outside the presence of the attorney.

For examples of more complete discussions of evidence destruction issues, *see* John M. Fedders & Lauryn H. Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME L. REV. 5 (1981); Steven W. Huang & Robert H. Muriel, *Spoliation of Evidence: Defining the Ethical Boundaries of Destroying Evidence*, 22 AM. J. TRIAL ADVOC. 191 (1998); Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793 (1991); R. Laird Hart, Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979).

286. Some experts may have incentives to refrain from disclosing previously confidential information in addition to their desire to follow the instructions from retaining counsel. *See supra* note 283. Although the work product or attorney-client law of the relevant jurisdiction may treat disclosure to an expert as a waiver of confidentiality, *see supra* notes 249-66 and accompanying text, the expert may be a member of a profession that requires its members to maintain confidences revealed to them, absent specific client consent to disclosure or a court order or rule requiring disclosure.

287. Once the existence or even the possibility of work product materials or attorney-client communications is revealed to the opposing attorney, that attorney may have at least two formal discovery avenues to pursue in her attempt to obtain these items. First, she can argue that her opponent's forwarding of the work product materials or attorney-client communications to the expert was a waiver of the work product or attorney-client protection that previously attached to these materials or communications. In several jurisdictions, this argument will result in access to the underlying materials or communications. *See supra* notes 261-66 and accompanying text. Even if the case is venued in a jurisdiction where disclosure to an expert

iv. Revealing Confidential Materials or
Communications Without Related Instructions

The final option available to the attorney is to reveal the previously confidential materials or communications without instructing the expert to avoid *ex parte* communications or to avoid revealing the materials or communications in *ex parte* communications. In jurisdictions where disclosure of work product materials or attorney-client communications to the expert constitutes waiver of any then-existing protection,²⁸⁸ this may be the most realistic option for attorneys who choose to provide experts with such items. If opposing counsel can demand the materials or communications through formal discovery and if the attorney has decided not to instruct her expert to avoid *ex parte* communications, there may be little to be gained from advising the expert not to reveal previously confidential items in *ex parte* communications. In addition, allowing experts to discuss matters with opposing counsel without restrictions should eliminate any otherwise available suggestions during cross-examination that an attorney is hiding certain subjects from her opponent and, by implication, the jurors.²⁸⁹

Adoption of this option does not necessarily mean that the expert will reveal previously confidential items in *ex parte* communications. The opposing attorney might never contact the expert *ex parte*.²⁹⁰ Even if she does, she may not ask about whatever issue would otherwise result in disclosure of the previously confidential items.

In weighing all of these options, the attorney is in the best position to evaluate the costs and benefits.²⁹¹ Given the existence of an option that virtually guarantees that an expert will not disclose confidential items in *ex parte* communications²⁹² and the existence of other options that substantially reduce the risk that an expert will disclose previously confidential items in *ex parte* communications, there is no need for a rule prohibiting *ex parte* communications.

is not considered a waiver, if the underlying materials were work product, the opposing attorney could argue that her client, in the words of the Federal Rules of Civil Procedure, "has substantial need of the materials in the preparation of [her] case and . . . is unable without undue hardship to obtain the substantial equivalent of the materials by other means." FED. R. CIV. P. 26(b)(3).

288. See *supra* notes 261-66 and accompanying text.

289. See *infra* notes 357-63 and accompanying text.

290. See *infra* note 293 and accompanying text.

291. Of course, the attorney may need to consult her client in making this determination. See *supra* note 271.

292. The option of not disclosing confidential items to experts has been described as a "sure way to protect attorney-client/work product information and material" from disclosure. Lieberman, *supra* note 231, at 10.

3. The "Loyalty as Paramount" Assumption

Once the attempted, but indefensible, justifications about the discovery rules and allegedly confidential information are negated, only one possible reason²⁹³ to prohibit *ex parte* communications remains. That possible justification is loyalty. Indeed, when the opinions finding *ex parte* contact impermissible are read carefully and critically, it appears that concerns about an expert's loyalty to the party and attorney who hired

293. In addition to this reason, there is arguably one other explanation for opposition to *ex parte* contact, but this explanation cannot really be called a reason for a ban. This explanation is custom. With about fifteen years of experience in civil litigation, this author can attest that many attorneys believe that contacting opposing experts is something that just is not done. Another commentator has suggested that there may be "a tacit understanding among civil trial lawyers that they will not look too deeply into each other's witness preparation." Applegate, *supra* note 32, at 280 n.12. Professor Hazard and Mr. Hodes similarly note the existence of a "well-established and well-known" litigator "practice norm" of using formal discovery rather than "other forms of contact" with expert witnesses. 1 HAZARD & HODES, *supra* note 126, § 3.4:402, at 637-38. One court has suggested that an attempt to communicate with an adverse expert *ex parte* "seldom happens." *Erickson v. Newmar Corp.*, 87 F.3d 298, 302 (9th Cir. 1996).

Although some attorneys believe that there is an "I will not talk to your experts because I know that you will not talk to mine" unspoken agreement, it is clear that this understanding is not universal. The presence of written opinions outlining facts that include *ex parte* communications between attorneys and adverse experts, *see supra* notes 119-29, demonstrates that at least some attorneys believe that they are free to engage in such communications. Also, while it is common for both parties to have expert witnesses who will testify concerning an issue in dispute, *see* WOLFRAM, *supra* note 58, § 12.4.6, at 652, this is not always the case. *See* Easton, *supra* note 23, at 506; Graham, *supra* note 1, at 184-85; Lubet, *supra* note 25, at 465 & n.5 (discussing a study of California cases showing that opposing experts testified in fifty-seven percent of civil trials, but at least one expert testified in eighty-six percent of civil trials). In a case where only one party has retained an expert witness (sometimes because the other party cannot afford to retain one, *see* Easton, *supra* note 23, at 506), it is beyond reasonable to assume the existence of an unspoken mutual agreement to avoid an information-gathering technique that will help the side without an expert in the cross-examination of the only expert who will testify.

Furthermore, while custom may explain the reluctance of some attorneys to contact opposing experts *ex parte*, it cannot, in and of itself, justify an ethical ban on such contact. If the custom against *ex parte* contact with experts and the policy behind it (like the custom and related policy of bans on *ex parte* contact with represented parties, *see supra* note 110 and accompanying text) is to be considered controlling, it should result in the adoption of ethical rules that explicitly and directly prohibit such contact (similar to the ethical rules that explicitly prohibit *ex parte* contact with represented persons, *see supra* note 110). In the absence of any such rules, *ex parte* contact is permitted by the rules, despite the distaste among some members of the bar for the practice.

Finally, it is worth noting that any agreement regarding abstaining from *ex parte* contact does not have to remain unspoken. If the opposing attorneys believe that it is in their clients' best interests for all attorneys to refrain from *ex parte* contact with adverse retained expert witnesses, the attorneys can verbalize this agreement and memorialize it in writing. In fact, the parties could stipulate to the entry of an order of the court prohibiting *ex parte* contact with adverse expert witnesses. *See* FED. R. CIV. P. 26(f)(4).

her are sometimes the primary reason for attempted prohibitions of *ex parte* communications. After all, when a party hires and pays thousands or hundreds of thousands of dollars for an expert's work, she should at least be certain that the expert will not talk to the opposing party, right? Wrong.

a. A Brief Review of Expert Loyalty Concerns

Expert loyalty considerations permeate the opinions finding *ex parte* communications impermissible. Sometimes these concerns are implied.²⁹⁴ At least on occasion, however, they are openly stated. In a recent case, the Ninth Circuit noted with obvious substantial concern that a party "did not know if he could trust" his expert after the expert had a brief *ex parte* conversation with opposing counsel.²⁹⁵ A state bar ethics committee worried that *ex parte* communication could "undermine the right of [retaining] counsel, in our state court adversary system, to formulate his or her case in confidence."²⁹⁶ In the end, whether concerns about expert loyalty are implied or openly stated in opinions finding *ex parte* contact unethical, these concerns trump any possible benefits of *ex parte* contact in the minds of trial-team-model advocates.

294. For example, the Alaska Bar Association Ethics Committee's outrage was obvious when it stated that in one incident of *ex parte* contact reported to it, the "expert, not as sophisticated or experienced as the others, apparently sent the opposing counsel a copy of his expert report and underlying factual data before these had even been seen by the attorney who retained the expert." Alaska Bar Ass'n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *2. In a similar vein, one commentator opposed to *ex parte* contact demonstrated his belief in loyalty by stating, "Indeed, a question that a careful lawyer should ask when confronted with a garrulous adverse expert is whether that lawyer is being set up by his or her adversary rather than vice versa." Nilles, *supra* note 127, at 20.

295. See *Erickson*, 87 F.3d at 300-02. The court noted, "Erickson believed he could no longer use Dr. Grimm because Erickson did not know what had transpired during the meeting between Combs and Dr. Grimm." *Id.* at 302.

296. Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 5 (1992), summarized in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122.

While this comment demonstrates that trial-team-model advocates have concerns about expert loyalty, it does not necessarily reflect law outside of Oregon. As of the time of this opinion, Oregon, unlike almost all other American jurisdictions, see *supra* note 147, had no formal discovery regarding testifying expert witnesses. Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 3 (1992) (noting "the complete lack of express provision under Oregon rules for formal discovery of expert witnesses retained to testify at trial"), summarized in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122. The Oregon committee's concern for the possibility that *ex parte* contact would result in revelation of trial strategy has more merit than would a concern in a jurisdiction where revealing such strategy to a testifying expert renders the communications about the strategy discoverable. See *supra* notes 261-66 and accompanying text.

b. The Dangers of Loyalty

This belief in an expert's loyalty as paramount to all other concerns, including the potential of ex parte communications to make the search for truth more effective, perhaps results from the realities of the relationship between attorneys and the experts they hire. Without a doubt, testifying experts are affected by the sometimes large amounts of money that their clients pay them.²⁹⁷ Human nature dictates this. Without a doubt, experts are often close to the attorneys who choose them and work closely with them for months or years.²⁹⁸ Human nature dictates this also. In other words, without a doubt, experts are very loyal to the attorneys and clients that hire and pay them.²⁹⁹

The loyalty that experts have for their clients and attorneys is not a reason to prohibit opposing counsel from communicating with experts, though. Instead, this loyalty should cause the system to arm the opposing party and her attorney with every possible weapon to fight the loyalty that the expert feels for the attorney and client.³⁰⁰ Loyalty is a form of bias, and a very powerful one at that.³⁰¹ Given the vast sums of money they are paid and the reality that the flow of money will stop if the expert

297. See Easton, *supra* note 23, at 494, 496; *supra* note 61.

298. See Easton, *supra* note 23, at 493-94, 497; *supra* note 62 and accompanying text.

299. See Langbein, *supra* note 58, at 835 (noting the "psychological pressure" that is exerted upon expert witnesses).

300. As one court reasoned:

The trier of fact has a right to know *who* is testifying. If it is the lawyer who really is testifying surreptitiously through an expert (i.e., if the expert is in any significant measure parroting the views that are really the lawyer's), it would be fundamentally unfair to the truth finding process to lead the jury or court to believe that the background and personal attributes of the expert should be taken into account when the persuasive power of the testimony is assessed.

Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 396 (N.D. Cal. 1991) (emphasis in original).

301. Cf. Benny Agosto, Jr., *Should Clinical Medical Testimony Be Subject to Daubert Analysis?*, TEX. B.J., Jan. 1999, at 30, 34 (noting "the unfortunate fact that experts are nearly always biased toward those who pay their fees").

The loyalty of retained expert witnesses to the advocates who employ them is not a uniquely American problem. For one Australian perspective, see Hon. Justice H.D. Sperling, Supreme Court of New South Wales, *Expert Evidence: The Problem of Bias and Other Things*, Speech at Supreme Court of New South Wales Annual Conference, at http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_030999 (Sept. 3-4, 1999). Justice Sperling quoted an 1873 Australian decision where the judge reported: "Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them." *Id.* (quoting *Lord Arbinger v. Ashton*, 17 L.R.-Eq. 358, 374 (Ch. App. 1873)). He also reported the results of a survey of Australian judges who had handled civil trials without a jury that indicated that eighty-five percent "had encountered partisanship in expert witnesses." *Id.* (citation omitted). Despite this data, Justice Sperling opined: "The problem of biased evidence is much more acute in the United States than here. Most civil suits are tried by jury there and juries are more likely to be duped by 'junk science' than judges." *Id.*

reaches conclusions that do not advance the cause of the attorney and her client,³⁰² experts are often the most biased nonparty witnesses in a trial.³⁰³

Attorneys preparing to cross-examine these biased, financially motivated, and skilled witnesses face an often monumental task. If the attorney retaining the expert chose carefully,³⁰⁴ the expert will be a strong witness who will make a good

302. One experienced expert witness frankly outlined how economic pressures can influence expert testimony:

Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side.

Langbein, *supra* note 58, at 835 (footnote omitted).

303. Many have noted that retained expert witnesses are controlled to a dramatic extent by the attorneys who retain them. More than four decades ago, a commentator contended: "[T]here is no such thing as a neutral, impartial [expert] witness. . . . [The expert] is bound to be biased and partial, and strongly motivated towards advocacy of his particular prejudiced point of view." Bernard L. Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIM. PSYCHODYNAMICS 221, 229-30 (1959), reprinted in DAVID W. LOUISELL ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE 842, 846 (5th ed. 1983).

One commentator who serves as an expert noted that many refer to experts as "saxophones," because "the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes." Langbein, *supra* note 58, at 835. A federal district judge echoed this thought with the observation that expert witnesses "are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune is desired." *Karn v. Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (citation omitted).

Another commentator observed that "the use of experts has led to some of the most notorious abuses of the adversary system" because experts often lack "any hint of impartiality." Applegate, *supra* note 32, at 295. This observation is supported by the comments of an expert witness who noted that, when he serves as an expert, he feels pressure to "join the team" by letting himself be convinced "to shade [his] views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that [he] has been hired to bolster." Langbein, *supra* note 58, at 835; cf. Luby, *supra* note 25, at 468 ("[S]ome lawyers will be tempted to see the expert as simply another member of the litigation team.").

Similarly, a federal judge has observed that "expert testimony has often been subject to improper influences, and that counsel can all too easily color the expert's opinion." *Karn*, 168 F.R.D. at 639 (citation omitted); cf. WOLFRAM, *supra* note 58, § 12.4.6, at 652 ("The tarnished ideal of expert testimony is testimony based entirely on the witness' honest scientific data and opinion. In truth, however, many expert witnesses are as much hired-gun advocates as are the lawyers for whom they work." (footnotes omitted)).

Even a court that limited formal expert witness discovery admitted that an attorney can have tremendous influence over the expert she retains when it noted that an "expert's view may have originated with an attorney's opinion or theory." *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984).

304. Of course, another aspect of choosing experts carefully is finding experts who are likely to reach opinions favorable to the choosing attorney's case. See WOLFRAM, *supra* note 58, § 12.4.6, at 652 ("Lawyers are expected to seek out experts whose testimony will favor their side

impression on the jury and will be skilled at defending herself during cross-examination.³⁰⁵ Nonetheless, given the economic and loyalty pressures on the expert, she may reach incorrect conclusions that the attorney has, in one commentator's words, "more or less" told her to reach.³⁰⁶ If trials are to be a search for truth,³⁰⁷ the justice system should not unnecessarily handicap the attorney who must take on the daunting task of impeaching a biased, but important, witness.³⁰⁸

Certainly the system should not place greater restrictions upon an attorney in her efforts to prepare for the cross-examination or other impeachment of expert witnesses than it places upon her in her effort to prepare for the cross-examination or impeachment of fact witnesses. If ex parte communications with testifying experts are disallowed, the system is doing just that, because attorneys are generally³⁰⁹ allowed to contact fact witnesses without advising their opponents or seeking their approval,³¹⁰ regardless of how loyal they are to one of the attorneys or parties.³¹¹ If

. . . "); *infra* note 306 and accompanying text.

305. See *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 596 (D. Md. 1963) ("[I]t needs no citation of authority to say that an expert is the most difficult witness to cross-examine . . ."); *Wroblewski v. de Lara*, 727 A.2d 930, 934 (Md. 1999); Hallahan, *supra* note 41, at 61.

306. One observer noted that "it is generally recognized that the lawyer explains to the expert more or less exactly what needs to be said." Applegate, *supra* note 32, at 348 n.368.

307. Courts have recognized the importance of ex parte interviews in promoting the search for the truth. In a passage quoted and adopted by the Second Circuit, the U.S. District Court for the Southern District of New York observed, "A trial is a search for the truth. . . . A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal case without the consent of opposing counsel." *Coppolino v. Helpert*, 266 F. Supp. 930, 935 (S.D.N.Y. 1967), *quoted in Int'l Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 44 (2d Cir. 1975); *cf. Seven-Up Bottling Co. v. United States*, 39 F.R.D. 1, 2 (D. Colo. 1966) (rejecting the theory that a party's investment in an expert witness is more important than the systemic interest in finding the truth), *cited in Norfin, Inc. v. Int'l Bus. Machs. Corp.*, 74 F.R.D. 529, 533 (D. Colo. 1977).

308. See *Karn*, 168 F.R.D. at 639 ("[I]t stands to reason that useful cross examination and possible impeachment can only be accomplished by gaining access to all of the information that shaped or potentially influenced the expert witness's opinion."); *Emergency Care Dynamics Ltd. v. Superior Court*, 932 P.2d 237, 300 (Ariz. Ct. App. 1997) ("Just as an expert witness's sources remain a proper subject of cross-examination, . . . so do the expert's relations with the hiring party and its counsel."); *Stearrett v. Newcomb*, 521 A.2d 636, 638 (Del. Super. Ct. 1986) ("It is inherent in the testimony of the expert that he would be called upon to divulge all facts and information upon which he bases his opinion, and any limitations placed upon his retention as an expert.").

309. For a discussion of the exceptions to this general rule, see *supra* notes 110-16 and accompanying text.

310. See, e.g., *Coppolino*, 266 F. Supp. at 935-36, *quoted in Int'l Bus. Machs.*, 526 F.2d at 44; Or. State Bar Legal Ethics Comm., Op. 1992-132, at 2 (1992), *summarized in ABA/BNA Manual, 1991-1995 Ethics Opinions*, *supra* note 11, at 1001:7122; see also *supra* note 111 and accompanying text.

311. See *supra* note 110-14.

Perhaps the best example of an unpaid witness who is loyal to one side, short of one who is actually represented as a party in an action, is a crime victim or other prosecution witness in a criminal case. Despite the rather intense loyalty that many crime witnesses feel for the prosecutor, criminal defense attorneys are free to contact them ex parte. See *Gregory v. United*

ex parte contact with fact witnesses is allowed and even encouraged,³¹² restrictions upon attorney contact with witnesses based upon their status as retained experts cannot be justified,³¹³ particularly when the Model Rules do not distinguish between expert and fact witnesses.³¹⁴

In fact, those who wrote the Model Rules and adopted them into state professional responsibility provisions believe so strongly in the value of ex parte communications with witnesses that they did more than just allow such contact. The Model Rules take a significant additional step in support of ex parte contact, by forbidding an attorney from asking a witness to avoid ex parte contact with opposing counsel.³¹⁵ Furthermore, with the exception of some circumstances involving a client's relatives, employees, or agents,³¹⁶ this prohibition against asking a witness not to participate in ex parte communications applies to witnesses who are very loyal to the attorney's client, including such persons as the client's close friends and colleagues. The inclusion of this prohibition in the Model Rules documents a belief in the benefits of ex parte contact with witnesses for the adversary system, including the acquisition of information that could lead to either settlement or more informed cross-examinations,³¹⁷ and a concern about the problems that would result from allowing

States, 369 F.2d 185, 188 (D.C. Cir. 1966); *Ex parte Nichols*, 624 So. 2d 1325, 1326-27 (Ala. 1992); *Jones v. Georgia*, 520 S.E.2d 454, 456 (Ga. 1999); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 98-134 (1998), 1999 WL 516727, at *2 ("[I]t is improper for an attorney for the Commonwealth to tell a victim not to speak with a defense attorney, under Pa. R.P.C. 3.4, let alone attempt to interfere with [a defense attorney's] attempt to interview other witnesses."). As the law regarding crime witnesses, including victims, establishes, a witness's loyalty to one of the attorneys or parties is not recognized as significant enough to render ex parte contact by the opposing attorney unethical.

312. See *McMoran*, *supra* note 88, at 999.

313. If anything, the dollar-induced loyalty that experts feel for their clients should result in giving attorneys more methods to prepare for expert impeachment than are allowed for fact witness impeachment, not less. See *Easton*, *supra* note 23, at 489-90, 565.

314. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208 ("No Model Rule . . . treats expert witnesses differently from fact witnesses."); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 577 (1986), 1986 WL 68786, at *1 (stating that the committee is "unaware of any ethical rule or policy which would justify a distinction between a retained expert witness and an ordinary witness").

315. Under Model Rule 3.4(f), an attorney cannot "request a person other than a client to refrain from voluntarily giving relevant information to another party." MODEL RULES, *supra* note 8, R. 3.4(f); see *supra* note 143 (citing state professional responsibility rules). *But see infra* notes 341-45 and accompanying text (discussing exceptions to the rule). An attorney would violate this rule by asking a witness not to participate in ex parte contact with the attorney's opponent because such contact could involve the conveying of relevant information to another party through the opposing counsel.

316. Model Rule 3.4(f) does allow an attorney to ask a nonclient not to voluntarily give information to the attorney's opponent when "(1) the person is a relative or an employee or other agent of the client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." MODEL RULES, *supra* note 8, R. 3.4(f).

317. An attorney's purposes in seeking to communicate ex parte with fact witnesses would

one party to quarantine witnesses, including an interference with the truth-seeking process.³¹⁸ If these benefits and problems are present with fact witnesses, they are at least equally present with retained experts,³¹⁹ who are given special advantages³²⁰ and are often among the most important witnesses in a given case.³²¹

IV. ETHICAL RESTRICTIONS ON ATTORNEYS CONDUCTING EX PARTE COMMUNICATIONS

This does not mean that there should be no ethical restrictions upon attorneys conducting ex parte communications with adverse retained experts. Instead, it simply means that the ethical restrictions that have been developed for ex parte communications with fact witnesses³²² are sufficient for ex parte communications with expert witnesses. Some of these restrictions will be briefly catalogued here.

A. Abstaining from Contact with Represented Persons

Because this Article concerns contact with retained expert witnesses, Model Rule 4.2 generally will not apply. Nonetheless, this fundamental "no contact" rule bears repeating. Model Rule 4.2 prohibits an attorney from contacting persons who are represented by counsel in the case at hand.³²³ With regard to corporate parties and

presumably be the same as her purposes in seeking to communicate ex parte with expert witnesses. *See supra* text accompanying notes 107-09.

318. *See supra* notes 307-08 and accompanying text.

319. One court noted:

As a general proposition, . . . no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance. Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone. Unless impeded by privilege an adversary may inquire, in advance of trial, by any lawful manner to learn what any witness knows if other appropriate conditions the witness alone may impose are satisfied, e.g., compensation for his time and expertise or payment of reasonable expenses involved

Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983) (citations omitted), *cited in* *Donako v. Rowe*, 475 N.W.2d 30, 36 (Mich. 1991).

320. *See supra* notes 44-54 and accompanying text.

321. *See supra* note 18.

322. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, 1001:207, :208 ("There are . . . ethical limitations that apply to contacts with any witness . . ."); *McMoran*, *supra* note 88, at 992 (similar).

323. MODEL RULES, *supra* note 8, R. 4.2.

Of course, the attorney who "close[es her] eyes to the obvious" fact that a witness is represented could be guilty of misconduct. *See id.* at cmt. [6]; *see also* *McMoran*, *supra* note 88, at 998. The Ethics 2000 Commission has proposed removing a provision from the Model Rule comment stating that an inference of knowledge of representation "may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed." MODEL RULES (Final

other entities, the forbidden zone generally includes employees who are members of an entity's control group or are otherwise authorized to make statements on behalf of the entity.³²⁴ Because most employee experts would presumably be within the scope and authority of their employment when making statements about the issues that an opposing attorney would like to discuss with them, attorneys probably should assume that most or all experts who are employees of represented entities generally cannot be contacted.³²⁵

B. Acknowledging the Attorney's Role

Under Model Rule 4.3, an attorney who is "dealing" with an unrepresented person cannot state or imply that she is disinterested.³²⁶ Furthermore, an attorney must attempt to correct any misunderstandings held by an unrepresented person about the attorney's role.³²⁷ Therefore, when an attorney contacts or interviews a witness ex parte, she must be candid about her role in the case.³²⁸

C. Avoiding False Statements

Pursuant to Model Rule 4.1(a), an attorney can not "make a false statement of material fact or law to a third person."³²⁹ This prohibition applies to ex parte communications with witnesses.³³⁰

D. Refraining from Suggesting the Witness Must Communicate Ex Parte

Because Model Rule 4.1(a) prohibits false statements of law, attorneys must be careful in approaching witnesses. In the absence of a subpoena requiring attendance

Draft), *supra* note 110, R. 4.2 cmt. [8], <http://www.abanet.org/cpr/e2k-rule42.html>.

324. *See supra* note 116.

325. Nilles, *supra* note 127, at 19.

326. MODEL RULES, *supra* note 8, R. 4.3; *Ethics Digest*, *supra* note 114, ¶ 94-48.

327. *See supra* note 326.

328. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208 ("When a lawyer contacts any witness, lay or expert, actual or potential, the lawyer must not knowingly leave the witness in ignorance of the lawyer's relationship to the case that gives occasion to the contact."); Or. State Bar Legal Ethics Comm., Op. 1992-132, at 6 (1992) ("[A]n Oregon attorney cannot misrepresent the identity or motive of the interviewer."), *summarized in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122; McMoran, *supra* note 88, at 997; Nilles, *supra* note 127, at 19 ("If the expert is considered to be unrepresented by counsel, the lawyer cannot state or imply that she or he is disinterested. Further, if the lawyer reasonably should know that the expert misunderstands the lawyer's role, the lawyer must take reasonable steps to correct the misunderstanding."); *cf.* Morrison v. Brandeis Univ., 125 F.R.D. 14, 19-20 (D. Mass. 1989) (requiring counsel to disclose her capacity at the beginning of ex parte interviews with witnesses).

329. MODEL RULES, *supra* note 8, R. 4.3; *accord* RESTATEMENT, *supra* note 101, § 98(1).

330. Nilles, *supra* note 127, at 19.

at a formal proceeding, a witness does not have to talk to an attorney.³³¹ Therefore, an attorney cannot suggest that a witness must participate in ex parte communications with her.³³²

E. Avoiding Harassment

An attorney's intensity in preparing for cross-examination of a witness must be tempered by a respect for the witness and her rights. Model Rule 4.4 states, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."³³³ In other words, an attorney cannot harass a witness.

F. Protecting the Integrity of Evidence

Model Rule 3.4(b) provides that an attorney shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."³³⁴ These prohibitions apply not only to an attorney's "own" witnesses, but also to those friendly to her opponent.³³⁵

G. Refraining from Persuading Witnesses Not to Testify

Under Model Rule 3.4(a), an attorney cannot obstruct another party's access to evidence.³³⁶ This prohibition is viewed as an incorporation and expansion of the old Model Code provision that an attorney "shall not advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness . . ."³³⁷ Pursuant to these provisions, ethics authorities have determined that attorneys cannot attempt to persuade witnesses not to testify,³³⁸ but they can attempt to convince them that their

331. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208; Alaska Bar Ass'n Ethics Comm., Op. 84-8 (1984) ("An expert witness . . . is obviously free to refrain from discussing his opinions or the basis for such opinions with anyone."), *summarized in* ABA/BNA Manual, 1980-1985 Ethics Opinions, *supra* note 127, at 801:1203.

332. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208 ("[T]he lawyer may not, consistent with Rule 4.1(a), convey the message, directly or indirectly, that the witness *must* speak to the lawyer." (emphasis in original)); Nilles, *supra* note 127, at 19; *see also* Kaveney v. Murphy, 97 F. Supp. 2d 88, 93 (D. Mass. 2000); Alaska Bar Ass'n Ethics Comm., Op. 85-2 (1985), 1985 WL 301273, at *2 (noting with disdain an instance where "opposing counsel had contacted several of the attorney's retained experts and repeatedly asserted to them that they were 'required' to discuss their testimony with him").

333. MODEL RULES, *supra* note 8, R. 4.4.

334. *Id.* R. 3.4(b).

335. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), *reprinted in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208 ("[T]he prohibition of Model Rule 3.4(b), on counseling or assisting a witness to testify falsely, necessarily applies to an opponent's witnesses as well as one's own.").

336. MODEL RULES, *supra* note 8, R. 3.4(a).

337. MODEL CODE, *supra* note 139, DR 7-109(B).

338. Or. State Bar Legal Ethics Comm., Op. 1992-132, at 6 (1992), *summarized in*

memories or opinions are in error.³³⁹

If these restrictions are adequate to protect the justice system from improper conduct by attorneys in *ex parte* communications with fact witnesses, they are adequate to protect the system from improper conduct by attorneys in *ex parte* communications with experts. Of course, the restrictions outlined in the Model Rules and state ethical provisions are subject to revision.³⁴⁰ If new restrictions are needed and are enacted regarding *ex parte* contact with witnesses, these restrictions should apply to both fact and expert witness contact.

ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122; Va. State Bar Standing Comm. on Legal Ethics, Op. 1678, at 2 (1996) (“The committee believes . . . that it is not ethically permissible for a lawyer directly to advise the other party’s expert witness not to testify, or indirectly through another acting at the lawyer’s request to cause the other party’s expert witness not to testify.”), *summarized in* ABA/BNA Manual, *supra* note 116, at 1101:8703; *Trial Conduct, Fairness to Opposing Party*, ABA/BNA Manual, *supra* note 116, at 61:701 (“With respect to witnesses, Model Rule 3.4(a)’s prohibition against obstructing access to evidence bars a lawyer from procuring the absence of a witness. More subtle efforts to dissuade a witness from testifying may also violate Rule 3.4(a), as well as other professional conduct rules.”).

The Oregon State Bar Legal Ethics Committee also opined that an attempt to convince a fact or expert witness not to testify “would be prejudicial to the administration of justice,” even if the attempt proved unsuccessful. Or. State Bar Legal Ethics Comm., Op. 1992-132, at 6 (1992), *summarized in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122; *cf.* Or. State Bar Legal Ethics Comm., Op. 530 (1990) (“[I]t goes without saying that efforts to persuade the expert against testifying are . . . improper.”), *summarized in* ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106.

339. Or. State Bar Legal Ethics Comm., Op. 1992-132, at 6 (1992), *summarized in* ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:7122; Or. State Bar Legal Ethics Comm., Op. 530 (1990), *summarized in* ABA/BNA Manual, 1986-1990 Ethics Opinions, *supra* note 116, at 901:7106.

340. The Ethics 2000 Commission has proposed changes in the text of several of the Model Rules limiting the conduct of attorneys conducting *ex parte* communications discussed in this section. *See supra* note 116 (outlining Ethics 2000 Commission’s proposed revision to Model Rule 4.2); MODEL RULES (Final Draft), *supra* note 110, R. 4.3 (adding provision regarding the giving of legal advice to unrepresented persons), <http://www.abanet.org/cpr/e2k-rule43.html>; *Id.* R. 4.4(b) (adding comments regarding privileged and inadvertently sent items), <http://www.abanet.org/cpr/e2k-rule44.html>. The text of, though not necessarily the comments to, the other Model Rules discussed here would remain unaffected by the Ethics 2000 Commission’s proposals. *See id.* R. 4.1, Reporter’s Explanation of Changes, <http://www.abanet.org/cpr/e2k-rule41.html>; *supra* note 143 (regarding Model Rule 3.4).

V. ETHICAL RESTRICTIONS ON RETAINING ATTORNEYS CONCERNING
EX PARTE COMMUNICATIONS

The attorney who wishes to communicate with an opposing witness is not the only lawyer whose behavior is constrained by professional responsibility considerations regarding ex parte contact. Instead, the Model Rules also restrict the conduct of the attorney who will call the witness to the stand at trial, by limiting the circumstances in which she can advise the witness not to participate in ex parte communications with opposing counsel.

*A. Current Law: Attorneys May Advise Their Retained Experts
Not to Participate in Ex Parte Communications
with Opposing Counsel*

Unlike the restrictions on the attorney conducting ex parte communications with an adverse witness, the restrictions on attorneys advising witnesses about whether to participate in ex parte communications sometimes operate differently for fact witnesses and experts.

1. Application of Model Rule 3.4(f)

Model Rule 3.4(f) provides:

A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.³⁴¹

As applied, this Model Rule has resulted in differences in the permissible advice that attorneys can give to fact witnesses and retained experts.

Attorneys cannot admonish fact witnesses who are neither relatives, employees, nor agents of parties to refrain from ex parte communications with opposing counsel.³⁴² Attorneys are allowed to inform fact witnesses that they do not have to participate in ex parte communications.³⁴³ In addition, professional responsibility authorities

341. MODEL RULES, *supra* note 8, R. 3.4(f). Many states have adopted professional responsibility rules based upon Model Rule 3.4. *See supra* note 143.

The predecessor Model Code did not contain an equivalent provision:

With regard to paragraph (f) [of Model Rule 3.4], DR 7-104(A)(2) provided that a lawyer shall not "give advice to a person who is not represented . . . other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

See MODEL RULES, *supra* note 8, R. 3.4, Model Code Comparison (omission in original). The Model Code did state that an attorney "shall not advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness." MODEL CODE, *supra* note 139, DR 7-109(B).

342. MODEL RULES, *supra* note 8, R. 3.4(f).

343. *See Ex parte Nichols*, 624 So. 2d 1325, 1327 (Ala. 1992).

generally conclude that attorneys can tell fact witnesses that they are allowed to insist that opposing counsel allow them to participate in interviews.³⁴⁴

Under the existing rules, as interpreted by ethics authorities, an attorney's advice to retained expert witnesses is allowed to go one step further. The question of whether an attorney can advise a retained expert witness not to participate in ex parte communications with opposing counsel turns on whether retained experts are "agents" of the parties that pay them under the Model Rule 3.4(f) provisions quoted above. Most ethics authorities have found that experts are agents, for purposes of Model Rule 3.4(f) and its state counterparts, and retaining attorneys are therefore allowed to ask them to refrain from ex parte contact with opposing counsel.³⁴⁵

Although these holdings do result in some differentiation between fact and expert witnesses, they are defensible interpretations of the existing Model Rules and similar state ethics provisions. Although the term "agent" is an imprecise one,³⁴⁶ it is probably correct that retained experts are agents, at least to some extent.³⁴⁷ Clients hire them to review data and reach conclusions on their behalf. If the presence of any³⁴⁸ type of agency is sufficient to bring Model Rule 3.4(f)(1) into effect, the Rule

344. See *id.* at 1327; cf. *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 20 (D. Mass. 1989) (noting that a witness is permitted to insist upon the presence of his or her own attorney as a condition to participation in an interview with the other party's attorney).

345. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993), reprinted in ABA/BNA Manual, 1991-1995 Ethics Opinions, *supra* note 11, at 1001:207, :208 ("[T]he opposing party or its lawyer may properly have asked the expert *not* to discuss the case with the inquiring lawyer." (emphasis in original)); Alaska Bar Ass'n Ethics Comm., Op. 84-8 (1984) ("[A]n attorney may, as a term of the engagement for such expert, obligate the expert to refrain from discussing his opinions regarding the subject in controversy unless previously authorized by the attorney or through applicable discovery or trial procedures."), summarized in ABA/BNA Manual, 1980-1985 Ethics Opinions, *supra* note 127, at 801:1203.

346. Although the agency course is no longer a staple of the standard law school curriculum, see Robert C. Clark, *In Memoriam: Louis Loss*, 111 HARV. L. REV. 2135, 2136 (1998); Robert B. Thompson, *The Basic Business Associations Course: An Empirical Study of Methods and Content*, 48 J. LEGAL EDUC. 438, 446 n.10 (1998), the fact that it once took an entire semester to discuss and digest agency law demonstrates that the term "agent" has many different meanings.

347. In an opinion that did not deal directly with expert witnesses specifically, but agents generally, one ethics committee opined that "communication with [an opposing party's] agent may be permissible depending upon the scope and extent of the agency." Phila. Bar Ass'n Prof'l Guidance Comm., Guidance Inquiry 88-30, at 1 (1988). If this logic applies to an attorney's ability to instruct expert witnesses not to participate in ex parte communications with opposing counsel, the instruction not to participate should only be as broad as the scope of the agency. Therefore, to the extent that the expert has information acquired before she was retained, an attorney instructing noncooperation may arguably be required to note that she can only advise noncooperation on matters developed for the litigation at hand. See *supra* note 183.

348. Viewing experts as agents of clients has interesting implications. For example, under Rule 801(d)(2) of the Federal Rules of Evidence, "a statement by [a] party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is an admission. FED. R. EVID. 801(d)(2). An admission is admissible against the party whose agent made the statement, because it is not hearsay. FED. R. EVID. 801(d). If experts are the agents of parties for purposes of both Model Rule 3.4(f) and Federal Rule of Evidence 801(d)(2), parties presumably cannot raise hearsay objections to statements

does allow attorneys to instruct retained experts not to participate in ex parte communications.³⁴⁹

2. Practical Implications of Model Rule 3.4(f)

Trial-team-model advocates might seize upon Rule 3.4(f) as a reason for disallowing ex parte communications altogether. If attorneys can ethically advise their retained experts not to participate in ex parte communications, why bother letting adverse attorneys make ex parte contact in the first place? The answer, like the question, involves practical realities of ex parte contact.

First, the existence of an information-gathering technique for attorneys should not and does not depend upon that technique being universally or even usually effective. Ex parte communications with fact witnesses provide a prime, but certainly not the only,³⁵⁰ example of an information-gathering maneuver that often results in the gathering of little or no information. Like experts, fact witnesses are free not to participate in ex parte communication.³⁵¹ No attorney can force any witness to talk to her without serving a subpoena upon her and thereby engaging in a decidedly non-ex

made by their experts. *Compare* McKitty v. Bd. of Educ., Nyack Union Free School Dist., No. 86 Civ. 3176 (PKL), 1987 WL 28791, at *4 (S.D.N.Y. Dec. 16, 1987) (equating the group of employees of a party who could not be contacted under the predecessor to Model Rule 4.2 with the group of employees who could make statements that would be considered admissions of their employer (citing *Frey v. Dep't of Health & Human Servs.*, 106 F.R.D. 32, 37-38 (E.D.N.Y. 1985))), with *Morrison*, 135 F.R.D. at 16-18 (finding that the group of persons who could make statements that would be admissible as admissions under the Federal Rules of Evidence is even larger than the group of persons who are considered represented parties for purposes of the no-contact professional responsibility rule). As long as the expert's statements are relevant, they should be admissible, unless some provision of evidence or other law renders them inadmissible. Some courts have held that expert witnesses are agents whose statements therefore are admissible as admissions against the parties who hire them. *See* *Collins v. Wayne Corp.*, 621 F.2d 777, 780-82 (5th Cir. 1980); *Onti, Inc. v. Integra Bank*, No. CIV.A.14514, 1998 WL 67123 (Del. Ch. Aug. 25, 1998). On the other hand, other courts have rejected the idea that experts are agents who can make binding admissions. *See* *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 162-64 (3d Cir. 1995); *Taylor v. Kohli*, 642 N.E.2d 467, 468-69 (Ill. 1994). The latter holdings suggest that expert witnesses arguably also are not agents for purposes of Model Rule 3.4(f), at least in these jurisdictions.

349. In this Article, I have argued that attorneys should not be subject to allegations of ethical impropriety when they act in conformance with the language in the Model Rules. *See supra* notes 201-02 and accompanying text. An attorney reviewing Model Rule 3.4(f), as it is currently constituted, would certainly be reasonable in concluding that she could permissibly advise a retained expert to avoid ex parte communications with attorneys representing other parties. To be consistent, I cannot now suggest that attorneys who give such advice to retained experts are violating Model Rule 3.4(f), even though I am obviously an advocate of ex parte communications and I believe that allowing attorneys to instruct their retained experts not to participate in ex parte communications is not in the best interests of the truth-seeking process. *See infra* Part V.B.

350. *See* *Hayes & Ryder, supra* note 1, at 1123 n.116, 1123-24, 1138 (noting the inadequacy of interrogatory answers).

351. *See supra* note 332.

parte communication.³⁵² Fact witnesses often exercise the option of not talking.³⁵³ In other words, ex parte communications with fact witnesses often do not result in the acquisition of new information.³⁵⁴ In similar fashion, many other information-gathering efforts, including many formal discovery devices,³⁵⁵ often do not result in the acquisition of much (or any) useful information.³⁵⁶ Nonetheless, attorneys are allowed to attempt to engage in these information-gathering efforts, because such efforts, at least occasionally, do lead to the acquisition of significant information.

Furthermore, ex parte contacts with retained experts that do not result in a meaningful dialogue are not necessarily "ineffective," or, at least, not totally ineffective. Even if the expert slams the phone down almost immediately after an attorney calls her, the attorney has gained something from her attempt to discuss the case with the expert. When the expert refuses to talk to an attorney based upon the advice of the attorney who hired her, the expert's cross-examination might include an exchange along the following lines:³⁵⁷

352. See *Johnston v. Nat'l Broad. Co.*, 356 F. Supp. 904, 910 (E.D.N.Y. 1973) ("[A]ny witness has the right to refuse to be interviewed if he so desires."); cf. *Kaveney v. Murphy*, 97 F. Supp. 2d 88, 89 (D. Mass. 2000) (requiring attorney conducting ex parte interviews to remind witnesses that they have the right to refuse to participate); *Ex parte Nichols*, 624 So. 2d 1325, 1327 (Ala. 1992); *Gulley v. State*, 519 S.E.2d 655, 664 (Ga. 1999) (stating that in a criminal case, "[w]itnesses cannot be compelled to submit to interviews with the defense").

353. See *McMoran*, *supra* note 88, at 991-92.

354. As a practical matter, the allowable parameters for advising expert and fact witnesses about whether to participate in ex parte communications may not be as different as one might first believe. While it is true that attorneys usually cannot advise fact witnesses not to talk to their opponents, a carefully emphasized and perfectly allowable "you do not have to talk to my opponent" or "you have the right to demand that I be there when you talk to my opponent," see *supra* notes 343-44 and accompanying text, may be enough to end any realistic hope that opposing counsel has of conducting an ex parte interview of a fact witness.

355. A classic example of a formal discovery device that did not yield much useful information was the pre-1993 Rule 26(b)(4) expert witness interrogatory, which typically did not produce enough data to allow an attorney to adequately prepare for cross-examination of the witness. See *Day*, *supra* note 102, at 51-52; *Graham*, *supra* note 1, at 172 ("[The Rule 26(b)(4) interrogatory] overwhelmingly is recognized as a totally unsatisfactory method of providing adequate preparation for cross-examination and rebuttal.").

356. See *supra* notes 88-95 and accompanying text.

In 1980, then Professor Wayne D. Brazil published the results of a survey that established that formal discovery does not always result in the acquisition of all the information sought by the requesting party. See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787 (1980). Over half of the responding attorneys indicated that "[e]vasive or incomplete responses" to discovery requests impeded their acquisition of the information they requested in formal discovery. See *id.* at 833.

Brazil reported several comments of attorneys that help to explain why so many attorneys felt that discovery responses were evasive or incomplete. One attorney outlined an approach to discovery that rested on the tenet "[n]ever be candid and never helpful and make (your) opponent fight for everything." *Id.* at 832. Another indicated, "The purpose of discovery . . . is to give as little as possible so [your opponents] will have to come back and back and maybe will go away or give up." *Id.* at 829 (alteration in original).

357. Professor Imwinkelried, who is renowned for his mastery of both trial techniques and

Q: You talked to Attorney Jones, who hired you, about this case dozens of times, right?

A: Sure.

Q: But when I called you and asked you to discuss your theories with me, you refused to do so, right?

A: Right.³⁵⁸

Q: In fact, our conversation lasted about thirty seconds, right?

A: About that.

Q: You did not talk to me because Attorney Jones told you not to talk to me, right?³⁵⁹

expert witness law, suggests a similar set of cross-examination questions as a way to establish bias. See *IMWINKELRIED*, *supra* note 159, § 9-7(b), at 247.

358. In some circumstances, the attorney may want to be in a position to add: "Q: I offered to reimburse you for your time in speaking to me, at the same rate as you are charging my opponent, right?" See *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983) (noting that an expert could condition her participation in *ex parte* communications upon counsel's payment for her time and expenses).

Some have suggested that an offer to compensate an adverse expert is inappropriate. In a case where an attorney asked an adverse expert to conduct an inspection in a matter unrelated to the case at hand, the Ninth Circuit rather remarkably declared:

In layman's terms, Erickson [the pro se plaintiff] labeled the employment offer [by defense counsel] to Dr. Grimm as a bribe. This may not be a fair characterization. However, attorneys must use their common sense to avoid conduct which could appear to be an improper attempt to influence a witness who is about to testify. We will never know Combs' actual motivation in making an offer of employment to Dr. Grimm. Regardless of Combs' motive, at a minimum, the offer of employment put Dr. Grimm in the position of having divided loyalties. Quite simply, this court chooses to abide by the ageless wisdom that a person cannot serve two masters.

Erickson v. Newmar Corp., 87 F.3d 298, 303 (9th Cir. 1996).

If the goal is a search for the truth, these sentiments are misplaced. Following the logic of the Ninth Circuit, any possible payment to an expert affects the expert's biases. While this is almost certainly true, it applies just as readily to the payments by the party retaining the witness as to the adverse party who suggests the possibility of retaining her in another case or paying her for time spent in *ex parte* communications. Any balancing out of the bias created by the original payments should therefore be encouraged, not discouraged. The Ninth Circuit's suggestion that any possible negating of the effects of the payments from the initially retaining party constitute "witness tampering," *see id.*, demonstrated just how distorted the present system has become. In the view of the Ninth Circuit and other trial-team-model advocates, the paramount value to be protected is the right of attorneys to buy experts on the open market, with no fear that the power of the dollars they spend will be offset by other forces like dollars spent by their opponents. The ultimate goal for the system should be truth, not the unchallengeable power of the market for opinion testimony. See *Norfin, Inc. v. Int'l Bus. Machs. Corp.*, 74 F.R.D. 529, 533 (D. Colo. 1977) ("[W]e cannot accept this 'oath helper' approach to discovery. It is inconsistent with our basic assumption that the trial is a search for truth and not a tactical contest which goes to either the richest or to the most resourceful litigant." (quoting *Seven-Up Bottling Co. v. United States*, 39 F.R.D. 1, 2 (D. Colo. 1966))).

359. If the expert decided on her own not to talk to opposing counsel, either because an attorney did not instruct her to avoid *ex parte* communications, *see supra* Part V.A.1, or

A: That's right.³⁶⁰

Q: You did not make that decision, because Attorney Jones made the decision for you, correct?

A: Correct.³⁶¹

because the adoption of an amendment to Model Rule 3.4(f) prohibited the attorney from so instructing the witness, *see infra* Part V.B, the attorney should refrain from asking this question. The absence of a question establishing the expert's refusal to participate in *ex parte* communications presumably will somewhat weaken the cross-examiner's efforts to establish that the expert is controlled by the attorney, but this is a reasonable result. After all, if the attorney does not explicitly instruct her expert not to participate in *ex parte* communications she is indeed exercising less control over the expert than an attorney who does give this instruction.

An experienced or otherwise savvy expert witness might, and presumably often would, avoid participating in *ex parte* communications with her future cross-examiner even if her retaining attorney does not instruct her to do so, because she might believe that there is little to be gained from such communications. Even when the expert herself decides not to participate in *ex parte* communications, however, a series of cross-examination questions establishing the numerous "ex parte" communications between the retaining attorney and the expert (i.e., those outside the presence and knowledge of opposing counsel) and the expert's refusal to participate in any such communications with opposing counsel will help the cross-examiner establish the expert's loyalty to retaining counsel.

As with any cross-examination questions, an attorney may wish to determine the answers to these questions before asking them at trial. *See supra* note 2 and accompanying text. Therefore, the attorney may wish to examine the expert about her willingness to participate in *ex parte* communications during the expert's deposition. A deposition inquiry about these matters should limit the opportunity for the expert to present unexpected damaging answers to the cross-examination questions that cast the attorney in a negative light for attempting to engage in *ex parte* communications. An attorney who proceeded with cross-examination questions like those suggested here without learning the expert's answers to these questions, including an attorney who tried to use a last minute call to an adverse expert to cover up the attorney's inadequate discovery and preparation efforts, could be unpleasantly surprised with answers to these questions that cast the attorney's attempted *ex parte* contact in the appropriate negative light.

360. If *ex parte* communications are not permitted, the witness could answer (on cross or on redirect, after appropriate coaching from her retaining attorney) with, "No. I did not talk with you because it was unethical for you to even try to talk to me." As long as there is a possibility of such an answer, a wise attorney might not pursue this line of questioning during cross-examination. Therefore, the possibility of such an answer means that one part of the truth (i.e., the full extent of the retaining attorney's control over the expert witness) will be kept from the jurors. If the trial is to be a search for the truth, this hiding of the truth should not be tolerated.

361. Some attorneys might add:

Q: Let's get this straight. When Attorney Jones tells you to do something or not do something regarding this case, you are at least on occasion willing to follow her instructions without making decisions for yourself, right?

A: Maybe sometimes, but not always.

Others, who believe that they should avoid questions that might lead to arguments with witnesses during cross-examination, *see* ROGER HAYDOCK & JOHN SONSTENG, TRIAL: ADVOCACY BEFORE JUDGES, JURORS AND ARBITRATORS § 10.1(e), at 500 (2d ed. 1991), would forego this question, but make the same point in final argument.

An attorney who has the right to contact retained witnesses *ex parte* and exercises that right can use such a series of cross-examination questions to establish the strong ties between the adverse expert and the attorney who retains her. Given the tendency of experts and the attorneys who hire them to try to suggest that they are far more impartial than they actually are,³⁶² these questions help the jury understand the real dynamics of the expert-attorney relationship.³⁶³ Therefore, even if an attorney instructs her experts not to talk to opposing counsel and the expert follows this instruction, allowing the opposing counsel the chance to try to engage the adverse expert in an *ex parte* discussion still contributes to the truth-seeking process.

At least on occasion, retaining attorneys will conclude that the potential negative implications of the line of questioning outlined above are greater than the downside of allowing their experts to talk to their opponents.³⁶⁴ Trial attorneys may come to this conclusion most often when they are confident that their experts will be able to handle themselves in *ex parte* conversations. When they are correct, *ex parte* communications may convince the opposing attorneys who engage in them that they should actively pursue settlement.

Also, as noted previously, even when attorneys advise their experts not to participate in *ex parte* communications with opposing counsel, some experts will not follow this advice. Experts who truly believe that their role is to educate the parties and jurors may believe that they can best accomplish this goal by talking freely with attorneys for both parties. Although the ingrained combative nature of litigation makes such a concept a difficult one for attorneys to consider, much less accept,³⁶⁵

362. See *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 395-96 (N.D. Cal. 1991) (“When experts testify, they present opinions and reasoning as their own.”); *supra* note 41 and accompanying text.

363. See *Intermedics*, 139 F.R.D. at 395 (“Knowing that some or all of the reasoning and opinion that is being presented by an expert is not her own, but is a lawyer’s, might well have an appreciable effect on the probative value the trier of fact ascribes to the expert testimony.”). The court explained:

[I]t would be fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an “expert” in fact was the product, in whole or significant part, of the suggestions of counsel. The trier of fact has a right to know *who* is testifying.

Id. at 395-96 (emphasis in original); *cf.* *TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585, 588 (S.D. Miss. 2000) (“[W]hen an attorney hires an expert both the expert’s compensation and his ‘marching orders’ can be discovered and the expert cross-examined thereon.”).

364. Trial attorneys sometimes conclude that providing information to opponents is preferable to trying to hide it. See THOMAS A. MAUET, *PRETRIAL* § 6.3, at 191 (4th ed. 1999) (“It is often sound strategy to provide broad disclosure to other parties.”).

365. One trial-team-model advocate outlined what may be a fairly typical attorney-based view of the “proper” attitude for experts to have about *ex parte* contact:

Seasoned trial lawyers may wonder what expert witnesses would knowingly engage in any contact with opposing counsel. In most cases, people identified as expert witnesses are sufficiently knowledgeable about legal proceedings that they will seek to avoid contact with opposing counsel. There are exceptions, however, consisting primarily of those experts who are retained because of knowledge they have gained of the issues underlying the litigation in advance of litigation. There

it is hard to argue that these experts are wrong. If the expert's ultimate purpose is to increase the knowledge of the jurors, her chances of success in this endeavor are increased if not just one, but both, attorneys are given every opportunity to learn from her.

*B. A Modest Proposal: Prohibiting Attorneys from Advising
Retained Experts to Refrain from Ex Parte
Communications with Opposing Counsel*

Although Model Rule 3.4(f)'s granting of permission to attorneys to ask retained expert witnesses not to participate in ex parte communications does not render attempts to engage in such communications purposeless, removal of this permission would presumably increase the probability of actual ex parte communications about relevant issues.³⁶⁶ Because such communications would benefit the justice system by increasing the flow of information leading to settlement and making cross-examination more effective,³⁶⁷ this is a change worth making.³⁶⁸

also are some experts who either are so naive or so arrogant that they fail to perceive the hazards of affording opposing counsel unchecked inquiry into their thought processes.

Nilles, *supra* note 127, at 18.

From the standpoint of a given trial attorney in a given case, this perspective is understandable. After all, ex parte contact is undertaken, in the main, in an effort to gather information to be used at trial to cross-examine and otherwise discredit the expert witness. From a broader systemic view, however, ex parte communication can help attorneys overcome the strong inherent bias of retained expert witnesses and therefore assist in the search for the truth. Formal discovery is designed, at least in part, for the same purpose. *See supra* note 80 and accompanying text. Therefore, the fact that a given information-gathering technique arms an attorney opposing an expert witness with information that can be used to impeach the expert is not a reason to outlaw the technique. Indeed, that very purpose is one that should be advanced in a process that purports to seek truth.

366. Notwithstanding the existence of some expert witnesses who will fail to follow advice given by retaining attorneys to avoid ex parte communications, *see supra* text accompanying notes 283-84, a good many retained experts would follow the advice of their employers. Of the experts who are willing to follow advice given by retaining attorneys, there are surely some who would choose to engage in ex parte communications if they were not told not to do so, particularly when they believe this would expand the knowledge of key persons involved in the litigation and lead to a more just result. *See supra* text accompanying note 365.

367. *See supra* notes 105-06, 190-92 and accompanying text.

368. In the related context of determining whether to allow defense attorneys to contact plaintiff's treating physicians ex parte, *see supra* note 25, one court warned about the dangers of allowing one party to try to control access to a witness:

The inchoate threat implicit in refusing or qualifying permission to speak to a witness . . . operates to intimidate the witness, who is then placed in the position of withholding or divulging what he knows at his peril, and is itself a species of improper influence. It also enables the party so wielding the privilege to monitor his adversary's progress in preparing his case by his presence on each occasion such information is revealed . . .

Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128-29 (D.D.C. 1983), *quoted in* *Felder v. Wyman*, 139 F.R.D. 85, 89-90 (D.S.C. 1991). Current law allowing an attorney to control access to her

A relatively simple edit of Model Rule 3.4(f) would bring about this change. Adding the phrase "not including any person who has been retained to present expert testimony" after the term agent in Model Rule 3.4(f) would remove retained expert witnesses from the list of persons³⁶⁹ who can be advised by an attorney not to participate in ex parte communications.³⁷⁰ Given the recent amendments to the Federal Rules of Civil Procedure that might fortify an attorney who is considering trying to initiate ex parte communications with a retained expert, a change in the Model Rules that would increase the probability that this encounter would result in the acquisition of information is quite timely.³⁷¹

retained experts raises similar concerns.

369. As currently in place, the list of persons who can be asked by an attorney to refrain from ex parte communications includes "a relative or an employee or other agent of a client." MODEL RULES, *supra* note 8, R. 3.4(f). At least at first blush, this list seems, for the most part, to be persons who have a relationship with the client outside of the litigation. A relative of the client certainly has a nonlitigation relationship with her. Likewise, although it is possible to hire a person as an employee solely to assist in a particular litigated matter, this would be unusual. Therefore, it seems safe to assume that the vast majority of employees of clients have a relationship with the client that exists outside of the litigated matter at hand. Indeed, if the term "agent" is to be interpreted expansively enough to include retained expert witnesses, *see supra* notes 345-49 and accompanying text, certainly many, if not most, agents have some relationship with clients outside of the litigated matter at hand. A retained expert witness has no such relationship in many instances, because she was retained for the specific purpose of working on the case at hand. Therefore, removing retained expert witnesses from the Model Rule 3.4(f) list would not do a disservice to what would appear to be the spirit of the rule, which is allowing an attorney to advise persons who have a relationship with the client outside of the litigation at hand to refrain from ex parte communications because such communications might do damage to the interest of the person with whom they have this relationship.

370. If this change was adopted, Model Rule 3.4(f) would read:

A lawyer shall not . . .

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent, *not including any person who has been retained to present expert testimony*, of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

MODEL RULES, *supra* note 8, R. 3.4(f) (with suggested additions shown in italics).

As written above, this change would apply to both civil and criminal cases. Because this Article analyzes only the issues involved in civil cases, further analysis is warranted before a change affecting criminal cases is adopted, even though much of the analysis here should be relevant in criminal cases. Of course, the addition of the words "in a civil proceeding" at the end of the addition suggested above would limit the scope of the proposed amendment.

371. Although this suggestion ideally would have been directed to the Ethics 2000 Commission, the Commission has already released a report that does not change the text of Model Rule 3.4. *See supra* note 143. However, assuming that state committees and courts will eventually review the Ethics 2000 Commission's suggested changes and consider whether to adopt them or other modifications to their rules of professional responsibility, this suggestion of a relatively minor change in the language of Model Rule 3.4 could still be enacted in some jurisdictions in the relatively near future. *Cf. Hellman, supra* note 6, at 326-27 ("It is typical for a state's set of rules, even when based on one of the ABA models, to contain material

VI. CONCLUSION

With or without this suggested modification of Model Rule 3.4(f), *ex parte* communications are not a panacea that will instantly overcome the potentially substantial witness bias inherent in a system where attorneys and parties retain and pay expert witnesses. In some instances, *ex parte* communications will provide little information to an attorney who attempts to use them, but is thwarted by opposing attorneys who instruct against participation and experts who follow those instructions or independently choose not to participate. At best, *ex parte* contact is simply another arrow in the quiver of attorneys who seek to overcome the problems of expert witness bias.

Given the pervasive power of the money-fueled bias of retained experts, though, that quiver needs to be stocked with every reasonable arrow. When read and interpreted reasonably, no Model Rule prohibits attorneys from attempting *ex parte* contact. Moreover, trial-team-model advocates have not made a case on policy grounds for adoption of a rule prohibiting *ex parte* contact. Instead, *ex parte* contact has the potential to enhance the truth-seeking process, by making cross-examination more effective. As a result, the *ex parte* arrow, imperfect as it is, should be at the disposal of attorneys who can make effective use of it, at least on occasion. Other arrows that will make cross-examination more effective should also be added to the trial attorney's quiver.³⁷² The system needs to do more to overcome the dangers of retained expert loyalty, not less.

variations from the relevant ABA document.”).

372. For example, as I have previously argued, the cross-examiner should be given access to everything considered by an adverse retained expert witness, including all communications between the retaining attorney and the expert. *See supra* note 55.

