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# Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics

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JON BAUER\*

## Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics

*Lawyers frequently draft settlements that impede other parties' access to relevant evidence through clauses that prohibit the plaintiff from disclosing information to anyone with a claim against the defendant or forbid all discussion of the facts underlying the dispute. This Article argues that lawyers who negotiate these "noncooperation" agreements violate Rule 3.4(f) of the Model Rules of Professional Conduct, which prohibits requesting someone other than the lawyer's own client to withhold relevant information from another party, and Model Rule 8.4(d), which prohibits conduct "prejudicial to the administration of justice."*

*The conventional wisdom among practitioners and legal ethics scholars has been that lawyers may ethically negotiate any settlement terms that serve their clients' interests and are not criminal or fraudulent. (Some recent critics of settlement secrecy have argued that noncooperation settlements violate obstruction of justice statutes or other criminal laws, but the illegality argument is largely unconvincing.) This Article argues that the*

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\* Clinical Professor of Law, University of Connecticut School of Law. Thanks to Leslie Levin, Alexandra Lahav, Peter Siegelman, and Michelle Caldera for their detailed and helpful comments on earlier drafts; Paul Reingold and Mary Berkheiser for their collaboration on a role play that fostered a lively discussion at the 2003 AALS Workshop on Clinical Legal Education; and Stefanie Hennes for her formidable research assistance and good cheer. I am also grateful for the many thoughtful comments and questions I received at a University of Connecticut School of Law faculty workshop and a seminar on settlement sponsored by the Connecticut Bar Association.

*conventional view has looked at the problem through the wrong lens. In the ethos of the ethics codes, third party and societal interests generally take a back seat to client service, but certain types of conduct deemed especially harmful to the justice system have long been placed off-limits to lawyers because of their special role as "officers of the court."*

*This Article traces the history of one such duty, the principle that lawyers must not ask nonclients to refrain from voluntarily disclosing relevant information to other parties or their attorneys, and shows the important function that it plays in safeguarding the integrity of adversary adjudication. After providing a theoretical justification for liberally construing ethics rules that limit client advocacy for the sake of the adversary system's effective functioning, this Article explores what the rules mean for settlement practices. The Conclusion addresses the critique that prohibiting lawyers from negotiating agreements that their clients could lawfully enter into on their own is either futile or paternalistic, and shows that it is neither.*

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## INTRODUCTION

*It is improper for an attorney . . . to influence persons, other than his clients or their employees, to refuse to give information to opposing counsel which may be useful or essential to opposing counsel in establishing the true facts and circumstances affecting the dispute. . . .*

....

*. . . All persons who know anything about the facts in controversy are, in simple truth, the law’s witnesses.<sup>1</sup>*

*Defendants should not be able to buy the silence of witnesses with a settlement agreement when the facts of one controversy are relevant to another.<sup>2</sup>*

Felicia Martinez (not her real name) worked as a machine operator in a factory. She and several Latina co-workers were bilingual and frequently conversed in Spanish. After some other employees complained, the shift supervisor ordered the workers in his department to speak only English. Ms. Martinez tried to comply, but often found herself unconsciously slipping into her native language. The supervisor repeatedly warned her that she was violating his directive. Ms. Martinez became

<sup>1</sup> ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 131 (1935).

<sup>2</sup> *Wendt v. Walden Univ., Inc.*, No. 4-95-467, 1996 U.S. Dist. LEXIS 1720, at \*5 (D. Minn. Jan. 16, 1996).

particularly upset when he rebuked her for using Spanish while teaching a new employee, who barely understood any English, how to run a machine. She told the supervisor that his rule was unnecessary and unfair. He told her to just be quiet and follow instructions. Shortly thereafter, he notified her that she was being laid off due to a lack of work, although a new machine operator had been hired into the department just a few days earlier.

Ms. Martinez sought help from the law school clinical program where I teach. The clinic filed a complaint on her behalf, alleging that her employer had discriminated against her based on national origin and retaliated against her based on her expression of opposition to discriminatory practices in violation of Title VII of the 1964 Civil Rights Act.<sup>3</sup> Three years of litigation ensued, first in a state antidiscrimination agency and then in federal court. After extensive discovery, the defendant's attorneys expressed interest in settlement. The negotiations initially focused on money. When a sum was agreed on, the defense lawyers drafted a proposed settlement agreement. It included a provision requiring the plaintiff to keep the settlement amount confidential and another clause that read: "Martinez will not . . . assist any person who files a lawsuit, charge, claim or complaint against [the defendant] unless Martinez is required to render such assistance pursuant to a lawful subpoena or other legal obligation."

Incentives for compliance were built into the agreement. Part of the settlement would be paid upon signing, with the remainder to be paid six months later—but only if she abided by the confidentiality terms during that time. The company could also recover liquidated damages in an amount equal to half the total settlement sum if Ms. Martinez breached the secrecy or noncooperation clauses. To avoid disclosing the terms of the agreement in public court records, the agreement took the form of a private contract; upon its execution, the parties would file with the court a stipulation stating that the matter was voluntarily withdrawn.

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<sup>3</sup> See generally Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1726–38 (2006) (discussing the history and mixed success of Title VII challenges to English-only policies).

The students who handled the case presented the proposed settlement to our client with client-centered neutrality.<sup>4</sup> They explained the proposal and discussed alternatives, including going to trial or attempting further negotiations, elicited her reactions and concerns, spoke of pros and cons, but did not advise her what to do. Ms. Martinez expressed mixed emotions. She felt exhausted and wanted the case to be over. She was happy with the size of the settlement, but felt bad about not officially “winning” and establishing that the company did something wrong. She was comfortable keeping the settlement amount confidential; in fact, she wanted to make sure her friends and neighbors did not learn how much money she was getting—because if they did, they would probably want some. The noncooperation provision gave her pause. She believed that other employees at the company had faced similar discrimination, and if they brought claims, she wanted to be able to help them, just as some of her former co-workers had helped her. Nonetheless, she decided that, on balance, she could accept the restriction. After all, she could still testify if subpoenaed. She did not want to risk delaying the settlement by fighting over it.

So, the settlement was concluded. A few months later, Ms. Martinez called me, very upset. She had been contacted by an attorney representing a Latina woman recently fired by the company, someone she knew and liked. The attorney said that he was considering filing a discrimination complaint and wanted to know about any discrimination that Ms. Martinez had seen or experienced. She had to tell him that she couldn’t tell him anything. She asked me if I could call the attorney and give him the information. However, I explained that doing so would put her settlement at risk. She felt terrible about not being able to help her friend.

In retrospect, I wondered whether we had acceded too readily to the defense lawyers’ insistence on nonassistance. Our client’s lawsuit had been about her right to speak out against perceived discrimination, and it was painfully ironic that the settlement was

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<sup>4</sup> See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS* 2–13, 270–98 (2d ed. 2004) (describing the hallmarks of a client-centered approach to counseling that posits that lawyers generally should maintain a neutral stance toward important case decisions and assist the client in reaching a decision that accords with the client’s values, priorities, and tolerance for risk).

now silencing her on the same subject. Even more troubling was the possibility that the agreement was interfering with another person's ability to prove discrimination. I never found out what became of the co-worker's claim. The attorney may have concluded that without my client's evidence, he did not have enough to justify investing time, expense, and effort into a case where payment would be contingent on success. If he did take on the case, the agreement would increase his client's litigation costs; a deposition would be required to obtain information that, absent the agreement, would have been available for free by simply interviewing Ms. Martinez and having her sign a witness statement.

The agreement's effects would also be felt if the co-worker's claims were investigated by the Equal Employment Opportunity Commission or a state antidiscrimination agency.<sup>5</sup> It would bar Ms. Martinez from responding to inquiries by an agency investigator, and the absence of her corroborating evidence might mean the difference between dismissal of the co-worker's claim and a favorable finding. The silence mandated by the settlement agreement may have obstructed a tribunal's fact-finding or prevented a meritorious claim from being filed in the first place. At a minimum, it made it significantly more expensive for another litigant to get at the facts.

Lawyers frequently negotiate settlements that suppress evidence in the manner that Ms. Martinez's story illustrates. Sometimes this is done through agreements that expressly prohibit information-sharing with other litigants. Often, the same result is accomplished by settlement clauses that prohibit disclosure, to anyone, of the facts underlying the dispute. In this Article, the term "noncooperation" refers to all forms of settlement secrecy that effectively prohibit a settling plaintiff from disclosing relevant information to others with current or future claims against the same defendant.

This Article makes the case that attorneys who negotiate noncooperation settlements act in violation of their ethical responsibilities under binding disciplinary rules. Rule 3.4(f) of the Model Rules of Professional Conduct ("Model Rules" or

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<sup>5</sup> An administrative complaint is a prerequisite to filing suit under Title VII, *see* 42 U.S.C. § 2000e-5 (2008), and is the only realistic option for litigants not represented by counsel.



"Rules") prohibits a lawyer from requesting any person, other than the lawyer's client or the client's relatives or employees, to refrain from voluntarily providing relevant information to another party.<sup>6</sup> Lawyers who make settlement offers conditioned on noncooperation are doing precisely what the rule prohibits. A strong case can also be made that lawyers who ask for noncooperation, or accept a noncooperation settlement proposed by the other side, violate Model Rule 8.4(d), which prohibits attorneys from engaging in "conduct that is prejudicial to the administration of justice."<sup>7</sup>

The requirement that lawyers not seek to induce witnesses to withhold voluntary cooperation, though of longstanding vintage (it dates back at least to the 1935 ethics opinion quoted at the start of this Article), remains one of the least well-known of lawyers' ethical duties. I was unaware of the rule for most of my first decade or so in practice, and many lawyers I've spoken with either have never heard of it or never thought about its implications for settlement agreements. Leading law school ethics texts contain no discussion of Rule 3.4(f) or give it only passing mention.<sup>8</sup> Its application to settlement secrecy has received very little attention. The issue was briefly addressed in one state ethics advisory opinion, which concluded that a settlement offer conditioned on noncooperation violates Rule 3.4(f).<sup>9</sup> Stephen Gillers, in an article contending that

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<sup>6</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (2008).

<sup>7</sup> *Id.* R. 8.4(d). The Model Code of Professional Responsibility ("Model Code"), which still forms the basis for the ethical rules in two jurisdictions, contains no direct equivalent to Model Rule 3.4(f) but does include the "conduct prejudicial" rule. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (1981).

<sup>8</sup> See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (4th ed. 2004); RICHARD ZITRIN ET AL., LEGAL ETHICS IN THE PRACTICE OF LAW (3d ed. 2007). The most comprehensive current ethics treatise focuses nearly all of its discussion of Rule 3.4(f) on how it permits lawyers to advise clients and clients' employees not to cooperate with an adversary, while paying scant attention to what the rule prohibits. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 30.12 (3d ed. 2001 & Supp. 2008).

<sup>9</sup> S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993); see also Jon Bauer, *Settlement Provisions Restricting the Plaintiff's Right to Voluntarily Provide Relevant Information to Others Suing the Same Company May Violate Rule 3.4(f) of the Model Rules*, EMPLOYEE ADVOCATE (National Employment Lawyers Association), Summer 1995, at 158; Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of*

noncooperation settlements violate federal criminal laws on obstruction of justice, noted that Rule 3.4(f) appears to bar lawyers from making such requests.<sup>10</sup> Professor Gillers, however, gave the rule only passing mention, and other commentators (again with little analysis) have questioned the rule's application to settlements.<sup>11</sup>

In explaining why the ethics rules should be read to prohibit some very common settlement practices, this Article focuses attention on the largely forgotten history and purposes of the principle that it is unethical and prejudicial to the administration of justice for a lawyer to influence a witness to refrain from disclosing relevant information to an adverse party. It also explores the implications of this ethical proscription for the practice of settlement, examining the specific sorts of settlement terms that the rules should be construed to place off-limits or allow.

Part I discusses the varieties and prevalence of noncooperation settlements, and situates the issue within the broader public policy debates that have surrounded settlement secrecy. Part II considers the standard view of the ethics of settlement secrecy that has informed practitioners' thinking and most of the legal ethics literature, which frames the issue as a conflict between client interests and the protection of third parties from harm, in which the former takes precedence. The perception that lawyers' "hands are tied," that they must accept and abide by the client's decisions concerning secrecy, has produced widespread discomfort, particularly in the plaintiffs' bar. Recent changes to the Model Rules somewhat broaden the scope of the harm-prevention exceptions to the lawyer's confidentiality duty, but I conclude that these changes will have little impact.<sup>12</sup> Arguments have also been made that noncooperation agreements and other forms of settlement

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*Settlements*, 55 S.C. L. REV. 791, 815 n.142 (2004) (noting that such settlements may raise ethical issues under Rule 3.4(f)).

<sup>10</sup> Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 15 (2002).

<sup>11</sup> See Joel Cohen & James L. Bernard, *Buying Victim Silence*, 231 N.Y. L.J., Jul. 28, 2004, at 4 n.5 (suggesting that Professor Gillers's "reading of the rule may be broader than its text supports").

<sup>12</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(3) (2008); see also *infra* text accompanying notes 67–74.

secrecy run afoul of criminal statutes concerning obstruction of justice or compounding.<sup>13</sup> I conclude that the illegality argument is largely unconvincing, and is unlikely to make much headway with prosecutors or deter lawyers from negotiating noncooperation settlements.<sup>14</sup>

If lawyers generally must abide by lawful client decisions, regardless of harm to third parties, there is another strand in lawyers' ethical codes, rooted in the lawyer's role as an "officer of the court," that makes it impermissible to participate in certain actions deemed especially harmful to the justice system, regardless of the client's desires. Part III traces the development and underlying rationales of one such duty, the principle that it is improper for attorneys to impede voluntary witness disclosures to opposing parties. It derives from American Bar Association ("ABA") ethical pronouncements dating back to the 1920s, and was deliberately carried forward into the modern disciplinary codes. The principle rests on a vision of adversary adjudication as a means for uncovering truth and resolving disputes fairly, and is intended to further the integrity, accuracy, and efficiency of that process. Several lines of judicial precedent, addressing the enforceability of noncooperation contracts and other issues, similarly articulate the idea that interference with an adversary's access to *ex parte* witness interviews is prejudicial to the administration of justice.

Part IV turns to what the rules mean for settlement secrecy. I start with some general interpretive principles, since much depends on how broad or narrow a construction is given to ambiguous rule language. I argue that limitations on advocacy that are designed to set ground rules of fair competition needed to ensure the adversary system's effective functioning, of which the rule against noncooperation requests is one example, should be construed liberally to achieve their goals.<sup>15</sup>

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<sup>13</sup> See John P. Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 S.C. L. REV. 829 (2004); Gillers, *supra* note 10; Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783 (2002).

<sup>14</sup> See *infra* text accompanying notes 79–84 and Appendix.

<sup>15</sup> This discussion builds on the insights of an important but little-known essay by Robert Kutak, who chaired the commission that drafted the Model Rules, concerning the "competitive theory" that underlies the Rules' approach to ethical regulation. See *infra* text accompanying notes 220–29.

The remainder of Part IV addresses a number of specific interpretive issues that arise in applying the ethics rules to noncooperation settlements. I conclude that, both as a matter of plain meaning and regulatory purpose, no exemption for settlements can be read into Rule 3.4(f). And while that rule by its terms applies only to the requesting lawyer, Model Rule 8.4 requires plaintiffs' lawyers to say "no" to such requests rather than agree to settlement terms that are prejudicial to the administration of justice. I also examine the meaning of the phrase "another party" in Rule 3.4(f), which determines to whom disclosures must be allowed, and the scope of the exception in the rule that allows noncooperation requests to be made to a client's employees. Finally, I consider the extent to which it is permissible to require that certain types of information, including settlement amounts, discovery materials, privileged information, and trade secrets, not be disclosed, or to restrict the manner in which disclosures may be made.

In the Conclusion, I consider some objections to using the existing legal ethics rules to restrict lawyer participation in noncooperation settlements. Questions may be raised about the efficacy and appropriateness of barring lawyers from negotiating agreements that clients could lawfully enter into on their own. I explain why, despite possibilities of evasion, targeting lawyer involvement is likely to be reasonably effective in deterring settlement practices that harm the justice system, and why objections founded on client autonomy are unconvincing. Lawyers' special responsibilities to the administration of justice warrants forbidding attorney involvement in conduct that undermines the integrity of adversary adjudication, regardless of whether other law forbids it.

## I

### NONCOOPERATION AGREEMENTS IN THE CONTEXT OF THE SECRET SETTLEMENTS CONTROVERSY

Settlement agreements that prohibit a settling party from voluntarily providing evidence in other proceedings appear to be common. Just how common is hard to determine, since the parties covenant to keep the existence and terms of the agreement confidential as well. There is ample anecdotal evidence that defendants routinely insist on confidentiality

clauses that forbid disclosure of the settlement terms.<sup>16</sup> An unknown, but undoubtedly significant, proportion of settlements also prohibit disclosures of factual information relating to the lawsuit. Defendants have strong incentives to seek such restrictions in order to avoid adverse publicity, decrease the chances of similar suits being filed, and make it more difficult for those who bring claims to prove their cases. Plaintiffs and their lawyers who believe that they can obtain a larger payment in exchange for promises of secrecy have incentive to agree.

Secrecy clauses that bar disclosures to other litigants can take several forms. Overt noncooperation clauses, such as the one in Ms. Martinez's settlement, directly prohibit the voluntary disclosure of information to others bringing claims against a settling defendant.<sup>17</sup> Broader confidentiality provisions that prohibit discussion of the underlying facts or subject matter of the claim,<sup>18</sup> making "disparaging" statements about the other

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<sup>16</sup> See Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 675-76 (2001) (finding, based on interviews with attorneys for corporate defendants and insurance companies, that most attorneys insist on secrecy provisions in settlement agreements); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 113 n.4 (2007) (citing an estimate given by a federal magistrate judge that eighty-five percent to ninety percent of employment discrimination settlements are governed by confidentiality agreements); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 511 (1994) (noting, based on attorneys' reports and Judge Weinstein's "own experience in helping to settle thousands of cases," that "it is almost impossible to settle many mass tort cases without a secrecy agreement").

<sup>17</sup> See, e.g., *Dillard v. Starcon Int'l, Inc.*, 483 F.3d 502, 505 (7th Cir. 2007) (discussing draft settlement in employment discrimination case that prohibited plaintiff from assisting in future investigations of defendant). Another example is Michael Jackson's once-secret settlement with a minor who had accused him of sexual battery, which contained a clause prohibiting uncompelled disclosures to anyone bringing a civil claim against Jackson. Confidential Settlement Agreement and Mutual General Release at ¶ 10(f), *Chandler v. Jackson*, Case No. SC026226 (Cal. Super. Ct. L.A. County Jan. 25, 1994), available at <http://www.thesmokinggun.com/graphics/art3/0616041jacko14.gif>.

<sup>18</sup> See, e.g., *Scott v. Nelson*, 697 So. 2d 1300, 1300 (Fla. Dist. Ct. App. 1997) (quoting settlement agreement that barred the plaintiff or her attorneys from responding "in any way to any inquiry of any kind whatsoever with regard to the facts surrounding the case/claim"); Barry Siegel, *Dilemmas of Settling in Secret: Companies Offer Hefty Sums in Exchange for Keeping the Details of Public Hazard Lawsuits Quiet, Plaintiffs Must Choose Their Own Interest or the Public Good*, L.A. TIMES, Apr. 5, 1991, at A1 (discussing widespread use of such clauses).

party,<sup>19</sup> or disclosing any facts relating to the plaintiff's employment with the defendant<sup>20</sup> will have the same effect, unless they carve out an exception for disclosures of relevant information to other litigants—which they seldom do.<sup>21</sup> Settlement provisions that require the return, destruction, or nondisclosure of information obtained in discovery can also prevent a party or party's attorney from furnishing evidence to litigants in other cases.<sup>22</sup>

The facts underlying a settled case are often relevant to other claims involving similar conduct by the same defendant, and may be highly probative. The Federal Rules of Evidence express a general principle that prior bad acts are inadmissible to prove “the character of a person in order to show action in conformity therewith.”<sup>23</sup> However, the exceptions, which allow such evidence to be admitted for a wide variety of other purposes (including proof of motive, opportunity, intent, knowledge, or propensity to engage in sexual abuse),<sup>24</sup> tend to swallow the rule. In fraud, discrimination, sex abuse, products liability, and

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<sup>19</sup> See, e.g., *EEOC v. Severn Trent Servs., Inc.*, 358 F.3d 438, 440 (7th Cir. 2004) (noting that such clauses “appear to be fairly common”); *Hamad v. Graphic Arts Ctr., Inc.*, No. CIV 96-216-FR, 1997 WL 12955, at \*1 (D. Or. Jan. 3, 1997) (settlement prohibited plaintiff from “doing or saying anything which disparages or derogates” the defendant).

<sup>20</sup> See, e.g., *McKnight v. Stein Mart, Inc.*, No. 95-0258, 1996 U.S. Dist. LEXIS 12581, at \*2 (E.D. La. Aug. 22, 1996); *Kalinauskas v. Wong*, 151 F.R.D. 363, 365 (D. Nev. 1993).

<sup>21</sup> Confidentiality clauses in settlements frequently contain an exception for disclosures required by subpoena or court order. Sometimes even this is lacking. See, e.g., *Hasbrouck v. BankAmerica Hous. Servs.*, 187 F.R.D. 453, 456 (N.D.N.Y. 1999); *Hamad*, 1997 WL 12955, at \*1.

<sup>22</sup> See ASS'N OF TRIAL LAWYERS OF AM., RESOLUTION ON PROTECTIVE ORDERS (May 6, 1989), reprinted in James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, at 876 (2004) [hereinafter ATLA RESOLUTION] (stating that defendants in personal injury actions frequently demand, as a condition of settlement, secrecy agreements that, *inter alia*, require the return or destruction of discovery materials and prohibit the dissemination of information contained in pleadings and discovery); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 555–56 (2006) (noting that there is anecdotal evidence that settlements are routinely predicated on maintaining the confidentiality of discovery materials); Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1, 20–21 (2001) (stating that settlement secrecy agreements barring disclosure of discovery information are commonplace in sexual harassment, defamation, employment, and mass tort cases).

<sup>23</sup> FED. R. EVID. 404(b).

<sup>24</sup> *Id.* 404(b) & 413–15; *Huddleston v. United States*, 485 U.S. 681, 685–88 (1988).

environmental tort cases, information relating to similar past misconduct or complaints is routinely held by courts to be potentially admissible and within the scope of discovery.<sup>25</sup> The plaintiff who settles one case is frequently a potential witness in another.

A debate about settlement secrecy has raged on and off for the past two decades, fueled by media reports that serious environmental, safety, and health risks were kept hidden from public view by confidential settlements, sealed court files, and protective orders.<sup>26</sup> The discourse among academics, practitioners, and policy makers has largely focused on two issues: whether and under what circumstances courts, as public institutions, should be a party to secrecy agreements;<sup>27</sup> and

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<sup>25</sup> See, e.g., *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 149–56 (3d Cir. 2002) (discussing standards for admitting evidence of similar past conduct in civil cases for sexual assault or child molestation); *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 111 (3d Cir. 1999) (in employment discrimination case, evidence of other acts of harassment “extremely probative” on issues of discriminatory intent, employer’s knowledge, and effectiveness of response); *Orjias v. Stevenson*, 31 F.3d 995, 999–1002 (10th Cir. 1994) (evidence of defendant’s prior air pollution violations admissible to show that defendant opened plant with knowledge that it could not comply with air quality regulations with its existing technology); *Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 650 (11th Cir. 1990) (evidence of similar occurrences admissible in products liability action for a variety of purposes, including to show a lack of safety for intended uses, notice to the defendant of a defect or danger, and causation); *Channelmark Corp. v. Destination Prods. Int'l, Inc.*, No. 99 C 214, 2000 WL 968818, at \*2–\*3 (N.D. Ill. July 7, 2000) (prior similar acts relevant to intent in a fraud case).

<sup>26</sup> The scandals have included sexual abuse by Catholic priests, Bridgestone/Firestone tires failing on Ford SUVs, health risks from the Dalkon Shield and silicone breast implants, exploding fuel tanks on GM pickup trucks, and hazardous chemical spills. See, e.g., Jillian Smith, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. 237, 258–63 (summarizing several of these controversies); see also Daniel J. Givelber & Anthony Robbins, *Public Health Versus Court-Sponsored Secrecy*, 69 LAW & CONTEMP. PROBS., Summer 2006, at 131, 134 (discussing how A.H. Robins hid the safety risks of the Dalkon Shield with secret settlements while continuing to market the product); Koniak, *supra* note 13, at 783–85 (discussing how secrecy agreements delayed the recall of Firestone tires for years, resulting in deaths); Matt Carroll et al., *Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public Eye*, BOSTON GLOBE, Jan. 31, 2002, at A1 (discussing how the Archdiocese of Boston used secrecy clauses in settling child molestation claims against at least seventy priests over a decade); Benjamin Weiser, *Forging a “Covenant of Silence”*: *Secret Settlement Shrouds Health Impact of Xerox Plant Leak*, WASH. POST, Mar. 13, 1989, at A1.

<sup>27</sup> The battle lines have been drawn between secrecy advocates, who see courts as dispute-resolution mechanisms and favor giving judges broad leeway to enter and enforce secrecy orders to make litigation more efficient and promote settlement,

whether secrecy provisions that suppress information about health or safety dangers should be outlawed.<sup>28</sup>

The antisecrecy arguments have led to some reforms. Several states have enacted “sunshine in litigation” laws that limit the ability of judges to enter secrecy orders and declare out-of-court settlements that conceal health or safety hazards to be contrary to public policy and unenforceable.<sup>29</sup> The federal district court in South Carolina has adopted a rule prohibiting the sealing of settlement agreements filed with the court.<sup>30</sup> More generally, there has been an evolution in the judicial stance toward court-ordered secrecy. Courts have intensified their scrutiny of stipulated protective orders and sealing requests, placing greater weight on the public interest in access to information.<sup>31</sup> Judicial involvement in agreements that impede other litigants’ access to relevant information has also fallen into disfavor. Judges increasingly insist that protective orders provide for discovery

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and confidentiality critics, who view adjudication as a “public good” and argue that the public has a right of access to information generated by court processes, and that judges have a responsibility to scrutinize parties’ secrecy agreements to ensure that public interests are protected. *See generally* Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) (discussing both sides of the debate and advocating a balancing approach).

<sup>28</sup> *See, e.g.*, Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883 (2004) (arguing that statutes, court rules, and professional ethics rules should be strengthened to prevent settlements that bar disclosure of information concerning dangers to public health or safety); Richard A. Epstein, *The Disclosure Dilemma*, BOSTON GLOBE, Nov. 3, 2002, at D1 (arguing that restrictions on settlement confidentiality will be ineffective in promoting public safety).

<sup>29</sup> Statutes or court rules to this effect have been enacted in Texas, Florida, Louisiana, Washington, and Arkansas. For descriptions of the state laws and discussion of their limited effectiveness, see Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 394–400, 417–33 (2006); *see also* ARK. CODE ANN. § 16-55-122 (West Supp. 2008). Even in the absence of legislation, some courts have refused to enforce agreements that hide information about health or safety risks, deeming them contrary to public policy. *See, e.g.*, C.R. v. E., 573 So. 2d 1088, 1089 (Fla. Dist. Ct. App. 1991).

<sup>30</sup> D.S.C. Local R. 5.03(E). *See generally* Symposium, *Court-Enforced Secrecy*, 55 S.C. L. REV. 711 (2004) (articles discussing the South Carolina rule).

<sup>31</sup> *See, e.g.*, *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *Gleba v. Daimler Chrysler Corp.*, No. 98-230, 2001 Mass. Super. LEXIS 364 (Mass. Super. Ct. Aug. 6, 2001).



sharing with plaintiffs in similar cases<sup>32</sup> and refuse to enforce private noncooperation agreements when they interfere with discovery or informal investigation in another proceeding.<sup>33</sup>

None of these reforms prevent lawyers from negotiating noncooperation agreements that are effective in achieving their ends. Having the settlement take the form of a private, out-of-court contract obviates the need for judicial approval.<sup>34</sup> The prospect that a noncooperation agreement will be found unenforceable if challenged by a third party seeking information does not prevent settling parties from entering into one.<sup>35</sup> The agreement can be structured to give the plaintiff ample incentive to comply by making future payments contingent on continued silence, or by creating the risk that if a court does find the agreement valid, the plaintiff who breached will be liable for liquidated damages or attorney's fees.<sup>36</sup> As Ms. Martinez's case

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<sup>32</sup> See, e.g., *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131–32 (9th Cir. 2003); *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); see generally Doré, *supra* note 9, at 812–13; Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67, 92–93 (2000); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 493–500.

<sup>33</sup> See *infra* text accompanying notes 185–203.

<sup>34</sup> See *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (noting that the presumption of public access to judicial proceedings does not extend to settlement agreements embodied in private contracts, where only a stipulation of dismissal has been filed with the court); Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 732 (2004) (explaining that the South Carolina district court rule against sealed settlements is designed to address “court involvement in the business of enforcing secrecy” and does nothing to prohibit “bilateral secrecy covenants between the litigants”).

<sup>35</sup> Cf. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 344 (1998) (noting that regulation through contract law will not prevent private parties from pressuring others to agree to silence, but will deprive them of a court's assistance in enforcing such promises). In addition, the state “sunshine laws” that declare agreements concealing health or safety hazards to be void and unenforceable, see *supra* note 29, generally will have no effect on secret settlements in many types of litigation in which they are common, such as employment discrimination and fraud.

<sup>36</sup> In a column in the *New York Law Journal*, two big firm lawyers advised that, “because enforceability of a confidentiality agreement may be ‘problematic’ on public policy grounds, it should contain, if deemed appropriate, a liquidated damages provision, a staggered payment schedule, or both, to diminish the likelihood of an unwanted disclosure.” Joel Cohen & Joseph Strauss, *Confidentiality Agreements and Crime*, N.Y. L.J., Dec. 23, 2002, at 4; see also Koniak, *supra* note 13, at 805 (noting that parties can easily work around unenforceability by providing for payments over time). Ms. Martinez's settlement

illustrates, even without judicial enforcement, such agreements can prevent relevant evidence from reaching other litigants. As a result, valid claims may never be brought or will be rendered harder to prove. Even when they do not succeed in suppressing evidence entirely, noncooperation settlements impose the substantial costs of taking a deposition, or obtaining a judicial ruling, on parties who otherwise would have been able to obtain relevant information informally, and at minimal expense, from a willing witness.<sup>37</sup>

## II

### THE STANDARD VIEW AND ITS DISCONTENTS

Can an attorney ethically demand, or agree to, a settlement conditioned on noncooperation in other proceedings? The question has generally been examined only as a part of the broader question of whether lawyers can ethically agree to secrecy concerning the settlement terms and underlying facts of the case.<sup>38</sup> The standard response to that question is concisely summarized by the authors of a treatise on litigation ethics:

“Zealous advocacy” may require that the defense lawyer request confidentiality, and the client’s interests may mandate that the plaintiff’s lawyer accept [it] to obtain a favorable settlement.

....

. . . [I]t seems clear as a matter of legal ethics that the lawyer’s paramount obligation is to the client. . . . [T]he ultimate decision to participate or not to participate in a settlement coupled with a “gag order” is the client’s.<sup>39</sup>

The underlying assumption is that as long as it is legal for the client to agree to secrecy, it is not unethical for a lawyer to assist

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included both a liquidated damages provision and staggered payments. *See supra* text accompanying notes 3–4.

<sup>37</sup> *See* FREEDMAN & SMITH, *supra* note 8, at 115 (discussing the importance of informal witness interviews because of “the considerable expense of formal discovery, which can be prohibitive for many plaintiffs”).

<sup>38</sup> The major exception is Gillers, *supra* note 10.

<sup>39</sup> WILLIAM H. FORTUNE ET AL., *MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK* 580 (1996) (footnotes omitted). Similarly, U.S. District Court Judge Jack Weinstein observed, “Since the ethical rules require that attorneys obtain a swift and optimal recovery for their clients, the plaintiffs’ attorney seems to have little choice but to accept a favorable settlement offer on secrecy terms.” Weinstein, *supra* note 16, at 511.

the client in accomplishing her lawful objectives. The ethics rules' animating principles of loyalty, zeal,<sup>40</sup> and client autonomy require abiding by the client's decision, even if it imposes costs or injustice on third parties.<sup>41</sup>

The basis for the standard view is readily apparent from the ethics codes' key provisions relating to client decision making and settlement. Model Rule 1.2 requires the lawyer to "abide by a client's decisions concerning the objectives of representation" and "whether to settle a matter."<sup>42</sup> These obligations are subject to an outer limitation: the lawyer must not counsel or assist the client in "conduct that the lawyer knows is criminal or fraudulent,"<sup>43</sup> or take actions on behalf of the client that "will result in violation of the Rules of Professional Conduct or other law."<sup>44</sup> The only ethics rule that explicitly rules out settlement terms that may be desired by a client is Rule 5.6(b), which

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<sup>40</sup> A lawyer's obligation to "represent [a] client zealously within the bounds of the law" was the mantra of the Model Code. See MODEL CODE OF PROF'L RESPONSIBILITY Canon 7, EC 7-1, EC 7-19, DR 7-101 (1981). The disciplinary provisions of the Model Rules articulate blander and weaker-sounding duties of "competence" and "reasonable diligence," MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2008), but the preamble and commentary make it clear that "the basic principles underlying the Rules . . . include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law." *Id.* pmb. para. 9; see also *id.* pmb. para. 2 & R. 1.3 cmt. 1; FREEDMAN & SMITH, *supra* note 8, at 71 (noting that zealous advocacy remains a "pervasive ethic" under the Model Rules).

<sup>41</sup> See Weinstein & Wimberly, *supra* note 22, at 19 (noting, with respect to settlement secrecy, that "[u]nder the existing ethical scheme the plaintiff attorney's duty of loyalty requires putting the client's interests ahead of all others. . . . [T]he plaintiff's attorney has no affirmative ethical obligation to consider the interests of third parties or the general public"); cf. MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 1 (2008) ("Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client," so long as the legally protected rights of third persons are not violated.); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1395-96 & n.24 (1992) (describing the idea that a lawyer should do everything possible within the law to further the client's cause, "no matter what moral wrongs are perpetrated on others in the process," as "a classic formulation of the legal profession's ethos").

<sup>42</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008); see also MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1981).

<sup>43</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008). Similarly, under the Model Code, it is impermissible for a lawyer to "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1981).

<sup>44</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2008); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(8) (1981).

forbids a lawyer from participating in the offering or making of a settlement agreement that restricts the lawyer's right to practice.<sup>45</sup> In addition, the lawyer's duty of confidentiality, contained in Rule 1.6, requires, with narrow exceptions, that the lawyer not reveal any information relating to the representation unless authorized to do so by the client.<sup>46</sup> Based on these provisions, ABA and state ethics opinions, and most commentators, have concluded that it is ethically permissible for lawyers to agree to keep the underlying facts of a case confidential as part of a settlement.<sup>47</sup>

Lawyers who represent defendants in civil litigation tend to endorse the view that they are, and should be, free to negotiate any lawful settlement terms that will benefit their clients.<sup>48</sup>

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<sup>45</sup> MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2008). Model Rule 5.6(b) and the nearly identical Model Code provision, DR 2-108(b), clearly prohibit settlement clauses that bar the plaintiff's lawyer from representing future clients in suits against the same defendant. The ABA's and several states' ethics committees have construed the rule to also prohibit settlements that would bar a lawyer from *using* (as opposed to disclosing) information obtained during a representation. Thus, a lawyer could not be prevented from making use of the knowledge gained in one case as a basis for deciding what records or witnesses to subpoena in future cases against the same defendant. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000); Bd. of Prof'l Resp. of the Sup. Ct. of Tenn., Formal Ethics Op. 98-F-141 (1998); Colo. Bar Ethics Comm., Formal Ethics Op. 92 (1993). Agreements that would prevent a lawyer from disclosing information about the defendant that is a matter of public record have also been found to be impermissible practice restrictions. See D.C. Bar Legal Ethics Comm., Op. 335 (2006); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 730 (2000). All of these opinions take the view that settlements barring disclosure of nonpublic facts learned in the course of representing a client are permissible under Rule 5.6(b).

<sup>46</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2008); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1981).

<sup>47</sup> See ethics opinions cited *supra* note 45; see also N.C. State Bar, 2003 Formal Ethics Op. 9 (2004); SECTION OF LITIGATION, AM. BAR ASS'N, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS § 4.2.6 (2002); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 489-90 (1991); Joel S. Newman, *Gagging on the Public Interest*, 4 GEO. J. LEGAL ETHICS 371, 372-73 (1990); Anne-Thérèse Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 155 (1990); Heather Waldbeser & Heather DeGrave, Current Development, *A Plaintiff's Lawyer's Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815, 825-26 (2003). But see Alan F. Blakley, *To Squeal or Not to Squeal: Ethical Obligations of Officers of the Court in Possession of Information of Public Interest*, 34 CUMB. L. REV. 65 (2003) (arguing that attorneys' general duties as officers of the court sometimes require them to make disclosure in the public interest).

<sup>48</sup> The argument for client autonomy is usually coupled with a substantive defense of settlement secrecy as way to protect legitimate privacy, business, and

Some plaintiffs' attorneys likewise have no qualms about making secrecy "an item for barter on the road to resolution,"<sup>49</sup> using it as leverage to gain larger recoveries for their clients and bigger contingent fees for themselves. But many in the plaintiffs' bar have strong misgivings about the public harms caused by secret settlements. The Association of Trial Lawyers of America ("ATLA") has issued a resolution denouncing secrecy agreements that bar disclosure of discovery materials and the underlying facts of settled cases as detrimental to public health and safety, the proper functioning of the civil justice system, and the interests of individual victims.<sup>50</sup> ATLA encourages attorneys to refuse to enter into secrecy agreements.<sup>51</sup> Civil rights and public interest lawyers have also expressed concern that agreements requiring that the terms of settlement be kept confidential undermine the public and deterrent purposes of enforcement efforts.<sup>52</sup>

The standard view of the ethics rules, however, leaves lawyers who would like to "just say no" to secrecy agreements with little room to maneuver. In their book *The Moral Compass of the American Lawyer*, Richard Zitrin and Carol Langford describe the dilemma faced by a products liability lawyer representing a widow in a wrongful death suit against the manufacturer of her deceased husband's implanted heart valve.<sup>53</sup> When the plaintiff's discovery yielded documents proving that the defendant knew about dangerous design flaws in its product, the

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reputational interests, and to help deter frivolous lawsuits. See, e.g., Stephen E. Darling, *Confidential Settlements: The Defense Perspective*, 55 S.C. L. REV. 785 (2004); Epstein, *supra* note 28. But see ZITRIN ET AL., *supra* note 8, at 569 (stating that many in-house counsel and defense lawyers wish they could refuse to help clients hide the truth about safety dangers).

<sup>49</sup> Joseph A. Golden, *Secrecy Clauses, A Negotiated Restraint on Free Speech*, 73 MICH. B.J. 550, 550 (1994). Golden, a plaintiffs' employment lawyer, writes, "A desire to 'teach the company a lesson' or 'make an example of it' has made for difficult negotiations, not between the parties, but between plaintiff and plaintiff's counsel." *Id.* at 551.

<sup>50</sup> ATLA RESOLUTION, *supra* note 22, at 876. In 2006, ATLA changed its name to the American Association for Justice.

<sup>51</sup> See *id.* at 877.

<sup>52</sup> See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006); Newman, *supra* note 47, at 372.

<sup>53</sup> See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 183–85, 205–08 (1999). The account is a composite based on actual situations that the authors encountered in their legal ethics consulting practices. See *id.* at 4.

defendant's lawyer offered a settlement significantly larger than what the plaintiff would be likely to recover at trial, contingent on strict secrecy and the return of all discovery documents. The plaintiff's lawyer agonized about how to present this offer to her client. She was concerned that others could die if the heart valve's dangers were not exposed, but was also aware of "the guiding principle that her first duty is to her client, not the public at large."<sup>54</sup> When the attorney met with the client and her family, she discussed both the monetary advantages of accepting the offer and "how other people with similar heart valves could be hurt or even die unless the truth became known," but did not advise them what to do.<sup>55</sup> After thinking it over, the family decided to accept the offer. Later, the attorney regretted not having expressed her own moral concerns more forcefully, and wished that she had given her client "the big speech" about all the other families who lost loved ones because of the defective heart valve and "what they would have to go through to fight their case from scratch."<sup>56</sup> Prospectively, she and her partners decided to add a provision to the firm's retainer agreement stating that the client will not accept any settlement with secrecy conditions that hide safety dangers. However, the lawyers understood that the retainer provision was unenforceable.<sup>57</sup>

The story provides a vivid illustration of the limited scope of action that the ethics rules afford to attorneys concerned about the dangers of secret settlements. Moral counseling is authorized, and even encouraged, under both the Model Rules and the Model Code.<sup>58</sup> Thus, it is entirely permissible to raise

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<sup>54</sup> *Id.* at 185.

<sup>55</sup> *Id.* at 206.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* at 207–08. The *Restatement of the Law Governing Lawyers* takes the position that "[r]egardless of any contrary contract with a lawyer, a client may revoke a lawyer's authority to make . . . decisions" that are reserved to the client, including "whether and on what terms to settle a claim." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 (2000). The commentary to the Model Rules is to the same effect. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 3 (2008). The lawyer's duty of candor to the client would require letting the client know that she has the right to revoke such an agreement. See *id.* R. 1.2(c) (client's "informed consent" must be obtained to any agreement limiting the scope of representation); *id.* R. 2.1 (duty to give client "candid advice").

<sup>58</sup> See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2008) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's

the issue with the client, whether by presenting the moral ramifications as one relevant factor for the client to consider, as the attorney in the heart valve case did, or—as she later wished she had done—in the form of advice that openly expresses the lawyer's viewpoint and is designed to persuade the client to concur.<sup>59</sup> Some plaintiffs' lawyers have reported great success in getting clients to agree to and stick with a policy of no settlement secrecy,<sup>60</sup> but more of the practitioner literature suggests, not surprisingly, that moral counseling will be unavailing with many clients who have compelling needs for cash or closure. As one plaintiffs' lawyer put it:

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situation.”); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1981) (“In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.”); see generally Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365 (2005) (discussing Rule 2.1 and other provisions bearing on moral counseling, and concluding that attorneys are at times obligated to discuss moral and other nonlegal issues with their clients).

<sup>59</sup> See Béchamps, *supra* note 47, at 156 (suggesting that lawyers concerned about secret settlements engage their clients “in a dialogue regarding their joint responsibility for certain community-shared values, such as fairness to others, especially in cases of public interest”). How to conduct moral counseling effectively, and in a manner that is respectful of the client's dignity and autonomy, is a difficult issue. For a thoughtful discussion, see THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 261-99 (4th ed. 2005).

<sup>60</sup> An article written by partners in a San Francisco plaintiffs' firm reports that, in “seven years since our law office stopped accepting these [secrecy] agreements, not one case has failed to settle or has settled for less as a result of this policy.” Maja Ramsey et al., *Keeping Secrets with Confidentiality Agreements*, TRIAL, Aug. 1998, at 38, 40. During the first client interview, they explain the reasons for their policy and secure the client's commitment not to accept a secret settlement. “Let clients know that when a settlement is being presented to them, their commitment may waver, but you will remind them of their desire to see justice done.” *Id.* at 39. Although “most clients with whom you have developed trust will support you . . . , once an acceptable settlement amount has been offered, some may just want to end the case.” *Id.* at 40. With these clients, the firm goes into full persuasion mode. In one case, the firm offered to reduce its fees by \$25,000 to show how important resisting confidentiality was to them, and the client then agreed to stand firm—with no reduction in fees—and the case still settled for the amount originally offered. See *id.* at 40-41; see also TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE* 152-54 (2008) (discussing noneconomic motivations that led many plaintiffs and their attorneys in clergy sexual abuse cases to resist financial incentives to accept secret settlements); James A. Lowe, *How to Fight Protective Orders: Strategies and Sources of Support*, TRIAL, Apr. 1990, at 76, 77-78 (stating that most plaintiffs will accept their lawyers' advice to refuse settlement offers conditioned on complete confidentiality because of their desire to help others and prevent future deaths).

A client who is desperate for funds for medical care or other expenses . . . may have no choice but to accept what the defendant offers. Putting the public good before the client's interests . . . would be a breach of the lawyer's ethical duty to the client if it meant the defendant's refusal to settle.<sup>61</sup>

Similar sentiments have been expressed by numerous plaintiffs' lawyers. Despite strong misgivings about settlement secrecy, they feel that their hands are tied.<sup>62</sup>

When the issue is framed as a conflict between the client's right to decide and the interests of the public or third parties, the ethics rules do in fact effectively tie the lawyer's hands. Under the Model Rules, lawyers are required to "abide by a client's decisions" concerning the objectives of the representation and whether to settle a matter, and to "consult with the client" about the means to be employed in pursuit of these ends.<sup>63</sup> Assuming that the decision to include a secrecy clause in a settlement can be categorized as a question of means—how to effectuate a settlement—rather than as one of objectives or "whether to settle," the leeway that the Model Rules provide is still exceedingly narrow. The commentary to Rule 1.2 notes that "lawyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected."<sup>64</sup>

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<sup>61</sup> Frances Komoroske, *Should You Keep Settlements Secret?*, TRIAL, June 1999, at 55, 56.

<sup>62</sup> "[T]hey offer a big settlement if you'll keep quiet. . . . You're representing a client, not a public interest. I have clients with injuries who need the money. What are we supposed to do? Our hands are tied." Siegel, *supra* note 18 (quoting a Seattle plaintiff's attorney). For similar attorney statements, see Carroll et al., *supra* note 26; Davan Maharaj, *Firestone Recall Puts Spotlight on Secret Liability Settlements*, MILWAUKEE J. SENTINEL, Sept. 10, 2000, at A3; Sacha Pfeiffer, *Crisis in the Church: Critical Eye Cast on Sex Abuse Lawyers Confidentiality*, BOSTON GLOBE, June 3, 2002, at A1; Weiser, *supra* note 26. For practitioner articles expressing this view, see Philip H. Corboy, *Secret Settlements: The Challenges Remain*, TRIAL, June 1993, at 122, 122–24; E. Marla Felcher, *Safety Secrets Keep Consumers in the Dark*, TRIAL, Apr. 2001, at 40, 48–49; Martin H. Freeman & Robert K. Jenner, *Just Say No: Resisting Protective Orders*, TRIAL, Mar. 1990, at 66, 70; James L. Gilbert et al., *The Price of Silence*, TRIAL, June 1994, at 17, 18; Eugene I. Pavalon & Thomas G. Alvary, *Protective and Secrecy Orders: Time for Change*, TRIAL, Mar. 1991, at 110, 113; Nicole Schultheis, *Court Secrecy: A Continuing National Disgrace*, LITIG., Winter 2002, at 29, 29–30.

<sup>63</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008).

<sup>64</sup> *Id.* R. 1.2 cmt. 2. Another rule prohibits the use of means "that have no substantial purpose other than to embarrass, delay, or burden a third person," even if desired by a client. *Id.* R. 4.4(a). The "no substantial purpose" qualification



“Usually” does not mean “always,” and the rule on its face does not require the lawyer to defer.<sup>65</sup> If the lawyer does not accept the client’s decision, however, the only recourse available to the lawyer is to withdraw from the representation—and even that may be impossible if the tribunal denies permission to withdraw.<sup>66</sup> In the end, the lawyer has little choice but to assist the client in settling on any terms that the client deems acceptable, so long as those terms are not criminal, fraudulent, or placed off-limits by an ethics rule.

Recent changes to the confidentiality provisions of the Model Rules may have the indirect effect of making it impermissible for lawyers to enter into some settlement secrecy arrangements that hide safety risks. The exceptions to the lawyer’s duty of confidentiality contained in the original version of Model Rule 1.6 had no apparent application to the issue of settlement secrecy. Lawyers were authorized to disclose information to prevent “imminent death or substantial bodily harm,” but only in situations where the danger stemmed from an intended criminal act by the lawyer’s own client.<sup>67</sup> In 2002, the ABA

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leaves the rule with little content. Settlement secrecy clearly serves purposes that benefit one or both of the contracting parties.

<sup>65</sup> See also *id.* R. 1.3 cmt. 1 (stating that a lawyer “is not bound . . . to press for every advantage that might be realized for a client” and “may have authority to exercise professional discretion in determining the means by which a matter should be pursued”). The Model Code is more categorical in endorsing client authority to decide whether to use means that may harm others. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8 (1981) (“[T]he decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for [the lawyer].”).

<sup>66</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2008) (permitting a lawyer to withdraw if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”); *id.* R. 1.16(c) (requiring the lawyer to comply with applicable law requiring a tribunal’s permission to withdraw and to continue the representation if the tribunal so orders). Under the Model Code, a lawyer’s disagreement with a client’s decision affords a permissible basis for withdrawal only “in a matter not pending before a tribunal.” MODEL CODE OF PROF’L RESPONSIBILITY DR 2-110(C)(1)(e) (1981); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 159, 393–97 (1988) (analyzing the Model Code and Model Rules and concluding that they “put ultimate decision-making authority about whether to forgo an unjust action in the hands of the client, [and] the lawyer’s autonomy is ultimately limited to withdrawal”).

<sup>67</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (1983) (authorizing disclosure “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”). A parallel provision in the Code permits disclosure of the client’s intention to commit

broadened this exception, which now reads as follows: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."<sup>68</sup> The danger need not come from the client, or involve an intended crime. Thus, under the new rule, a plaintiff's lawyer may blow the whistle on serious continuing safety risks arising from the defendant's conduct, even if the lawyer's client agreed to keep the information confidential. Professor Susan Koniak has argued that in jurisdictions that adopt the new rule, it is unethical for a lawyer to agree to a settlement that bars the lawyer from disclosing such information, because "discretion given . . . for the purpose of protecting the courts, third parties, or society as a whole should not be available as an asset for the lawyer to trade away for her own pecuniary benefit or that of her client."<sup>69</sup>

Nonetheless, for several reasons the ABA's broadening of the confidentiality exception is unlikely to have much of an impact on settlement secrecy. Nearly half of the states have not adopted the ABA's new bodily harm exception and continue to

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a crime and any information necessary to prevent it. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1981).

<sup>68</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2008). In 2003, in response to the Enron and corporate fraud scandals, the ABA House of Delegates added further exceptions to the confidentiality rule that permit disclosures to prevent a client crime or fraud that is reasonably certain to result in substantial financial injury to others, or to prevent, rectify, or mitigate the financial harm caused by such conduct. These exceptions apply only in situations where the client has used or is using the lawyer's services in furtherance of the crime or fraud. *See id.* R. 1.6(b)(2) & (3).

<sup>69</sup> Koniak, *supra* note 13, at 808; *see also* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 284-85 (2006); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 51-57 (2005) (arguing that discretionary rules such as the one permitting disclosures to protect third parties from harm require that lawyers exercise conscientious discretion, and it is an abuse of discretion to enter into an agreement never to disclose). Several states, in adopting the ABA's revised bodily harm rule, have made the disclosure duty mandatory rather than discretionary. *See, e.g.,* FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b)(2) (2006); TENN. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2008); WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006). In those jurisdictions, it is clearly unethical for an attorney to agree not to make disclosures that are mandatory under the rules. *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994) (concluding that in circumstances where Model Rule 8.3 requires a lawyer to report misconduct by another lawyer, a settlement agreement barring such disclosure would violate the Rules).

restrict such disclosures to situations related to preventing the lawyer's own client from committing a crime.<sup>70</sup> Where the rule has been adopted, it kicks in only when death or serious injury is "reasonably certain."<sup>71</sup> A lawyer faced with a settlement offer that is financially advantageous to the client, and to the lawyer herself, will have strong incentive to conclude that any danger posed by the conduct covered by a confidentiality agreement falls short of this threshold.<sup>72</sup> The bodily harm exception has no application to nonphysical injuries, such as those caused by employment discrimination.<sup>73</sup> In addition, the rule only authorizes disclosures necessary to prevent future death or injury from occurring, not disclosures aimed at helping other

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<sup>70</sup> As of the end of December 2008, the ABA's new version of Model Rule 1.6(b)(1) had been substantially adopted in twenty-nine states.

<sup>71</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2008). The official comment says that the "reasonably certain" requirement is satisfied when there is "a present and substantial threat that a person will suffer such harm at a later date." *Id.* R. 1.6 cmt. 6. However, the language of the rule itself suggests a more stringent standard. A few states adopting the rule have eliminated the "reasonably certain" requirement or replaced it with a "reasonably likely" standard. See, e.g., FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b)(2) (2006); GA. RULES OF PROF'L CONDUCT R. 1.6(b)(1)(ii) (2008); WIS. RULES OF PROF'L CONDUCT R. 20:1.6(c)(1) (2008).

<sup>72</sup> See David Luban, *Limiting Secret Settlements by Law*, 2 J. INST. FOR STUDY LEGAL ETHICS 125, 128-29 (1999) (arguing that a proposed rule prohibiting lawyers from negotiating settlement agreements that suppress information about substantial dangers to public health or safety would be ineffective because lawyers will resolve doubts in favor of concluding that the danger is insufficient to trigger the rule). There is reason to believe that lawyers tend to resolve all doubts against making disclosures harmful to their clients' interests. See Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 128-30 (1994) (finding, based on a survey of New Jersey attorneys, that in situations where a state ethics rule *required* them to report information to prevent bodily harm, a majority failed to do so, and less than nine percent of attorneys who faced situations where the rule required disclosure to prevent financial injuries to others complied).

<sup>73</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2008). The provisions of the ABA's new confidentiality rule that allow disclosures to prevent injuries of a nonphysical nature apply only where the harm arises from a client's crime or fraud in which the lawyer's services have been used. See *id.* R. 1.6(b)(2)-(3). Many states have rules authorizing disclosures aimed at preventing financial injury to others, but nearly all such rules are limited to situations where such disclosure is necessary to prevent client crime or fraud. See *Disclosure: Crimes and Frauds*, Lawyers' Man. on Prof. Conduct (ABA/BNA) § 55:901 (2008) (describing state rules). New Jersey appears to be the only state that has enacted a confidentiality exception broad enough to allow disclosures aimed at preventing financial injuries caused by "illegal" (not just criminal or fraudulent) conduct by a client or nonclient. N.J. RULES OF PROF'L CONDUCT R. 1.6(b)-(c) (2006).

victims recover compensation for their past injuries.<sup>74</sup> Finally, the rule's effect on secrecy agreements is, at most, to prohibit a *lawyer* from promising not to disclose certain information. Noncooperation agreements that bar the lawyer's client from submitting to voluntary witness interviews, and thereby increase the cost to other parties of gathering evidence, are unaffected.

Arguments against settlement secrecy that are premised on the public interest in disclosure and the need to protect others from harm are morally powerful, but the framework of the existing ethics rules does very little to accommodate them. The dominant paradigm reflected in the ethics codes posits that in the long run, society is best served if lawyers keep their clients' confidences and pursue their clients' interests, and that lawyers have "no responsibilities to third parties or the public different from that of the minimal compliance with law that is required of everyone."<sup>75</sup> Lawyers who would like to "just say no" to secret settlements because of their public harms, without violating the rules themselves, are largely stuck. To break out of the bind would require either a change in the law or a radical rethinking of lawyers' ethics. As for the first, little headway has been made in enacting legislation to outlaw secrecy agreements.<sup>76</sup> With respect to the latter, legal scholars have sought to redefine the lawyer's role to place greater weight on "ordinary morality" or achieving justice than on client interests,<sup>77</sup> but ABA rule drafters and the state courts responsible for adopting disciplinary codes have shown little interest in departing from the traditional paradigm. The ABA's Ethics 2000 Commission rejected a

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<sup>74</sup> Cf. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2008). Disclosures for the purpose of rectifying financial injuries are allowed under the new ABA confidentiality rule and the rules of some states, but only in situations where the harm resulted from a client crime or fraud in furtherance of which the lawyer's services were used. *Id.* R. 1.6(b)(3); *Disclosure: Crimes and Frauds*, Laws. Man. on Prof. Conduct (ABA/BNA) § 55:901 (2008) (describing state rules).

<sup>75</sup> WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 8 (1998) (characterizing the "Dominant View" of legal ethics); see also MODEL RULES OF PROF'L CONDUCT pmb. para. 8 (2008) (positing that zealous advocacy and preserving client confidences ordinarily serve the public interest).

<sup>76</sup> See Koniak, *supra* note 13, at 809 (arguing that, in order to prevent lawyers from negotiating secrecy agreements that hide information about wrongful conduct, "other law needs to outlaw these agreements"); *supra* notes 29–30 and accompanying text (discussing legislative efforts to regulate settlement secrecy).

<sup>77</sup> See LUBAN, *supra* note 66; DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 49–80 (2000); SIMON, *supra* note 75.

proposal to amend the Model Rules to prohibit lawyer involvement in settlements that hide information about health or safety risks from the public, unanimously agreeing "that the ethics rules were not the vehicle for solving this problem."<sup>78</sup>

In recent years, several commentators have argued that noncooperation agreements and some other types of settlement secrecy are, in fact, already illegal. Stephen Gillers has attacked attorney involvement in noncooperation settlements on the ground that such agreements violate federal obstruction of justice laws.<sup>79</sup> Susan Koniak and John Freeman have argued that settlements suppressing information about unlawful conduct amount to the crime of compounding.<sup>80</sup> These are arguments that operate within the premises of the standard view; they assume that a lawyer may ethically negotiate any lawful settlement terms but rely on the outer limitation the rules set on zealous advocacy: a lawyer must not counsel or assist in conduct the lawyer knows to be criminal.<sup>81</sup> The flip side of this ethical analysis is that if the criminality of such settlements is unclear, it does not violate the rules for an attorney to negotiate settlement terms that will serve the client's interests. There have been no court decisions finding criminal liability based on settlement secrecy, or even any known prosecutions. While acknowledging uncertainty in the law,<sup>82</sup> Gillers takes the view that, at a minimum, lawyers have a professional obligation to advise their clients that noncooperation agreements expose them to a significant risk of criminal liability,<sup>83</sup> advice that probably would

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<sup>78</sup> Comm'n on the Evaluation of the Rules of Prof'l Conduct, ABA Ctr. for Prof'l Responsibility, Minutes, pt. V (Feb. 16–17, 2001), *available at* <http://www.abanet.org/cpr/e2k/e2k-02-16mtg.html>. The proposed rule would have barred lawyers from participating in settlements that "restrict the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to . . . health or safety." Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 116 (1999).

<sup>79</sup> See Gillers, *supra* note 10, at 5, 12–13.

<sup>80</sup> See Freeman, *supra* note 13, at 835–37; Koniak, *supra* note 13, at 793–95, 802.

<sup>81</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1981); Freeman, *supra* note 13, at 845; Gillers, *supra* note 10, at 13; Koniak, *supra* note 13, at 806–07.

<sup>82</sup> See Gillers, *supra* note 10, at 3, 16; *see also* Koniak, *supra* note 13, at 794–95, 806.

<sup>83</sup> Gillers, *supra* note 10, at 3, 12, 16.

be sufficient to dissuade most clients from pursuing such agreements.

The absence of prosecutions, however, is not simply a matter of prosecutorial forbearance. It is very unlikely that a settlement that prohibits voluntary disclosures to private litigants would be found to be criminal. (The reasons, which are complex and may not be of interest to all readers, are addressed in the Appendix to this Article.) Certain types of noncooperation provisions do run a high risk of violating criminal statutes—those that make no exception for disclosures in response to a subpoena or court order, forbid voluntary disclosures to a court or government agency when an official proceeding is known to be pending or imminent, or prohibit informing law enforcement authorities about criminal conduct (under certain circumstances). As a general matter, however, the risk of criminal liability for a carefully drafted noncooperation agreement is minimal.<sup>84</sup> Therefore, attorneys have no obligation to refrain from noncooperation settlements because they “know” them to be criminal, or to warn their clients that they face significant risk by entering into such settlements.

### III

#### THE RULES AGAINST REQUESTING WITNESS NONCOOPERATION

The standard view of the ethics of settlement secrecy, with its focus on the client's autonomy to pursue any lawful objective and the lawyer's duty to abide by client decisions, leaves lawyers with little choice but to participate in settlements that hide relevant facts from other litigants. The standard view, however, overlooks a crucial dimension of lawyers' ethical obligations. It conceptualizes the problem as a conflict between client interests and the potential for harm to third parties or society. Under the ethics rules, the lawyer's fundamental duties to clients—zealous advocacy, respect for client autonomy and confidentiality—nearly always trump concerns for the welfare of outsiders. However, another strand in the ethics codes imposes significant

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<sup>84</sup> See *infra* Appendix, text accompanying notes 353–55, 360–61, 363, 369–70 (discussing circumstances under which noncooperation provisions may violate criminal statutes and drafting approaches that avoid any significant risk of criminal liability).

limitations on lawyer conduct that are designed to protect the integrity of adjudication and the proper functioning of an adversary system of justice. These duties do not depend on what clients want or what “other law” allows. They are obligations that derive from the lawyer’s role as an “officer of the legal system” with “special responsibility for the quality of justice.”<sup>85</sup> Two such duties have direct bearing on the propriety of lawyers offering or accepting settlements conditioned on noncooperation: the requirement that lawyers not ask potential witnesses to withhold voluntary cooperation from other parties, and the prohibition of attorney conduct that is prejudicial to the administration of justice.

Model Rule 3.4(f) provides that “[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party.”<sup>86</sup> An exception allows such requests to be made to a relative, employee, or other agent of the client, provided that “the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”<sup>87</sup> The rule has its roots in an influential and widely accepted formal ethics opinion issued by the American Bar Association in 1935.<sup>88</sup> It rests on the idea that the fair and efficient functioning of the adversary system requires that litigants and their lawyers have an unfettered opportunity to seek information relevant to their claims, and that the decision whether to cooperate should be a voluntary one made by the witness. When lawyers try to obstruct voluntary cooperation, they are interfering with the proper functioning of the adversary system by making informal witness interviews, an essential tool of case preparation, unavailable to their adversaries, and requiring them to resort to more costly, and often less effective, means of gathering evidence.

How significant a barrier Rule 3.4(f) poses to noncooperation settlements depends on questions of interpretation. The rule generally prohibits a lawyer from requesting a nonclient to

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<sup>85</sup> MODEL RULES OF PROF’L CONDUCT pmbl. para. 1 (2008).

<sup>86</sup> *Id.* R. 3.4(f). The *Restatement* recognizes this duty as well. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116(4) (2000).

<sup>87</sup> MODEL RULES OF PROF’L CONDUCT R. 3.4(f)(1)–(2) (2008).

<sup>88</sup> See ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 131 (1935), discussed *infra* text accompanying notes 105–11.

“refrain from voluntarily giving relevant information to another party.”<sup>89</sup> The rule’s language contains no exception for requests made as part of a settlement offer, but can an implicit settlement exception be read into the rule? Does the phrase “another party” apply only to a person who is formally a party in a pending case, or does it also extend to individuals or entities with potential claims against the lawyer’s client? Under the narrower reading, most noncooperation agreements, which are aimed at potential future claims, would lie outside the rule’s scope. A great deal also depends on how broadly or narrowly one reads the exception allowing such requests to be made to an employee or agent of the client. Does the exception allow noncooperation agreements in settlements with former employees, or in severance agreements made prior to an employee’s termination?

Model Rule 8.4(d), which carries forward an identical provision from the Model Code, declares that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”<sup>90</sup> It may be invoked in situations not covered by Rule 3.4(f)’s express terms but implicating its core purposes, such as when a plaintiff’s lawyer accepts a noncooperation clause offered by opposing counsel, or a defense lawyer demands that a plaintiff not testify voluntarily at a trial or hearing.<sup>91</sup>

A closer look at the origins and development of the principle that requests for witness noncooperation are improper will help to shed light on the prohibition’s purpose and how the applicable ethics rules should be interpreted. The idea that obstructing access to informal witness interviews interferes with the proper functioning of the adversary system, and is therefore impermissible conduct for attorneys, was well-established by the 1930s and familiar to the drafters of modern ethics codes. An extensive body of judicial precedent, developed in several different contexts, disapproves of efforts to obstruct litigants’ access to informal witness interviews for the same reasons.<sup>92</sup>

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<sup>89</sup> MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (2008).

<sup>90</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (2008); MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(5) (1981).

<sup>91</sup> See *infra* notes 246–63, 279–81 and accompanying text.

<sup>92</sup> See *infra* Parts III.A–D.



The general question of what interpretive approach to follow in construing ambiguous or vaguely framed professional conduct rules also requires attention. Ethics rules should not be read like penal statutes; they should be construed in a way that is not unmoored from the rules' language but strives to give full effect to the underlying principles implicit in the codes' structure and purposes.<sup>93</sup> Approached in this way, the rules can and should be construed to forbid attorneys, with few exceptions, from negotiating settlements conditioned on noncooperation.<sup>94</sup>

### A. Origins of the Principle

The ABA's first ethics code, the 1908 *Canons of Professional Ethics*, contained a provision suggesting that a public prosecutor should not request a witness to refrain from disclosing exculpatory evidence to defense counsel,<sup>95</sup> but otherwise offered scant guidance on how far a lawyer may go in influencing a nonclient's cooperation with an adversary.<sup>96</sup> Case law and treatises on legal ethics through the early twentieth century also had little to say on the subject.<sup>97</sup> The first ethical standard on

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<sup>93</sup> See *infra* Part IV.A.

<sup>94</sup> See *infra* Part IV.B.

<sup>95</sup> ABA CANONS OF PROF'L ETHICS Canon 5 (1908) ("The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.").

<sup>96</sup> Canon 9 made it clear that the lawyer's own client could be advised not to speak with an opposing attorney. See *id.* Canon 9 (prohibiting lawyer communications with a party represented by counsel about the matter in controversy). Other canons admonished all lawyers to "treat adverse witnesses . . . with fairness and due consideration" and to "deal . . . candidly with the facts in taking the statements of witnesses." *Id.* Canons 18, 22.

<sup>97</sup> Some early ethics treatises, in general terms, condemned interference with a witness's availability or testimony. See 2 EDWARD M. THORNTON, A TREATISE ON ATTORNEYS AT LAW § 818 (1914) ("[A] lawyer who in any manner attempts to suppress truth, or to prevent a witness from appearing in court . . . is guilty of misconduct . . ."); GEORGE WILLIAM WARVELLE, ESSAYS IN LEGAL ETHICS § 191a (2d ed. 1920) (stating that it is unethical for an attorney to tamper with an adverse witness so that he cannot testify, or offer direct or indirect inducements to influence the witness's testimony). In an 1888 federal disciplinary decision, U.S. Supreme Court Justice Samuel Miller declared that a lawyer would deserve disbarment had he done what he was accused of: arranging to get a witness drunk, hiding him to prevent him from being deposed, and seeking to induce the witness to change the content of his testimony. See *In re Thomas*, 36 F. 242, 242-44 (C.C.D. Colo. 1888). However, Justice Miller determined that the lawyer's actual intent was merely to interview the witness before his deposition to find out what he had to say. See *id.* at 245. He expressed distaste for the lawyer's conduct, and lauded the

access to witnesses came in 1928, when the ABA adopted Canon 39, providing that a lawyer "is not . . . to be deterred from seeking to ascertain the truth from [a witness] in the interest of his client," even if the witness is "connected with or reputed to be biased in favor of an adverse party."<sup>98</sup> This was amended in 1937 to read, "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party."<sup>99</sup>

A corollary principle, making it unethical for a lawyer to interfere with the right and duty recognized in Canon 39 by requesting witnesses not to speak with opposing counsel, evolved in a series of ABA formal ethics opinions in the 1920s and 1930s.<sup>100</sup> In 1928, the ABA's ethics committee determined that a criminal defense lawyer acted ethically when, without the prosecutor's knowledge or consent, he met with a prosecution witness to request an affidavit retracting trial testimony that the lawyer had reason to believe was false. The committee found the lawyer's actions proper because "in no sense is [the witness] the prosecutor's client, and in no aspect has the United States Government, or its prosecuting attorney, a vested interest in or ownership of the witness."<sup>101</sup>

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English practice of barring barristers from speaking with witnesses outside of court, but concluded that under the American system interviewing an opponent's witnesses cannot be considered misconduct. *See id.* at 244-46. The decision did not address whether urging a witness not to voluntarily cooperate with an opponent would be unethical.

<sup>98</sup> ABA CANONS OF PROF'L ETHICS Canon 39 (1928).

<sup>99</sup> ABA CANONS OF PROF'L ETHICS Canon 39 (1937). The Canon added that in interviewing such a witness the lawyer should "avoid any suggestion calculated to induce the witness to suppress or deviate from the truth" or "affect his free and untrammelled conduct when appearing at the trial." *Id.*

<sup>100</sup> The ABA's Committee on Professional Ethics and Grievances began issuing advisory opinions in 1924, and its interpretations of the vaguely worded Canons were widely accepted as authoritative by bench and bar. *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, 70-71, 80 (1981); *see also* John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 264 (1970) (noting that the Model Code's drafting committee relied heavily on opinions of the ABA ethics committee when it codified existing ethical standards that had developed under the Canons).

<sup>101</sup> ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 12 (1928). Canon 39 had not yet been adopted when this opinion was issued, and the committee rested its conclusion on the duty of zealous representation contained in Canon 15. *See id.* In 1933, the committee rendered a similar opinion on the propriety of

The committee further developed the idea that no lawyer can claim “ownership” over a nonparty witness in 1934, when it held that the plaintiff’s attorney in a slip-and-fall case could interview store clerks who had witnessed the accident.<sup>102</sup> The committee found the Canon prohibiting communication with a represented party inapplicable because the opposing lawyer represented the store owner, not the owner’s employees; Canon 39’s duty to seek out the truth was controlling.<sup>103</sup> The opinion invoked the interests of the adjudicatory system as well as the lawyer’s duty of zeal: “The ascertainment of the truth is always essential to the attainment of justice and it is the duty of the attorney to learn the facts by every fair means within his reach.”<sup>104</sup>

Formal Opinion 131, issued in 1935, crystallized the rule against requests for witness noncooperation, and gave the fullest expression to the reasons behind it.<sup>105</sup> The opinion began in rule-like fashion:

It is improper for an attorney, by virtue of his personal or professional relations, to influence persons, other than his clients or their employees, to refuse to give information to opposing counsel which may be useful or essential to opposing counsel in establishing the true facts and circumstances affecting the dispute.<sup>106</sup>

While acknowledging “the duty of lawyers charged with the responsibility of representing clients against whom claims are presented to do every just and proper thing to defend them,” the committee found that a more fundamental commitment was at stake: “However, when controversies arise, and claims are asserted, the interests of justice . . . require that the truth in the field of fact as well as of law be ascertained so far as is humanly possible.”<sup>107</sup> Based on Canon 39 and other provisions,<sup>108</sup> the committee reasoned that noncooperation requests are improper,

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defense counsel interviewing prosecution witnesses, this time relying on Canon 39. See ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 101 (1933).

<sup>102</sup> See ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 117 (1934).

<sup>103</sup> See *id.*

<sup>104</sup> *Id.*

<sup>105</sup> See ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 131 (1935).

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

<sup>107</sup> *Id.*

<sup>108</sup> In addition to quoting from Canon 39, the committee recited broad statements from other canons concerning the lawyer’s duties of candor, fairness, and fidelity to the law. See *id.* (quoting Canons 22, 15, 32, and 39).

because “[n]o lawyer should endeavor in any way, directly or indirectly, to prevent the truth from being presented to the court in the event litigation arises.”<sup>109</sup> It cited its earlier opinions as standing for the proposition that witnesses cannot be viewed as belonging to one side or the other<sup>110</sup> and concluded, “All persons who know anything about the facts in controversy are, in simple truth, the law’s witnesses. They are the human instrumentalities through which the law, and its ministers, the judges and the lawyers, endeavor to ascertain truth, and to award justice to the contending parties.”<sup>111</sup>

Three years after Formal Opinion 131 was issued, the Federal Rules of Civil Procedure took effect. The Supreme Court’s famous decision in *Hickman v. Taylor*<sup>112</sup> made it clear that the liberal discovery regime ushered in by the rules did not render the ex parte witness interview any less important for the ascertainment of truth and the presentation of relevant facts to the tribunal. In holding that witness statements obtained by a lawyer are generally shielded from discovery,<sup>113</sup> the Court stressed that in an adversary system ex parte witness interviews are essential to each side’s ability to sift through the facts and present them effectively at trial:

Proper preparation of a client’s case demands that [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.<sup>114</sup>

If witness statements were discoverable, *Hickman* reasoned, the impairment of counsel’s ability to gather facts in private would

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<sup>109</sup> *Id.*

<sup>110</sup> “We have held that it is proper for a lawyer to interview persons even though they be persons who might, as is frequently inaccurately said, be the ‘other side’s witnesses.’” *Id.* (citing ABA Comm. on Prof’l Ethics and Grievances, Formal Ops. 12 (1928) and 117 (1934)).

<sup>111</sup> *Id.*

<sup>112</sup> 329 U.S. 495 (1947).

<sup>113</sup> See *id.* at 508–14. The statements at issue in *Hickman* included both signed written statements that the defendants’ lawyer obtained from witnesses after interviewing them and memoranda prepared by the lawyer recounting what other witnesses told him during interviews. See *id.* at 498.

<sup>114</sup> *Id.* at 511.

undermine the quality of information presented to the court and the end result in terms of justice.

Logically, the same would hold true if counsel were prevented at the outset from speaking with witnesses outside the adversary's presence. A line of judicial precedent that emerged in the 1960s and 1970s built upon both *Hickman*'s reasoning and the ABA Canons to prohibit interference with informal witness interviews. In *Gregory v. United States*,<sup>115</sup> an influential 1966 opinion by J. Skelly Wright, the U.S. Court of Appeals for the D.C. Circuit reversed a murder and robbery conviction because the prosecutor advised witnesses not to speak to defense counsel unless he was present.<sup>116</sup> The court held that the prosecutor's actions violated the defendant's due process rights and was inconsistent with Canon 39's recognition of the propriety of conducting witness interviews without opposing counsel's consent.<sup>117</sup> The opinion's rhetoric was redolent of both the ABA ethics committee decisions and *Hickman*:

Witnesses . . . are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.

. . . Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to. . . .

. . . .  
A criminal trial, like its civil counterpart, is a quest for truth. That quest 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.<sup>118</sup>

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<sup>115</sup> 369 F.2d 185 (D.C. Cir. 1966).

<sup>116</sup> See *id.* at 187–89, 192. There were also other grounds for reversal.

<sup>117</sup> See *id.* at 188–89. The court also found that the prosecutor's actions undermined the purposes of a federal statute requiring disclosure of witness identities. See *id.* at 187–89.

<sup>118</sup> *Id.* at 188.

*Gregory* has been widely followed,<sup>119</sup> and its reasoning has not been limited to criminal cases, where a prosecutor's special obligations to serve justice and the general unavailability of depositions lend extra support to its rule. In *IBM Corp. v. Edelstein*,<sup>120</sup> the Second Circuit overturned a trial judge's order that prohibited witness interviews unless opposing counsel was present or a transcript was prepared, deeming it "contrary to time-honored and decision-honored principles . . . that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private."<sup>121</sup> From *Hickman* and *Gregory*, the court drew the lesson that the truth-finding function of adversary litigation is undermined if counsel cannot conduct confidential witness interviews, which help to "insur[e] the presentation of the best possible case at trial."<sup>122</sup> Depositions, the court found, are no substitute because the presence of opposing counsel and a court reporter hinders the lawyer's ability to freely

explore the witness' knowledge, memory and opinion—frequently in light of information counsel may have developed from other sources. . . . It is the common experience of counsel at the trial bar that a potential witness, upon reflection, will often change, modify or expand upon his original statement and that a second<sup>123</sup> or third interview will be productive of greater accuracy.

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<sup>119</sup> See David S. Caudill, *Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims' Rights*, 17 GEO. J. LEGAL ETHICS 103, 105–06, 113 (2003). The decisions frequently invoke the themes that a witness is neither side's property and must be allowed to exercise his or her own free will in deciding whether to be interviewed, and that attempts to influence the witness's decision undermine the truth-seeking function of an adversary trial. See, e.g., *United States v. Carrigan*, 804 F.2d 599, 601, 603–04 (10th Cir. 1986); *United States ex rel. Trantino v. Hatrack*, 408 F. Supp. 476, 481 (D.N.J. 1976), *aff'd*, 563 F.2d 86 (3d Cir. 1977); *Johnston v. Nat'l Broad. Co.*, 356 F. Supp. 904, 910 (E.D.N.Y. 1973); *Coppolino v. Helpert*, 266 F. Supp. 930, 935–36 (S.D.N.Y. 1967); *Mota v. Buchanan*, 547 P.2d 517, 520, 522 (Ariz. Ct. App. 1976); *State v. York*, 632 P.2d 1261, 1263–65 (Or. 1981); *Lewis v. Court of Common Pleas*, 260 A.2d 184, 188–89 (Pa. 1969); *State v. Hofstetter*, 878 P.2d 474, 478–82 (Wash. Ct. App. 1994).

<sup>120</sup> 526 F.2d 37 (2d Cir. 1975).

<sup>121</sup> *Id.* at 42.

<sup>122</sup> *Id.*; see also *id.* at 42–44.

<sup>123</sup> *Id.* at 41. The court went on,

In contrast to the pre-trial interview with prospective witnesses, a deposition serves an entirely different purpose, which is to perpetuate

The two leading legal ethics treatises in use when the Model Code and Model Rules were drafted, Henry Drinker's 1953 *Legal Ethics*<sup>124</sup> and Raymond Wise's late 1960s treatise of the same name,<sup>125</sup> both cited Formal Opinion 131 and endorsed its principle that requests for witness noncooperation are unethical.<sup>126</sup> An extensive discussion of the issue could also be found in Harvard law professor Robert Keeton's trial practice text.<sup>127</sup> Keeton noted the potential tactical advantages of advising witnesses not to discuss the case with the opposing party or counsel; such advice, if followed, will "increase your adversary's difficulties of preparation and your own chances of superior preparation."<sup>128</sup> It forces your adversary to take depositions, allowing you to keep tabs on what your adversary has learned and gain insight into your opponent's theory of the case.<sup>129</sup> "The nature of these tactical advantages," Keeton continued, "demonstrates that the practice of encouraging witnesses not to talk to the opposing party or his representatives is opposed to the interests of full and fair development of facts.

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testimony, to have it available for use or confrontation at the trial, or to have the witness committed to a specific representation of such facts as he might present. A desire to depose formally would arise normally after preliminary interviews might have caused counsel to decide to take a deposition.

*Id.* at 41 n.4.

<sup>124</sup> HENRY S. DRINKER, *LEGAL ETHICS* (1953). The Model Code's preface states that the drafting committee that developed the Code "relied heavily upon" Drinker's work. Lewis H. Van Dusen, Jr., *Preface to the 1977 Version of the Code of Professional Responsibility*, in AM. BAR FOUND., *ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY* xix, xx (1979) [hereinafter *ANNOTATED CODE*]. As recently as 1981, Drinker was viewed as "the best known treatise in the field." Finman & Schneyer, *supra* note 100, at 80 n.52.

<sup>125</sup> RAYMOND L. WISE, *LEGAL ETHICS* (1st ed. 1966). Wise published a second edition in 1970 and supplements through 1979. Until the early 1980s, Wise served as "the only comprehensive and up-to-date treatise on attorneys' professional responsibilities." Finman & Schneyer, *supra* note 100, at 80 n.51.

<sup>126</sup> See DRINKER, *supra* note 124, at 86; RAYMOND L. WISE, *LEGAL ETHICS* 294 (2d ed. 1970).

<sup>127</sup> ROBERT E. KEETON, *TRIAL TACTICS AND METHODS* (1st ed. 1954).

<sup>128</sup> *Id.* at 328.

<sup>129</sup> *Id.* Keeton pointed out that the adversary who is deprived of a witness's voluntary cooperation will be at a disadvantage in gathering information even if he conducts a deposition because "it is practically impossible to anticipate all the matters on which the witness might be able to testify; the help of the witness in volunteering additional information which he thinks might be material is important." *Id.*

Primarily for this reason, the practice has been held to be ethically improper."<sup>130</sup> He cited to ABA Formal Opinion 131.<sup>131</sup>

### *B. Noncooperation Requests Under the Code*

The ABA's Model Code of Professional Responsibility (the "Code"), promulgated in 1969 and quickly adopted in nearly all the states,<sup>132</sup> was intended to systematize and update the ethical principles that had developed under the canons, and to provide clear rules that could serve as a basis for discipline.<sup>133</sup> The Code did not explicitly address the issue of witness noncooperation requests, and its provision relating to contacts with witnesses was far from a model of clarity. Disciplinary Rule ("DR") 7-109(B) makes it unethical for a lawyer to "advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making himself unavailable as a witness therein."<sup>134</sup> The related Ethical Consideration (EC 7-27) explains that such advice is prohibited because it "interferes with the proper administration of justice."<sup>135</sup> A footnote to EC 7-27 references ABA Formal Opinion 131, although the use of a "cf." designation leaves it unclear whether the opinion was cited as an example of what the rule prohibits or merely to note a general similarity of purpose.<sup>136</sup> Narrowly construed, the disciplinary rule's language can be read as covering only efforts to induce a

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<sup>130</sup> *Id.* at 328-29.

<sup>131</sup> *Id.* at 329 n.3. Keeton added, however, that "it is at least doubtful that this view prevails in all jurisdictions." *Id.* at 329.

<sup>132</sup> See ANNOTATED CODE, *supra* note 124, at ix; Sutton, *supra* note 100, at 255-56.

<sup>133</sup> See Sutton, *supra* note 100, at 257-58, 264. The drafting committee made a deliberate decision to maintain no records of its proceedings. Some legislative history and indications of the drafters' intent can be discerned from changes made over the course of three published drafts, footnotes included in the Model Code to indicate sources that the committee drew upon, and later interviews with the committee's Reporter. See MODEL CODE OF PROF'L RESPONSIBILITY pmbl n.1 (1981); ANNOTATED CODE, *supra* note 124, at xi, xiii.

<sup>134</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 7-109(B) (1981). The infelicitous phrase "secrete himself" was taken from a 1962 California bar rule that prohibited attorneys from advising a witness "to avoid service of process, or secrete himself, or otherwise to make his testimony unavailable," and 1908 ABA Canon 5, which discouraged the "secreting of witnesses" by a prosecutor. *Id.* DR 7-109(B) n.90.

<sup>135</sup> *Id.* EC 7-27.

<sup>136</sup> *Id.* EC 7-27 n.45.



witness to duck a subpoena or not show up in court.<sup>137</sup> On the other hand, requesting a witness to withhold voluntary cooperation has the purpose and possible effect of hiding potential testimony from adverse parties, thereby rendering it unavailable to the tribunal, and thus plausibly could be viewed as violating DR 7-109(B). One state supreme court and another state's ethics committee have read the rule this way.<sup>138</sup> The reach of the witness sequestration rule remains of practical importance in California, which has an ethics rule nearly identical to DR 7-109(B) but no other rule that could be construed to cover witness noncooperation requests.<sup>139</sup>

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<sup>137</sup> See *State v. York*, 632 P.2d 1261, 1263-64 (Or. 1981) (stating that the express terms of DR 7-109 were not violated when a prosecutor advised prospective witnesses not to speak to the defense; the court nonetheless found the conduct improper based on policies implicit in the ethics rules and procedural statutes); Alaska Bar Ass'n Ethics Comm., Ethics Op. 84-3 (1984) (concluding that a prosecutor's policy of advising witnesses not to talk to defense counsel unless a prosecutor is present does not directly violate DR 7-109, but is nonetheless improper because it runs counter to the policies reflected in the rule and the *Gregory* line of cases); 2 HAZARD & HODES, *supra* note 8, § 30.12, illus. 30-8, at 30-25 (interpreting DR 7-109(B) as not prohibiting advising witnesses not to submit to informal interviews with opposing counsel, because this does not render them "unavailable" as witnesses, since they can still be subpoenaed).

<sup>138</sup> See *Lewis v. Court of Common Pleas*, 260 A.2d 184, 188 & n.3 (Pa. 1969) (citing DR 7-109(B), *inter alia*, as basis for concluding that it was impermissible for a district attorney to request a witness not to talk to defense counsel); Or. State Bar Ass'n, Formal Op. 2005-132 (2005) (attempt to dissuade a witness from testifying for an adversary, if successful, has practical effect of "causing a witness to secrete himself" and therefore violates an Oregon ethics rule derived from DR 7-109(B)).

<sup>139</sup> CAL. RULES OF PROF'L CONDUCT R. 5-310(A) (2008) ("A member shall not . . . [a]dvise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein."); see also *infra* note 247 (discussing Oregon rule based on the Code's witness sequestration provision). The California rules do not include Model Rule 3.4(f) or the ABA's "conduct prejudicial" rule. An argument for reading California's witness sequestration rule broadly finds support in its wording (which adds the phrase "directly or indirectly" to the Code prohibition) and in the public policy expressed in the California Evidence Code, which states that, except as authorized by statute, "[n]o person has a privilege that another shall not be a witness or shall not disclose any matter." CAL. EVID. CODE § 911(c) (West 1995); cf. *McPhearson v. Michaels Co.*, 117 Cal. Rptr. 2d 489, 493 (Ct. App. 2002) (concluding, based on section 911, that "it would be contrary to public policy to permit a party to litigation to dissuade or otherwise influence the testimony of a percipient witness through a private [settlement] agreement"). The State Bar of California recently proposed adding a rule substantially identical to Model Rule 3.4(f) as part of a package of ethics rules revisions. COMM'N FOR THE REVISION OF THE RULES OF PROF'L CONDUCT, STATE BAR OF CAL., DISCUSSION DRAFT,

The Code's "catch-all" disciplinary rule forbidding "conduct that is prejudicial to the administration of justice"<sup>140</sup> can also be read to carry forward the principle of Formal Opinion 131. This rule replaced language in earlier drafts that would have prohibited all conduct "degrading to the legal profession."<sup>141</sup> The change was made in response to criticism from many members of the bar that the original language was "too vague to constitute 'fair notice'" of what was prohibited.<sup>142</sup> Given that Formal Opinion 131 and the *Gregory* line of cases were well established at the time of the Code's adoption, treating witness noncooperation requests as "conduct prejudicial" would not offend notions of due process. In 1974, the New Jersey Supreme Court showed no hesitation in disciplining a criminal defense lawyer who urged two witnesses, who were not his clients, to cooperate as little as possible if questioned by law enforcement officials, on the basis of the Code's "conduct prejudicial" rule.<sup>143</sup>

Despite the absence of explicit language in the Code addressing the issue, commentators at the time believed that Formal Opinion 131's rule against requesting witness noncooperation remained intact. In the 1970s editions of his legal ethics treatise, Raymond Wise took the view that the Code's rule against secreting witnesses and suppressing evidence carried forward the principle of Opinion 131.<sup>144</sup> Robert Keeton made no change in his analysis of why noncooperation requests are unethical in the second edition of his trial practice book in 1973,<sup>145</sup> and other Code-era treatises expressed similar views.<sup>146</sup>

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PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA 20 (March 2008), R. 3.4(h).

<sup>140</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (1981).

<sup>141</sup> ANNOTATED CODE, *supra* note 124, at 12.

<sup>142</sup> *Id.* (citing interview with John Sutton, the Code's reporter). The concern for "fair notice" apparently did not extend to an equally broad and vague provision that did make it into the Code, prohibiting "any other conduct that adversely reflects on [the lawyer's] fitness to practice law." MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(6) (1981). This provision was dropped in the Model Rules, while the provision on "conduct prejudicial to the administration of justice" was retained. MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983); *see infra* note 169 and accompanying text.

<sup>143</sup> *In re Blatt*, 324 A.2d 15, 17-18 (N.J. 1974).

<sup>144</sup> *See* WISE, *supra* note 126, at 109 & n.32; RAYMOND L. WISE, LEGAL ETHICS 97 & n.15, 459 (question 109), 494 (answer to question 109) (2d ed. Supp. 1979).

<sup>145</sup> ROBERT E. KEETON, TRIAL TACTICS AND METHODS 339-40 (2d ed. 1973); *see also supra* text accompanying notes 127-31 (discussing Keeton's analysis).

### C. Noncooperation Requests Under the Model Rules

Dissatisfaction with the Code and a desire to repair the legal profession's image after Watergate led the ABA in 1977 to appoint a commission, chaired by Omaha attorney Robert Kutak, to review professional conduct standards.<sup>147</sup> The Kutak Commission released a discussion draft of new Model Rules of Professional Conduct in January 1980,<sup>148</sup> and, after holding public hearings and reviewing extensive comments, issued its proposed final draft in May 1981.<sup>149</sup> The ABA House of Delegates debated the proposal over the next two years, made some amendments, and adopted the Model Rules in August 1983.<sup>150</sup>

The Kutak Commission's discussion draft expressly provided that a prosecutor shall not "discourage a person from giving relevant information to the defense,"<sup>151</sup> but otherwise dealt with the issue of witness noncooperation obliquely, in rules that barred "improperly obstruct[ing] another party's access to evidence" or "seek[ing] improperly to influence a witness."<sup>152</sup>

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<sup>146</sup> The ABA approved the Model Rules in August 1983, but it was not adopted by a majority of the states until 1988. See ABA Ctr. for Prof'l Responsibility, Model Rules of Professional Conduct Dates of Adoption, [http://www.abanet.org/cpr/mrpc/chron\\_states.html](http://www.abanet.org/cpr/mrpc/chron_states.html) (last visited Jan. 24, 2009). Charles Wolfram, in his 1986 legal ethics treatise, stated that "[w]itnesses do not 'belong' to either party and generally should be as available for interviews to one side as to the other." He relied on the *Gregory* and *Edelstein* line of decisions, and did not mention the new Model Rule 3.4(f). CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.4.2 (1986). Another mid-1980s treatise, citing Formal Opinion 131 and Keeton's discussion, concluded that it is "almost certainly ethically improper" to attempt to dissuade a nonparty witness from cooperating with an adversary. DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION 245 n.2 (1984).

<sup>147</sup> See Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 77, 82-93 (1981); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 688-93 (1989).

<sup>148</sup> COMM'N ON EVALUATION OF PROF'L STANDARDS, AM. BAR ASS'N, DISCUSSION DRAFT, MODEL RULES OF PROFESSIONAL CONDUCT (1980) [hereinafter DISCUSSION DRAFT].

<sup>149</sup> COMM'N ON EVALUATION OF PROF'L STANDARDS, AM. BAR ASS'N, PROPOSED FINAL DRAFT, MODEL RULES OF PROFESSIONAL CONDUCT (1981) [hereinafter PROPOSED FINAL DRAFT].

<sup>150</sup> See CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at viii-ix (2006) [hereinafter LEGISLATIVE HISTORY].

<sup>151</sup> DISCUSSION DRAFT, *supra* note 148, R. 3.10(e).

<sup>152</sup> *Id.* R. 3.2(b)(1), 3.7(b)(2).

Commentary to the obstruction rule stated that "a lawyer may properly advise a client against giving a statement or other evidence except under the lawyer's supervision," implying that a nonclient may not be given such advice.<sup>153</sup> Although the drafters probably meant to carry forward the principle of Formal Opinion 131, the absence of an express prohibition for anyone but prosecutors could have been read to mean that requests for witness noncooperation were not generally barred.

In response to bar criticism of the vagueness and potentially broad scope of the duties expressed in the discussion draft, the Kutak Commission, in its proposed final draft, replaced the prohibitions of "improper" conduct relating to evidence and witnesses with provisions making it impermissible for a lawyer to "unlawfully obstruct another party's access to evidence" or "offer an inducement to a witness *that is prohibited by law*."<sup>154</sup> At the same time, the commission added a new subsection (f) to define a duty that went beyond what other law required.

Rule 3.4(f) closely tracked the approach of Formal Opinion 131 by making it impermissible for a lawyer to "request a person other than a client to refrain from voluntarily giving relevant information to another party."<sup>155</sup> Like the earlier ABA pronouncement, it recognized an exception allowing such requests to be made to the client's employees.<sup>156</sup> The exception was extended to cover nonemployee agents and relatives of the client as well, while adding the proviso that the lawyer must "reasonabl[y] . . . believe that the person's interests will not be adversely affected by refraining from giving such information."<sup>157</sup>

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<sup>153</sup> *Id.* R. 3.2 cmt.

<sup>154</sup> PROPOSED FINAL DRAFT, *supra* note 149, R. 3.4(a) & (b) (emphasis added); *see* Schneyer, *supra* note 147, at 707-08.

<sup>155</sup> PROPOSED FINAL DRAFT, *supra* note 149, R. 3.4(f). The Proposed Final Draft also dropped the Discussion Draft's prohibition of prosecution requests that a witness not cooperate with the defense. *See id.* R. 3.8. The commission presumably viewed it as no longer necessary in light of the addition of a rule spelling out a similar obligation for all attorneys.

<sup>156</sup> *Id.* R. 3.4(f)(1); *cf.* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 131 (1935) (stating that "[i]t is improper for an attorney . . . to influence persons, other than his clients or their employees, to refuse to give relevant information to opposing counsel").

<sup>157</sup> PROPOSED FINAL DRAFT, *supra* note 149, R. 3.4(f)(1) & (2). In the ethics treatise that he later cowrote, Geoffrey Hazard, who served as Reporter to the Kutak Commission, explained that this caveat is designed to protect the client's relatives or employees from receiving advice that might cause them harm from a

The official comment that appeared in the Proposed Final Draft (and was ultimately adopted by the ABA) offered little explanation for subsection (f). The comment noted generally that “[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties,” and that all of Rule 3.4’s restrictions are designed to secure “[f]air competition in the adversary system.”<sup>158</sup>

When Rule 3.4 was taken up by the ABA House of Delegates, Geoffrey Hazard, the Kutak Commission’s Reporter, opened the discussion of subsection (f) by noting that no direct counterpart appeared in the Code.<sup>159</sup> He described it as an effort “to deal more precisely than present law” with a problematic issue.<sup>160</sup> Four state and local bar associations had filed amendments seeking to strike the provision.<sup>161</sup> A representative of the Philadelphia Bar Association presented the case for eliminating subsection (f). He argued that it was unnecessary given “our open and wide-ranging discovery process,” and that lawyers have good reason to suggest to witnesses that they give information only in a deposition, in order to protect against the

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lawyer who is not representing them and has no obligation to look out for their interests. 2 HAZARD & HODES, *supra* note 8, § 30.12 at 30-23; *see also id.* § 30-12, *illus.* 30-7 (illustrating the rule with the example that a lawyer representing a criminal defendant cannot urge the defendant’s brother, who is also a suspect, to refrain from seeking a grant of immunity and testifying against the lawyer’s client).

<sup>158</sup> PROPOSED FINAL DRAFT, *supra* note 149, R. 3.4 cmt. The only sentence in the commentary specific to subsection (f) explains that requests to a client’s employees are allowed because “the employee may identify his interests with those of the client.” *Id.* This is followed by a cross-reference to Rule 4.2, which prohibits lawyers from communicating with a party represented by counsel unless the person’s lawyer consents. That rule bars contacts with some—but not all—employees of a represented entity. *See infra* note 180.

<sup>159</sup> A Code comparison submitted with the Model Rules suggested that Model Rule 3.4(f) was similar to DR 7-104(A)(2), which prohibited giving advice to an unrepresented person whose interests may differ from those of the lawyer’s client. MODEL RULES R. 3.4 Model Code Comparison (1983). The analogy is weak; a noncooperation request, if openly made in the interest of the lawyer’s client, can hardly be considered “advice.” If it were, asking an unrepresented witness to provide information would be equally impermissible.

<sup>160</sup> ABA House of Delegates Transcript, Tape 8, at 47 (Feb. 8, 1983) [hereinafter ABA Transcript] (on file with author).

<sup>161</sup> Explanatory statements filed with the amendments criticized Rule 3.4(f) for going too far in restricting a lawyer’s ability to protect a client’s interests, or for addressing a discovery issue that was better left to the courts. LEGISLATIVE HISTORY, *supra* note 150, at 465–67.

risk of witness tampering or other abuses in unmonitored ex parte interviews.<sup>162</sup> Former ABA President David Brink then spoke to oppose the amendment. He defended the provision as supplying “needed guidance to lawyers in an area where they would otherwise be very much in doubt as to how to proceed,” and as furthering both “the need for [a]ccess to all useful information” and the need to protect nonclients from advice that might be contrary to their interests.<sup>163</sup> In the final speech opposing the amendment, a delegate gave powerful expression to the rule’s value in an era of skyrocketing litigation costs:

[W]e’re turning once again here to obligations of attorneys as officers of the court. This deals with a very, very common way of suppressing evidence. There are some clients, of course who can afford to take the depositions of every witness that you name and [in] some answers to interr[og]atories, you might name 30, 40, maybe 100 witnesses. There are other clients who cannot afford to do that until they determine whether or not that witness has something pertinent to say about the case. What you are suggesting in the proposed amendment here is that you deprive the client of the inexpensive way of finding out whether or not a deposition is desirable. I suggest this is just a way which lawyers in the past have used, and if we don’t prevent the lawyers in the future to use to suppress evidence, to obstruct the paths of justice and to make it more difficult to get at the heart of the case.<sup>164</sup>

The amendment was then defeated by a voice vote.<sup>165</sup>

The Model Rules’ legislative history sheds little light on the intended scope of Rule 8.4(d), the “conduct prejudicial” rule. The Kutak Commission’s proposed final draft omitted the Code’s catch-all prohibitions of conduct “prejudicial to the administration of justice” or “involving dishonesty, fraud, deceit, or misrepresentation.”<sup>166</sup> Hazard, in particular, appears to have disliked their vagueness and potential for discriminatory enforcement.<sup>167</sup> The National Organization of Bar Counsel, the

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<sup>162</sup> ABA Transcript, *supra* note 160, Tape 8, at 48–49, 52 (statement of Michael Bloom).

<sup>163</sup> *Id.*, Tape 8, at 50.

<sup>164</sup> *Id.*, Tape 8, at 51–52 (statement of Mr. Carpenter).

<sup>165</sup> *Id.*, Tape 8, at 53; LEGISLATIVE HISTORY, *supra* note 150, at 466.

<sup>166</sup> Compare PROPOSED FINAL DRAFT, *supra* note 149, R. 8.4, with MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(4) & (5) (1981).

<sup>167</sup> Later, in his coauthored treatise, Hazard expressed the view that such an “open-ended rule is dangerous” and gives disciplinary authorities an opening to

disciplinary enforcers' trade group, lobbied strenuously to keep the Code provisions, deeming them proven approaches that were needed to reach the many different forms of conduct that could reveal a lawyer's unfitness.<sup>168</sup> The commission ultimately was persuaded to support an amendment offered in the House of Delegates to include the Code language in Model Rule 8.4. The matter was voted on very late in a very long day, and the amendment passed without any substantive discussion.<sup>169</sup> The official comment to Rule 8.4 was drafted before the "conduct prejudicial" provision was added and contains no discussion of it.<sup>170</sup>

#### *D. Decisions After the Adoption of the Code and Model Rules*

Several lines of precedent that have emerged since the ABA's adoption of its modern ethical codes have addressed, in varying contexts, the issue of access to witnesses. Disciplinary decisions and procedural rulings by courts and advisory opinions by ethics committees have found violations of Model Rule 3.4(f) in a variety of settings, including requests by prosecutors that

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harass unpopular lawyers. 2 HAZARD & HODES, *supra* note 8, § 65.6, at 65-12; see also *id.* § 65.5, at 65-11.

<sup>168</sup> See NAT'L ORG. OF BAR COUNSEL, REPORT OF THE SPECIAL REVIEW COMMITTEE ON THE PROPOSED FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT 2, 15-16 (June 4, 1982) (on file with author); Schneyer, *supra* note 147, at 709-10.

<sup>169</sup> LEGISLATIVE HISTORY, *supra* note 150, at 808-09; ABA Transcript, *supra* note 160, Tape 12, at 14-15. Hazard and Hodes's treatise asserts that "[t]he debate leading to adoption of Rule 8.4(d) by the ABA House of Delegates made clear that it was intended to address violations of well-understood norms and conventions of practice only." 2 HAZARD & HODES, *supra* note 8, § 65.6, at 65-12. The records of the House of Delegates meeting, however, reveal no such discussion. A delegate did rise to oppose a different amendment, which would have forbidden "any other conduct that adversely reflects" on the lawyer's fitness to practice law, LEGISLATIVE HISTORY, *supra* note 150, at 810, on the ground that it is "so vague . . . [and] provides absolutely no guidance to the lawyer who wants to stay out of disciplinary difficulty." That amendment failed. ABA Transcript, *supra* note 160, Tape 12, at 15-17; LEGISLATIVE HISTORY, *supra* note 150, at 810. As previously discussed, the issue of "fair notice" had been of concern to the drafters of the Code when they came up with "conduct prejudicial to the administration of justice" as a replacement for conduct "degrading to the legal profession." See *supra* text accompanying note 142.

<sup>170</sup> See PROPOSED FINAL DRAFT, *supra* note 149, R. 8.4 cmt; MODEL RULES R. 8.4 cmt. (1983).

witnesses decline defense interviews,<sup>171</sup> attempts by criminal defense attorneys to convince witnesses not to cooperate with the prosecution,<sup>172</sup> requests made by lawyers in civil cases that witnesses not disclose information to an opposing party,<sup>173</sup> requests by one side's lawyer that a witness not speak with the opposing attorney unless the first lawyer is present at or has advance notice of the interview,<sup>174</sup> and efforts to dissuade a fact or expert witness from testifying on behalf of an adversary.<sup>175</sup> A state supreme court, in imposing a sixty-day suspension on an attorney who made a noncooperation request, described Rule 3.4(f) as "a vital canon of professional acquittal" whose violation was a "grievous assault upon the truth-seeking function of the judicial process."<sup>176</sup> Similar types of requests or inducements offered to witnesses have been found to constitute conduct "prejudicial to the administration of justice" under Model Rule 8.4(d) and the equivalent Code provision.<sup>177</sup>

The policies favoring unimpeded witness access also have weighed heavily in decisions interpreting the scope of the ethics rule that bars a lawyer from communicating with a represented

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<sup>171</sup> See, e.g., *United States v. Carrigan*, 804 F.2d 599, 601, 603-04 (10th Cir. 1986); State Bar of Mich., Ethics Op. RI-302 (1997); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 98-134 (1999); S.C. Bar Ethics Advisory Comm., Op. 99-14 (1999).

<sup>172</sup> See, e.g., *In re Alcantara*, 676 A.2d 1030, 1034-35 (N.J. 1995); State Bar of Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 23 (1995); cf. State Bar of Mich., Ethics Op. RI-302 (1997).

<sup>173</sup> See, e.g., *Harlan v. Lewis*, 982 F.2d 1255, 1258-59 (8th Cir. 1993); *Briggs v. McWeeny*, 796 A.2d 516, 523-24, 540 (Conn. 2002); S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993); cf. *Upjohn Co. v. Aetna Cas. & Sur. Co.*, 768 F. Supp. 1186, 1216-17 (W.D. Mich. 1991) (finding no Rule 3.4(f) violation where letter merely informed former employees of their right not to be interviewed and did not "constitute an inducement not to voluntarily provide information").

<sup>174</sup> See, e.g., *Davis v. Dow Corning Corp.*, 530 N.W.2d 178, 179, 181 (Mich. Ct. App. 1995); S.C. Bar Ethics Advisory Comm., Op. 99-14 (1999); cf. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Stauffer Chem. Co.*, No. 87C-SE-11, 1990 Del. Super. LEXIS 346 (Del. Super. Ct. Sept. 13, 1990) (not ruling on whether such conduct violated Rule 3.4(f) but referring the matter to Delaware's Disciplinary Counsel).

<sup>175</sup> See, e.g., *Harlan*, 982 F.2d at 1257-59; *State ex rel. Okla. Bar Ass'n v. Cox*, 48 P.3d 780, 785-86 (Okla. 2002); cf. *In re Kornreich*, 693 A.2d 877, 878, 883 (N.J. 1997) (disciplining attorney who violated Rule 3.4(f) by attempting to dissuade a person from appearing in court).

<sup>176</sup> *Cox*, 48 P.3d at 786.

<sup>177</sup> See cases cited *infra* note 254; see also *Alcantara*, 676 A.2d at 1034-35 (finding that statements urging witness noncooperation violated Rule 8.4(d) as well as 3.4(f)).



person or entity unless that party's lawyer consents.<sup>178</sup> When an attorney is investigating a claim against a corporation or government agency, the no-contact rule has the potential to stand as a wholesale barrier to informal interviews if it is read to cover current or former employees of the organization.<sup>179</sup> Most of the decisions by courts and ethics committees have construed the rule narrowly to allow *ex parte* interviews of all former employees and many categories of current employees.<sup>180</sup> Considerations of both efficiency and the truth-seeking goals of adversary litigation feature prominently in the justifications given for this result. For example, in *Niesig v. Team I*,<sup>181</sup> New York's highest court cited the need to preserve "avenues of informal discovery . . . that may serve both the litigants and the entire justice system by uncovering relevant facts, thus

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<sup>178</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 (2008); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1981).

<sup>179</sup> See generally Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868 (2003); Jerome N. Krulewitch, Comment, *Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest*, 82 NW. U. L. REV. 1274 (1988). The ABA's ethics committee, as we have seen, dealt with this problem in 1934 and concluded that the policies favoring unimpeded access to witnesses should prevail, at least in situations where the represented employer is an individual. See Formal Op. 117, discussed *supra* text accompanying notes 102-04. Subsequent interpretations of the rule by ABA code drafters, ethics committees, and courts have taken into account that corporate entities can only act through their employees and agents; if the rule shielding a represented party from contacts from an opposing lawyer is to mean anything for them, it must extend to at least some employees. See MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2002); MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 2 (1983); John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. PA. L. REV. 683, 695 (1979).

<sup>180</sup> The decisions are not uniform, but this has been the strong general trend. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 reporter's note (2000) (reviewing differing positions taken by courts and ethics authorities). In 2002, the ABA sought to bring clarity to this area by revising the official comment to Model Rule 4.2, which had been highly confusing in its original version. The revised comment provides that the rule does not apply at all to former employees and that current employees are covered only if they supervise or regularly consult with the organization's lawyer regarding the matter in question, have authority to bind the organization with respect to the matter, or are persons whose acts or omissions in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2008).

<sup>181</sup> 558 N.E.2d 1030 (N.Y. 1990)

promoting the expeditious resolution of disputes.”<sup>182</sup> The court invoked *Hickman v. Taylor* and the Second Circuit’s *Edelstein* decision in arguing that ex parte interviews serve justice by allowing the lawyers for each side to develop and refine competing versions of the facts in private.<sup>183</sup> “Costly formal depositions that may deter litigants with limited resources, or . . . interviews attended by adversary counsel, are no substitute for . . . off-the-record private efforts to learn and assemble, rather than perpetuate, information.”<sup>184</sup>

The idea that the administration of justice is harmed by agreements that restrict a witness’s freedom to disclose information relevant to other cases is the central theme in a large and growing body of case law finding such agreements unenforceable. In *EEOC v. Astra USA, Inc.*,<sup>185</sup> the U.S. Court of Appeals for the First Circuit upheld an injunction prohibiting an employer from using noncooperation clauses to prevent employees who had settled sexual harassment claims from making voluntary disclosures to the EEOC, which was investigating similar complaints against the company. The court found such agreements contrary to public policy and unenforceable.<sup>186</sup> Astra’s argument that the EEOC could obtain

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<sup>182</sup> *Id.* at 1034.

<sup>183</sup> *See id.*; *see also supra* text accompanying notes 112–14, 120–23 (discussing *Hickman* and *Edelstein*, respectively).

<sup>184</sup> *Niesig*, 553 N.E.2d at 1034. For similarly reasoned opinions, *see, e.g.*, *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259, 261–62 (S.D. Iowa 1993); *Siguel v. Trs. of Tufts Coll.*, No. 88-0626-Y, 1990 U.S. Dist. LEXIS 2775 (D. Mass. Mar. 12, 1990); *Clark v. Beverly Health & Rehab. Servs., Inc.*, 797 N.E.2d 905, 909–11 (Mass. 2003); *Palmer v. Pioneer Inn Assocs.*, 59 P.3d 1237, 1242, 1248 (Nev. 2002); *Wis. State Bar Prof’l Ethics Comm.*, Op. E-07-01 (2007). The Supreme Court of Washington has pushed the principle a step further, holding that in situations where the no-contact rule does not prohibit a plaintiff’s attorney from interviewing the defendant’s employees, it is impermissible for the defendant to instruct its employees not to meet with opposing counsel. *See Wright v. Group Health Hosp.*, 691 P.2d 564, 570 (Wash. 1984). In a similar vein, the New York Court of Appeals recently ruled that a plaintiff who puts her medical condition in issue cannot interfere with defense counsel’s ability to privately interview the plaintiff’s treating physician by refusing to sign a HIPAA authorization. *See Arons v. Jutkowitz*, 880 N.E.2d 831, 837–38 (N.Y. 2007).

<sup>185</sup> 94 F.3d 738 (1st Cir. 1996).

<sup>186</sup> *See id.* at 744–45. The harm caused by impeding the EEOC’s ability to effectively investigate employment discrimination was held to outweigh any detriment to the public interest in promoting settlements. The court found it unlikely that the unavailability of a nonassistance provision would create any substantial disincentive to settlement. *See id.* at 744.

the employees' testimony by issuing subpoenas was rejected on the grounds that public policy favors a "free flow of information" to an agency charged with vindicating wrongs.<sup>187</sup> Requiring the agency to resort to its subpoena power would "stultify investigations" and "significantly increase the time and expense of a probe."<sup>188</sup> Other decisions have invalidated settlement provisions that impeded voluntary cooperation with the EEOC or other agencies on similar public policy grounds,<sup>189</sup> or based on statutes prohibiting retaliation against a person who takes part in an investigation or enforcement proceeding.<sup>190</sup>

The same ideas are at work in decisions upholding claims by employees who were discharged or disciplined for their willingness to testify on behalf of private parties in litigation. Testimony by public employees has been accorded First Amendment protection against employer retaliation on the theory that uninhibited witness testimony is essential to the

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<sup>187</sup> *Id.* at 745.

<sup>188</sup> *Id.*

<sup>189</sup> See *EEOC v. Int'l Profit Assocs.*, No. 01 C 4427, 2003 U.S. Dist. LEXIS 6761 (N.D. Ill. Apr. 21, 2003); *EEOC v. Morgan Stanley & Co.*, No. 01 Civ. 8421, 2002 U.S. Dist. LEXIS 17484 (S.D.N.Y. Sept. 20, 2002) (following *Astra* and holding confidentiality agreements preventing voluntary disclosures to EEOC to be void as against public policy); *Lana C. v. Cameron P.*, 108 P.3d 896, 902 (Alaska 2005) (voiding child custody settlement insofar as it prevented mother from disclosing past child abuse allegations against father in a domestic violence petition, because agreements "preventing an individual from providing evidence relevant to litigation or investigations are contrary to public policy"); *Mary R. v. B. & R. Corp.*, 196 Cal. Rptr. 871, 876 (Ct. App. 1983) (finding stipulated gag order that barred disclosures to state medical board concerning doctor's molestation of minors void because contrary to public policy).

<sup>190</sup> See *Conn. Light & Power Co. v. Sec'y of Labor*, 85 F.3d 89, 94-96 (2d Cir. 1996) (holding that employer violated Energy Reorganization Act's antiretaliation provision by conditioning settlement of employee's claim on agreement that would preclude his voluntary appearance as a witness in judicial or administrative proceedings); *EEOC v. U.S. Steel Corp.*, 671 F. Supp. 351, 357-58 (W.D. Pa. 1987) (construing ADEA's antiretaliation provision to bar enforcement of clause in retirement agreement that prohibited assisting others in the prosecution of any age discrimination claim); *United States v. City of Milwaukee*, 390 F. Supp. 1126, 1128 (E.D. Wis. 1975) (finding employer's use of confidentiality policy to bar employees from speaking with Justice Department attorneys unlawful retaliation under Title VII); see also Equal Employment Opportunity Commission, *Enforcement Guidance on Non-Waivable Employee Rights* (April 10, 1997), available at <http://www.eeoc.gov/policy/docs/waiver.html>. But see *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006) (holding that company did not violate antiretaliation statutes by offering separation agreements that could penalize voluntary disclosures to EEOC, although these provisions might well be unenforceable).

justice system's proper functioning.<sup>191</sup> Antiretaliation provisions of discrimination laws have been construed to protect those who provide information to private litigants and offer to testify on their behalf, based on the idea that effective enforcement depends on the initiative of individual plaintiffs and their "access to the unchilled testimony of witnesses."<sup>192</sup>

The idea that obstructing access to relevant witness testimony is prejudicial to the administration of justice has been the linchpin of decisions addressing noncooperation clauses in the context of discovery disputes. The leading cases are *Kalinauskas v. Wong*<sup>193</sup> and *Wendt v. Walden University, Inc.*,<sup>194</sup> both of which involved efforts by the defendant in a sex discrimination suit to prevent the plaintiff from seeking deposition testimony from former employees who had entered into settlement agreements with secrecy provisions. In *Kalinauskas*, the court weighed the public policy of encouraging settlement against the danger that a defendant could use a secrecy agreement to hide relevant factual information from others whom it injures through similar misconduct, and concluded that "settlement agreements which suppress evidence violate the greater public policy."<sup>195</sup> The *Wendt* court gave pithy expression to the principle: "Defendants should not be able to buy the silence of witnesses with a settlement agreement when the facts of one controversy are relevant to another."<sup>196</sup> These cases, and others that have followed them, allow discovery of potentially relevant factual information that underlies a settled case, and declare any contractual agreement that would penalize a witness for making such disclosure to be void.<sup>197</sup>

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<sup>191</sup> See, e.g., *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989).

<sup>192</sup> *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 175 (2d Cir. 2005) (quoting *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999)).

<sup>193</sup> 151 F.R.D. 363 (D. Nev. 1993).

<sup>194</sup> No. 4-95-467, 1996 U.S. Dist. LEXIS 1720 (D. Minn. Jan. 16, 1996).

<sup>195</sup> *Kalinauskas*, 151 F.R.D. at 367.

<sup>196</sup> *Wendt*, 1996 U.S. Dist. LEXIS 1720, at \*5.

<sup>197</sup> See *Sparks v. Seltzer*, No. 05-CV-1061, 2006 U.S. Dist. LEXIS 61398, at \*13-\*14 (E.D.N.Y. Aug. 14, 2006); *Channelmark Corp. v. Destination Prods. Int'l, Inc.*, No. 99 C 214, 2000 WL 968818 (N.D. Ill. July 7, 2000); *Hamad v. Graphic Arts Ctr., Inc.*, No. CIV 96-216-FR, 1997 WL 12955 (D. Or. Jan. 3, 1997); *McKnight v. Stein Mart, Inc.*, No. 95-0258, 1996 U.S. Dist. LEXIS 12581 (E.D. La. Aug. 22, 1996); *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 445 (S.D.N.Y. 1995); *Scott v.*

The principle has been extended to voluntary, ex parte witness interviews conducted outside the formal discovery process. In *In re JDS Uniphase Corp. Securities Litigation*,<sup>198</sup> the lead plaintiff moved to have confidentiality agreements signed by the defendant's former employees declared void as against public policy to the extent that the agreements interfered with the ability of the plaintiff's lawyers and investigators to interview them about matters relevant to the litigation.<sup>199</sup> A federal magistrate judge agreed, holding that it would be contrary to public policy to allow employers to "muzzle" ex-employees with agreements that prevent them from assisting private litigants who are seeking to vindicate federally protected rights.<sup>200</sup> While the defendant could properly use a confidentiality agreement to safeguard privileged information or trade secrets, the "whistleblower-type information about allegedly unlawful acts" sought by the plaintiff did not fall into these categories.<sup>201</sup> The company had no right to "use its confidentiality agreements to chill former employees from voluntarily participating in legitimate investigations into alleged wrongdoing" and could not prevent them from meeting privately with plaintiff's counsel to provide relevant information.<sup>202</sup> Other decisions have used

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Nelson, 697 So. 2d 1300 (Fla. Dist. Ct. App. 1997); *Llerena v. J.B. Hanauer & Co.*, 845 A.2d 732 (N.J. Super. Ct. Law Div. 2002); cf. *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998) (holding that judgment issued by a state court barring a witness from giving testimony could not operate to prevent parties in litigation before another state's courts from taking witness's deposition). A few decisions have refused to allow discovery of information covered by a confidentiality agreement in situations where the facts underlying the settled case were found by the court to be irrelevant, or of very little relevance, to the current proceeding. See *Hasbrouck v. BankAmerica Hous. Servs.*, 187 F.R.D. 453, 460-62 (N.D.N.Y. 1999); *Flynn v. Portland Gen. Elec. Corp.*, No. 88-455-FR, 1989 U.S. Dist. LEXIS 11219 (D. Or. Sept. 21, 1989).

<sup>198</sup> 238 F. Supp. 2d 1127 (N.D. Cal. 2002).

<sup>199</sup> See *id.* at 1129-32. At the time the motion was filed, formal discovery was unavailable because of a provision in the Private Securities Litigation Reform Act of 1995 that stays all discovery while a motion to dismiss is pending. See *id.* at 1132-34.

<sup>200</sup> See *id.* at 1136-37.

<sup>201</sup> *Id.* at 1135.

<sup>202</sup> *Id.* at 1137; see also *id.* at 1133. A federal district court in another case upheld and enforced a nondisclosure agreement that was limited to trade secrets and other traditionally protected commercial information, rejecting a former employee's claim that he had a right to volunteer information about defective gambling equipment to a company suing his former employer for breach of contract. See *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 916-17, 924-25 (D. Nev. 2006). The

similar reasoning to void confidentiality agreements that prevented a plaintiff's lawyer from conducting ex parte interviews or predeposition conversations with witnesses in cases brought under federal employment statutes.<sup>203</sup>

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The principle that litigants and their attorneys should be able to conduct ex parte interviews with willing witnesses to gather evidence in support of their claims, free of adversary interference, has a long history, with its roots in early twentieth-century ABA ethical pronouncements that have been carried forward into the modern professional conduct rules, and a long line of judicial decisions aimed at preserving witness access and invalidating attempts to block it. The principle rests on the idea that when lawyers seek to ascertain the facts from witnesses, they perform a function essential to the administration of justice. Ex parte witness interviews serve the adjudicatory system by allowing each party to get at the unvarnished facts, shape those facts into a persuasive presentation, and present competing versions of the truth to the tribunal. Witnesses are free agents and may decline to be interviewed, but adversary interference with a witness's decision whether or not to cooperate undermines the principles of fair competition on which the system depends. Witnesses do not belong to either side in a dispute, and neither side should be able to claim or create a property interest in their testimony. Noncooperation settlements increase the costs to adversaries, public agencies,

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court viewed *JDS Uniphase* and similar cases as "persuasive authority," *id.* at 920, but found their principle inapplicable when the disclosure implicated trade secrets, the former employee initiated the disclosure rather than being asked for information as part of an agency's or litigant's investigation, and the disclosure did not expose illegal or harmful activities of public concern. *See id.* at 921-23.

<sup>203</sup> *See Hoffman v. Sbarro, Inc.*, No. 97 Civ. 4484, 1997 U.S. Dist. LEXIS 18908 (S.D.N.Y. 1997); *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 444-45 (S.D.N.Y. 1995). In *Hoffman*, a federal magistrate judge ruled that a nondisclosure agreement signed by the defendant's current and former employees could not be used to prevent plaintiffs' counsel from interviewing them about the wage practices at issue in the litigation. *See Hoffman*, 1997 U.S. Dist. LEXIS 18908, at \*4. In *Chambers*, an age discrimination suit, the court found that confidentiality agreements signed by former employees would adversely affect the plaintiff's ability to gather relevant information and held that, absent extraordinary circumstances, "it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law." *Chambers*, 159 F.R.D. at 444 (footnote omitted).

and the courts of getting at the facts, undermining both the system's efficiency and its effectiveness in determining the truth and adjudicating cases fairly.

#### IV

#### APPLYING THE MODEL RULES TO SETTLEMENT SECRECY AGREEMENTS

##### A. *How to Read the Rules*

Before addressing the specifics of what the ethics rules mean for settlements with noncooperation requirements, the broader question of how to go about interpreting the rules requires some attention. The ethics rules are a binding code for lawyers, and violations can lead to disciplinary sanctions.<sup>204</sup> In this sense, they are a form of legislation, and the tools ordinarily used to construe statutes—considerations of text, structure, and purpose—can appropriately be used.<sup>205</sup> It would be a mistake, however, to treat the ethics rules like criminal statutes and apply a presumption that ambiguities should be construed in favor of

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<sup>204</sup> The progression from Canons to Model Code to Model Rules has been marked by a movement away from broad statements of ethical standards and aspirations in favor of concrete and enforceable rules. See generally Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249–60 (1991); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 41–53 (1995); Murray L. Schwartz, *The Death and Regeneration of Ethics*, 4 AM. B. FOUND. RES. J. 953, 953–60 (1980).

<sup>205</sup> Lawyers' ethical codes differ from ordinary legislation in the sense that they are drafted by the ABA, a private body that has no legislative authority. However, it is reasonable to assume, in the absence of evidence to the contrary, that when a particular jurisdiction adopts the ABA's rules, it shares the ABA's intent. Disciplinary rules also differ from legislation in the sense that the regulation of attorney conduct has long been recognized as an inherent judicial power. In interpreting the rules that they themselves have enacted, courts may feel freer to make their own policy choices than when dealing with legislation enacted by a separate branch of government. See *Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990) (noting that when interpreting professional conduct rules adopted as "the legal profession's document of self-governance," as opposed to statutes passed by "a coequal branch of government," courts are "not constrained to read the rules literally or effectuate the intent of the drafters, but [may] look to the rules as guidelines to be applied with due regard for the broad range of interests at stake"); Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 534–42 (1989).

the accused.<sup>206</sup> That approach would invite lawyers to push the boundaries of the rules wherever possible to maximize advantage for their clients or themselves,<sup>207</sup> and is inconsistent with the premises of professional self-regulation.

Society's grant of self-governance to the legal profession "carries with it," in the words of the Model Rules' preamble, "a responsibility to assure that its regulations are conceived in the public interest" and "properly applied" to fulfill lawyers' role in this social compact.<sup>208</sup> It follows that "[t]he Rules of Professional Conduct are rules of reason" that "should be interpreted with reference to the purposes of legal representation and of the law itself."<sup>209</sup> When there is ambiguity as to how the rules apply in a given situation, lawyers are required to "exercise . . . sensitive professional and moral judgment guided by the basic principles underlying the Rules."<sup>210</sup> Consistent with this framework, courts enforcing the rules have generally eschewed narrow-construction canons of interpretation in favor of an approach that construes ambiguities in light of the purposes a rule is designed to serve.<sup>211</sup>

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<sup>206</sup> See *Fla. Bar v. St. Louis*, 967 So. 2d 108, 122 (Fla. 2007) (holding that the "rule of lenity" applicable to criminal cases does not apply to bar disciplinary proceedings, which are quasi-judicial in nature).

<sup>207</sup> See Luban & Millemann, *supra* note 204, at 57 (arguing that the penal code-like appearance of the Model Rules invites lawyers to "push the edges of the envelope" in construing the limits of what they may do on behalf of clients or to maximize their own income); Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975, 977-78 (1990) (discussing the strong pressures lawyers face to resolve all ethical doubts in favor of the client).

<sup>208</sup> MODEL RULES OF PROF'L CONDUCT pmb. paras. 12-13 (2008); see also Schneyer, *supra* note 147, at 695-96 (discussing the Kutak Commission's "vision of the Model Rules as a professional covenant with the public").

<sup>209</sup> MODEL RULES OF PROF'L CONDUCT pmb. para. 14 (2008). The influential 1958 report written by Lon Fuller and John Randall, as coauthors of a joint committee of the ABA and the Association of American Law Schools, similarly cautioned that "a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility," which "must derive from an understanding of the reasons that lie back of specific restraints." Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958) [hereinafter *Joint Conference Report*].

<sup>210</sup> MODEL RULES OF PROF'L CONDUCT pmb. para. 9 (2008).

<sup>211</sup> See, e.g., *EEOC v. HORA, Inc.*, No. 03-CV-1429, 2005 U.S. Dist. LEXIS 11279, at \*34 (E.D. Pa. June 8, 2005) (noting, in disqualifying lawyer for various rule violations, that even if the application of the rules to her conduct was unsettled, "calculating one's behavior to merely comply with the wording of the professional rules, while doing violence to their spirit, is fundamentally inconsistent with a lawyer's responsibilities to the parties, to the community at large and to the [c]ourt"); *Fla. Bar v. Machin*, 635 So. 2d 938, 940 (Fla. 1994) (disciplining attorney



What can the purposes of legal representation tell us about the application of the ethics rules to settlements requiring witness noncooperation? The lawyer's role as client advocate, with its hallmark duties of loyalty and zeal, would appear to support a narrow reading that allows lawyers to negotiate any lawful settlement terms which serve client interests, while a lawyer's duties as an "officer of the legal system"<sup>212</sup> would cut in favor a broad construction that forbids lawyer participation in agreements that impair the truth-seeking function of adjudication. The Model Rules' preamble treats the lawyer's roles as a client representative and officer of the court as equal in importance and generally complementary.<sup>213</sup> For the "difficult ethical problems" that arise when they conflict, lawyers are told to consult the "terms for resolving such conflicts" embodied in particular rules, and how the balance has been struck in "the framework of these Rules" as a whole.<sup>214</sup> Accordingly, we need to examine the theory that underlies the policy choices that the rule drafters made in deciding when duties to the legal system should trump obligations to the client, and consider the place of the rule prohibiting witness noncooperation requests within the framework of those principles.

There are two basic stories that can be told about the Model Rules' vision of lawyers as officers of the court.<sup>215</sup> The plot line of the first story runs roughly as follows. The Kutak Commission set out with high aspirations to expand lawyers'

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for seeking to induce crime victim not to testify at sentencing hearing and citing the preamble in finding that, even in the absence of a clear prohibition spelled out in a rule or binding precedent, a lawyer is responsible for using sound judgment that is guided by the Model Rules' purposes).

<sup>212</sup> "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES OF PROF'L CONDUCT pmbl. para. 1 (2008).

<sup>213</sup> See *id.* para. 8.

<sup>214</sup> *Id.* para. 9.

<sup>215</sup> The vision that had been articulated in the Model Code was a very thin one, essentially treating a lawyer's client-centered and systemic duties as being one and the same: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . ." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1981) (footnotes omitted). Nonetheless, the Code included some limits on advocacy, designed to codify certain obligations of lawyers as officers of the court, that went beyond merely prohibiting the illegal. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 49-61 (1989) (listing and assessing such obligations under the Code).

obligations as court officers. Its membership included Judge Marvin Frankel, who had prominently advocated changing the priorities of legal ethics to make its defining principle the ascertainment of truth, rather than the advancement of client interests.<sup>216</sup> The commission's initial drafts<sup>217</sup> would have created radical new duties, including requirements that lawyers disclose material adverse facts and law to the tribunal, treat other litigants fairly, exercise restraint in litigation tactics, and provide unpaid legal services for the public good.<sup>218</sup> These proposals produced a flood of criticism from the organized bar, and the ABA retreated, in the end requiring little more of lawyers than that they not participate in criminal or fraudulent conduct.<sup>219</sup>

The second story is the one told by Robert Kutak himself, in an essay that he wrote shortly before his death in 1983.<sup>220</sup> Kutak acknowledged that the commission had made significant changes

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<sup>216</sup> See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). For discussion of the apparent influence of Frankel and other critics of adversary ethics on the Kutak Commission's early drafts, see Schneyer, *supra* note 147, at 700-01; James H. Stark, *Review Essay, The Model Rules of Professional Conduct*, 12 CONN. L. REV. 948, 972-73 (1980).

<sup>217</sup> These included the officially published discussion draft, *supra* note 148, and an earlier draft that was leaked to the press. *Text of Initial Draft of Ethics Code Rewrite Committee*, LEGAL TIMES WASH., Aug. 27, 1979, at 26.

<sup>218</sup> The discussion draft's reception in the press emphasized and largely welcomed the expansion of the lawyer's role as an officer of the court. See Schneyer, *supra* note 147, at 696. The *New York Times* described it as setting out "fundamentally to alter" lawyers' duties to clients by requiring that increased weight be given to "the duty to be fair and candid toward all other participants in the legal system, even adversaries." *Id.*, quoting Linda Greenhouse, *Lawyers' Group Offers a Revision in Code of Ethics: Draft Says Client Interests Could Be Placed Second*, N.Y. TIMES, Feb. 2, 1980, at 6.

<sup>219</sup> Versions of this story can be found in ZITRIN & LANGFORD, *supra* note 53, at 106-07; Gaetke, *supra* note 215, at 69-71; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 600-01 (1985); Stark, *supra* note 216, at 964-80; Jill M. Dennis, Note, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 GEO. J. LEGAL ETHICS 157, 160-65 (1994). Ted Schneyer, in his superb study of the Model Rules' drafting and adoption, gives an account that also portrays the Model Rules as the product of political struggles and compromises among different segments of the bar and competing conceptions of legal ethics. Schneyer, however, sees the end result as reflecting no single outlook, rather than representing a victory by forces favoring a "hired-gun" ethos. See generally Schneyer, *supra* note 147.

<sup>220</sup> Robert J. Kutak, *The Adversary System and the Practice of Law*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 172 (David Luban ed., 1983). Kutak sounded similar themes in his introduction to the commission's proposed final draft.

in response to the heated criticism its initial proposals received. However, he insisted that the choices the commission ultimately made were not the product of unprincipled political compromise, but instead reflected “an earnest desire to find coherent and workable solutions” in conformity with lawyers’ roles as both client representatives and officers of the court.<sup>221</sup>

The contours of the officer-of-the-court duties in the commission’s final product rested, in Kutak’s view, on the “competitive theory,”<sup>222</sup> that underlies our nation’s legal, political, and economic institutions. One fundamental tenet of this ideology is that “competing individuals have no legal responsibility for the competence of their counterparts on the other side of the transaction and, consequently, have no obligation to share the benefits of their own competence with the other side.”<sup>223</sup> Since “individual competencies in employing a given process may vary,” it is understood that competitive processes “will not in every instance guarantee a correct result or in every case advance the common interest”; instead, the system is justified by a belief that, in the aggregate, it produces more correct outcomes than alternative approaches.<sup>224</sup> Accordingly, competitors in an adversary system have no general duty to act for the benefit of others, volunteer adverse information, or ensure just results.<sup>225</sup> At the same time, “[u]nderlying the basic theory that free competition . . . will maximize good results is the assumption that the process of competition is not distorted by conduct that bears no relationship to individual competence.”<sup>226</sup> Thus, force and bribery are unacceptable as tools of competition. While there is no general duty to disclose, information that is volunteered cannot be false or deceptive. “[T]hose who are not sufficiently competent to ask the right questions” are out of luck,

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<sup>221</sup> *Id.* at 172–73; see also Robert J. Kutak, *Chairman’s Introduction to PROPOSED FINAL DRAFT*, *supra* note 149, at i, ii.

<sup>222</sup> Kutak, *supra* note 220 at 174.

<sup>223</sup> *Id.* Justice Jackson relied on the same basic conception in *Hickman v. Taylor* to justify the Court’s holding that attorney work product should be shielded from disclosure: “[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.” 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

<sup>224</sup> Kutak, *supra* note 220, at 174.

<sup>225</sup> *Id.* at 174–75.

<sup>226</sup> *Id.* at 175.

but the person who asks the right questions “is entitled to the fruits of that competence” in the form of an honest answer.<sup>227</sup> Information that is relevant to a matter “cannot be concealed or destroyed with the purpose of preventing its availability.”<sup>228</sup>

In the remainder of the essay, Kutak focused on how this general theory shaped the approach taken in the Model Rules toward issues of confidentiality and candor.<sup>229</sup> It also helps to account—which the first story fails to do—for the presence in the Rules of a variety of other duties that favor systemic over client interests and go beyond the requirements of other law.<sup>230</sup> For example, in *ex parte* proceedings before a tribunal, an attorney is obliged to disclose all material facts, even adverse ones,<sup>231</sup> a departure from the nondisclosure norm that can be justified under the competitive theory because the adversary is deprived of any opportunity to benefit from its own competence by presenting its side of the story. Statements to the media that are likely to materially prejudice an adjudicative proceeding are prohibited, because parties should only be able to benefit from

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 176. The idea that limitations on advocacy can be derived from the premises of the adversary system is not unique to the Kutak Commission. The 1958 report of the ABA-AALS Joint Conference on Professional Responsibility made an eloquent case for “the limits partisan advocacy must impose on itself if it is to remain wholesome and useful” in achieving its purposes. *Joint Conference Report*, *supra* note 209, at 1160. Eleanor Holmes Norton proposed a “functionalist model for negotiation ethics” that derives ethical limits from a conception of bargaining as an adversarial market process whose purpose is to achieve valid agreements. See Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 525–41 (1989). More recently, Robert Gordon has argued that a lawyer’s role as an agent for clients in a system designed to provide a public framework for securing rights gives rise to an obligation to refrain from overly adversarial strategic behavior that undermines the system’s effectiveness. See Robert W. Gordon, *Why Lawyers Can’t Just Be Hired Guns*, in *ETHICS IN PRACTICE* 42 (Deborah L. Rhode ed., 2000).

<sup>229</sup> See Kutak, *supra* note 220, at 178–87.

<sup>230</sup> See Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 264 (1985) (noting that, even after discounting obligations that are either illusory or required by other law, the Model Rules contain a number of mandatory duties that are best explained as “duties imposed in the interest of safeguarding the boundaries of adversary justice,” which “protect the dominant jurisprudential model for dispute resolution and interest reconciliation by forbidding behavior that seeks to skirt its principles”).

<sup>231</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3(d) (2008); see also Dennis, *supra* note 219. The ban on *ex parte* communications with a judge or juror during an adjudicative proceeding performs a similar function. See MODEL RULES OF PROF’L CONDUCT R. 3.5(b) (2008).

competence exercised within the channels of adversary adjudication.<sup>232</sup> Rules that prohibit direct communication with another lawyer's client,<sup>233</sup> restrict dealings with unrepresented persons,<sup>234</sup> and forbid settlements that make a lawyer's services unavailable to future clients<sup>235</sup> are all designed to ensure that people have the opportunity to benefit from legal representation, which is often a prerequisite to competent participation in the adversary process.<sup>236</sup>

Rule 3.4(f)'s prohibition of witness noncooperation requests also fits comfortably into the framework of the competitive theory. The official comment to Model Rule 3.4 begins by noting that the rule's prohibitions are designed to secure "[f]air competition" in an adversary system that "contemplates that the evidence in a case is to be marshalled competitively by the contending parties."<sup>237</sup> A system that depends on competitive marshaling and presentation of the facts needs to ensure that

<sup>232</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.6 (2008). Other rules address the danger that personal influence, rather than competence in arguing the facts and the law, will sway the adjudicator. See *id.* R. 3.4(e) (prohibiting lawyers from asserting personal knowledge of facts or stating a personal opinion as to the credibility of a witness, the culpability of a litigant, or the justness of a cause at trial); R. 3.7 (generally prohibiting lawyers from serving as a witness and an advocate in the same case).

<sup>233</sup> *Id.* R. 4.2.

<sup>234</sup> *Id.* R. 4.3 & cmt. 1 (requiring that a lawyer not give any legal advice to an unrepresented person, other than the advice to secure counsel, if there is a reasonable possibility of conflicting interests, and generally requiring the lawyer to disclose that she is acting on behalf of a client).

<sup>235</sup> *Id.* R. 5.6(b) & cmt. 2 (prohibiting a lawyer from participating in offering or making a settlement agreement in which the lawyer agrees not to represent other persons).

<sup>236</sup> As a foundation for an ethical code, the competitive theory leaves much to be desired. Its assumption that zealous advocacy, untempered by any responsibility to account for whether the other side's claims are being competently presented, will achieve just outcomes in the long run, is hard to defend when many disputants lack the resources to obtain legal representation. Although the Model Rules' preamble acknowledges that it is only "when an opposing party is well represented [that] a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done," *id.* pmbl. para. 8, the Model Rules create no duty either to assure that the other side is well represented or to assume greater responsibility for achieving a just result when that condition does not hold. See generally RHODE, *supra* note 77, at 55–56; SIMON, *supra* note 75, at 139–42. My argument here is simply that the "competitive theory" does a reasonably good job of accounting for the systemic duties that the Rules do recognize, and provides insight into the purposes that those rules are designed to achieve.

<sup>237</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 1 (2008).

litigants have a fair opportunity to obtain them. Voluntary cooperation by witnesses enhances the effectiveness of parties' presentations of their claims by allowing them to probe and develop potential testimony before deciding whether to use it—and whether to file suit in the first place. In a competitive system, disputants and their attorneys should be able to reap the benefits of their initiative and competence by interviewing willing witnesses. While a witness is free to decline informal interviews, neither side to a dispute should be able to exercise influence or offer inducements to deprive an adversary of access. These arguments for a principle of access to *ex parte* witness interviews date back to the time of the ABA Canons and Formal Opinion 131, and have been invoked by courts since the time of *Hickman v. Taylor*.<sup>238</sup>

Thus, the principle embodied in Rule 3.4(f) should not be viewed as an oddball exception to the client-centered duties that are at the core of the ethics rules. As with many of the non-client-focused duties that the Model Rules recognize, it can best be understood as a product of the competitive theory that underlies lawyers' ethical obligations. In itself, this does not answer the question of how broadly the rule should be read. Expansive construction of a rule designed to preserve the adversary system's proper functioning might sometimes threaten other core values protected by the Rules. For example, the requirement that a lawyer report client perjury to the court<sup>239</sup> is aimed at preserving the integrity of adversary adjudication, but it also has the potential to undermine the purposes served by confidentiality by making clients less likely to disclose information to their lawyers. Furthermore, an erroneous report of perjury to the court may cause grave injustice to the client. These concerns could justify a fairly narrow interpretation of the

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<sup>238</sup> That Rule 3.4(f) fits comfortably into an adversary-system-based conception of lawyers' ethics is confirmed by the inclusion of a similar prohibition in the alternative ethics code that was put forward by the Association of Trial Lawyers of America. ATLA had strongly criticized the proposed Model Rules for being inconsistent with the values of the adversary system and insufficiently protective of clients' rights. See *THE AMERICAN LAWYER'S CODE OF CONDUCT* (1982), reprinted in 2002 *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY* 419 (Thomas D. Morgan & Ronald D. Rotunda eds., 2002). Rule 3.5 in the American Lawyer's Code provided that "[a] lawyer shall not knowingly . . . discourage a witness or potential witness from talking to counsel for another party." *Id.* at 433.

<sup>239</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2008).

rule's requirement that the lawyer *know* that the testimony was false, so that any reasonable doubt is resolved in the client's favor.<sup>240</sup> No risks of a similar magnitude are posed by a broad reading of the rule banning witness noncooperation requests. All rules that restrict the permissible means for achieving clients' ends infringe to some degree on the principle of client autonomy. The particular interest impaired here—the client's ability to request or demand noncooperation from a witness—represents a very modest intrusion on the client's freedom, and is not associated with fundamental rights such as the right to testify on one's own behalf. A liberal construction that resolves doubts in favor of achieving the rule's intended purposes is therefore warranted.

*B. The Contours of the Rules Against Requesting  
Noncooperation in the Context of Settlement*

*1. Settlements Are Not Exempt*

The basic issue of whether Model Rule 3.4(f) applies to noncooperation requests made in settlement proposals presents no difficult issues of interpretation; it rests on a straightforward application of the rule's language. Rule 3.4(f) prohibits a lawyer from "request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party" unless the person falls into one of the excepted categories.<sup>241</sup> It contains no exception for requests made to an opposing party in the course of settlement negotiations. In the only state ethics opinion to address the issue thus far, South Carolina's bar ethics committee concluded that the rule, by its plain terms, prohibits a defense lawyer from conditioning a settlement offer on the plaintiff agreeing not to voluntarily provide relevant information to other parties suing the same defendant.<sup>242</sup>

Courts sometimes refuse to apply the literal language of a rule to avoid absurd results that the drafters could not possibly have

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<sup>240</sup> See generally Lauren Gilbert, *Facing Justice: Ethical Choices in Representing Immigrant Clients*, 20 GEO. J. LEGAL ETHICS 219 (2007) (analyzing an attorney's ethical choices in deciding whether to disclose misrepresentations to the tribunal).

<sup>241</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (2008).

<sup>242</sup> See S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993).

intended,<sup>243</sup> but Rule 3.4(f)'s rationales apply just as strongly in the settlement context as in other settings. If merely asking a person to refrain from voluntarily disclosing relevant information to other parties is unethical, offering payment in exchange for a binding promise is worse still. If a lawyer approached a nonparty witness and said, "I'll pay you five thousand dollars if you agree not to cooperate with anyone who's suing my client," unquestionably the rule would be violated.<sup>244</sup> That the recipient of a noncooperation request happens to be a plaintiff suing the lawyer's client is irrelevant to the rule's purposes; it is precisely because the plaintiff is a potential witness in other cases, and to influence her behavior in that capacity, that the request is being made. The fact that the ethics rules, and the law in general, encourage the settlement of disputes cannot mean that conduct expressly prohibited by the rules becomes permissible simply because it helps bring about a settlement.<sup>245</sup>

Whether conduct that violates Rule 3.4(f) is also prohibited under the rule that bars lawyers from engaging in "conduct that is prejudicial to the administration of justice"<sup>246</sup> is of little practical significance in the vast majority of jurisdictions because

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<sup>243</sup> See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

<sup>244</sup> The commentary to the provision based on Rule 3.4(f) in the *Restatement of the Law Governing Lawyers* states, "A lawyer may not offer threats or financial or other inducements to a witness not to cooperate with another party." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. c (2000).

<sup>245</sup> Cf. Gillers, *supra* note 10, at 14–15 (discussing why the public policy of promoting settlement does not make noncooperation agreements exempt from obstruction of justice laws). In situations where the Model Rules' drafters were concerned that a rule might be misread to interfere with legitimate settlement practices, they took pains to guard against this in the official commentary. See MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2 (2008) (clarifying that the prohibition against giving legal advice to an unrepresented person does not prohibit informing a *pro se* adverse party of the terms on which the lawyer's client is willing to settle and explaining the lawyer's view of the meaning of proposed settlement terms); *id.* R. 4.1 cmt. 2 (stating that some conventional negotiation ploys, such as exaggerating "a party's intentions as to an acceptable settlement," ordinarily are not understood as "statements of material fact" and therefore do not violate the rule on lawyer truthfulness). The comments to Model Rule 3.4(f), in contrast, are devoid of any indication that the rule should not be applied to settlements.

<sup>246</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2008); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (1981).



Rule 3.4(f) has been nearly universally adopted.<sup>247</sup> But it is important to an issue that I will take up in the next section: whether it is unethical for a plaintiff's lawyer to negotiate a settlement requiring the plaintiff not to cooperate in other proceedings.<sup>248</sup> Before reaching that issue, it is necessary to consider the scope of the "conduct prejudicial" rule.

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<sup>247</sup> California, New York, and Maine, the three remaining states with ethics codes not based on the Model Rules, have not adopted Model Rule 3.4(f). California also never adopted the "conduct prejudicial" rule, but, as previously discussed, its rule against the seclusion of witnesses may prohibit witness noncooperation requests, and its state bar has proposed adopting Model Rule 3.4(f). See *supra* note 139 and accompanying text. The ethics codes in New York and Maine include the ABA's "conduct prejudicial" rule. See ME. CODE OF PROF'L RESPONSIBILITY R. 3.2(f)(4) (2008); N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (2007). Maine has adopted a version of the Model Rules, including Rule 3.4(f), that will go into effect in August 2009. See ME. RULES OF PROF'L CONDUCT R. 3.4(f) (2009). New York's judiciary recently promulgated a new set of attorney conduct rules, effective April 1, 2009, that follow the numbering system of the Model Rules, but in substance are an amalgam of provisions carried forward from New York's version of the Model Code and language drawn from the Model Rules. See N.Y. RULES OF PROF'L CONDUCT (2008); 24 ABA/BNA Lawyers' Manual on Prof'l Conduct 666 (Dec. 24, 2008). Although Rule 3.4(f) had been included in a set of proposed rules put forward by the New York State Bar Association, see N.Y. State Bar Ass'n, *Proposed Rules of Professional Conduct* (Feb. 1, 2008) [hereinafter *Proposed N.Y. Rules*], R. 3.4(f), the final rules omit it. See N.Y. RULES OF PROF'L CONDUCT R. 3.4 (2008). Because the judicial board that adopted the rules gave no explanations for its changes, it is unclear whether the proposed rule was rejected for being too restrictive; too permissive, or simply unnecessary in light of other prohibitions, including the "conduct prejudicial" rule.

Three other Model Rules jurisdictions have not adopted Model Rule 3.4(f). In Washington state, the official commentary to Rule 3.4 indicates that subsection (f) was not adopted because its exception for requests made to a client's employees was too broad in light of a state supreme court decision finding such requests improper. The comment also states that noncooperation requests may violate Rule 8.4(d), the "conduct prejudicial" rule. See WASH. RULES OF PROF'L CONDUCT R. 3.4 cmt. 5 (2006) (citing *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984)). Oregon has retained the language of the Code's witness seclusion rule in its version of the Model Rules, instead of the ABA's Rule 3.4(f). See OR. RULES OF PROF'L CONDUCT R. 3.4(f) (2006). A state ethics opinion holds that attempting to dissuade a witness from testifying on behalf of an adversary violates Oregon's "conduct prejudicial" rule, *id.* R. 8.4(a)(4), and may run afoul of the witness seclusion rule as well. See Or. State Bar Ass'n, Formal Op. 2005-132 (2005). Kentucky's version of the Model Rules omits both Rule 3.4(f) and Rule 8.4(d). See KY. RULES OF PROF'L CONDUCT R. 3.130 (2008). A handful of other states have made changes from the ABA's version of Model Rule 3.4(f) which I will discuss when relevant to particular interpretive issues.

<sup>248</sup> Rule 3.4(f) prohibits only noncooperation requests made to "a person other than a client," MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (2008), and therefore does not apply to this situation.

The rule's extremely broad language poses an interpretive problem. Its inclusion in the Model Code and Model Rules reflects a judgment that specifically framed rules cannot capture the entire universe of lawyer conduct that is unethical and deserving of discipline.<sup>249</sup> To limit the rule to behavior that is illegal would make it redundant and undermine its purpose. On the other hand, the undefined nature of the duty raises concern that attorneys may face discipline without fair notice that their conduct was improper, and poses the danger of selective enforcement against attorneys pursuing unpopular causes.<sup>250</sup> Courts have resolved these competing concerns by upholding the rule's application, even in the absence of a violation of an explicit statute or court rule, in situations where a lawyer has reason to know that conduct "impedes or subverts the process of resolving disputes" and "the fair balance of interests . . . essential to litigation."<sup>251</sup> The standard has been upheld against void-for-vagueness challenges because lawyers, as professionals, can be charged with knowledge of what is expected of them based on the guidance provided in case law and the legal profession's traditions.<sup>252</sup>

These criteria provide grounds for finding witness noncooperation requests, including those made in settlement negotiations, impermissible. The idea that partisan interference with an adversary's access to an otherwise willing witness interferes with the proper administration of justice has a long history in both the ABA's ethical pronouncements and case law, as shown in Part III of this Article. Disciplinary decisions have frequently relied on the "conduct prejudicial" rule to sanction attorneys who made noncooperation requests,<sup>253</sup> and many of

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<sup>249</sup> See *supra* text accompanying notes 167–70.

<sup>250</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. c (2000); 2 HAZARD & HODES, *supra* note 8, § 65.6, at 65-12.

<sup>251</sup> *In re Friedman*, 23 P.3d 620, 628 (Alaska 2001) (characterizing what cases imposing discipline under the rule generally have required); see also *In re Hopkins*, 677 A.2d 55, 59–61 (D.C. 1996). See generally Green & Zacharias, *supra* note 69, at 39–44, 63–64 (discussing the obligation of attorneys, long recognized by courts and acknowledged in the "conduct prejudicial" provisions of ethical codes, to avoid conduct that undermines the integrity of the adjudicative process).

<sup>252</sup> See, e.g., *Howell v. State Bar*, 843 F.2d 205, 208 (5th Cir. 1988); *In re Discipline of an Attorney*, 815 N.E.2d 1072, 1079–81 (Mass. 2004); *Comm. on Legal Ethics v. Douglas*, 370 S.E.2d 325, 328 (W. Va. 1988).

<sup>253</sup> See *supra* notes 143, 177 and accompanying text.

those decisions involved attempts to secure a noncooperation pledge as part of a plea deal or civil settlement.<sup>254</sup> The cases holding noncooperation clauses unenforceable are also based on the idea that buying witness silence through a settlement agreement undermines the proper functioning of the justice system.<sup>255</sup> Where courts have declared a particular type of agreement contrary to public policy precisely because it is prejudicial to the administration of justice, it is fair to charge lawyers who seek such a provision with engaging in prejudicial conduct.<sup>256</sup> The principles articulated in court decisions and the profession's own ethical statements provide sufficient guidance for lawyers to know that conditioning a settlement on an

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<sup>254</sup> See *People v. Kenelly*, 648 P.2d 1065 (Colo. 1982) (discipline imposed for offering civil settlement with suggestion that payment be used to travel to avoid being subpoenaed for criminal trial); *Fla. Bar v. Machin*, 635 So. 2d 938 (Fla. 1994) (upholding discipline of defense attorney who offered to set up a trust fund for victim in exchange for victim's family not speaking at sentencing hearing); *In re Lutz*, 607 P.2d 1078 (Idaho 1980) (discipline imposed for offering civil settlement conditioned on agreement not to testify in criminal case); *In re Boothe*, 740 P.2d 785, 788–89, 790–91 (Or. 1987) (attorney disciplined for conditioning civil settlement on agreement not to testify at disciplinary hearing); *In re Bonet*, 29 P.3d 1242 (Wash. 2001) (disciplining prosecutor for offering to drop charges against defendant if he agreed to assert privilege to avoid testifying for another defendant); *Morano v. Williams*, Grievance Decision No. 98-0663 (Conn. Statewide Grievance Comm. 2002) (finding violation where attorney offered settlement payment to victim in exchange for his agreement not to testify or cooperate with police or prosecutors); cf. *State v. Hofstetter*, 878 P.2d 474, 481–82 (Wash. Ct. App. 1994) (holding that because it is improper for a prosecutor to request a witness not to speak with defense counsel outside of prosecutor's presence, *a fortiori* it is improper to impose this condition, as part of a plea bargain, on a defendant who is a potential witness in another case).

<sup>255</sup> See *supra* text accompanying notes 185–203.

<sup>256</sup> The legislative history of the Model Rules suggests that putting unenforceable terms in a settlement agreement is not per se unethical. A Kutak Commission proposal to prohibit lawyers from counseling or assisting a client in the preparation of a written instrument containing terms that the lawyer knows are legally prohibited was eliminated in the ABA House of Delegates. See LEGISLATIVE HISTORY, *supra* note 150, at 44. The sponsor of the successful amendment argued that it is legitimate for lawyers to help clients “express an understanding, which they may recognize as being legally unenforceable, or which they may believe will become enforceable over time.” *Id.* at 45. However, where courts have found a particular type of agreement to be unenforceable *because* it is prejudicial to the administration of justice, lawyers who seek such a provision are engaging in conduct that they should know undermines the justice system's proper functioning.

opposing party's agreement not to cooperate as a witness in other cases is harmful to the administration of justice.<sup>257</sup>

## 2. *Selling Noncooperation*

Rule 3.4(f) prohibits lawyers from asking for noncooperation, but says nothing about the responsibilities of the lawyer who receives an improper request. South Carolina's ethics committee appropriately concluded that it would be unethical for a plaintiff's lawyer to recommend that his client accept a settlement with a noncooperation clause: "Rule 8.4(a) prohibits a lawyer from knowingly assisting another to violate any Rule. By recommending to his client an improper request of defense counsel, plaintiff's counsel would be assisting the defense counsel in violating Rule 3.4(f) . . . ."<sup>258</sup> Because noncooperation settlements are prejudicial to the administration of justice, an attorney who counsels a client to enter into one violates Model Rule 8.4(d) as well.<sup>259</sup>

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<sup>257</sup> Cf. 2 HAZARD & HODES, *supra* note 8, § 65.6, at 65-23 n.5 (observing that purchasing a witness's silence "would obviously . . . be 'prejudicial to the administration of justice,'" in addition to violating Model Rule 3.4).

<sup>258</sup> S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993). This analysis should not be affected by an official comment that the ABA added to Model Rule 8.4(a) in 2002, which states that the rule "does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take." MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1 (2008). Recommending that the client accept an unethical proposal, or agreeing to negotiate such terms on the client's behalf, is qualitatively different from informing the client that it is not illegal for the client to enter such an agreement without the attorney's assistance. As I will discuss later, it is neither futile nor inappropriate for ethics rules to prohibit attorney facilitation of agreements that are harmful to the administration of justice even though clients might not be legally barred from entering such agreements on their own. *See infra* text accompanying notes 329-39.

<sup>259</sup> The fact that Rule 3.4(f) by its terms applies only to the lawyer requesting noncooperation cannot support an inference that the Model Rules' drafters intended to permit attorneys to effectuate unethical requests made by opposing counsel. One might argue that when the rule-drafters wanted to ban lawyers from accepting as well as offering something, they knew how to say so. *See* MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2008) (prohibiting lawyer participation in "offering or making" a settlement agreement that restricts the lawyer's right to practice). But Rule 3.4(f)'s focus on the requesting attorney's role is explained by its context. It is part of a rule that prohibits a variety of unfair litigation tactics that lawyers may be tempted to use to advance their clients' interests. Asking witnesses—who frequently are unrepresented—not to cooperate is one such form of strategic behavior. The rule's silence about what an attorney should do when faced with such a request cannot reasonably be construed as reflecting a judgment that it

What if the plaintiff's attorney urges the client to refuse the request, but the client still wants to go forward? If the plaintiff's lawyer participates in the drafting or execution of the agreement, she is helping to bring about the very results that the defendant's lawyer is prohibited from seeking. The rules relating to witness noncooperation exist to prevent harms to other litigants and the justice system; they are not something that a lawyer should be able to waive at the client's request. The plaintiff's lawyer needs to explain to her client that a lawyer cannot ethically negotiate an agreement that requires witness noncooperation. If the client insists, the lawyer should withdraw from the representation. Model Rule 1.16 requires an attorney to withdraw if following the client's instructions would result in an ethical violation.<sup>260</sup>

Can a plaintiff's lawyer affirmatively offer noncooperation as a sweetener to increase the value of a settlement? This would not violate Rule 3.4(f), because the lawyer is not requesting that anyone besides the lawyer's own client refrain from disclosures.<sup>261</sup> However, even more than the passive acceptance considered above, this active instigation should be considered a violation of Rule 8.4(a), which makes it unethical to "knowingly assist or induce another" to violate a rule, or to violate a rule "through the acts of another."<sup>262</sup> Inviting the defendant to tender money in exchange for a noncooperation pledge is doing

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is ethical for an attorney to help bring about results that the requesting attorney cannot ethically seek.

<sup>260</sup> See *id.* R. 1.16(a)(1) & cmt. 2; see also MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(B)(2) (1981). Withdrawal is subject to the approval of the tribunal if the case is in litigation. MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2008); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(A)(1) (1981). If permission to withdraw were denied, the plaintiff's lawyer should still refuse to negotiate or sign off on the unethical settlement terms. Denial of permission to withdraw might absolve the lawyer from responsibility for an ethical violation that would result from the mere fact of continued representation (e.g., a conflict of interest), but it could not justify carrying out a directive of the client that would require the lawyer to violate an ethics rule. Imagine that a lawyer moved to withdraw because her client insisted that she present perjured testimony at an upcoming trial; if the motion were denied, clearly the lawyer would still have an ethical obligation to refuse to proffer the testimony.

<sup>261</sup> See Cohen & Bernard, *supra* note 11 (pointing out that Rule 3.4(f) "prohibits asking someone 'other than your client' from refraining to give information, and thus would not prevent offering the same from your own client").

<sup>262</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2008); see also Mo. Sup. Ct. Advisory Comm., Formal Op. 125 (2008) (stating that it violates Rule 8.4(a) "for an attorney to propose a settlement that includes a provision that would involve a violation of any of the Rules of Professional Conduct by another attorney").

exactly that. It also should be viewed as a violation of Rule 8.4(d), the "conduct prejudicial" rule. Like any witness, the lawyer's client has the freedom to decide whether or not to cooperate in other cases. However, it is quite another matter for a lawyer to participate in the sale of that right. The reasons given by the District of Columbia Court of Appeals for disciplining an attorney who offered to sell information about the identity of a witness apply with equal force here:

The attempt to sell evidence is "conduct that is prejudicial to the administration of justice" . . . . To permit one attorney to sell information is to permit another to buy it; thus, were the profession to countenance the selling of evidence (other than expert opinion evidence for a fee), it would also endorse an attorney's decision, indeed obligation, to further a client's interests by purchasing harmful factual evidence, in order to assure the seller's silence. . . . Because a market in factual evidence would hinder the discovery of truth within the justice system and often taint the outcome of disputes, whether litigated or not, the [court] unanimously concludes that attorneys, as officers of the court, may not participate in such a market either as buyers or as sellers.<sup>263</sup>

The ABA's ethics committee has found that in one particular context it is not impermissible for a lawyer to use a client's willingness to refrain from being a witness to gain leverage in settlement negotiations.<sup>264</sup> The Model Code included a provision that prohibited using or threatening criminal prosecution to gain advantage in a civil matter,<sup>265</sup> based on the idea that invoking criminal sanctions for private gain subverts the criminal process, which is "designed for the protection of society as a whole."<sup>266</sup> In a 1992 formal ethics opinion, the ABA concluded that the Model Rules' drafters had deliberately

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<sup>263</sup> *In re Sablowsky*, 529 A.2d 289, 293 (D.C. 1987). The case involved a lawyer who obtained information from a nurse about an operation that was the subject of a malpractice suit, which cast doubt on the defendant hospital's version of events. The attorney, who was not involved in the litigation, approached the lawyer for the plaintiff and offered to provide information about the witness's identity in exchange for a consulting fee. See *id.* at 290; *cf.* *Williamson v. Super. Ct. of L.A. County*, 582 P.2d 126 (Cal. 1978) (employing similar reasoning in finding it impermissible for a defendant to buy a codefendant's agreement not to use a witness at trial).

<sup>264</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992) (concerning the use of threats of prosecution in connection with a civil matter).

<sup>265</sup> See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-105(A) (1981).

<sup>266</sup> *Id.* EC 7-21.

omitted this rule because they viewed it as overly broad.<sup>267</sup> The ethics committee noted that the crimes of compounding and extortion, as defined in the Model Penal Code, allow a crime victim to threaten prosecution in order to obtain restitution for harm caused by the offense. It found that such threats do not subvert the criminal justice system if the threatened criminal liability is well-founded in fact and law and arises from the same facts or transaction as the civil claim. The committee cautioned, however, that “exploitation of extraneous matters . . . to gain leverage in settling a civil claim” would tend to prejudice the administration of justice and may violate Model Rule 8.4.<sup>268</sup>

Noncooperation offers of the sort I have been discussing fall on the unethical side of this line. When a crime victim forgoes the right to ask law enforcement authorities to punish the offender, the potential criminal proceeding that is affected arises directly from a wrong committed against the victim. In contrast, when a plaintiff agrees not to disclose relevant information to others with claims against the defendant, the affected proceedings have a basis independent of the wrong suffered by the plaintiff. The plaintiff’s lawyer is exploiting “extraneous matters” to gain advantage in a way that has a tangible impact on other parties’ ability to prove their claims.

### 3. *To Whom Must Disclosure Be Allowed?*

Rule 3.4(f) prohibits a lawyer from asking a nonclient to “refrain from voluntarily giving relevant information to *another party*.”<sup>269</sup> The word “party” has a range of possible meanings in ordinary and legal usage. In its narrowest sense, it means a person who is a formal party to a legal proceeding, such as the plaintiff or defendant in a civil lawsuit. It can also mean a person who is involved or has an interest in a dispute or transaction, regardless of whether a formal proceeding has been

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<sup>267</sup> See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-363 (1992).

<sup>268</sup> *Id.* Two years later, the committee found that the use of threats to bring a disciplinary complaint against opposing counsel to gain advantage in a civil settlement, although not expressly prohibited in the Model Rules, generally would constitute “conduct that is prejudicial to the administration of justice” under Rule 8.4(d), in part because such a threat introduces “extraneous factors” unrelated to the merits of the client’s claim into the decision whether to settle or proceed to trial. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-383 (1994).

<sup>269</sup> MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (2008) (emphasis added).

filed. For example, someone whose rights have been adversely affected by another's actions can be referred to as an "aggrieved party."<sup>270</sup> In its broadest sense, "party" can simply mean "person," as in the phrase "third party." The rule's language is also ambiguous as to when the person's status as a "party" matters. Does "another party" refer only to someone who is a party at the moment the noncooperation request is made, or does it also extend to future parties (i.e., to someone who is a "party" when the act of "voluntarily giving relevant information" occurs)?

The interpretive approach taken by the ABA's ethics committee in a 1995 opinion that addressed similar issues is instructive. The committee considered how the word "party" should be construed in Model Rule 4.2, which at the time prohibited communications "with a party the lawyer knows to be represented by another lawyer."<sup>271</sup> It looked to the purposes that the rule is intended to serve, and concluded that the rule's goals of protecting against interference with lawyer-client relationships and avoiding the risk of attorney overreaching are best achieved by reading the word "party" in its broadest sense, as being equivalent to "person."<sup>272</sup> Interpreting "party" to refer only to those who are formal parties in litigation would make little sense, the committee found, since Rule 4.2's purposes are equally applicable to persons who have retained counsel "when litigation is simply under consideration, even though it has not actually been instituted."<sup>273</sup>

Ambiguities in Rule 3.4(f) should also be resolved in light of its purposes.<sup>274</sup> The rule is aimed at preventing harms to the integrity of adversary litigation that result when lawyers block

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<sup>270</sup> See BLACK'S LAW DICTIONARY 1154 (8th ed. 2004) (definitions of "party" and "aggrieved party"); see also BLACK'S LAW DICTIONARY 1122 (6th ed. 1990) (defining "party" as "[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually").

<sup>271</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 (1994).

<sup>272</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995). The committee also proposed that to eliminate ambiguities arising from the use of the word "party," Rule 4.2 should be amended to substitute the word "person" for "party." *Id.* at nn.2 & 16. The ABA House of Delegates later made this change. See LEGISLATIVE HISTORY, *supra* note 150, at 534.

<sup>273</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396, at n.17 (1995).

<sup>274</sup> See *supra* Part IV.A.



the flow of relevant information, not only to persons who have actually sued their clients, but also to those investigating potential claims. The original articulation of the principle in the ABA's Formal Opinion 131 made this clear. The ABA found witness noncooperation requests unethical because such conduct tends to "prevent the truth from being presented to the court *in the event litigation arises*."<sup>275</sup> Among the rationales that courts have given for a principle of unimpeded witness access are that the interests of the justice system are furthered when attorneys are able to ascertain the facts before filing suit, so that meritorious cases will be filed or settled and meritless ones will not be brought solely to obtain discovery.<sup>276</sup> Accordingly, "another party" in Rule 3.4(f) should be read to mean a person with a potential claim against the lawyer's client, regardless of whether suit has actually been filed.<sup>277</sup>

Rule 3.4(f) should be construed to cover future parties as well as current ones. The rule is aimed at preventing interference with voluntary disclosures of relevant information to parties with claims against the lawyer's client. Whether the claim already exists at the time of the noncooperation request or arises later should make no difference. The settlements that lawyers for the Archdiocese of Boston negotiated in the 1990s in at least seventy cases alleging child molestation by priests, which required the plaintiffs to remain silent about the underlying facts, illustrate the point.<sup>278</sup> The information known by a settling plaintiff would be highly relevant in any later suit alleging that the same priest abused another victim, both to establish a pattern of conduct by the abuser and the archdiocese's awareness of the danger. Making the ethical propriety of the defense lawyer's noncooperation request depend on whether the priest had already abused another child or would do so in the future would

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<sup>275</sup> ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 131 (1935) (emphasis added).

<sup>276</sup> See, e.g., *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259, 261–62 (S.D. Iowa 1993); see also *supra* text accompanying notes 178–84.

<sup>277</sup> Note that this represents a rejection of the broadest definition of "party" (as "person") as well as the narrowest (as formal participant in a legal proceeding). Rule 3.4(f)'s reference to "relevant information" and its placement in a rule that is entitled "Fairness to Opposing Party and Counsel" suggest that "party" is intended to refer to a person who has some sort of claim against the lawyer's client, rather than any person at all.

<sup>278</sup> See Carroll et al., *supra* note 26.

be arbitrary in relation to the purposes that Rule 3.4(f) is intended to serve. In either situation, it would be foreseeable that the first victim's testimony would have evidentiary value in any similar suits against the defendant.

Another question raised by the phrase "another party" is whether Rule 3.4(f) prohibits requesting a witness to refrain from testifying at a trial or hearing unless subpoenaed. South Carolina's ethics committee concluded that such a provision, "useless as it . . . may be," would not violate Rule 3.4(f).<sup>279</sup> This is a sound interpretation of the rule's language, inasmuch as the tribunal deciding a dispute cannot plausibly be described as a "party" to the dispute.<sup>280</sup> However, requesting or offering inducements to a witness to withhold voluntary testimony should be considered a violation of Rule 8.4(d). Even if it is relatively easy for an opposing party to subpoena the witness, it still places an obstacle in the path of the core fact-finding function of a hearing, and sometimes it may matter a great deal, such as when a witness is beyond the geographic reach of a subpoena. The "conduct prejudicial" rule has frequently, and appropriately, been applied to discipline lawyers for requests or agreements aimed at discouraging witnesses from testifying.<sup>281</sup>

A public agency that is conducting an investigation to determine whether to file charges or bring an enforcement action should be considered a "party" covered by Rule 3.4(f). Agency officials acting in this role are a "party" in the same sense as private litigants who are investigating a possible lawsuit—they are seeking to assess whether a potential legal claim is well-founded and should be pursued.<sup>282</sup> In an employment discrimination case, for example, it would violate Rule 3.4(f) for a defense lawyer to offer a settlement that would prohibit the plaintiff from making voluntary disclosures to the

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<sup>279</sup> S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993).

<sup>280</sup> *But see In re Kornreich*, 693 A.2d 877, 878, 883 (N.J. 1997) (holding, without discussion of the rule's "another party" language, that an attorney violated Rule 3.4(f) in attempting to dissuade a witness from attending court).

<sup>281</sup> *See supra* note 254.

<sup>282</sup> Under Title VII and many similar administrative schemes, the agency plays an adjudicatory role in the sense that it acts on a complaint made by an aggrieved party, hears both sides, and issues a ruling. The purpose of the proceeding, however, is not to determine the rights of the parties but to assess whether there is sufficient cause to bring an enforcement action before a court or administrative law judge. *See* 42 U.S.C. § 2000e-5 (2008) (enforcement provisions of Title VII).

EEOC or a comparable state agency investigating other discrimination complaints against the same defendant.

#### 4. *The Employee Exception*

Rule 3.4(f) contains an exception clause that allows a noncooperation request to be made if “the person is a relative or an employee or other agent of a client” and the lawyer reasonably believes the person’s interests will not be adversely affected by withholding information.<sup>283</sup> The official comment explains the employee exception by noting “employees may identify their interests with those of the client,” and cross-references Rule 4.2, the rule prohibiting lawyer contacts with represented parties.<sup>284</sup> According to the *Restatement*, such requests are permitted because individuals in the specified relationships may have a “special loyalty to the lawyer’s client” and a duty to protect confidential information.<sup>285</sup>

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<sup>283</sup> MODEL RULES OF PROF’L CONDUCT R. 3.4(f)(1) & (2) (2008). The rule’s language is clear that *both* requirements must be satisfied in order for the exception to apply; i.e., the person in question must be a relative, employee, or other agent of the client, *and* the lawyer must reasonably believe that the person’s interests will not be adversely affected. See *In re Alcantara*, 676 A.2d 1030, 1034–35 (N.J. 1995); Colo. Bar Ass’n Ethics Comm., Op. 120 (2008). But see Cohen & Bernard, *supra* note 11 (incorrectly describing Rule 3.4(f)(2) as a “catch-all” exception that allows lawyers to request noncooperation whenever they reasonably believe that the person’s interests will not be adversely affected thereby).

<sup>284</sup> MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 4 (2008). Because Rule 3.4(f) uses the word “request,” it is possible to read the exception as forbidding a lawyer from *requiring*, as opposed to requesting, that employees refuse to be interviewed by someone suing the company. See Wis. State Bar Prof’l Ethics Comm., Formal Op. E-07-01 (2007); *Proposed N.Y. Rules*, *supra* note 247, Reporter’s Note to Rule 3.4 (interpreting Rule 3.4(f) in this manner). It seems doubtful that the rule was intended to have this effect. The word “request” is used in reference to the general prohibition rather than the exception (“A lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party unless . . .”), and the prohibition clearly reaches demands as well as nonbinding requests. Employers are ordinarily free to request their employees to do something to serve its interests, or else be fired. See 2 HAZARD & HODES, *supra* note 8, § 30.12, illus. 30-8 (concluding that a lawyer does not violate the rule by informing a client’s employees that they should not speak to a lawyer or investigator for a plaintiff suing the company unless he is present and that they will be fired if they do so).

<sup>285</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. e (2000). The *Restatement* also explains that the exception for “other agent[s]” is designed to reach “an investigator or expert witness” retained by the lawyer’s client or the lawyer. *Id.*; see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-378 (1993).

The exception has not been, and should not be, read to extend to former employees.<sup>286</sup> It is phrased in the present tense (“the person is . . . an employee . . . of a client”<sup>287</sup>), which suggests that the drafters intended it to be applicable only to current employees.<sup>288</sup> The assumptions of special loyalty and shared interests that underlie the employee exception generally hold true only while the employment relationship lasts. The cross-reference to Rule 4.2 indicates that Rule 3.4(f)’s exception is designed to parallel the no-contact rule: in situations where an opposing lawyer is prohibited from speaking with employees of a represented entity, it is appropriate for the entity’s lawyer to ask its employees not to speak to opposing counsel.<sup>289</sup> Rule 4.2 has

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<sup>286</sup> See, e.g., *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 n.3 (D. Mont. 1986). The *Restatement* takes the position that noncooperation requests are permissible with respect to former employees “only if the person continues to maintain a confidential relationship with the former employer, such as an employee continuing to consult with respect to the matter involved in the representation”—in other words, with someone who remains a *current* agent of the employer—or if the individual “possesses extensive confidential information of the former employer.” *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 116 cmt. e (2000). That last qualification runs parallel to the *Restatement* requirement that lawyers not communicate with persons who are known to have had extensive exposure to privileged or otherwise legally protected information through their employment and “who likely possess[] little information that is not privileged.” *Id.* § 102 cmt. d. This applies only in “situations in which confidentiality occurs by operation of law and not solely, for example, through a contractual undertaking of the agent.” *Id.*

<sup>287</sup> *MODEL RULES OF PROF’L CONDUCT* R. 3.4(f)(1) (2008). Virginia is the only state that has modified the exception to allow noncooperation requests to be made to “a current *or former* employee” where “the information is relevant in a pending civil matter.” *VA. RULES OF PROF’L CONDUCT* R. 3.4(h) (2004) (emphasis added).

<sup>288</sup> Cf. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (holding that Congress’s use of the present indicative verb form in defining a statutory term means that a person must be presently in that condition to qualify); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341–42 (1997) (finding that the terms “employees” and “employed” in Title VII could be read to include former employees because of the absence of any temporal qualifier such as would exist if the statute said “*is employed*”).

<sup>289</sup> The exception in Rule 3.4(f) is broader than Rule 4.2 insofar as it authorizes asking all current employees to withhold cooperation from an adversary, while Rule 4.2 permits the opposing lawyer to seek interviews with some categories of current employees. See *MODEL RULES OF PROF’L CONDUCT* R. 4.2 cmt. 7 (2008); *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 100 cmt. f (2000). Three states have narrowed the exception to bring it into closer alignment with the no-contact rule. North Carolina’s version of Rule 3.4(f) limits the exception to managerial employees. *N.C. RULES OF PROF’L CONDUCT* R. 3.4(f)(1) (2006). In Pennsylvania, noncooperation requests are allowed under the employee exception only when “such conduct is not prohibited by Rule 4.2.” *PA. RULES OF PROF’L CONDUCT* R. 3.4(d)(2) (2006). The Supreme Court of Washington has held that

been interpreted to allow *ex parte* interviews with former employees so as not to unduly restrict adversaries' access to the facts.<sup>290</sup> Rule 3.4(f)'s core principle of noninterference with witness access would be severely undermined if its exception were read to allow employers' lawyers to effectively foreclose such interviews by engineering agreements that require former employees to withhold cooperation.<sup>291</sup>

The exception should be understood to carry with it the requirement that any noncooperation obligation placed on an employee not extend beyond the period of that person's employment. For example, consider the case of a plaintiff who files a sexual harassment complaint without quitting her job. As long as she remains an employee, the company's lawyer can ask for a noncooperation clause as part of a settlement without violating Rule 3.4(f). But if the agreement would continue to bar her from voluntarily disclosing relevant information to other litigants after she leaves the job, the lawyer's request should be considered unethical. The rule's language is ambiguous as to whether the condition that "the person is . . . an employee" must be satisfied only at the time the noncooperation request is made, or whether it also must hold true at the time of "voluntarily giving relevant information to another party."<sup>292</sup> The latter reading best serves the rule's purposes. Otherwise, the exception's limitation to current employees could be rendered a nullity by requiring every employee, while still employed, to sign

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noncooperation requests may be made only to those employees who would be considered represented parties under the no-contact rule, reasoning that "[a]n attorney's right to interview corporate employees would be a hollow one if corporations were permitted to instruct their employees not to meet with adverse counsel." *Wright v. Group Health Hosp.*, 691 P.2d 564, 570 (Wash. 1984); *see also* WASH. RULES OF PROF'L CONDUCT R. 3.4 cmt. 5 (2006) (explaining that Washington did not adopt Model Rule 3.4(f) because it is inconsistent with *Wright*).

<sup>290</sup> *See supra* note 180 and accompanying text; *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991) (finding that neither the text nor the commentary to Rule 4.2 suggest that coverage of former employees was intended and that "expand[ing] its coverage to former employees by means of liberal interpretation" is inappropriate where the effect would be "to inhibit the acquisition of information").

<sup>291</sup> *Cf. Comm'r v. Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.").

<sup>292</sup> MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (2008).

an agreement pledging to never cooperate with anyone suing the company.

*5. Placing Restrictions on the Type of Information That May Be Disclosed or the Manner of Disclosure*

Is it ethically permissible to require in a settlement agreement that the plaintiff not disclose (even to other litigants) certain types of information, such as the terms of the settlement agreement, information learned through discovery, privileged information, or trade secrets? Can a defendant require that the plaintiff not initiate contacts with other litigants, insist on a right to be present at any interviews, or impose other restrictions to minimize the risk of overly broad disclosure?

Answers to these questions should be informed by the rule's *raison d'être*, which is to give litigants a fair opportunity to gather information that "may be useful . . . in establishing the true facts and circumstances affecting the dispute."<sup>293</sup> Although part of the rule's purpose is to enable litigants to develop their cases without the expense and constraints of formal discovery, it is founded on the same conception of party responsibility for finding and developing the facts that informs the scope of discovery under the Federal Rules of Civil Procedure. The phrase "relevant information" in Rule 3.4(f) should be read as broadly as the discovery rules' definition of relevance—anything relating to a party's claim or defense that "appears reasonably calculated to lead to the discovery of admissible evidence."<sup>294</sup>

*a. Secrecy of the Amount or Terms of a Settlement*

This standard suggests that it should be permissible to prohibit disclosure of a settlement agreement's monetary terms. Settlement amounts are nearly always inadmissible in subsequent proceedings and have generally been held to be beyond the scope of discovery.<sup>295</sup> The settlement terms are a construction of the settling parties, rather than historical facts

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<sup>293</sup> ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 131 (1935).

<sup>294</sup> FED. R. CIV. P. 26(b)(1).

<sup>295</sup> See FED. R. EVID. 408; *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158 (E.D.N.Y. 1982). Prior settlement payments may be discoverable in unusual circumstances where a compelling need can be shown. See *Doré*, *supra* note 9, at 815 n.139 (giving examples).

having evidentiary significance.<sup>296</sup> While the information may be very useful to future litigants bringing similar cases, because it sends signals about the defendant's assessment of the strength of the claim against it and how much it is willing to pay to avoid trial, the defendant has a legitimate interest in keeping these matters confidential. Part of what Rule 3.4(f) is designed to protect—the availability of ex parte witness interviews so that parties can learn facts without revealing their litigation strategies—rests on the idea that the adversary system works best when work product of this sort is shielded from disclosure.<sup>297</sup> A large settlement may be based on factors unrelated to the merits, such as the defendant's risk averseness, concerns about a biased tribunal, or fear of adverse publicity. Disclosure could have the effect of encouraging frivolous lawsuits.<sup>298</sup>

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<sup>296</sup> See THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES 45 (2007) (recommending that courts assessing whether to approve or enforce a confidential settlement “should distinguish between ‘settlement facts,’ such as the amount, terms and conditions of a compromise, and ‘adjudicative facts’ that are relevant to the merits of the underlying controversy”); Doré, *supra* note 27, at 398–99 (arguing that agreements to keep settlement terms confidential should be enforced by courts because, “[u]nlike the historical facts giving rise to the settlement, settlement facts lay peculiarly within party control and would not exist but for the litigation in which they were generated”); see also Doré, *supra* note 9, at 814. The cases holding noncooperation agreements unenforceable in other proceedings have generally limited this principle to factual information surrounding the settled case, but not the amount a case settled for. See, e.g., *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993).

<sup>297</sup> See *supra* text accompanying notes 112–31, 158, 181–84.

<sup>298</sup> See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2685 (1995) (arguing against generally making settlements public because good settlement “requires the revelation of . . . ‘nonlegally relevant facts,’ such as the parties’ real and underlying needs and interests . . . including such factors as emotional needs and motives, future business needs, financial data, . . . [and] psychological and social issues like risk aversion,” and because disclosure of settlement terms will chill the willingness of parties to reach agreement based on such factors); Weinstein, *supra* note 16, at 517 (“Sometimes a defendant will give a premium to a particularly effective advocate or appealing case because going to trial might result in an unusually high verdict, ratcheting up settlements across the board. At other times the defendant will agree to a settlement in a completely meritless case because the jurisdiction is notoriously pro-plaintiff . . . .”); Alison Lothes, Comment, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants’ Economic Incentives*, 154 U. PA. L. REV. 433, 460–63 (2005) (arguing that disclosure of settlement amounts may reveal more about a defendant’s strategies than its culpability and create incentives for frivolous suits).

Nonmonetary provisions that are designed to prevent the recurrence of wrongful conduct are another matter. The settlement of a sexual harassment claim, for example, might contain a requirement that the employer institute sexual harassment training, and a Clean Water Act settlement might set forth steps that a factory will take to avoid future chemical spills. In subsequent cases alleging similar misconduct, settlement terms of this sort may constitute or lead to admissible evidence relevant to liability or damages on issues such as the defendant's awareness of the nature or extent of a problem and whether it exercised reasonable care to prevent recurrence.<sup>299</sup> Under Rule 3.4(f), disclosure of such settlement terms to other litigants must be allowed.

*b. Information Learned Through Discovery*

An argument might be made for limiting the scope of disclosure under Rule 3.4(f) to knowledge that a person acquired independently of the lawsuit but not information learned by means of discovery. In holding that protective orders which

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A case for making settlement data available to other litigants can be made on grounds of economic efficiency. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 570 (6th ed. 2003) (suggesting that confidential settlement agreements impose costs on other litigants and impair the efficiency of the court system because if plaintiffs "knew the terms of . . . earlier settlements they would be able to make a more accurate estimate of the value of their own claims"); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 886–903 (2007) (arguing that a rule prohibiting confidential settlements once suit has been filed would lead to more accurate settlement valuation, more early settlements, and less frivolous litigation). Greater public availability of settlement information may also send valuable signals about the extent and seriousness of problems such as workplace discrimination and defective products, assist in the evaluation of how effectively laws are functioning, and help people make better informed decisions about where to work or what to buy. See Moss, *supra*, at 903–10; see also Kotkin, *supra* note 52, at 961–71. These are good reasons to consider enacting statutes or rules to forbid settlement on secret terms, but they have little bearing on how Rule 3.4(f), which exists to safeguard litigant access to relevant evidence, should be interpreted.

<sup>299</sup> A New Jersey trial court followed this line of reasoning in holding that a confidentiality agreement that barred disclosure of the terms of a sexual harassment settlement was unenforceable when the information was sought by a plaintiff who later brought a similar harassment claim against the same defendant. The court found the settlement terms relevant to ascertaining what the company knew, when they knew it, and how they responded when the existence of a hostile work environment was brought to their attention. See *Llerena v. J.B. Hanauer & Co.*, 845 A.2d 732, 736, 739 (N.J. Super. Ct. Law Div. 2002). It is not clear, however, why the court concluded that the monetary amount of the settlement was relevant.



prohibit the further dissemination of discovery materials do not violate litigants' First Amendment rights, the Supreme Court has reasoned that a party's access to those materials exists only by virtue of the court's discovery processes, and limitations on the use of the information can be imposed as a quid pro quo for broad access.<sup>300</sup> A settlement agreement that requires the return of all discovery materials or prohibits their disclosure to anyone (including other litigants) arguably rests on the same bargain; the information does not "belong" to the plaintiff but was made available with the implicit understanding that it be used only for purposes of trying the plaintiff's case.<sup>301</sup>

Rule 3.4(f), however, is not about the plaintiff's ownership of information or interest in disseminating it. Its purpose is to forbid adversarial interference with *other parties'* access to relevant information. The fact that a court has the authority to issue a protective order prohibiting the further dissemination of discovery materials does not entitle a defendant to such protection; the rules of procedure require that protective orders be issued only upon a showing of good cause.<sup>302</sup> If there are legitimate reasons for restricting the use of certain discovery materials, because they contain trade secrets or implicate personal privacy interests, for example, a party can apply for a protective order.<sup>303</sup> In the absence of a court-approved protective order, neither the text nor the objectives of Rule 3.4(f) provides a basis for exempting information learned in discovery from the rule's requirement that a party's lawyer not

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<sup>300</sup> See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32–33 (1984). The Court has given more stringent First Amendment protection to the dissemination of information obtained independently of judicial processes. See *Butterworth v. Smith*, 494 U.S. 624, 631–32 (1990) (holding that a state statute that was used to prohibit a grand jury witness from ever disclosing the facts about which he testified—information that he already possessed and did not learn about as a result of his participation in the grand jury process—was unconstitutional).

<sup>301</sup> Cf. *Béchamps*, *supra* note 47, at 151 (arguing, by analogy to the First Amendment cases, that stipulated gag orders should be limited to information obtained through the discovery process, and "should not restrict dissemination of information which the parties acquired prior to the litigation or from independent sources").

<sup>302</sup> E.g., FED. R. CIV. P. 26(c)(1).

<sup>303</sup> Protective orders generally should allow for disclosure to other litigants who have a legitimate need for the information. See *supra* note 32 and accompanying text. Procedural safeguards, such as requiring that such litigants only use the information for purposes of the litigation, may be appropriate.

interfere with an adversary's ability to seek relevant information from a person who has it.<sup>304</sup>

*c. Privileged Information, Trade Secrets, and "Irrelevant" Information*

Prohibiting the disclosure of privileged information that is subject to a preexisting legal duty of confidentiality should be permissible under Rule 3.4(f). For example, if the plaintiff in a wrongful discharge suit is a former manager who communicated with corporate counsel, the defendant's lawyer can legitimately ask for a settlement provision that categorically bars the plaintiff from disclosing information subject to the attorney-client privilege. Rule 3.4(f) makes no express exception for privileged information, but the nondisclosure obligation would exist even in the absence of the lawyer's request, and it would serve no purpose to read the rule to prevent a lawyer from taking steps to ensure compliance.<sup>305</sup> There is no interference with the legitimate informational interests of other litigants: privileged information is beyond the scope of discovery,<sup>306</sup> and a lawyer

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<sup>304</sup> In the absence of an order or agreement to the contrary, parties are free to disclose discovery materials to whomever they wish. See THE SEDONA CONFERENCE, *supra* note 296, at 7 (citing case authority). Since there is no preexisting obligation to keep the information confidential, Rule 3.4(f) prohibits a lawyer from requesting a nonclient to refrain from disclosing such materials to other parties with claims against the lawyer's client when the information is relevant to those claims. This does not mean that contractual agreements to keep discovery materials confidential are per se prohibited under Rule 3.4(f); they simply need to include an exception that allows for the limited class of disclosures that the rule protects. If a party believes that no such exception is appropriate, the claim should be decided by the court. Offering inducements to obtain the other side's agreement not to oppose such a motion should be considered a violation of Rule 3.4(f); it is tantamount to asking a witness to voluntarily refrain from making disclosures covered by the rule. Cf. Koniak, *supra* note 13, at 805 (arguing that payoffs to get an opposing party to agree to a protective order should be sanctionable).

<sup>305</sup> The *Restatement* takes this position in its commentary on the rule against noncooperation requests. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. e (2000). Two states have modified Model Rule 3.4(f) to provide an explicit exception for information that is subject to a legal duty of confidentiality. See ALA. RULES OF PROF'L CONDUCT R. 3.4(d)(2) (2008) (creating exception where "the person may be required by law to refrain from disclosing the information"); GA. RULES OF PROF'L CONDUCT R. 3.4(f)(2) (2008) (creating an exception for information "subject to the assertion of a privilege by the client").

<sup>306</sup> FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . .").

conducting informal interviews is prohibited under the ethics rules from seeking privileged information.<sup>307</sup>

A harder issue is presented by confidentiality obligations that are recognized in law, but generally yield in judicial proceedings to the interest of other litigants in obtaining relevant evidence through discovery. Employees have a common law and/or statutory duty not to disclose trade secrets or other proprietary commercial information of their employer, which continues after the employment relationship ends.<sup>308</sup> Unlike privileged information, trade secrets are discoverable, but a party may apply for a protective order, and if good cause is shown a court can order that the information “not be revealed or be revealed only in a specified way.”<sup>309</sup> The usual judicial response is to grant a protective order that allows the discovery if the information is relevant, but limits its use to the litigation and contains safeguards to ensure the information is not publicly disclosed.<sup>310</sup>

An agreement that prohibits the voluntary disclosure of trade secret information relevant to other parties’ claims runs counter to the purposes of Rule 3.4(f) to the extent that it impairs the ability of other litigants to gather discoverable evidence through *ex parte* interviews. On the other hand, such an agreement reflects a preexisting legal obligation not to disclose in the absence of legal compulsion, and ensures that the defendant has the opportunity to obtain the safeguards of a protective order. On balance, it probably should be allowed. This interpretation is consistent with the case law on enforceability; courts have found

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<sup>307</sup> See MODEL RULES OF PROF’L CONDUCT R. 4.4(a), R. 4.4 cmt. 1 (2008) (prohibiting lawyers from using methods of obtaining evidence that violate a person’s rights, including intrusions into privileged relationships); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 91-359 (1991) (stating that an attorney interviewing a former employee of an adversary party “must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications” so as not to violate Rule 4.4).

<sup>308</sup> See Becker, *supra* note 179, at 967–76 (discussing the scope and sources of legal protection of trade secrets and proprietary information held by former employees). Trade secrets and proprietary information are distinct concepts, but for ease of discussion I will use “trade secrets” to refer to both.

<sup>309</sup> FED. R. CIV. P. 26(c)(1)(G).

<sup>310</sup> Similar protection is often given to information that implicates personal privacy interests, such as sensitive medical or financial information. See *id.* R. 26(c)(1) (authorizing the issuance of protective orders “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”).

noncooperation agreements void as contrary to public policy only when such agreements go beyond protecting trade secrets and privileged information.<sup>311</sup> However, it is important to note that information concerning an employer's illegal or tortious conduct generally cannot qualify as a trade secret.<sup>312</sup> Seeking to block the disclosure of information about wrongful conduct that is relevant to the claims of other litigants or investigating agencies, under the guise of trade secret protection, would violate Rule 3.4(f).

A defense lawyer whose goal is to draft a settlement agreement that prohibits all disclosures relating to the underlying facts, except for what must be allowed under Rule 3.4(f), might object to leaving it entirely up to the plaintiff's judgment to determine what constitutes "relevant information to

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<sup>311</sup> See *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1135–37 (N.D. Cal. 2002) (holding agreements that precluded former employees from being interviewed about company's allegedly illegal activities void as contrary to public policy, but stating that agreements to keep privileged information, trade secrets, or highly personal medical information confidential are legitimate); *Hoffman v. Sbarro, Inc.*, No. 97 Civ. 4484 (SS), 1997 U.S. Dist. LEXIS 18908, at \*4 (S.D.N.Y. Nov. 26, 1997) (invalidating agreement that prevented employees from being interviewed about allegedly illegal payroll practices, while suggesting that the result might be different if "competition-related information . . . such as pricing strategies, customer lists, or secret recipes" were involved); *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 445 (S.D.N.Y. 1995) (finding confidentiality agreement invalid insofar as it prohibited disclosures relevant to age discrimination claim but legitimate with respect to "genuine trade secrets or other legitimately privileged information"); cf. *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 916–17, 920–23 (D. Nev. 2006) (holding confidentiality agreement that was limited to trade secrets and confidential product information was enforceable against ex-employee who voluntarily disclosed such information to a plaintiff suing his ex-employer).

<sup>312</sup> See *JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d at 1135–36 (holding that "whistleblower-type information about allegedly unlawful acts" do not constitute trade secrets and that a confidentiality agreement cannot be enforced to prevent another litigant from seeking relevant information about such misconduct through ex parte interviews); *Davidson Supply Co. v. P.P.E., Inc.*, 986 F. Supp. 956, 959 (D. Md. 1997) (holding that trade secret protection cannot be claimed for information relating to a defendant's illegal acts); *McGrane v. Reader's Digest Ass'n*, 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993) (noting that "[d]isclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees"); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627 (1999) (arguing, based on contract, trade secret, and agency principles, that agreements protecting trade secrets and confidential business information are not enforceable to prevent disclosures of illegal or tortious conduct or dangers to health and safety); Garfield, *supra* note 35, at 327–28 (concluding that "a court is unlikely to protect information about an employer's tortious conduct as a trade secret" under principles established in case law and the *Restatement of Unfair Competition*).

another party” and isn’t privileged or a trade secret. These risks, however, are unavoidable by-products of the policy balance struck in the rule: the harms to the truth-seeking function of the adversary system that arise when lawyers interfere with a witness’s freedom to convey relevant evidence to opposing parties in *ex parte* interviews have been deemed to outweigh the benefits of restricting contacts to the judicially supervised setting of the formal discovery process.

A settlement agreement that allows for the disclosures that Rule 3.4(f) contemplates can nonetheless provide significant guidance as to the scope of permissible disclosure and incentives to avoid going beyond it. Clear language describing the types of information that are privileged or subject to trade secret protection, and imposing penalties for violations, will give a plaintiff ample incentive to be cautious about crossing the line into impermissible disclosures. And while the term “relevant information” is inherently fuzzy, a plaintiff who gratuitously discloses disparaging information that bears no reasonable relationship to another party’s claim will run the risk of being found in breach of the agreement.

*d. Monitoring Interviews and “Don’t Tell Unless Asked” Provisions*

One settlement condition that should not be allowed is a requirement that the defendant have the opportunity to attend and monitor any interviews. While this could help to deter improper disclosures, it runs counter to Rule 3.4(f)’s policy of preserving access to *ex parte* interviews, not only because they are less costly than formal discovery (in this regard, the adversary’s presence at an informal interview would not create any additional expense), but also because the adversary’s presence may chill a witness’s willingness to disclose relevant facts. Opposing counsel’s presence also hinders the interviewing lawyer’s ability to “explore the witness’[s] knowledge, memory and opinion . . . in light of information counsel may have developed from other sources” without disclosing the work product that informs the lawyer’s questions.<sup>313</sup> Under Rule

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<sup>313</sup> *IBM Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975); *see also Hickman v. Taylor*, 329 U.S. 495, 508–14 (1947) (explaining why materials memorializing *ex parte* witness interviews are work product ordinarily shielded from discovery). In one of the cases holding that a noncooperation agreement could not be used to

3.4(f) and the identical principle that has developed in the criminal case law, courts have found it improper for a lawyer to request a witness not to submit to an interview unless the lawyer is present.<sup>314</sup>

Can a defendant's lawyer demand that the plaintiff agree not to initiate contact with other parties and disclose information only if approached? A few of the enforceability cases suggest this might be an acceptable way of ensuring that the plaintiff does not cross the line from providing relevant information to actively fomenting litigation.<sup>315</sup> Such a restriction, however, is hard to square with the text and goals of Rule 3.4(f).

To be sure, some restrictions on how information is disseminated should be permitted. Running advertisements or sending out a press release could help to ensure that people with potential claims learn of relevant evidence, but also would broadcast information harmful to the defendant's reputation to

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prevent witness interviews, the judge's order provided that the defendant would be permitted to have a representative present as an observer, unless the defendant had previously interviewed the witness. See *Chambers*, 159 F.R.D. at 445-46. This procedure would likely lead to guarded responses that would substantially undermine the value of informal interviews, and it runs counter to the logic of *Hickman* and *Edelstein*, which found that confidential witness interviews play an essential role in the search for truth. See *supra* text accompanying notes 112-23. Other decisions have rejected the *Chambers* court's requirement that the defendant be given the opportunity to attend. See *JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d at 1138; *Hoffman*, 1997 U.S. Dist. LEXIS 18908, at \*4-\*7.

<sup>314</sup> See, e.g., *Davis v. Dow Corning Corp.*, 530 N.W.2d 178, 179-81 (Mich. Ct. App. 1995) (holding that plaintiffs' lawyer's letter to plaintiffs' treating physicians requesting that they not speak to defense attorneys unless plaintiffs' counsel was present violated Rule 3.4(f)); *State v. Hofstetter*, 878 P.2d 474, 480-82 (Wash. Ct. App. 1994) (listing and discussing decisions finding requests that witnesses not speak to defense counsel except in the prosecutor's presence to be improper); S.C. Bar Ethics Advisory Comm., Op. 99-14 (1999) (finding that prosecutor's request that public safety officers not discuss cases with criminal defense attorneys outside his presence would violate Rule 3.4(f)). But see *BINDER & BERGMAN*, *supra* note 146, at 245 n.2 (expressing the view that requesting a witness "to notify one whenever he or she is contacted by the opposition so that one can arrange to be present at any interview" would be ethically permissible).

<sup>315</sup> See *Saini*, 434 F. Supp. 2d at 921-22 (relying in part on the fact that a former employee initiated disclosures to another litigant, rather than waiting to be contacted, as reason for holding the agreement enforceable); *Chambers*, 159 F.R.D. at 444 (limiting holding that noncooperation agreements are unenforceable to situations "where the former employee is not the initiating party" and expressly declining to reach the issue of whether "restrictions on recruiting others to complain or sue" are permissible).

the public at large.<sup>316</sup> However, a “don’t tell unless asked” requirement goes too far in the other direction. A person who has settled with a defendant may have information highly probative of another party’s claim. The other claimant may be unaware of the witness’s knowledge and thus have no reason to contact the witness; without the information, the person may even be unaware that he or she has the basis for a claim. It is not uncommon for a witness, upon hearing about a case or harmful conduct by a defendant, to contact the injured party or an investigating agency to volunteer relevant information.<sup>317</sup> Rule 3.4(f), which prohibits interference with “voluntarily giving relevant information to another party,” contains no language limiting this to situations where the witness has first been contacted, and the rule’s core purpose, preventing adversary interference with a party’s access to information that can assist in ascertaining the truth, militates against an interpretation that would categorically exclude witness-initiated disclosures.<sup>318</sup>

A settlement clause along the following lines would strike the appropriate balance:

The plaintiff shall not encourage or solicit litigation against the defendant, but may voluntarily disclose relevant information to a person or agency that has filed, is investigating, or is known to have the basis for a claim against the defendant.

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<sup>316</sup> Cf. Marcus, *supra* note 32, at 499–500 (discussing the problem of how information may be disseminated under protective orders that provide for discovery sharing).

<sup>317</sup> See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 565 (8th Cir. 2007) (describing how a person alleging that Wal-Mart failed to hire him because of mobility impairments contacted the EEOC to offer his services as a possible witness after hearing about a disability discrimination claim that had been filed against Wal-Mart); *Palmer v. Pioneer Inn Assocs.*, 59 P.3d 1237, 1239 (Nev. 2002) (describing how an employee of the defendant company contacted the attorney for a plaintiff who had brought a sex discrimination claim, offering information showing that the reasons given by the company for refusing to hire the plaintiff were pretextual).

<sup>318</sup> Alan Garfield, in his article analyzing promises of silence under contract law, argues that contracts that suppress information about tortious conduct should be unenforceable because they frustrate public policy “by creating barriers for tort victims attempting to identify wrongdoers and thereby vindicate their rights.” Garfield, *supra* note 35, at 325. He gives the example of a person who witnesses one neighbor break another neighbor’s window. “If the negligent neighbor pays the witness for promising not to tell the injured neighbor,” a court ought not to enforce the contract. *Id.* Rule 3.4(f) protects similar interests and should likewise be construed to prohibit the negligent neighbor’s lawyer from inducing the witness to refrain from disclosing to the injured party information that supports a claim for redress.

This would preclude wide-scale publication as a means of reaching potential litigants, but allow targeted disclosures when the plaintiff has reason to know that the recipient has a claim to which the information is relevant.

### CONCLUSION

This Article has made the case that certain settlement terms lawyers frequently demand or accede to are impermissible under the ethics rules. This includes not only agreements that explicitly require noncooperation, but also settlements that mandate secrecy concerning the facts and make no exception for voluntary disclosures of information relevant to other parties' claims. In this concluding section, I will address several general objections that my analysis invites.

One might argue that the very prevalence of such agreements shows that they are consistent with professional ethics norms. If most attorneys have concluded that the ethics rules leave it in the client's hands to decide whether to offer or accept settlement terms that preclude voluntary cooperation, and there is no rule that explicitly and unequivocally says otherwise (Model Rule 3.4(f), after all, says nothing directly about settlements), shouldn't we defer to lawyers' widely shared understanding of the rules governing their behavior? The best short answer to this line of reasoning was given by the first great American legal ethicist, David Hoffman, in 1836:

What is wrong, is not the less so from being common. . . . If, therefore, there be among my brethren, any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing, I unhappily come in collision with what is (erroneously I think) too often denominated the policy of the profession.<sup>319</sup>

Lawyers face substantial economic and cultural pressures to view their obligations through the lens of a partisan, client-centered approach that subordinates systemic and societal values to zealous advocacy and produces immediate financial benefits for their clients and themselves.<sup>320</sup> When interpreting ethics rules

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<sup>319</sup> 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 765 (Baltimore, Joseph Neal, 2d ed. 1836).

<sup>320</sup> See generally Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1324-26 (1995) (discussing factors that



that place limitations on client advocacy, there is good reason to distrust the profession's prevailing wisdom.

Moreover, the fact that settlements requiring noncooperation are common probably has less to do with lawyers making a considered judgment that they are ethical than with a simple lack of awareness of Rule 3.4(f) and its application to settlement.<sup>321</sup> As previously discussed, many plaintiffs' lawyers are uncomfortable with blanket secrecy requirements but have felt obliged to go along based on their belief that the ethics rules tie their hands.<sup>322</sup> Professional conduct rules, as Murray Schwartz has pointed out, can fulfill an important "reinforcement function" by

enabl[ing] lawyers who do not want to assist clients in questionable transactions to decline on the grounds that the [rules do] not permit them to go forward, and thus to avoid the unpleasantness of refusing to assist on a basis that is seen by the client as a personal condemnation.<sup>323</sup>

As more plaintiffs' lawyers become aware that the rules provide a strong argument against noncooperation provisions, more of them can be expected to tell opposing counsel, and explain to their clients, that they simply cannot agree to terms that would violate their professional obligations.<sup>324</sup>

A defense lawyer who refuses to back down in the face of an objection could face a disciplinary complaint. Even if the plaintiff and her counsel are not inclined to take this step, other litigants who later learn that a potential witness cannot be interviewed because of a noncooperation settlement might grieve the lawyers who negotiated the agreement. Although disciplinary boards are often reluctant to impose sanctions for

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have caused civil litigators to gravitate toward a client-centered approach that emphasizes purely partisan conduct and ignores provisions of ethics codes that protect other values); Matasar, *supra* note 207, at 979–80 (discussing the strong pressure lawyers face to engage in client-serving conduct that goes beyond what the rules permit but is deemed acceptable by large numbers of practitioners).

<sup>321</sup> See *supra* text accompanying notes 8–11.

<sup>322</sup> See *supra* text accompanying notes 50–62.

<sup>323</sup> Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 682 (1978).

<sup>324</sup> Explaining why proposed settlement terms violate an ethical rule may be enough to convince opposing counsel to withdraw them. See Bauer, *supra* note 9 (containing sample letter informing defense counsel that settlement demand for noncooperation is unacceptable because it violates Rule 3.4(f)).

conduct deemed acceptable by a large segment of the bar, courts and disciplinary authorities have imposed discipline for conduct that is closely analogous to settlement noncooperation demands, so the possibility of enforcement cannot be discounted.<sup>325</sup> If disciplinary decisions begin to be issued, lawyers' incentives to abide by the rules will be strengthened.<sup>326</sup> Plaintiffs' lawyers who object to defense demands for noncooperation can also seek advisory opinions from ethics committees; one such ruling has already been issued.<sup>327</sup> Although nonbinding, ethics opinions may help to develop a consensus that the practice is professionally unacceptable.<sup>328</sup>

One might question the efficacy of prohibiting lawyers from negotiating settlement terms that are not illegal for their clients.<sup>329</sup> Barring lawyers from negotiating noncooperation clauses would be an exercise in futility if it causes parties to bypass their lawyers and negotiate such agreements on their own. While one can imagine the possibility that a plaintiff or defendant, upon being told by her lawyer that legal ethics rules prohibit the lawyer's involvement in a noncooperation agreement, might enter into direct discussions with the opposing party and conclude the settlement without further legal assistance,<sup>330</sup> this seems unlikely. Litigation tends to be acrimonious, and both plaintiffs and defendants are prone to view their opponents as unpleasant, unreasonable, and difficult to deal with. The vast majority of clients will be reluctant to forgo the filter of having their negotiations conducted by a representative, and nervous about the traps they may fall into if

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<sup>325</sup> See *supra* note 252.

<sup>326</sup> See Zacharias, *supra* note 320, at 1348 (noting that "[t]o the extent that the prohibitive rules are enforced . . . , lawyers have reason to obey [them]," even when they are in tension with a client-centered ethos).

<sup>327</sup> S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993), discussed *supra* text accompanying notes 240, 257.

<sup>328</sup> See Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 749-50 (2002).

<sup>329</sup> See *supra* text accompanying notes 79-84 and *infra* Appendix (explaining why noncooperation agreements generally will not violate criminal statutes).

<sup>330</sup> David Luban has criticized Richard Zitrin's proposed ethics rule that would prohibit lawyers from negotiating secret settlements involving public safety risks on the ground that it would lead clients to do an end run around their lawyers and agree to secrecy on their own. See Luban, *supra* note 72, at 128.

they try to conclude an agreement without legal counsel.<sup>331</sup> A party could also seek out a new lawyer who takes a different view of the ethical issue, but the financial cost, delay, and emotional toll of dismissing counsel and hiring a new one make it unlikely that many clients will take this step.<sup>332</sup> Moreover, many plaintiffs start out with a strong desire to help others harmed by a defendant's wrongful conduct, and have significant qualms about settlement terms that make it harder for others to bring claims. Being informed that a defendant's noncooperation demand is prohibited under lawyer's ethics rules can serve a reinforcing function for such clients, strengthening their commitment to resist when faced with a settlement offer.<sup>333</sup>

Nor is it likely that prohibiting lawyer participation in noncooperation agreements will prevent cases from settling. There is no evidence that settlements have been chilled in the states that have enacted statutes or court rules limiting secrecy.<sup>334</sup>

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<sup>331</sup> Luban raises the further objection that accountants could negotiate the banned secrecy terms on behalf of their clients, and would escape liability for unauthorized practice of law on the theory that conduct prohibited to lawyers cannot be part of the practice of law. *See id.* This strikes me as implausible. The function of negotiating an agreement resolving a client's legal dispute is likely to be viewed by courts as a quintessential aspect of the practice of law inseparable from the giving of legal advice and the exercise of legal skills, even if it involves a settlement term prohibited under lawyers' ethics rules.

<sup>332</sup> *See* Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 497 (2006).

<sup>333</sup> *See supra* note 60. A retainer agreement that informs the client, at the outset of the representation, that the lawyer cannot negotiate a settlement involving noncooperation, and will have to withdraw if the client insists on doing so, can enhance the likelihood that the client will not waver when faced with a settlement offer. Ethics committees have found that engagement agreements that prohibit a client from accepting a settlement with terms that the lawyer deems unacceptable (including retainers that preclude confidential settlements) are impermissible under Model Rule 1.2, because they interfere with the client's right to decide whether to settle. *See, e.g.,* D.C. Bar Legal Ethics Comm., Op. 289 (1999); *see also* Newman, *supra* note 47, at 374. *But see* L.A. County Bar Ass'n Prof'l Responsibility and Ethics Comm., Formal Op. 505 (2000) (finding no ethical bar to an engagement agreement that provides that a client who accepts secrecy terms in a settlement will be required to pay the lawyer's full hourly fee instead of the reduced rate otherwise offered). There can be no serious objection, however, to an agreement that explains what the ethics rules require of the lawyer, and obtains the client's commitment to allow the lawyer to act in conformity with the rules. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 805 (2007) (stating that a retainer agreement that accurately describes circumstances in which a lawyer is permitted to withdraw is ethically permissible).

<sup>334</sup> *See* David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217,

The unavailability of noncooperation clauses should have little impact on defendants' willingness to settle or the size of settlement offers, especially when the types of secrecy most valuable to defendants—keeping the monetary amount confidential and prohibiting statements to the media—are still allowed. Defendants will have ample incentive to settle to avoid the financial exposure and greater publicity that would result from a trial.<sup>335</sup>

Prohibiting lawyers from assisting in conduct that clients can engage in themselves without violating the law may also be objected to from the standpoint of client autonomy. Stephen Pepper has argued that making the law accessible to individuals so that they can pursue their goals constitutes an important social good, and that it is destructive of individual autonomy, diversity, and equality for lawyers to impose their moral values on clients in situations where the conduct has not been determined by society to be intolerable and made explicitly unlawful.<sup>336</sup> But it is only in a very weak sense that noncooperation agreements can be said to be "lawful." Numerous courts have declared them to be contrary to public policy and refused to enforce them.<sup>337</sup> Even if parties violate no positive command of law by entering into noncooperation agreements, a public institution has determined that such agreements inflict serious harm on the justice system. By virtue

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1225 & n.18; Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 101, 110–14 (2006); cf. Ramsey et al., *supra* note 60 (reporting that a plaintiff's firm that stopped agreeing to secret settlements has not encountered any case that failed to settle or settled for less as a result).

<sup>335</sup> See *Dillard v. Starcon Int'l, Inc.*, 483 F.3d 502, 505–06 (7th Cir. 2007) (describing settlement negotiation in which, after plaintiff refused to accept a nonassistance clause that the defendant had insisted on including, defendant sought to enforce oral settlement agreement without it); Friedenthal, *supra* note 32, at 95–96 (discussing why even a total ban on confidentiality provisions is unlikely to be a major deterrent to settlement).

<sup>336</sup> Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615–19. The "equality" portion of the critique, which argues that it is unjustifiable "[f]or access to the law to be filtered unequally through the disparate moral views of each individual's lawyer," *id.* at 618, would not be applicable to a rule that obliges all lawyers to refrain from participating in certain conduct.

<sup>337</sup> See *supra* text accompanying notes 185–203; see also *supra* text accompanying notes 112–23, 171–84, 253–57 (discussing judicial articulations of policies disfavoring noncooperation in other decisional contexts).

of their role as officers of the court, lawyers have a “special responsibility for the quality of justice.”<sup>338</sup> There is nothing incongruous or objectionably paternalistic in requiring lawyers to refuse to participate in conduct that is prejudicial to the administration of justice, regardless of whether such conduct is illegal when engaged in by clients who do not share the lawyer’s special role.<sup>339</sup>

To those who favor greater moral activism by lawyers, my reading of the ethics rules may be criticized on the grounds that it leaves untouched the most objectionable sorts of secret settlements—those that hide safety dangers and information about unlawful conduct from the public.<sup>340</sup> But my concern in this Article is with the constraints on settlement secrecy that can be derived from the rules as they are. The Model Rules, even after the Ethics 2000 expansion of the public-regarding exceptions to the duty of confidentiality, provide very limited scope of action for placing societal or third-party interests over those of the client.<sup>341</sup> For better or worse, the tenor of the lawyers’ ethics codes is that lawyers generally are not barred from assisting clients in conduct that is harmful to third parties or socially undesirable, unless legislatures or the courts have prohibited the behavior. But the existing system of professional regulation does recognize the need for lawyers to legislate for themselves restraints on advocacy that are designed to preserve the proper functioning of the adversary system.

This Article has focused attention on one such duty, the obligation not to impede other parties’ access to relevant evidence by inducing witnesses to withhold cooperation. The principle has a long pedigree and is firmly rooted in the ethics

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<sup>338</sup> MODEL RULES OF PROF’L CONDUCT pmbl. para. 1 (2008).

<sup>339</sup> Many of the “officer of the court” duties that the ethics rules impose on lawyers involve conduct that is not illegal if engaged in by an unrepresented party. *See, e.g., id.* R. 3.3(a)(2) (obligation to disclose controlling legal authority to the court); R. 3.3(d) (requiring disclosure of all material facts in *ex parte* proceedings); R. 3.4(e) (placing limitations on trial statements); R. 3.6(a) (limiting extrajudicial statements).

<sup>340</sup> However, requiring lawyer-negotiated settlement agreements to permit disclosure of information relevant to other parties’ claims will have the incidental effect, in many cases, of exposing wrongdoing and helping to prevent and remedy public harms.

<sup>341</sup> *See supra* text accompanying notes 63–78.

codes. Too often, the duty has been ignored when lawyers settle cases on behalf of clients.

## APPENDIX: ARE NONCOOPERATION AGREEMENTS CRIMINAL?

*Obstruction of Justice*

Stephen Gillers<sup>342</sup> rests his argument that noncooperation settlements violate federal obstruction of justice laws primarily on § 1512(b) of Title 18, which makes it a felony to “knowingly . . . corruptly persuade[] another person, or attempt[] to do so, . . . with intent to . . . cause or induce any person to withhold testimony, or withhold a record, document, or other object, from an official proceeding.”<sup>343</sup> An “official proceeding” is defined in the statute to include any proceeding before a federal court or agency, which “need not be pending or about to be instituted at the time of the offense.”<sup>344</sup> Relying on the broad construction that a number of courts of appeal have given to the word “corruptly,” Professor Gillers concludes that offering a financial reward to secure a person’s pledge to not voluntarily provide information to the government or private parties in pending or future federal proceedings violates the statute’s terms.<sup>345</sup> He also relies on two other criminal statutes that apply when there is an already-pending federal proceeding. Section 1503(a) of Title 18 makes it a crime when any person “corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice” in pending federal judicial proceedings.<sup>346</sup> Section 1505 contains similar language

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<sup>342</sup> Gillers, *supra* note 10.

<sup>343</sup> 18 U.S.C. § 1512(b)(2)(A) (2008).

<sup>344</sup> 18 U.S.C. §§ 1512(f)(1), 1515(a)(1) (2008). The Supreme Court, however, has read the statute to require that the defendant act “in contemplation [of a] particular official proceeding in which those documents [or testimony] might be material.” *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

<sup>345</sup> See Gillers, *supra* note 10, at 7–13. Some circuits have held that the “corrupt persuasion” element is satisfied if the defendant acted with an “improper purpose” and have suggested that a request that a witness withhold testimony, without more, can satisfy this standard. See *id.* at 11–12. Other circuits have held or suggested that the statute requires proof that the defendant’s efforts were aimed at persuading a witness to violate a legal duty to provide information. See *id.* at 8; see also Jeremy McLaughlin & Joshua M. Nahum, *Obstruction of Justice*, 44 AM. CRIM. L. REV. 793, 815 & n.133 (2007).

<sup>346</sup> 18 U.S.C. § 1503(a) (2008). The Supreme Court has read into the statute a requirement that there be a pending case in federal court, of which the defendant has knowledge or is chargeable with notice. *Pettibone v. United States*, 148 U.S. 197, 207 (1893) (construing a virtually identical predecessor statute).

and covers pending proceedings before federal agencies and Congress.<sup>347</sup>

Gillers's conclusion that these statutes reach noncooperation agreements that forbid voluntary disclosures *to other parties* in a current or future proceeding (rather than just those agreements that would block disclosure to the court or agency presiding over a proceeding) is hard to square with the statutory language and the Supreme Court's interpretations of the obstruction laws. Section 1512(b) speaks in terms of withholding information "from an official proceeding."<sup>348</sup> Section 1503(a), which includes no such limiting language, has nonetheless been read by the Supreme Court to require a showing of a probable impact on specific judicial proceedings. In *United States v. Aguilar*,<sup>349</sup> the Court, emphasizing the need for "restraint in assessing the reach of a federal criminal statute,"<sup>350</sup> held that a defendant who made false statements to investigating FBI agents, with knowledge that a grand jury proceeding was pending, could not be found guilty of obstruction in the absence of proof that he knew that his false statements would actually be conveyed to the grand jury and be likely to affect its proceedings.<sup>351</sup>

It is extremely unlikely that entering into a noncooperation settlement that prohibits voluntary disclosures to other litigants, while allowing disclosure in response to a subpoena or court order, could constitute obstruction under *Aguilar*. Forcing an opposing party to resort to formal discovery processes in order to obtain information does not render the evidence unavailable

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<sup>347</sup> 18 U.S.C. § 1505 (2008) ("Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States" or in a congressional inquiry commits a felony.).

<sup>348</sup> 18 U.S.C. § 1512(b)(2)(A) (2008).

<sup>349</sup> 515 U.S. 593 (1995).

<sup>350</sup> *Id.* at 600.

<sup>351</sup> The government's theory was that the defendant knew and hoped that his false statements would be conveyed to the grand jury through the agents' testimony, and therefore made the statements with an intent to thwart the grand jury investigation. *Id.* The Court held that "uttering false statements to an investigating agent . . . who might or might not testify before a grand jury" is insufficient and that the government must prove "that respondent knew that his false statement would be provided to the grand jury" in order to establish the "nexus" required by the statute: proof that the defendant's action had the "natural and probable effect" of interfering with the tribunal's administration of justice. *Id.* at 600–01.



to a tribunal or have the *probable* effect of ensuring that the information will never be presented in court.<sup>352</sup>

A stronger case can be made that settlements that prohibit voluntary cooperation with a federal agency in connection with a pending agency proceeding constitutes obstruction under § 1505.<sup>353</sup> In federal administrative proceedings, obtaining testimony or documents from an unwilling witness generally requires having the agency follow specified procedures for issuing an administrative subpoena, and obtaining enforcement of the subpoena may require the agency to go to court.<sup>354</sup> Here the costs of a noncooperation clause are borne by the agency itself (not merely other parties to the proceeding), and thus might be said to impede the agency's "due and proper administration of the law."<sup>355</sup>

The Supreme Court's 2005 decision in *Arthur Andersen LLP v. United States*<sup>356</sup> also makes it doubtful that a defendant who seeks a noncooperation clause can be found to have engaged in "knowingly corrupt" conduct, one of the requisites of criminal

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<sup>352</sup> Efforts to conceal or destroy information requested in discovery might well be found, consistent with *Aguilar*, to violate the obstruction statutes, since such conduct presents a high likelihood of affecting the evidence presented in court. See *United States v. Lundwall*, 1 F. Supp. 2d 249, 254 (S.D.N.Y. 1998) (refusing to dismiss indictment against two former Texaco officials under § 1503(a) for willfully destroying documents that had been requested at a deposition in an employment discrimination class action). As I argue elsewhere in this Article, noncooperation settlements that deprive other litigants of the ability to obtain evidence through informal investigation impose significant costs, impair the proper functioning of the adversary system, and may prevent meritorious suits from being brought. The point here, however, is that *Aguilar* requires more to make out a criminal violation. The Supreme Court found no violation in conduct that made it harder for the United States, the prosecuting party, to obtain information that it could have presented in court.

<sup>353</sup> At least in those circuits that take a broad view of what constitutes a "corrupt" motivation. See *supra* note 345.

<sup>354</sup> See, e.g., 29 C.F.R. § 1601.16 (2008) (EEOC regulations on issuance and enforcement of subpoenas); see also *supra* text accompanying notes 185–86.

<sup>355</sup> 18 U.S.C. § 1505 (2008). A request that a witness not cooperate with a federal agency in a pending or anticipated proceeding would also be an attempt to induce a person to "withhold testimony . . . from an official proceeding" within the meaning of § 1512(b). 18 U.S.C. § 1512(b)(2)(A) (2008). However, for reasons discussed in the next paragraph, it is unlikely that liability could be established under that section's more stringent culpability standard.

<sup>356</sup> 544 U.S. 696 (2005).

liability under § 1512(b).<sup>357</sup> In overturning the accounting firm's conviction for urging employees to destroy documents in accordance with the firm's document retention policies, so that they would be unavailable in anticipated Enron-related lawsuits, the Court read the statutory language to mean that the violator must be "conscious of wrongdoing."<sup>358</sup> The Court noted that the use of corporate document retention policies "to keep certain information from getting into the hands of others, including the Government" is routine and not inherently malign.<sup>359</sup> Under this reasoning, it would be difficult to establish that a defendant who sought a noncooperation clause had the requisite knowledge of wrongfulness, considering the widespread use of such agreements and the fact that no court has squarely held that they violate any criminal statute.

Noncooperation agreements that fail to include an exception allowing for disclosure in response to a lawful subpoena or court order do run a high risk of violating federal obstruction of justice laws. It can be reasonably assumed that most people are aware that refusing to comply with judicial process, or paying another to do so, is wrongful conduct.<sup>360</sup> In addition, separate subsections of the obstruction statute specifically make it a crime to cause or induce any person to evade or flout legal process.<sup>361</sup>

### *Witness Tampering*

The state law equivalent to the federal provisions that Gillers considered are witness tampering statutes, which are typically patterned on section 241.6 of the Model Penal Code. The crime of witness tampering is there defined to include situations where a person, "believing that an official proceeding or investigation is pending or about to be instituted, . . . attempts to induce or

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<sup>357</sup> The "knowingly" requirement is omitted from §§ 1503(a) and 1515, which require only a showing that the defendant "corruptly" engaged in the conduct in question. See *supra* notes 346–47 and accompanying text.

<sup>358</sup> *Arthur Andersen*, 544 U.S. at 704–06.

<sup>359</sup> *Id.* at 703–04.

<sup>360</sup> See Cohen & Strauss, *supra* note 36 (concluding that agreements that purport to require a witness to disobey a subpoena or court order are impermissible); *EEOC v. Severn Trent Servs., Inc.*, 358 F.3d 438, 442–43 (7th Cir. 2004) (Posner, J.) (stating in dicta that an effort to use a confidentiality clause in a settlement agreement to block compliance with a subpoena would be obstruction of justice).

<sup>361</sup> See 18 U.S.C. § 1512(b)(2)(C)–(D) (2008); see also MODEL PENAL CODE § 241.6(1)(c)–(d) (1962) (containing similar provisions).

otherwise cause a witness or informant to . . . withhold any testimony, information, document or thing.”<sup>362</sup> The reach of witness tampering laws is significantly limited by the “pending or about to be instituted” qualification. In many, probably most, situations where defendants seek noncooperation clauses, they act out of concern that similar lawsuits may be filed in the future but without specific knowledge of another case that is pending or imminent. In addition, the statutory language appears to contemplate a withholding of information *from* the official proceeding or investigation. While attempts to stop a person from voluntarily testifying in court or providing information to an investigating government agency can easily be construed as witness tampering,<sup>363</sup> it seems unlikely that the offense extends to efforts to induce a person to refrain from making voluntary disclosures to private litigants or their lawyers. The interpretive principle that ambiguities in criminal statutes are to be construed in favor of the defendant would support the narrower reading.

### *Compounding*

The crime of compounding, the basis for Susan Koniak’s<sup>364</sup> and John Freeman’s<sup>365</sup> arguments that much settlement secrecy is illegal, is defined in the Model Penal Code as follows:

A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.<sup>366</sup>

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<sup>362</sup> MODEL PENAL CODE § 241.6(1)(b) (1962).

<sup>363</sup> The Model Penal Code’s commentary makes clear that the offense reaches efforts to induce a witness to withhold cooperation, even if the witness is not legally obliged to produce the information. “One is liable for efforts to cause an informant to maintain silence even though there is no legal obligation to inform. Similarly, one who bribes a witness to invoke the fifth amendment is guilty of tampering even if that witness is entitled to refuse to testify.” MODEL PENAL CODE § 241.6 cmt. 2 (1980).

<sup>364</sup> Koniak, *supra* note 13.

<sup>365</sup> Freeman, *supra* note 13.

<sup>366</sup> MODEL PENAL CODE § 242.5 (1962). There is no federal compounding statute, but two federal crimes are somewhat analogous. The misprision of felony statute applies to a person who has knowledge of the commission of a federal felony

The information covered by secrecy clauses in settlements of civil lawsuits often relates to conduct that violates criminal statutes as well.<sup>367</sup> The crime of compounding, however, applies only when the paid-for promise is to refrain from reporting to *law enforcement authorities* and does not reach agreements that bar disclosures to civil litigants.<sup>368</sup> Moreover, the Model Penal Code's affirmative defense is easy to establish for the vast majority of civil settlements, because the consideration paid for a secrecy clause, and even the total amount of the settlement, will generally be less than the amount of compensatory damages that the plaintiff sought in the lawsuit or demand letter.<sup>369</sup> The common law crime of compounding, however, recognized no affirmative offense, and in states with compounding statutes that track the common law rather than the Model Penal Code, noncooperation agreements that are drafted broadly enough to prohibit voluntary disclosures to law enforcement agencies

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and "conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States." 18 U.S.C. § 4 (2008). Most courts construing the statute have interpreted it to require more than just a failure to notify the authorities; there must be some positive act designed to conceal the offense from the authorities. *See, e.g.,* United States v. Davila, 698 F.2d 715, 717 (5th Cir. 1983). That element may be satisfied by a refusal to testify in violation of a valid court order, *see* United States v. Cefalu, 85 F.3d 964, 969 (2d Cir. 1996), but it is unclear whether an agreement to refrain from voluntarily reporting the offense to the authorities would suffice.

The federal obstruction of criminal investigations statute prohibits "willfully endeavor[ing] by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a [federal] criminal investigator." 18 U.S.C. § 1510(a). Unlike compounding, the payor, rather than the payee, is the offender. Some courts have found that the statute applies only if a specific federal criminal investigation is under way or is being contemplated by the authorities at the time the payment is made. *See, e.g.,* United States v. Siegel, 717 F.2d 9, 21 (2d Cir. 1983).

<sup>367</sup> *See* Freeman, *supra* note 13, at 840–41.

<sup>368</sup> The same is true of the federal misprision of felony and obstruction of criminal investigations statutes. *See supra* note 366.

<sup>369</sup> Some settlements exceed any amount that the plaintiff could plausibly claim as restitution, either because secrecy is particularly valuable to the defendant or the defendant fears a large punitive damage award. An example of a settlement that would likely violate the Model Penal Code's compounding provision, assuming that the suppressed information related to criminal conduct by the defendant, is the one in the heart valve case described by Zitrin and Langford. *See supra* text accompanying notes 53–57.

about conduct that constitutes a criminal offense very likely are criminal.<sup>370</sup>

In sum, parties negotiating noncooperation settlements need to pay careful attention to potentially applicable federal and state criminal laws. In most jurisdictions, however, an attorney could reasonably reach the conclusion, and advise her client, that the risk of criminal liability for a carefully drafted noncooperation agreement is negligible. Some guideposts for minimizing the risk of a criminal violation would be to draft the agreement to permit disclosures in response to a subpoena or court order or as otherwise required by law; allow voluntary disclosures to the relevant court or agency if an official proceeding is known to be pending or imminent; and, if a compounding statute applies, ensure either that the settlement satisfies the criteria for an affirmative defense or that disclosures to law enforcement authorities are permitted.

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<sup>370</sup> See MODEL PENAL CODE § 242.5 cmt. 6 (1980) (discussing the elements of common law compounding); Freeman, *supra* note 13, at 835–36. At least ten states have compounding laws that contain no affirmative defense for settlement. See ARK. CODE ANN. § 5-54-107 (West 2004); GA. CODE ANN. § 16-10-90 (2007); 720 ILL. COMP. STAT. ANN. 5/32-1 (West 2003); KAN. STAT. ANN. § 21-3807 (2007); MICH. COMP. LAWS ANN. § 750.149 (West 2004); MO. ANN. STAT. § 575.020 (West 2003); N.M. STAT. ANN. § 30-22-6 (West 2003); OKLA. STAT. ANN. tit. 21, §§ 543, 544 (West 2002); S.C. CODE ANN. § 16-9-370 (2003); VT. STAT. ANN. tit. 13, § 8 (1998); see also CAL. PENAL CODE § 153 (West 1999) (exception only for “cases provided for by law, in which crimes may be compromised by leave of court”). The federal obstruction of criminal investigations statute, discussed *supra* note 366, also contains no defense for money paid as part of a settlement.

