Beyond the No-Contact Rule: Ex Parte Contact by Lawyers with Nonclients

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The ethics rules governing lawyers include a number of rules banning contact between lawyers and nonclients. These “no-contact” rules are rarely studied as a group. This Article examines and compares four no-contact provisions contained in the ethics rules. Although protecting vulnerable nonclients from lawyer overreaching plays an important role in justifying these rules, the rules also often aim to protect absent lawyers or clients as much as the contacted parties. This alternative purpose may better explain some features of the no-contact rules.

I. INTRODUCTION

Legal ethics rules cover a variety of topics and, like all other legal subjects, can be organized in a variety of ways. The American Bar Association’s (ABA) Model Rules of Professional Conduct divide the ethics rules governing lawyers into eight categories,¹ which focus

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* © 2013 George M. Cohen. Brokaw Professor of Corporate Law, University of Virginia School of Law. An earlier version of this Article was presented at the Tulane Admiralty Law Institute and benefitted from the comments of the participants. Some of the topics in this Article are topics on which I have been asked to give ethics opinions as a paid consultant and as a potential witness in ongoing litigation, and some of the research was done in the course of that work. I cannot reveal the matter because of confidentiality obligations, but I have not been asked to write this Article by the law firm I am consulting with nor its client and am not being paid to write it. This Article will not address the specific factual situations on which I have given opinions but will generally discuss some of the legal issues addressed in those opinions, as well as rules, cases, and published ethics opinions addressed in those opinions.

¹. The categories are Client-Lawyer Relationship, Counselor, Advocate, Transactions with Persons other than Clients, Firms and Associations, Public Service, Information about Legal Services, and Maintaining the Integrity of the Profession. Model Rules of Prof’l Conduct (2012).
largely on the different roles lawyers play. These roles include being an agent and fiduciary of a client, advocate in the court system, counselor, member of a law firm, member of a self-regulating (to some degree) profession, and public citizen with a special responsibility for promoting justice in society. Another way to conceptualize legal ethics rules is to focus on the kinds of duties the rules impose, which often cut across different lawyer roles. When I begin my course on professional responsibility, for example, I tell my students that the main topics of the course are four “C’s” of legal ethics: competence (under which one could include an additional “C” for communication), confidentiality, conflicts of interest, and complicity in client wrongdoing (or put in a positive way, conformity to law). Different organizational frameworks help highlight different relationships and connections among legal ethics rules.

The duties of competence, confidentiality, avoiding conflicts, and conformity to law do not, of course, cover the entire landscape of legal ethics rules. One set of duties this list omits involves what might be called contact rules. These are rules that regulate—and, at the extreme, ban—personal, private ex parte contact by lawyers with nonclients. Model Rule 4.2, often referred to as the “no-contact” or “anti-contact” rule, is the most general and most discussed rule of this type. But it is not the only one. In fact, if one defines “contact rules” broadly (as I just did) to include rules regulating contact with nonclients rather than just rules that prohibit such contact, there are actually a fair number of them. Yet scholars, courts, and ethics committees tend not to group ethics rules this way. The preamble to the ABA’s Model Rules of Professional Conduct makes no direct references to contact rules. Moreover, unlike the other “C’s,” many of these contact rules do not have roots in, or parallels to, the general law of agency. Certainly there

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2. *See, e.g., id. pmbl., cmt. 1 (“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.”).*

3. *See, e.g., id. pmbl., cmt. 4 (“In all professional functions a lawyer should be competent, prompt and diligent. . . . A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.”); id. pmbl., cmt. 5 (“A lawyer’s conduct should conform to the requirements of the law . . . .”); id. pmbl., cmt. 9 (“Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts.”).*

4. *Id. R. 4.2.*

5. *Id. pmbl.*
are no rules of agency that prohibit contact between agents and particular people.

This Article aims to begin an exploration of contact rules as a group, focusing on the "per se" contact rules, which prohibit ex parte contact rather than just regulate it. In addition to Model Rule 4.2, these include a no-contact rule for expert witnesses, grounded in Model Rule 3.4(c), a no-contact rule for judges and jurors, found in Model Rule 3.5, and a no-contact rule for prospective clients, located in Model Rule 7.3. It is not obvious on first encounter why these rules exist. The no-contact rules seem to reflect a concern with overbearing lawyers intimidating vulnerable third parties. But why should lawyers be singled out among all agents as particularly threatening? And even if they are, why should that concern result in bans on ex parte contact rather than more targeted regulation of specific conduct? It is true that in the case of all four rules, lawyers may have reasonable alternatives to ex parte contact, but these alternatives may be inferior.

My goal is not so much to critique the no-contact rules as to examine and compare them in light of their purposes. A closer examination of the no-contact rules reveals that although the vulnerability of the contacted parties plays an important role in justifying these rules, other rationales may be equally or more important. Specifically, the rules often aim to protect absent lawyers or clients as much as the contacted parties. Moreover, comparing the no-contact rules may help us better understand not only the rationales for, but also the appropriate scope of, these rules.

II. THE GENERAL NO-CONTACT RULE: MODEL RULE 4.2

Model Rule 4.2 states:

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

The comments to Model Rule 4.2 list three main purposes of the rule. First, the rule protects against "possible overreaching" by a lawyer in

6. Id. R. 3.4(c).
7. Id. R. 3.5.
8. Id. R. 7.3.
9. Id. R. 4.2; see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 (2000).
dealing with a person represented by a different lawyer. Second, the rule protects against interference with the lawyer-client relationship between the other person and that person's lawyer. Third, the rule protects privileged and confidential information by protecting against "uncounseled disclosure" by the other person.10

Model Rule 4.2 is a per se contact rule. It prohibits contact itself rather than specific types of harmful conduct for which contact is a proxy. In this respect, Model Rule 4.2 is a prophylactic rule similar to the rules governing conflicts of interest. Like all per se rules, Model Rule 4.2 is subject to the criticism that it sweeps too broadly and prohibits behavior that causes no real harm and may in fact be beneficial.11 My main purpose here, however, is to see how well the rule and various interpretations of it match up against the rule's purposes and to compare the rule's features with those of the other no-contact rules.

The first question to consider is whom the no-contact rule is designed to protect. The obvious answer is that the rule aims to protect persons who are represented by their own lawyers in some matter in which the lawyer seeking to make the contact is representing a client. But why do represented persons need such protection? One might think that the contact-target's own lawyer can adequately protect that person against potentially harmful contact by a lawyer representing a different client in the matter. Indeed, the contact-target's lawyer can simply tell his client not to talk to another lawyer involved in the matter2 or to forward all correspondence received from another lawyer.

The contact-target is protected not only by their own lawyer but also by other ethics rules as well as other law. For example, if the lawyer seeking the contact were to deceive the contact-target about the lawyer's identity or role in the matter to get the represented person to talk to them, that lawyer could be in violation of several ethics rules.13

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11. For recent criticism and proposed revisions of Model Rule 4.2, see Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797 (2009). I discuss below some of the criticisms they raise.
12. Model Rule 3.4(f) prohibits a lawyer from requesting "a person other than a client" to refrain from voluntarily giving information to another party, but by negative implication permits a lawyer to request that the lawyer's client not do so. Model Rules of Prof'L Conduct R. 3.4(f).
13. Model Rule 4.1(a) prohibits a lawyer from knowingly making a false statement of material fact to a third person. Comment 1 adds, "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative
Moreover, a lawyer who induced a person represented by another lawyer to waive the attorney-client privilege or work product doctrine or to reveal otherwise protected information would risk violating Model Rule 4.4(a), which prohibits a lawyer from using "methods of obtaining evidence that violate the legal rights of [a third] person." And a lawyer who contacts a represented nonclient for the purpose of undermining that person's relationship with their lawyer runs the risk of committing, or aiding and abetting, the tort of intentional interference with contractual relations.

A final difficulty with the conclusion that Model Rule 4.2 is designed to protect the contact-target is that the rule makes no exceptions for situations in which the represented person has an interest in the contact. The rule applies even if the represented person initiates the contact with the other lawyer. And the rule applies even if the represented person gives informed consent to the contact.

An alternative approach that may usefully supplement the vulnerable target rationale is that the no-contact rule aims to protect the target's lawyer. The protection of the target's lawyer could, of course, inure to the benefit of the represented person, but it need not. In some cases, the represented person could collude with the contacting lawyer (and that lawyer's client) against the interests of the represented

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false statements." Model Rule 8.4(c) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." Finally, Model Rule 4.3, though it expressly deals only with unrepresented third parties, prohibits a lawyer from stating or implying that a lawyer is disinterested and requires a lawyer to clarify the lawyer's role in the matter when the lawyer knows or reasonably should know that the nonclient misunderstands that role. It seems likely that the same requirements would be held to apply to represented persons, for example, where Model Rule 4.2 allows contact, perhaps via Model Rule 4.1 or Model Rule 8.4(c).

14. Id. R. 4.4(a). Comment 1 to that rule states that the prohibition includes "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." See Restatement (Third) of the Law Governing Lawyers § 102 (prohibiting a lawyer from seeking to obtain, in communicating with a nonclient, "information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law").


16. Model Rules of Prof'l Conduct R. 4.2 cmt. 3. By contrast, clients can waive most conflicts of interest by giving informed consent, and even those that they cannot waive involve situations in which there is strong reason to suspect that any consent would not truly be informed due to the severity of the conflict. See id. R. 1.7, R. 1.9.

17. Geoffrey Hazard and Dana Irwin argue that the interest of the absent lawyer should not be a concern of the no-contact rule, but they do not consider the collusion possibility. See Hazard & Irwin, supra note 11, at 804.
person's lawyer. For example, a defendant's lawyer could receive a settlement offer from a plaintiff's lawyer for $300,000. If the plaintiff's lawyer is working under a one-third contingency fee arrangement, the plaintiff's lawyer would get $100,000 and the plaintiff would get $200,000. Absent the no-contact rule, the defendant's lawyer could approach the plaintiff and offer a $120,000 "settlement" and a secret payment of $150,000 outside of that "settlement," which would not be revealed to the plaintiff's lawyer. The defendant would be better off by paying $270,000 instead of $300,000. And the plaintiff would be better off, by receiving $230,000 ($150,000 plus 2/3 multiplied by $120,000) instead of $200,000. Although this conduct would likely be tortious as well as a breach of contract, the victimized lawyer might have a hard time proving these claims, or they might not involve enough money to make the suit worthwhile. On this rationale, the absence of potential collusion makes the case for a ban on contact weaker.

A variation on the rationale that the no-contact rule aims to protect an absent person rather than, or in addition to, the contacted person may help explain the application of the no-contact rule to corporate or other organizational clients. Often this issue arises when plaintiffs' lawyers seek to contact employees of corporate defendants. Here, the concern is that the contacting lawyer might collude with an agent of the entity against the interests of the absent entity-client.

18. See George M. Cohen, When Law and Economics Met Professional Responsibility, 67 FORDHAM L. REV. 273, 283 (1998). Model Rule 5.6(b), which prohibits a lawyer from participating in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy," may also serve a similar purpose in deterring collusion between a lawyer and a represented nonclient. MODEL RULES OF PROF'L CONDUCT R. 5.6(b).

19. See RESTATEMENT (SECOND) OF AGENCY § 448 (1958) ("An agent whose compensation is conditional upon his accomplishment of a specified result is entitled to the agreed compensation if, and only if, he is the effective cause of accomplishing the result.").

20. For example, the collusion concern would be much less in the typical criminal defense context. Thus, in addition to the usual criticism of the no-contact rule's application in this context—that it hinders effective law enforcement, see, e.g., Hazard & Irwin, supra note 11, at 811—the lack of collusive risks, even if the defendant engages in plea bargaining with the prosecutor, could also justify applying a more relaxed version of the rule to prosecutorial contact with criminal defendants. Moreover, although criminal defendants are certainly vulnerable, the Sixth Amendment, which includes a constitutionalized version of the no-contact rule, arguably provides sufficient protection against prosecutorial overreaching. Id. at 810-11, 817 (arguing that Model Rule 4.2 should be amended to clarify that "constitutionally permissible communications are ethically permissible").
Doing so would of course be a breach of the agent’s fiduciary duty, as well as aiding and abetting this breach by the lawyer, but again it might be difficult for the entity-client to prove or recover for such claims. By contrast, the law does not usually worry about individual clients being disloyal to themselves.

Individuals can, of course, have agents, but the no-contact rule does not generally apply to those agents. Nor does it apply to all agents of an entity. And the agents to whom the no-contact rule does apply are not distinguished by their vulnerability to being taken advantage of by another party’s lawyer. Rather, the no-contact rule for entities is limited to those agents who pose the greatest risk of colluding with another person’s lawyer in breach of their fiduciary duties to the entity. These agents include those who deal regularly with the entity’s lawyer about the matter, those who have authority to bind the entity with respect to the matter, and those whose actions relevant to the matter could subject the entity to liability. Entity-agents who deal regularly with the entity’s lawyer about a matter are most likely to have information protected by the entity’s attorney-client privilege and the work product doctrine, and therefore they are in the best position to breach their fiduciary duties by acquiring and revealing that information to their personal advantage. Entity-agents who have authority to bind the entity with respect to the matter can bind the entity to settlements that benefit the agent at the expense of the entity. And employees, whose actions within the scope of their employment subject the entity to vicarious liability, may have an incentive to cooperate with the adversary’s lawyer in the hopes that the adversary will seek to go after the entity rather than the employee.

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21. See Restatement (Third) of Agency § 8.01 (2006) ("An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.").

22. See, e.g., Restatement (Third) of the Law Governing Lawyers § 51 cmt. h (2000) ("A lawyer who knowingly assists a client to violate the client’s fiduciary duties is civilly liable ... "); id. § 56 cmt. h (same).


24. See Messing, Rudavsky & Weliky, PC. v. President of Harvard Coll., 764 N.E.2d 825 (Mass. 2002); Niesig v. Team I, 558 N.E.2d 1030 (N.Y. 1990); Model Rules of Prof’l Conduct R. 4.2 cmt. 7; Restatement (Third) of the Law Governing Lawyers § 100. Although the reach of the no-contact rule is limited in the case of organizational employees, an organization’s lawyer does have the right to request all employees not to communicate voluntarily with a lawyer representing another client, as long as the organization’s lawyer “reasonably believes that the [employee’s] interests will not be adversely affected by refraining from giving such information.” Model Rules of Prof’l Conduct R. 3.4(f).
Even for those entity-agents who would otherwise be covered by the no-contact rule, the protection vanishes once the duty of loyalty disappears or is mitigated by other considerations. For example, former employees generally owe limited duties of loyalty to their former employer. Thus, it is no surprise that many authorities conclude that the no-contact rule does not apply to former employees.

Similarly, when an organizational employee hires his own lawyer, that usually means that the employee has interests that diverge from those of the organization, and the duty of loyalty is limited by the employee's own legitimate interests. To the extent the duty of loyalty still applies, the employee's lawyer has an obligation to advise the employee of that fact and not to assist the employee in breaching this duty. Accordingly, the no-contact rule does not apply in this situation either.

The rationale that Model Rule 4.2 aims at least in part to deter collusion against the absent lawyer representing the contacted person helps explain some of the rule's requirements and limitations. First,

25. See Restatement (Third) of Agency § 8.01 cmt. c (2006) ("An agent's fiduciary duty to a principal is generally coterminous with the duration of the agency relationship. However, an agent may be subject to post-termination duties applicable to the agent's use of confidential information provided by the principal or otherwise acquired in the course of the agency relationship.").

26. Model Rules of Prof'L Conduct R. 4.2 cmt. 7; Restatement (Third) of the Law Governing Lawyers § 100 cmt. g ("Contact with a former employee or agent ordinarily is permitted, even if the person had formerly been within a category of those with whom contact is prohibited."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-359 (1991); Hazard & Irwin, supra note 11, at 840 n.271 (citing cases). The lawyer who contacts former agents of an entity must of course abide by the requirement of Model Rule 4.4 not to obtain information that remains legally protected, as well as the requirements of Model Rule 4.3. Some courts extend the no-contact rule to former employees if there is strong likelihood that privileged information could be disclosed. See, e.g., Camden v. Maryland, 910 F. Supp. 1115, 1116 (D. Md. 1996).

27. See Model Rules of Prof'L Conduct R. 1.13(f) & cmt. 10 (stating that the organization's lawyer "should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation").

28. See, e.g., Restatement (Third) of the Law Governing Lawyers § 51 cmt. h ("A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable . . ."); id. § 56 cmt. h (same).

29. Model Rules of Prof'L Conduct R. 4.2 cmt. 7. A similar problem arises when a client has two or more cocounsel. Model Rule 4.2 does not prohibit any cocounsel from contacting the client because the rule prohibits contact only with a represented "person" distinct from the lawyer's own "client." Id. R. 4.2 cmt. 7. Although one cocounsel could act with the client against the interests of the other cocounsel, a per se ban on contact would prevent cocounsel from communicating with the client, in potential violation of that cocounsel's obligations to the client. See id. R. 1.4.
the lawyers restricted by the rule are those lawyers representing clients in a particular matter. This limitation preserves the ability of represented persons to seek second opinions from unconflicted lawyers. This situation could, of course, result in the contacted client changing counsel to the disadvantage of the current lawyer, but that does not necessarily entail collusion against the current lawyer to cut that lawyer out of a legitimately earned fee. On the other hand, when the lawyer is also the client and engaged in self-representation, the potential for collusive behavior in that lawyer's contacting the represented person remains, and so should be interpreted as within the ban. Similarly, the prohibited target of contact is limited to "a person the lawyer knows to be represented by another lawyer in the matter." The requirement that the contacting lawyer "know" that the contacted nonclient is represented by another lawyer in the matter avoids punishing lawyers who contact represented persons without any intent to undermine their relationship with their own lawyers or to collude with them against their lawyers. The two representation limitations—the contacting lawyer must be representing a client and the contacted person must be represented by a different lawyer—define the duration of the rule's contact ban in a way consistent with the concern with collusion. The prohibition begins when the contacting lawyer and the contacted nonclient's lawyer both are representing their respective clients in the same matter, because that is when the collusive possibilities are greatest. The prohibition ends when either one of these representations in that matter ends, or the matter itself ends.

30. Id. R. 4.2 cmt. 4 ("Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter"); see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. e.

31. See Hazard & Irwin, supra note 11, at 830-31. Hazard and Irwin argue for changing the opening phrase of Model Rule 4.2 to cover "[a] lawyer participating in a matter" rather than a lawyer representing a client in a matter. Id. at 848. This change would include situations in which lawyers retain their own lawyer in the matter as opposed to self-representation. One might be able to get to the same result by arguing that there is a risk that lawyers retaining another lawyer to represent them and then engaging in ex parte contact with their litigation opponent is effectively using another lawyer to be able to do something that would otherwise be forbidden, which violates at least the spirit of Model Rule 8.4(a), although the typical violations of that rule involves lawyers using nonlawyers as their agents to violate the rule for the lawyers.

32. MODEL RULES OF PROF'L CONDUCT R. 4.2.

33. Id. R. 4.2 cmt. 8; see also id. R. 1.0(f) (defining "knows" as denoting "actual knowledge of the fact in question," but adding that "knowledge may be inferred from circumstances"). Comment 8 to Model Rule 4.2 adds that "the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." Id. R. 4.2 cmt. 8.
that point, the collusive risk diminishes significantly or disappears entirely.

In addition, the communication prohibited by the rule is limited to communication "about the subject of the representation." Communication on other subjects does not threaten to result in collusion between the contacting lawyer and the contacted person against the contacted person's lawyer. Of course, permitted communications could spill over into prohibited topics, so lawyers should be wary of taking advantage of this limitation.

Finally, several exceptions recognized by Model Rule 4.2 are consistent with the anticollusion rationale. The exception for consent only by the represented person's lawyer (and not the represented person) suggests that Model Rule 4.2 is as much about protecting the represented person's lawyer as it is about protecting the represented person. The "authorized by law" exception recognizes, among other things, the public interests at issue when the government is the represented "person" that a lawyer representing a private client seeks to contact and when a government lawyer is the one seeking to engage in the contact (as in a criminal investigation). The collusive risks in these situations are relatively low. Similarly, the "court order" exception encourages a lawyer to seek court permission for contact in uncertain or emergency situations in which, again, collusive behavior is less likely.

34. Id. R. 4.2; see id. R. 4.2 cmt. 4 ("This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.").

35. Hazard and Irwin criticize Model Rule 4.2 for not allowing the represented person to waive the protection. Hazard & Irwin, supra note 11, at 825-28. They identify several situations in which such waiver would be desirable and then ask, "If the argument for client autonomy is persuasive in some contexts, why is it not persuasive in all contexts?" Id. at 828. The potential for collusion against the absent lawyer is one possible answer.

36. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 5; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 99(1)(a), 101 (2000) (allowing express exception of communications with a public officer or agency); Hazard & Irwin, supra note 11, at 818-22.

37. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 6; cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(1)(d) (creating an exception to the no-contact rule even without a court order if "the communication reasonably responds to an emergency"); Hazard & Irwin, supra note 11, at 829-30 (endorsing the Restatement (Third) of the Law Governing Lawyers' position and arguing that sometimes it will not be feasible for a lawyer to seek a court order). For example, if a lawyer were to disclose to a represented person that the lawyer's client intended to harm that person, which Model Rule 1.6(b)(1) permits if the lawyer "reasonably believes" it is "necessary" to do so, MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1), a court or disciplinary authority could view that contact as "authorized by law" under Model Rule 4.2. Id. R. 4.2.
The anticollusion rationale for the no-contact rule does not explain all aspects of the rule in its current form. One exception not recognized in Model Rule 4.2 or its comments is contact initiated by a represented person with the lawyer representing another person for the purpose of reporting or confirming wrongdoing. That purpose suggests an absence of collusive risk, and therefore the contact should be allowed. For example, in the case of an individual represented person, a well-recognized concern arises when the prohibited lawyer or the represented person suspects that the represented person’s lawyer has not communicated a settlement offer by the prohibited lawyer. The case for banning this communication seems weak under either the vulnerability or the collusion theory. On the other hand, because a potential settlement is involved, a court or disciplinary authority might be suspicious that the contact is in reality an attempt to cut out the other lawyer from sharing in the settlement rather than to redress misbehavior by the other lawyer.

In the organizational client context, at least one case has recognized an exception for communication about wrongdoing, in this case by another agent of the organizational client and perhaps the organization’s lawyer. In United States v. Talao, the United States Department of Justice was investigating possible criminal violations of employment statutes by the defendant company. The company’s bookkeeper was subpoenaed to testify before a grand jury. The company’s owner directed that the company’s lawyer be present for the bookkeeper’s testimony. The bookkeeper then contacted an Assistant United States Attorney (AUSA) and said she did not want to testify in the presence of the company’s lawyer because she would feel pressured to give false testimony—pressure she had already felt from the company’s owner. The AUSA decided to interview the bookkeeper outside the presence of the company’s lawyer. The bookkeeper provided evidence of wrongdoing by the company and stated that her boss had told her to lie to the grand jury. The bookkeeper subsequently repeated those allegations to the grand jury, leading to indictments against her boss and the company.

The defendants filed a motion to dismiss the indictment, asserting that contact with the AUSA violated California’s version of

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39. 222 F.3d 1133 (9th Cir. 2000).
40. Id. at 1135-37.
the no-contact rule. After finding that the prosecutor was bound by the requirements of the no-contact rule, the court held that the prosecutor had not violated the rule. The court stated that "when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that corporate officers are attempting to suborn perjury and obstruct justice, [the no-contact rule] does not bar discussions between the employee and the attorney." Although Talao involved contact with a government lawyer, much of the court's reasoning was not expressly limited to contact with prosecutors. Analogizing to the crime-fraud exception to the attorney-client privilege, the court stated, "[I]t would be a perversion of the rule against ex parte contacts to extend it to protect corporate officers who would suborn perjury by their employees." Moreover, the court added, "When a corporate employee/witness comes forward to disclose attempts by the corporation's officers to coerce her to give false testimony, the prohibition against ex parte contacts does little to support an appropriate attorney-client relationship."

Talao is consistent with both the traditional rationale of the no-contact rule, as well as the alternative proposed here. By initiating the conversation with the AUSA, the bookkeeper was not subjecting herself to potential overreaching by the opposing lawyer; rather, she was trying to escape overreaching by the client company and its lawyer. Additionally, there was no risk that she would collude with the AUSA against the interests of the entity in violation of her duty of loyalty to the company. Agents owe no duties to assist principals and other agents in violations of law, and may generally reveal such violations to law enforcement authorities.

Although Model Rule 4.2 raises a host of other issues, these provide a sufficient basis for comparison with the other no-contact rules.

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41. Id. at 1136; CAL. RULES OF PROF'L CONDUCT R. 2-100 (1992).
42. Talao, 222 F.3d at 1140.
43. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000). For an analogous exception to the duty of confidentiality in the Model Rules, see MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3).
44. Talao, 222 F.3d at 1140.
45. Id.
46. See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (2006) ("[A]s a general matter, an agent may reveal to law-enforcement authorities that the principal is committing or is about to commit a crime."); id. § 8.05 cmt. c.
III. THE EXPERT WITNESS NO-CONTACT RULE: MODEL RULE 3.4(c)

The Model Rules contain no express prohibition on contact with an opponent's expert witnesses. Nevertheless, a 1993 ABA ethics opinion derives a per se ban on such contact from Model Rule 3.4(c), which makes it unethical for a lawyer to "knowingly disobey an obligation under the rules of a tribunal." According to the ABA opinion, Federal Rule of Civil Procedure 26 includes "specific and exclusive procedures for obtaining the opinions, and the bases therefore, of the experts who may testify for the opposing party." At the time the ABA ethics opinion was published, Federal Rule 26(b)(4) on expert witnesses included an introductory clause stating, "Discovery of facts known and opinions held by experts, otherwise discoverable . . . and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows . . . ." Based on this language, the ABA opinion concludes that ex parte contact by a lawyer with an opposing party's expert "would probably constitute a violation of Model Rule 3.4(c) if the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule 26(b)(4)(A)."

Shortly after the publication of the ABA ethics opinion, the introductory "exclusivity" clause was removed from Federal Rule 26(b)(4). The remaining language was somewhat more ambiguous about the rule's exclusivity. Although one commentator has argued

48. MODEL RULES OF PROF'L CONDUCT R. 3.4(c).
51. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-378. The opinion relied on earlier case law that had reached the same conclusion. Durflinger v. Artilie, 727 F.2d 888, 891 (10th Cir. 1984); Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980) (holding that ex parte contact with an expert violated FED. R. CIV. P. 26); Heyde v. Xiraman, Inc., 404 S.E.2d 607, 611 (Ga. Ct. App. 1991) (holding that ex parte contact with an opponent's expert would "circumvent" mandatory discovery procedures). The opinion's equivocation ("would probably constitute a violation") likely is a nod to the principle that the ABA opinions are not supposed to express opinions about other law outside the ethics rules. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-378 (emphasis added).
52. The 1993 revisions to Federal Rule 26(b)(4)(A) state simply that a "party may depose any person who has been identified as an expert whose opinions may be presented at trial," without saying anything about exclusivity. FED. R. CIV. P. 26(b)(4)(A) (1993) (repealed 2000). With respect to nontestifying (consulting) experts, Federal Rule 26(b)(4)(B) was revised to state: "A party may not . . . interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." Id. R. 26(b)(4)(B) (2000). This rule does provide an exclusive means for
forcefully that the change in language should mean that the per se ban on expert witness contacts no longer exists, courts have continued to follow the no-contact rule, albeit without noting or discussing the revised language in Federal Rule 26.\(^5\)

The rationale that the no-contact rule for expert witnesses prevents circumvention of mandatory discovery rules differentiates this rule from the no-contact rule in Model Rule 4.2. Unlike the rationales for Model Rule 4.2, this justification is grounded in law outside the ethics rules and does not directly focus on the vulnerability of the contacted party to overreaching by the contacting lawyer.\(^5\) On the other hand, courts have identified two other rationales for the expert no-contact rule that the parallel rationales offered for Model Rule 4.2.\(^5\) One of these rationales is to protect against inadvertent


55. _Cf._ Olson, 183 F.R.D. at 543 n.1 (denying a motion to disqualify the plaintiff's lawyer for improper contact with the defendant's expert in part because "the evidence does not reveal any unprofessional overreaching" during the contact).

56. These rationales are apparently not sufficient to justify the expert no-contact rule under the ABA opinion, which states that if the matter is not pending in a jurisdiction with an expert discovery rule patterned after Federal Rule 26, ex parte contact of an expert would not be a violation. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-378; _see also_ Phila. Bar Ass'n Prof'l Guidance Comm., Ethics Op. 94-22 (1995) (stating that ex parte contact with an opponent's expert is not a violation of Pennsylvania rules because Pennsylvania did not adopt Model Rule 3.4(c), but warning that lawyers must still comply with Model Rule 4.4); Or. State Bar Ass'n Bd. of Governors, Formal Op. 1998-154 (1998) (declining to ban ex parte contact with experts because Oregon has no rule equivalent to Federal Rule 26).
disclosure of confidential or privileged information or information protected by the work product doctrine. 57 Recently adopted amendments to Federal Rule 26 arguably strengthen that rationale by adding express protections for information held by experts. 58 In addition, both rules seek to protect against the interference by one lawyer in the relationship between another lawyer and the expert the first lawyer seeks to contact, although the relationship in the case of an expert is not a lawyer-client one. 59

What, then, is the nature of this relationship? One way to think about this is to consider the different treatment the rules afford to fact witnesses and expert witnesses. Ex parte contact with fact witnesses is generally permitted by Model Rule 4.2; 60 thus Model Rule 4.2 in effect promotes a kind of informal discovery. Ex parte contact with a fact witness is prohibited only if the fact witness is represented by counsel, or if the fact witness is an employee or agent for a represented entity-client whose fiduciary obligations to the entity mean that ex parte contact with a lawyer for another person poses a significant risk of collusion against the interests of the entity. 61 By contrast, the ban on ex parte contact with expert witnesses applies to all experts, even though they are generally not represented by counsel, even if they are retained by individuals rather than entities, and even when they are retained by entities and pose no threat of breaching fiduciary duties to the entity. 62

So why should expert witnesses be treated differently? For one thing, they are paid. That might lead to a concern that allowing a lawyer to contact an opponent's expert could result in an attempt to outbid the opponent for the expert's services. There are important limits to that, however, because many cases apply a version of conflict

57. See Carlson, 2006 U.S. Dist. LEXIS 21464, at *10 ("[F]or at least part of the litigation, the parties' contacts with experts would be guarded by work product immunity and attorney-client privilege; premature contacts might well invade these privileges.").

58. The current version of Federal Rule 26(b)(4)(B) protects against discovery drafts of any report or disclosure required by experts. FED. R. CIV. P. 26(b)(4)(B). The current version of Federal Rule 26(b)(4)(C) protects communications between the party's attorney and the expert, except for those that relate to compensation, identify facts the expert considered, or identify assumptions provided by the party's attorney and relied on by the expert. Id. R. 26(b)(4)(c).

59. See Carlson, 2006 U.S. Dist. LEXIS 21464, at *10 (stating that ex parte contact with an opponent's expert "may well result in a collapse of trust between the retaining party/counsel and the expert"). The relationship between a lawyer and an expert may, however, be an agency relationship. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-407 nn.2, 9 (1997).


of interest rules to disqualify experts who switch sides. Alternatively, the contacting lawyer could simply offer to pay the opponent's expert not to testify. This conduct would likely be viewed as tortious interference, or perhaps obstruction of justice, but might be difficult to prove.

Another important difference between fact witnesses and experts is that in general, experts create the information that serves as the basis of their testimony, whereas fact witnesses simply convey the information they already have. It is true that experts already have a store of information that represents their expertise, but applying that expertise to a particular case often takes a large amount of analytical effort. Lawyers who retain experts of course shape that effort in a variety of ways. The lawyer's ability to shape an expert's testimony is the source of much of the criticism about such testimony, but there is a more generous interpretation of the practice. An advocate has the right to present the evidence to fit her story of the case, as long as the evidence is not itself false or fraudulent. Guiding an expert is part of that effort. If the opponent's counsel could contact the expert, the contacting lawyer would not be limited to asking questions about what the expert was doing and the bases for the expert's opinion. The lawyer could subtly convey that lawyer's own story of the case and thus cause the expert some concern. Having heard this alternative version, the expert might feel the need to do alternative analyses under different assumptions or with different emphases, resulting in additional time and expense for the retaining lawyer and the client. At the extreme, the resulting doubts could lead the expert to drop out of the case, necessitating the retention of a new expert, again resulting in increased time and expense. It is not obvious why a lawyer should be able to impose these costs on the opposing side. Opposing lawyers have ample opportunities to develop their own stories through their own experts and through cross-examination of the other side's expert. Fact witnesses, whose information is "given," would not face a similar dilemma as a result of being contacted by opposing counsel.

From this perspective, the no-contact rule in Model Rule 4.2 and the expert witness no-contact rule both aim to prevent ex parte contacts that harm the absent lawyer (or absent entity-client) and the trust relationship between that lawyer and the contacted person. But the nature of that harm differs between the two rules. Under Model

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63. See generally Stephen D. Easton, "Red Rover, Red Rover, Send that Expert Right Over": Clearing the Way for Parties To Introduce the Testimony of Their Opponents' Expert Witnesses, 55 SMU L. REV. 1427 (2002).
Rule 4.2, in the case of an individual client, the trust concern is the potential betrayal of the absent lawyer-agent by the client-principal who is contacted by the lawyer for a different client.\textsuperscript{64} This contact potentially undermines the investment the absent lawyer has already made in the lawyer-client relationship. In the case of an entity-client, the trust concern underlying Model Rule 4.2 is the potential betrayal of both the absent lawyer-agent and the absent entity-client principal by a contacted agent of the entity. By contrast, the trust concern in the expert witness no-contact rule is the potential betrayal of the relationship between the lawyer as principal and the expert as agent.\textsuperscript{65} Contact here can plant seeds of doubt in the expert's mind, and so could increase the investment in expert testimony the retaining lawyer needs to make going forward.

How do the different purposes of the two no-contact rules affect the boundaries of the rules? One difference is that Model Rule 4.2 has a subject matter limitation: the no-contact rule applies only to communications "about the subject of the representation."\textsuperscript{66} Communications about other topics do not risk undermining the trust between the lawyer and the contacted party, which is grounded in the lawyer's representation in the matter. By contrast, the common statements of the expert witness no-contact rule seem to permit ex parte contact with the opponent's expert.

It may not be immediately apparent what the contacting lawyer would want to contact the opposing side's expert about if not the expert's testimony nor how this contact risks interfering with the lawyer-expert relationship. Several recent cases provide examples. In

\footnotesize{64. See Model Rules of Prof'l Conduct R. 4.2.  
65. Deborah DeMott has questioned how well agency law principles actually apply to the expert witness context. She cautions:  
Characterizing a testifying expert as the retaining lawyer's agent implies that the lawyer has the right to control the witness's testimony, perhaps by instructing the witness how to answer questions and whether to answer questions asked by the adversary's lawyer. This right is inconsistent with the witness's duty to testify truthfully as to the witness's own opinions and knowledge. At a minimum, the witness assumes duties to the court, articulated in the oath the witness takes, that supersede the claims of agency on the witness.  
DeMott is surely correct that the lawyer's control over the expert witness is limited by the expert witness's legal obligations as a witness. That does not mean, however, that the retaining lawyer has no legitimate right of control over the expert witness. In developing the expert's testimony (though not at a deposition or cross-examination at trial), the lawyer can to some extent instruct the witness how to frame certain questions and how to answer others.  
66. Model Rules of Prof'l Conduct R. 4.2.}
Olson v. Snap Products, Inc., the expert witness was also a fact witness for the defendant in a product liability suit involving a device for inflating tires. The plaintiff's lawyer contacted the witness, but alleged that the purpose of the contact was only "to ascertain his factual knowledge concerning the development of the product, and not to probe into any expert opinions that he may have formed." Rejecting the lawyer's justification, the court stated: "We reject, as unsound, any attempt to artificially balkanize an expert's anticipated testimony into facts, and opinion, such as to allow informal, ex parte discovery of the facts, while prohibiting an ex parte inquiry into the expert's opinions. Quite simply, the dichotomy is unworkable." Nevertheless, the court found that the contact did not violate the expert witness no-contact rule, and denied the defendant's motion to disqualify the lawyer, because it found that the defendant had not in fact retained the expert at the time of the contact and that the plaintiff's lawyer had no reason to know that the witness was about to be retained as an expert. The court's interpretation of the expert witness no-contact rule makes sense. Even if the lawyer confined the discussion with the expert witness to the factual elements of the witness's prior involvement, that discussion could potentially impact the scope and nature of the witness's expert testimony. On the other hand, the court's ruling could encourage some parties to engage their fact witnesses as sham experts to shield the factual information from informal discovery.

In Carlson v. Monaco Coach Corp., the court held that a lawyer cannot contact an expert to seek to retain that expert in a different matter while the expert was serving as an expert for the lawyer's litigation opponent. This contact presents a more classic loyalty problem. The possibility of future business poses too great a risk of coloring the expert's testimony. It comes too close to bidding against the opposing lawyer for the expert's services, albeit indirectly because it is in a different case. In this situation, the expert no-contact rule operates similarly to conflict of interest rules for lawyers.

In a third case, Sewell v. Maryland Department of Transportation, a plaintiff's lawyer suing for discrimination contacted the

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68. Id. at 540.
69. Id. at 543.
70. Id.
defendant's psychiatric expert because the lawyer believed the expert had defamed the plaintiff by reporting to various people that the plaintiff had brought weapons onto the defendant's property and planned to kill the plaintiff's supervisor. Finding improper the ex parte contact with the expert, the court stated that "no matter how offensive [the plaintiff's lawyer] found [the expert's] conduct, he was not permitted to grab the telephone, ring up the expert, and try to interrogate him about his opinions, the medical examination, or anything else bearing upon [the expert's] involvement in the case." As in Olson and Carlson, the court apparently feared that any discussion with the expert about the expert's alleged misconduct would inevitably spill over into discussion about the expert's testimony. Moreover, even if the discussion did not directly address the expert's testimony, the lawyer's concerns about the expert's comments could lead the expert to feel the need to do extra work to respond to the claims. In any case, there was a ready solution to the problem of a misbehaving expert: if the plaintiff's lawyer "believed that [the defendant's expert] had misbehaved ... his options were to raise the matter with opposing counsel and, if unsatisfied after that dialogue, he could seek a deposition or raise the matter with the Court." Because the expert was currently serving as an expert in a pending matter, there were ample options available for addressing any improper conduct by the expert other than direct contact by the opposing party's lawyer.

Another point of comparison between the two no-contact rules is the duration of the contact ban. The contact ban in Model Rule 4.2 lasts as long as both parties are represented by counsel and the relevant matter continues. The fact that the ban ends when either the representation or the matter ends emphasizes the rule's focus on the potential for collusion against the absent lawyer, as well as protecting that lawyer's investment in the representation. By contrast, the expert no-contact rule, at least according to the ABA opinion, lasts as long as the "matter" is "pending." But what exactly does that mean? And why should that determine the duration of the ban? Opinions and cases since the ABA opinion have generally not addressed these questions. One possible meaning would be that the matter is pending until the entire proceeding is concluded. That would be consistent with the duration standard given in Model Rule 3.3, which like Model

73. Id. at 547.
74. Id.
75. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2012).
Rule 3.4(c) deals with the lawyer's role as advocate. Model Rule 3.3(c) imposes duties of candor to the tribunal until "the conclusion of the proceeding."77 The expert no-contact rule is not about protecting the tribunal, however, so it is not obvious that this duration is the appropriate one.

A different approach to duration would focus on the purposes the expert witness no-contact rule is intended to serve, though these turn out to yield a host of possibilities. If the main purpose of the rule is to deter the circumvention of the discovery rules, one could argue that the ban should last only until the end of discovery, at least if the information sought in any postdiscovery contact is something that the lawyer could not have obtained during discovery. Or if the contact is for a purpose that could be accomplished through the court's exercise of its supervisory powers, even after discovery, as in Sewell, then perhaps the duration should be until the end of the trial. If the main purpose of the rule is to protect the trust between the retaining lawyer and the expert, one could argue that the ban should last until the expert is no longer working for the lawyer because at that point, the expert would not be able to do any additional work for which the lawyer who had retained the expert would be responsible. Alternatively, one could interpret the duration of the ban as lasting only until the expert submits a report, at least if there is no risk that after that time the expert would be taking on additional analytical work.

Finally, if the main purpose of the expert no-contact rule is to protect confidential information, then one could argue that the ban should last at least until the end of the proceeding and perhaps for the duration of the privilege or work product protection. In that case, however, the ban would have to be limited in some other way, for example, to future matters that are substantially related78 to the one the

77. MODEL RULES OF PROF'L CONDUCT R. 3.3(c). Comment 13 to Model Rule 3.3 defines "conclusion of the proceeding" as "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." Id. R. 3.3 cmt. 13. I will return to this duration standard below in discussing the tribunal no-contact rule. See infra Part IV.

78. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (adopting a substantial relationship test for former client conflicts of interest). In the Olson case, discussed above, the defendant argued that the plaintiff's lawyer who had contacted the defendant's expert should be disqualified even if the defendant had not yet retained the expert in the case at hand because the defendant had previously used the expert on a similar issue in a prior case. The court rejected this argument because "to adopt [that] position would inevitably chill a core function of judicial proceedings—the search for the truth—by permitting corporations to insulate factual witnesses from future discovery by indelibly branding the witness as an 'expert.'" 183 F.R.D. at 543. Nevertheless, the court warned that a lawyer
expert testified in; otherwise, experts would never be able to testify on behalf of anyone other than the first party to retain them. On the other hand, basing the duration of the expert no-contact rule on the confidentiality rationale seems unjustified, because Model Rule 4.4 as well as the special conflict of interest rules governing side-switching by experts already protect against a lawyer improperly seeking to get protected information.

A final question one could ask about the expert no-contact rule is whether an exception should be recognized for contacts initiated by the expert to report wrongdoing by the lawyer who retained the expert or that lawyer's client. As with Model Rule 4.2, there is no generally recognized exception to the expert no-contact rule for reporting wrongdoing. Two cases have discussed this question and rejected the exception, but both involve somewhat special circumstances. In American Protection Insurance Co. v. MGM Grand Hotel-Las Vegas, Inc., MGM designated its former vice president of construction to serve as its sole testifying trial expert as well as a nontestifying consultant in connection with a dispute with its insurance companies concerning a fire at its hotel. Subsequently, while still engaged as an expert with MGM, the expert witness through his personal lawyer contacted lawyers for one of the insurers and offered his services to them. Negotiations ensued between the insurance company lawyers and the expert and his lawyer. After several months, at the insistence of the lawyers for the insurer, the expert resigned from, and ended his agreement with, MGM. MGM subsequently moved to disqualify the lawyers for the insurer. The insurer and its lawyers claimed that the contact with the expert was justified because MGM was a participant in an ongoing fraud against the insurer (passing along inflated insurance claims), and that they had discussed only information

who contacts a former expert of the opposing party, on an ex parte basis, engages in needlessly risky conduct. The better course is to allow discovery to have its proper play, particularly if the witness has previously given expert opinions, and that is a topic for the ex parte inquiry.  

Id. at 543 n.1.

79. ABA Formal Opinion 00-417 concludes that a lawyer who enters into a settlement agreement that includes a provision not to use a particular expert in future litigation would violate Model Rule 5.6(b). ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-417 (2000). One could characterize this as an anti-no-contact rule.

80. MODEL RULES OF PROF'L CONDUCT R. 4.4.

concerning fraud with the expert witness’s attorney. Despite this claim, the district court granted the disqualification motion.\footnote{Id. The case has a somewhat complicated procedural history, some of which casts doubt on the insurer’s claims of fraud. The initial district judge who heard the case disqualified the lawyers for the insurer, and that judgment was affirmed by the United States Court of Appeals for the Ninth Circuit. Am. Prot. Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., 765 F.2d 925 (9th Cir. 1985). The Ninth Circuit opinion found that no evidence had been presented that indicated ongoing fraud by MGM; rather, there was evidence that subcontractors might have padded their bills to MGM, thus making MGM the victim of fraud rather than a perpetrator. After a petition for rehearing, the United States Supreme Court held that an order disqualifying counsel is not immediately appealable. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985). The Ninth Circuit then dismissed the appeal and withdrew its decision, rendering it unavailable as precedent. The disqualification motion was then referred to a federal magistrate, who again ruled in favor of disqualification. The 1986 district court opinion cited above is an affirmation of that judgment by another district court in response to a motion for reconsideration. See Am. Prot. Ins., 1986 U.S. Dist. LEXIS 28326, at *1-10 (describing the procedural history of the case).}

In its opinion, the district court noted that the Pennsylvania disciplinary board had previously found that the insurer’s lawyer did not violate any ethical rules under these circumstances, in part because the expert had evidence of fraud and had his own attorney, who permitted discussion only as to facts demonstrating fraud.\footnote{Id. at *12-13.} The district court disagreed with the Pennsylvania disciplinary board’s conclusion.\footnote{Id. The court relied in part on Canon 9 of the then-applicable ethical rules (the Model Code of Professional Responsibility) of the relevant jurisdiction (Nevada), which stated that a lawyer “Should Avoid Even the Appearance of Professional Impropriety.” Id. at *14 (citing MODEL CODE OF PROF’L RESPONSIBILITY canon 9 (1980)). The Model Rules eliminated the “appearance of impropriety” standard.} The court’s main concern with the lawyers’ behavior was that the lawyers were “facilitating [the expert’s] scheme to collect a bonanza for being disloyal to his former employer (and then present contractee),” which amounted to allowing “the most important witness’ assistance in the litigation to be sold to the highest bidder.”\footnote{Id. at *17.} In reaching this conclusion, the court was thus focusing on one of the loyalty rationales I have suggested for the expert no-contact rule: the danger of a bidding war by litigation opponents for an expert’s testimony. Under this rationale, the court might have reached a different conclusion had the expert withdrawn from working for MGM before contacting the insurance companies, because in that case, the expert would not be engaging in a bidding war over the retention of his services. That conclusion would be stronger if the former expert for MGM subsequently served as only a fact witness for the insurance
companies on the issue of fraud and so was not paid by the insurers as an expert for his testimony.\textsuperscript{86}

On the other hand, the court also added reasoning that suggests a broader scope for the expert no-contact rule. The court stated:

Even protestations that [the expert] would divulge only facts to [the insurer], and not theories or strategies of litigation or communications from employees of MGM to its attorneys, would not assuage the fears of any reasonable person that forbidden matters would be discussed. Even if [the witness's personal lawyer] were present at every conversation between [the insurer's] representatives and [the expert], there could be no assurance that [the expert] wouldn't reveal something he should not. After the revelation had been made, it would be too late. [The expert's personal lawyer] did not represent the interests of MGM. . . . The fact that [the expert] initiated the ex parte contacts does not save [the insurer's attorney].\textsuperscript{87}

This passage implicitly endorses the confidentiality rationale for the expert no-contact rule. Under this rationale, even if the expert had withdrawn from the MGM retention, he would apparently still be prohibited from contacting the insurers (or at least working as an expert for them) because the expert still had information protected by the attorney-client privilege or the work product doctrine. Of course, both of those protections would be lost if the requirements of the crime-fraud exception were met.

A second case in which an expert engaged in ex parte contact with opposing counsel to report wrongdoing of the party that had retained the expert is \textit{In re Firestorm 1991}.\textsuperscript{88} In Firestorm, the court found that lawyers who engaged in ex parte contact with a consulting expert for their adversaries violated ethical rules\textsuperscript{89} but declined to disqualify the lawyers. The expert had been hired by lawyers for several defendant utility companies to investigate a firestorm. The expert, apparently while still retained by the defendants, subsequently contacted the lawyers for the plaintiffs in the case and said that "he had extreme concern that his information [about one of the fires] would be concealed or hidden by the utility company Defendants and their counsel."\textsuperscript{90} Nevertheless, the court found that the lawyers were

\textsuperscript{86.} Under Model Rule 3.4(b) and accompanying comment 3, a lawyer may not pay a fact witness for testifying. \textit{Model Rules of Prof'L Conduct R. 3.4(b) & cmt. 3} (2012).

\textsuperscript{87.} \textit{Am. Prot. Ins.}, 1986 U.S. Dist. LEXIS 28326, at *16.

\textsuperscript{88.} 916 P.2d 411 (Wash. 1996).

\textsuperscript{89.} \textit{Id.} at 415. The court based this finding on a violation of the state law equivalent of the pre-1993 version of Federal Rule 26(b)(4). \textit{See id.}

\textsuperscript{90.} \textit{Id.} at 413.
obligated to comply with the procedure set forth in the discovery rules so that:

[T]he trial court may then fashion the proper form and scope of discovery, as required by the particular circumstances. In this case, the trial court was not initially given this opportunity. By unilaterally determining [the state version of Federal Rule 26(b)(4)] did not apply or that these were exceptional circumstances, [the lawyers] did not conform their conduct (conducting an ex parte interview of [the expert]) with the requirements of [the procedural rule].

It is not clear what the court would have done if the expert had first resigned from the engagement and then gone to the plaintiff’s lawyer with his concerns, but it is possible that the court would not have found such contact inconsistent with the mandatory discovery requirements. This conclusion finds support in the fact that the court declined to disqualify the contacted lawyer. In reaching this judgment, the Firestorm court took into account several factors. First, the expert contacted the lawyers rather than the other way around. According to the court:

This is not a case of plaintiff or defense counsel trolling for experts or seeking to take advantage of opposing counsel by hiring their discarded or unused experts. Counsel who seek to hire or consult former experts of opponents or former integral employees of opponents can violate [procedural rules] as well as create possible grounds for disciplinary action by the Bar.

Second, the expert in Firestorm told the lawyers that the “information would not have been made available” had he not come forward.

Third, the lawyers’ motive in talking with the expert in Firestorm “was not to create delay or confusion.” Fourth, the lawyers never “discussed or brought up the possibility of compensating [the expert] for his information.” Fifth, the lawyers “disclosed the existence and substance of the interview to [opposing] counsel the day after the interview.” Sixth, the expert had not been “privy to litigation strategy.” The court’s opinion does not clarify how many of these factors would have to be present to overcome the expert no-contact

91. Id. at 416.
92. Id. at 418 (footnote omitted) (citing Am. Prot. Ins., 1986 U.S. Dist. LEXIS 28326).
93. Id.
94. Id.
95. Id.
96. Id.
97. Id. at 417 (distinguishing American Protection Insurance on this ground).
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rule, but the factors are consistent with recognizing some exception based on an expert's report of misconduct. Because contact for this reason raises no legitimate concerns of encouraging disloyal behavior by the expert toward the lawyer who originally retained him, the rationale articulated here supports recognizing an exception.

IV. THE TRIBUNAL NO-CONTACT RULE: MODEL RULE 3.5

The third no-contact rule is Model Rule 3.5, which states:

A lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
(c) communicate with a juror or prospective juror after discharge of the jury if:
   (1) the communication is prohibited by law or court order;
   (2) the juror has made known to the lawyer a desire not to communicate; or
   (3) the communication involves misrepresentation, coercion, duress or harassment; . . . .98

Model Rule 3.5 serves two purposes, both of which promote due process within the adversary system.99 First, the rule ensures equal access of all parties to the court.100 The equal access rationale is not quite sufficient to justify the tribunal no-contact rule, however, because equal access could also be assured by allowing both sides equal opportunity to engage in ex parte contacts with the tribunal. That is the approach the ethics rules implicitly take with respect to fact witnesses. Unless those witnesses are protected against ex parte contact by one side under Model Rule 4.2, the lawyers on either side of

98. MODEL RULES OF PROF'L CONDUCT R. 3.5 (2012). I have omitted Model Rule 3.5(d), which prohibits a lawyer from "engag[ing] in conduct intended to disrupt a tribunal." Id. R. 3.5(d). Model Rule 3.5(a) is not really a no-contact aspect of the rule but including it is necessary to determine the scope of Model Rule 3.5(b). See id. R. 3.5. The Restatement has separate no-contact rules for judges and jurors. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 113, 115 (2000).
99. See RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 113 cmt. b ("Ex parte communication with a judicial official before whom a matter is pending violates the right of the opposing party to a fair hearing and may constitute a violation of the due-process rights of the absent party.").
100. Some ex parte proceedings before a court are permitted by law. In those cases, lawyers have special obligations to ensure due process. See MODEL RULES OF PROF'L CONDUCT R. 3.3(d).
a controversy have equal access to fact witnesses through ex parte contact as well as court testimony.\textsuperscript{101}

The second purpose of the tribunal no-contact rule is that it prevents the contacting lawyer from undermining the judicial official’s role by threatening to make the contacted official either a witness in the case or subject to further ex parte contacts. If one lawyer has ex parte access to a judge or juror or other official,\textsuperscript{102} how can the other lawyer fairly determine what happened during that ex parte contact?\textsuperscript{103} One possibility would be to allow the contacted judge or juror to testify about the contact. But that conflicts with the judicial role in the proceeding, which is to regulate and evaluate testimony.\textsuperscript{104} The alternative is to have the absent lawyer engage in a subsequent ex parte contact with the judge or juror to determine what was said in the prior contact with the other lawyer. But that ex parte contact could in turn raise concerns by the first lawyer, leading that lawyer to engage in yet another ex parte contact, and so on. The tribunal no-contact rule precludes a wasteful and potentially endless chain of ex parte contacts.\textsuperscript{105}

Most important for the thesis of this Article, neither rationale for the tribunal no-contact rule focuses on the vulnerability of the

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101. \textit{Id.}
102. Model Rule 3.5 does not define “other official,” and Comment 2 adds only “masters” as an example. See \textit{id}. R. 3.5 & cmt. 2. A comment to the Restatement (Third) of the Law Governing Lawyers section 113 states:

The prohibition applies to a judge, master, hearing officer, arbitrator, or other officer authorized to rule upon evidence or argument about a disputed matter. It also applies to other officials who have decisionmaking authority in the litigation, such as a jury commissioner or a clerk with responsibility to assign cases to judges.

It also applies to indirect communications, as through a judge’s clerk. \textbf{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 cmt. d.}

103. The Restatement comment explaining the rationale for the tribunal no-contact rule states, “A communication made secretly may not withstand scrutiny.” \textbf{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 cmt. b.} In my view, the bigger problem is that a communication made secretly encourages further scrutiny.

104. \textit{Cf. In re Carmick}, 48 P.3d 311, 318 (Wash. 2002) (stating that Model Rule 3.5(b) is “designed to protect the integrity of the legal system and the ability of courts to function as courts”). A similar concern with preserving a participant’s role in the adversary process underlies Model Rule 3.7, which prevents a lawyer in certain circumstances from acting as both an advocate and a witness in the same case. \textbf{MODEL RULES OF PROF’L CONDUCT R. 3.7.}

105. The Restatement comment also expresses concern that allowing ex parte contact with a judge would interfere with the relationship between the judge and the parties. It states, “Ex parte communication also threatens to embarrass the parties’ relationship with the judicial officer, requiring the officer either improperly to acquiesce in the conduct or to make a censorious response.” \textbf{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 cmt. b.} The nature of the judicial-lawyer relationship sought to be protected is not entirely clear. The rationale offered in the text attempts to provide an alternative way to frame the concern.
contacted person. The judge is not likely a vulnerable person and the vulnerability of the juror is handled by the contact prohibitions in Model Rule 3.5(c). On the other hand, both rationales implicate the interests of the absent lawyer and that lawyer's client.

These purposes help inform the scope of the tribunal no-contact rule and facilitate a comparison of this rule to the previous two. The first question is which lawyers are covered by the rule. Model Rule 4.2 restricts only lawyers who are representing a client in some matter, and Model Rule 3.4(c) restricts only lawyers who are bound by the rules of a particular tribunal, including rules of civil procedure that provide exclusive means of obtaining discovery from expert witnesses. On the other hand, Model Rule 3.5 by its terms is not limited to a lawyer representing a client in litigation before a particular judge and jury, or even to a lawyer representing a client who has some interest in the proceeding, or even to a lawyer representing a client at all. A no-contact restriction that applies to lawyers beyond the advocates in a case makes sense based on the purposes of the rule. Ex parte contact by any lawyer to discuss a case with a judge or juror who is performing an official role in that case could raise the same due process concerns as contact by an advocate representing a client in that case. Allowing these contacts would run the risk of permitting a kind of secret evidence into the proceeding and could lead to still more

107. Id. R. 3.4(c).
108. Restatement (Third) of the Law Governing Lawyers sections 113 and 115 similarly include no limitation on the lawyers to whom the rules apply, in contrast to a number of other rules in the Restatement's chapter 7 on "Representing Clients in Litigation." See Restatement (Third) of the Law Governing Lawyers §§ 105-107, 109 (beginning each section with the phrase "[i]n representing a client in a matter before a tribunal"). On the other hand, most of the Model Rules in part 3, captioned "Advocacy," do not explicitly limit their application to lawyers representing a client before a tribunal. See Model Rules of Prof'L Conduct Rules 3.1-2, 3.4-6, 3.9. But see id. R. 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). One court, in declining to sanction under Model Rule 3.5(b) a nonadvocate lawyer who had contacted a judge, relied on the "Advocacy" caption in the Model Rules to conclude that Model Rule 3.5(b) applies only to lawyers acting as advocates. Nevertheless, the court sanctioned a lawyer who contacted the judge under Model Rule 8.4(d), which prohibits any lawyer from engaging in conduct prejudicial to the administration of justice. State ex rel. Okla. Bar Ass'n v. Hine, 937 P.2d 996, 999 (Okla. 1997) (reprimanding, under Oklahoma's counterpart to Model Rule 8.4(d), a lawyer and member of child advocacy group who was not representing a client and who wrote an ex parte letter to the court in a child custody dispute discussing alleged sexual abuse of the child).
contacts or attempts to have the judge or juror testify about the nature of the contact.

Not only is Model Rule 3.5(b) broad in its coverage of restricted lawyers, it also is broadly drafted in other ways. In particular, Model Rule 3.5(b) seems to place no limits on the judges with whom contact is prohibited and the subject matter to which the ban applies. By its terms, Model Rule 3.5(b) prohibits any "communicat[ion]" with "a judge" if that communication takes place "during the proceeding." Read literally, the rule seems to say that a lawyer cannot communicate with any judge about some case, even if the judge is not involved in the case, as long as the case is ongoing somewhere, and that a lawyer involved in a case cannot communicate on any topic with a judge involved in that case. In these respects, Model Rule 3.5(b) differs from the versions of the rule contained in the formerly applicable Model Code of Professional Responsibility, as well as in the Restatement (Third) of the Law Governing Lawyers, and some state versions of Model Rule 3.5(b). These alternative provisions limit the applicability of the tribunal no-contact rule to judges before whom some proceeding is pending, and limit the prohibited subject matter to communications about that proceeding. Model Rule 3.5(b) does include a comment that seems to adopt the restriction of the contact ban to judges before whom the matter is pending, though it is not clear why the drafters would choose to move the restriction from the text of the rule to the comment. According to the comment, "During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding . . . ." There is, however, no similar comment that limits the subject matter of the prohibited communication to communications about the proceeding. Model Rule 3.5(b) thus seems to adopt the broader subject matter prohibition of the expert witness no-contact rule rather than the

109. MODEL RULES OF PROF'L CONDUCT R. 3.5.
110. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-110(B) (1980) ("In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, [unless a stated exception applies].").
111. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113(1) ("A lawyer may not knowingly communicate ex parte with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law.").
113. MODEL RULES OF PROF'L CONDUCT R. 3.5 cmt. 2.
narrower approach of Model Rule 4.2, which limits the prohibited contact to communications about the subject matter of the representation.

The limits on the tribunal no-contact rule imposed by the Model Code and the Restatement are more consistent with the purposes of the rule. Unless the judge has some role in the case, a communication with that judge would not interfere with due process or a fair hearing and would not necessarily lead an opposing counsel to want to question the judge about the substance of the communication. Similarly, only communications about subjects that have the potential to affect the outcome of the case raise the kinds of concerns addressed by the rule.\(^{114}\) It is true that a lawyer might suspect that any communication between an adversary's lawyer and a judge could inevitably spill over into a discussion of the matter before the judge, but the line seems like a relatively easy one for the contacting lawyer and the contacted judge to observe. Further, there is no obvious reason why the lawyers and judges should not be trusted in general to adhere to their ethical obligations. If anything, one would think the spillover concern would be greater in the no-contact situation governed by Model Rule 4.2, where the contacted person has no ethical obligations and may have an incentive to collude with the contacting lawyer. Moreover, unlike the expert witness situation, there is no reason to think that, in general, discussions about matters other than the case before the judge would necessarily lead the judge to act in a biased way in the case or otherwise inconsistently with due process. Finally, communications about topics not related to the matter before the judge would not

\(^{114}\) Restatement §113(1) differs from DR 7-110(B) in that it does not limit prohibited communications to those about the "merits" of the case. An accompanying comment explains the rationale for the broader prohibition as a concern with the potential to affect the outcome of the case. The comment states:

The prohibition applies to communication about the merits of the cause and to communications about a procedural matter the resolution of which will provide the party making the communication substantial tactical or strategic advantage. The prohibition does not apply to routine and customary communications for the purpose of scheduling a hearing or similar communications, but does apply to communications for the purpose of having a matter assigned to a particular court or judge.

\textit{Restatement (Third) of the Law Governing Lawyers} § 113 cmt. c; see also D.C. Legal Ethics Comm., Ethics Op. 295 (2000) (interpreting Model Rule 3.5(b) not to prohibit ex parte communications concerning administrative or scheduling matters).
invariably lead to further ex parte communications by the other lawyer with the judge.

In addition to the questions of which lawyers are restricted, which nonclients are protected from contact, and what types of communication are covered by the tribunal no-contact rule, another interpretive question is the possible justifications for ex parte contact. As already noted, Model Rule 3.5 is broadly drafted, and seems to offer little room for justification. The only stated exceptions are for contacts that are "authorized . . . by law or court order."115 Do these exceptions encompass contact by the lawyer to report potential wrongdoing by another lawyer to the tribunal? The answer seems to be no. In *In re Lee,*116 the court held that a lawyer (who actually had previously served as a judge for almost two decades) violated Model Rule 3.5(b) by engaging in ex parte contact with a judge to inform that judge about possible ethical misconduct by opposing counsel. The Louisiana Supreme Court flatly rejected the lawyer’s purported justification that he was acting to fulfill his ethical obligation to inform the tribunal of wrongdoing by another attorney. The court stated, "[T]he language of Rule 3.5(b) clearly and broadly prohibits all ex parte communication with a judge during the course of a proceeding."117 The court emphasized that there were other "procedures available to [the lawyer] for reporting possible misconduct on the part of another attorney."118 Specifically, the lawyer could have reported the misconduct to the appropriate disciplinary authority or to a judge other than the one before whom the case was pending.119

The principle espoused in *In re Lee* is consistent with the purposes of the tribunal no-contact rule. It is helpful to compare *In re Lee* with the other no-contact rules already considered. In the situations governed by the general no-contact rule and the expert witness no contact rule, the issue of lawyer wrongdoing typically comes up when the person with whom contact is ordinarily prohibited has information about lawyer wrongdoing and seeks to inform another lawyer about that wrongdoing. If the applicable no-contact rule prohibits the contact, the contacted lawyer might not learn of the

115. MODEL RULES OF PROF’L CONDUCT R. 3.5(b).
116. 2007-2061 (La. 2/26/08); 977 So. 2d 852.
117. Id. at p. 10; 977 So. 2d at 858.
118. Id.
119. Model Rule 8.3(a) requires a lawyer who “knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” to “inform the appropriate professional authority.” MODEL RULES OF PROF’L CONDUCT R. 8.3(a).
wrongdoing at all. In the tribunal no-contact rule situation represented by *In re Lee*, by contrast, the lawyer restricted by the no-contact rule already has information about another lawyer and wants to report it to the tribunal.

Restricting the contacting lawyer's ability to report through an ex parte contact with the judge before whom the case is pending will not ordinarily prevent the lawyer from reporting in other ways, as *In re Lee* states; thus, the need for an exception is much less than in the situations governed by the other no-contact rules. Of course, the nonlawyer in these situations could report to someone other than the restricted lawyer, but the nonlawyer may not have an ethical or legal obligation to do so and may not know about the possible alternatives. Further, in the situations governed by the other no-contact rules, the reason for the contact—reporting wrongdoing—negates the concern motivating the contact ban, which in both cases is based in part on the protecting the legitimate relationship and fiduciary duties between the represented person or expert witness and the absent lawyer. In the tribunal no-contact situation represented by *In re Lee*, however, the fact that the restricted lawyer wants to report misconduct of the other lawyer involved in the case to the tribunal does not negate the concern underlying the no-contact rule. Rather, it implicates that concern, because ex parte reporting could harm the absent lawyers' ability to defend their conduct to the judge, thus potentially depriving the absent lawyers' clients of due process and leading the absent lawyers to seek further ex parte contact with judges, or call the judges as witnesses, to ascertain the content of the previous contacts.\(^\text{120}\)

Several ethics opinions have also declined to recognize an exception to the tribunal no-contact rule for ex parte communications concerning judicial recusal. In one opinion, a defense lawyer sought to contact a judge ex parte about possible recusal because the judge was previously married to a partner in the plaintiff's law firm. In finding

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\(^{120}\) A related question is whether a lawyer may make an ex parte disclosure that involves wrongdoing on the part of that lawyer's own witness or others involved in the proceeding. The concerns raised by the *In re Lee* situation seem similar. Model Rules 3.3(a)(2), 3.3(a)(3), and 3.3(b) all require disclosure to the tribunal in some circumstances. One ethics opinion has concluded that in this situation, a lawyer must not make the required disclosure in an ex parte communication. State Bar of Ariz. on the Rules of Prof'l Conduct, Ethics Op. 05-05 n.9 (2005) (recommending that a motion be made to the tribunal with notice to all affected parties). The opinion's implicit conclusion is that even when the ethics rules authorize disclosure to the tribunal, they do not expressly authorize ex parte disclosure, and so such disclosures are not authorized by law under Model Rule 3.5(b). See id.
that the proposed contact would violate Model Rule 3.5(b), the opinion
reasons:

Whether the judge serves is an issue potentially impacting the plaintiff
and the plaintiff’s counsel without giving them an opportunity for
consultation and participation concerning the proceeding pending
before the judge. A lawyer may not contact the presiding judge
regarding judicial disqualification outside the presence of other counsel
in the matter.\(^{121}\)

Another ethics opinion reached the same result in response to the
question of whether a prosecutor could engage in ex parte
communication with a judge about possible grounds for recusal from a
case in which both the prosecutor and the judge were involved.\(^{122}\) As
with the case of reporting lawyer wrongdoing, it makes sense not to
create an exception for informing a judge of the judge’s own ethical
obligations. The opposing lawyer and that lawyer’s client may have a
strong interest in whether or not a judge is recused, so the concerns
with due process and the context of any ex parte conversation with the
contacting lawyer are very much present.

On the other hand, an ABA ethics opinion reaches the opposite
conclusion in the somewhat unusual situation of a lawyer representing
a judge in one matter who has a case pending before that judge in a
different matter.\(^{123}\) The ABA opinion says that in these circumstances,
lawyers may communicate with judges about the judges’ own ethical
obligation to recuse themselves from the cases the lawyers are
litigating before them. In support of this conclusion, the opinion
broadly states, “We do not believe that an attempt to dissuade a judge
from conducting a proceeding constitutes an ex parte conversation
with the judge during the proceeding within the meaning of Rule
3.5.”\(^{124}\) One could perhaps extract from that statement a principle that
any communications with a judge about the appropriateness of that
judge’s participation in a proceeding, as opposed to the “merits” of the
underlying case, are not improper ex parte communications.

However, the opinion is susceptible of a narrower reading, which
seems more appropriate and more consistent with the purposes of
Model Rule 3.5. When a lawyer represents a judge, who is
subsequently assigned to an unrelated case in which the lawyer is
appearing as an advocate on behalf of a different client, the disclosure

\(^{124}\) Id.
of information about recusal to the lawyer's litigation adversary in the unrelated case could violate the lawyer's duty of confidentiality to the judge as client. Moreover, because of the lawyer's representation of the judge, the lawyer will have no choice but to engage in at least some ex parte conversations with that judge. Last, as the opinion itself noted, the lawyer in advising the judge to recuse would arguably be taking a position against the lawyer's own interest as advocate, to the extent that the lawyer's relationship in with the judge in the representation could be thought to lead the judge to favor the lawyer's litigation position in the unrelated matter pending before the judge.\(^\text{i25}\)

The exception recognized in the ABA opinion may not be the only sensible one, however. In particular, a lawyer not involved in litigation before the judge should not be deemed to violate Model Rule 3.5(b) if the judge contacts the lawyer ex parte about the judge's own ethical obligations.\(^\text{i26}\) Moreover, in addition to being a client, a judge may serve other extrajudicial roles. For example, a lawyer who contacts a judge to investigate the judge’s personal knowledge of wrongdoing by another person would arguably not contravene the purposes of Model Rule 3.5(b) because the judge in that situation is a potential fact witness and because the contact follows, rather than creates, the judge's status as a fact witness.

A final topic to consider is the duration of the tribunal no-contact rule. With respect to jurors, Model Rule 3.5 is relatively clear. Under Model Rule 3.5(b), a lawyer is forbidden from communicating with a juror “during the proceeding.”\(^\text{i27}\) Under Model Rule 3.5(c), a lawyer is forbidden from communicating with a juror “after discharge of the jury” if one of the three stated conditions applies.\(^\text{i28}\) This formulation suggests that if the stated conditions do not apply, the lawyer in a jurisdiction that has adopted Model Rule 3.5 may ethically contact a juror after discharge of the jury.\(^\text{i29}\) Again, this makes sense in terms of

\(^{125}\) *Id.* at n.8 ("Indeed, if the lawyer wished to exert undue influence, it is hardly likely that he would seek the judge’s withdrawal under the circumstances.").

\(^{126}\) A judge would not violate the judicial ethics code by engaging in ex parte contact with a lawyer not involved in the litigation for the purpose of getting ethical advice, including advice about possible recusal. *MODEL CODE OF JUDICIAL CONDUCT* R. 2.9 cmt. 7 (2011). In a somewhat different context, the lawyer ethics rules recognize an exception to an otherwise applicable ethical duty to permit a lawyer to obtain advice about compliance with the ethics rules. *See MODEL RULES OF PROF’L CONDUCT* R. 1.6(b)(4) (2012) (allowing a lawyer to reveal confidential client information "to secure legal advice about the lawyer’s compliance with these Rules").

\(^{127}\) *MODEL RULES OF PROF’L CONDUCT* R. 3.5(b).

\(^{128}\) *Id.* R. 3.5(c).

\(^{129}\) *See id.* R. 3.5 cmt. 3:
the purposes of the tribunal no-contact rule because once the juror's role in the case has ended, contacting the juror would not have any potential to affect the outcome of the case, and there would be no need for opposing counsel to question the discharged juror in response. The contact could provide useful feedback but the information would be relevant only to possible grounds for appeal, to a remand after appeal, or to future cases.

With respect to judges, the duration of the ban is less clear. As already noted, the Model Code and the Restatement rules limit the contact ban to judges before whom a proceeding is pending. Under that language, the ban ends when the case is no longer before that judge, whether the judge is a trial or appellate judge. The drafters of the Model Rules deleted the "before whom the proceeding is pending" language, however, and replaced it with "during the proceeding." So does that mean that Model Rule 3.5 extends the period of the no-contact ban beyond the time when the case is pending before the judge to the time when the entire "proceeding" ends? One way to resolve this question is to focus on the meaning of the term "proceeding" in the Model Rules. Although it is not a defined term either in Model Rule 3.5 or in the general definition section of the Model Rules, the term does appear in Model Rule 3.3(c), which imposes various duties on lawyers representing a client in litigation before a tribunal until the "conclusion of the proceeding." An accompanying comment to Model Rule 3.3 states: "A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." If

A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.


130. See Restatement (Third) of the Law Governing Lawyers § 113 cmt. c ("The prohibition becomes effective when the lawyer knows that the judicial officer has assumed or will assume any responsibility in the matter and continues until responsibility is terminated.").

131. Model Code of Prof'l Responsibility DR 7-110(b) (1980).

132. Model Rules of Prof'l Conduct R. 3.5(b).

133. Id. R. 1.0.

134. Id. R. 3.3(c).

135. Id. R. 3.3 cmt. 13. Note that by its terms ("within the meaning of this Rule") the comment applies only to Model Rule 3.3. Id.
“proceeding” means the same thing under Model Rule 3.5(b) as it does under Model Rule 3.3(c), then arguably the ban lasts as long as the case is ongoing, even if it is no longer before that judge.

On the other hand, maintaining internal consistency within Model Rule 3.5(b) may argue for a different interpretation of the term “proceeding,” based on its meaning as applied to jurors. The “during the proceeding” limitation did not appear in the original version of Model Rule 3.5, but was added by the ABA in 2001, at the recommendation of its Ethics 2000 Commission, along with the current Model Rule 3.5(c). The wording of Model Rule 3.5(c) suggests that the drafters thought that in the absence of the three stated conditions prohibiting postdischarge juror contact, such contact would be permitted, even if the “proceeding” had not ended because, for example, an appeal was pending. If the drafters had thought that the prohibition on contacting jurors lasted until the end of the proceeding, one might have expected the drafters to state the new Model Rule 3.5(c) as an exception to the prohibition in Model Rule 3.5(b) rather than as an additional prohibition, or to base the additional prohibition in Model Rule 3.5(c) on contact after the proceeding (which would already be banned) rather than on contact after discharge of the jury. Under this interpretation, “during the proceeding” as applied to jurors means “while the juror is sitting as a juror on the case.” If that is what “during the proceeding” means with respect to a juror, then arguably it should mean the same thing with respect to a judge.

We cannot stop here, however, because the no-contact rule for judges contains a feature not found in the other no-contact rules.

136. ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 475-76 (2006) (noting that the “during the proceeding” limitation was added “in light of the Commission’s decision to treat post-discharge communication with jurors in a new paragraph (c)”). Model Rule 3.5(c) itself was added as a response to a court decision holding unconstitutional as overbroad under the First Amendment the flat prohibition on post-trial juror contact contained in the original version of Model Rule 3.5. See Rapp v. Disciplinary Bd. of Haw. Sup. Ct., 916 F. Supp. 1525, 1534-38 (D. Haw. 1996).

137. For example, Model Rule 3.5(c) might have been drafted to begin, “Notwithstanding Rule 3.5(b), a lawyer may communicate with a juror after discharge, unless . . . .”

138. In addition, the fact that the drafters added “during the proceeding” because they were simultaneously adding to Model Rule 3.5 a new section dealing with juror contact may also suggest that “during the proceeding” might not have been intended to displace the “before whom a proceeding is pending” standard for judicial contact. Once they expanded Model Rule 3.5 to cover jurors as well as judges, the drafters might have felt that it would have been awkward to define the limiting standard applicable to both judges and jurors as “before whom a proceeding is pending.” It is not common usage to say that a matter is “pending before” a juror. See MODEL RULES OF PROF’L CONDUCT R. 3.5.
Unlike represented persons and expert witnesses, the subjects of the no-contact rules of the previous sections, judges have their own ethical obligations not to engage in ex parte contact with litigants and their lawyers. And lawyers have an additional ethical obligation not to "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." Thus, the lawyer's ethical obligation to avoid ex parte contact with judges needs to be harmonized with the judge's ethical obligation to avoid ex parte contact with lawyers and the lawyer's derivative obligation not to assist a judge in violating the judge's own ethical obligations.

Rule 2.9 of the recently revised ABA Model Code of Judicial Conduct addresses ex parte communications between a judge and others. Rule 2.9(A) provides in part:

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

1. When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
   a. the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
   b. the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

2. A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

3. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

139. Id. R. 8.4(f).
(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.141 Rule 2.9(A) does not limit the ban on ex parte communications to matters pending before the judge. Instead, it applies the ban to any "pending or impending matter." The terminology section of the Model Code of Judicial Conduct defines "pending matter" as "a matter that has commenced. A matter continues to be pending through any appellate process until final disposition."142 Thus, a judge would violate Rule 2.9(A) of the Model Code of Judicial Conduct by engaging in ex parte contact with an advocate (or anyone else) even after the judge's involvement in the case ended, as long as the case is ongoing.143 As a result, even if Model Rule 3.5(b) were read to permit such contact, a lawyer would arguably be forbidden from engaging in it under Model Rule 8.4(f).144

Several cases interpreting the former version of the ex parte rule in the ABA Model Code of Judicial Conduct support the interpretation that the prohibition for judges is not limited to judges before whom a matter is currently pending. These cases extend the prohibition on ex parte communication to matters that had at one time been before the judge even though they were not before the judge at the time of the communication. In In re Young,145 a judge fulfilling a rotational assignment presided over a case involving the discipline of a student. After granting a temporary restraining order, the judge was replaced by a different judge in the case when the rotational assignment ended. A motion by the plaintiff's lawyer for attorneys' fees was pending at the time the first judge's assignment ended. Shortly thereafter, the first judge made an ex parte telephone call to the lawyer for the school district to discuss some aspects of the case. Subsequently, the judge

141. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A).
142. Id. terminology. An "impending matter" is defined as "a matter that is imminent or expected to occur in the near future." Id. Canon 3B(7) of the former Model Code expresses a similar ban on ex parte contact, though it uses the phrase "pending or impending proceeding" instead of "pending or impending matter." MODEL CODE OF JUDICIAL CONDUCT canon 3B(7) (1990).
143. In addition to being supported by the definition of "pending matter," the result is also supported by the fact that both Rule 2.9(A)(2) and Rule 2.9(A)(4) specifically limit exceptions to the ex parte contact ban to matters pending before that judge, suggesting that the other parts of the rule have a different duration. See MODEL CODE OF JUDICIAL CONDUCT terminology, R. 2.9 (2011). Similarly, in Canon 3B(7) of the former Model Code, some exceptions are described as applicable to a proceeding pending before the judge.
144. MODEL RULES OF PROF'L CONDUCT R. 8.4(f). For a possible response to that position, see infra notes 152-157 and accompanying text.
145. 984 P.2d 997 (Utah 1999).
was reassigned to the case and ruled on the attorneys’ fee petition. The judge was disciplined for violating the judicial ethics rules and the Utah Supreme Court affirmed, holding that the judge violated the ex parte rule “by initiating an ex parte telephone conversation with an attorney in a case over which he had presided, which was then a pending proceeding,” because “the issue of attorney fees had not yet been resolved.”

A second case reaching a similar conclusion is *In re White.* After a trial judge sentenced a criminal defendant, the defendant appealed. The trial judge’s sentence was overturned on the ground that “a reasonable person could question the [trial judge’s] impartiality,” and the case was remanded for “resentencing by another county judge.” The prosecuting attorney then provided a copy of the appellate opinion to the original trial judge and asked that judge whether he had a view of the possibility of further appeal by the state. The original trial judge later met with the prosecutor, criticized the appellate opinion, and provided case support for the judge’s view. The Nebraska Supreme Court found that the judge violated the Code of Judicial Conduct by engaging in ex parte communications with the prosecutor, “despite the fact that the [underlying] case was not directly pending before the [judge],” because the language of the relevant rule “does not limit [its] prohibition by reference to the docket of a particular judge.” Further, the Nebraska Supreme Court found that the case was “pending” because the appellate process had not been completed. The court noted that if the state had appealed and prevailed, “the case might have been remanded to the [judge] for further proceedings,” which “provides an additional rationale for prohibiting ex parte communications,” but the court did not rest its holding solely on that fact.

Interestingly, neither case discusses the ethical duties of the lawyer involved in judicial contact and how those duties relate to the

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146. *Id.* at 1009.
147. *Id.* at 1006. Although the judge who engaged in the ex parte communication was subsequently re-assigned to the case and ruled on the attorneys’ fee petition, the court in *Young* did not base its holding on that fact. *See id.* at 1006-09.
148. 651 N.W.2d 551 (Neb. 2002).
149. *Id.* at 558.
150. *Id.* at 561. In reaching this conclusion, the court made no reference to the relevant lawyer ethics rule on ex parte contact with judges, which at the time was DR 7-110(B) of the Model Code of Professional Responsibility. *See id.* That rule limited a lawyer’s ethical prohibition against ex parte contact to a judge “before whom the proceeding is pending.” NEB. CODE OF PROF’L RESPONSIBILITY DR 7-110(B) (2000).
151. *White,* 651 N.W.2d at 562.
judge's ethical duties. Nor do Model Rule 3.5 or Model Code of Judicial Conduct Rule 2.9 or their comments reference the ex parte rule contained in the other. Yet both rules include an exception for ex parte contacts that are "authorized by law." Is each rule "law" for purposes of the exception in the other, so that an ex parte contact prohibited by Model Rule 3.5 but allowed by Model Code of Judicial Conduct Rule 2.9 becomes permitted under Model Rule 3.5 and vice versa?

Even if the rules count as "law," there would be a separate question whether either rule "authorizes" ex parte contact. Both

152. The first comment to Model Rule 3.5 does reference the Model Code of Judicial Conduct, but in reference to the prohibition against improper influence contained in Model Rule 3.5(a), not with respect to the no-contact rule in Model Rule 3.5(b). MODEL RULES OF PROF'L CONDUCT R. 3.5 cmt. 1 (2012). In addition, the comments to Model Rule 3.5 make no reference to Model Rule 8.4(f). See id. R. 3.5.

153. Id. R. 3.5(b); MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(5) (2011). The Model Rules do not expressly define "law," but Model Rule 8.4(f) may suggest that the code of judicial conduct is "law" because it states that a lawyer may not assist a judge in violating these rules "or other law." MODEL RULES OF PROF'L CONDUCT R. 8.4(f). The Model Code of Judicial Conduct defines "law" in its Terminology section as encompassing "court rules as well as statutes, constitutional provisions, and decisional law." MODEL CODE OF JUDICIAL CONDUCT terminology. Lawyer ethics codes are generally adopted by states as court rules or statutes, and so seem to fit this definition.

154. For example, Model Code of Judicial Conduct Rule 2.9(A)(1) includes an exception for "scheduling, administrative, or emergency purposes," MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(1), and Rule 2.9(A)(4) allows a judge, "with the consent of the parties," to "confer separately with the parties and their lawyers in an effort to settle matters pending before the judge," id. R. 2.9(A)(4), but Model Rule 3.5(b) contains no such express exceptions, MODEL RULES OF PROF'L CONDUCT R. 3.5(b). And if "during the proceeding" in Model Rule 3.5(b) is interpreted to mean "while the case is pending before the judge" (or if a state adopts a version of Model Rule 3.5(b) that expressly includes that phrase), then Model Rule 3.5(b) would permit contact that Model Code of Judicial Conduct Rule 2.9 forbids. See MODEL RULES OF PROF'L CONDUCT R. 3.5.

155. Model Code of Judicial Conduct Rule 2.9(A)(5) adds the requirement that the law must "expressly" authorize ex parte conduct. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(5). Model Rule 3.5(b) does not include that limitation. See MODEL RULES OF PROF'L CONDUCT R. 3.5(b). That difference may suggest an asymmetrical result in which the Model Code of Judicial Conduct Rule 2.9 exceptions make ex parte contact permissible for lawyers under Model Rule 3.5 (because they are "authorized by law"), id., but Model Rule 3.5 does not create exceptions for judges under Model Code of Judicial Conduct Rule 2.9, see MODEL CODE OF JUDICIAL CONDUCT R. 2.9, and derivatively for lawyers under Model Rule 8.4(f) (because they are not "expressly authorized by law"), MODEL RULES OF PROF'L CONDUCT R. 8.4(f). On the other hand, a North Carolina ethics opinion finds that a state statute that allows a prosecutor to "at any time apply to an appropriate ... judge ... for modification or revocation of an order of release," but does not specifically state that the prosecutor may make the application ex parte, does not fall within the "authorized by law" exception to Model Rule 3.5. N.C. Council of the N.C. State Bar, Formal Ethics Op. 2001-15 (2002). According to the opinion, "[A] lawyer may not engage in an ex parte communication with a judge ... unless there is a statute or case law specifically and clearly authorizing such communication." Id. (emphasis added).
rules state prohibitions on ex parte contact as well as exceptions that permit ex parte contact, but "permit" may not be the same as "authorize." Finally, it could be that when a court approves ex parte contact permitted by Model Code of Judicial Conduct Rule 2.9, it would count as a "court order," which is a separate exception under Model Rule 3.5(b).  

Apart from the difficult question of what the law is with respect to the duration of the tribunal no-contact rule is the question of what the law should be. If there is a reasonable likelihood that a case could be remanded to a judge for further proceedings, there is a good argument for extending the no-contact ban beyond the end of the trial. On the other hand, if there is no reason to think that the case would be remanded to that judge, for example, because the judge retires after the trial ends, the argument for applying the no-contact ban is weaker because the judge would have no further ability to influence the outcome of the case (apart from talking to other judges). As a result, there would be less reason to fear a series of ex parte contacts by both sides to find out what the judge said to the other side. Nor would there likely be any need for a judge to testify about these contacts. Alternatively, the problem of the judge handling the case on remand could be dealt with by recusal or by assigning the case to another judge, rather than by extending the duration of the judicial no-contact rule.

V. THE POTENTIAL CLIENT NO-CONTACT RULE: MODEL RULE 7.3

The last of the no-contact rules is the antisolicitation rule contained in Model Rule 7.3. It differs from the other no-contact rules in that lawyers who solicit potential clients are trying to provide information to them, not extract information from them, though of

156. Prior to the "Ethics 2000" revisions to the ABA Model Rules, the exception to Model Rule 3.5(b) read "except as permitted by law." ABA, supra note 136, at 475 (emphasis added). The change from "permitted" to "authorized" is potentially important because it suggests that the mere absence of a legal prohibition is not sufficient to trigger the exception in Model Rule 3.5(b). Instead, perhaps the law must somehow affirmatively recognize the legitimacy of the ex parte communication. But cf. Hazard & Irwin, supra note 11, at 811 (arguing, in the context of Model Rule 4.2's "authorized by law" exception, that to interpret "authorized" as "specifically permitted" would be "unusual for legislation").

157. The "court order" exception was added to Model Rule 3.5 in 2002 to "alert lawyers to the availability of judicial relief in the rare situation in which an ex parte communication is needed." ABA, supra note 136, at 476.

158. MODEL RULES OF PROF'L CONDUCT R. 7.3.
course the contacting lawyers are trying to get a representation agreement from the potential clients. Model Rule 7.3(a) provides:

A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.159

The comment to the rule makes clear that its main purpose is to protect vulnerable prospective clients from abusive behavior by lawyers seeking to represent them. According to the comment:

There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.160

Unlike the other no-contact rules, the antisolicitation rule does not seem to be designed to protect absent parties, and certainly not another lawyer. Indeed, there may not be another lawyer in the picture at the time of the contact, which is not the case with the other no-

159. Id. R. 7.3(a). Model Rule 7.3 was recently amended by the ABA House of Delegates in the summer of 2012. The caption of the Rule was changed from "Direct Contact with Prospective Clients" to "Solicitation of Clients." The only change to former Model Rule 7.3 was to delete the phrase "from a prospective client" after "solicit professional employment." The change was not intended to broaden the scope of the rule, but to avoid narrowing it in light of Model Rule 1.18, which defines "prospective client" as someone who has already discussed possible representation with a lawyer. See ABA COMM'N ON ETHICS 20/20, NO. 105B, REPORT TO THE HOUSE OF DELEGATES (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105bfiled_may_2012.authcheckdam.pdf. Model Rule 7.3 is obviously intended to apply to potential clients even if they have had no previous contact with a lawyer.

160. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 2; see also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978) (upholding against a First Amendment challenge an ethical ban on in-person solicitation because of the state's interest in protecting the lay public from the potential for overreaching by lawyers). Comment 2 was formerly comment 1 before the 2012 revisions. Apart from its new placement, the main change to the comment was to delete references to the "prospective client" consistent with the change to Model Rule 7.3(a). See MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 2.
contact rules. And yet, absent lawyers may have an interest in, and be affected by, the solicitation in several ways. Most obviously, absent lawyers may have an interest in competing for the potential client’s business. Although one could view solicitation as lawyers just being entrepreneurial and thus acting in a pro-competitive manner to offer services others may not have thought of to potential clients others may not have found and who may not know they need a lawyer, the more common situation might well be that the lawyer who just happens to get there first is not necessarily better suited to represent the potential client than another lawyer who might easily be willing and available. Moreover, lawyers representing other parties may have an interest in their own ex parte contact before potential clients are represented by their own lawyers.

Thus, even the antisolicitation rule combines a purpose to protect the contacted person with a purpose to protect absent lawyers. And as is the case with the other no-contact rules, this combination helps to explain the contours of the rule. For example, the rule covers a lawyer who “solicit[s] professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” The fact that a lawyer solicits employment for pecuniary gain may suggest that the

161. The comment to Model Rule 7.3 recognizes this possibility in its reference to the fact that the contacted person “may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest.” MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 2; see also Ohralk, 436 U.S. at 457-58 (“In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the ‘availability, nature, and prices’ of legal services.”).

162. For a vigorous defense of solicitation practices along these lines, see MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 341-54 (4th ed. 2010). An alternative approach would be to allow solicitation but require a cooling off period during which contacted parties would be able to shop around for another lawyer.

163. Conversely, a lawyer seeking to solicit a potential client may want to do so before a lawyer representing another party gets to the unrepresented person first and induces that person to give up important legal rights. That problem is dealt with in Model Rule 4.3, which regulates, but does not impose a per se ban on, contact with unrepresented persons. MODEL RULES OF PROF’L CONDUCT R. 4.3. Moreover, a potential plaintiff client also may be contacted by the defendant’s insurance company to settle the case before a lawyer becomes involved. If that contact is made without a lawyer’s assistance, see id. R. 8.4(a), the ethics rules cannot reach it.

164. Id. R. 7.3(a). The “pecuniary gain” limitation derives from In re Primus, 436 U.S. 412, 422 (1978) (holding that the discipline of an ACLU lawyer who informed a potential client in person of her legal rights and subsequently by letter informed her of the ACLU’s willingness to represent her for free violated the First Amendment because “her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain”). A comment newly added in 2012 helpfully defines “solicitation” as “a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.” MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 1.
lawyer is more likely to take advantage of a vulnerable client. But one could imagine that "altruistic" lawyers who seek representation for a reason other than pecuniary gain could have motives that are not necessarily consistent with a vulnerable potential client's best interests. On the other hand, the fact that a lawyer seeks representation despite the lack of a pecuniary gain means that it is less likely that another lawyer would want to compete for the representation, perhaps because the case is not likely to generate sufficient income.

A similar point could be made about the delineation of protected nonclients. Model Rule 7.3 creates exceptions from the no-contact rule when the contacted person "is a lawyer" or "has a family, close personal, or prior professional relationship with the [contacting] lawyer." Again, it is plausible that a lawyer would be less likely to take advantage of another lawyer or a person with whom the lawyer has a prior or existing relationship, but that is not invariably true. With respect to the latter exception, some relationships are better than others, and although we might imagine that potential clients who have had bad experiences with the lawyer are quite capable of turning down the solicitation, they may not always know when they have been taken advantage of in the past or may find it harder to "just say no" than if the lawyer were a stranger. Moreover, if vulnerability were the only concern, one might expect to see additional exceptions to the rule, such as one for a sophisticated potential client or for a client already represented by counsel (such as an entity-client), or perhaps for a potential client who has hired any lawyer in the past. But an alternative approach focused on competition might suggest a greater willingness to give a lawyer who has a prior or existing relationship a

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165. See Model Rules of Prof'l Conduct R. 7.3 cmt. 5.
166. See Primus, 436 U.S. at 445 (Rehnquist, J., dissenting) ("A State may reasonably fear that a lawyer's desire to resolve 'substantial civil liberties questions,' ... may occasionally take precedence over his duty to advance the interests of his client.").
168. Id. R. 7.3(a)(2). The "prior professional relationship" exception has been understood to include a relationship with the lawyer's firm, not just the lawyer personally. Thus, a lawyer who leaves a firm and solicits clients of the firm does not violate Model Rule 7.3. See Restatement (Third) of the Law Governing Lawyers § 9 (2000).
169. See Model Rules of Prof'l Conduct R. 7.3 cmt. 5.
170. Note that soliciting an already represented client would not violate Model Rule 4.2 because the lawyer would not be engaging in the contact in the course of "representing a client," see id. R. 4.2, though it would violate Model Rule 7.3, see id. R. 7.3. Interestingly, Model Rule 7.3 adopts a kind of variation of Model Rule 4.2, because the exception allowing solicitation of a lawyer seems to apply whether the lawyer is the potential client or whether the lawyer is representing the potential client. See id.
leg up on the competition, a kind of right of first refusal. And a contacted lawyer is likely to be well aware of other potential lawyers who could handle the representation.

The nature of the prohibited contact—solicitation—also reflects both the vulnerability and the competition rationales. The Model Rules distinguish solicitation from advertising. Advertising is subject only to regulation, not a per se ban. Potential clients likely feel less pressure to respond positively to advertising than to solicitation, and lawyers may be less able to exploit potential clients through advertising, but in addition, advertising affords potential clients more opportunity to compare lawyers. The faith in advertising as an effective alternative to solicitation may help explain the fact that, unlike the other no-contact rules, the antisolicitation rule has no limit on its duration.

Another key difference between the antisolicitation rule and the other no-contact rules is that the antisolicitation rule is a one-way no-contact rule. It applies only to contact by the lawyer of the potential client, not to contact by the potential client of the lawyer. By contrast, the no-contact rules in Model Rule 4.2 and Model Rule 3.5 apply to "communicat[ions] . . . with" the protected nonclient, regardless of who initiates the contact, and the expert witness no-contact rule has been interpreted the same way. Although one could explain the one-way feature of the antisolicitation rule on the ground that a client who

171. Id. R. 7.2; see id. R. 7.3 cmt. 4. The line between advertising and solicitation is explored in Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472-78 (1988) (finding unconstitutional a prior version of Model Rule 7.3 that included direct mail solicitation of potential clients known to face particular legal problems).

172. See Shapero, 486 U.S. at 474 ("The relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility").

173. Some limit on duration might make sense, but it would be difficult to define that limit in a general way. Cf. Fla. Bar v. Went for It, Inc., 515 U.S. 618, 635 (1995) (upholding against First Amendment challenge a rule prohibiting direct mail contact from a lawyer to a victim or the family of a victim within thirty days of an accident or disaster); Chambers v. Stengel, 256 F.3d 397, 399 (6th Cir. 2001) (upholding a Kentucky law establishing a thirty-day moratorium on "direct solicitation" after "the filing of a criminal or civil action, or claim for damages, or a traffic citation, injury, accident, or disaster"); Alexander v. Cahill, 634 F. Supp. 2d 239, 254-55 (N.D.N.Y. 2007), aff'd in part and rev'd in part, 634 F. Supp. 2d (2d Cir. 2010) (upholding a New York law establishing a thirty-day moratorium on all advertisements and solicitations). But cf. Ficker v. Curran, 119 F.3d 1150, 1151 (4th Cir. 1997) (striking down a Maryland prohibition on targeted-mail solicitations of criminal and traffic defendants for thirty days after their arrest).

174. MODEL RULES OF PROF'L CONDUCT Rules 3.5, 4.2.

takes the initiative to contact the lawyer is less likely to be vulnerable, the competition rationale helps reinforce this conclusion. A potential client who contacts the lawyer is more likely to have done at least some shopping around or made some inquiries. In fact, the client may already have a lawyer and may be seeking a new one for a second opinion or because of dissatisfaction with the current lawyer.

So far, we have been emphasizing the competition rationale as an alternative, or at least a complement, to the vulnerability rationale for the antisolicitation rule. A recent set of cases from New York, however, interestingly raises the other possible rationale, namely protecting the possibility of counsel for another party to engage in ex parte contact. These cases suggest that the antisolicitation rule may actually be viewed in part as a pro-contact rule. In *Rivera v. Lutheran Medical Center*, a law firm representing a hospital in an employment discrimination case was disqualified from representing the hospital’s employees (but not the hospital itself). The court found that the hospital’s lawyers had improperly “solicited” the employees who had firsthand knowledge of the facts, but who were not themselves defendants. The court reasoned that the solicitation deprived the plaintiff of the ability to interview fact witnesses without the defendant’s lawyer being present, which contravened the policy of promoting informal discovery embodied in Model Rule 4.2. In *Matusick v. Erie County Water Authority*, the court held that the defendant’s counsel could not advise the organization’s nonparty, nonpolicymaking employees that they could not meet with or talk to the plaintiff’s counsel and that in addition, defendant’s

177. *Rivera* appears to be the first case to have interpreted Model Rule 7.3 this way. Several earlier ethics opinions had concluded that it is improper for corporate counsel to try to block an opposing lawyer’s informal access to fact witnesses in a case by claiming to represent all corporate employees whose testimony is relevant, unless the employee-witnesses fall under the protection of Model Rule 4.2 as applied to organizational clients. These opinions reasoned that such conduct would unethically obstruct an opponent’s access to evidence (as well as violate the prohibition against making false statements of material fact to third parties). See Ohio Bd. of Comm’rs on Grievances and Discipline, Advisory Op. 2005-3 (2005); Utah State Bar, Ethics Advisory Utah Op. 04-06 (2004). These opinions, however, objected merely to a lawyer claiming to represent all employee-witnesses without having established a proper attorney-client relationship with each one, not to the establishment of such a relationship after solicitation by the corporate counsel. *See also Hazard & Irwin, supra* note 11, at 832 & n.213 (noting that courts have rejected blanket claims by corporate counsel that they always represent all employees). For a discussion of some of the benefits of informal discovery in the context of criticizing Model Rule 4.2 for being insufficiently protective of such discovery, see *id.* at 805.
counsel could not solicit to represent any of those employees at a
deposition or meeting with the plaintiff’s counsel. If, however, the
employees approached the organization’s counsel for representation,
they could undertake the representation. 179

By contrast, Wells Fargo Bank, N.A. v. LaSalle Bank National
Ass’n 180 reached a different conclusion, denying a motion to disqualify
the defendant’s counsel from representing the defendant’s former
employees whom the defendant’s counsel had contacted by telephone
and offered to represent free of charge. Two features of the case
distinguish it from the New York cases. First, the plaintiff was seeking
to depose the former employees, not merely contact them informally;
thus, the plaintiff was not being deprived of the kind of contact the
New York courts found that Model Rule 4.2 is designed to encourage.
Second, the plaintiff had known about the defendant’s representation of
the former employees for some time before filing its motion to
disqualify, which suggested to the court that the motion was being
made for tactical purposes rather than to redress a serious ethical
concern. 181

The court’s opinion, however, more broadly suggests that Model
Rule 7.3 is simply not applicable to this situation. The court found that
the soliciting lawyers were not seeking “professional employment”
within the meaning of Model Rule 7.3 because the lawyers were
already employed by the defendant organization. That argument is not
persuasive: the fact that a lawyer already represents one client in some
matter does not generally give the lawyer license to solicit the
representation of other clients in the same matter. The court also
reasoned that the lawyers’ motive in contacting the former employees
was not “pecuniary gain” because “defense counsel was attempting to
represent its client, the corporation, and also to protect the interests of
the former employees whose conduct forms the basis for Plaintiff’s
claims in this case.” 182 This rationale is also unpersuasive. It is
certainly true that the lawyer was not getting any additional financial
gain from representing the employees, but it is equally true that the
lawyer’s motive for the solicitation was surely the financial gain the
lawyer expected from the existing corporate client. Model Rule 7.3
does not say that the “lawyer’s pecuniary gain” must be from the
solicited potential clients, though of course that is the usual concern.

179. Id. at *9.
181. Id. at *4-5.
182. Id. at *3.
Thus, the question comes down to the intent of the no-contact rule. The Wells Fargo decision makes sense if the sole purpose of the rule is to protect vulnerable potential clients. The New York cases are defensible if the purpose of the rule is understood to include, like the other no-contact rules, some protection for absent lawyers.

VI. CONCLUSION

The ethics rules include not one no-contact rule, but several. This Article has examined and compared the four no-contact rules contained in the Model Rules of Professional Conduct: the no-contact rule for represented persons, the expert witness no-contact rule, the tribunal (judge and jury) no-contact rule, and the potential client (antisolicitation) no-contact rule. Although all the no-contact rules aim at least in part to protect the contacted parties, they all also have a purpose to protect some absent lawyer or lawyers and in some cases their absent clients. The rationales for protecting absent lawyers differ among the four no-contact rules, and these differences help explain the different contours of the rules.

The per se no-contact rules examined here are just a subset of the large number of ethics rules that regulate contact between a lawyer and various nonclient third parties, who range from a client’s adversaries and business transaction partners, to a lawyer’s partners and associates, to courts, to members of the general public. The types of contact regulation also vary widely, from rules prohibiting false or misleading statements, to rules imposing mandatory disclosures or warnings.

183. See C. Evan Stewart, Just When Lawyers Thought It Was Safe To Go Back into the Water, N.Y. BUS. L.J., Winter 2011, at 24 (criticizing Rivera as inconsistent with the purpose of Model Rule 7.3, which is to protect vulnerable people against advantage-taking by lawyers). C. Evan Stewart suggests that corporate counsel can respond to Rivera by adopting a policy “which makes clear that, with respect to actions undertaken in the normal course of an individual's corporate duties, the company will supply counsel at no cost to the individual, if the individual voluntarily agrees to such representation.” Id. at 25. Even if corporations decide to adopt such a policy, they would have to be mindful of other concerns, such as the potential for conflicts of interest between the employees and the corporation, see MODEL RULES OF PROF'L CONDUCT Rules 1.7, 1.13(g) (2012), and the potential effect on the corporation’s attorney-client privilege.

184. These rules could be subdivided into general restrictions, see MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (false statements and omissions in the course of representing a client); id. R. 8.4(c) (misrepresentations), statements to or about judges, see id. R. 3.3(a) (false statements to a court); id. R. 8.2 (false statements about a judge), and information about legal services, see id. R. 7.1 (false advertising); id. R. 7.4 (misleading advertisement as specialist); id. R. 7.5(d) (misleading representation as partnership).

185. See id. R. 1.13(f) (warning to entity constituent); id. R. 3.3(a), (d) (disclosures to court); id. R. 3.8(b) (prosecutor's obligation to apprise criminal defendant of right to counsel); id. R. 4.1(b) (disclosure to avoid assisting in fraud); id. R. 4.3 (disclosure of lawyer's role to
to rules restricting particular methods of purposes of contact, to rules regulating the nature of transactions or agreements lawyers can make with nonclients. Further work that organizes and thinks about the ethics rules by type of regulation of lawyer contact with nonclients may help lawyers better understand, honor, and reform their ethical obligations.

186. See id. R. 3.4(a) (obstruction); id. R. 3.4(b) (payment to witnesses); id. R. 3.4(f) (request to refrain from giving information); id. R. 3.5(a) (improper influence of judges, jurors, and court officials); id. R. 3.8(c) (prosecutor seeking waiver from criminal defendants); id. R. 4.3 (legal advice); id. R. 4.4(a) (embarrassment, delay, burden, violation of legal rights); id. R. 7.3 (solicitation)

187. These rules could be subdivided into (1) rules dealing with conflicts of interest with the client or interference with the lawyer’s independence, see id. R. 1.8(a) (pecuniary interest); id. R. 1.8(b) (use of client information); id. R. 1.8(f) (fee from nonclient); id. R. 1.8(i) (financial interest in litigation); id. R. 5.4 (financial interest of nonlawyer); id. R. 5.6(b) (restrictions as part of settlement), (2) rules regulating the relationship with other lawyers involved in the representation of the client, see id. R. 5.1 (supervising lawyers); id. R. 5.2 (subordinate lawyers); id. R. 5.3 (nonlawyer assistants); id. R. 5.6(a) (restrictive covenants), and (3) the various rules discussing screening of lawyers, see id. Rules 1.0(k), 1.10(a)(2), 1.11, 1.12, 1.18.