WHEN SECRET SETTLEMENTS ARE UNETHICAL

By Patrick Malone and Jon Bauer*

Attorneys for injury victims are all too familiar with defendants’ demands for blanket secrecy as a sine qua non for settlement. The confidentiality provisions that defense lawyers insist on often go well beyond keeping the amount and terms of the settlement secret; they also require the plaintiff and the plaintiff’s lawyer to keep silent about the facts underlying the case. Pressured by powerful defendants and working with clients exhausted by litigation, many plaintiffs’ attorneys feel that they have no choice but to agree.

In fact, the binding ethics rules in most jurisdictions provide strong grounds for resisting such secrecy clauses. Secrecy provisions that prohibit voluntary disclosures of relevant evidence to other litigants, or prohibit further disclosure of the allegations made in publicly filed court documents, run afoul of two specific provisions of the Model Rules of Professional Conduct, Rules 3.4(f) and 5.6(b). Under these rules, a plaintiff’s lawyer not only has the ability to “just say no” – but an ethical duty to do so. As we explain in this article, the text and purpose of the rules, and decisions of bar ethics committees interpreting them, require just such a conclusion.

Why Keeping the Facts Secret Triggers Ethical Concerns

The organized plaintiffs’ bar has long been sensitive to the dangers secret settlements pose to society and the justice system. In 1989, ATLA, the predecessor of the American Association for Justice, issued a resolution denouncing settlements that hide the underlying facts of settled cases.¹ Secret settlements undermine the proper functioning of the adversary system by concealing evidence that may be crucial to other parties’ claims. For example, for decades lawyers for archdioceses routinely

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settled sexual abuse cases with gag orders that prevented other victims from learning that their abusers were serial offenders whose misdeeds were already known to church authorities. Settlements that prohibit any mention of the allegations raised in a lawsuit also interfere with the public’s ability to find the lawyer best qualified to handle a particular case, by making it impossible for plaintiffs’ lawyers to inform prospective clients of the identities of the defendants they have litigated against and what those cases were all about.

Despite these concerns, many lawyers faced with demands for blanket secrecy believe their hands are tied: they must present the offer to the client and abide by the client’s decision. While most plaintiffs have a strong desire to expose wrongdoing and help others similarly harmed, their pressing needs for cash or closure often lead them to reluctantly accept settlements with gag orders.

To be sure, abiding by a client’s decisions, including the decision whether to settle, is a central tenet of legal ethics. However, the Model Rules of Professional Conduct also contain many provisions that oblige lawyers to avoid certain conduct that undermines the effective functioning of our adversarial system of justice. Indeed, the chair of the committee that wrote the Model Rules noted that the truth-seeking function of adjudication depends on parties and their lawyers having a fair opportunity to gather and present competing versions of the facts, and thus requires that lawyers not be allowed to interfere with the other side’s ability to obtain relevant information.

Secrecy clauses in settlements frequently violate at least two provisions in the Model Rules designed to ensure the adversary system’s integrity. These ethics rules -- Rules 3.4(f) and 5.6(b) -- bar lawyers from requesting any person to refrain from voluntarily providing relevant information to other parties with claims against the same defendant, or to negotiate settlements that interfere with a lawyer’s right to practice.
Plaintiffs’ lawyers can use these rules to resist overbroad demands for settlement secrecy and convince defendants’ lawyers to withdraw objectionable clauses. They also provide an opportunity to explain to clients why it is wrong to agree to settlement terms that harm the public and the justice system. Armed with knowledge of these ethics rules, plaintiffs’ lawyers and their clients can structure fair settlement agreements that serve both the interests of the parties and the interests of justice.

The ethics rules do allow for keeping the amount and terms of the settlement agreement confidential, which is often the defendant’s biggest concern, and which many plaintiffs also desire to shield themselves from nosy friends and relatives. At the same time, the rules place off limits some of the most pernicious, and all too common, forms of settlement secrecy.

Safeguarding Other Parties’ Access to Relevant Evidence

Rule 3.4(f) of the Model Rules prohibits a lawyer from requesting any person, other than a lawyer’s own client or the client’s relatives or employees, to refrain from voluntarily providing relevant information to another party. In the settlement context, this means that a defense lawyer cannot ethically ask that the plaintiff refrain from giving potentially relevant evidence to another party. A version of Rule 3.4(f) has been adopted by nearly every state. The rule’s rationale starts with the recognition that ex parte witness interviews are essential to the effective operation of the adversary system. Witnesses do not “belong” to either party, and for one party to try to cut off the ability of opposing litigants to interview people with relevant knowledge constitutes unfair interference with the truth-seeking function of adversary litigation. Despite the availability of depositions, courts have long recognized the crucial role played by witness interviews conducted in private, which are needed to secure an unvarnished version of the facts free of the intimidation that the presence of the opposing party and lawyer may create. Indeed, now that the Supreme Court, in its Iqbal and Twombly decisions,
has made cases vulnerable to dismissal prior to any discovery unless the complaint pleads specific facts that support its conclusions, unimpeded access to informal interviews is more important than ever.

When a defendant’s attorney proposes a settlement clause that would prohibit the plaintiff from voluntarily providing relevant factual information to other people with claims against the same defendant, defense counsel is doing exactly what Rule 3.4(f) prohibits. Settlements are not exempt from the rule’s requirements – indeed, if merely asking a person to withhold information from others suing the defendant is unethical, offering money in exchange for a promise not to make such disclosures is even worse. A South Carolina ethics advisory opinion found that a defense lawyer’s demand for a noncooperation clause as part of a settlement violated Rule 3.4(f), and that a plaintiff’s lawyer would be violating his or her own ethical obligations by agreeing to it.

Proposed settlement clauses that would expressly bar the plaintiff from voluntarily cooperating with parties, agencies or lawyers who are suing or investigating the defendant clearly run afoul of Rule 3.4(f), even if they allow for disclosures in response to a subpoena. Equally important, blanket confidentiality clauses that bar any discussion of the underlying facts, and make no exception for disclosures of relevant information to other litigants, violate the rule as well.

A defense lawyer might object that if there is no other “party” currently in litigation, the rule does not apply. But given the rule’s purposes, the word “party” should be construed broadly, to encompass any person with a current or future claim against the defendant. The ABA’s ethics committee, in a similar context, has given a broad meaning to the word “party,” and it would be irrational to read Rule 3.4(f) in a way that would allow defense lawyers to hide relevant information from people with potential claims in order to impede their lawsuits.

Some restrictions on disclosure of factual information can be requested as part of a settlement without violating Rule 3.4(f). For example, if the plaintiff is a former employee of the defendant who
had access to privileged attorney-client information, settlement terms that reaffirm the plaintiff’s pre-
extisting legal obligation to not disclose that information are permissible. Limitations on disclosure of
legitimate trade secrets, if narrowly defined, are probably allowable as well. Restrictions on whether
and how media attention will be sought also may be permissible under Rule 3.4(f), as long as relevant
factual information can be disclosed to individuals, agencies and lawyers investigating or pursuing
claims against the defendant. (However, as discussed in the next section, overbroad restrictions on
publicity will sometimes violate Rule 5.6(b).)

But the main thrust of most defense demands for settlement clauses barring disclosure of the
underlying facts is to prevent the plaintiff from sharing relevant information with other victims of the
defendant’s misconduct. It is unethical for defendants’ lawyers to make that request, and plaintiffs’
lawyers have an ethical obligation to resist impermissible secrecy clauses that interfere with the proper
functioning of our justice system.

**Once Public, Always Public**

Another weapon against defense demands for blanket secrecy is provided by Model Rule 5.6(b). This rule, which has been adopted, with some variations, in every U.S. jurisdiction, prohibits lawyers
from participating in any settlement agreement that restricts a lawyer’s right to practice. It clearly bars
“lawyer buy-out” provisions that expressly prohibit a plaintiff’s lawyer from suing the same defendant
again. But the rule has been, and should be, interpreted to also cover settlements that have the indirect
effect of making a lawyer’s services unavailable to others who wish to pursue similar claims. For
example, settlements that prohibit a plaintiff’s lawyer from using any information obtained during the
case have been found to violate the rule, because such a promise would interfere with the lawyer’s
ability to provide effective representation to others suing the same defendant.
An important but little-known recent opinion from the D.C. Bar Legal Ethics Committee takes this reasoning a step further, and concludes that it is unethical to enter into a settlement that would require confidentiality for any of the public facts of a lawsuit – the allegations in a complaint, the name of the defendant, and other facts set out in non-sealed motion papers and other filings.16

The Committee reasoned in its opinion that a broad reading of the rule was required by its purpose, which is to enhance public access to legal representation, and enable potential clients to obtain the information they need to find the right lawyer with the right skills and experience to handle a dispute. The Committee wrote:

We believe that the purpose and effect of the proposed [secret settlement] condition on the inquirer and his firm is to prevent other potential clients from identifying lawyers with the relevant experience and expertise to bring similar actions. While it places no direct restrictions on the inquirer’s ability to bring such an action, even against the same defendant if he is retained to do so, it does restrict his ability to inform potential clients of his experience. As such, it interferes with the basic principle that D.C. Rule 5.6 serves to protect: that clients should have the opportunity to retain the best lawyers they can employ to represent them. Were clauses such as these to be regularly incorporated in settlement agreements, lawyers would be prevented from disclosing their relevant experience, and clients would be hampered in identifying experienced lawyers.

The Committee notes that a client, of course, can always ask her lawyer to refrain from disclosing even publicly available information about a case, and that a lawyer should abide by such wishes. But the ethics opinion gives a powerful weapon against attempts by defendants to impose such secrecy, by making it clear that a settlement cannot require that public record facts which may be relevant to a lawyer’s representation of future clients be kept confidential.

**How to Respond to Unethical Settlement Proposals**

In sum, when a defense lawyer demands that a settlement include language that would bar the plaintiff from sharing relevant factual information with other people (or public agencies) who are pursuing or investigating claims against the same defendant, or would prevent the plaintiff’s lawyer
from disclosing public record facts about the case to prospective clients, the lawyer is engaging in conduct that is prohibited by Model Rules 3.4(f) and/or 5.6(b). What should a plaintiff’s lawyer do when faced with such demands? Rule 8.4(a) prohibits a lawyer from knowingly assisting another to violate any rule.17 Plaintiff’s counsel should politely but firmly explain to the requesting lawyer why these settlement terms are unethical, and cannot be included in the agreement. Such an explanation will often be enough to convince defendant’s counsel to withdraw the objectionable language. If it isn’t, consideration should be given in appropriate circumstances to filing a grievance or seeking an advisory opinion from an ethics committee.

A thorough discussion with the client is also important. You should explain why the defendant’s proposed settlement terms are unethical, and why, as a matter of your own professional obligations, you cannot accept them. Most clients, after receiving a good explanation as to why such settlement provisions have been prohibited under the ethics rules because of their harmful effects on other litigants, the justice system, and the public interest, will fully back up their counsel in resisting them. Plaintiffs’ lawyers should consider putting something in their retainer agreements making clear in advance that these types of settlement terms are unethical and must be rejected.18

“Gag orders” that bar the plaintiff and plaintiff’s counsel from telling the public or other attorneys about the facts of the cases they have prosecuted are pernicious on many levels. Not only do they allow defendants to hide relevant evidence from others who may have valid claims and prevent other victims from finding the best lawyers to represent them, but they also undermine efforts to preserve the civil justice system in the face of “tort reform” propaganda that relies on twisting the facts of lawsuits to make them seem ridiculous. Stella Liebeck, the Albuquerque woman whose McDonald’s coffee spill became perhaps the most famous tort suit of all time, cannot defend herself against the parodies of her case because she signed a secrecy agreement when she reached a post-trial settlement.
with McDonald’s. The same kind of hush agreements frequently frustrate malpractice victims who cannot explain the realities of medical errors to legislators who are fed notions of frivolous lawsuits from the medical industry. Plaintiffs’ attorneys need to “just say no” when unethical provisions are proposed for settlement agreements. The public and the legal profession will be better off for it.

ENDNOTES:


3 See Model Rules of Prof’l Conduct R. 1.2(a).

4 Robert Kutak, who chaired the Commission that drafted the Model Rules, wrote that the Rules rest on a “competitive theory” which posits that the legal system best serves justice if it relies on lawyers, who owe their clients strong duties of loyalty and zeal, to prepare and present competing versions of the truth. At the same time, Kutak explained, in order for this system to work there must be ground rules that prevent lawyers from engaging in conduct on behalf of clients that would undermine the effective operation of the adversary system. For this reason, conduct such a lying to a tribunal, or concealing evidence for the purpose of preventing its availability, is prohibited. See Robert J. Kutak, The Adversary System and the Practice of Law, in The Good Lawyer: Lawyers’ Roles and Legal Ethics 172, 175-76 (David Luban, ed. 1983). The two rules that are the focus of this article, Model Rules 3.4(f) and 5.6(b), are examples of numerous provisions in the Model Rules that place limitations on advocacy in order to preserve the adversary system’s effective functioning.

5 Settlement gag orders sometimes also violate a provision the ABA added to Model Rule 1.6 in 2002, which has been adopted in most states. The rule provides that a lawyer may reveal information when necessary to protect third parties from substantial bodily harm. Model Rules of Prof’l Conduct R. 1.6(b)(1). In situations where a defendant’s ongoing conduct presents a reasonably certain risk of serious injury to others, entering into a settlement agreement that would take away the lawyer’s ability to disclose that information undermines the rule’s purposes and is probably unethical. See Susan P. Koniak, Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something In Between?, 30 Hofstra L. Rev. 783, 808 (2002).

6 One of the co-authors of this article has published an article that explores in greater detail the principles underlying this provision of the Model Rules and how it applies to settlement secrecy. Jon Bauer, Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics, 87 Oregon L. Rev. 481 (2008). The article can be downloaded at http://ssrn.com/abstract=1159748. With respect to the exemption in the rule allowing a lawyer to ask a client’s employees not to cooperate with adversaries, it is important to note that the exception applies only to current, not former, employees. Thus, a defense lawyer cannot ethically ask a plaintiff who is an ex-employee of the defendant to refrain from voluntarily giving relevant information to other parties. See id. at 553-56.

7 California is the only remaining state whose ethics code is not based on the Model Rules. Among other states, only New York, Oregon, and Washington do not include Rule 3.4(f) in their versions of the Model Rules. In some of those states, conduct that would violate Rule 3.4(f) may be considered unethical under rules that prohibit lawyers from secreting witnesses or engaging in conduct prejudicial to the administration of justice. See Bauer, supra note 6, at 519 n.139 and 543 n.247.
See, e.g., ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 131 (1935); Hickman v. Taylor, 329 U.S. 495, 511 (1947); Gregory v. United States, 369 F.2d 185, 188-89 (D.C. Cir. 1966); IBM Corp. v. Edelstein, 526 F.2d 37, 41-44 (2d Cir. 1975); Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990). Courts have invalidated settlement agreements that bar a plaintiff from voluntarily providing relevant information to others suing the same defendant or public agencies investigating the defendant’s conduct, finding such agreements void as a matter of public policy because of their interference with the proper administration of justice. See, e.g., EEOC v. Astra USA, Inc., 94 F.3d 738, 744-45 (1st Cir. 1996); In re JDS Uniphase Corp. Securities Litigation, 238 F.Supp.2d 1127 (N.D. Cal. 2002).

See, e.g., ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 131 (1935); Hickman v. Taylor, 329 U.S. 495, 511 (1947); Gregory v. United States, 369 F.2d 185, 188-89 (D.C. Cir. 1966); IBM Corp. v. Edelstein, 526 F.2d 37, 41-44 (2d Cir. 1975); Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990). Courts have invalidated settlement agreements that bar a plaintiff from voluntarily providing relevant information to others suing the same defendant or public agencies investigating the defendant’s conduct, finding such agreements void as a matter of public policy because of their interference with the proper administration of justice. See, e.g., EEOC v. Astra USA, Inc., 94 F.3d 738, 744-45 (1st Cir. 1996); In re JDS Uniphase Corp. Securities Litigation, 238 F.Supp.2d 1127 (N.D. Cal. 2002).

Under certain circumstances, settlement agreements that bar voluntary disclosures to public agencies, law enforcement authorities, or other litigants may even be criminal, violating statutes that prohibit obstruction of justice, witness tampering, or compounding. See Stephen Gillers, Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical, 31 Hofstra L. Rev. 1 (2002); John P. Freeman, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C. Law Rev. 829, 835-37 (2004); Koniak, supra note 5, at 793-95, 802; Bauer, supra note 6, at 573-79.


See Bauer, supra note 6, at 560-63. It is important to note that information about an employer’s illegal or tortious conduct cannot qualify as a trade secret. See id. at 562 (citing authorities).

See Bauer, supra note 6, at 564-66.


Because Model Rules 3.4(f) and 5.6(b) are designed to safeguard the integrity and proper functioning of the justice system, a plaintiff’s lawyer who agrees to settlement demands prohibited under these rules likely also violates Rule 8.4(d), which prohibits lawyers from engaging in “conduct that is prejudicial to the administration of justice.” See Bauer, supra note 6, at 546-49. In the case of Rule 5.6(b), acquiescence by a plaintiff’s lawyer is a direct violation of the rule, which by its terms applies not only to offering, but to any participation in making, settlements that restrict a lawyer’s right to practice.

See Maja Ramsey et al., Keeping Secrets with Confidentiality Agreements, Trial, Aug. 1998, at 38, 40-41 (describing a plaintiffs’ firm’s success in getting clients to reject objectionable secrecy clauses when the firm explains, starting with the first client interview, why such settlements are unacceptable). Although retainer agreements restricting a client’s ability to accept or reject a settlement offer have been found ethically impermissible, there is nothing wrong with an agreement that explains to the client what the ethics rules require of a lawyer, and commits the client to reject settlement provisions that violate the rules. See Bauer, supra note 6, at 569 n.333 (discussing relevant ethics authorities).

Formal Opinion 00-417

April 7, 2000

Settlement Terms Limiting a Lawyer’s Use of Information

Although a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except in limited circumstances. An agreement not to use information learned during the representation effectively would restrict the lawyer’s right to practice and hence would violate Rule 5.6(b).

The Committee has been asked whether, under the ABA Model Rules of Professional Conduct, a lawyer representing a party in a controversy may agree to a proposal by opposing counsel that settlement of the matter be conditioned on the lawyer not using any of the information learned during the current representation in any future representation against the same opposing party. The proposed settlement would be favorable to the lawyer’s client. The Committee notes that, while this particular situation is most likely to arise in litigation, it also could arise in transactional matters.

The Model Rules prohibit a lawyer, as part of the settlement of a controversy, from participating in offering or making an agreement that would restrict the lawyer’s right to practice.1 In ABA Formal Opinion 93-371, this Committee expressed the opinion that a lawyer may not offer, nor may opposing counsel accept, a settlement term that would obligate the latter to refrain from representing either present or future clients who might opt out of a set-

1. Model Rule 5.6(b) provides: “A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.” This rule is an expansion of former disciplinary rule DR 2-108(B), which did not proscribe “participating in the offering” as does Model Rule 5.6(b).

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

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tlement of mass tort or class action litigation. Although a lawyer normally
would be required, pursuant to Rule 1.2 (Scope of Representation), to abide
by the client’s instructions to accept a settlement offer, the proscription in
Rule 5.6(b) (Restrictions on Right to Practice) makes it impossible for the
lawyer to comply with a client’s instructions in these circumstances. The
Committee later, in Formal Opinion 95-394, specifically affirmed that this
Rule 5.6(b) proscription would apply even where one of the parties was a
government entity.

A lawyer is a client’s representative and must represent the client diligent-
ly. Nevertheless, the Model Rules’ Preamble makes clear that the lawyer
also is “an officer of the legal system and a public citizen having special
responsibility for the quality of justice.” Although the Committee did not cite
the Preamble in Formal Opinion 93-371, it must have had these principles in
mind when it stated:

The rationale of Model Rule 5.6 is clear. First, permitting such agree-
ments restricts the access of the public to lawyers who, by virtue of their
background and experience, might be the very best available talent to
represent these individuals. Second, the use of such agreements may
provide clients with rewards that bear less relationship to the merits of
their claims than they do to the desire of the defendant to “buy off ”
plaintiff’s counsel. Third, the offering of such restrictive agreements
places the plaintiff’s lawyer in a situation where there is conflict
between the interests of present clients and those of potential future
clients. While the Model Rules generally require that the client’s inter-
ests be put first, forcing a lawyer to give up future representations may
be asking too much, particularly in light of the strong countervailing
policy favoring the public’s unfettered choice of counsel.

Thus, a lawyer may not, as part of settlement of a controversy on behalf of
a client, agree to a limitation on the lawyer’s right to represent other clients
against the same opposing party.

Here, however, the opposing party’s lawyer has not proposed a restriction
that, in specific terms, would limit the lawyer’s right to represent other clients
with similar claims against that party. Rather, the proposed settlement provi-
sion would prohibit the lawyer from “using” information learned during the
current representation in any future representation against the opposing

2. Comment [1] to Rule 1.3 (Diligence) provides that a lawyer “may take whatev-
er lawful and ethical measures are required to vindicate a client’s cause or endeavor.”

3. See also David J. Luban, Settlements and the Erosion of the Public Realm, 83
Geo. L.J. 2619, 2624 (1995). Luban argues that “[t]he ban on lawyer buyout is virtu-
ally the only piece of the ethics codes that recognizes that accumulated legal skills are a
public good that should not be squandered on a single favorable settlement.”
Nevertheless, some jurisdictions have interpreted the prohibition in Rule 5.6(b) to include settlement provisions that, while not outright bars on future representation, would have the effect of limiting the lawyer’s right to practice. For example, the District of Columbia Bar Ethics Committee has determined that it is unethical for a lawyer to agree, as part of a settlement, not to refer a potential client to another lawyer if that potential client has a claim against the settling defendant. The Arizona Ethics Committee has determined that a lawyer who represents several franchisees against a franchisor may not enter into a settlement agreement requiring the lawyer to disclose the names of all franchisees that have contacted the lawyer regarding potential representation against the defendant. Recognizing that these and similar limitations indirectly restrict a lawyer’s right to practice, the Colorado Ethics Committee has set forth a general principle to guide lawyers in determining when a limitation amounts to a restriction on practice that violates Rule 5.6(b)—“a claimant’s attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have.”

In this case, the proposed settlement provision would not be a direct ban on any future representation. Rather, it would forbid the lawyer from using information learned during the representation of the current client in any future representations against this defendant. As a practical matter, however, this proposed limitation effectively would bar the lawyer from future representations because the lawyer’s inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation. Once the lawyer reaches these conclusions, client consent is ineffective. Rule 1.7(b) would prohibit the representation. Thus, a prohibition against using the information is a restriction upon the lawyer’s right to practice.

4. Rule 5.6(b) applies only to restrictions imposed as part of settlement of a controversy. Thus, the rule and this opinion have no application to agreements restricting the use of information where the agreement is entered into as a condition of receiving the information. Nor does the rule apply to protective orders imposed during litigation.

8. Rule 1.7(b) provides:
   A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless: the lawyer reasonably believes the representation will not be adversely affected; and the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
A prohibition on a lawyer’s use of information gained during representation of a client is similar to a proposed settlement provision that bars a lawyer in future representations from subpoenaing certain records or fact witnesses, or using certain expert witnesses. Knowledge of the existence of these records, or witnesses, and an agreement not to use such knowledge is tantamount to agreeing not to subpoena or use the information. The Committee believes that each of these restrictions is a restriction on the lawyer’s right to practice.

On the other hand, it generally is accepted that offering or agreeing to a bar on the lawyer’s disclosure of particular information is not a violation of the Rule 5.6(b) proscription. For example, Rule 5.6(b) does not proscribe a lawyer from agreeing not to reveal information about the facts of the particular matter or the terms of its settlement. This information, after all, is information relating to the representation of the attorney’s present client, protected initially by Rule 1.6 (Confidentiality of Information) and, after conclusion of the representation, by Rule 1.9(c) (Conflict of Interest: Former Client). With respect to former clients, a lawyer may reveal information relating to the representation only with client consent or in certain limited circumstances not relevant here. A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer’s future practice in the manner accomplished by a restriction on the use of information relating to the opposing party in the matter. Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision.

Although the Model Rules also place a restraint on the “use” of information relating to the former client’s representation, it applies only to use of the information to the disadvantage of the former client. Even in this circum-

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9. In considering restrictions that may affect a lawyer’s right to practice, the Colorado Bar Ethics noted that:

   Prohibited restrictions may include barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party, preventing the settling claimant’s lawyer from using a certain expert witness in future cases, and imposing forum or venue limitations in future cases brought on behalf of non-settling claimants.


11. Model Rule 1.9(c)(2) provides: “A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.”

12. Model Rule 1.9(c)(1) provides: “A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter use information relating to the representation to the disad-
stance, the prohibition does not apply when the information has become generally known or when the limited exceptions of Rule 1.6 or 3.3 (Candor Towards the Tribunal) apply. This prohibition has been interpreted to mean that a lawyer may not use confidential information against a former client to advance the lawyer’s own interests, or advance the interests of another client adverse to the interests of the former client. If these circumstances are not applicable, using information acquired in a former representation in a later representation is not a violation of Rule 1.9(c). Thus, from a policy point of view, the subsequent use of information relating to the representation of a former client is treated quite liberally as compared to restrictions regarding disclosure of client information. This fact provides further support for the Committee’s determination that a general bar, requested by the opposing party, on the use of such information would restrict the access of the public to lawyers. These lawyers, by virtue of their background and experience, might be the most qualified lawyers available to represent future clients against the same opposing party. As long as the lawyer does not disclose information relating to the representation of the former client to a third party, the lawyer may use that information in subsequent representations, subject to the limited restrictions of Rule 1.9(c)(1).

**Conclusion**

Although a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that vantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known.”

13. The Committee notes that a more stringent rule applies against the use of information during a current representation. The rules do not permit the use of this information to the disadvantage of the client, even if it has become generally known. See Model Rule 1.8(b) (Conflict of Interest: Prohibited Transactions).

14. See Centerline Indus., Inc. v. Knize, 894 S.W.2d 874, 876 (Tex. App. 1995) (even though all confidences obtained by lawyer from former client had been disclosed in another proceeding, lawyer could not represent individual suing that former client in substantially related matter); In re Wood’s Case, 137 N.H. 698, 704-06, 634 A.2d 1340, 1344-45 (N.H. 1993) (lawyer censured for using information relating to representation of former client to further his own interests in publicly opposing former client’s plan to develop a shopping mall next to lawyer’s home).

15. Rule 1.9(c)(1) protects against use of information relating to the representation of a former client to the former client’s disadvantage. The former client’s disadvantage does not, however, encompass any detriment that might result when a client does not receive a monetary enhancement to a settlement conditioned on his lawyer’s agreement not to use information relating to the representation against the opposing party in future representations. The lawyer must be free to use the information in future representations. Otherwise, Rule 5.6(b) could be circumvented by an interpretation of 1.9(c) that was not intended.
agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except to the limited extent described above. An agreement not to use information learned during the representation would effectively restrict the lawyer’s right to practice and hence would violate Rule 5.6(b).
STATEMENT OF

LESLIE A. BAILEY
PUBLIC JUSTICE

BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

CONCERNING

THE SUNSHINE IN LITIGATION ACT:
HOW UNNECESSARY COURT SECRECY UNDERMINES OUR CIVIL JUSTICE SYSTEM AND THREATENS PUBLIC HEALTH AND SAFETY

DECEMBER 11, 2007
Introduction

Mr. Chairman and Members of the Subcommittee:

I am pleased to accept your invitation to testify today on the issue of unnecessary court secrecy. I am an attorney at Public Justice, a national public interest law firm based in Washington, D.C. and supported by the non-profit Public Justice Foundation. My testimony is based on Public Justice’s work for nearly two decades fighting unnecessary secrecy in the courts.

It is a fact that much of the civil litigation in this country is taking place in secret. This secrecy takes many forms. First, corporate defendants often refuse to produce documents in pretrial discovery unless the documents are subject to a protective order that prohibits the plaintiff or her attorney from distributing them to anyone else. Second, corporations often refuse to settle a case unless the settlement is confidential, insisting upon gag orders that bar the injury victim from publicly discussing the cause of her injury or the terms of the settlement, or even disclosing that the case existed. Third, courts are often asked to seal the record of a case in part (for example, certain pleadings or a decision) or its entirety. Once a case is sealed in its entirety, it becomes nearly impossible for any member of the public or press to learn what happened or to obtain any information about why the case is sealed.

Thus, through protective orders, secret settlements, and sealing of court records, the public courts are being used by private corporations to keep smoking-gun evidence of wrongdoing from the public eye. Plaintiffs’ lawyers, obligated to put their clients’ interests first, often feel they have no choice but to consent to secrecy in order to achieve justice for a particular victim. Judges, facing ever-escalating dockets and mounting time pressures, often sign off on overbroad protective orders and approve settlements with secrecy provisions, grateful for any
instance in which both parties agree. All the while, Americans unsuspectingly continue to drive unsafe cars, drink unsafe water, entrust our financial well-being to institutions that engage in fraud and deception, and seek treatment from incompetent doctors.

This secrecy subverts our system of open government, undermines public trust in the court system, and threatens public health and safety. Unfortunately, while Public Justice and other public interest groups have successfully challenged abusive sealing orders and protective orders by intervening in litigation, secrecy orders go unchallenged in the vast majority of cases. If federal judges were required by law to consider the public interest before entering a secrecy order, this would provide a substantial counterweight to the factors that allow secrecy to flourish.

**Background on Public Justice**

Public Justice (formerly Trial Lawyers for Public Justice), founded in 1982, is a national public interest law firm dedicated to using trial lawyers’ skills and resources to advance the public good. We specialize in precedent-setting and socially significant individual and class action litigation designed to further consumer and victims’ rights, environmental protection and safety, civil rights and civil liberties, workers’ rights, America’s civil justice system, and the protection of the poor and powerless. Through our Access to Justice Campaign, we strive to keep the courthouse doors open to all by battling federal preemption of injury victims’ rights, unfair mandatory arbitration, class action bans and abuse, unnecessary secrecy in the courts, attacks on the right to counsel and jury trial, and unconstitutional legislation.

Public Justice is the principal project of the Public Justice Foundation, a non-profit membership organization. We are supported by a nationwide network of over 3,500 attorneys and others, including trial lawyers, appellate lawyers, consumer advocates, constitutional
litigators, employment lawyers, environmental attorneys, civil rights lawyers, class action specialists, law professors and law students. Public Justice and the Public Justice Foundation are headquartered in Washington, D.C., and have a West Coast Office in Oakland, California.

For nearly two decades, through a special litigation project called “Project ACCESS,” Public Justice has opposed unnecessary court secrecy as a threat to public health and safety, the fair and efficient administration of justice, and our democratic system of government. As part of Project ACCESS, we have intervened in a wide variety of cases to fight for the public’s right to know and have advised attorneys in cases implicating public health, safety, and welfare. More information on Public Justice and Project ACCESS is available on our web site at www.publicjustice.net.

Public Justice does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, respond to informational requests from legislators and persons interested in legislation, and have occasionally been invited to testify before legislative and administrative bodies on issues within our expertise. In keeping with that practice, we are grateful for the opportunity to share our experience with respect to the important issues the Subcommittee is considering today.

Unnecessary Court Secrecy is Pervasive

There is no question that secrecy pervades the justice system. Famous examples abound of damaging information revealed in litigation but kept secret from the public for long periods of time: Bic lighters, car seats, breast implants, and all-terrain vehicles were all subject to protective orders while countless consumers continued to be at risk from using them. Doctors continued unknowingly to implant defective heart valves into patients, even though documents disclosed in
litigation—but concealed from the public for far too long—revealed a high risk of valve failure. Manufacturers of dangerous drugs settled cases brought by injured patients on terms that forbade the patients’ attorneys from notifying the FDA that the drug caused harm.

In 2000, the public learned that a safety defect in Firestone tires, when combined with the susceptibility of Ford Explorers to rolling over, had caused at least 250 injuries and 80 deaths in the United States. Firestone had known about the defect for a decade. But each time a victim or her survivors sued the tire manufacturer, the corporation settled the case on condition that the documents showing that the tires had safety defects be returned to the corporation and hidden from the public and the press. While a government investigation and television exposé ultimately forced the corporation to recall 14.4 million tires—6.5 million of which were still in use at the time—many of those injuries and deaths may not have occurred if Firestone had not successfully kept the knowledge of its defective product from reaching the public.\(^1\) As of last year, Firestone still had not notified all the owners of the dangerous tires that they had been recalled.\(^2\)

Similar abuses continue to this day. An award-winning *Seattle Times* investigative series earlier this year uncovered more than 400 cases in a single court that had been wrongly sealed in their entirety—many of them involving matters of public safety.\(^3\) And protective orders, which


\(^3\) Ken Armstrong, Justin Mayo, & Steve Miletich, *Your Courts, Their Secrets*, Seattle Times, March 5–15, 2007, series available at...
keep information unveiled in the discovery process confidential, are routine, especially in product liability, automobile design, toxic tort, pharmaceutical, environmental, and medical malpractice cases.

For example, in several lawsuits against Cooper Tire, the families of victims killed or injured in accidents have uncovered documents allegedly showing that the accidents were caused by tread separation. But Cooper, in virtually every case, has fought to keep that evidence under seal, claiming that to release it would expose the corporation’s trade secrets. In at least one case, Cooper sought and obtained a “draconian” protective order whereby the corporation was “effectively permitted to unilaterally designate any document it chose as confidential.”4 And a Mississippi court recently found that “Cooper Tires has engaged upon a course of conduct exhibiting an attitude that it does not have to provide documents or even the barest information about them unless and until plaintiffs have discovered from other sources that they exist.”5 The plaintiffs in a case in federal court in Utah cited five separate cases in which courts found that Cooper had willfully engaged in bad faith by failing to produce documents or respond to discovery.6 But in an unknown number of other cases, courts have been persuaded to permit Cooper and other defendants to get away with hiding the truth.

http://seattletimes.nwsource.com/html/yourcourtstheirsecrets/. The authors of the series were honored as finalists for the 2007 Pulitzer Prize in investigative journalism.

4 Fortunately, the order was subsequently reversed. Mann v. Cooper Tire Co., 816 N.Y.S. 2d 45, 56 (App. Div. 2006).


6 Id.
In an equally disturbing example, it has recently come to light that Allstate Insurance Company had implemented a program designed to increase its shareholder profits by intentionally and significantly underpaying policyholders on indisputably legitimate claims.\(^7\) The new paradigm, which was implemented on the advice of McKinsey Consulting in a series of PowerPoint slides now known as the “McKinsey documents,” resulted in record operating income for the corporation—during a time period marked by several of the worst natural disasters in recent history, including Hurricane Katrina. The purposeful denial of valid claims clearly constituted bad faith and violated insurance laws—after all, insurance companies have a fiduciary duty to their policyholders. The McKinsey documents, which also showed Allstate was forcing victims to litigate valid claims rather than settling them, were produced in litigation. However, they were kept secret from the public pursuant to a protective order. Even after the protective order expired, Allstate refused to turn over the documents, even when this subjected the corporation to contempt of court. Finally, a lawyer who had viewed the McKinsey documents published his notes and analysis, and the contents of the slides are now known to the public.\(^8\)

In the last few years, Public Justice has fought several overbroad protective orders and sealing orders. In some cases, though certainly not all, we have succeeded in making documents public that should never have been concealed in the first place. Although every court decision unsealing such documents is a victory, it should not take public interest litigants and lawyers being in the right place at the right time to make sure unnecessary secrecy is avoided. Literally

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\(^8\) *Id.*
hundreds of thousands of cases are handled each year by federal and state courts, and it is simply not possible for the handful of organizations dedicated to fighting court secrecy to intervene in more than a tiny fraction of them. Furthermore, challenges to secrecy orders offer no possibility of recovering any damages, and few lawyers can afford to undertake such cases on a *pro bono* basis. Thus, while the following examples demonstrate that it is possible, in some cases, to fight secrecy, it should also be remembered that for every success story, there are hundreds of equally harmful secrecy orders that remain in force.

**Davis v. Honda: Unsealing of court record showing auto maker’s expert witness intentionally destroyed evidence in a personal injury case (2005)**

Sarah Davis was seventeen years old when the Honda Civic in which she was riding crashed, leaving her paralyzed. She filed a lawsuit against Honda in a California state court, and a key issue of fact at trial was whether she was wearing a seat belt at the time of the accident. After Ms. Davis had presented her case to the jury and Honda had begun its defense, the court granted permission for Honda’s expert, automotive engineer Robert Gratzinger, to examine the car at issue in the presence of all counsel. During the inspection, Mr. Gratzinger was observed using a rag to intentionally wipe off marks on the seat belt that would have provided evidence of Ms. Davis’s seat-belt use. Honda’s attorney then refused to allow Ms. Davis’s counsel to preserve the rag as evidence of spoliation.

As a result of this incident, Ms. Davis moved for sanctions, and the court halted the trial in order to investigate. After hearing testimony about what had happened, the court issued a scathing 36-page sanctions decision, finding that Mr. Gratzinger had “wrongfully and intentionally altered the most significant physical evidence in the case” and that Honda’s
attorney had knowingly prevented the rag from being preserved.\textsuperscript{9} The court sanctioned Honda by entering a judgment of liability against the corporation, leaving only the question of the amount of damages for the jury.

Unsurprisingly, a settlement was announced within a few days. Apparently as a condition of the settlement, the parties stipulated to an order sealing the sanctions decision. In addition to vacating that decision, the extraordinary sealing order banned all publication and sharing of the decision, and prohibited anyone from even mentioning it in any legal proceeding. As a result, Mr. Gratzinger was shielded from questions about his actions in \textit{Davis} and continued to serve as an expert witness for automakers in crash cases around the country.

Public Justice challenged the secrecy order on behalf of the Center for Auto Safety, a national consumer group that works to improve automobile safety, and attorneys representing car crash victims against defendants who had named Mr. Gratzinger as an expert witness in their cases. On October 26, 2005, the court that had entered the sealing order reversed itself, agreeing that the order violated California law and the First Amendment.

\textit{Jessee v. Farmers Insurance Exchange: Reversal of overbroad protective order designating documents showing insurer linked employee compensation to limited payouts as confidential (2006)}

After Ruth Jessee was injured in an automobile accident, she filed a lawsuit against Farmers Insurance for denying coverage of her insurance claim in bad faith. Before trial, Ms. Jessee’s attorney, in addition to seeking discovery from Farmers, obtained a number of documents from an attorney representing an injury victim against Farmers in a different state. Among them were internal documents that show that Farmers linked its adjusters’ compensation

\textsuperscript{9} The sanctions decision in \textit{Davis} is available on the Public Justice web site at http://www.publicjustice.net/Repository/Files/Davis%20-%20Decision.pdf
to the amount they saved the corporation on claims. Farmers then sought a protective order that would make this key evidence secret, even though it had been obtained not from Farmers in discovery, but from an attorney in another case against Farmers where it was not sealed—and thus was already public. The trial court granted the corporation’s motion.

The unusually broad protective order in *Jessee*, which was issued without any showing of good cause for secrecy, required the plaintiff’s counsel to identify all documents in his possession relating to the subject matter of the case—and permitted the insurance company to label those documents “confidential” regardless of their source. It also required that any court records containing or referring to those documents be filed under seal. Finally, it obligated the crash victim and her attorney to return all “confidential” documents to the insurance company at the conclusion of the case.

Public Justice, representing the plaintiffs before the Colorado Supreme Court, argued that the order should be vacated because it violated Colorado law and the First Amendment. On November 20, 2006, the court agreed, reversing the trial court’s order and holding that the documents must remain public.

**State Farm v. Foltz: Unsealing of court records in consumer fraud case (2003)**

Debbie Foltz sued State Farm for conspiring with another company to conduct a phony medical review of her file in order to defraud her of medical coverage under her auto policy. After four years of litigation, the parties reached a secret settlement and asked the court to seal virtually the entire record. The court agreed to back-seal the record, and the entire case—

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10 Our brief is available at http://www.publicjustice.net/Repository/Files/jessee_reply_021506.pdf.
including the docket sheet—was erased from the court’s computer system. Following the settlement, the court also permitted State Farm to physically remove the case files from the courthouse. As a result, it was impossible for the public to determine that the case existed, much less view the record.

Public Justice intervened in 1999 on behalf of several public interest groups, and won a partial victory. The court ordered the file returned to the courthouse and restored the docket sheet to the court’s record-keeping system, but said it would continue to bar access to materials filed under seal pursuant to protective orders entered earlier in the case. These documents allegedly showed that State Farm was cheating its policyholders. Joined by other intervening litigants, Public Justice fought to have the remaining documents unsealed—but the district court denied further access to the evidence, holding that the parties’ agreement to keep the documents secret justified the sealing orders.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that the discovery materials had been improperly sealed, because there had never been any showing of the “good cause” for secrecy required by Rule 26(c). Instead, the parties had simply agreed that the materials could remain secret. The court also ruled that the court records in the case had been wrongly sealed; affirmed that the “strong presumption in favor of access to court records” can only be overcome by a showing of “compelling reasons” for secrecy; and made clear that reliance on an agreed-upon protective order did not constitute a compelling reason.

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12 The Public Justice briefs are available at www.publicjustice.net/Resources/Cases/Foltz-v-State-Farm.aspx
14 Id. at 1135.
While these cases are success stories, the vast majority of secrecy orders are never known to anyone except the parties and the court, let alone challenged by public interest groups. In our communications with numerous plaintiffs’ attorneys, we have come to understand that secrecy orders are more widespread now than ever. In order to understand how to solve this problem, it is helpful to understand why secrecy is so pervasive.

Secrecy flourishes because no party to the litigation is advocating for the public.

Secrecy continues to flourish because defendants want it, and because plaintiffs and judges do not do enough to oppose it at any stage of the process. Corporate defendants want secrecy, for the most part, because they are interested in maximizing profits. If evidence of their wrongdoing is concealed, it will be much more difficult for future plaintiffs to sue the company, and the defendant will be able to avoid paying as much as it otherwise would in damages. In addition, secrecy enables defendants to avoid the negative public relations that would result from public knowledge of their wrongdoing—and the ensuing loss in profits.

Plaintiffs’ lawyers often agree to secrecy out of perceived necessity. A plaintiff’s lawyer may be so concerned with gaining access to the key documents she needs to present her client’s case that she does not recognize an unlawful protective order—or may decide it isn’t worth slowing down the litigation to fight. And when faced with a settlement that will compensate their clients—even if the defendant is willing to pay a premium for secrecy—few plaintiffs’ attorneys balk at the condition that the case and the settlement be kept secret. To fight would be to delay justice for the client, or possibly to lose the chance to settle altogether, and many cannot afford that risk.
Judges, meanwhile, are frequently overburdened. Because neither of the parties is arguing for the public’s right of access to information, it is often possible to resolve disputes without considering the public interest at all. If the parties disagree about whether a protective order is proper, a busy judge may simply insist that they work it out. Few judges are likely to reject a proposed settlement that has a confidentiality clause, as long as both parties agree to the term. The result is that as long as each participant in the legal process pursues her own narrow interest, no one in the process is protecting the public interest—and the public remains unaware of the underlying facts that prompted the desire for secrecy.

Although the public generally has a right of access to trials, this is virtually meaningless, given that the vast majority of cases settle. A recent UCLA report found that the 2002 rate of resolution by trial of cases in federal court is less than a sixth of what it was in 1962.\textsuperscript{15} Naturally, settlement is especially likely when facts revealed in discovery show that the defendant has put peoples’ health or safety at risk, or has defrauded its customers. When such facts do come out, defendants who want to shield their actions from public scrutiny have the perfect solution: pay for a secret settlement.

**Unnecessary secrecy threatens public safety, undermines the civil justice system, and blocks the courthouse doors.**

Whether or not unnecessary secrecy is acceptable in our nation’s civil justice system depends on whether one views the publicly-funded courts as simply a means of resolving private disputes, or whether one believes that the public has a right of access to information about what happens in our court system.

No one would deny that there are some cases in which secrecy is appropriate. For example, Coca-Cola may understandably wish to prevent its competitors from knowing the secret formula of its soft drink. In such cases, judges could easily conclude that no public interest would be harmed by confidentiality. But in cases where the information at stake would alert the public to harmful corporate practices, the costs of secrecy are too high.

This is not merely a question of ideals; it has serious practical ramifications. The first and most obvious effect of secrecy is that consumers remain unaware of risks to their safety and health, and continue to use dangerous products. But there are other, more subtle costs as well.

Unnecessary secrecy makes discovering the truth much more difficult and costly. When a defendant is able to keep its wrongdoing secret, it does not have to pay as much money to subsequent victims. In addition, many other victims will never learn that they have legal claims against the corporation. Others who know they have claims will be unable to sue because of the high cost of obtaining information that only the defendant possesses. Those who do sue will face protective orders at every corner, and the few who do prevail will likely be forced to agree to a secret settlement. Meanwhile, consumers are prohibited from making informed decisions about which companies to do business with, and the defendant continues to compete in the marketplace.

The cost to the judicial system—and to taxpayers—is enormous. Judges must decide the same discovery disputes over and over again. Cases that should be resolved easily if the truth were known take years to resolve, or never reach resolution at all. Instead of the public courtroom being the institution that ensures the truth is discovered and justice is done, the courtroom is being used all too often as a means of hiding the truth.
In light of this, federal legislation aimed at reducing unnecessary secrecy in the courts and ensuring the public’s right to know is long overdue.

**The Sunshine in Litigation Act**

The Sunshine in Litigation Act would restrict federal judges from entering a protective order or sealing a case or settlement without making specific factual findings that the secrecy order would not harm the public’s interest in disclosure of information relevant to health or safety. A requirement that factual findings be issued would charge the court with examining whether the public interest in access to the information at stake outweighs the interest the proponent of the order has in secrecy. It would also provide a valuable record on which to base appeals of—or challenges by interveners to—any secrecy order entered. Equally importantly, the bill would prohibit courts from approving or enforcing settlements or issuing protective orders or sealing orders that would restrict disclosure of information to regulatory agencies. All of these things are likely to reduce unnecessary court secrecy.

However, if the intent of the legislation is to definitively strengthen the standards that must be met before a court can enter a secrecy order, there are ways in which the bill as currently drafted may fall short of delivering this effect. In light of this, the Subcommittee might consider the following concerns when evaluating potential revisions to the bill.

1. **The bill does not encompass public interests other than health and safety.**

   As currently drafted, several provisions of the bill are narrowly limited to ensuring public access to information “relevant to the protection of public health or safety.” However, as explained above, secrecy orders are also commonly used to shield egregious misconduct that is not directly linked to health or safety; for example, refusal by insurance companies to pay
policyholders’ legitimate claims after they have suffered severe injuries or lost their homes.

While it is certainly true that health and safety information must not be concealed, the public has a broader interest in access to information concerning corporate wrongdoing—including fraud, discrimination, and insurance bad faith. Legislation would go much further towards eradicating the problem of court secrecy if it were not limited to information relevant to the protection of public health and safety.

2. The bill could be interpreted as supplanting or weakening the existing Constitutional and common-law right of access to court records.

   As currently drafted, section (a)(1) imposes new requirements for the issuing of protective orders and orders sealing court records, but it does not make clear that these requirements must be satisfied in addition to any requirements that already exist under current law. In addition, it appears to impose a single standard for the issuing of any secrecy order, regardless of whether it is a protective order under Federal Rule of Civil Procedure 26(c) (which governs the sealing of materials produced in pretrial discovery and does not apply to court records or settlements) or an order restricting access to court records. Because of these ambiguities, the section, as currently drafted, could have the unintended effect of actually weakening existing protections against the sealing of court records.

   Section (a)(1)(B), as written, provides that court records may be sealed as long as any public interest in information related to the protection of public health or safety is outweighed by a “specific and substantial interest” in confidentiality. However, under current law, court records are subject to an arguably much more stringent test. Many courts have held that, under both the common law right of access and the First Amendment to the United States Constitution, court records are subject to a “strong presumption in favor of access” that can only be overcome upon
a showing of “compelling reasons for secrecy” or “exceptional circumstances.” While courts use varying language to describe the burden that must be satisfied before access to court records can be restricted, it is clear that this standard is different from—and higher than—the Rule 26(c) “good cause” standard for issuing protective orders. In keeping with this, numerous courts have held that the mere existence of a protective order is not enough to justify the sealing of court records.

Because section (a)(1)(B) does not make clear how the provision relates to current legal standards—i.e., whether it is intended to supplement or to replace them—it could be interpreted as permitting a court to seal court records, despite a public interest, as long as an (arguably weaker) “specific and substantial interest” standard is satisfied. Thus, if the bill is intended to ensure that standards are strengthened, it should be made clear that the bill’s provision does not replace the stronger standards currently applicable to court records with a weaker standard. This concern could be remedied, for example, by excluding reference to court records in the bill altogether. Alternatively, language could be added that clarifies that nothing in the bill should be interpreted as diminishing existing legal standards for the issuance of an order restricting access to court records in a civil case, and that the standards set forth in the bill are to be applied in addition to, not in lieu of, such existing legal standards.

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17 Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982).
18 See, e.g., Littlejohn v. BIC Corp., 851 F.2d 673, 680 (3d Cir. 1988) (rejecting argument that a stipulated protective order gave the defendant the power to unilaterally block public access to trial exhibits); Bank of America Nat. Trust v. Hotel Rittenhouse, 800 F.2d 339, 345 (3d Cir. 1986) (parties’ private confidentiality agreement could not bar access to what had become judicial record).
3. **The bill could be interpreted as weakening requirements for the sealing of discovery materials.**

   Section (a)(1)(B) could also be construed as weakening current requirements under Rule 26(c) for the issuing protective orders. Although the provision requiring a court to consider the public interest would strengthen the standard applied by courts in many jurisdictions, the other factor to be weighed in the balance—whether the proponent of secrecy can demonstrate a “specific and substantial interest” in confidentiality—is arguably a lesser standard in some contexts than that currently applied under Rule 26(c). For example, under existing law, a defendant’s interest in avoiding embarrassment and possible loss of sales due to disclosure of its unethical practices would not be grounds for a protective order under Rule 26(c). But a defendant could argue that exactly that sort of interest is now cognizable under the new “specific and substantial interest” test.

   Again, this concern could be remedied by including language that makes clear that nothing in the bill should be interpreted as diminishing existing legal standards for the issuance of an order restricting access to court records in a civil case, and that the standards set forth in the bill are to be applied in addition to, not in lieu of, such existing legal standards.

4. **The bill could be interpreted as permitting a court to enter a secrecy order as long as it finds that the information at issue does not relate to the public interest or that the public interest is outweighed, without complying with existing legal requirements.**

   As written, section (a)(1) could be interpreted as permitting a court to issue a protective order or sealing order simply upon finding either (A) that the material at issue does not relate to public health and safety, “or” (B) that the public interest is outweighed—without satisfying any other requirements. Because it is not clear that the existing standards still must be met, it is conceivable that a court could interpret this provision as obviating both the good cause standard
of Rule 26(c) and the compelling interest standard applicable to court records, and permitting the secrecy order even if one of those additional requirements has not been met. This concern could also be addressed by making clear that the bill does not diminish existing standards.

**Conclusion**

While Public Justice has successfully unsealed court records and blocked overbroad protective orders in many cases, it is simply not possible for public interest organizations to discover and fight every instance of court secrecy that puts the public at risk. Likewise, while some federal courts and local bar associations have adopted rules regulating secrecy to some extent, these rules do not go far enough to prevent the problems described above. Without widespread change through legislation, corporate defendants will continue to invest their substantial resources into keeping evidence of wrongdoing from the public, and plaintiffs’ attorneys will too often continue to have no choice but to agree to secrecy as a condition of achieving a fair outcome for their clients. Only judges have the power to protect the public’s right to know in each and every case. Federal legislation that gives judges a blueprint for determining whether secrecy is actually necessary and a legal basis for refusing to sanction secrecy—even if the parties agree to it—is needed to protect the public’s right to know. We cannot afford to continue to allow our historically rooted system of open government to be used as a tool for the powerful to hide the truth from the public.

I am grateful to the Subcommittee for bringing this very important issue to the attention of Congress, and I appreciate the opportunity to present this testimony.
Fighting Protective and Secrecy Orders
AAJ 2013 Annual Convention
Advocacy Track: Anatomy of a Personal Injury Lawsuit
July 22, 2013 – San Francisco, CA

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I. **Introduction**

A. **Why fight overbroad court secrecy?**

1. “Common sense tells us that the greater motivation a corporation has to shield its operations, the greater the public’s need to know.” *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983).

2. Secrecy allows wrongdoing to continue, prevents victims from knowing they may have a viable legal claim, and undermines trust in the justice system.

B. **Public Justice court secrecy cases**

1. *Aleksich v. Remington Arms Co.* (D. Mont. CV-91-05). Public Justice successfully represented Montana father Richard Barber in his efforts to unseal the records in a case involving defects in the firing mechanism of Remington gun manufacturer’s popular 700-series rifle. Before our involvement, the case had been sealed since 1995, pursuant to a settlement between the parties.

2. *Toe v. Cooper Tire & Rubber Co.* (Iowa District Court, Polk County, No. CL 106914). Public Justice represented proposed intervenor The Center for Auto Safety, a non-profit public interest research and education organization. The case arose from a 2007 rollover crash that killed one passenger and severely injured several others. During discovery, the plaintiffs obtained key documents showing that Cooper was aware of dangerous defects in its tire lines, and these documents were used as evidence in the trial. In March 2010, an Iowa jury found 7-1 for the

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1 This outline is based on “Fighting Protective and Secrecy Orders and Avoiding Secret Settlements” by Lori E. Andrus, Leslie A. Bailey, and Patrick Malone (chapter in the forthcoming AAJ Trial Guide *Anatomy of a Personal Injury Lawsuit*); and on Amy Radon & Leslie A. Bailey, *Confronting Court Secrecy Issues from Discovery through Settlement: Measures to Protect Both Your Client and the Public Interest*, AAJ Prods. Liab. Section Newsletter, Summer 2012.

2 To see briefs and decisions in our cases, go to www.publicjustice.net and click on “What We Do,” then “Court Secrecy” – or just search by case name.
plaintiffs and returned a special verdict form confirming that Cooper was at fault for the crash. Public Justice successfully opposed Cooper’s motion to seal the transcript of that public trial.

3. **In re Prempro Prods. Liability Litig.** (E.D. Ark., MDL Docket No: 4:03-cv-01507-WRW). Public Justice represented PLoS Medicine, a medical journal published by the non-profit Public Library of Science, in its effort to intervene and gain access to documents Wyeth had produced in discovery which allegedly show that the company engaged in ghostwriting of medical journal articles to promote its Prempro hormone replacement drug. The documents had been made confidential pursuant to a stipulated protective order, and Wyeth had never demonstrated “good cause” under Fed. R. Civ. Pro. 26(c). The court granted the motion to intervene and order the documents unsealed.

4. **Weiss v. Allstate Co.** (E.D. La. No. 06-cv-3774). Public Justice represented intervenor Consumer Watchdog (then the Foundation for Taxpayer and Consumer Rights) in opposing Allstate’s request to seal documents introduced in a trial where a New Orleans couple won a $2.8 million verdict against Allstate for illegally refusing a hurricane-related claim. We successfully argued that the trial exhibits provide insight into the company’s decision-making process and that denying public access to the documents “would directly impede FTCR’s mission of educating the public about insurance practices and abuses.” The district court agreed, specifically rejecting the company’s argument that public access to the trial exhibits would cause it prejudice in other litigation involving Hurricane Katrina claims.

5. **Davis v. City of Auburn**, No. SCV9736 (Cal. Super. Ct., Placer County). The Davis lawsuit was based on an accident in a Honda Civic that left the plaintiff, then 17 years old, a quadriplegic. After the court found that Honda and its expert witness had deliberately tampered with evidence, the court sanctioned Honda and held the company liable. Honda and the plaintiff immediately settled, and the sanctions decision was vacated and sealed from public view as part of a settlement. Public Justice intervened on behalf of the Center for Auto Safety, and the court unsealed its sanctions decision.

II. **Fighting Overbroad Protective Orders in Discovery**

   A. **Defendant must demonstrate “good cause” under Rule 26(c)**

   1. **Specific documents, specific harm.**

      a. “A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific
**prejudice or harm** will result if no protective order is granted.” Fed. R. Civ. P. 26(c).

b. Not enough to “[s]imply mention[] a general category of privilege.” *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (“Cipollone II”).


2. **Embarrassment and past good cause are not enough.**

a. For “embarrassment” to form the basis for a protective order, it must be particularly serious: “to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.” *Cipollone II*, 785 F.2d at 1121-22. Adverse publicity stemming from public reaction to the facts giving rise to liability does not qualify as good cause, even where the parties stipulate to the entry of a protective order. *See Vassiliades v. Israely*, 714 F. Supp. 604, 605 (D. Conn. 1989).

b. The proponent of secrecy has the burden of proving the need for continued protection of specified documents. *Cipollone II*, 785 F.2d at 1121.

B. Stipulation by the parties is not a substitute for a court finding.

1. Even if the parties stipulated to a protective order, Rule 26 does not permit a court to enter the order unless it finds “good cause” to do so. See Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996) (district court “cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public” simply because the parties agree to the protective order); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 790 (3d Cir. 1994) (“It would be improper and unfair to afford an order presumptive correctness if it is apparent that the court did not engage in the proper balancing to initially determine whether the order should have been granted.”); Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994) (“Even if the parties agree that a protective order should be entered, they still have the burden of showing that good cause exists for issuance of that order.”); Davis v. Prince, 753 F. Supp. 2d 561, 567 (E.D. Va. 2010) (there must be a judicial determination of good cause; not enough for the parties to determine what warrants protection).

2. To allow for appellate review of its discretion, the court must lay out the factors it relied upon in the good cause determination. See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003). In some jurisdictions, the court must cite to specific factual findings. See, e.g., Campbell v. U.S. Dept. of Justice, 231 F. Supp. 2d 1, 7 (D.D.C. 2002).

C. Negotiate a fair protective order.

1. Insist on an appropriately narrow definition of “confidential”

   a. Information previously publicly available cannot be made confidential.

   b. Documents produced in discovery that were also acquired outside the discovery process are not confidential. See Jessee v. Farmers Ins. Exch., 147 P.3d 56, 60 (Colo. 2006) (invalidating protective order under state Rule 26(c) “to the extent that it purports to place limits on the use of documents not acquired solely as a result of discovery in this case”).

   c. Information concerning the hazardous nature of a product is not a trade secret. In re Upjohn Co. Antibiotic Cleocin Prod. Liab. Litig., 81 F.R.D. 482, 483-84 (E.D. Mich. 1979), aff’d, 664 F.2d 114 (6th Cir. 1981); Rucklehaus v. Monsanto Co., 467 U.S. 986, 1011 n.15 (1984) (“If...a public disclosure of data reveals, for example, the harmful side effects of the submitter’s product [that] cannot constitute the taking of a trade secret.”).

2. Insist on protocols for **challenging confidentiality designations** and **filing confidential documents with the court** that keep the burden where it belongs: on the proponent of secrecy.

   a. The protective order should provide a **clear procedure for challenging any confidentiality designation** and make clear that and the designating party has the burden of demonstrating good cause for secrecy to the court. This procedure could require that once a plaintiff objects to a designation, the defendant must move for court-ordered protection with respect to each challenged document or set of documents within the designated time frame. If the defendant does not obtain such a court ruling, the document in question loses its confidential status. This mechanism ensures that the proponent of secrecy, which bears the burden of showing good cause for secrecy, must take the necessary action to prevent disclosure. *See, e.g.*, *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 90 (11th Cir. 1989) (approving protective order that “allows the producing party to designate a document confidential unless the other party objects,” and in the event of an objection, allows the producing party to move the court for a ruling or concede the objection); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 354 (11th Cir. 1987) (approving protective order that provides that once a notice of objection to a confidentiality designation was received, the producing party had ten days to apply to the district court for a ruling to keep the material confidential).

   b. A fair protective order will permit plaintiffs to **submit “confidential” matter conditionally under seal**, and impose a timeframe within which the designating party must move the court to maintain the confidentiality designations.

3. **Say “no” to no-sharing and “return-or-destroy” provisions.**

   a. **Courts promote sharing among plaintiffs’ counsel.** Courts have explicitly authorized (and even encouraged) the sharing of discovery between litigants in different cases. *See, e.g.*, *United Nuclear Corp. v. Cranford*, 905 F.2d 1424, 1428 (10th Cir. 1990) (agreeing with other appellate courts that information sharing should be permitted). Cooperation among similarly situated litigants “promotes the speedy and inexpensive determination of every action as well as conservation of judicial resources” and

b. **ABA resolution prohibits destruction of discovery in personal injury cases.** “No protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order.” ABA Blueprint for Improving the Civil Justice System; Report to the American Bar Association Working Group on Civil Justice System Proposal, 74 (American Bar Ass’n 1992).

4. **Make sure the protective order can be modified.**

a. **Include a provision allowing for modification** if the need arises – for example, to allow plaintiffs to turn over certain discovery materials to a federal agency in order to contradict the defendants’ association’s misrepresentations to that agency. *See, e.g.*, *Hall v. Sprint Spectrum L.P.*, 368 Ill. App. 3d 820 (2006). The majority of federal circuits also apply a “presumption in favor of access in cases where an intervening party involved in bona fide collateral litigation seeks access to protected discovery materials.” *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 317-18 (D. Conn. 2009) (citing *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990)); *Wilk v. Am. Med. Ass ’n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *Pansy*, 23 F.3d at 789-90; *Beckman Industries, Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475-76 (9th Cir. 1992); *Public Citizen v. Liggett Group*, 858 F.2d at 791).

III. **Opposing the Sealing of Court Records**

A. **Court records** include pleadings filed with the court, court orders, minute entries, hearing transcripts, trial exhibits, and discovery materials filed with the court in support of dispositive motions.

B. **“Good cause” is not enough – a higher standard applies.** It is well settled that the public has a common-law “right to inspect and copy . . . judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). This right “is firmly rooted in our nation’s history.” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Because the public has presumptive right of access to court records, these records are subject to the more exacting standards of federal common law and First Amendment to the U.S. Constitution. Thus, even if a defendant was able to demonstrate “good cause” for
keeping a document confidential during the discovery phase, that will not be sufficient for sealing a court record. 3

1. Federal common law:  The presumption of public access can be overcome only if the proponent of secrecy demonstrates “compelling reasons” for secrecy that are supported by “specific factual findings” that outweigh the general history of access and the public policies favoring disclosure.” Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1178-79 (9th Cir. 2006). “[O]nly the most compelling reasons can justify the non-disclosure of judicial records.” In re Gitto Global Corp., 422 F.3d 1, 6 (1st Cir. 2005). “Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.” Union Oil Co. of California v. Leavell, 220 F.3d 562, 567 (7th Cir. 2000).

a. The “compelling reasons” standard is very narrow – for example, where disclosure of court records would result in “improper use of the material for scandalous or libelous purposes” or “infringement upon trade secrets.” Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995).

2. First Amendment: public’s right of access can be overcome only by “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984).

a. Proponent of secrecy must identify specific reasons why secrecy is warranted and show that nothing short of sealing will adequately protect their interests. Oregonian Pub. Co. v. U.S. Dist. Ct., 920 F.2d 1462, 1465 (9th Cir. 1990) (citation omitted).

b. The Second, Third, Fourth, Sixth, and Seventh Circuits have conclusively recognized a First Amendment right of access to court records in civil proceedings. See Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006); Virginia Dept. of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004); Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); Publicker, 733 F.2d at 1070; Brown & Williamson Tobacco Corp., 710 F.2d 1165, 1177 (6th Cir. 1983).

3. In its Judicial Conference Policy on Sealed Cases, the Office of U.S. Courts has stated that the sealing of an entire case file is an act of “last

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3 The approaches under federal common law and the First Amendment are relatively similar, and courts that rule on the basis of one standard often decline to address the other. The two arguments taken together, however, make an extremely compelling case for public access, and advocates would be wise to make both arguments when challenging the sealing of court records.
resort” which should only occur when “required by statute or rule,” or when “justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives (such as sealing discrete documents or redacting information).” Administrative Office of the U.S. Courts, Judicial Conference Policy on Sealed Cases (Sept. 13, 2011), available at http://www.uscourts.gov/uscourts/News/2011/docs/JudicialConferencePolicyOnSealedCivilCases2011.pdf. The Policy further provides that “[a]ny order sealing a civil case [must contain] findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule.” Finally, the policy dictates that if in the event an entire case file is sealed, that seal should be “lifted when the reason for sealing has ended.” Id. Although not binding on courts, the Policy is “at the very least entitled to respectful consideration,” and should be brought to the court’s attention whenever you are faced with a request from an opposing party to seal the entire court file or when you need to access court records in a sealed case. Hollingsworth v. Perry, 130 S. Ct. 705, 712 (2010) (citation and quotation omitted).

C. Court records must be unsealed immediately once secrecy is no longer warranted. As soon as the court determines that there is no longer any valid basis for continued secrecy, the “default posture of public access prevails” and the court should immediately release the court records back into the public domain. Kamakana, 447 F.3d at 1181-82; see also Lugosch, 435 F.3d 110, 126 (2d Cir. 2006) (noting that the circuit courts “emphasize the importance of immediate access where a right to access is found”); Grove Fresh, 24 F.3d at 897 (“[O]nce found to be appropriate, access should be immediate and contemporaneous.”).

D. The public’s interest in access to court records is strongest when the records concern public health or safety. See, e.g., Brown & Williamson Tobacco Corp., 710 F.2d at 1180-81 (vacating district court’s sealing of court records involving the content of tar and nicotine in cigarettes and emphasizing that the public had a particularly strong interest in the court records at issue because the “litigation potentially involves the health of citizens who have an interest in knowing the accurate ‘tar’ and nicotine content of the various brands of cigarettes on the market”); see also United States v. General Motors, 99 F.R.D. 610, 612 (D.D.C. 1983) (the “greater the public’s interest in the case the less acceptable are restraints on the public’s access to the proceedings”); In re Air Crash at Lexington, Ky., August 27, 2006, No. 5:06-CV-316-KSF, 2009 WL 1683629, at *8 (E.D. Ky. June 16, 2009) (the “public has an interest in ascertaining what evidence and records the . . . Court [has] relied upon in reaching [its] decisions,” and that “the public interest in a plane crash that resulted in the deaths of forty-nine people is quite strong, as is the public interest in air safety”).

E. Insufficient reasons for sealing court records

1. Embarrassment. A desire to avoid public scrutiny of alleged wrongdoing or embarrassment is not a sufficient legal basis for sealing
court records. As the Ninth Circuit has explained, “[t]he mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.” *Foltz*, 331 F.3d at 1136; see also *Phase II Chin, LLC v. Forum Shops, LLC*, 2010 WL 2695659, at *2 (D. Nev. July 2, 2010) (“The mere suggestion that embarrassing allegations . . . might harm a company commercially if disclosed in publicly available pleadings does not meet the burden of showing specific harm will result.”).

2. **Protective order in discovery.** Defendants often try to use the existence of a protective order as a basis for maintaining confidentiality once a document is introduced at trial or attached to a dispositive motion. This kind of “bootstrapping” is contrary to law and should be opposed. See *Foltz*, 331 F.3d at 1127-29, 1139 (reversing district court’s sealing of court records pursuant to confidential settlement, notwithstanding fact that parties had stipulated to protective orders governing discovery).

### IV. Opposing and Challenging Secret Settlements

#### A. Legal restrictions on court-approved secret settlements

1. A settlement agreement filed with the court is a **presumptively a public record** just like any other court document. *See Bank of Am. Nat’l Trust & Savings Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343–44 (3d Cir. 1986) (“[A] motion or a settlement agreement filed with the court is a public component of a civil trial.”). Thus, the same legal standards applicable to all court records apply.

2. The **public interest** in judicially-approved settlements is strong. *See Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (“Whatever the rationale for the judge’s participation in the making of the settlement in this case, the fact and consequences of his participation are public acts. He was not just a kibitzer. But even if he had been, judicial kibitzing is official behavior. The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.”)

3. The **mere fact of settlement** is **not** sufficient grounds for sealing a court record. As numerous courts have held, “the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public’s common law right of access.” *Hotel Rittenhouse*, 800 F.2d at 346 (“Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public’s
common law right of access.”); see also S.E.C. v. Van Waeyenberghe, 990 F.2d 845, 849-50 (5th Cir. 1993) (district court abused its discretion in sealing transcript of settlement proceedings without considering the public’s right of access); Daines v. Harrison, 838 F. Supp. 1406, 1408-09 (D. Colo. 1993) (“interest in promoting settlement” insufficient to rebut the presumption of public access to court filings). More importantly, “[t]he right of access to court documents belongs to the public, and the [parties] [a]re in no position to bargain that away” as a condition of settling a case. San Jose Mercury News, 187 F.3d at 1098.

4. **State laws and court rules may limit secret settlements.**

   a. Some states have “Sunshine in Litigation” laws that impose limitations on courts’ ability to approve secret settlements or declare settlements that hide information critical to public health or safety unenforceable for public policy reasons. See Jon Bauer, Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics, 87 Oregon L. Rev. 480, 493 (2008), available at http://law.uoregon.edu/org/olrold/archives/87/bauer.pdf (listing states). The defendant should not be able to require you to agree to a secrecy term that would be unenforceable under state law.

   b. Check your local court rules and rules of civil procedure. The District of South Carolina’s Local Civil Rule 5.03(E) provides that “No settlement agreement filed with the Court shall be sealed.” D.S.C. Local R. 5.03(E); see generally Symposium, Court-Enforced Secrecy, 55 S.C. L. Rev. 711 (2004); Joseph F. Anderson, Jr., Secrecy in the Courts: At the Tipping Point?, 53 Vill. L. Rev. 811 (2008) (analysis by Chief Judge of the District of South Carolina of the debate over “court-ordered” secrecy and his court’s landmark adoption of an anti-secrecy rule). The state’s Rule of Civil Procedure 41.1 likewise provides that any proposed settlement agreement submitted for the court’s approval “shall not be conditioned upon its being filed under seal.” S.C. R. Civ. P. 41.1(c); see also South Carolina Bar Ethics Adv. Op. #10-04. The rule requires the court to consider whether there are alternatives other than sealing that would protect the parties’ interests, and whether sealing would best serve the public interest.

B. **Ethical restrictions on secret settlements.** Even if you are entering into a private settlement and will not seek court approval, attorneys’ actions are always subject to scrutiny under the rules of professional conduct.

   1. **Duty to abide by client’s decisions**

      a. Rule 1.2(a) - Scope of Representation and Allocation of Authority Between Client and Lawyer. “[A] lawyer shall abide
by a client’s decisions concerning the objectives of representation.

A lawyer shall abide by a client’s decision whether to settle a
matter.”

2. Duty to ensure the integrity of the adversary system

a. Rule 3.4(f) – protecting other litigants’ access to relevant
evidence. “A lawyer shall not . . . request a person other than a
client to refrain from voluntarily giving relevant information to
another party unless: (1) the person is a relative or an employee or
other agent of a client; and (2) the lawyer reasonably believes that
the person’s interests will not be adversely affected by refraining
from giving such information.”

i. In the settlement context, the rule should mean that a
defense lawyer cannot ethically ask the plaintiff to refrain
from volunteering potentially relevant evidence to another
party. This makes sense, because litigants must be allowed
to interview witnesses and people with relevant knowledge.

ii. A version of Rule 3.4(f) has been adopted by nearly every
state.

iii. Settlement terms that may violate Rule 3.4(f):

1.) Clause expressly baring plaintiff from voluntarily
cooperating with parties, agencies, or lawyers
suing or investigating the defendant, even if it
allows for disclosures in response to a subpoena.

2.) Blanket confidentiality clause that bars any
discussion of underlying facts (without exception
for disclosures of relevant information to other
litigants).

3.) Broad “non-disparagement” clauses that seek to
prevent the plaintiff from sharing relevant, non-
privileged information with other victims of the
defendant’s misconduct.
4.) A South Carolina ethics advisory opinion found that a defense lawyer’s demand for a noncooperation clause as part of a settlement violated Rule 3.4(f)—and that a plaintiff’s lawyer would be violating his or her own ethical obligations by agreeing to it. S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993).

b. Rule 5.6(b) – Once public, always public. “A lawyer shall not participate 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.”

i. Bars “lawyer buy-out” provisions that bar a plaintiff lawyer from suing the same defendant again. Should also be interpreted to cover settlements that have the indirect effect of making a lawyer’s services unavailable to others who wish to pursue similar claims.

ii. D.C. Bar Ethics Adv. Op. 335 (May 16, 2006), at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion335.cfm. “A settlement agreement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case, such as the name of the opponent, the allegations set forth in the complaint on file, or the fact that the case has settled.”


iv. New Hampshire Bar Assn. Ethics Opinion 2009-10/6, at http://pub.bna.com/lw/NHEthicsOpinion2009-10-6.pdf. “It would violate New Hampshire Rules of Professional Conduct Rule 5.6(b) for defense counsel to request, as a term of a settlement agreement, that plaintiff’s counsel refrain from disclosing information concerning the suit that is public, if doing so would have the effect of restricting the right of plaintiff’s counsel to practice law or the public’s right to identify and retain qualified legal counsel.

c. Rule 1.6 (1)(b) - Confidentiality of Information. “A lawyer may reveal information relating to the representation of a client to the
extent the lawyer reasonably believes necessary: [] to prevent reasonably certain death or substantial bodily harm.”

i. Where a defendant’s ongoing conduct presents a reasonably certain risk of serious injury to others, entering into a settlement agreement that would prevent the lawyer from disclosing that information undermines the rule’s purposes and is probably unethical. See Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something In Between?*, 30 Hofstra L. Rev. 783, 808 (2002).

V. **Additional Resources**

If you were about to make a big investment—say, a new car, or tires for your current car—wouldn’t you want to know before you shell out money that the product isn’t dangerous? Johnny Bradley did. In 2004, Mr.
Bradley and his wife set out on a cross-country drive from California to Mississippi to visit relatives on their way to new Navy recruiter assignments in Florida. Before the trip, Mr. Bradley decided to equip his Ford Explorer with new tires. Having heard recent publicity about the dangers of Firestone tires, he made a different choice: Cooper Tires. But on a highway in New Mexico, the tread on one of the car’s tires separated, rolling the Explorer four times. Johnny Bradley ended up in a coma for two weeks. His wife wasn’t so fortunate—she was killed instantly. Mr. Bradley testified before Congress that he believes his wife would still be alive today if courts had not allowed Cooper to hide the evidence of the defect from the public.

That’s right—Johnny Bradley’s accident was hardly the first involving deadly tread separation on Cooper Tires. In fact, in several lawsuits against Cooper Tire, the families of victims have uncovered documents allegedly showing that the accidents were caused by tread separation. But Cooper, in virtually every case, has fought to keep that evidence under seal, claiming that to release it would expose the corporation’s “trade secrets.” In a related case, we fought to prevent Cooper from sealing the transcript of a public trial in which an Iowa jury found the company responsible for causing a rollover that left one passenger dead and rendered another a quadriplegic. Remington Rifle Co., the nation’s largest producer of hunting guns, also fights hard to hide the evidence showing that a design flaw in its Model 700 causes the rifle to fire without anyone pulling the trigger. Had Montana father Rich Barber known about the risk, he would have chosen a different rifle for his family. Instead, he still mourns the death of his son Gus, who was only 9 when he was mortally wounded from a shot fired by a defective Remington rifle. Years later, we helped Rich unseal a court record showing that the same thing had happened to another child in Montana, only a few years earlier. But because the entire record was sealed, no one knew until it was too late for Gus Barber. Today’s editorial in USA Today hits the court secrecy nail on its head: sealed settlements can and do kill. It’s about time Americans wake up and realize that our public court system is all-too-often being co-opted by private corporations to hide their dirty secrets and keep us in the dark about dangerous products. And it’s time we demand that something be done about it.

- See more at: http://publicjustice.net/blog/court-secrecy-can-be-deadly-and-needs-to-end#sthash.TLqvu8x2.dpuf
EXCERPTS FROM THE MODEL RULES OF PROFESSIONAL CONDUCT

Rules That Affect the Permissibility of Certain Kinds of Secret Settlements:

Rule 3.4  Fairness to Opposing Party and Counsel

A lawyer shall not:

.......

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

Excerpt from official Comment to Rule 3.4:

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Rule 5.6  Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

.......

(b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.

Excerpt from official Comment to Rule 5.6:

An agreement restricting the right of lawyers to practice after leaving a firm [which is prohibited by paragraph (a) of the rule] not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. . . . Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.
Rule 1.2 Scope of Representation and Allocation of Authority Between Lawyer and Client

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm.

Excerpt from official Comment to Rule 1.6:

. . . Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to so so, or do so through the acts of another;

. . . . . . .

(d) engage in conduct that is prejudicial to the administration of justice; . . .
Other Rules Relevant to Counseling Clients About Settlement:

Rule 1.2 Scope of Representation and Allocation of Authority Between Lawyer and Client

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client’s decision whether to settle a matter. . . .

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, . . . .

Rule 1.4 Communication

(a) A lawyer shall:

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Rule 1.16  Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law; . . .

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Rule 2.1  Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.
EXAMPLES OF ETHICALLY QUESTIONABLE SETTLEMENT CLAUSES

Plaintiff will not encourage, assist, or provide information to any person or agency in connection with any lawsuit, charge, claim or complaint against the defendant unless plaintiff is required to render such assistance pursuant to a lawful subpoena or other legal obligation.

*Violates Model Rule 3.4(f) by prohibiting the voluntary disclosure of relevant information to other parties.*

Plaintiff and her attorneys will not make any statements concerning or respond in any way to any inquiry whatsoever with regard to the facts surrounding the case and the plaintiff’s claim.

Plaintiff shall refrain from doing or saying anything which disparages or denigrates the defendant.

*These clauses violate Rule 3.4(f) to the extent that they prohibit the voluntary disclosure of relevant information to other parties. Also may violate Model Rule 5.6(b) by barring plaintiff’s counsel from using publicly available information about the lawsuit to inform potential clients of the lawyer’s relevant experience. If information obtained through the lawsuit implicates issues of public safety, these clauses also may violate Rule 1.6(b)(1) by barring plaintiff’s counsel from disclosing information when necessary to prevent reasonably certain death or substantial bodily harm to others.*

Before submitting to an interview with or providing any information to any lawyer, law enforcement official, agency investigator, or party investigating or pursuing a claim against defendant, plaintiff shall provide advance written notice to the defendant and shall, upon defendant’s request, agree to allow any attorney or representative designated by defendant to attend such interview.

*May violate Rule 3.4(f) by interfering with the ability of other parties to obtain relevant information from the plaintiff through ex parte witness interviews.*
Plaintiff’s counsel will not represent any future clients in any lawsuit, claim or complaint against the defendant.

*Directly violates Rule 5.6(b).*

Plaintiff’s counsel will not use any information learned as a result of this litigation in any subsequent action against the defendant.

*Violates Rule 5.6(b) by impairing counsel’s ability to represent future clients.*

Plaintiff and plaintiff’s counsel will not publicize or disseminate to the public at large, through any media whatsoever, any statements or information that relate to the facts and information underlying this action, or otherwise disparages or denigrates the defendant.

*May violate Rule 5.6(b) by preventing plaintiff’s counsel from disseminating publicly available information about the lawsuit for the purpose of informing potential clients of the lawyer’s relevant experience.*

**EXAMPLES OF PERMISSIBLE SETTLEMENT CLAUSES**

Except as may be specifically required by law, plaintiff will not disclose the terms or this Agreement or the amount of the settlement contained herein to anyone except her attorney, her immediate family and her tax advisor. To any questions regarding the status of this case, plaintiff may communicate only that it has been resolved.

Plaintiff shall not encourage or solicit litigation against the defendant, but may voluntarily disclose relevant information to a person or agency that has filed, is investigating, or is known to have the basis for a claim against the defendant.
Nothing in this agreement shall be interpreted to prohibit plaintiff’s counsel from disclosing matters of public record relating to this case for the purpose of informing potential clients of her experience.

Nothing in this agreement shall be interpreted to prohibit counsel for either party from exercising discretion to disclose information, to the extent permitted by Rule 1.6(b)(1) of the Rules of Professional Conduct, if circumstances arise in which counsel reasonably believes such disclosure is necessary to prevent reasonably certain death or substantial bodily harm.
Buying Witness Silence:
Evidence-Suppressing Settlements and Lawyers’ Ethics

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

The conventional wisdom among practitioners and legal ethics
scholars has been that lawyers may ethically negotiate any settlement
terms that serve their clients’ interests and are not criminal or
fraudulent. (Some recent critics of settlement secrecy have argued
that noncooperation settlements violate obstruction of justice statutes
or other criminal laws, but the illegality argument is largely
unconvincing.) This Article argues that the conventional view has
looked at the problem through the wrong lens. In the ethos of the
ethics codes, third party and societal interests generally take a back

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seat to client service, but certain types of conduct deemed especially harmful to the justice system have long been placed off-limits to lawyers because of their special role as “officers of the court.”

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

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INTRODUCTION

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

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

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

Felicia Martinez (not her real name) worked as a machine operator in a factory. She and several Latina co-workers were bilingual and frequently conversed in Spanish. After some other employees complained, the shift supervisor ordered the workers in his department to speak only English. Ms. Martinez tried to comply, but often found herself unconsciously slipping into her native language. The supervisor repeatedly warned her that she was violating his directive. Ms. Martinez became particularly upset when he rebuked her for using Spanish while teaching a new employee, who barely understood any English, how to run a machine. She told the supervisor that his rule was unnecessary and unfair. He told her to just be quiet and follow instructions. Shortly thereafter, he notified

her that she was being laid off due to a lack of work, although a new machine operator had been hired into the department just a few days earlier.

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

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

The students who handled the case presented the proposed settlement to our client with client-centered neutrality. They explained the proposal and discussed alternatives, including going to trial or attempting further negotiations, elicited her reactions and concerns, spoke of pros and cons, but did not advise her what to do.

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

4 See DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS 2–13, 270–98 (2d ed. 2004) (describing the hallmarks of a client-centered approach to counseling that posits that lawyers generally should maintain a neutral stance toward important case decisions and assist the client in reaching a decision that accords with the client’s values, priorities, and tolerance for risk).
Ms. Martinez expressed mixed emotions. She felt exhausted and wanted the case to be over. She was happy with the size of the settlement, but felt bad about not officially “winning” and establishing that the company did something wrong. She was comfortable keeping the settlement amount confidential; in fact, she wanted to make sure her friends and neighbors did not learn how much money she was getting—because if they did, they would probably want some. The noncooperation provision gave her pause. She believed that other employees at the company had faced similar discrimination, and if they brought claims, she wanted to be able to help them, just as some of her former co-workers had helped her. Nonetheless, she decided that, on balance, she could accept the restriction. After all, she could still testify if subpoenaed. She did not want to risk delaying the settlement by fighting over it.

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

In retrospect, I wondered whether we had acceded too readily to the defense lawyers’ insistence on nonassistance. Our client’s lawsuit had been about her right to speak out against perceived discrimination, and it was painfully ironic that the settlement was now silencing her on the same subject. Even more troubling was the possibility that the agreement was interfering with another person’s ability to prove discrimination. I never found out what became of the co-worker’s claim. The attorney may have concluded that without my client’s evidence, he did not have enough to justify investing time, expense, and effort into a case where payment would be contingent on success. If he did take on the case, the agreement would increase his client’s litigation costs; a deposition would be required to obtain information that, absent the agreement, would have been available for free by simply interviewing Ms. Martinez and having her sign a witness statement.

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

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

This Article makes the case that attorneys who negotiate noncooperation settlements act in violation of their ethical responsibilities under binding disciplinary rules. Rule 3.4(f) of the Model Rules of Professional Conduct (“Model Rules” or “Rules”) prohibits a lawyer from requesting any person, other than the lawyer’s client or the client’s relatives or employees, to refrain from voluntarily providing relevant information to another party. Lawyers who make settlement offers conditioned on noncooperation are doing precisely what the rule prohibits. A strong case can also be made that lawyers who ask for noncooperation, or accept a noncooperation settlement proposed by the other side, violate Model Rule 8.4(d), which prohibits attorneys from engaging in “conduct that is prejudicial to the administration of justice.”

The requirement that lawyers not seek to induce witnesses to withhold voluntary cooperation, though of longstanding vintage (it dates back at least to the 1935 ethics opinion quoted at the start of this

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


7 Id. R. 8.4(d). The Model Code of Professional Responsibility (“Model Code”), which still forms the basis for the ethical rules in two jurisdictions, contains no direct equivalent to Model Rule 3.4(f) but does include the “conduct prejudicial” rule. MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(5) (1981).
Article), remains one of the least well-known of lawyers’ ethical duties. I was unaware of the rule for most of my first decade or so in practice, and many lawyers I’ve spoken with either have never heard of it or never thought about its implications for settlement agreements. Leading law school ethics texts contain no discussion of Rule 3.4(f) or give it only passing mention. Its application to settlement secrecy has received very little attention. The issue was briefly addressed in one state ethics advisory opinion, which concluded that a settlement offer conditioned on noncooperation violates Rule 3.4(f). Stephen Gillers, in an article contending that noncooperation settlements violate federal criminal laws on obstruction of justice, noted that Rule 3.4(f) appears to bar lawyers from making such requests. Professor Gillers, however, gave the rule only passing mention, and other commentators (again with little analysis) have questioned the rule’s application to settlements.

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

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11 See Joel Cohen & James L. Bernard, Buying Victim Silence, 231 N.Y. L.J., Jul. 28, 2004, at 4 n.5 (suggesting that Professor Gillers’s “reading of the rule may be broader than its text supports”).
Part I discusses the varieties and prevalence of noncooperation settlements, and situates the issue within the broader public policy debates that have surrounded settlement secrecy. Part II considers the standard view of the ethics of settlement secrecy that has informed practitioners’ thinking and most of the legal ethics literature, which frames the issue as a conflict between client interests and the protection of third parties from harm, in which the former takes precedence. The perception that lawyers’ “hands are tied,” that they must accept and abide by the client’s decisions concerning secrecy, has produced widespread discomfort, particularly in the plaintiffs’ bar. Recent changes to the Model Rules somewhat broaden the scope of the harm-prevention exceptions to the lawyer’s confidentiality duty, but I conclude that these changes will have little impact.12 Arguments have also been made that noncooperation agreements and other forms of settlement secrecy run afoul of criminal statutes concerning obstruction of justice or compounding.13 I conclude that the illegality argument is largely unconvincing, and is unlikely to make much headway with prosecutors or deter lawyers from negotiating noncooperation settlements.14

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

12 See Model Rules of Prof’l Conduct R. 1.6(b)(1)–(3) (2008); see also infra text accompanying notes 67–74.

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

14 See infra text accompanying notes 79–84 and Appendix.
issues, similarly articulate the idea that interference with an adversary’s access to ex parte witness interviews is prejudicial to the administration of justice.

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

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

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

15 This discussion builds on the insights of an important but little-known essay by Robert Kutak, who chaired the commission that drafted the Model Rules, concerning the “competitive theory” that underlies the Rules’ approach to ethical regulation. See infra text accompanying notes 220–29.
undermines the integrity of adversary adjudication, regardless of whether other law forbids it.

I

NONCOOPERATION AGREEMENTS IN THE CONTEXT OF THE SECRET SETTLEMENTS CONTROVERSY

Settlement agreements that prohibit a settling party from voluntarily providing evidence in other proceedings appear to be common. Just how common is hard to determine, since the parties covenant to keep the existence and terms of the agreement confidential as well. There is ample anecdotal evidence that defendants routinely insist on confidentiality clauses that forbid disclosure of the settlement terms.16 An unknown, but undoubtedly significant, proportion of settlements also prohibit disclosures of factual information relating to the lawsuit. Defendants have strong incentives to seek such restrictions in order to avoid adverse publicity, decrease the chances of similar suits being filed, and make it more difficult for those who bring claims to prove their cases. Plaintiffs and their lawyers who believe that they can obtain a larger payment in exchange for promises of secrecy have incentive to agree.

Secrecy clauses that bar disclosures to other litigants can take several forms. Overt noncooperation clauses, such as the one in Ms. Martinez’s settlement, directly prohibit the voluntary disclosure of information to others bringing claims against a settling defendant.17

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

Broader confidentiality provisions that prohibit discussion of the underlying facts or subject matter of the claim, making “disparaging” statements about the other party, or disclosing any facts relating to the plaintiff’s employment with the defendant will have the same effect, unless they carve out an exception for disclosures of relevant information to other litigants—which they seldom do. Settlement provisions that require the return, destruction, or nondisclosure of information obtained in discovery can also prevent a party or party’s attorney from furnishing evidence to litigants in other cases.

The facts underlying a settled case are often relevant to other claims involving similar conduct by the same defendant, and may be highly probative. The Federal Rules of Evidence express a general principle that prior bad acts are inadmissible to prove “the character of a person in order to show action in conformity therewith.”

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


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


23 Fed. R. Evid. 404(b).
However, the exceptions, which allow such evidence to be admitted for a wide variety of other purposes (including proof of motive, opportunity, intent, knowledge, or propensity to engage in sexual abuse), tend to swallow the rule. In fraud, discrimination, sex abuse, products liability, and environmental tort cases, information relating to similar past misconduct or complaints is routinely held by courts to be potentially admissible and within the scope of discovery. The plaintiff who settles one case is frequently a potential witness in another.

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

25 See, e.g., Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 149–56 (3d Cir. 2002) (discussing standards for admitting evidence of similar past conduct in civil cases for sexual assault or child molestation); Hurley v. Atl. City Police Dep’t, 174 F.3d 95, 111 (3d Cir. 1999) (in employment discrimination case, evidence of other acts of harassment “extremely probative” on issues of discriminatory intent, employer’s knowledge, and effectiveness of response); Orjias v. Stevenson, 31 F.3d 995, 999–1002 (10th Cir. 1994) (evidence of defendant’s prior air pollution violations admissible to show that defendant opened plant with knowledge that it could not comply with air quality regulations with its existing technology); Hessen v. Jaguar Cars, Inc., 915 F.2d 641, 650 (11th Cir. 1990) (evidence of similar occurrences admissible in products liability action for a variety of purposes, including to show a lack of safety for intended uses, notice to the defendant of a defect or danger, and causation); Channelmark Corp. v. Destination Prods. Int’l, Inc., No. 99 C 214, 2000 WL 968818, at *2–*5 (N.D. Ill. July 7, 2000) (prior similar acts relevant to intent in a fraud case).
26 The scandals have included sexual abuse by Catholic priests, Bridgestone/Firestone tires failing on Ford SUVs, health risks from the Dalkon Shield and silicone breast implants, exploding fuel tanks on GM pickup trucks, and hazardous chemical spills. See, e.g., Jillian Smith, Secret Settlements: What You Don’t Know Can Kill You!, 2004 Mich. St. L. Rev. 237, 258–63 (summarizing several of these controversies); see also Daniel J. Givelber & Anthony Robbins, Public Health Versus Court-Sponsored Secrecy, 69 LAW & CONTEM. PROHS., Summer 2006, at 131, 134 (discussing how A.H. Robins hid the safety risks of the Dalkon Shield with secret settlements while continuing to market the product); Koniak, supra note 13, at 783–85 (discussing how secrecy agreements delayed the recall of Firestone tires for years, resulting in deaths); Matt Carroll et al., Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public Eye, BOSTON GLOBE, Jan. 31, 2002, at A1 (discussing how the Archdiocese of Boston used secrecy clauses in settling child molestation claims against at least seventy priests over a decade); Benjamin Weiser, Forging a “Covenant of Silence”: Secret Settlement Shrouds Health Impact of Xerox Plant Leak, WASH. POST, Mar. 13, 1989, at A1.
agreements;27 and whether secrecy provisions that suppress information about health or safety dangers should be outlawed.28

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

27 The battle lines have been drawn between secrecy advocates, who see courts as dispute-resolution mechanisms and favor giving judges broad leeway to enter and enforce secrecy orders to make litigation more efficient and promote settlement, and confidentiality critics, who view adjudication as a “public good” and argue that the public has a right of access to information generated by court processes, and that judges have a responsibility to scrutinize parties’ secrecy agreements to ensure that public interests are protected. See generally Laurie Kratky Doré, Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 NOTRE DAME L. REV. 283 (1999) (discussing both sides of the debate and advocating a balancing approach).

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

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


sharing with plaintiffs in similar cases and refuse to enforce private noncooperation agreements when they interfere with discovery or informal investigation in another proceeding.

None of these reforms prevent lawyers from negotiating noncooperation agreements that are effective in achieving their ends. Having the settlement take the form of a private, out-of-court contract obviates the need for judicial approval. The prospect that a noncooperation agreement will be found unenforceable if challenged by a third party seeking information does not prevent settling parties from entering into one. The agreement can be structured to give the plaintiff ample incentive to comply by making future payments contingent on continued silence, or by creating the risk that if a court does find the agreement valid, the plaintiff who breached will be liable for liquidated damages or attorney’s fees. As Ms. Martinez’s case illustrates, even without judicial enforcement, such agreements can prevent relevant evidence from reaching other litigants. As a

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33 See infra text accompanying notes 185–203.

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

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

36 In a column in the New York Law Journal, two big firm lawyers advised that, “because enforceability of a confidentiality agreement may be ‘problematic’ on public policy grounds, it should contain, if deemed appropriate, a liquidated damages provision, a staggered payment schedule, or both, to diminish the likelihood of an unwanted disclosure.” Joel Cohen & Joseph Strauss, Confidentiality Agreements and Crime, N.Y. L.J., Dec. 23, 2002, at 4; see also Koniak, supra note 13, at 805 (noting that parties can easily work around unenforceability by providing for payments over time). Ms. Martinez’s settlement included both a liquidated damages provision and staggered payments. See supra text accompanying notes 3–4.
result, valid claims may never be brought or will be rendered harder to prove. Even when they do not succeed in suppressing evidence entirely, noncooperation settlements impose the substantial costs of taking a deposition, or obtaining a judicial ruling, on parties who otherwise would have been able to obtain relevant information informally, and at minimal expense, from a willing witness.37

II

THE STANDARD VIEW AND ITS DISCONTENTS

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

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

. . .

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

The underlying assumption is that as long as it is legal for the client to agree to secrecy, it is not unethical for a lawyer to assist the client in accomplishing her lawful objectives. The ethics rules’ animating principles of loyalty, zeal,40 and client autonomy require abiding by

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

38 The major exception is Gillers, supra note 10.

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

40 A lawyer’s obligation to “represent [a] client zealously within the bounds of the law” was the mantra of the Model Code. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7, EC 7-1, EC 7-19, DR 7-101 (1981). The disciplinary provisions of the Model Rules articulate blander and weaker-sounding duties of “competence” and “reasonable
the client’s decision, even if it imposes costs or injustice on third parties.\(^4\)

The basis for the standard view is readily apparent from the ethics codes’ key provisions relating to client decision making and settlement. Model Rule 1.2 requires the lawyer to “abide by a client’s decisions concerning the objectives of representation” and “whether to settle a matter.”\(^4\) These obligations are subject to an outer limitation: the lawyer must not counsel or assist the client in “conduct that the lawyer knows is criminal or fraudulent,”\(^4\) or take actions on behalf of the client that “will result in violation of the Rules of Professional Conduct or other law.”\(^4\) The only ethics rule that explicitly rules out settlement terms that may be desired by a client is Rule 5.6(b), which forbids a lawyer from participating in the offering or making of a settlement agreement that restricts the lawyer’s right to practice.\(^4\) In addition, the lawyer’s duty of confidentiality, contained
diligence,” Model Rules of Prof’l Conduct R. 1.1, 1.3 (2008), but the preamble and commentary make it clear that “the basic principles underlying the Rules . . . include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law.” id. pmbl. para. 9; see also id. pmbl. para. 2 & R. 1.3 cmt. 1; Freedman & Smith, supra note 8, at 71 (noting that zealous advocacy remains a “pervasive ethic” under the Model Rules).

\(^4\) See Weinstein & Wimberly, supra note 22, at 19 (noting, with respect to settlement secrecy, that “[u]nder the existing ethical scheme the plaintiff attorney’s duty of loyalty requires putting the client’s interests ahead of all others. . . . [T]he plaintiff’s attorney has no affirmative ethical obligation to consider the interests of third parties or the general public”); cf. Model Rules of Prof’l Conduct R. 4.4 cmt. 1 (2008) (“Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client,” so long as the legally protected rights of third persons are not violated.); Susan P. Konik, The Law Between the Bar and the State, 70 N.C. L. Rev. 1389, 1395–96 & n.24 (1992) (describing the idea that a lawyer should do everything possible within the law to further the client’s cause, “no matter what moral wrongs are perpetrated on others in the process,” as “a classic formulation of the legal profession’s ethos”).

\(^4\) Model Rules of Prof’l Conduct R. 1.2(a) (2008); see also Model Code of Prof’l Responsibility EC 7-7 (1981).

\(^4\) Model Rules of Prof’l Conduct R. 1.2(d) (2008). Similarly, under the Model Code, it is impermissible for a lawyer to “[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.” Model Code of Prof’l Responsibility DR 7-102(A)(7) (1981).


\(^4\) Model Rules of Prof’l Conduct R. 5.6(b) (2008). Model Rule 5.6(b) and the nearly identical Model Code provision, DR 2-108(b), clearly prohibit settlement clauses that bar the plaintiff’s lawyer from representing future clients in suits against the same defendant. The ABA’s and several states’ ethics committees have construed the rule to also prohibit settlements that would bar a lawyer from using (as opposed to disclosing) information obtained during a representation. Thus, a lawyer could not be prevented from making use of the knowledge gained in one case as a basis for deciding what records or
in Rule 1.6, requires, with narrow exceptions, that the lawyer not reveal any information relating to the representation unless authorized to do so by the client. Based on these provisions, ABA and state ethics opinions, and most commentators, have concluded that it is ethically permissible for lawyers to agree to keep the underlying facts of a case confidential as part of a settlement.

Lawyers who represent defendants in civil litigation tend to endorse the view that they are, and should be, free to negotiate any lawful settlement terms that will benefit their clients. Some plaintiffs’ attorneys likewise have no qualms about making secrecy “an item for barter on the road to resolution,” using it as leverage to gain larger recoveries for their clients and bigger contingent fees for witnesses to subpoena in future cases against the same defendant. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000); Bd. of Prof'l Resp. of the Sup. Ct. of Tenn., Formal Ethics Op. 98-F-141 (1998); Colo. Bar Ethics Comm., Formal Ethics Op. 92 (1993). Agreements that would prevent a lawyer from disclosing information about the defendant that is a matter of public record have also been found to be impermissible practice restrictions. See D.C. Bar Legal Ethics Comm., Op. 335 (2006); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 730 (2000). All of these opinions take the view that settlements barring disclosure of nonpublic facts learned in the course of representing a client are permissible under Rule 5.6(b).

46 MODEL RULES OF PROF’L CONDUCT R. 1.6 (2008); see also MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (1981).


48 The argument for client autonomy is usually coupled with a substantive defense of settlement secrecy as a way to protect legitimate privacy, business, and reputational interests, and to help deter frivolous lawsuits. See, e.g., Stephen E. Darling, Confidential Settlements: The Defense Perspective, 55 S.C. L. REV. 785 (2004); Epstein, supra note 28. But see ZITRIN ET AL., supra note 8, at 569 (stating that many in-house counsel and defense lawyers wish they could refuse to help clients hide the truth about safety dangers).

49 Joseph A. Golden, Secrecy Clauses, A Negotiated Restraint on Free Speech, 73 Mich. B.J. 550, 550 (1994). Golden, a plaintiffs’ employment lawyer, writes, “A desire to ‘teach the company a lesson’ or ‘make an example of it’ has made for difficult negotiations, not between the parties, but between plaintiff and plaintiff’s counsel.” Id. at 551.
themselves. But many in the plaintiffs’ bar have strong misgivings about the public harms caused by secret settlements. The Association of Trial Lawyers of America (“ATLA”) has issued a resolution denouncing secrecy agreements that bar disclosure of discovery materials and the underlying facts of settled cases as detrimental to public health and safety, the proper functioning of the civil justice system, and the interests of individual victims. 50 ATLA encourages attorneys to refuse to enter into secrecy agreements. 51 Civil rights and public interest lawyers have also expressed concern that agreements requiring that the terms of settlement be kept confidential undermine the public and deterrent purposes of enforcement efforts. 52

The standard view of the ethics rules, however, leaves lawyers who would like to “just say no” to secrecy agreements with little room to maneuver. In their book The Moral Compass of the American Lawyer, Richard Zitrin and Carol Langford describe the dilemma faced by a products liability lawyer representing a widow in a wrongful death suit against the manufacturer of her deceased husband’s implanted heart valve. 53 When the plaintiff’s discovery yielded documents proving that the defendant knew about dangerous design flaws in its product, the defendant’s lawyer offered a settlement significantly larger than what the plaintiff would be likely to recover at trial, contingent on strict secrecy and the return of all discovery documents. The plaintiff’s lawyer agonized about how to present this offer to her client. She was concerned that others could die if the heart valve’s dangers were not exposed, but was also aware of “the guiding principle that her first duty is to her client, not the public at large.” 54 When the attorney met with the client and her family, she discussed both the monetary advantages of accepting the offer and “how other people with similar heart valves could be hurt or even die unless the truth became known,” but did not advise them what to do. 55 After thinking it over, the family decided to accept the

50 ATLA RESOLUTION, supra note 22, at 876. In 2006, ATLA changed its name to the American Association for Justice.
51 See id. at 877.
53 See Richard Zitrin & Carol M. Langford, The Moral Compass of the American Lawyer 183–85, 205–08 (1999). The account is a composite based on actual situations that the authors encountered in their legal ethics consulting practices. See id. at 4.
54 Id. at 185.
55 Id. at 206.
offer. Later, the attorney regretted not having expressed her own moral concerns more forcefully, and wished that she had given her client “the big speech” about all the other families who lost loved ones because of the defective heart valve and “what they would have to go through to fight their case from scratch.”

Prospectively, she and her partners decided to add a provision to the firm’s retainer agreement stating that the client will not accept any settlement with secrecy conditions that hide safety dangers. However, the lawyers understood that the retainer provision was unenforceable.

The story provides a vivid illustration of the limited scope of action that the ethics rules afford to attorneys concerned about the dangers of secret settlements. Moral counseling is authorized, and even encouraged, under both the Model Rules and the Model Code. Thus, it is entirely permissible to raise the issue with the client, whether by presenting the moral ramifications as one relevant factor for the client to consider, as the attorney in the heart valve case did, or—as she later wished she had done—in the form of advice that openly expresses the lawyer’s viewpoint and is designed to persuade the client to concur.

Some plaintiffs’ lawyers have reported great

56 See id.

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

58 See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2008) (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7–8 (1981) (“In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.”); see generally Larry O. Natt Gantt, II, More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations, 18 GEO. J. LEGAL ETHICS 365 (2005) (discussing Rule 2.1 and other provisions bearing on moral counseling, and concluding that attorneys are at times obligated to discuss moral and other nonlegal issues with their clients).

59 See Béchamps, supra note 47, at 156 (suggesting that lawyers concerned about secret settlements engage their clients “in a dialogue regarding their joint responsibility for certain community-shared values, such as fairness to others, especially in cases of public interest”). How to conduct moral counseling effectively, and in a manner that is respectful of the client’s dignity and autonomy, is a difficult issue. For a thoughtful discussion, see
success in getting clients to agree to and stick with a policy of no settlement secrecy, but more of the practitioner literature suggests, not surprisingly, that moral counseling will be unavailing with many clients who have compelling needs for cash or closure. As one plaintiffs’ lawyer put it:

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

Similar sentiments have been expressed by numerous plaintiffs’ lawyers. Despite strong misgivings about settlement secrecy, they feel that their hands are tied.


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


When the issue is framed as a conflict between the client’s right to decide and the interests of the public or third parties, the ethics rules do in fact effectively tie the lawyer’s hands. Under the Model Rules, lawyers are required to “abide by a client’s decisions” concerning the objectives of the representation and whether to settle a matter, and to “consult with the client” about the means to be employed in pursuit of these ends.63 Assuming that the decision to include a secrecy clause in a settlement can be categorized as a question of means—how to effectuate a settlement—rather than as one of objectives or “whether to settle,” the leeway that the Model Rules provide is still exceedingly narrow. The commentary to Rule 1.2 notes that “lawyers usually defer to the client regarding such questions as . . . concern for third persons who might be adversely affected.”64 “Usually” does not mean “always,” and the rule on its face does not require the lawyer to defer.65 If the lawyer does not accept the client’s decision, however, the only recourse available to the lawyer is to withdraw from the representation—and even that may be impossible if the tribunal denies permission to withdraw.66 In the end, the lawyer has little

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64 Id. R. 1.2 cmt. 2. Another rule prohibits the use of means “that have no substantial purpose other than to embarrass, delay, or burden a third person,” even if desired by a client. Id. R. 4.4(a). The “no substantial purpose” qualification leaves the rule with little content. Settlement secrecy clearly serves purposes that benefit one or both of the contracting parties.
65 See also id. R. 1.3 cmt. 1 (stating that a lawyer “is not bound . . . to press for every advantage that might be realized for a client” and “may have authority to exercise professional discretion in determining the means by which a matter should be pursued”). The Model Code is more categorical in endorsing client authority to decide whether to use means that may harm others. See Model Code of Prof’l Responsibility EC 7-8 (1981) (“[T]he decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for [the lawyer].”).
66 See Model Rules of Prof’l Conduct R. 1.16(b)(4) (2008) (permitting a lawyer to withdraw if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”); id. R. 1.16(c) (requiring the lawyer to comply with applicable law requiring a tribunal’s permission to withdraw and to continue the representation if the tribunal so orders). Under the Model Code, a lawyer’s disagreement with a client’s decision affords a permissible basis for withdrawal only “in a matter not pending before a tribunal.” Model Code of Prof’l Responsibility DR 2-110(C)(1)(e) (1981); see also David Luban, Lawyers and Justice: An Ethical Study 159, 393–97 (1988) (analyzing the Model Code and Model Rules and concluding that they “put ultimate decision-making authority about whether to forgo an unjust action
choice but to assist the client in settling on any terms that the client deems acceptable, so long as those terms are not criminal, fraudulent, or placed off-limits by an ethics rule.

Recent changes to the confidentiality provisions of the Model Rules may have the indirect effect of making it impermissible for lawyers to enter into some settlement secrecy arrangements that hide safety risks. The exceptions to the lawyer’s duty of confidentiality contained in the original version of Model Rule 1.6 had no apparent application to the issue of settlement secrecy. Lawyers were authorized to disclose information to prevent “imminent death or substantial bodily harm,” but only in situations where the danger stemmed from an intended criminal act by the lawyer’s own client.67 In 2002, the ABA broadened this exception, which now reads as follows: “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.”68 The danger need not come from the client, or involve an intended crime. Thus, under the new rule, a plaintiff’s lawyer may blow the whistle on serious continuing safety risks arising from the defendant’s conduct, even if the lawyer’s client agreed to keep the information confidential. Professor Susan Koniak has argued that in jurisdictions that adopt the new rule, it is unethical for a lawyer to agree to a settlement that bars the lawyer from disclosing such information, because “discretion given . . . for the purpose of protecting the courts, third parties, or society as a whole should not be available as an asset for the lawyer to trade away for her own pecuniary benefit or that of her client.”69

in the hands of the client, [and] the lawyer’s autonomy is ultimately limited to withdrawal”).

67 MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (1983) (authorizing disclosure “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”). A parallel provision in the Code permits disclosure of the client’s intention to commit a crime and any information necessary to prevent it. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(3) (1981).

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

69 Koniak, supra note 13, at 808; see also Bruce A. Green & Fred C. Zacharias, Permissive Rules of Professional Conduct, 91 MIII. L. REV. 265, 284–85 (2006); Fred C.
Nonetheless, for several reasons the ABA’s broadening of the confidentiality exception is unlikely to have much of an impact on settlement secrecy. Nearly half of the states have not adopted the ABA’s new bodily harm exception and continue to restrict such disclosures to situations related to preventing the lawyer’s own client from committing a crime. \(^70\) Where the rule has been adopted, it kicks in only when death or serious injury is “reasonably certain.” \(^71\) A lawyer faced with a settlement offer that is financially advantageous to the client, and to the lawyer herself, will have strong incentive to conclude that any danger posed by the conduct covered by a confidentiality agreement falls short of this threshold. \(^72\) The bodily harm exception has no application to nonphysical injuries, such as

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\(^{70}\) As of the end of December 2008, the ABA’s new version of Model Rule 1.6(b)(1) had been substantially adopted in twenty-nine states.

\(^{71}\) MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2008). The official comment says that the “reasonably certain” requirement is satisfied when there is “a present and substantial threat that a person will suffer such harm at a later date.” \(\text{Id. R. 1.6 cmr. 6.}\) However, the language of the rule itself suggests a more stringent standard. A few states adopting the rule have eliminated the “reasonably certain” requirement or replaced it with a “reasonably likely” standard. \(\text{See, e.g., FLA. RULES OF PROF’L CONDUCT R. 4-1.6(b)(2) (2006); TENN. RULES OF PROF’L CONDUCT R. 1.6(c)(1) (2008); WASH. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2006).}\) In those jurisdictions, it is clearly unethical for an attorney to agree not to make disclosures that are mandatory under the rules. \(\text{Cf. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-383 (1994) (concluding that in circumstances where Model Rule 8.3 requires a lawyer to report misconduct by another lawyer, a settlement agreement barring such disclosure would violate the Rules).}\)

\(^{72}\) See David Luban, Limiting Secret Settlements by Law, 2 J. INST. FOR STUDY LEGAL ETHICS 125, 128–29 (1999) (arguing that a proposed rule prohibiting lawyers from negotiating settlement agreements that suppress information about substantial dangers to public health or safety would be ineffective because lawyers will resolve doubts in favor of concluding that the danger is insufficient to trigger the rule). There is reason to believe that lawyers tend to resolve all doubts against making disclosures harmful to their clients’ interests. \(\text{See Leslie C. Levin, Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others, 47 RUTGERS L. REV. 81, 128–30 (1994) (finding, based on a survey of New Jersey attorneys, that in situations where a state ethics rule required them to report information to prevent bodily harm, a majority failed to do so, and less than nine percent of attorneys who faced situations where the rule required disclosure to prevent financial injuries to others complied).}\)
those caused by employment discrimination. In addition, the rule only authorizes disclosures necessary to prevent future death or injury from occurring, not disclosures aimed at helping other victims recover compensation for their past injuries. Finally, the rule’s effect on secrecy agreements is, at most, to prohibit a lawyer from promising not to disclose certain information. Noncooperation agreements that bar the lawyer’s client from submitting to voluntary witness interviews, and thereby increase the cost to other parties of gathering evidence, are unaffected.

Arguments against settlement secrecy that are premised on the public interest in disclosure and the need to protect others from harm are morally powerful, but the framework of the existing ethics rules does very little to accommodate them. The dominant paradigm reflected in the ethics codes posits that in the long run, society is best served if lawyers keep their clients’ confidences and pursue their clients’ interests, and that lawyers have “no responsibilities to third parties or the public different from that of the minimal compliance with law that is required of everyone.” Lawyers who would like to “just say no” to secret settlements because of their public harms, without violating the rules themselves, are largely stuck. To break out of the bind would require either a change in the law or a radical rethinking of lawyers’ ethics. As for the first, little headway has been

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

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

made in enacting legislation to outlaw secrecy agreements. With respect to the latter, legal scholars have sought to redefine the lawyer’s role to place greater weight on “ordinary morality” or achieving justice than on client interests, but ABA rule drafters and the state courts responsible for adopting disciplinary codes have shown little interest in departing from the traditional paradigm. The ABA’s Ethics 2000 Commission rejected a proposal to amend the Model Rules to prohibit lawyer involvement in settlements that hide information about health or safety risks from the public, unanimously agreeing “that the ethics rules were not the vehicle for solving this problem.”

In recent years, several commentators have argued that noncooperation agreements and some other types of settlement secrecy are, in fact, already illegal. Stephen Gillers has attacked attorney involvement in noncooperation settlements on the ground that such agreements violate federal obstruction of justice laws. Susan Koniak and John Freeman have argued that settlements suppressing information about unlawful conduct amount to the crime of compounding. These are arguments that operate within the premises of the standard view; they assume that a lawyer may ethically negotiate any lawful settlement terms but rely on the outer limitation the rules set on zealous advocacy: a lawyer must not counsel or assist in conduct the lawyer knows to be criminal. The flip side of this ethical analysis is that if the criminality of such settlements is unclear, it does not violate the rules for an attorney to

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

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


79 See Gillers, supra note 10, at 5, 12–13.

80 See Freeman, supra note 13, at 835–37; Koniak, supra note 13, at 793–95, 802.

81 See MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2008); MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(7) (1981); Freeman, supra note 13, at 845; Gillers, supra note 10, at 13; Koniak, supra note 13, at 806–07.
negotiate settlement terms that will serve the client’s interests. There have been no court decisions finding criminal liability based on settlement secrecy, or even any known prosecutions. While acknowledging uncertainty in the law, Gillers takes the view that, at a minimum, lawyers have a professional obligation to advise their clients that noncooperation agreements expose them to a significant risk of criminal liability, advice that probably would be sufficient to dissuade most clients from pursuing such agreements.

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

III

THE RULES AGAINST REQUESTING WITNESS NONCOOPERATION

The standard view of the ethics of settlement secrecy, with its focus on the client’s autonomy to pursue any lawful objective and the lawyer’s duty to abide by client decisions, leaves lawyers with little choice but to participate in settlements that hide relevant facts from other litigants. The standard view, however, overlooks a crucial dimension of lawyers’ ethical obligations. It conceptualizes the problem as a conflict between client interests and the potential for

82 See Gillers, supra note 10, at 3, 16; see also Koniak, supra note 13, at 794–95, 806.
83 Gillers, supra note 10, at 3, 12, 16.
84 See infra Appendix, text accompanying notes 353–55, 360–61, 363, 369–70 (discussing circumstances under which noncooperation provisions may violate criminal statutes and drafting approaches that avoid any significant risk of criminal liability).
harm to third parties or society. Under the ethics rules, the lawyer’s fundamental duties to clients—zealous advocacy, respect for client autonomy and confidentiality—nearly always trump concerns for the welfare of outsiders. However, another strand in the ethics codes imposes significant limitations on lawyer conduct that are designed to protect the integrity of adjudication and the proper functioning of an adversary system of justice. These duties do not depend on what clients want or what “other law” allows. They are obligations that derive from the lawyer’s role as an “officer of the legal system” with “special responsibility for the quality of justice.”\footnote{MODEL RULES OF PROF’L CONDUCT pmbl. para. 1 (2008).} Two such duties have direct bearing on the propriety of lawyers offering or accepting settlements conditioned on noncooperation: the requirement that lawyers not ask potential witnesses to withhold voluntary cooperation from other parties, and the prohibition of attorney conduct that is prejudicial to the administration of justice.

Model Rule 3.4(f) provides that “[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party.”\footnote{Id. R. 3.4(f). The Restatement recognizes this duty as well. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116(4) (2000).} An exception allows such requests to be made to a relative, employee, or other agent of the client, provided that “the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”\footnote{MODEL RULES OF PROF’L CONDUCT R. 3.4(f)(1)–(2) (2008).} The rule has its roots in an influential and widely accepted formal ethics opinion issued by the American Bar Association in 1935.\footnote{See ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 131 (1935), discussed infra text accompanying notes 105–11.} It rests on the idea that the fair and efficient functioning of the adversary system requires that litigants and their lawyers have an unfettered opportunity to seek information relevant to their claims, and that the decision whether to cooperate should be a voluntary one made by the witness. When lawyers try to obstruct voluntary cooperation, they are interfering with the proper functioning of the adversary system by making informal witness interviews, an essential tool of case preparation, unavailable to their adversaries, and requiring them to resort to more costly, and often less effective, means of gathering evidence.

How significant a barrier Rule 3.4(f) poses to noncooperation settlements depends on questions of interpretation. The rule generally
prohibits a lawyer from requesting a nonclient to “refrain from voluntarily giving relevant information to another party.” The rule’s language contains no exception for requests made as part of a settlement offer, but can an implicit settlement exception be read into the rule? Does the phrase “another party” apply only to a person who is formally a party in a pending case, or does it also extend to individuals or entities with potential claims against the lawyer’s client? Under the narrower reading, most noncooperation agreements, which are aimed at potential future claims, would lie outside the rule’s scope. A great deal also depends on how broadly or narrowly one reads the exception allowing such requests to be made to an employee or agent of the client. Does the exception allow noncooperation agreements in settlements with former employees, or in severance agreements made prior to an employee’s termination?

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

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

The general question of what interpretive approach to follow in construing ambiguous or vaguely framed professional conduct rules

91 See infra notes 246–63, 279–81 and accompanying text.
92 See infra Parts III.A–D.
also requires attention. Ethics rules should not be read like penal statutes; they should be construed in a way that is not unmoored from the rules’ language but strives to give full effect to the underlying principles implicit in the codes’ structure and purposes.93 Approached in this way, the rules can and should be construed to forbid attorneys, with few exceptions, from negotiating settlements conditioned on noncooperation.94

A. Origins of the Principle

The ABA’s first ethics code, the 1908 Canons of Professional Ethics, contained a provision suggesting that a public prosecutor should not request a witness to refrain from disclosing exculpatory evidence to defense counsel,95 but otherwise offered scant guidance on how far a lawyer may go in influencing a nonclient’s cooperation with an adversary.96 Case law and treatises on legal ethics through the early twentieth century also had little to say on the subject.97 The first ethical standard on access to witnesses came in 1928, when the

93 See infra Part IV.A.
94 See infra Part IV.B.
95 ABA Canons of Prof’l Ethics Canon 5 (1908) (“The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.”).
96 Canon 9 made it clear that the lawyer’s own client could be advised not to speak with an opposing attorney. See id. Canon 9 (prohibiting lawyer communications with a party represented by counsel about the matter in controversy). Other canons admonished all lawyers to “treat adverse witnesses . . . with fairness and due consideration” and to “deal . . . candidly with the facts in taking the statements of witnesses.” Id. Canons 18, 22.
97 Some early ethics treatises, in general terms, condemned interference with a witness’s availability or testimony. See 2 Edward M. Thornton, A Treatise on Attorneys at Law § 818 (1914) (“[A] lawyer who in any manner attempts to suppress truth, or to prevent a witness from appearing in court . . . is guilty of misconduct . . . .”); George William Warvelle, Essays in Legal Ethics § 191a (2d ed. 1920) (stating that it is unethical for an attorney to tamper with an adverse witness so that he cannot testify, or offer direct or indirect inducements to influence the witness’s testimony). In an 1888 federal disciplinary decision, U.S. Supreme Court Justice Samuel Miller declared that a lawyer would deserve disbarment had he done what he was accused of: arranging to get a witness drunk, hiding him to prevent him from being deposed, and seeking to induce the witness to change the content of his testimony. See In re Thomas, 36 F. 242, 242–44 (C.C.D. Colo. 1888). However, Justice Miller determined that the lawyer’s actual intent was merely to interview the witness before his deposition to find out what he had to say. See id. at 245. He expressed distaste for the lawyer’s conduct, and lauded the English practice of barring barristers from speaking with witnesses outside of court, but concluded that under the American system interviewing an opponent’s witnesses cannot be considered misconduct. See id. at 244–46. The decision did not address whether urging a witness not to voluntary cooperate with an opponent would be unethical.
ABA adopted Canon 39, providing that a lawyer “is not . . . to be deterred from seeking to ascertain the truth from [a witness] in the interest of his client,” even if the witness is “connected with or reputed to be biased in favor of an adverse party.” This was amended in 1937 to read, “A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party.”

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

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

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

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

While acknowledging “the duty of lawyers charged with the responsibility of representing clients against whom claims are presented to do every just and proper thing to defend them,” the committee found that a more fundamental commitment was at stake: “However, when controversies arise, and claims are asserted, the interests of justice . . . require that the truth in the field of fact as well as of law be ascertained so far as is humanly possible.”107 Based on Canon 39 and other provisions,108 the committee reasoned that noncooperation requests are improper, because “[n]o lawyer should endeavor in any way, directly or indirectly, to prevent the truth from being presented to the court in the event litigation arises.”109 It cited its earlier opinions as standing for the proposition that witnesses

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102 See ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 117 (1934).
103 See id.
104 Id.
106 Id.
107 Id.
108 In addition to quoting from Canon 39, the committee recited broad statements from other canons concerning the lawyer’s duties of candor, fairness, and fidelity to the law. See id. (quoting Canons 22, 15, 32, and 39).
109 Id.
cannot be viewed as belonging to one side or the other \textsuperscript{110} and concluded, “All persons who know anything about the facts in controversy are, in simple truth, the law’s witnesses. They are the human instrumentalities through which the law, and its ministers, the judges and the lawyers, endeavor to ascertain truth, and to award justice to the contending parties.”\textsuperscript{111}

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

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

If witness statements were discoverable, \textit{Hickman} reasoned, the impairment of counsel’s ability to gather facts in private would undermine the quality of information presented to the court and the end result in terms of justice.

Logically, the same would hold true if counsel were prevented at the outset from speaking with witnesses outside the adversary’s presence. A line of judicial precedent that emerged in the 1960s and 1970s built upon both \textit{Hickman}’s reasoning and the ABA Canons to

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

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} 329 U.S. 495 (1947).

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

\textsuperscript{114} \textit{Id.} at 511.
prohibit interference with informal witness interviews. In *Gregory v. United States*, an influential 1966 opinion by J. Skelly Wright, the U.S. Court of Appeals for the D.C. Circuit reversed a murder and robbery conviction because the prosecutor advised witnesses not to speak to defense counsel unless he was present. The court held that the prosecutor’s actions violated the defendant’s due process rights and was inconsistent with Canon 39’s recognition of the propriety of conducting witness interviews without opposing counsel’s consent. The opinion’s rhetoric was redolent of both the ABA ethics committee decisions and *Hickman*:

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

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

. . . .

A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined.

*Gregory* has been widely followed, and its reasoning has not been limited to criminal cases, where a prosecutor’s special

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115 369 F.2d 185 (D.C. Cir. 1966).
116 See id. at 187–89, 192. There were also other grounds for reversal.
117 See id. at 188–89. The court also found that the prosecutor’s actions undermined the purposes of a federal statute requiring disclosure of witness identities. See id. at 187–89.
118 Id. at 188.
obligations to serve justice and the general unavailability of depositions lend extra support to its rule. In *IBM Corp. v. Edelstein*, the Second Circuit overturned a trial judge’s order that prohibited witness interviews unless opposing counsel was present or a transcript was prepared, deeming it “contrary to time-honored and decision-honored principles . . . that counsel for all parties have a right to interview an adverse party’s witnesses (the witness willing) in private.” From *Hickman* and *Gregory*, the court drew the lesson that the truth-finding function of adversary litigation is undermined if counsel cannot conduct confidential witness interviews, which help to “insur[e] the presentation of the best possible case at trial.” Depositions, the court found, are no substitute because the presence of opposing counsel and a court reporter hinders the lawyer’s ability to freely explore the witness’ knowledge, memory and opinion—frequently in light of information counsel may have developed from other sources. . . . It is the common experience of counsel at the trial bar that a potential witness, upon reflection, will often change, modify or expand upon his original statement and that a second or third interview will be productive of greater accuracy.

The two leading legal ethics treatises in use when the Model Code and Model Rules were drafted, Henry Drinker’s 1953 *Legal Ethics* and Raymond Wise’s late 1960s treatise of the same name, both

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120 526 F.2d 37 (2d Cir. 1975).
121 Id. at 42.
122 Id.; see also id. at 42–44.
123 Id. at 41. The court went on,

In contrast to the pre-trial interview with prospective witnesses, a deposition serves an entirely different purpose, which is to perpetuate testimony, to have it available for use or confrontation at the trial, or to have the witness committed to a specific representation of such facts as he might present. A desire to depose formally would arise normally after preliminary interviews might have caused counsel to decide to take a deposition.

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

125 RAYMOND L. WISE, LEGAL ETHICS (1st ed. 1966). Wise published a second edition in 1970 and supplements through 1979. Until the early 1980s, Wise served as “the only
cited Formal Opinion 131 and endorsed its principle that requests for witness noncooperation are unethical. An extensive discussion of the issue could also be found in Harvard law professor Robert Keeton’s trial practice text. Keeton noted the potential tactical advantages of advising witnesses not to discuss the case with the opposing party or counsel; such advice, if followed, will “increase your adversary’s difficulties of preparation and your own chances of superior preparation.” It forces your adversary to take depositions, allowing you to keep tabs on what your adversary has learned and gain insight into your opponent’s theory of the case. “The nature of these tactical advantages,” Keeton continued, “demonstrates that the practice of encouraging witnesses not to talk to the opposing party or his representatives is opposed to the interests of full and fair development of facts. Primarily for this reason, the practice has been held to be ethically improper.” He cited to ABA Formal Opinion 131.

B. Noncooperation Requests Under the Code

The ABA’s Model Code of Professional Responsibility (the “Code”), promulgated in 1969 and quickly adopted in nearly all the states, was intended to systematize and update the ethical principles that had developed under the canons, and to provide clear rules that could serve as a basis for discipline. The Code did not

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126 See DRINKER, supra note 124, at 86; RAYMOND L. WISE, LEGAL ETHICS 294 (2d ed. 1970).
128 Id. at 328.
129 Id. Keeton pointed out that the adversary who is deprived of a witness’s voluntary cooperation will be at a disadvantage in gathering information even if he conducts a deposition because “it is practically impossible to anticipate all the matters on which the witness might be able to testify; the help of the witness in volunteering additional information which he thinks might be material is important.” Id.
130 Id. at 328–29.
131 Id. at 329 n.3. Keeton added, however, that “it is at least doubtful that this view prevails in all jurisdictions.” Id. at 329.
132 See ANNOTATED CODE, supra note 124, at ix; Sutton, supra note 100, at 255–56.
133 See Sutton, supra note 100, at 257–58, 264. The drafting committee made a deliberate decision to maintain no records of its proceedings. Some legislative history and indications of the drafters’ intent can be discerned from changes made over the course of three published drafts, footnotes included in the Model Code to indicate sources that the committee drew upon, and later interviews with the committee’s Reporter. See MODEL.
explicitly address the issue of witness noncooperation requests, and its provision relating to contacts with witnesses was far from a model of clarity. Disciplinary Rule ("DR") 7-109(B) makes it unethical for a lawyer to "advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making himself unavailable as a witness therein." The related Ethical Consideration (EC 7-27) explains that such advice is prohibited because it "interferes with the proper administration of justice." A footnote to EC 7-27 references ABA Formal Opinion 131, although the use of a "cf." designation leaves it unclear whether the opinion was cited as an example of what the rule prohibits or merely to note a general similarity of purpose. Narrowly construed, the disciplinary rule’s language can be read as covering only efforts to induce a witness to duck a subpoena or not show up in court. On the other hand, requesting a witness to withhold voluntary cooperation has the purpose and possible effect of hiding potential testimony from adverse parties, thereby rendering it unavailable to the tribunal, and thus plausibly could be viewed as violating DR 7-109(B). One state supreme court and another state’s ethics committee have read the rule this way. The reach of the witness secretion rule remains of

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

135 Id. EC 7-27.

136 Id. EC 7-27 n.45.

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

138 See Lewis v. Court of Common Pleas, 260 A.2d 184, 188 & n.3 (Pa. 1969) (citing DR 7-109(B), inter alia, as basis for concluding that it was impermissible for a district attorney to request a witness not to talk to defense counsel); Or. State Bar Ass’n, Formal Op. 2005-132 (2005) (attempt to dissuade a witness from testifying for an adversary, if
practical importance in California, which has an ethics rule nearly identical to DR 7-109(B) but no other rule that could be construed to cover witness noncooperation requests.139

The Code’s “catch-all” disciplinary rule forbidding “conduct that is prejudicial to the administration of justice”,140 can also be read to carry forward the principle of Formal Opinion 131. This rule replaced language in earlier drafts that would have prohibited all conduct “degrading to the legal profession.”141 The change was made in response to criticism from many members of the bar that the original language was “too vague to constitute ‘fair notice’” of what was prohibited.142 Given that Formal Opinion 131 and the Gregory line of cases were well established at the time of the Code’s adoption, treating witness noncooperation requests as “conduct prejudicial” would not offend notions of due process. In 1974, the New Jersey Supreme Court showed no hesitation in disciplining a criminal defense lawyer who urged two witnesses, who were not his clients, to successful, has practical effect of “causing a witness to secrete himself” and therefore violates an Oregon ethics rule derived from DR 7-109(B)).

139 Cal. Rules of Prof’l Conduct R. 5-310(A) (2008) (“A member shall not . . . [a]dvice or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.”); see also infra note 247 (discussing Oregon rule based on the Code’s witness secretion provision). The California rules do not include Model Rule 3.4(f) or the ABA’s “conduct prejudicial” rule. An argument for reading California’s witness secretion rule broadly finds support in its wording (which adds the phrase “directly or indirectly” to the Code prohibition) and in the public policy expressed in the California Evidence Code, which states that, except as authorized by statute, “[n]o person has a privilege that another shall not be a witness or shall not disclose any matter.” Cal. Evid. Code § 911(c) (West 1995); cf. McPhearson v. Michaels Co., 117 Cal. Rptr. 2d 489, 493 (Ct. App. 2002) (concluding, based on section 911, that “it would be contrary to public policy to permit a party to litigation to dissuade or otherwise influence the testimony of a percipient witness through a private [settlement] agreement”). The State Bar of California recently proposed adding a rule substantially identical to Model Rule 3.4(f) as part of a package of ethics rules revisions. Comm’n for the Revision of the Rules of Prof’l Conduct, State Bar of Cal., Discussion Draft, Proposed Amendments to the Rules of Professional Conduct of the State Bar of California 20 (March 2008), R. 3.4(h).


141 Annotated Code, supra note 124, at 12.

142 Id. (citing interview with John Sutton, the Code’s reporter). The concern for “fair notice” apparently did not extend to an equally broad and vague provision that did make it into the Code, prohibiting “any other conduct that adversely reflects on [the lawyer’s] fitness to practice law.” Model Code of Prof’l Responsibility DR 1-102(A)(6) (1981). This provision was dropped in the Model Rules, while the provision on “conduct prejudicial to the administration of justice” was retained. Model Rules of Prof’l Conduct R. 8.4 (1983); see infra note 169 and accompanying text.
cooperate as little as possible if questioned by law enforcement officials, on the basis of the Code’s “conduct prejudicial” rule.\footnote{In re Blatt, 324 A.2d 15, 17–18 (N.J. 1974).}


\section*{C. Noncooperation Requests Under the Model Rules}

extensive comments, issued its proposed final draft in May 1981.149 The ABA House of Delegates debated the proposal over the next two years, made some amendments, and adopted the Model Rules in August 1983.150

The Kutak Commission’s discussion draft expressly provided that a prosecutor shall not “discourage a person from giving relevant information to the defense,”151 but otherwise dealt with the issue of witness noncooperation obliquely, in rules that barred “improperly obstruct[ing] another party’s access to evidence” or “seek[ing] improperly to influence a witness.”152 Commentary to the obstruction rule stated that “a lawyer may properly advise a client against giving a statement or other evidence except under the lawyer’s supervision,” implying that a nonclient may not be given such advice.153 Although the drafters probably meant to carry forward the principle of Formal Opinion 131, the absence of an express prohibition for anyone but prosecutors could have been read to mean that requests for witness noncooperation were not generally barred.

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

Rule 3.4(f) closely tracked the approach of Formal Opinion 131 by making it impermissible for a lawyer to “request a person other than a client to refrain from voluntarily giving relevant information to

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


151 DISCUSSION DRAFT, supra note 148, R. 3.10(e).

152 Id. R. 3.2(b)(1), 3.7(b)(2).

153 Id. R. 3.2 cmt.

154 PROPOSED FINAL DRAFT, supra note 149, R. 3.4(a) & (b) (emphasis added); see Schneyer, supra note 147, at 707–08.
another party." Like the earlier ABA pronouncement, it recognized an exception allowing such requests to be made to the client’s employees. The exception was extended to cover nonemployee agents and relatives of the client as well, while adding the proviso that the lawyer must “reasonabl[y] . . . believe that the person’s interests will not be adversely affected by refraining from giving such information.”

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

When Rule 3.4 was taken up by the ABA House of Delegates, Geoffrey Hazard, the Kutak Commission’s Reporter, opened the discussion of subsection (f) by noting that no direct counterpart appeared in the Code. He described it as an effort “to deal more

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

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

157 PROPOSED FINAL DRAFT, supra note 149, R. 3.4(f)(1) & (2). In the ethics treatise that he later cowrote, Geoffrey Hazard, who served as Reporter to the Kutak Commission, explained that this caveat is designed to protect the client’s relatives or employees from receiving advice that might cause them harm from a lawyer who is not representing them and has no obligation to look out for their interests. 2 HAZARD & HODES, supra note 8, § 30.12 at 30-23; see also id. § 30-12, illus. 30-7 (illustrating the rule with the example that a lawyer representing a criminal defendant cannot urge the defendant’s brother, who is also a suspect, to refrain from seeking a grant of immunity and testifying against the lawyer’s client).

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

159 A Code comparison submitted with the Model Rules suggested that Model Rule 3.4(f) was similar to DR 7-104(A)(2), which prohibited giving advice to an unrepresented person whose interests may differ from those of the lawyer’s client. MODEL RULES R. 3.4 Model Code Comparison (1983). The analogy is weak; a noncooperation request, if
Four state and local bar associations had filed amendments seeking to strike the provision. A representative of the Philadelphia Bar Association presented the case for eliminating subsection (f). He argued that it was unnecessary given “our open and wide-ranging discovery process,” and that lawyers have good reason to suggest to witnesses that they give information only in a deposition, in order to protect against the risk of witness tampering or other abuses in unmonitored ex parte interviews. Former ABA President David Brink then spoke to oppose the amendment. He defended the provision as supplying “needed guidance to lawyers in an area where they would otherwise be very much in doubt as to how to proceed,” and as furthering both “the need for [a]ccess to all useful information” and the need to protect nonclients from advice that might be contrary to their interests.

In the final speech opposing the amendment, a delegate gave powerful expression to the rule’s value in an era of skyrocketing litigation costs:

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

openly made in the interest of the lawyer’s client, can hardly be considered “advice.” If it were, asking an unrepresented witness to provide information would be equally impermissible.

160 ABA House of Delegates Transcript, Tape 8, at 47 (Feb. 8, 1983) [hereinafter ABA Transcript] (on file with author).
161 Explanatory statements filed with the amendments criticized Rule 3.4(f) for going too far in restricting a lawyer’s ability to protect a client’s interests, or for addressing a discovery issue that was better left to the courts. LEGISLATIVE HISTORY, supra note 150, at 465–67.
162 ABA Transcript, supra note 160, Tape 8, at 48–49, 52 (statement of Michael Bloom).
163 Id., Tape 8, at 50.
164 Id., Tape 8, at 51–52 (statement of Mr. Carpenter).
The amendment was then defeated by a voice vote.\footnote{165}

The Model Rules’ legislative history sheds little light on the intended scope of Rule 8.4(d), the “conduct prejudicial” rule. The Kutak Commission’s proposed final draft omitted the Code’s catch-all prohibitions of conduct “prejudicial to the administration of justice” or “involving dishonesty, fraud, deceit, or misrepresentation.”\footnote{166} Hazard, in particular, appears to have disliked their vagueness and potential for discriminatory enforcement.\footnote{167} The National Organization of Bar Counsel, the disciplinary enforcers’ trade group, lobbied strenuously to keep the Code provisions, deeming them proven approaches that were needed to reach the many different forms of conduct that could reveal a lawyer’s unfitness.\footnote{168} The commission ultimately was persuaded to support an amendment offered in the House of Delegates to include the Code language in Model Rule 8.4. The matter was voted on very late in a very long day, and the amendment passed without any substantive discussion.\footnote{169} The official comment to Rule 8.4 was drafted before the “conduct prejudicial” provision was added and contains no discussion of it.\footnote{170}

\footnote{165 \textit{Id.}, Tape 8, at 53; \textit{Legislative History}, supra note 150, at 466.}

\footnote{166 \textit{Compare Proposed Final Draft}, supra note 149, R. 8.4, with \textit{Model Code of Prof’l Responsibility} DR 1-102(A)(4) & (5) (1981).}

\footnote{167 Later, in his coauthored treatise, Hazard expressed the view that such an “open-ended rule is dangerous” and gives disciplinary authorities an opening to harass unpopular lawyers. \textit{2 Hazard \& Hodes}, supra note 8, § 65.6, at 65-12; \textit{see also id.} § 65.5, at 65-11.}

\footnote{168 \textit{See Nat’l Org. of Bar Counsel}, Report of the Special Review Committee on the Proposed Final Draft of the Model Rules of Professional Conduct 2, 15–16 (June 4, 1982) (on file with author); Schneyer, supra note 147, at 709–10.}

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

\footnote{170 \textit{See Proposed Final Draft}, supra note 149, R. 8.4 cmt; \textit{Model Rules} R. 8.4 cmt. (1983).}
D. Decisions After the Adoption of the Code and Model Rules

Several lines of precedent that have emerged since the ABA’s adoption of its modern ethical codes have addressed, in varying contexts, the issue of access to witnesses. Disciplinary decisions and procedural rulings by courts and advisory opinions by ethics committees have found violations of Model Rule 3.4(f) in a variety of settings, including requests by prosecutors that witnesses decline defense interviews, requests made by lawyers in civil cases that witnesses not disclose information to an opposing party, requests by one side’s lawyer that a witness not speak with the opposing attorney unless the first lawyer is present at or has advance notice of the interview, and efforts to dissuade a fact or expert witness from testifying on behalf of an adversary. A state supreme court, in imposing a sixty-day suspension on an attorney who made a noncooperation request, described Rule 3.4(f) as “a vital canon of professional acquittal” whose violation was a “grievous assault upon the truth-seeking function of the judicial process.” Similar types of requests or inducements offered to witnesses have been found to constitute conduct “prejudicial to the


176 Cox, 48 P.3d at 786.
administration of justice” under Model Rule 8.4(d) and the equivalent Code provision.177

The policies favoring unimpeded witness access also have weighed heavily in decisions interpreting the scope of the ethics rule that bars a lawyer from communicating with a represented person or entity unless that party’s lawyer consents.178 When an attorney is investigating a claim against a corporation or government agency, the no-contact rule has the potential to stand as a wholesale barrier to informal interviews if it is read to cover current or former employees of the organization.179 Most of the decisions by courts and ethics committees have construed the rule narrowly to allow ex parte interviews of all former employees and many categories of current employees.180 Considerations of both efficiency and the truth-seeking goals of adversary litigation feature prominently in the justifications given for this result. For example, in Niesig v. Team

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


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

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

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

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

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181 558 N.E.2d 1030 (N.Y. 1990)

182 Id. at 1034.

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


185 94 F.3d 738 (1st Cir. 1996).

186 See id. at 744–45. The harm caused by impeding the EEOC's ability to effectively investigate employment discrimination was held to outweigh any detriment to the public interest in promoting settlements. The court found it unlikely that the unavailability of a
employees’ testimony by issuing subpoenas was rejected on the
grounds that public policy favors a “free flow of information” to an
agency charged with vindicating wrongs. 187 Requiring the agency to
resort to its subpoena power would “stultify investigations” and
“significantly increase the time and expense of a probe.” 188 Other
decisions have invalidated settlement provisions that impeded
voluntary cooperation with the EEOC or other agencies on similar
public policy grounds, 189 or based on statutes prohibiting retaliation
against a person who takes part in an investigation or enforcement
proceeding. 190

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

\[\text{nonassistance provision would create any substantial disincentive to settlement. See id. at 744.}\]

187 Id. at 745.
188 Id.

190 See Conn. Light & Power Co. v. Sec’y of Labor, 85 F.3d 89, 94–96 (2d Cir. 1996) (holding that employer violated Energy Reorganization Act’s antiretaliation provision by conditioning settlement of employee’s claim on agreement that would preclude his voluntary appearance as a witness in judicial or administrative proceedings); EEOC v. U.S. Steel Corp., 671 F. Supp. 351, 357–58 (W.D. Pa. 1987) (construing ADEA’s antiretaliation provision to bar enforcement of clause in retirement agreement that prohibited assisting others in the prosecution of any age discrimination claim); United States v. City of Milwaukee, 390 F. Supp. 1126, 1128 (E.D. Wis. 1975) (finding employer’s use of confidentiality policy to bar employees from speaking with Justice Department attorneys unlawful retaliation under Title VII); see also Equal Employment Opportunity Commission, Enforcement Guidance on Non-Waiveable Employee Rights (April 10, 1997), available at http://www.eeoc.gov/policy/docs/waiver.html. But see EEOC v. SunDance Rehab. Corp., 466 F.3d 490 (6th Cir. 2006) (holding that company did not violate antiretaliation statutes by offering separation agreements that could penalize voluntary disclosures to EEOC, although these provisions might well be unenforceable).
is essential to the justice system’s proper functioning.\textsuperscript{191} Antiretaliatory provisions of discrimination laws have been construed to protect those who provide information to private litigants and offer to testify on their behalf, based on the idea that effective enforcement depends on the initiative of individual plaintiffs and their “access to the unchilled testimony of witnesses.”\textsuperscript{192}

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

\textsuperscript{191} See, e.g., Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989).

\textsuperscript{192} Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 175 (2d Cir. 2005) (quoting Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999)).

\textsuperscript{193} 151 F.R.D. 363 (D. Nev. 1993).


\textsuperscript{195} \textit{Kalinauskas}, 151 F.R.D. at 367.


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

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198 238 F. Supp. 2d 1127 (N.D. Cal. 2002).
199 See id. at 1129–32. At the time the motion was filed, formal discovery was unavailable because of a provision in the Private Securities Litigation Reform Act of 1995 that stays all discovery while a motion to dismiss is pending. See id. at 1132–34.
200 See id. at 1136–37.
201 Id. at 1135.
202 Id. at 1137; see also id. at 1133. A federal district court in another case upheld and enforced a nondisclosure agreement that was limited to trade secrets and other traditionally protected commercial information, rejecting a former employee’s claim that he had a right to volunteer information about defective gambling equipment to a company suing his former employer for breach of contract. See Saini v. Int’l Game Tech., 434 F. Supp. 2d 913, 916–17, 924–25 (D. Nev. 2006). The court viewed *JDS Uniphase* and similar cases as “persuasive authority,” id. at 920, but found their principle inapplicable when the disclosure implicated trade secrets, the former employee initiated the disclosure rather than being asked for information as part of an agency’s or litigant’s investigation, and the disclosure did not expose illegal or harmful activities of public concern. See id. at 921–23.
predeposition conversations with witnesses in cases brought under federal employment statutes.\textsuperscript{203}

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

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

A. How to Read the Rules

Before addressing the specifics of what the ethics rules mean for settlements with noncooperation requirements, the broader question of how to go about interpreting the rules requires some attention. The ethics rules are a binding code for lawyers, and violations can lead to disciplinary sanctions. In this sense, they are a form of legislation, and the tools ordinarily used to construe statutes—considerations of text, structure, and purpose—can appropriately be used. It would be a mistake, however, to treat the ethics rules like criminal statutes and apply a presumption that ambiguities should be construed in favor of the accused. That approach would invite lawyers to push the boundaries of the rules wherever possible to maximize advantage for their clients or themselves, and is inconsistent with the premises of professional self-regulation.

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

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

207 See Luban & Millemann, supra note 204, at 57 (arguing that the penal code-like appearance of the Model Rules invites lawyers to “push the edges of the envelope” in construing the limits of what they may do on behalf of clients or to maximize their own
Society’s grant of self-governance to the legal profession “carries with it,” in the words of the Model Rules’ preamble, “a responsibility to assure that its regulations are conceived in the public interest” and “properly applied” to fulfill lawyers’ role in this social compact. It follows that “[t]he Rules of Professional Conduct are rules of reason” that “should be interpreted with reference to the purposes of legal representation and of the law itself.” When there is ambiguity as to how the rules apply in a given situation, lawyers are required to “exercise . . . sensitive professional and moral judgment guided by the basic principles underlying the Rules.” Consistent with this framework, courts enforcing the rules have generally eschewed narrow-construction canons of interpretation in favor of an approach that construes ambiguities in light of the purposes a rule is designed to serve.

What can the purposes of legal representation tell us about the application of the ethics rules to settlements requiring witness noncooperation? The lawyer’s role as client advocate, with its hallmark duties of loyalty and zeal, would appear to support a narrow reading that allows lawyers to negotiate any lawful settlement terms which serve client interests, while a lawyer’s duties as an “officer of income); Richard A. Matasar, The Pain of Moral Lawyering, 75 IOWA L. REV. 975, 977–78 (1990) (discussing the strong pressures lawyers face to resolve all ethical doubts in favor of the client).

208 MODEL RULES OF PROF’L CONDUCT pmbl. paras. 12–13 (2008); see also Schneyer, supra note 147, at 695–96 (discussing the Kutak Commission’s “vision of the Model Rules as a professional covenant with the public”).


211 See, e.g., EEOC v. HORA, Inc., No. 03-CV-1429, 2005 U.S. Dist. LEXIS 11279, at *34 (E.D. Pa. June 8, 2005) (noting, in disqualifying lawyer for various rule violations, that even if the application of the rules to her conduct was unsettled, “calculating one’s behavior to merely comply with the wording of the professional rules, while doing violence to their spirit, is fundamentally inconsistent with a lawyer’s responsibilities to the parties, to the community at large and to the [c]ourt”); Fla. Bar v. Machin, 635 So. 2d 938, 940 (Fla. 1994) (disciplining attorney for seeking to induce crime victim not to testify at sentencing hearing and citing the preamble in finding that, even in the absence of a clear prohibition spelled out in a rule or binding precedent, a lawyer is responsible for using sound judgment that is guided by the Model Rules’ purposes).
the legal system”\textsuperscript{212} would cut in favor a broad construction that forbids lawyer participation in agreements that impair the truth-seeking function of adjudication. The Model Rules’ preamble treats the lawyer’s roles as a client representative and officer of the court as equal in importance and generally complementary.\textsuperscript{213} For the “difficult ethical problems” that arise when they conflict, lawyers are told to consult the “terms for resolving such conflicts” embodied in particular rules, and how the balance has been struck in “the framework of these Rules” as a whole.\textsuperscript{214} Accordingly, we need to examine the theory that underlies the policy choices that the rule drafters made in deciding when duties to the legal system should trump obligations to the client, and consider the place of the rule prohibiting witness noncooperation requests within the framework of those principles.

There are two basic stories that can be told about the Model Rules’ vision of lawyers as officers of the court.\textsuperscript{215} The plot line of the first story runs roughly as follows. The Kutak Commission set out with high aspirations to expand lawyers’ obligations as court officers. Its membership included Judge Marvin Frankel, who had prominently advocated changing the priorities of legal ethics to make its defining principle the ascertainment of truth, rather than the advancement of client interests.\textsuperscript{216} The commission’s initial drafts\textsuperscript{217} would have

\begin{footnotesize}
\textsuperscript{212} “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.” \textit{Model Rules of Prof’l Conduct} pmbl. para. 1 (2008).
\textsuperscript{213} \textit{Id.} para. 8.
\textsuperscript{214} \textit{Id.} para. 9.
\textsuperscript{215} The vision that had been articulated in the Model Code was a very thin one, essentially treating a lawyer’s client-centered and systemic duties as being one and the same: “The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . .” \textit{Model Code of Prof’l Responsibility} EC 7-1 (1981) (footnotes omitted). Nonetheless, the Code included some limits on advocacy, designed to codify certain obligations of lawyers as officers of the court, that went beyond merely prohibiting the illegal. See Eugene R. Gaetke, \textit{Lawyers as Officers of the Court}, 42 \textit{Vandy. L. Rev.} 39, 49–61 (1989) (listing and assessing such obligations under the Code).
\textsuperscript{217} These included the officially published discussion draft, supra note 148, and an earlier draft that was leaked to the press. \textit{Text of Initial Draft of Ethics Code Rewrite Committee}, \textit{Legal Times Wash.}, Aug. 27, 1979, at 26.
\end{footnotesize}
created radical new duties, including requirements that lawyers disclose material adverse facts and law to the tribunal, treat other litigants fairly, exercise restraint in litigation tactics, and provide unpaid legal services for the public good.218 These proposals produced a flood of criticism from the organized bar, and the ABA retreated, in the end requiring little more of lawyers than that they not participate in criminal or fraudulent conduct.219

The second story is the one told by Robert Kutak himself, in an essay that he wrote shortly before his death in 1983.220 Kutak acknowledged that the commission had made significant changes in response to the heated criticism its initial proposals received. However, he insisted that the choices the commission ultimately made were not the product of unprincipled political compromise, but instead reflected “an earnest desire to find coherent and workable solutions” in conformity with lawyers’ roles as both client representatives and officers of the court.221

The contours of the officer-of-the-court duties in the commission’s final product rested, in Kutak’s view, on the “competitive theory”222 that underlies our nation’s legal, political, and economic institutions. One fundamental tenet of this ideology is that “competing individuals have no legal responsibility for the competence of their counterparts

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

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


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

222 Kutak, supra note 220 at 174.
on the other side of the transaction and, consequently, have no obligation to share the benefits of their own competence with the other side.\textsuperscript{223} Since “individual competencies in employing a given process may vary,” it is understood that competitive processes “will not in every instance guarantee a correct result or in every case advance the common interest”; instead, the system is justified by a belief that, in the aggregate, it produces more correct outcomes than alternative approaches.\textsuperscript{224} Accordingly, competitors in an adversary system have no general duty to act for the benefit of others, volunteer adverse information, or ensure just results.\textsuperscript{225} At the same time, “[u]nderlying the basic theory that free competition . . . will maximize good results is the assumption that the process of competition is not distorted by conduct that bears no relationship to individual competence.”\textsuperscript{226} Thus, force and bribery are unacceptable as tools of competition. While there is no general duty to disclose, information that is volunteered cannot be false or deceptive. “[T]hose who are not sufficiently competent to ask the right questions” are out of luck, but the person who asks the right questions “is entitled to the fruits of that competence” in the form of an honest answer.\textsuperscript{227} Information that is relevant to a matter “cannot be concealed or destroyed with the purpose of preventing its availability.”\textsuperscript{228}

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

\textsuperscript{224} Kutak, supra note 220, at 174.

\textsuperscript{225} Id. at 174–75.

\textsuperscript{226} Id. at 175.

\textsuperscript{227} Id.

\textsuperscript{228} Id. at 176. The idea that limitations on advocacy can be derived from the premises of the adversary system is not unique to the Kutak Commission. The 1958 report of the ABA-AALS Joint Conference on Professional Responsibility made an eloquent case for “the limits partisan advocacy must impose on itself if it is to remain wholesome and useful” in achieving its purposes. Joint Conference Report, supra note 209, at 1160. Eleanor Holmes Norton proposed a “functionalist model for negotiation ethics” that derives ethical limits from a conception of bargaining as an adversarial market process whose purpose is to achieve valid agreements. See Eleanor Holmes Norton, Bargaining and the Ethic of Process, 64 N.Y.U. L. Rev. 493, 525–41 (1989). More recently, Robert Gordon has argued that a lawyer’s role as an agent for clients in a system designed to provide a public framework for securing rights gives rise to an obligation to refrain from overly adversarial strategic behavior that undermines the system’s effectiveness. See Robert W. Gordon, Why Lawyers Can’t Just Be Hired Guns, in ETHICS IN PRACTICE 42 (Deborah L. Rhode ed., 2000).
In the remainder of the essay, Kutak focused on how this general theory shaped the approach taken in the Model Rules toward issues of confidentiality and candor.\textsuperscript{229} It also helps to account—which the first story fails to do—for the presence in the Rules of a variety of other duties that favor systemic over client interests and go beyond the requirements of other law.\textsuperscript{230} For example, in ex parte proceedings before a tribunal, an attorney is obliged to disclose all material facts, even adverse ones,\textsuperscript{231} a departure from the nondisclosure norm that can be justified under the competitive theory because the adversary is deprived of any opportunity to benefit from its own competence by presenting its side of the story. Statements to the media that are likely to materially prejudice an adjudicative proceeding are prohibited, because parties should only be able to benefit from competence exercised within the channels of adversary adjudication.\textsuperscript{232} Rules that prohibit direct communication with another lawyer’s client,\textsuperscript{233} restrict dealings with unrepresented persons,\textsuperscript{234} and forbid settlements that make a lawyer’s services unavailable to future clients\textsuperscript{235} are all designed to ensure that people have the opportunity to benefit from legal representation, which is

\textsuperscript{229} See Kutak, supra note 220, at 178–87.

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

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

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

\textsuperscript{233} Id. R. 4.2.

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

\textsuperscript{235} Id. R. 5.6(b) & cmt. 2 (prohibiting a lawyer from participating in offering or making a settlement agreement in which the lawyer agrees not to represent other persons).
often a prerequisite to competent participation in the adversary process. 236

Rule 3.4(f)’s prohibition of witness noncooperation requests also fits comfortably into the framework of the competitive theory. The official comment to Model Rule 3.4 begins by noting that the rule’s prohibitions are designed to secure “[f]air competition” in an adversary system that “contemplates that the evidence in a case is to be marshalled competitively by the contending parties.” 237 A system that depends on competitive marshaling and presentation of the facts needs to ensure that litigants have a fair opportunity to obtain them. Voluntary cooperation by witnesses enhances the effectiveness of parties’ presentations of their claims by allowing them to probe and develop potential testimony before deciding whether to use it—and whether to file suit in the first place. In a competitive system, disputants and their attorneys should be able to reap the benefits of their initiative and competence by interviewing willing witnesses. While a witness is free to decline informal interviews, neither side to a dispute should be able to exercise influence or offer inducements to deprive an adversary of access. These arguments for a principle of access to ex parte witness interviews date back to the time of the ABA Canons and Formal Opinion 131, and have been invoked by courts since the time of Hickman v. Taylor. 238

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


238 That Rule 3.4(f) fits comfortably into an adversary-system-based conception of lawyers’ ethics is confirmed by the inclusion of a similar prohibition in the alternative ethics code that was put forward by the Association of Trial Lawyers of America. ATLA had strongly criticized the proposed Model Rules for being inconsistent with the values of the adversary system and insufficiently protective of clients’ rights. See The American Lawyer’s Code of Conduct (1982), reprinted in 2002 Selected Standards on Professional Responsibility 419 (Thomas D. Morgan & Ronald D. Rotunda eds., 2002). Rule 3.5 in the American Lawyer’s Code provided that “[a] lawyer shall not
Thus, the principle embodied in Rule 3.4(f) should not be viewed as an oddball exception to the client-centered duties that are at the core of the ethics rules. As with many of the non-client-focused duties that the Model Rules recognize, it can best be understood as a product of the competitive theory that underlies lawyers’ ethical obligations. In itself, this does not answer the question of how broadly the rule should be read. Expansive construction of a rule designed to preserve the adversary system’s proper functioning might sometimes threaten other core values protected by the Rules. For example, the requirement that a lawyer report client perjury to the court is aimed at preserving the integrity of adversary adjudication, but it also has the potential to undermine the purposes served by confidentiality by making clients less likely to disclose information to their lawyers. Furthermore, an erroneous report of perjury to the court may cause grave injustice to the client. These concerns could justify a fairly narrow interpretation of the rule’s requirement that the lawyer know that the testimony was false, so that any reasonable doubt is resolved in the client’s favor. No risks of a similar magnitude are posed by a broad reading of the rule banning witness noncooperation requests. All rules that restrict the permissible means for achieving clients’ ends infringe to some degree on the principle of client autonomy. The particular interest impaired here—the client’s ability to request or demand noncooperation from a witness—represents a very modest intrusion on the client’s freedom, and is not associated with fundamental rights such as the right to testify on one’s own behalf. A liberal construction that resolves doubts in favor of achieving the rule’s intended purposes is therefore warranted.

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

1. Settlements Are Not Exempt

The basic issue of whether Model Rule 3.4(f) applies to noncooperation requests made in settlement proposals presents no difficult issues of interpretation; it rests on a straightforward knowing . . . discourage a witness or potential witness from talking to counsel for another party.” Id. at 433.


240 See generally Lauren Gilbert, Facing Justice: Ethical Choices in Representing Immigrant Clients, 20 GEO. J. LEGAL ETHICS 219 (2007) (analyzing an attorney’s ethical choices in deciding whether to disclose misrepresentations to the tribunal).
application of the rule’s language. Rule 3.4(f) prohibits a lawyer from “request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party” unless the person falls into one of the excepted categories.\(^{241}\) It contains no exception for requests made to an opposing party in the course of settlement negotiations. In the only state ethics opinion to address the issue thus far, South Carolina’s bar ethics committee concluded that the rule, by its plain terms, prohibits a defense lawyer from conditioning a settlement offer on the plaintiff agreeing not to voluntarily provide relevant information to other parties suing the same defendant.\(^{242}\)

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


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

\(^{245}\) Cf. Gillers, supra note 10, at 14–15 (discussing why the public policy of promoting settlement does not make noncooperation agreements exempt from obstruction of justice laws). In situations where the Model Rules’ drafters were concerned that a rule might be misread to interfere with legitimate settlement practices, they took pains to guard against this in the official commentary. See MODEL RULES OF PROF’L CONDUCT R. 4.3 cmt. 2 (2008) (clarifying that the prohibition against giving legal advice to an unrepresented person does not prohibit informing a pro se adverse party of the terms on which the
Whether conduct that violates Rule 3.4(f) is also prohibited under the rule that bars lawyers from engaging in “conduct that is prejudicial to the administration of justice” is of little practical significance in the vast majority of jurisdictions because Rule 3.4(f) has been nearly universally adopted. But it is important to an issue lawyer’s client is willing to settle and explaining the lawyer’s view of the meaning of proposed settlement terms; id. R. 4.1 cmt. 2 (stating that some conventional negotiation ploys, such as exaggerating “a party’s intentions as to an acceptable settlement,” ordinarily are not understood as “statements of material fact” and therefore do not violate the rule on lawyer truthfulness). The comments to Model Rule 3.4(f), in contrast, are devoid of any indication that the rule should not be applied to settlements.


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

Three other Model Rules jurisdictions have not adopted Model Rule 3.4(f). In Washington state, the official commentary to Rule 3.4 indicates that subsection (f) was not adopted because its exception for requests made to a client’s employees was too broad in light of a state supreme court decision finding such requests improper. The comment also states that noncooperation requests may violate Rule 8.4(d), the “conduct prejudicial” rule. See Wash. Rules of Prof’l Conduct R. 3.4 cmt. 5 (2006) (citing Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1984)). Oregon has retained the language of the Code’s witness secretion rule in its version of the Model Rules, instead of the ABA’s Rule 3.4(f). See Or. Rules of Prof’l Conduct R. 3.4(f) (2006). A state ethics opinion holds that attempting to dissuade a witness from testifying on behalf of an adversary violates Oregon’s “conduct prejudicial” rule, id. R. 8.4(a)(4), and may run afool of the witness secretion rule as well. See Or. State Bar Ass’n, Formal Op. 2005-132 (2005). Kentucky’s version of the Model Rules omits both Rule 3.4(f) and Rule 8.4(d). See Ky. Rules of Prof’l Conduct R. 3.130 (2008). A handful of other states have made changes from the ABA’s version of Model Rule 3.4(f) which I will discuss when relevant to particular interpretive issues.
that I will take up in the next section: whether it is unethical for a plaintiff’s lawyer to negotiate a settlement requiring the plaintiff not to cooperate in other proceedings. Before reaching that issue, it is necessary to consider the scope of the “conduct prejudicial” rule.

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

These criteria provide grounds for finding witness noncooperation requests, including those made in settlement negotiations, impermissible. The idea that partisan interference with an adversary’s access to an otherwise willing witness interferes with the proper administration of justice has a long history in both the ABA’s ethical pronouncements and case law, as shown in Part III of this Article.

248 Rule 3.4(f) prohibits only noncooperation requests made to “a person other than a client,” MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (2008), and therefore does not apply to this situation.

249 See supra text accompanying notes 167–70.

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

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

Disciplinary decisions have frequently relied on the “conduct prejudicial” rule to sanction attorneys who made noncooperation requests,253 and many of those decisions involved attempts to secure a noncooperation pledge as part of a plea deal or civil settlement.254 The cases holding noncooperation clauses unenforceable are also based on the idea that buying witness silence through a settlement agreement undermines the proper functioning of the justice system.255 Where courts have declared a particular type of agreement contrary to public policy precisely because it is prejudicial to the administration of justice, it is fair to charge lawyers who seek such a provision with engaging in prejudicial conduct.256 The principles articulated in court decisions and the profession’s own ethical statements provide sufficient guidance for lawyers to know that conditioning a settlement

253 See supra notes 143, 177 and accompanying text.

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

255 See supra text accompanying notes 185–203.

256 The legislative history of the Model Rules suggests that putting unenforceable terms in a settlement agreement is not per se unethical. A Kutak Commission proposal to prohibit lawyers from counseling or assisting a client in the preparation of a written instrument containing terms that the lawyer knows are legally prohibited was eliminated in the ABA House of Delegates. See LEGISLATIVE HISTORY, supra note 150, at 44. The sponsor of the successful amendment argued that it is legitimate for lawyers to help clients “express an understanding, which they may recognize as being legally unenforceable, or which they may believe will become enforceable over time.” Id. at 45. However, where courts have found a particular type of agreement to be unenforceable because it is prejudicial to the administration of justice, lawyers who seek such a provision are engaging in conduct that they should know undermines the justice system’s proper functioning.
on an opposing party’s agreement not to cooperate as a witness in other cases is harmful to the administration of justice.257

2. Selling Noncooperation

Rule 3.4(f) prohibits lawyers from asking for noncooperation, but says nothing about the responsibilities of the lawyer who receives an improper request. South Carolina’s ethics committee appropriately concluded that it would be unethical for a plaintiff’s lawyer to recommend that his client accept a settlement with a noncooperation clause: “Rule 8.4(a) prohibits a lawyer from knowingly assisting another to violate any Rule. By recommending to his client an improper request of defense counsel, plaintiff’s counsel would be assisting the defense counsel in violating Rule 3.4(f) . . . .” 258

Because noncooperation settlements are prejudicial to the administration of justice, an attorney who counsels a client to enter into one violates Model Rule 8.4(d) as well.259

What if the plaintiff’s attorney urges the client to refuse the request, but the client still wants to go forward? If the plaintiff’s

257 Cf. 2 HAZARD & HODES, supra note 8, § 65.6, at 65-23 n.5 (observing that purchasing a witness’s silence “would obviously . . . be ‘prejudicial to the administration of justice,’” in addition to violating Model Rule 3.4).

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

259 The fact that Rule 3.4(f) by its terms applies only to the lawyer requesting noncooperation cannot support an inference that the Model Rules’ drafters intended to permit attorneys to effectuate unethical requests made by opposing counsel. One might argue that when the rule-drafters wanted to ban lawyers from accepting as well as offering something, they knew how to say so. See MODEL RULES OF PROF’L CONDUCT R. 5.6(b) (2008) (prohibiting lawyer participation in “offering or making” a settlement agreement that restricts the lawyer’s right to practice). But Rule 3.4(f)’s focus on the requesting attorney’s role is explained by its context. It is part of a rule that prohibits a variety of unfair litigation tactics that lawyers may be tempted to use to advance their clients’ interests. Asking witnesses—who frequently are unrepresented—not to cooperate is one such form of strategic behavior. The rule’s silence about what an attorney should do when faced with such a request cannot reasonably be construed as reflecting a judgment that it is ethical for an attorney to help bring about results that the requesting attorney cannot ethically seek.
lawyer participates in the drafting or execution of the agreement, she is helping to bring about the very results that the defendant’s lawyer is prohibited from seeking. The rules relating to witness noncooperation exist to prevent harms to other litigants and the justice system; they are not something that a lawyer should be able to waive at the client’s request. The plaintiff’s lawyer needs to explain to her client that a lawyer cannot ethically negotiate an agreement that requires witness noncooperation. If the client insists, the lawyer should withdraw from the representation. Model Rule 1.16 requires an attorney to withdraw if following the client’s instructions would result in an ethical violation.260

Can a plaintiff’s lawyer affirmatively offer noncooperation as a sweetener to increase the value of a settlement? This would not violate Rule 3.4(f), because the lawyer is not requesting that anyone besides the lawyer’s own client refrain from disclosures.261 However, even more than the passive acceptance considered above, this active instigation should be considered a violation of Rule 8.4(a), which makes it unethical to “knowingly assist or induce another” to violate a rule, or to violate a rule “through the acts of another.”262 Inviting the defendant to tender money in exchange for a noncooperation pledge is doing exactly that. It also should be viewed as a violation of Rule 8.4(d), the “conduct prejudicial” rule. Like any witness, the lawyer’s client has the freedom to decide whether or not to cooperate in other cases. However, it is quite another matter for a lawyer to participate in the sale of that right. The reasons given by the District of

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

261 See Cohen & Bernard, supra note 11 (pointing out that Rule 3.4(f) “prohibits asking someone ‘other than your client’ from refraining to give information, and thus would not prevent offering the same from your own client”).

Columbia Court of Appeals for disciplining an attorney who offered to sell information about the identity of a witness apply with equal force here:

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

The ABA’s ethics committee has found that in one particular context it is not impermissible for a lawyer to use a client’s willingness to refrain from being a witness to gain leverage in settlement negotiations.264 The Model Code included a provision that prohibited using or threatening criminal prosecution to gain advantage in a civil matter,265 based on the idea that invoking criminal sanctions for private gain subverts the criminal process, which is “designed for the protection of society as a whole.”266 In a 1992 formal ethics opinion, the ABA concluded that the Model Rules’ drafters had deliberately omitted this rule because they viewed it as overly broad.267 The ethics committee noted that the crimes of compounding and extortion, as defined in the Model Penal Code, allow a crime victim to threaten prosecution in order to obtain restitution for harm caused by the offense. It found that such threats do not subvert the criminal justice system if the threatened criminal liability is well-founded in fact and law and arises from the same facts

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


266 Id. EC 7-21.

or transaction as the civil claim. The committee cautioned, however, that “exploitation of extraneous matters . . . to gain leverage in settling a civil claim” would tend to prejudice the administration of justice and may violate Model Rule 8.4.268

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

3. To Whom Must Disclosure Be Allowed?

Rule 3.4(f) prohibits a lawyer from asking a nonclient to “refrain from voluntarily giving relevant information to another party.”269 The word “party” has a range of possible meanings in ordinary and legal usage. In its narrowest sense, it means a person who is a formal party to a legal proceeding, such as the plaintiff or defendant in a civil lawsuit. It can also mean a person who is involved or has an interest in a dispute or transaction, regardless of whether a formal proceeding has been filed. For example, someone whose rights have been adversely affected by another’s actions can be referred to as an “aggrieved party.”270 In its broadest sense, “party” can simply mean “person,” as in the phrase “third party.” The rule’s language is also ambiguous as to when the person’s status as a “party” matters. Does “another party” refer only to someone who is a party at the moment the noncooperation request is made, or does it also extend to future

268 Id. Two years later, the committee found that the use of threats to bring a disciplinary complaint against opposing counsel to gain advantage in a civil settlement, although not expressly prohibited in the Model Rules, generally would constitute “conduct that is prejudicial to the administration of justice” under Rule 8.4(d), in part because such a threat introduces “extraneous factors” unrelated to the merits of the client’s claim into the decision whether to settle or proceed to trial. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-383 (1994).
270 See BLACK’S LAW DICTIONARY 1154 (8th ed. 2004) (definitions of “party” and “aggrieved party”); see also BLACK’S LAW DICTIONARY 1122 (6th ed. 1990) (defining “party” as “[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually”).
parties (i.e., to someone who is a “party” when the act of “voluntarily giving relevant information” occurs)?

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

Ambiguities in Rule 3.4(f) should also be resolved in light of its purposes.274 The rule is aimed at preventing harms to the integrity of adversary litigation that result when lawyers block the flow of relevant information, not only to persons who have actually sued their clients, but also to those investigating potential claims. The original articulation of the principle in the ABA’s Formal Opinion 131 made this clear. The ABA found witness noncooperation requests unethical because such conduct tends to “prevent the truth from being presented to the court in the event litigation arises.”275 Among the rationales that courts have given for a principle of unimpeded witness access are that the interests of the justice system are furthered when attorneys are able to ascertain the facts before filing suit, so that meritorious cases will be filed or settled and meritless ones will not be brought

272 ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995). The committee also proposed that to eliminate ambiguities arising from the use of the word “party,” Rule 4.2 should be amended to substitute the word “person” for “party.” Id. at nn.2 & 16. The ABA House of Delegates later made this change. See LEGISLATIVE HISTORY, supra note 150, at 534.
274 See supra Part IV.A.
solely to obtain discovery. Accordingly, “another party” in Rule 3.4(f) should be read to mean a person with a potential claim against the lawyer’s client, regardless of whether suit has actually been filed.

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

Another question raised by the phrase “another party” is whether Rule 3.4(f) prohibits requesting a witness to refrain from testifying at a trial or hearing unless subpoenaed. South Carolina’s ethics committee concluded that such a provision, “useless as it . . . may be,” would not violate Rule 3.4(f). This is a sound interpretation of the rule’s language, inasmuch as the tribunal deciding a dispute cannot


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

278 See Carroll et al., supra note 26.

plausibly be described as a “party” to the dispute. However, requesting or offering inducements to a witness to withhold voluntary testimony should be considered a violation of Rule 8.4(d). Even if it is relatively easy for an opposing party to subpoena the witness, it still places an obstacle in the path of the core fact-finding function of a hearing, and sometimes it may matter a great deal, such as when a witness is beyond the geographic reach of a subpoena. The “conduct prejudicial” rule has frequently, and appropriately, been applied to discipline lawyers for requests or agreements aimed at discouraging witnesses from testifying.

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

4. The Employee Exception

Rule 3.4(f) contains an exception clause that allows a noncooperation request to be made if “the person is a relative or an employee or other agent of a client” and the lawyer reasonably believes the person’s interests will not be adversely affected by withholding information. The official comment explains the

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

281 See supra note 254.

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

283 MODEL RULES OF PROF’L CONDUCT R. 3.4(f)(1) & (2) (2008). The rule’s language is clear that both requirements must be satisfied in order for the exception to apply; i.e., the person in question must be a relative, employee, or other agent of the client, and the lawyer must reasonably believe that the person’s interests will not be adversely affected. See In re Alcantara, 676 A.2d 1030, 1034–35 (N.J. 1995); Colo. Bar Ass’n Ethics Comm.,
employee exception by noting “employees may identify their interests with those of the client,” and cross-references Rule 4.2, the rule prohibiting lawyer contacts with represented parties. According to the Restatement, such requests are permitted because individuals in the specified relationships may have a “special loyalty to the lawyer’s client” and a duty to protect confidential information.

The exception has not been, and should not be, read to extend to former employees. It is phrased in the present tense (“the person is . . . an employee . . . of a client”), which suggests that the drafters

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

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

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

287 MODEL RULES OF PROF’L CONDUCT R. 3.4(f)(1) (2008). Virginia is the only state that has modified the exception to allow noncooperation requests to be made to “a current
intended it to be applicable only to current employees. The assumptions of special loyalty and shared interests that underlie the employee exception generally hold true only while the employment relationship lasts. The cross-reference to Rule 4.2 indicates that Rule 3.4(f)’s exception is designed to parallel the no-contact rule: in situations where an opposing lawyer is prohibited from speaking with employees of a represented entity, it is appropriate for the entity’s lawyer to ask its employees not to speak to opposing counsel. Rule 4.2 has been interpreted to allow ex parte interviews with former employees so as not to unduly restrict adversaries’ access to the facts. Rule 3.4(f)’s core principle of noninterference with witness access would be severely undermined if its exception were read to allow employers’ lawyers to effectively foreclose such interviews by

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

289 The exception in Rule 3.4(f) is broader than Rule 4.2 insofar as it authorizes asking all current employees to withhold cooperation from an adversary, while Rule 4.2 permits the opposing lawyer to seek interviews with some categories of current employees. See MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2008); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 cmt. f (2000). Three states have narrowed the exception to bring it into closer alignment with the no-contact rule. North Carolina’s version of Rule 3.4(f) limits the exception to managerial employees. N.C. RULES OF PROF’L CONDUCT R. 3.4(f)(1) (2006). In Pennsylvania, noncooperation requests are allowed under the employee exception only when “such conduct is not prohibited by Rule 4.2.” PA. RULES OF PROF’L CONDUCT R. 3.4(d)(2) (2006). The Supreme Court of Washington has held that noncooperation requests may be made only to those employees who would be considered represented parties under the no-contact rule, reasoning that “[a]n attorney’s right to interview corporate employees would be a hollow one if corporations were permitted to instruct their employees not to meet with adverse counsel.” Wright v. Group Health Hosp., 691 P.2d 564, 570 (Wash. 1984); see also WASH. RULES OF PROF’L CONDUCT R. 3.4 cmt. 5 (2006) (explaining that Washington did not adopt Model Rule 3.4(f) because it is inconsistent with Wright).

290 See supra note 180 and accompanying text; see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 91-359 (1991) (finding that neither the text nor the commentary to Rule 4.2 suggest that coverage of former employees was intended and that “expand[ing] its coverage to former employees by means of liberal interpretation” is inappropriate where the effect would be “to inhibit the acquisition of information”).
engineering agreements that require former employees to withhold cooperation.291

The exception should be understood to carry with it the requirement that any noncooperation obligation placed on an employee not extend beyond the period of that person’s employment. For example, consider the case of a plaintiff who files a sexual harassment complaint without quitting her job. As long as she remains an employee, the company’s lawyer can ask for a noncooperation clause as part of a settlement without violating Rule 3.4(f). But if the agreement would continue to bar her from voluntarily disclosing relevant information to other litigants after she leaves the job, the lawyer’s request should be considered unethical. The rule’s language is ambiguous as to whether the condition that “the person is . . . an employee” must be satisfied only at the time the noncooperation request is made, or whether it also must hold true at the time of “voluntarily giving relevant information to another party.”292 The latter reading best serves the rule’s purposes. Otherwise, the exception’s limitation to current employees could be rendered a nullity by requiring every employee, while still employed, to sign an agreement pledging to never cooperate with anyone suing the company.

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

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

Answers to these questions should be informed by the rule’s raison d’être, which is to give litigants a fair opportunity to gather information that “may be useful . . . in establishing the true facts and

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

circumstances affecting the dispute.”  Although part of the rule’s purpose is to enable litigants to develop their cases without the expense and constraints of formal discovery, it is founded on the same conception of party responsibility for finding and developing the facts that informs the scope of discovery under the Federal Rules of Civil Procedure. The phrase “relevant information” in Rule 3.4(f) should be read as broadly as the discovery rules’ definition of relevance—anything relating to a party’s claim or defense that “appears reasonably calculated to lead to the discovery of admissible evidence.”

a. Secrecy of the Amount or Terms of a Settlement

This standard suggests that it should be permissible to prohibit disclosure of a settlement agreement’s monetary terms. Settlement amounts are nearly always inadmissible in subsequent proceedings and have generally been held to be beyond the scope of discovery. The settlement terms are a construction of the settling parties, rather than historical facts having evidentiary significance. While the information may be very useful to future litigants bringing similar cases, because it sends signals about the defendant’s assessment of the strength of the claim against it and how much it is willing to pay to avoid trial, the defendant has a legitimate interest in keeping these matters confidential. Part of what Rule 3.4(f) is designed to protect—the availability of ex parte witness interviews so that parties can learn facts without revealing their litigation strategies—rests on

294 FED. R. CIV. P. 26(b)(1).
295 See FED. R. EVID. 408; Bottaro v. Hatton Assocs., 96 F.R.D. 158 (E.D.N.Y. 1982). Prior settlement payments may be discoverable in unusual circumstances where a compelling need can be shown. See Doré, supra note 9, at 815 n.139 (giving examples).
296 See THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES 45 (2007) (recommending that courts assessing whether to approve or enforce a confidential settlement “should distinguish between ‘settlement facts,’ such as the amount, terms and conditions of a compromise, and ‘adjudicative facts’ that are relevant to the merits of the underlying controversy”); Doré, supra note 27, at 398–99 (arguing that agreements to keep settlement terms confidential should be enforced by courts because, “[u]nlike the historical facts giving rise to the settlement, settlement facts lay peculiarly within party control and would not exist but for the litigation in which they were generated”); see also Doré, supra note 9, at 814. The cases holding noncooperation agreements unenforceable in other proceedings have generally limited this principle to factual information surrounding the settled case, but not the amount a case settled for. See, e.g., Kalinauskas v. Wong, 151 F.R.D. 363, 367 (D. Nev. 1993).
the idea that the adversary system works best when work product of this sort is shielded from disclosure.\textsuperscript{297} A large settlement may be based on factors unrelated to the merits, such as the defendant’s risk averseness, concerns about a biased tribunal, or fear of adverse publicity. Disclosure could have the effect of encouraging frivolous lawsuits.\textsuperscript{298}

Nonmonetary provisions that are designed to prevent the recurrence of wrongful conduct are another matter. The settlement of a sexual harassment claim, for example, might contain a requirement that the employer institute sexual harassment training, and a Clean Water Act settlement might set forth steps that a factory will take to avoid future chemical spills. In subsequent cases alleging similar misconduct, settlement terms of this sort may constitute or lead to

\textsuperscript{297} See \textit{ supra} text accompanying notes 112–31, 158, 181–84.

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

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

b. Information Learned Through Discovery

An argument might be made for limiting the scope of disclosure under Rule 3.4(f) to knowledge that a person acquired independently of the lawsuit but not information learned by means of discovery. In holding that protective orders which prohibit the further dissemination of discovery materials do not violate litigants’ First Amendment rights, the Supreme Court has reasoned that a party’s access to those materials exists only by virtue of the court’s discovery processes, and limitations on the use of the information can be imposed as a quid pro quo for broad access. A settlement agreement that requires the return of all discovery materials or prohibits their disclosure to anyone (including other litigants) arguably rests on the same bargain; the information does not “belong” to the plaintiff but was made available with the implicit understanding that it be used only for purposes of trying the plaintiff’s case.

Rule 3.4(f), however, is not about the plaintiff’s ownership of information or interest in disseminating it. Its purpose is to forbid adversarial interference with other parties’ access to relevant

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

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

301 Cf. Béchamps, supra note 47, at 151 (arguing, by analogy to the First Amendment cases, that stipulated gag orders should be limited to information obtained through the discovery process, and “should not restrict dissemination of information which the parties acquired prior to the litigation or from independent sources”).
information. The fact that a court has the authority to issue a protective order prohibiting the further dissemination of discovery materials does not entitle a defendant to such protection; the rules of procedure require that protective orders be issued only upon a showing of good cause.\textsuperscript{302} If there are legitimate reasons for restricting the use of certain discovery materials, because they contain trade secrets or implicate personal privacy interests, for example, a party can apply for a protective order.\textsuperscript{303} In the absence of a court-approved protective order, neither the text nor the objectives of Rule 3.4(f) provides a basis for exempting information learned in discovery from the rule’s requirement that a party’s lawyer not interfere with an adversary’s ability to seek relevant information from a person who has it.\textsuperscript{304}

c. Privileged Information, Trade Secrets, and “Irrelevant” Information

Prohibiting the disclosure of privileged information that is subject to a preexisting legal duty of confidentiality should be permissible under Rule 3.4(f). For example, if the plaintiff in a wrongful discharge suit is a former manager who communicated with corporate counsel, the defendant’s lawyer can legitimately ask for a settlement provision that categorically bars the plaintiff from disclosing information subject to the attorney-client privilege. Rule 3.4(f) makes no express exception for privileged information, but the nondisclosure obligation would exist even in the absence of the lawyer’s request.

\textsuperscript{302} E.g., FED. R. CIV. P. 26(c)(1).

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

\textsuperscript{304} In the absence of an order or agreement to the contrary, parties are free to disclose discovery materials to whomever they wish. See THE SEDONA CONFERENCE, supra note 296, at 7 (citing case authority). Since there is no preexisting obligation to keep the information confidential, Rule 3.4(f) prohibits a lawyer from requesting a nonclient to refrain from disclosing such materials to other parties with claims against the lawyer’s client when the information is relevant to those claims. This does not mean that contractual agreements to keep discovery materials confidential are per se prohibited under Rule 3.4(f); they simply need to include an exception that allows for the limited class of disclosures that the rule protects. If a party believes that no such exception is appropriate, the claim should be decided by the court. Offering inducements to obtain the other side’s agreement not to oppose such a motion should be considered a violation of Rule 3.4(f); it is tantamount to asking a witness to voluntarily refrain from making disclosures covered by the rule. Cf. Koniak, supra note 13, at 805 (arguing that payoffs to get an opposing party to agree to a protective order should be sanctionable).
and it would serve no purpose to read the rule to prevent a lawyer from taking steps to ensure compliance.\textsuperscript{305} There is no interference with the legitimate informational interests of other litigants: privileged information is beyond the scope of discovery,\textsuperscript{306} and a lawyer conducting informal interviews is prohibited under the ethics rules from seeking privileged information.\textsuperscript{307}

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

\textsuperscript{305} The \textit{Restatement} takes this position in its commentary on the rule against noncooperation requests. \textit{See Restatement (Third) of the Law Governing Lawyers} § 116 cmt. e (2000). Two states have modified Model Rule 3.4(f) to provide an explicit exception for information that is subject to a legal duty of confidentiality. \textit{See Ala. Rules of Prof’l Conduct R. 3.4(d)(2) (2008) (creating exception where “the person may be required by law to refrain from disclosing the information”); Ga. Rules of Prof’l Conduct R. 3.4(f)(2) (2008) (creating an exception for information “subject to the assertion of a privilege by the client”).}

\textsuperscript{306} \textit{Fed. R. Civ. P. 26(b)(1)} (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense . . . .”).

\textsuperscript{307} \textit{See Model Rules of Prof’l Conduct R. 4.4(a), R. 4.4 cmt. 1 (2008) (prohibiting lawyers from using methods of obtaining evidence that violate a person’s rights, including intrusions into privileged relationships); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 91-359 (1991) (stating that an attorney interviewing a former employee of an adversary party “must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications” so as not to violate Rule 4.4).}

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

\textsuperscript{309} \textit{Fed. R. Civ. P. 26(c)(1)(G).}

\textsuperscript{310} Similar protection is often given to information that implicates personal privacy interests, such as sensitive medical or financial information. \textit{See id. R. 26(c)(1) (authorizing the issuance of protective orders “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”).}
An agreement that prohibits the voluntary disclosure of trade secret information relevant to other parties’ claims runs counter to the purposes of Rule 3.4(f) to the extent that it impairs the ability of other litigants to gather discoverable evidence through ex parte interviews. On the other hand, such an agreement reflects a preexisting legal obligation not to disclose in the absence of legal compulsion, and ensures that the defendant has the opportunity to obtain the safeguards of a protective order. On balance, it probably should be allowed. This interpretation is consistent with the case law on enforceability; courts have found noncooperation agreements void as contrary to public policy only when such agreements go beyond protecting trade secrets and privileged information. However, it is important to note that information concerning an employer’s illegal or tortious conduct generally cannot qualify as a trade secret. Seeking to block the disclosure of information about wrongful conduct that is

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

312 See JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d at 1135–36 (holding that “whistleblower-type information about allegedly unlawful acts” do not constitute trade secrets and that a confidentiality agreement cannot be enforced to prevent another litigant from seeking relevant information about such misconduct through ex parte interviews); Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956, 959 (D. Md. 1997) (holding that trade secret protection cannot be claimed for information relating to a defendant’s illegal acts); McGrane v. Reader’s Digest Ass’n, 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993) (noting that “[d]isclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees”); Carol M. Bast, At What Price Silence: Are Confidentiality Agreements Enforceable?, 25 WM. MITCHELL L. REV. 627 (1999) (arguing, based on contract, trade secret, and agency principles, that agreements protecting trade secrets and confidential business information are not enforceable to prevent disclosures of illegal or tortious conduct or dangers to health and safety); Garfield, supra note 35, at 327–28 (concluding that “a court is unlikely to protect information about an employer’s tortious conduct as a trade secret” under principles established in case law and the Restatement of Unfair Competition).
relevant to the claims of other litigants or investigating agencies, under the guise of trade secret protection, would violate Rule 3.4(f).

A defense lawyer whose goal is to draft a settlement agreement that prohibits all disclosures relating to the underlying facts, except for what must be allowed under Rule 3.4(f), might object to leaving it entirely up to the plaintiff’s judgment to determine what constitutes “relevant information to another party” and isn’t privileged or a trade secret. These risks, however, are unavoidable by-products of the policy balance struck in the rule: the harms to the truth-seeking function of the adversary system that arise when lawyers interfere with a witness’s freedom to convey relevant evidence to opposing parties in ex parte interviews have been deemed to outweigh the benefits of restricting contacts to the judicially supervised setting of the formal discovery process.

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


One settlement condition that should not be allowed is a requirement that the defendant have the opportunity to attend and monitor any interviews. While this could help to deter improper disclosures, it runs counter to Rule 3.4(f)’s policy of preserving access to ex parte interviews, not only because they are less costly than formal discovery (in this regard, the adversary’s presence at an informal interview would not create any additional expense), but also because the adversary’s presence may chill a witness’s willingness to disclose relevant facts. Opposing counsel’s presence also hinders the interviewing lawyer’s ability to “explore the witness’[s] knowledge, memory and opinion . . . in light of information counsel may have developed from other sources” without disclosing the work product
that informs the lawyer’s questions. 313 Under Rule 3.4(f) and the identical principle that has developed in the criminal case law, courts have found it improper for a lawyer to request a witness not to submit to an interview unless the lawyer is present. 314

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

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

313 IBM Corp. v. Edelstein, 526 F.2d 37, 41 (2d Cir. 1975); see also Hickman v. Taylor, 329 U.S. 495, 508–14 (1947) (explaining why materials memorializing ex parte witness interviews are work product ordinarily shielded from discovery). In one of the cases holding that a noncooperation agreement could not be used to prevent witness interviews, the judge’s order provided that the defendant would be permitted to have a representative present as an observer, unless the defendant had previously interviewed the witness. See Chambers, 159 F.R.D. at 445–46. This procedure would likely lead to guarded responses that would substantially undermine the value of informal interviews, and it runs counter to the logic of Hickman and Edelstein, which found that confidential witness interviews play an essential role in the search for truth. See supra text accompanying notes 112–23. Other decisions have rejected the Chambers court’s requirement that the defendant be given the opportunity to attend. See JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d at 1138; Hoffman, 1997 U.S. Dist. LEXIS 18908, at *4–*7.

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

315 See Saini, 434 F. Supp. 2d at 921–22 (relying in part on the fact that a former employee initiated disclosures to another litigant, rather than waiting to be contacted, as reason for holding the agreement enforceable); Chambers, 159 F.R.D. at 444 (limiting holding that noncooperation agreements are unenforceable to situations “where the former employee is not the initiating party” and expressly declining to reach the issue of whether “restrictions on recruiting others to complain or sue” are permissible).
the defendant’s reputation to the public at large. However, a “don’t tell unless asked” requirement goes too far in the other direction. A person who has settled with a defendant may have information highly probative of another party’s claim. The other claimant may be unaware of the witness’s knowledge and thus have no reason to contact the witness; without the information, the person may even be unaware that he or she has the basis for a claim. It is not uncommon for a witness, upon hearing about a case or harmful conduct by a defendant, to contact the injured party or an investigating agency to volunteer relevant information. Rule 3.4(f), which prohibits interference with “voluntarily giving relevant information to another party,” contains no language limiting this to situations where the witness has first been contacted, and the rule’s core purpose, preventing adversary interference with a party’s access to information that can assist in ascertaining the truth, militates against an interpretation that would categorically exclude witness-initiated disclosures.

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

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

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

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

318 Alan Garfield, in his article analyzing promises of silence under contract law, argues that contracts that suppress information about tortious conduct should be unenforceable because they frustrate public policy “by creating barriers for tort victims attempting to identify wrongdoers and thereby vindicate their rights.” Garfield, supra note 35, at 325. He gives the example of a person who witnesses one neighbor break another neighbor’s window. “If the negligent neighbor pays the witness for promising not to tell the injured neighbor,” a court ought not to enforce the contract. Id. Rule 3.4(f) protects similar interests and should likewise be construed to prohibit the negligent neighbor’s lawyer from inducing the witness to refrain from disclosing to the injured party information that supports a claim for redress.
This would preclude wide-scale publication as a means of reaching potential litigants, but allow targeted disclosures when the plaintiff has reason to know that the recipient has a claim to which the information is relevant.

CONCLUSION

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

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

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

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

319 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 765 (Baltimore, Joseph Neal, 2d ed. 1836).
320 See generally Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 WM. & MARY L. REV. 1303, 1324–26 (1995) (discussing factors that have caused civil litigators to gravitate toward a client-centered approach that emphasizes purely partisan conduct and ignores provisions of ethics codes that protect other values); Matasar, supra note 207, at 979–80 (discussing the strong pressure lawyers face to engage in client-
limitations on client advocacy, there is good reason to distrust the profession’s prevailing wisdom.

Moreover, the fact that settlements requiring noncooperation are common probably has less to do with lawyers making a considered judgment that they are ethical than with a simple lack of awareness of Rule 3.4(f) and its application to settlement. As previously discussed, many plaintiffs’ lawyers are uncomfortable with blanket secrecy requirements but have felt obliged to go along based on their belief that the ethics rules tie their hands. Professional conduct rules, as Murray Schwartz has pointed out, can fulfill an important “reinforcement function” by enabling lawyers who do not want to assist clients in questionable transactions to decline on the grounds that the rules do not permit them to go forward, and thus to avoid the unpleasantness of refusing to assist on a basis that is seen by the client as a personal condemnation.

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

A defense lawyer who refuses to back down in the face of an objection could face a disciplinary complaint. Even if the plaintiff and her counsel are not inclined to take this step, other litigants who later learn that a potential witness cannot be interviewed because of a noncooperation settlement might grieve the lawyers who negotiated the agreement. Although disciplinary boards are often reluctant to impose sanctions for conduct deemed acceptable by a large segment of the bar, courts and disciplinary authorities have imposed discipline for conduct that is closely analogous to settlement noncooperation demands, so the possibility of enforcement cannot be discounted.

serving conduct that goes beyond what the rules permit but is deemed acceptable by large numbers of practitioners).

321 See supra text accompanying notes 8–11.
322 See supra text accompanying notes 50–62.
324 Explaining why proposed settlement terms violate an ethical rule may be enough to convince opposing counsel to withdraw them. See Bauer, supra note 9 (containing sample letter informing defense counsel that settlement demand for noncooperation is unacceptable because it violates Rule 3.4(f)).
325 See supra note 252.
If disciplinary decisions begin to be issued, lawyers’ incentives to abide by the rules will be strengthened.\textsuperscript{326} Plaintiffs’ lawyers who object to defense demands for noncooperation can also seek advisory opinions from ethics committees; one such ruling has already been issued.\textsuperscript{327} Although nonbinding, ethics opinions may help to develop a consensus that the practice is professionally unacceptable.\textsuperscript{328}

One might question the efficacy of prohibiting lawyers from negotiating settlement terms that are not illegal for their clients.\textsuperscript{329} Barring lawyers from negotiating noncooperation clauses would be an exercise in futility if it causes parties to bypass their lawyers and negotiate such agreements on their own. While one can imagine the possibility that a plaintiff or defendant, upon being told by her lawyer that legal ethics rules prohibit the lawyer’s involvement in a noncooperation agreement, might enter into direct discussions with the opposing party and conclude the settlement without further legal assistance,\textsuperscript{330} this seems unlikely. Litigation tends to be acrimonious, and both plaintiffs and defendants are prone to view their opponents as unpleasant, unreasonable, and difficult to deal with. The vast majority of clients will be reluctant to forgo the filter of having their negotiations conducted by a representative, and nervous about the traps they may fall into if they try to conclude an agreement without legal counsel.\textsuperscript{331} A party could also seek out a new lawyer who takes a different view of the ethical issue, but the financial cost, delay, and

\textsuperscript{326}See Zacharias, supra note 320, at 1348 (noting that “[t]o the extent that the prohibitive rules are enforced . . . , lawyers have reason to obey [them],” even when they are in tension with a client-centered ethos).


\textsuperscript{328}See Bruce A. Green, Bar Association Ethics Committees: Are They Broken?, 30 HOFSTRA L. REV. 731, 749–50 (2002).

\textsuperscript{329}See supra text accompanying notes 79–84 and infra Appendix (explaining why noncooperation agreements generally will not violate criminal statutes).

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

\textsuperscript{331}Luban raises the further objection that accountants could negotiate the banned secrecy terms on behalf of their clients, and would escape liability for unauthorized practice of law on the theory that conduct prohibited to lawyers cannot be part of the practice of law. See id. This strikes me as implausible. The function of negotiating an agreement resolving a client’s legal dispute is likely to be viewed by courts as a quintessential aspect of the practice of law inseparable from the giving of legal advice and the exercise of legal skills, even if it involves a settlement term prohibited under lawyers’ ethics rules.
emotional toll of dismissing counsel and hiring a new one make it unlikely that many clients will take this step. Moreover, many plaintiffs start out with a strong desire to help others harmed by a defendant’s wrongful conduct, and have significant qualms about settlement terms that make it harder for others to bring claims. Being informed that a defendant’s noncooperation demand is prohibited under lawyer’s ethics rules can serve a reinforcing function for such clients, strengthening their commitment to resist when faced with a settlement offer.

Nor is it likely that prohibiting lawyer participation in noncooperation agreements will prevent cases from settling. There is no evidence that settlements have been chilled in the states that have enacted statutes or court rules limiting secrecy. The unavailability of noncooperation clauses should have little impact on defendants’ willingness to settle or the size of settlement offers, especially when the types of secrecy most valuable to defendants—keeping the monetary amount confidential and prohibiting statements to the media—are still allowed. Defendants will have ample incentive to


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

334 See David A. Dana & Susan P. Koniak, Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms, 2003 U. ILL. L. REV. 1217, 1225 & n.18; Christopher R. Drahozal & Laura J. Hines, Secret Settlement Restrictions and Unintended Consequences, 54 U. KAN. L. REV. 101, 110–14 (2006); cf. Ramsey et al., supra note 60 (reporting that a plaintiff’s firm that stopped agreeing to secret settlements has not encountered any case that failed to settle or settled for less as a result).
settle to avoid the financial exposure and greater publicity that would result from a trial.335

Prohibiting lawyers from assisting in conduct that clients can engage in themselves without violating the law may also be objected to from the standpoint of client autonomy. Stephen Pepper has argued that making the law accessible to individuals so that they can pursue their goals constitutes an important social good, and that it is destructive of individual autonomy, diversity, and equality for lawyers to impose their moral values on clients in situations where the conduct has not been determined by society to be intolerable and made explicitly unlawful.336 But it is only in a very weak sense that noncooperation agreements can be said to be “lawful.” Numerous courts have declared them to be contrary to public policy and refused to enforce them.337 Even if parties violate no positive command of law by entering into noncooperation agreements, a public institution has determined that such agreements inflict serious harm on the justice system. By virtue of their role as officers of the court, lawyers have a “special responsibility for the quality of justice.”338 There is nothing incongruous or objectionably paternalistic in requiring lawyers to refuse to participate in conduct that is prejudicial to the administration of justice, regardless of whether such conduct is illegal when engaged in by clients who do not share the lawyer’s special role.339

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

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

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


339 Many of the “officer of the court” duties that the ethics rules impose on lawyers involve conduct that is not illegal if engaged in by an unrepresented party. See, e.g., id. R. 3.3(a)(2) (obligation to disclose controlling legal authority to the court); R. 3.3(d) (requiring disclosure of all material facts in ex parte proceedings); R. 3.4(e) (placing limitations on trial statements); R. 3.6(a) (limiting extrajudicial statements).
To those who favor greater moral activism by lawyers, my reading of the ethics rules may be criticized on the grounds that it leaves untouched the most objectionable sorts of secret settlements—those that hide safety dangers and information about unlawful conduct from the public. But my concern in this Article is with the constraints on settlement secrecy that can be derived from the rules as they are. The Model Rules, even after the Ethics 2000 expansion of the public-regarding exceptions to the duty of confidentiality, provide very limited scope of action for placing societal or third-party interests over those of the client. For better or worse, the tenor of the lawyers’ ethics codes is that lawyers generally are not barred from assisting clients in conduct that is harmful to third parties or socially undesirable, unless legislatures or the courts have prohibited the behavior. But the existing system of professional regulation does recognize the need for lawyers to legislate for themselves restraints on advocacy that are designed to preserve the proper functioning of the adversary system.

This Article has focused attention on one such duty, the obligation not to impede other parties’ access to relevant evidence by inducing witnesses to withhold cooperation. The principle has a long pedigree and is firmly rooted in the ethics codes. Too often, the duty has been ignored when lawyers settle cases on behalf of clients.

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

341 See supra text accompanying notes 63–78.
APPENDIX: ARE NONCOOPERATION AGREEMENTS CRIMINAL?

Obstruction of Justice

Stephen Gillers\(^{342}\) rests his argument that noncooperation settlements violate federal obstruction of justice laws primarily on § 1512(b) of Title 18, which makes it a felony to “knowingly . . . corruptly persuade[] another person, or attempt[] to do so, . . . with intent to . . . cause or induce any person to withhold testimony, or withhold a record, document, or other object, from an official proceeding.”\(^{343}\) An “official proceeding” is defined in the statute to include any proceeding before a federal court or agency, which “need not be pending or about to be instituted at the time of the offense.”\(^{344}\) Relying on the broad construction that a number of courts of appeal have given to the word “corruptly,” Professor Gillers concludes that offering a financial reward to secure a person’s pledge to not voluntarily provide information to the government or private parties in pending or future federal proceedings violates the statute’s terms.\(^{345}\) He also relies on two other criminal statutes that apply when there is an already-pending federal proceeding. Section 1503(a) of Title 18 makes it a crime when any person “corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice” in pending federal judicial proceedings.\(^{346}\) Section 1505 contains similar language and covers pending proceedings before federal agencies and Congress.\(^{347}\)

\(^{342}\) Gillers, \textit{supra} note 10.


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

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

\(^{347}\) 18 U.S.C. § 1505 (2008) (“Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law
Gillers’s conclusion that these statutes reach noncooperation agreements that forbid voluntary disclosures to other parties in a current or future proceeding (rather than just those agreements that would block disclosure to the court or agency presiding over a proceeding) is hard to square with the statutory language and the Supreme Court’s interpretations of the obstruction laws. Section 1512(b) speaks in terms of withholding information “from an official proceeding.”

Section 1503(a), which includes no such limiting language, has nonetheless been read by the Supreme Court to require a showing of a probable impact on specific judicial proceedings. In United States v. Aguilar, the Court, emphasizing the need for “restraint in assessing the reach of a federal criminal statute,” held that a defendant who made false statements to investigating FBI agents, with knowledge that a grand jury proceeding was pending, could not be found guilty of obstruction in the absence of proof that he knew that his false statements would actually be conveyed to the grand jury and be likely to affect its proceedings.

It is extremely unlikely that entering into a noncooperation settlement that prohibits voluntary disclosures to other litigants, while allowing disclosure in response to a subpoena or court order, could constitute obstruction under Aguilar. Forcing an opposing party to resort to formal discovery processes in order to obtain information does not render the evidence unavailable to a tribunal or have the probable effect of ensuring that the information will never be presented in court.

under which any pending proceeding is being had before any department or agency of the United States or in a congressional inquiry commits a felony.

350 Id. at 600.
351 The government’s theory was that the defendant knew and hoped that his false statements would be conveyed to the grand jury through the agents’ testimony, and therefore made the statements with an intent to thwart the grand jury investigation. Id. The Court held that “uttering false statements to an investigating agent . . . who might or might not testify before a grand jury” is insufficient and that the government must prove “that respondent knew that his false statement would be provided to the grand jury” in order to establish the “nexus” required by the statute: proof that the defendant’s action had the “natural and probable effect” of interfering with the tribunal’s administration of justice. Id. at 600–01.
352 Efforts to conceal or destroy information requested in discovery might well be found, consistent with Aguilar, to violate the obstruction statutes, since such conduct presents a high likelihood of affecting the evidence presented in court. See United States v. Lundwall, 1 F. Supp. 2d 249, 254 (S.D.N.Y. 1998) (refusing to dismiss indictment against two former Texaco officials under § 1503(a) for willfully destroying documents
A stronger case can be made that settlements that prohibit voluntary cooperation with a federal agency in connection with a pending agency proceeding constitutes obstruction under § 1505. In federal administrative proceedings, obtaining testimony or documents from an unwilling witness generally requires having the agency follow specified procedures for issuing an administrative subpoena, and obtaining enforcement of the subpoena may require the agency to go to court. Here the costs of a noncooperation clause are borne by the agency itself (not merely other parties to the proceeding), and thus might be said to impede the agency’s “due and proper administration of the law.”

The Supreme Court’s 2005 decision in *Arthur Andersen LLP v. United States* also makes it doubtful that a defendant who seeks a noncooperation clause can be found to have engaged in “knowingly corrupt” conduct, one of the requisites of criminal liability under § 1512(b). In overturning the accounting firm’s conviction for urging employees to destroy documents in accordance with the firm’s document retention policies, so that they would be unavailable in anticipated Enron-related lawsuits, the Court read the statutory language to mean that the violator must be “conscious of wrongdoing.” The Court noted that the use of corporate document

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353 At least in those circuits that take a broad view of what constitutes a “corrupt” motivation. See supra note 345.

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

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


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

358 *Arthur Andersen*, 544 U.S. at 704–06.
retention policies “to keep certain information from getting into the hands of others, including the Government” is routine and not inherently malign.\(^{359}\) Under this reasoning, it would be difficult to establish that a defendant who sought a noncooperation clause had the requisite knowledge of wrongfulness, considering the widespread use of such agreements and the fact that no court has squarely held that they violate any criminal statute.

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

**Witness Tampering**

The state law equivalent to the federal provisions that Gillers considered are witness tampering statutes, which are typically patterned on section 241.6 of the Model Penal Code. The crime of witness tampering is there defined to include situations where a person, “believing that an official proceeding or investigation is pending or about to be instituted, . . . attempts to induce or otherwise cause a witness or informant to . . . withhold any testimony, information, document or thing.”\(^{362}\) The reach of witness tampering laws is significantly limited by the “pending or about to be instituted” qualification. In many, probably most, situations where defendants seek noncooperation clauses, they act out of concern that similar lawsuits may be filed in the future but without specific knowledge of another case that is pending or imminent. In addition, the statutory language appears to contemplate a withholding of information from the official proceeding or investigation. While attempts to stop a

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\(^{359}\) Id. at 703–04.

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


\(^{362}\) MODEL PENAL CODE § 241.6(1)(b) (1962).
person from voluntarily testifying in court or providing information to an investigating government agency can easily be construed as witness tampering,\textsuperscript{363} it seems unlikely that the offense extends to efforts to induce a person to refrain from making voluntary disclosures to private litigants or their lawyers. The interpretive principle that ambiguities in criminal statutes are to be construed in favor of the defendant would support the narrower reading.

\textit{Compounding}

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

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

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

\textsuperscript{364} Koniak, \textit{supra} note 13.

\textsuperscript{365} Freeman, \textit{supra} note 13.

\textsuperscript{366} \textit{Model Penal Code} § 242.5 (1962). There is no federal compounding statute, but two federal crimes are somewhat analogous. The misprision of felony statute applies to a person who has knowledge of the commission of a federal felony and “conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States.” 18 U.S.C. § 4 (2008). Most courts construing the statute have interpreted it to require more than just a failure to notify the authorities; there must be some positive act designed to conceal the offense from the authorities. \textit{See}, e.g., United States v. Davila, 698 F.2d 715, 717 (5th Cir. 1983). That element may be satisfied by a refusal to testify in violation of a valid court order, \textit{see} United States v. Cefalu, 85 F.3d 964, 969 (2d Cir. 1996), but it is unclear whether an agreement to refrain from voluntarily reporting the offense to the authorities would suffice.

The federal obstruction of criminal investigations statute prohibits “willfully endeavor[ing] by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a [federal] criminal investigator.” 18 U.S.C. § 1510(a). Unlike compounding, the payor, rather than the payee, is the offender. Some courts have found that the statute applies only if a specific federal criminal investigation is under way or is being
The information covered by secrecy clauses in settlements of civil lawsuits often relates to conduct that violates criminal statutes as well. The crime of compounding, however, applies only when the paid-for promise is to refrain from reporting to law enforcement authorities and does not reach agreements that bar disclosures to civil litigants. Moreover, the Model Penal Code’s affirmative defense is easy to establish for the vast majority of civil settlements, because the consideration paid for a secrecy clause, and even the total amount of the settlement, will generally be less than the amount of compensatory damages that the plaintiff sought in the lawsuit or demand letter. The common law crime of compounding, however, recognized no affirmative offense, and in states with compounding statutes that track the common law rather than the Model Penal Code, noncooperation agreements that are drafted broadly enough to prohibit voluntary disclosures to law enforcement agencies about conduct that constitutes a criminal offense very likely are criminal.

In sum, parties negotiating noncooperation settlements need to pay careful attention to potentially applicable federal and state criminal laws. In most jurisdictions, however, an attorney could reasonably reach the conclusion, and advise her client, that the risk of criminal liability for a carefully drafted noncooperation agreement is negligible. Some guideposts for minimizing the risk of a criminal contemplation by the authorities at the time the payment is made. See, e.g., United States v. Siegel, 717 F.2d 9, 21 (2d Cir. 1983).

367 See Freeman, supra note 13, at 840–41.
368 The same is true of the federal misprision of felony and obstruction of criminal investigations statutes. See supra note 366.
369 Some settlements exceed any amount that the plaintiff could plausibly claim as restitution, either because secrecy is particularly valuable to the defendant or the defendant fears a large punitive damage award. An example of a settlement that would likely violate the Model Penal Code’s compounding provision, assuming that the suppressed information related to criminal conduct by the defendant, is the one in the heart valve case described by Zitrin and Langford. See supra text accompanying notes 53–57.
370 See MODEL PENAL CODE § 242.5 cmt. 6 (1980) (discussing the elements of common law compounding); Freeman, supra note 13, at 835–36. At least ten states have compounding laws that contain no affirmative defense for settlement. See ARK. CODE ANN. § 5-54-107 (West 2004); GA. CODE ANN. § 16-10-90 (2007); 720 ILL. COMP. STAT. ANN. 5/32-1 (West 2003); KAN. STAT. ANN. § 21-3807 (2007); MICH. COMP. LAWS ANN. § 750.149 (West 2004); MO. ANN. STAT. § 575.020 (West 2003); N.M. STAT. ANN. § 30-22-6 (West 2003); OKLA. STAT. ANN. tit. 21, §§ 543, 544 (West 2002); S.C. CODE ANN. § 16-9-370 (2003); VT. STAT. ANN. tit. 13, § 8 (1998); see also CAL. PENAL CODE § 153 (West 1999) (exception only for “cases provided for by law, in which crimes may be compromised by leave of court”). The federal obstruction of criminal investigations statute, discussed supra note 366, also contains no defense for money paid as part of a settlement.
violation would be to draft the agreement to permit disclosures in response to a subpoena or court order or as otherwise required by law; allow voluntary disclosures to the relevant court or agency if an official proceeding is known to be pending or imminent; and, if a compounding statute applies, ensure either that the settlement satisfies the criteria for an affirmative defense or that disclosures to law enforcement authorities are permitted.
During the course of Unnamed Attorney's representation of a fellow attorney in a disciplinary matter, Unnamed Attorney negotiated a settlement between his client and the complaining party. The terms of the negotiated settlement have now resulted in charges of professional misconduct against Unnamed Attorney because the terms of the settlement agreement required the complaining party to refuse to cooperate voluntarily with the Kentucky Bar Association in any investigation into the matter. The Trial Commissioner adjudged Unnamed Attorney guilty of professional misconduct for entering into such an agreement with a witness, but the KBA Board of Governors overturned that determination on appeal. Neither party has appealed to this Court, but we exercise our discretion under SCR 3.370(8) and notice review. We now reverse,
in part, and affirm, in part, the decision of the Board of Governors. In so doing, we find Unnamed Attorney guilty of violating SCR 3.130-3.4(g) but not guilty of violating SCR 3.130-3.4(a).

I. FACTUAL AND PROCEDURAL BACKGROUND.

The material facts of this case are undisputed. Unnamed Attorney agreed to represent a fellow attorney in a disciplinary matter filed by one of the fellow attorney's former clients, Jane Doe. Doe alleged the client of Unnamed Attorney overcharged for his handling of a probate matter. Eventually, Doe's dissatisfaction with what she perceived to be little work for great expense led her to terminate employment of Unnamed Attorney's client and hire a new attorney.

At some point after terminating the employment of Unnamed Attorney’s client, Doe filed a bar complaint against Unnamed Attorney’s client. During the initial stages of the complaint proceedings, Unnamed Attorney arranged a meeting between Doe and the Unnamed Attorney’s client to discuss a possible settlement. Unnamed Attorney notified the Office of Bar Counsel, the prosecutorial agency in the disciplinary matter, of the meeting and potential settlement. In April of 2010, as a result of Unnamed Attorney’s negotiations, Doe agreed to settle the dispute. The terms of the settlement required Unnamed Attorney’s client to refund a $30,000 fee in return for Doe’s withdrawal of her bar complaint. Specifically, paragraph 4 of the settlement agreement stated:

2 Jane Doe is a pseudonym to protect the identity of those involved.
Withdrawal of Bar Complaint. [Jane Doe] agrees to take all action legally necessary to immediately withdraw [sic] of the Bar Complaint and agrees to the extent permitted by law, to refuse to voluntarily assist or to voluntarily provide information to the KBA or anyone else, regarding the Bar Complaint unless directed to do so pursuant to subpoena, court order or other binding authority.

At the request of Doe, Unnamed Attorney provided a copy of the agreement to Doe's attorney for his review. Doe's attorney reviewed the agreement, suggested minor changes, and recommended Doe sign the agreement.

Unnamed Attorney's client paid the $30,000. Later, Unnamed Attorney complied with the OBC's request for a copy of the settlement agreement. The Inquiry Commission ultimately issued a Charge against Unnamed Attorney alleging he violated: (1) SCR 3.130-3.4(a),3 “by unlawfully obstructing another party's access to evidence, or by counseling or ordering another to do so, as evidenced by paragraph 4 of the Release Agreement”; and (2) SCR 3.130-3.4(g),4 “by requesting that a person, . . . , who was not Respondent's client, refrain from voluntarily giving relevant information to another party as evidenced by paragraph 4 of the Release Agreement.”

3 SCR 3.130-3.4(a) reads, “A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."

4 SCR 3.130-3.4(g) reads, “A lawyer shall not: request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or agent who supervises, directs or regularly consults with the client concerning the matter or has authority to obligate the client with respect to the matter;

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.”
After a hearing, the Trial Commissioner found Unnamed Attorney guilty of both charges and recommended Unnamed Attorney receive a public reprimand and be suspended from the practice of law for thirty days. Unnamed Attorney appealed the decision to the Board of Governors. The Board of Governors, after conducting its own de novo review of the matter, concluded Unnamed Attorney was not guilty of either charge, by a 16-0 and 12-4 vote, respectively. We exercised our authority under SCR 3.370(8) and took review of the case. We now reverse the Board of Governors, in part.

II. ANALYSIS.

A. Unnamed Attorney did not Violate SCR 3.130-3.4(a).

As mentioned previously, SCR 3.130-3.4(a) prohibits a lawyer from *unlawfully* obstructing another party's access to evidence. Although the Trial Commissioner concluded that Unnamed Attorney had obstructed the KBA's access to evidence by committing the unlawful act of "fraud," no statute or case law was cited in support of this assertion. We have failed to identify any Kentucky statute under which Unnamed Attorney's actions could be considered fraudulent. As a result, we must look to our common-law definition of fraud for guidance.

In Kentucky, to make a prima facie claim of fraud, a party must, by clear and convincing evidence, satisfy six elements: "a) material representation b) which is false c) known to be false or made recklessly d) made with
inducement to be acted upon e) acted in reliance thereon and f) causing injury." These requirements are clearly lacking in this case.

During the negotiation, Unnamed Attorney asked Doe, outside of the presence of Unnamed Attorney's client: "What would you accept?" Doe responded, "$30,000." Unnamed Attorney took that information to his client who agreed to reimburse the $30,000 and the negotiation ended. After Unnamed Attorney's client reimbursed the estate, Doe signed the release. There was no false representation, and Doe suffered no injury. Rather, Unnamed Attorney obtained Doe's signature on the release agreement by successfully negotiating a settlement in which Doe received everything she asked for. Doe was represented by counsel who advised her to accept the settlement and to sign the release agreement. Accordingly, we adopt the recommendation of the Board of Governors and find Unnamed Attorney not guilty of violating SCR 3.130-3.4(a).

B. Unnamed Attorney Violated SCR 3.130-3.4(g).

1. The Trial Commissioner did not Err in Excluding Professor Fortune's "Expert" Testimony.

Initially, we feel it worthwhile to discuss an important point raised primarily by the KBA's brief. At the underlying hearing in this case, Unnamed Attorney offered Professor William Fortune to testify as an expert. The Trial Commissioner, finding that it needed no expert help in reading and applying the applicable disciplinary rule, did not allow Professor Fortune's testimony. Unnamed Attorney properly preserved Professor Fortune's testimony in the

5 United Parcel Serv. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999).
Indeed, Professor Fortune's testimony was paramount in attempting to convince the Trial Commissioner to construe the rule in a manner that would result in finding Unnamed Attorney not guilty. As a result, Unnamed Attorney has previously argued the Trial Commissioner acted erroneously in excluding the testimony. The KBA now argues there was no error. We agree with the KBA.

It is well settled that the Kentucky Rules of Evidence are applicable in KBA proceedings. KRE 702 specifies that "[i]f scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify." In reviewing a trial court's, in this case the Trial Commissioner's, decision to prohibit expert testimony, we look for an abuse of discretion. An abuse of discretion is only found when the "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Using this standard, we cannot say that the Trial Commissioner's decision in this case was an abuse of discretion.

The KBA and OBC, as agents of this Court, are charged with applying, and often interpreting, the Rules of Professional Conduct. This case is no different. Here, the Trial Commissioner was faced with a seemingly novel

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6 See Kentucky Rules of Evidence (KRE) 103(a)(2).
7 SCR 3.340 ("The rules of evidence applicable in civil proceedings shall apply, and the Trial Commissioner will rule on all evidentiary issues.").
8 Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 577-78 (Ky. 2000).
9 Id. at 581.
application of a rule adopted during “Ethics 2000,” the recent overhaul of our ethics rules. We fail to see how a Trial Commissioner choosing to interpret a particular rule without the aid of a proffered expert is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” We would not require a court to allow testimony of a grammar expert in the interpretation of a statute, and we see no reason to require a Trial Commissioner to do so here. And we should not foist such a requirement on triers of fact simply because we find the excluded evidence or testimony alluring.

It is indisputable that Professor Fortune is a highly respected authority in the field of legal ethics, and he was asked by this Court to play a vital role in the process of adopting Ethics 2000. In dissent, Justice Scott relies heavily on Professor Fortune’s singular expertise on our Rules of Professional Conduct. But that alone cannot be sufficient reason for a finding of abuse of discretion in a trier of fact’s decision to exclude expert testimony. Taking the dissent’s reasoning to its logical conclusion renders the abuse of discretion standard meaningless and indicates KRE 702 requires a judge to allow expert testimony when a party proffers a prominent expert, regardless of the subject. Simply put, Professor Fortune’s testimony was enlightening, but it was not mandatory, especially given the subject matter. The Trial Commissioner, as an attorney, is adequately equipped to apply the Rules of Professional Conduct. And, furthermore, the Trial Commissioner is entrusted with adequate discretion to decide whether an expert will be helpful. We find no abuse of that discretion.
and, accordingly, do not make mention of Professor Fortune's testimony in deciding the instant case.

2. The Plain Language of SCR 3.130-3.4(g) Proves Unnamed Attorney's Guilt.

We now turn to the question of whether or not Unnamed Attorney violated SCR 3.130-3.4(g). SCR 3.130-3.4(g) provides,

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

(1) the person is a relative or agent who supervises, directs or regularly consults with the client concerning the matter or has authority to obligate the client with respect to the matter;

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The structure of the rule immediately presents a concern—that is, notably, whether 3.4(g)(1) and 3.4(g)(2) are to be read in the conjunctive or disjunctive. Curiously, the rule is written in a manner that does not indicate how it should be read. The semicolon after -3.4(g)(1) is followed by neither “and” nor “or.” Before we can accurately or fairly determine if an attorney has violated a rule, we must first determine what the rule requires.¹⁰

We believe it is clear that -3.4(g)(1) and (2) are to be read in the conjunctive. Accordingly, an attorney can request a person other than a client to refrain from voluntarily giving relevant information to another party only if

¹⁰ Effective January 1, 2014, SCR 3.130-3.4(g) includes “and” following the semi-colon between paragraphs (1) and (2). However, we must interpret the rule as it read during the action against Unnamed Attorney.
the person “is a relative or agent who supervises, directs or regularly consults with the client concerning the matter or has authority to obligate the client with respect to the matter” and “the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.” This interpretation is supported by the manifest weight of the relevant evidence and commentary.

Our Rules of Professional Conduct are modeled after the American Bar Association’s (ABA) Model Rules of Professional Conduct (MRPC). Notably, MRPC 3.4(f), the model for our -3.4(g), reads as follows:

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

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information. (emphasis added).

It is telling and highly persuasive that the ABA’s Model Rules include “and.” So by the ABA’s Model Rules, a lawyer is only permitted to request a person other than a client to refrain from volunteering relevant information to another party if both subparts are satisfied. Of course, our reliance on and adoption of the ABA Model Rules makes the omission of “and” in our -3.4(g) even more curious. Nonetheless, it is undeniable that the language of the ABA Model Rules is highly persuasive.
In addition, the Commentary to -3.4(g) clearly indicates that sections (1) and (2) should be read in the conjunctive. Comment 4, particularly, sheds light on this topic:

Paragraph (g) permits a lawyer to request relatives or employees or other agents of a client to refrain from giving information to another party. Such persons may identify their interests with those of the client. . . . The lawyer must reasonably believe that the person’s interests will not be adversely affected by compliance with the request. The Rule does not require that the lawyer know or ascertain the person’s interest, but any such knowledge, communication, or other information available to the lawyer may suggest that such a belief is reasonable . . . .

This Comment provides a strong implication that the rule is to be read in the conjunctive. Importantly, the Comment speaks seamlessly about persons other than clients being requested to refrain from giving information, i.e. -3.4(g)(1), and those persons’ interests, i.e. -3.4(g)(2). It is our opinion that “and,” while omitted, was certainly intended to be included in -3.4(g).

Under this interpretation, Unnamed Attorney is guilty of violating SCR 3.130-3.4(g). Unnamed Attorney negotiated a deal in which Unnamed Attorney’s client agreed to refund the $30,000 fee in return for Doe’s agreement to withdraw her bar complaint and to refuse to cooperate voluntarily with the KBA. It is indisputable that Doe was not Unnamed Attorney’s client, nor was she “a relative or agent who supervises, directs or regularly consults with the client concerning the matter or has authority to obligate the client with respect to the matter.” So Unnamed Attorney cannot meet the requirement of SCR 3.130-3.4(g)(1). Accordingly, because -3.4(g)(1) and (2) are read in the conjunctive, Unnamed Attorney cannot satisfy the exception to the general rule.
prohibiting a lawyer from “request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party[.]” The plain language of the rule mandates this result. And when we engage in interpretation, it is a fundamental principle that when the language is unambiguous, we will apply it straightforwardly. There is no need to engage in the imprecise debate of what was intended with our passage of the rule because the language is certain. Unnamed Attorney must be found guilty under the plain language of SCR 3.130-3.4(g).

III. CONCLUSION.

We cannot place our imprimatur on settlements that attempt to obstruct the disciplinary process in any way. And it is clear the plain language of the rule requires a finding of guilt in this case. Certainly, Unnamed Attorney’s actions were not of a highly objectionable nature as undoubtedly many attorneys may engage in similar conduct outside the disciplinary context. Weighing this accordingly, we find a private reprimand is an appropriate sanction.

For the foregoing reasons, the Court ORDERS:

1) Unnamed Attorney is guilty of violating SCR 3.130-3.4(g);

2) Unnamed Attorney is not guilty of violating SCR 3.130-3.4(a); and

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11 See, e.g., MPM Financial Group, Inc. v. Morton, 289 S.W.3d 193, 197 (Ky. 2009); King Drugs, Inc. v. Commonwealth, 250 S.W.3d 643, 645 (Ky. 2008) (“[I]f a plain reading of the statute yields a reasonable legislative intent, then that reading is decisive and must be given effect.”); Commonwealth v. Steve Plowman, 86 S.W.3d 47, 49 (Ky. 2002) (“This Court has repeatedly held that statutes must be given their literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.”).
3) Unnamed Attorney is hereby privately reprimanded.

All sitting. Minton, C.J.; Keller, Noble, and Venters, JJ., concur.

Abramson, J., concurs by separate opinion. Scott, J., concurs, in part, and dissents, in part, by separate opinion in which Cunningham, J., joins.

ABRAMSON, J., CONCURRING: I concur but write separately to explain my reasoning. At adoption of this rule, I focused on the use of the words “another party” as meaning someone with whom the person being asked by the lawyer to refrain from voluntary cooperation was in active litigation, i.e., another party to the proceeding for which the request was made. I see that it can and does have broader application, as currently written, and do not have any hesitancy in applying it to this situation. Doe was the initiating party of the KBA complaint, although not technically a named party, and the client of Unnamed Attorney was the respondent. Unnamed Attorney’s request, on his client’s behalf, was a request to a party in the KBA proceeding to refrain from voluntary cooperation. Although our rules would allow for the subpoena of relevant information for “good cause” shown, SCR 3.180, we should not condone a practice that would make the disciplinary process more difficult, nor should we encourage a practice that allows attorneys to attempt to buy their way out of their misdeeds by silencing a party who has initiated a KBA complaint. As for the broader application of this rule in other contexts, I think this case and the issues it has raised establish the need for further evaluation of the rule by this Court.
SCOTT, J., CONCURRING IN PART AND DISSENTING IN PART:

Although I agree with the majority’s points that Unnamed Attorney did not violate SCR 3.130-3.4(a) and that SCR 3.130-3.4(g) should be read to include the conjunctive “and” between subsections (1) and (2), I must strongly disagree with the majority’s extension of SCR 3.130-3.4(g) to settlements.

Moreover, given Professor William Fortune’s unique role with this Court in its consideration of -3.4(g) (and the rest of the voluminous “Ethics 2000” rule changes), his heading up of the KBA Rules Hearing for the Court and explaining the meaning of the “Ethics 2000” rules, and his subsequent leadership role in explaining the rules to the Kentucky Bar during the Kentucky Law Updates, I believe it was an abuse of discretion, in this instance, for the trial commissioner to have disallowed Professor Fortune’s testimony. In this rare and unique instance, it would not have hurt for the commissioner to have listened to the “leader of the parade.”12

Thus, I will first address the majority’s exclusion of Professor Fortune’s testimony regarding how the particular Rule at issue was formulated and should be interpreted and applied.

Admittedly, KRE 702 provides that an expert witness may testify “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” And, typically, as the

12 That is not to say that he had to accept it, but it did give the context surrounding the adoption of this rule.
finder of fact in KBA actions is the trial commissioner, under normal circumstances, expert testimony on the legal meaning of a rule would not be necessary. Yet, the circumstances here were very different.

In this case, the opinions of Professor Fortune were relied on heavily by this Court—and the Bar—in the “Ethics 2000” rule-making process SCR 3.130-3.4g was a part of. Here with his in-depth knowledge of these rules and their history, context, and intent, Professor Fortune helped this Court and the Bar come to a better understanding of the rules’ meanings before they were adopted. The problem we must grapple with now is that the meaning of -3.4(g), as interpreted by the majority, is not the one we thought it was. Thus, there is a matter of equity at play here, too.

Thus, in this very unique and particular instance, I believe it was error to exclude the testimony of Professor Fortune, as his testimony and recollection was necessary for a full understanding of the rule as presented—and how it was presented—in the “Ethics 2000” rule hearing as well as the later adoptive process. Plainly, this Court relied heavily on Professor Fortune in the formulation of these rules—and even relied on him to “sell” the changes to the

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13 “Ethics 2000” was a massive undertaking to make material changes to the ethics rules of the Kentucky Supreme Court. The process was lengthy, and the proposed changes did not become available for comment until 2008. The final version of the changes went into effect in July of 2009.

14 The “Ethics 2000” rules changes were so massive, it is not an exaggeration to describe Professor Fortune as having been not only the Court’s advisor on the implementation of the Ethics 2000 rules vetting process, but also the Court’s salesman for the changes to the Kentucky bar. It is for this reason that this is indeed a very unusual case involving the applicability of expert testimony as to the intended scope of a particular rule.
bar. Yet, the majority now feels it would have been improper for the trial commissioner to have listened to the very person this Court entrusted to explain its meaning.

Next, I will address the majority's analysis of SCR 3.130-3.4(g). As previously stated, I agree that the majority correctly reads the rule in the conjunctive. However, I do not agree that Unnamed Attorney is guilty under this construction. Unnamed Attorney argued to the Board of Governors—and I agree—that -3.4(g) was not intended to apply to confidentiality and non-cooperation provisions in the context of settlement agreements; and had it been so intended, no reasonable notice was given to the attorneys in Kentucky indicating that it would be so applied. Because confidentiality and non-cooperation provisions are customary in settlement agreements, applying this rule to those agreements (which by nature restrict the free flow of discoverable information) will have unintended effects.

Suppose, for example, that one plaintiff in a tort action with national implications wants to settle her case. The defense presents her with an agreeable settlement offer and she signs a settlement agreement that includes a confidentiality provision which prohibits her and her attorney from voluntarily disclosing the terms of the settlement to other plaintiffs, as well as the evidence discovered in the action, and requires the return of all discovered documents and their copies. Under the interpretation advanced today, the defense attorney who proposed the settlement agreement would be subject to
Thus, given the ubiquitous nature of confidentiality and non-cooperation provisions in settlement agreements of this type, I begin with the assumption that -3.4(g) was not intended to apply to them. And this was the way -3.4(g) was presented.

This position is supported by the avowal testimony of Professor Fortune in the proceedings below. Although substantial in volume, I find Professor Fortune's testimony highly relevant to my point and therefore reproduce it below:

[Question]: Professor Fortune . . . [b]ased upon your training and experience and the qualifications that you have previously espoused and as contained in your résumé, do you believe that -3.4(g) was intended to apply to a settlement where the language suggests or requires the parties to the settlement to not supply information to a third party?

[Professor Fortune]: No. . . .

ABA [Model Rule] 3.4(f) [from which SCR 3.130-3.4(g) was modeled] is a rule that the ABA promulgated to deal with a situation in which lawyers instruct witnesses not to cooperate with the other side, particularly acute in criminal cases, defense counsel often suspects the prosecutor of telling prosecution witnesses not to talk to defense counsel. Prosecutors often suspect defense counsel of the same thing.

Such a complaint would not come from the settling plaintiff, but from the next plaintiff who faces such a denial or lack of access due to the original settlement agreement.

Professor Fortune teaches Professional Responsibility (among other courses) at the University of Kentucky College of Law. He is a past member of the Kentucky Bar Association committee on the Model Rules of Professional Conduct and helped with the drafting and implementation of the Rules; a past member of the KBA Ethics and Professionalism committee; co-author of *Modern Litigation and Professional Responsibility Handbook: The Limits of Zealous Advocacy* (2d ed., Aspen 2000); author of several articles on the topic of legal ethics and professional responsibility; and has testified as an expert witness in several cases involving alleged professional misconduct.
So the rule was structured in such a way to say you can’t put the witnesses—unless they are employees or relatives—you can’t put the witnesses out of bounds to the other side by instructing them not to cooperate. And that’s the context in which that rule has always, to my knowledge, been applied.\[17\]

I find no authority for the proposition that that rule, as promulgated by the ABA, and certainly as adopted by the Supreme Court of Kentucky, was intended to apply to provisions in a settlement between parties, in this case [Unnamed Attorney]’s client and the Complainant, in which money is paid and a condition of that payment is, as in this case, confidentiality and a dismissal of a complaint.

I find no authority for that proposition, and the reasons that I do not think that our Supreme Court intended that are manifold. First, that the rule while on its face could be deemed to apply, the context in which this rule is applied is always one in which the people who are being advised or people who are being told not to cooperate are characterized as witnesses, telling a witness not to cooperate with the other side. It’s never been described, that I can find, in the context of requiring a party to a settlement not to cooperate with a disciplinary authority.

So the context in which this rule was presented to the Court is one in which the entire background, if you will, was one involving witnesses to an event. There’s nothing in the Ethics 2000 Committee report that indicates that the drafters of the committee contemplated that this would be pro—would be applied to settlements.

I didn’t think of it as applied to settlements, so in the presentations I made to members of the Bar [at the 2007 and 2009 Kentucky Law Updates and as Chair of a hearing at the 2008 Kentucky Bar Convention, among other events], I didn’t say anything about settlements. I described the obvious situation where the question is whether or not you’re telling a witness not to

\[17\] This is consistent with our decision in *Radford v. Lovelace*, 212 S.W.3d 72, 83 (Ky. 2006) overruled on other grounds by *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009). (“The evidence is in line with the case law of other jurisdictions in which the courts have held that unless the contact with the witness wrongfully threatens or prejudices the other side’s ability of discovery, preparation, or presentation, there is no violation.”). *Lovelace* dealt with a perceived interference with witnesses in a criminal investigation.
cooperate or simply informing them that they have a right not to talk, and that's the—that's been the rub in these cases.

Furthermore, and I really stress this, I believe that at that public hearing where members of the [Supreme Court Rules] [C]ommittee were present and I stimulated discussion of this particular rule, that if the members of the committee had contemplated that this rule would ever be applied to provisions in a settlement, they would have spoken up, because application of this rule to provisions in a settlement implicates not only noncooperation agreements, it implicates confidentiality agreements as well.

And if what was intended was to, in effect, say that if you're settling a civil case that you cannot impose upon—in most instances, the plaintiff—a confidentiality agreement, if the effect of that is to shut the plaintiff up in communicating with plaintiffs who are similarly situated, I would suggest to you that there are probably confidentiality agreements being drafted today which would violate this rule as the Bar Counsel is interpreting it.

And so I think the ramifications of application of this rule to provisions in a settlement in a civil case are very far reaching, and there's been no notices to the Bar that that is the position of Bar Counsel.

I think that there is an argument that perhaps confidentiality agreements, noncooperation agreements, and so on, should be impermissible, but if that's the argument, let it come in the form of a Supreme Court Rule with an opportunity for comment, because it's just fundamentally unfair to lawyers who are settling civil cases to have this trap sitting out there for them.

So I feel strongly that this is something that needs to come before the Court, and it needs to come before the Court prospectively, not in an appeal from an ethics matter.

In other words, that the—and if Bar Counsel feels strongly about this—that they ought to make the suggestion to the Court that you take this up and that you have a rule which speaks specifically on the matter, but not to do it in the context of disciplining a lawyer.

Also informative is a report prepared by Professor Fortune summarizing his interpretation of SCR 3.130-3.4(g). That report provides, in relevant part:
While it is for the Supreme Court to say what the rule means, the legislative history and secondary authorities do not support the proposition that the rule was intended to apply to non-cooperation agreements contained in settlements.

1) While the language of the rule refers to requesting persons to refrain from giving information, the focus of the rule has always been on requesting witnesses—non-parties—to refrain from giving information to the opposing party. The rule does not put lawyers on notice that it applies to a provision in a settlement agreement that the parties not voluntarily provide information to a disciplinary authority.

2) There is nothing in the Ethics 2000 report that indicates that the committee contemplated that the rule would apply to a settlement. Those dissenting from the adoption of the ABA rule use the word "witnesses" in describing the proposed application of the rule.

3) I chaired the Supreme Court’s public meeting at the 2008 Bar Convention. Because there was a dissent in the committee report, there was considerable discussion of proposed rule 3.[4](g). A representative of the majority spoke in favor and a representative of the dissenters spoke against; there were comments from the floor; and there was no spoken recognition that the rule, if interpreted literally, might be applied to provisions in settlements. The debate at the convention centered on the difficulty in distinguishing between requesting a witness not to cooperate with the opposing party and informing the witness that the witness need not cooperate with the opposing party. It is my opinion that the drafters of Rule 3.[4](g) did not intend the rule to be applicable to settlements. They were present at the public hearing and would have spoken up to inform the bar, had that been their intent.

4) There is nothing in the leading secondary authorities to support the proposition that ABA Model Rule 3.4(f) (and the state rules based thereon) applies to provisions in settlements. In Hazard and Hodes, The Law of Lawyering, the applicable section (30.12) is titled “Advising a Witness Not to Speak to Opposing Parties.” In the ABA/BNA Lawyers’ Manual on Professional Conduct, the section is titled “Dealing with Witnesses,” the text stating that “Except in that limited situation, it is improper to request that a witness not talk to counsel for the opposing party.” (61:715).
See also Restatement of the Law of Lawyering, sec.116. There is nothing in the text or examples in these authorities that indicates that the authors contemplated that the rule would be applied to a provision in a settlement agreement.

5) An all-states Westlaw search . . . yields only one case in which a state's version of 3.4(f) was applied to a settlement provision; in that case the lawyer being disciplined was the defendant in a civil case brought by the client. *In re Walsh*, 182 P.3d 1218 (Kan. 2008). . . .

6) Application of 3.4(g) to settlements potentially affects confidentiality agreements. A confidentiality agreement requires a party not to voluntarily reveal information to other persons. In the context of mass torts, the “other persons” are often parties to lawsuits against the settling defendant. Application of 3.4(g) to settlements may thus have far reaching and unanticipated consequences.

7) Fair notice to the practicing bar requires that application of SCR 3.130-3.4(g) to settlement provisions should come by way of a comment to the rule (or amendment of the rule) by the Supreme Court after notice to the bar and an opportunity for litigating lawyers to provide input to the Court.

In light of this overwhelming avowal testimony, and based on my own participation, observations, and interpretation, I agree with Professor Fortune and would hold that SCR 3.130-3.4(g) was not intended to apply to confidentiality and non-cooperation provisions in settlement agreements. I would, therefore, find Unnamed Attorney not guilty of violating SCR 3.130-3.4(g). Moreover, on the equities, I don't believe we should seek approval of a rule on the basis it is one thing and then penalize Kentucky attorneys by now holding it is something else! If for no other reason, equity should have a play here.
For the foregoing reasons, I concur in part and dissent in part, and would find Unnamed Attorney not guilty of violating SCR 3.130-3.4(a) and -3.4(g).

Cunningham, J., joins.

ENTERED: December 19, 2013.

[Signature]
CHIEF JUSTICE
Secrecy is one of the most powerful weapons used to prevent consumers, employees, and injury victims from having their day in court because it hinders our ability to identify threats to public health and safety and hold wrongdoers accountable. As Justice Brandeis noted, “[s]unlight is the best of disinfectants,” yet we’re finding that the prevalence of over-broad protective orders and secret settlements has increased dramatically in the past few years.

Public Justice has a litigation project that is dedicated solely to exposing and preventing unwarranted court secrecy. The Court Secrecy Project is aimed at unsealing evidence of corporate wrongdoing that is unearthed in litigation, opposing overbroad protective orders and the sealing of court records, and educating the public about the dangers of litigation conducted behind closed doors. For example, we recently represented the Center for Auto Safety in defeating Cooper Tire Company’s efforts to seal the transcript of a public trial in which an Iowa jury concluded, based on evidence that Cooper was aware of dangerous defects in its tires, that Cooper was 100 percent at fault for a fatal rollover crash. We also represented the medical journal *PLoS Medicine* in obtaining public access to volumes of discovery material involving drug giant Wyeth Pharmaceutical’s routine failure to disclose its role in preparing medical studies and articles touting its hormone replacement therapy drug as safe when—in fact— independent studies proved that the drug was deadly.

What we’ve learned from litigating these types of cases is that, not only is the law extremely favorable to opponents of court secrecy, but also that courts understand and value the importance of a transparent judicial system. However, all too often, plaintiffs’ attorneys simply agree to overbroad protective orders, sealing orders, and secret settlements in order to “get on with” the litigation, minimize motion practice, or extract some perceived short-term strategic advantage. It doesn’t have to be this way.

This article offers five “DOs” and “DON’Ts” at each stage of litigation—from discovery through settlement—that plaintiffs’ counsel can use to push back against defendants who insist

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1 This article was originally published in the Summer 2012 American Association for Justice Products Liability Section Newsletter and is made available here with permission from AAJ.


on secrecy when it’s not warranted. As you will see, the law is on your side. Courts have been very responsive to challenges that seek to curtail unwarranted secrecy, but the onus is on the plaintiffs’ bar to help ensure that secrecy orders once again become the exception and not the norm.

**Five Dos & Don’ts During Discovery**

Undoubtedly the defendants will be all too happy to send you their standard boilerplate protective order. But you can resist such a stipulation on the ground that it is an end-run around the Rule 26 “good cause” requirement for protective orders. Alternatively, you can seize control of the situation and propose your own protective order rather than trying to improve on the defendant’s version, and the end document will be more likely to include the terms that are important to you. While there are several kinds of terms that merit discussion, we’ve identified what we believe are the most universally important terms to insist on—or avoid.

1. **DO make the proponent of secrecy demonstrate “good cause” under Rule 26.**

Under Rule 26 of the Federal Rules of Civil Procedure (and many state court counterparts), a party may publicly disseminate materials produced during discovery so long as there is no protective order directing otherwise. Many defendants, however, will insist on a blanket protective order during discovery in an attempt to keep all information exchanged confidential. You can avoid stipulating to such an order because Rule 26 requires the defendant to show “good cause” to keep discovery material confidential. Indeed, even if the parties have stipulated to the protective order, Rule 26 does not permit a court to enter the order unless it finds “good cause” to do so. In order to allow appellate review of its discretion, the court must

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5 See, e.g., *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) (“As a general rule, the public is permitted ‘access to litigation documents and information produced during discovery.’”) (quoting *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002)); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 857 (7th Cir. 1994) (“Absent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit.”); *Public Citizen v. Liggett Group*, 858 F.2d 775, 790 (1st Cir. 1988) (“It is implicit in Rule 26(c)’s ‘good cause’ requirement that ordinarily (in the absence of good cause) a party receiving discovery materials might make them public.”), cert. denied, 488 U.S. 130 (1989); *Oklahoma Hosp. Ass’n v. Oklahoma Pub. Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984) (“[P]arties to litigation have a constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order”); *National Polymer Products, Inc. v. Bog-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981) (“The discovery rules themselves place no limits on what a party may do with materials obtained in discovery.”).

6 FED. R. CIV. PROC. 26(c).

7 See, e.g., *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) (noting that district court order denying motion to intervene was improper where district court failed to apply good cause requirement to individual documents under a blanket stipulated protective order); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (cont’d on next page)
lay out the factors it relied upon in the good cause determination, and in some jurisdictions must cite to specific factual findings.

Mere convenience alone does not satisfy the “good cause” standard. Rather, proponents of secrecy are required to make fact-based demonstrations of the precise harms that would result if a particular discovery document or set of documents were made publicly available. This harm “must be significant, not a mere trifle.” In short, a proponent of secrecy can and should be put to its proof that there is “good cause” for secrecy in any given case.

2. **DON’T agree to no-sharing or “return or destroy” provisions.**

Defense counsel push protective orders in large part to quell collaboration and cooperative discovery efforts amongst plaintiffs’ counsel litigating similar cases. However, the law favors sharing. Indeed, many courts to address the issue have explicitly authorized (and even encouraged) the sharing of discovery between litigants in different cases. As one court

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10 *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 343 (3d Cir.), cert. denied, 484 U.S. 976 (1987) (“The magistrate’s rationale that entry of the protective order would facilitate and streamline this litigation is not sufficient ‘good cause’ under Rule 26(c).”).
11 See, e.g., *Foltz*, 331 F.3d at 1130 (“A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted.”); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (“‘Good cause’ is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice.”); *Pansy*, 33 F.3d at 787–91 (same; also setting forth various factors that may be considered in weighing good cause balance); *Anderson v. Cryovac*, 805 F.2d 1, 7 (1st Cir. 1986) (“A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements.”) (citing 8 C. Wright & A. Miller, Federal Practice & Procedure § 2035, at 264–65 (1970)).
12 *Cipollone*, 785 F.2d at 1121 (citing *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982)).
13 See, e.g., *United Nuclear Corp. v. Cranford*, 905 F.2d 1424, 1428 (10th Cir. 1990) (agreeing with other appellate courts that information sharing should be permitted).
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aptly noted, “there is no merit to the all-encompassing contention that the fruits of discovery in one case are to be used in that case only.”

Likewise, if you’re suing a company that is involved in many lawsuits, the defendant will almost certainly try to include a term in the protective order requiring you to return or destroy all discovery materials subject to the order at the end of the litigation. However, in the event government authorities or other private litigants may be interested in “confidential” information produced in the case, that information should not be destroyed. To that end, an ABA resolution states: “No protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order.” In addition, some attorneys have successfully insisted on retaining complete client files, at least through the statute of limitations for malpractice actions, which in some jurisdictions is required by the rules of professional conduct.

3. **DO** define “confidential materials” as narrowly as possible and insist on a mechanism for challenging confidentiality designations.

   Defendants frequently insist on blanket protective orders that allow them unilaterally to designate any document as “confidential,” but you should resist any language that gives complete carte blanche to the producing party to make this designation at its own unbridled discretion. At the very least, the protective order should state that a party may only designate a document as “confidential” where the party believes in good faith that “good cause” exists under Rule 26 for protecting the information from public disclosure.

   In addition, the protective order must have a clear procedure for challenging any confidentiality designation – and, crucially, that the proponent of secrecy has the burden of demonstrating to the court the need for secrecy. In the words of the *Cipollone* Court, any other approach “would turn Rule 26(c) on its head.” Thus, in the event of a disagreement over a

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15 ABA Blueprint for Improving the Civil Justice System; Report to the American Bar Association Working Group on Civil Justice System Proposal, 74 (American Bar Ass’n 1992).

16 See, e.g., Rule 4-1.15(j) of Missouri Rules of Professional Conduct (available at http://www.law.cornell.edu/ethics/mo/code/MO_CODE.HTM) (providing that a lawyer shall not destroy a client’s file if s/he knows or reasonably should know “a criminal or other governmental investigation is pending related to the representation,” if “other litigation” is pending related to the representation, or if the file has “intrinsic value”).

17 *Cipollone*, 785 F.2d at 1122; see also *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (“Under the provisions of umbrella orders, the burden of proof justifying the (cont’d on next page)
confidentiality designation, the document in question loses its confidential status unless the producing party obtains a court ruling that the information is entitled to protection. Under such an approach, a plaintiff who opposes a confidentiality designation need only voice an objection, and then the defendant will have the burden of moving for court-ordered protection over a specific document or set of documents.

4. **DON’T accept that everything designated a “trade secret” really is a trade secret.**

Perhaps the most common ground used by defendants as a basis for designating a discovery document “confidential” is that the document contains trade secrets. Prior to making this designation, a defendant is supposed to “make ‘specific demonstrations of fact, supported where possible by affidavits and concrete examples,’ demonstrating that disclosure will result in clearly defined and very serious injury to its competitive and financial position.” Defendants often skirt this required showing, and plaintiffs’ attorneys too often defer to unsupported “trade secret” designations when—in fact—the information produced either affects the public health, or involves matters of general knowledge within a particular industry—neither of which are considered to be “trade secrets” under the law.

Moreover, even where trade secrets are contained in a discovery document, courts “have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed the[] claim to privacy against the need for disclosure.” In short, just because the producing party alleges that a discovery document should be designated “confidential” on the basis that it contains a trade secret does not mean that you should accept this as so.

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need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party.”).  

18 See, e.g., McCarthy v. Barnett Bank of Polk County, 876 F.2d 89, 90 (11th Cir. 1989) (approving protective order that “allows the producing party to designate a document confidential unless the other party objects,” and in the event of an objection, allows the producing party to move the court for a ruling or concede the objection); In re Alexander Grant, 820 F.2d at 354 (approving protective order that provides that once a notice of objection to a confidentiality designation was received, the producing party had ten days to apply to the district court for a ruling to keep the material confidential).


20 See, e.g., Garcia v. Peeples, 734 S.W.2d 343, 348 n.4 (Tex. 1987) (information on matters affecting the public health are not “trade secrets”); see also Smith v. BIC Corp., 869 F.2d 194, 199-200 (3d Cir. 1989) (information involving matters of generally knowledge within a particular industry not considered “trade secrets”).

21 Smith, 869 F.2d at 199.
5. **DO use the public interest to your advantage.**

Even if the party requesting a protective order establishes that the material it seeks to protect rises to the level of a trade secret or other legitimate basis for confidentiality, this does not end the inquiry. In fact, some courts will still deny confidentiality designations after finding that the public’s interest in access outweighs the need for secrecy.22 As Judge Posner once noted, “[t]he judge is the primary representative of the public interest . . . . He may not rubber stamp a stipulation to seal the record.”23 If your case involves issues affecting public health or safety, or could expose other types of corporate wrongdoing that the public has a strong interest in knowing, you should urge the court to consider the public’s interest in accessing the discovery materials produced before allowing the defendant to shield the material from public inspection.

### Five Dos & Don’ts to Avoid the Sealing of Court Records

An even higher burden applies for sealing court records, which includes pleadings filed with the court, court orders, minute entries, hearing transcripts, trial exhibits, and even discovery materials filed with the court as attachments to dispositive motions.24 With respect to this category of documents, the proponent of secrecy must demonstrate that sealing is warranted under both the federal common law and the First Amendment to the U.S. Constitution, which serve as independent grounds for challenging secrecy orders.

This means that, in some circumstances, even if a defendant is able to demonstrate “good cause” to keep a document confidential during the discovery phase of litigation, once that discovery document is either filed with the court as an attachment to a dispositive motion or used as a trial exhibit, it is treated as a “court record” and is subject to the more exacting standards of

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22 *In re Roman Catholic Archbishop*, 661 F.3d at 424; *see also Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005) (“[A] court always must consider the public interest when deciding whether to impose a protective order.”); *Glenmede Trust*, 56 F.3d at 483 (“[T]he analysis [of good cause] should always reflect a balancing of private versus public interests.”); *see, e.g., Ayyad v. Sprint Spectrum, L.P.*, 2009 WL 2197276, at *6 (Cal. Ct. App. July 24, 2009) (concluding that the “ultimate issue before the trial court” was not whether documents should be sealed because they contained trade secrets, but rather “whether [the producing party’s] interest in protecting its trade secret information outweighed the public’s constitutionally-protected interest in access to civil trial proceedings and overcame the presumption of public access”); *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 298 (Cal. Ct. App. 2002) (“The mere presence of a claimed trade secret does not carry a mandatory confidentiality requirement.”).


24 Although the Rule 26 “good cause” standard applies to unfiled discovery materials and discovery materials filed with the court as attachments to non-dispositive motions, when discovery material is attached to a dispositive motion (most often a motion for summary judgment), that material is treated as a court record for the purposes of determining the public’s right of access. *Foltz*, 331 F.3d at 1135.
the federal common law and First Amendment. It is therefore important to recognize that the answer to the question of whether confidentiality is warranted with respect to any particular document depends on the stage of litigation and how that document will be used.

1. **DO require defendants to meet the more stringent standards under the federal common law and First Amendment to seal court records.**

   We often challenge sealing orders under both the federal common law and First Amendment even though the analyses are similar and courts that reach one of the challenges often decline to address the other. Both types of challenges taken together, however, demonstrate an extremely compelling case for public access, and we urge you to consider this approach when faced with a motion to seal court records.

   Under the federal common law standard for sealing court records, courts begin with a “strong presumption in favor of [public] access” when determining whether a particular court record should be shielded from public view. This presumption of access can be overcome only if the proponent of secrecy demonstrates “compelling reasons” for secrecy that are supported by “specific factual findings.” The standard is a stringent one: “compelling reasons” justifying secrecy have been found where disclosure of court records would result in “improper use of the material for scandalous or libelous purposes” or “infringement upon trade secrets,” but not much beyond that.

   The First Amendment places similar restraints on secrecy. The public’s right of access to court records under the First Amendment can be overcome only by “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” As is the case with the federal common law standard, this is a high threshold that is not easily met, as proponents of secrecy must identify specific reasons why secrecy is warranted, and must also demonstrate that any available alternatives to public access would not adequately protect their interests. However, only the Second, Third, Fourth, Sixth, and

25 Because of these different standards, a discovery protective order should not address sealing of exhibits at trial. Any such determination should be expressly reserved for trial.

26 *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1194-95 (9th Cir. 2011) (citations omitted).

27 *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006); see also *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005) (“[O]nly the most compelling reasons can justify the non-disclosure of judicial records.”); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 11 (1st Cir. 2002) (applying compelling reasons standard to request to seal court records); see generally *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (“Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.”).

28 *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

29 *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984).

Seventh Circuits have conclusively recognized a First Amendment right of access to court records in civil proceedings, 31 and the issue remains open in other jurisdictions. 32

2. **DO utilize the standards promulgated by the Office of U.S. Courts.**

   In addition to the federal common law and First Amendment, the Office of U.S. Courts recently promulgated another tool for fighting unwarranted court secrecy in its Judicial Conference Policy on Sealed Cases. 33 The Policy is useful in situations where an entire case file has been sealed, which the Office of U.S. Courts describes as an act of “last resort.” 34 More specifically, the Policy states that sealing an entire case file should only occur when “required by statute or rule,” or when “justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives (such as sealing discrete documents or redacting information).” 35 The Policy further provides that “[a]ny order sealing a civil case [must contain] findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule.” 36 Finally, the policy dictates that in the event an entire case file is sealed, that seal should be “lifted when the reason for sealing has ended.” 37

   Although not binding on courts, the Policy is “at the very least entitled to respectful consideration,” 38 and should be brought to the court’s attention whenever you are faced with a request from an opposing party to seal the entire court file or when you need to access court records in a sealed case.

3. **DON’T agree to seal court records merely because a defendant will be embarrassed.**

31 See, e.g., Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006); Virginia Dept. of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004); Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); Publicker, 733 F.2d at 1070; Brown & Williamson Tobacco Corp., 710 F.2d 1165, 1177 (6th Cir. 1983).

32 See, e.g., Webster Groves Sch. Dist. v. Pulitzer Pub. Co., 898 F.2d 1371, 1374 (8th Cir. 1990) (“We find it unnecessary to our decision in this case to decide whether there is a First Amendment right of access applicable to civil proceedings.”); San Jose Mercury News, 187 F.3d at 1102 (“We leave for another day the question of whether the First Amendment also bestows on the public a prejudgment right of access to civil court records.”).


34 Id.

35 Id.

36 Id.

37 Id.

A desire to avoid public scrutiny of alleged wrongdoing or embarrassment is not a sufficient legal basis for sealing court records. As the Ninth Circuit has explained, “[t]he mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.”\(^3^9\)

Often times, defendants will claim that a particular document should be protected on grounds that it will “embarrass” them. However, because any unintended release of information may tend to embarrass, “embarrassment” should justify sealing court records only when the embarrassment is “particularly serious,” and the defendant can otherwise satisfy the standards set forth by the federal common law and First Amendment.\(^4^0\) Further, because embarrassment is ordinarily associated with non-economic harm—i.e., bad feelings—it is “especially difficult” for a business enterprise or other corporate defendant to show embarrassment sufficient to merit a protective order.\(^4^1\) A broad, general claim of injury to reputation cannot suffice to show embarrassment; rather, the business must make a specific showing of the significant economic harm it would suffer from disclosure.\(^4^2\)

4. **DO demand that court records be unsealed immediately once the court rules that secrecy is not warranted.**

Court records are public by default. As soon as the court determines that there is no longer any valid basis for continued secrecy, the “default posture of public access prevails” and the court should immediately release improperly-sealed court records back into the public domain.\(^4^3\) In one case, after a district court had ordered all documents to be sealed without requiring the proponents of secrecy to demonstrate that sealing was warranted under the law, the Ninth Circuit vacated the order and noted that “ordinarily, documents sealed under an unconstitutional order would be released immediately.”\(^4^4\) However, noting that the parties may have filed certain documents in reliance on a protective order that had been entered in the case, the court gave the parties a mere three days to provide such “sufficiently specific . . . document-

\(^3^9\) Foltz, 331 F.3d at 1136; see also Phase II Chin, LLC v. Forum Shops, LLC, 2010 WL 2695659, at *2 (D. Nev. July 2, 2010) (“The mere suggestion that embarrassing allegations . . . might harm a company commercially if disclosed in publicly available pleadings does not meet the burden of showing specific harm will result.”).

\(^4^0\) Cipollone, 785 F.2d at 1121.

\(^4^1\) Id.

\(^4^2\) Id.

\(^4^3\) Kamakana, 447 F.3d at 1181-82; see also Lugosch, 435 F.3d 110, 126 (2d Cir. 2006) (noting that the circuit courts “emphasize the importance of immediate access where a right to access is found”); Grove Fresh, 24 F.3d at 897 (“[O]nce found to be appropriate, access should be immediate and contemporaneous.”).

\(^4^4\) Associated Press v. U.S. District Court for Central District of California, 705 F.2d 1143, 1147 (9th Cir. 1983).
by-document” justification for continued secrecy. The amount of time—if any—that should
pass before court records are released to the public will vary based on the particular
circumstances of your case, but should be measured in days—not weeks or months—unless the
proponent of secrecy can obtain an order staying the case pending an appeal of the unsealing
order.

5. **DO identify any public health or safety issues implicated by the sealed records.**

Courts uniformly hold that the public’s interest in access to court records is strongest
when those records concern issues of public health or safety. In one case, a district court had
sealed court records involving the content of tar and nicotine in various brands of cigarettes. The
Sixth Circuit vacated the sealing orders, emphasizing that the public had a particularly strong
interest in the court records at issue because the “litigation potentially involves the health of
citizens who have an interest in knowing the accurate ‘tar’ and nicotine content of the various
brands of cigarettes on the market.” Another court noted, in granting a motion to unseal court
records in an unrelated case, that “the ‘greater the public’s interest in the case the less acceptable
are restraints on the public’s access to the proceedings.’” Because courts are especially loathe
to enter sealing orders in cases involving public health and safety, it is important that you
identify for the court any such issues implicated by your case and how secrecy might exacerbate
the problem by keeping the public in the dark.

**Five Dos & Don’ts at Settlement**

Secret settlements can take many forms. A defendant may be most concerned that
discovery materials revealing evidence of wrongdoing are returned to the company; another
defendant may be focused on preventing publicity about the amount of money it was willing to
pay to settle a case where it denied any wrongdoing. For many reasons, including a defendant’s
desire to keep its wrongdoing a secret to avoid future liability, your client’s silence may be worth
a great deal.

Given attorneys’ duty to abide by our client’s settlement decisions, it may seem difficult
to counsel a client to turn down a financially advantageous offer in exchange for silence. But
there are some things you can do to help ensure that by settling a case, you won’t be helping a
repeat wrongdoer avoid liability in future cases.

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45 *Id.*

46 *Brown & Williamson Tobacco Corp.,* 710 F.2d at 1180-81.

47 *United States v. General Motors*, 99 F.R.D. 610, 612 (D.D.C. 1983); *see also In re Air Crash at Lexington, Ky., August 27, 2006*, No. 5:06-CV-316-KSF, 2009 WL 1683629, at *8 (E.D. Ky. June 16, 2009) (denying a motion for a protective order; noting that the “public has an interest in
ascertaining what evidence and records the . . . Court [has] relied upon in reaching [its]
decisions,” and that “the public interest in a plane crash that resulted in the deaths of forty-nine
people is quite strong, as is the public interest in air safety”).
1. **DO** talk to your client in advance about secrecy.

Chances are, at the beginning of the case, your client was primarily interested in holding the company accountable and even making sure the same thing doesn’t happen to anyone else—at least as much as winning damages against the defendant. Many attorneys have adopted the practice of discussing secrecy with clients early on in the attorney-client relationship. The conversation could begin with a discussion of whether the harm to your client could have been avoided if only your client had access to information about the harm and could have made different decisions or could have taken extra precautions. Perhaps it was because the defendant bought silence in a past case that your client was injured.

While it is likely unethical to ask a client to prospectively waive her right to enter into a confidential settlement, some law firms do include a term in their retainer agreements specifying that neither lawyer nor client presently intends to enter into a secret settlement, if only as a basis for later discussion during settlement negotiations.

2. **DON’T** forget that a settlement agreement filed with the court is a public record.

While some settlement agreements have the same status as a private contract, a settlement agreement filed with the court is presumptively a public record just like any other court document. A settlement agreement may be filed with the court for any number of reasons. The obvious example is where the court retains jurisdiction to enforce legal rights or duties embodied in the agreement, such as injunctive relief. But whatever the reason, the public has a presumptive right of access to court records, and thus the same arguments discussed above with respect to sealing of court records applies equally to settlement agreements filed with the court.

Critically, the mere fact that a case is settling is not sufficient grounds for sealing a court record. As numerous courts have held, “the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public’s common law right of access.”

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49 Bank of Am. Nat’l Trust & Savings Ass’n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 343–44 (3d Cir. 1986) (“[A] motion or a settlement agreement filed with the court is a public component of a civil trial.”).

50 See Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002) (“Whatever the rationale for the judge’s participation in the making of the settlement in this case, the fact and consequences of his participation are public acts. He was not just a kibitzer. But even if he had been, judicial kibitzing is official behavior. The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.”)

51 Hotel Rittenhouse, 800 F.2d at 346 (“Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the...”)
public, and the [parties] are in no position to bargain that away” as a condition of settling a case.52

Some plaintiffs’ lawyers have succeeded in using the public interest to essentially shame a defendant into backing down on its insistence on a secret settlement. These advocates argue that by staying silent about their clients’ experiences, they would become accomplices, helping the defendant continue to perpetrate fraud or sell a product it knows is hazardous. Examples of this abound: Firestone Tires was aware of a defect in its product that was responsible for at least 80 deaths and 250 injuries, but concealed the evidence from the public for years through confidential settlement agreements.53 The Boston Archdiocese concealed child sex abuse cases from the public for over a decade through the use of confidential settlement agreements.54 And BIC concealed the dangers of its lighters through secret settlements and millions of dollars in payouts so no one would know that the lighters were linked to ten deaths and were so unsafe they didn’t meet the industry’s own safety standards.55 It also can’t hurt to remind the defendant that the only way to truly protect its reputation is not to swear everyone to silence, but to change its own behavior and stop engaging in the conduct that gave rise to this lawsuit in the first place.

3. **DO** insist that the settlement comply with your state’s statutes, court rules, and ethics rules.

   Several states have adopted “Sunshine in Litigation” laws that impose limitations on courts’ ability to approve secret settlements or declare settlements that hide information critical

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52 _San Jose Mercury News_, 187 F.3d at 1098.


to public health or safety unenforceable for public policy reasons. The defendant should not be able to require you to agree to a secrecy term that would be unenforceable under state law.

Your jurisdiction’s rules of civil procedure and/or your local court rules may also have helpful provisions on secret settlements. For example, the District of South Carolina’s Local Civil Rule 5.03(E) provides that “No settlement agreement filed with the Court shall be sealed.” The state’s Rule of Civil Procedure 41.1 likewise provides that any proposed settlement agreement submitted for the court’s approval “shall not be conditioned upon its being filed under seal.” The rule requires the court to consider whether there are alternatives other than sealing that would protect the parties’ interests, and whether sealing would best serve the public interest. In one case, where plaintiff’s counsel objected to the inclusion of a confidentiality clause in a release, the district court removed the secrecy term and enforced the settlement without it, citing these rules.

Even if you are entering into a private settlement and will not seek court approval, attorneys’ actions are always subject to scrutiny under the rules of professional conduct. These rules can be helpful to plaintiffs’ attorneys seeking leverage for resisting secrecy terms. For example, ABA Model Rule 5.6(b) requires that a lawyer “shall not participate 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.” That “right to practice” includes an attorney’s right to advertise and solicit clients. The U.S. Supreme Court has held that “lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection.” As comment 2 to that Model Rule explains, the Rule “prohibits a lawyer from agreeing not to


59 Id.


61 For a thorough argument that agreeing to certain settlement terms—such as noncooperation terms or terms that require the facts of a case to be kept secret with no exception for voluntary disclosures of information relevant to other litigants’ claims—is unethical under the model rules, see Bauer, supra.

represent other persons in connection with settling a claim on behalf of a client.” Thus, a
defendant cannot require that plaintiff’s counsel refrain from publicizing that she has obtained a
settlement against that company as a means of attracting other clients with similar potential
claims.

In a recent advisory opinion, the Legal Ethics Committee of the District of Columbia Bar
Association concluded that “[a] settlement agreement may not compel counsel to keep
confidential and not further disclose in promotional materials or on law firm websites public
information about the case, such as the name of the opponent, the allegations set forth in the
complaint on file, or the fact that the case has settled.” The committee explained that the
purpose behind D.C. Rule 5.6(b) (which mirrors the model rule) is to “preserve the public’s
access to lawyers who, because of their background and experience, might be the best available
talent to represent future litigants in similar cases, perhaps against the same opponent.” The
committee emphasized that when “settlement terms are taken off the table because they are
prohibited, clients are not harmed,” because “[i]f all parties are prohibited from agreeing to such
provisions, they have no value.” This is worth keeping in mind when entering into settlement
negotiations—whenever secrecy can be taken off the table completely, it no longer merits
discussion.

4. **DO be prepared to call the defendant’s bluff.**

One successful tactic reported by some attorneys is to agree to secrecy, but only in
exchange for such a high monetary amount that the defendant is just not willing to pay the price.
Often a defendant will wait until settlement negotiations are almost complete before bringing up
confidentiality. In this circumstance, one strategy is to file a motion with the court to enforce the
settlement agreement *without the confidentiality term*—making the agreement part of the public
record.

In negotiating a settlement, remember that if the defendant is worried about your client
talking after the case settles, imagine how concerned they are about you airing their dirty laundry
at trial. If the case goes to trial, much more information about the defendant’s conduct will
become a matter of public record than would be risked by a settlement with no confidentiality
provision. Thus, when negotiating about secrecy, it is essential to be prepared to go forward to
try the case—and to convincingly argue that if the case cannot settle except with a confidentiality
clause, you will do just that.

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64 *Id.*

65 **See Pansy v. Borough of Stroudsburg**, 23 F.3d 772 (3d Cir. 1994) (“The parties might prefer
to have confidentiality, but this does not mean that they would not settle otherwise. For one
thing, if the case goes to trial, even more is likely to be disclosed than if the public has access to
pretrial materials.”) (citation omitted).
5. **DON’T give in to unconditional secrecy.**

Lastly, if your client truly wants to settle the case, and the only term preventing agreement is secrecy, you should try to limit the scope and effect of the confidentiality term by inserting terms that protect your client and the public interest. First, make sure the agreement includes a term allowing your client to disclose information about the settlement to government agencies, in connection with the prosecution or defense of any action to which they may be a party, in response to a subpoena, or as otherwise required by law, court order, rule, or regulation.

Second, there is no reason the confidentiality need be permanent. You could agree to confidentiality on condition that it expires (for example) one year after execution of the settlement agreement. Similarly, it would be advantageous to limit damages for breach of the confidentiality agreement to a smaller amount than the damages for breach of other terms.

One compromise that may well be acceptable to all involved, including your client, is an agreement to keep the dollar amount and terms of the settlement confidential, but not the alleged wrongdoing or any documents containing information to which the public should have access. Sometimes a client may prefer not to have word get out that she accepted a large amount of money, particularly if the claim was for the wrongful death of a loved one. In addition, a defendant may be satisfied by an agreement that you and your client will refrain from affirmatively reaching out to the media, but retain the right to talk to the press if contacted.

**Conclusion**

Consumer lawyers have many ways to push back against excessive demands for secrecy. The more we all stand up against confidentiality, the less defendants will take it for granted. Best of all, the law is on our side. At each step of the way—from discovery to settlement—it pays to approach the issue of secrecy carefully and to keep in mind not only the interests of the client in the present case, but future clients, the public interest, and the integrity of the practice of law. Public Justice has fought unnecessary secrecy in the courts for over two decades, and we have developed a resource bank of briefs, testimony, and model protective orders. If you are facing a difficult situation involving court secrecy, don’t hesitate to call on us for help.
The chief legal officer calls you in to his office. “Good news, Chuck … We have settled the new case with the aggressive DC lawyers. Now tell our defense team to draft a settlement agreement that ties up that DC firm tight as a drum. I don’t want to see those guys on the other side from us … period!! Is that clear? Put in the agreement that they can never represent anyone against us ever again, understand?” But, you gasp, “That’s prohibited by the ethics rules.” He groans. “What has this world come to? Okay, make the settlement confidential, the documents confidential, hire them as our lawyers… I don’t care how much extra you need to pay the attorneys, keep them off of our backs.” You walk out with a bad feeling.

Practice Restrictions in Settlement Agreements

BY JOHN K. VILLA

You were right to have a bad feeling as these indirect practice limitations, as prevalent as they are, are subject to challenge in many jurisdictions. While it has historically been relatively common to demand settlement terms that have the effect of limiting a lawyer’s ability to represent other litigants, most litigators now realize that an express restriction on future representations included as part of a settlement agreement is prohibited by the ethical rules and could subject participating counsel to disciplinary sanctions.

But what about other types of agreements within a settlement package that may achieve a similar result. For example, is it ethical to ask plaintiff’s counsel to promise not to use certain information learned during the course of the representation in any future litigation involving the company, or to agree to represent or consult for the opposing party as a consultant or as counsel after settlement of the existing claim? The short and somewhat surprising answer: maybe not. To answer this question, we must examine the ethical rules and their interpretation by both courts and ethics commissions. This, as you should be warned, is an area where ethics theory may depart substantially from practice.

Rule 5.6: Limitations on Practice

Our focal point is Rule 5.6 of the Model Rules of Professional Conduct, which provides, in pertinent part:

A lawyer shall not participate in offering or making:

(b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.

The rule is premised on three public policy rationales. As explained by the American Bar Association (ABA):

The rationale of Model Rule 5.6 is clear. First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individu-

als. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to “buy off” plaintiff’s counsel. Third, the offering of such restrictive agreements places the plaintiff’s lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.

Thus, even though a client may be delighted to accept a limitation on her lawyers’ future right to represent other similar clients in exchange for receiving herself a larger settlement, and might readily direct her lawyer to enter into that settlement, and Rule 1.2 would normally require a lawyer to follow the client’s instructions to accept a settlement agreement, the lawyer’s ability to do so is limited by Rule 5.6(b).

According to the comment to Rule 5.6, subdivision (b) “prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.” While an explicit limitation on a lawyer’s right to represent other clients with similar claims against the same opposing party is “[t]he most obvious example of an ethically impermissible settlement provision” under the rule, the ABA has opined that the rule applies not only to such an explicit limitation, but also to other limitations that indirectly restricts a lawyer’s right to practice.

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Indirect Limitations and ABA Opinion 00-417

In Formal Opinion No. 00-417, the ABA Standing Committee on Ethics and Professional Responsibility addressed the application of Rule 5.6(b) to a settlement agreement that prohibited counsel from using information learned during the existing representation in any future representation against the same opponent. Finding that the restriction was impermissible under Rule 5.6(b), the committee explained that, even though it was not a direct ban on any future representation, “[a]s a practical matter . . . [it] effectively would bar the lawyer from future representations because the lawyer’s inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation.” 13

In addition, such a provision would undermine an important policy rationale underlying Rule 5.6(b)—by preventing the use of information learned during the prior representation, the provision would restrict the public’s access to the services of a lawyer who, “by virtue of [his] background and experience, might be the most qualified lawyer available to represent future clients against the same opposing party.” 14

In reaching its determination, the committee was careful to distinguish between a restriction against the use of information learned during the representation and a restriction against the disclosure of confidential information, such as the terms of the settlement, noting that the latter type of restriction merely comports with the requirements of Rule 1.6 and “does not necessarily limit the lawyer’s future practice in the manner accomplished by a restriction on the use of information relating to the opposing party.” 15

And, while acknowledging that Rule 1.9(c) precludes a lawyer from subsequently using information relating to a prior representation, 16 the committee noted that the restraint imposed under that rule does not extend to the subsequent use of information that is not adverse to the interests of the former client or that is publicly known. 17

Many jurisdictions concur with the ABA that settlement agreements containing indirect restrictions on the lawyer’s right to practice violate those jurisdictions’ respective equivalents of Rule 5.6(b). Examples of similar provisions found to constitute unethical restrictions under the rule include those that require counsel to keep confidential public information concerning the case, such as the identity of the defendant, the allegations of the complaint, and the fact of settlement; 18 those that prohibit counsel from disclosing information concerning the business or operations of the opposing party; 19 those that require counsel to turn over her work product to opposing counsel; 20 and, those that bar counsel from subpoenaing certain records or fact witnesses, or from using certain expert witnesses in future actions against the opponent. 21

ABA’s Ethical Guidelines for Settlement Negotiations

Limitations in settlement agreements that affect the use or disclosure of information are not the only types of limitations found to violate Rule 5.6(b) as indirect restrictions on the right to practice. In its Ethical Guidelines for Settlement Negotiations, the ABA’s Section on Litigation proscribes as unethical, settlement provisions in which a plaintiff’s attorney agrees to become a consultant for, or be retained as an attorney by, the opponent. 22 Such a provision may be regarded as a “buy off” of plaintiff’s attorney, since “conflict of interest rules will prevent the plaintiff’s lawyer from representing future plaintiffs against the defendant without the defendant’s consent.” 23 Some courts have agreed with this analysis. 24

In Adams v. BellSouth Telecomm., Inc., 25 for example, a federal district court concurred with the findings of the magistrate that the defendant’s counsel violated Florida Bar Rule 4-5.6(b) by conditioning settlement of the underlying action on the inclusion of a consulting agreement. Under this agreement, which was not made known to the plaintiffs, counsel for both parties agreed that plaintiffs’ counsel would be hired as a consultant for the defendant upon settlement of the existing case. 26 The agreement further provided that consideration for the consulting arrangement would be taken from the total amount of the settlement. 27

According to the court, the record disclosed that defense counsel aggressively negotiated for inclusion of the consulting arrangement in the settlement: Due to questionable litigation tactics on the part of plaintiffs’ counsel, defense counsel “sought ‘finality’ for their client by preventing the filing of similar future suits by Plaintiffs’ counsel.” 28 Although noting that this motive was neither disreputable nor detrimental to the interests of the defendant, 29 the court held that the consulting agreement constituted a clear practice restriction that violated Rule 4-5.6(b) for several public policy reasons: not only was the agreement “a payoff to Plaintiffs’ counsel to make them go away and never come back[,]” 30 but it created a direct conflict of interest between plaintiffs’ counsel and their clients. 31

Rule 5.6(b) is not without its critics, 32 and courts have not always been willing to invalidate restrictive settlement agreements that violate the rule. 33 Indeed, you can question whether it is consistent with zealous advocacy for your client to forego an advantageous bargaining chip in settlement negotiations to preserve the rights of non-clients who have chosen to sit out the battle on the sidelines. The rule remains, however, and counsel who offer or accept practice restrictions in settlement agreements must examine the extent to which they commit an ethical violation for which disciplinary sanctions may be imposed. 34
What is our hapless young lawyer to do?
- Review the ethics rules and, particularly, the decisions in the state whose law will govern the settlement agreement and counsel’s conduct. Remember, the enforceability of the provision is one issue; the ethical propriety of the lawyer’s conduct under governing law is another.
- A carefully written settlement agreement limiting disclosure of confidential materials, and requiring advance notice of potential disclosures, may nonetheless cause opposing counsel to review with great care the wisdom of proceeding against your client again.
- Severability in settlement agreements may be important to make sure that even if some provisions are stricken, others may survive. While the likelihood of ethical sanctions remains low, these rules are important as they may prove to be the undoing of provisions of agreements that are the very reasons for some settlements. Figure them out now.

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NOTES
4 While all jurisdictions prohibit settlement agreements that include direct restrictions on future adverse litigation, most jurisdictions have adopted a rule fashioned on Model Rule 5.6(b). See Golan, supra n. 1, at 3 n. 7.
5 ABA Model Rules of Professional Conduct, Rule 5.6(b).
7 See ABA Model Rules of Professional Conduct, Rule 1.2(a) (providing, in part, that “[a] lawyer shall abide by a client’s decision whether to settle a matter.”)
9 ABA Model Rules of Professional Conduct, Rule 5.6(b), cmt. 2.
10 ABA, Section of Litigation, Ethical Guidelines for Settlement Negotiations, § 4.2.1, at 40 (Aug. 2002); see, e.g., In re Hager, 812 A.2d at 919 (finding that a settlement provision precluding plaintiffs’ counsel from representing future consumers against the defendant manufacturer on similar claims involving defendant’s shampoo directly contravened D.C. Bar Rule 5.6(b)).
13 Id. at 2.
14 Id. at 2-3. As noted by one state ethic’s commission, such a restriction on use would also defeat another policy underlying the rule, since it would create a conflict between the present client’s interests and those of the lawyer and any future clients. N.Y. Ethics Op. 730 (2000) (construing N.Y. Code of Professional Responsibility DR 2-108(B), New York’s version of Rule 5.6(b)).
16 Model Rule 1.9(c) provides, in pertinent part: “A lawyer who has formerly represented a client in a matter or whose present or former firm has represented a client in a matter shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 5.3 [Candor Towards the Tribunal] would permit or require with respect to a client, or when the information has become generally known].” ABA Model Rules of Professional Conduct, Rule 1.9(c)(1) (2006).
17 ABA Formal Op. 00-417, at 2. As further noted by the Committee, “[t]he former client’s disadvantage does not . . . encompass any detriment that might result when a client does not receive a monetary enhancement to a settlement conditioned on his lawyer’s agreement not to use information relating to the representation against the opposing party in future representations.” Id. at n. 15.
22 Ethical Guidelines for Settlement Negotiations, supra, n. 10.
23 Id. at 40-41.
26 2001 WL 34032759, at *1.
27 Id. The plaintiffs were never told the total amount of the settlement, but only the specific amount that each would receive, and were never given a breakdown of the attorneys’ fees or costs. Id. at *5.
29 Id.
30 Id. at *6-*7.
31 Id. at *8.
32 See, e.g., Stephen Gillers, A Rule Without a Reason, 79-Oct A.B.A. J. 118 (1993) (“Rule 5.6(b) is an anachronism, illogical and bad policy.”); see also Golan, supra, n. 1 (critiquing the policy arguments in support of Rule 5.6(b)).
33 See Feldman v. Minars, 250 A.D.2d 356, 658 N.Y.S.2d 614, 617 (App. Div. 1st Dept. 1997) (“[W]e conclude that an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York. At the least failure to enforce a freely entered into agreement would appear unseemly, and the “clean hands” doctrine would preclude the offending attorneys from using their own ethical violations as a basis for avoiding obligations undertaken by them. Even if it is against the public policy of this State, the “violation” can be addressed by the appropriate disciplinary authorities.”) (emphasis in original).
34 See, e.g., In re Hager, 812 A.2d at 921-924 (imposing a one-year suspension, with reinstatement conditioned upon proof of rehabilitation “with inquiry thereunder primarily directed to” his plans to disgorge his fees).