THE PARAMETERS OF MODEL RULE 3.4(f)'S EXCEPTION FOR A CLIENT'S EMPLOYEES: MAY A LAWYER ETHICALLY THREATEN A CLIENT'S EMPLOYEE WITH DISCHARGE FOR VOLUNTARILY GIVING INFORMATION TO AN OPPOSING PARTY?

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ABSTRACT

In our justice system, there is an inherent tension between policies favoring granting parties informal access to information and the right of organizational employers to exercise some control over the flow of information from their employees. Model Rule 3.4(f) of the American Bar Association's Model Rules of Professional Conduct balances these interests. The Rule bars lawyers from requesting "a person other than a client to refrain from giving 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."

Rule 3.4(f) promotes the policy favoring informal access to information by barring lawyers, in most circumstances, from requesting persons to refrain from communicating with opposing parties. However, the Rule's exception for employees ensures fairness to organizations by allowing an organization's lawyer to ask a client's employees to refrain from voluntarily giving information to opposing parties, thereby requiring opposing attorneys to use formal means of obtaining information such as depositions, interrogatories, and testimony at trial.

This Article addresses a question left open by Rule 3.4(f). Assume that a lawyer reasonably believes that the interests of a client's employee will not be adversely affected if the employee refrains from voluntarily giving information to an opposing party. Under these circumstances, the Rule would permit the lawyer to ask the employee to not informally communicate with the opposing party. May the organization's lawyer, with the client's permission, go a step further and threaten the employee with discharge if the employee voluntarily gives information to the opposing party? After discussing the policies behind Rule 3.4(f) and an employee's duty of loyalty to his employer, this Article concludes that if the employee's discharge would violate other law, then the attorney may not ethically threaten the employee with discharge. If the employee's discharge would not violate other law, this Article concludes that the

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organization's lawyer may ethically order the employee, under threat of discharge, to refrain from voluntarily giving information to an opposing party.

I. INTRODUCTION

Rule 3.4(f) of the American Bar Association's Model Rules of Professional Conduct ("Model Rules") bars a lawyer from requesting

> 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.[1]

One scholar, Professor John Bauer, has observed that Model Rule 3.4(f) is "one of the least well-known of lawyers' ethical duties."[2] According to Professor Bauer, many lawyers have not heard of the provision and "[l]eading law school ethics texts contain no discussion of Rule 3.4(f) or give it only passing mention."[3] But the Rule serves important truth-seeking functions in our justice system. Furthermore, courts have relied on Rule 3.4(f) in discovery disputes and lawyers have been disciplined for violating the Rule. This Article discusses Rule 3.4(f)'s truth-seeking functions and the countervailing policy interests that limit the Rule's application, especially in regard to a client's employees.

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1. MODEL RULES OF PROF'L CONDUCT r. 3.4(f) (AM. BAR ASS'N. 2018).

2. Jon Bauer, *Buying Witness Silence*: *Evidence Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 509 (2008).

3. *Id.* There has not been a great deal of scholarship on Rule 3.4(f). Most of the scholarship regarding Rule 3.4(f) has focused on the Rule's impact on secret settlements. *See, e.g.*, Bauer, *supra* note 2, at 508–72; Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation are Illegal and Unethical,* 31 HOFSTRA L. REV. 1, 15 (2002).

Consider the following hypotheticals. Hypothetical 1: Pam Pritchard was injured at one of Delta Corporation's retail locations. Delta has learned that Pam has retained Attorney Alex to bring a personal injury suit against Delta. Delta's president Peter has retained Lex Lawyer to represent Delta in the matter. Lex, with Peter's permission, sends a memorandum to all Delta employees informing them of the potential lawsuit. The memorandum continues:

> You are instructed to refrain from talking to Pam or Attorney Alex about the matter. If you do talk informally with Pam or Attorney Alex, you will be discharged. Of course, if you are asked to be a witness before a tribunal or court or to appear at a deposition or given any court order to appear or testify, then you may do so. We are merely instructing you to not talk informally with Pam or Attorney Alex about the matter. If you do, you will be discharged.

Has Delta's Lawyer Lex violated Rule 3.4(f) by sending this memo to Delta's employees?

Hypothetical 2: Suppose, instead, that Paula, an African American woman, has retained an attorney and filed a discrimination charge with the Equal Employment Opportunity Commission alleging that Delta has a pattern or practice of discriminating against African Americans and women in promotions. Assume Delta's lawyer, Lex, sends a similar memorandum to all employees ordering them not to talk to Paula or her attorneys. Would Lex sending this memorandum violate Rule 3.4(f)?

Before Delta's lawyer Lex distributes either memorandum, he must take several considerations into account. Model Rule 3.4(f) requires that Lex determine whether any employee-recipients would be adversely affected by refraining from giving information to Pam, Paula or their attorneys. Assuming that Lex makes such a determination and reasonably believes that employee-recipients will not be adversely affected, then Model Rule 3.4(f) allows Lex to *request* that an employee of the organization refrain from voluntarily giving relevant information to Pam, Paula or their attorneys. It is an open question, however, whether the organization's lawyer may *order* the organization's employees to refrain from voluntarily giving information to opposing parties. In addition, discharging employees under certain circumstances may run afoul of other laws, such as whistleblower laws, state retaliatory discharge actions, protections for contacts with government agencies, and labor laws.

This Article discusses the proscriptions of Model Rule 3.4(f) and the Rule's exception for a client's employees. Part II of the Article discusses the Rule's history and the policies behind the Rule. Part III dis-

cusses the caselaw dealing with Rule 3.4(f), including litigation disputes and disciplinary cases. Part IV examines Model Rule 3.4(f)'s exception for a client's employees. The exception allows a lawyer to request that a client's employee refrain from voluntarily giving information to another party if "the lawyer reasonably believes that the [employee's] interests will not be adversely affected by refraining from giving such information."[4] This would require, in many circumstances, that the lawyer make an individualized determination regarding whether an employee would be adversely affected by refraining from giving information to an opposing party. Part IV discusses the types of situations in which a lawyer could make such an individualized determination.

Part V takes the analysis a step further. Assume that a lawyer for an organizational client determines that she could ethically request a client's employee to refrain from voluntarily giving information to an opposing party. Could the lawyer, with the client's permission, *order* the employee, under threat of termination, to refrain from voluntarily giving information to the opposing party? There are two possible obstacles to such an order. Part V.A. discusses other substantive law—whistleblower laws, retaliatory discharge actions, laws protecting contacts with government agencies, and the National Labor Relations Act's ban on interference with employees' concerted activities—that may preclude such a threat to discharge an employee. Part V.B. discusses whether Rule 3.4(f) *itself* should be interpreted to preclude the threat. The Article discusses the duty of loyalty that employees owe their employers. The Article then concludes that if a lawyer for an organization determines that she could ethically request a client's employee to refrain from voluntarily giving information to an opposing party and that discharging the employee under the circumstances would not violate other substantive law, then the lawyer could *order* the employee to refrain from such contact.

II. THE POLICIES UNDERLYING MODEL RULE 3.4(F)

Model Rule 3.4(f) "has its roots in an influential and widely accepted formal ethics opinion issued by the American Bar Association in 1935."[5] Formal Opinion 131 queried whether it was

> proper for an attorney . . . to influence persons, other than his clients, or their employees, in a case in which he may be defending, to refuse to give information or prevent them from

4. MODEL RULES OF PROF'L CONDUCT r. 3.4(f).

5. Bauer, *supra* note 2, at 509. Professor Bauer's article has an excellent discussion on the historical development of the principles that led to the promulgation of Model Rule 3.4(f). *Id.* at 511–18.

> disclosing facts to opposing counsel or client which may be useful or essential to them.[6]

The opinion acknowledged that attorneys had to "do every just and proper thing" to defend their clients but the "interests of justice" required that truth "be ascertained so far as is humanly possible."[7] The opinion admonished that, if litigation arose, attorneys should not "in any way . . . prevent the truth from being presented to the court."[8] The opinion noted that earlier ethical opinions had authorized lawyers to interview individuals, even if those individuals "as is frequently inaccurately said" were "the other side's witnesses."[9] Factual witnesses, the opinion continued, were simply "the *law's* witnesses."[10] Formal Opinion 131 concluded, therefore, that it was improper for lawyers to influence or prevent individuals, "other than . . . clients or [the client's] employees" from giving information to the opposing lawyers or their clients.[11] The opinion's conclusion rests on the truth-seeking function of the litigation system, the resulting importance of access to information and witnesses by parties and their lawyers, and the fact that most witnesses do not owe any special loyalty to either side—their duty is to the law and the truth. Thus, lawyers should not *influence* or *prevent* most witnesses from voluntarily giving information to the opposing party. However, the client and the client's employees are excepted from this principle. Later, Model Rule 3.4(f) also excepted "agent[s]" of clients and "relative[s]" of clients.[12] Presumably, the reason is that those people—agents, employees, and relatives of clients—*do* owe a degree of loyalty to the client.[13] One then, could further infer from Formal Opinion 131 that, because of the loyalty employees owe their employers, it would not be improper for an employer's attorney to *influence* or *prevent* such employees from voluntarily giving information to the other side.

Model Rule 3.4(f) balances the tension between two competing policy considerations. On the one hand, our justice system favors allowing parties access to relevant information. Allowing parties access to information underlies our liberal discovery system. As stated by the

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6. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 131 (1935).
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*. (emphasis added).
11. *Id*.
12. MODEL RULES OF PROF'L CONDUCT r. 3.4(f)(1) (AM. BAR ASS'N. 2018).
13. *See* 2 GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 30.12, at 30–28 (3d ed. & Supp. 2007) (stating that, in addition to allowing an attorney to tell a client to refrain from giving information to an opposing party, "the rule extends this general right of passive non-disclosure to those closely associated with the client, such as relatives and employees").

Supreme Court in *Hickman v. Taylor*,[14] our rules of discovery give parties the ability to "obtain the fullest possible knowledge of the issues and facts before trial."[15] In addition to formal discovery, our justice system grants parties the opportunity to *informally* interview witnesses. As a general rule, it is a "time-honored" principle that a party's attorney has the "right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel . . . ."[16] On the other hand, organizational parties are entitled to vigorous representation and that includes preventing the organization's lawyer from being unfairly blindsided by information given to opposing counsel by the organization's employees. Furthermore, employers can expect a certain degree of loyalty from their employees.[17] These competing policy considerations—the right of parties to have informal access to witnesses and the right of organizational parties to exercise *some* control over the flow of information to opposing counsel from its employees—can be examined by looking at Model Rule 4.2, a "companion" rule to Model Rule 3.4(f).[18]

Unlike Model Rule 3.4(f), Model Rule 4.2[19] and its predecessor under the American Bar Association Model Code of Professional Responsibility ("Model Code"),[20] has received a great deal of judicial and academic attention.[21] Model Rule 4.2 prevents an attorney, in representing a client, from communicating with another represented

14. 329 U.S. 495 (1947).

15. *Id.* at 501; *see also* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.44[3][b] (3d. ed. 2018) ("The trial court's discovery decisions on questions of relevance must adhere to the liberal spirit underlying the discovery rules and their purpose, and must not impose undue burdens or costs.").

16. Int'l Bus. Mach. Corp. v. Edelstein, 526 F.2d 37, 42 (2d Cir. 1975).

17. *See infra* notes 159–171 and accompanying text.

18. Indeed, the comment to Model Rule 3.4(f) cites Model Rule 4.2 and, in turn, the comment to Model Rule 4.2 cites Model Rule 3.4(f).

19. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N. 2018).

20. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (AM. BAR ASS'N. 1980).

21. There have been numerous cases and articles dealing with Model Rule 4.2. *See, e.g.*, Clark v. Beverly Health & Rehab. Servs., Inc., 797 N.E.2d 905 (Mass. 2003); Palmer v. Pioneer Inn Assocs., 59 P.3d. 1237 (Nev. 2002); Wright v. Grp. Health Hosp., 691 P.2d 564 (Wash. 1984) (en banc); In re Disciplinary Proceeding Against Haley, 126 P.3d 1262 (Wash. 2006); John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. LEGAL MAL. & ETHICS 204 (2013); David A. Green, *Balancing Ethical Concerns Against Liberal Discovery: The Case of Rule 4.2 and the Problem of Loophole Lawyering*, 8 GEO. J. LEGAL ETHICS 283 (1995); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J 797, 804–06 (2009); Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating With Represented Parties,* 67 IND. L. J. 549 (1992); F. Dennis Saylor & Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459 (1992); Stephen M. Sinaiko, *Ex Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U. L. REV. 1456 (1991). Model Rule 3.4(f), on the other hand has been called "one of the least well-known of lawyers' ethical duties." Bauer, *supra* note 2, at 487.

party about the subject matter of the representation unless the other party's attorney consents to the communication.[22] When the represented party is an organization

> [this] Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or [who] has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[23]

In *Niesig v. Team I*,[24] the New York Court of Appeals discussed the competing policy interests balanced by the rule against communicating with represented parties. The court stated that "informal encounters between [an opposing] lawyer and an employee-witness . . . serve long-recognized values in the litigation process."[25] According to the *Niesig* Court:

> [I]nformal discovery of information . . . may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes . . . . "A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion—frequently in light of information counsel may have developed from other sources. This is part of an attorney's so-called work product." Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information.[26]

Thus, allowing parties informal access to witnesses serves important policy interests.

On the other hand, there are countervailing interests. In discussing the ethical ban on contacting represented parties, the *Niesig* Court noted the importance of "fairness" to the represented organizational

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22. MODEL RULES OF PROF'L CONDUCT r. 4.2.

23. *Id*. at r. 4.2 cmt. Individual states have departed from Model Rule 4.2 regarding which organizational employees are encompassed by the Rule's ban on communications. *See, e.g.*, TENN. RULES OF PROF. CONDUCT r. 4.2 cmt. (2018).

24. 558 N.E.2d 1030 (N.Y. 1990).

25. *Id*. at 1034.

26. *Id*. (quoting Int'l Bus. Mach. Corp. v. Edelstein, 526 F.2d 37, 41 (2d Cir. 1975)) (internal citations omitted).

party.[27] The rule against communicating with represented parties serves this purpose by preventing opposing lawyers "from deliberately dodging" the organizational party's lawyer.[28] Scholars have noted that "effective representation . . . requires supervision of the manner in which information is elicited from the client"[29] and that the ethical rule's restriction of the information flow "prevents the attorney [for the organization] from being blind sided [sic]." [30]

Model Rule 3.4(f)'s exception for a client's employer balances the same countervailing interests balanced by Model Rule 4.2. Indeed, the two ethical rules work in tandem. Model Rule 4.2 establishes a degree of protection for a represented organization from communication between its employees and opposing counsel. Certain employees are within that zone and opposing counsel may not communicate with them informally. Opposing counsel, however, may informally communicate with those employees who are outside of Model Rule 4.2's reach. It is with regard to those employees that Model Rule 3.4(f) speaks. Model Rule 3.4 (f) generally bans attorneys from requesting "a person other than a client from voluntarily giving relevant information to another party."[31] An exception to the Rule allows an organization's attorney to "request" or "advise" the organization's employees to refrain from voluntarily giving information to opposing counsel.[32] Model Rule 3.4(f)'s general ban on attorneys requesting individuals to refrain from giving information to other parties promotes the policy allowing parties access to information. On the other hand, the exception for a client's employees allows the client's lawyer to partially restrict the flow of information from employees, preventing her from being "blindsided."

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27. *Id*. at 1033.

28. *Id*.

29. Samuel R. Miller & Angelo J. Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is it Ethical?*, 42 BUS. LAW. 1053, 1054 (1987).

30. Ernest F. Lidge III, *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties,* 67 IND. L. J. 549, 562 (1992). The Washington Supreme Court in *Wright by Wright v. Group Health Hospital*, also identified the competing interests in discussing the ABA Model Code's predecessor to Model Rule 4.2, DR 7-104(A)(1). The Court said:

> In our adversarial legal system, a policy conflict arises when a corporation attempts to use CPR DR 7-104(A)(1) defensively so as to prevent an adverse attorney from interviewing its employees ex parte. On the one hand, there is the need of the adverse attorney for information which may be in the exclusive possession of the corporation and may be too expensive or impractical to collect through formal discovery. On the other hand is the corporation's need to protect itself for the traditional reasons justifying the rule.

691 P.2d 564, 568 (Wash. 1984).

31. MODEL RULES OF PROF'L CONDUCT r. 3.4(f) (AM. BAR ASS'N. 2018).

32. *Id.* at r. 3.4(f), 3.4(f) cmt.

Rule 3.4(f)'s exception for employees is justified because the represented organizational employer has the right to a vigorous defense and can generally expect a certain degree of loyalty from employees in preparing that defense.[33] This is further supported by the comment to Model Rule 3.4, which states: "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."[34]

While Model Rule 3.4(f) authorizes corporate counsel to request an employee to refrain from talking to the other side,[35] the Rule does not authorize making such a request to a *former* employee. Presumably, it is much less likely that former employees, as opposed to current employees, will "identify their interests with those of the [corporate] client." The distinction is further supported by the comment's reference to Model Rule 4.2, which restricts a lawyer's communications with represented parties, including some of the employees of a represented party. The comment to Model Rule 4.2 explicitly exempts former employees from the Rule's protection, stating that "[c]onsent of the organization's lawyer is not required for communication with a former constituent."[36]

III. THE CASELAW

A. Litigation Disputes

Courts have invoked Rule 3.4(f) in discovery disputes. In *Castaneda v. Burger King Corporation,*[37] the defendants alleged that plaintiffs' counsel had instructed at least one witness, a putative class member, not to speak to representatives of the defendants.[38] The court opined that, absent a showing of abuse, both sides had the right to fully investigate the case.[39] Therefore, plaintiff counsel's instructions to a witness to not communicate with defendants' representatives would "corrupt the case preparation process"[40] and violate Rule 3.4.[41] The

33. For a discussion of employees' duty of loyalty, see *infra* notes 159–171 and accompanying text.

34. MODEL RULES OF PROF'L CONDUCT r. 3.4(f) cmt.

35. *Id.* at r. 3.4(f).

36. MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. *See also* Utah Ethics Advisory Op. 04-06, 2004 WL 2803333, at *2 (Utah St. Bar 2004) (stating that under Rule 3.4(f) "corporate counsel may *request any current* employee (including fact witnesses) whose interests will not be adversely affected to refrain from informally speaking with opposing counsel").

37. No. C 08-4262 WHA (JL), 2009 WL 2382688 (N.D. Cal. July 31, 2009).

38. No. C 08-4262 WHA (JL), 2009 WL 2382688, at *4 (N.D. Cal. July 31, 2009).

39. *Id*. at *5.

40. *Id*. at *4.

41. *Id*. at *4, *7.

court issued an order, *inter alia,* forbidding the plaintiffs and their lawyers from interfering with the defendant's interviews of witnesses.[42]

In *Briggs v. McWesley*, the Connecticut Supreme Court upheld the trial court's determination that an attorney had violated Connecticut's version of Rule 3.4(f) by instructing an individual not to discuss a relevant engineering report with anyone.[43] The Court found that the trial court had not abused its discretion in disqualifying the attorney for this and other unethical conduct.[44]

In *WellStar Health Systems, Inc. v. Kemp,* the appellate court found that attorneys had violated Rule 3.4(f) when they contacted the employer of an opposing party's expert witness in order to pressure the witness not to testify.[45] The court also found that the trial court had not abused its discretion when it disqualified the attorneys for their unethical conduct.[46] Similarly, in *Harlan v. Lewis*, the Eighth Circuit found that the district court had not abused its discretion in sanctioning an attorney $2,500 for violating Rule 3.4(f) when the attorney attempted to dissuade two witnesses from testifying or cooperating with the opposing parties.[47]

B. Disciplinary Cases

Attorneys have been disciplined for violating Rule 3.4(f). In *Kentucky Bar Association v. Unnamed Attorney*,[48] an unnamed attorney (Attorney 1) represented another attorney (Attorney 2) in a disciplinary matter in which a former client (Jane Doe) of Attorney 2 alleged that Attorney 2 had overcharged her in a probate matter.[49] Attorney 1 negotiated a settlement with Doe requiring that Attorney 2 refund a $30,000 fee. In exchange, Doe agreed to withdraw her bar

42. *Id.* at *8.

43. 796 A.2d 516, 540 (Conn. 2002).

44. *Id.* at 542; *see also* Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc., No. 09-CV-11783, 2010 WL 10107597, at *4 (E.D. Mich. May 12, 2010) (finding that defense counsel's consulting agreement barring communications between consultant and plaintiff without defense counsel's permission violated Rule 3.4(f)).

45. 751 S.E.2d 445, 451 (Ga. Ct. App. 2013); *see also* In re Kornreich, 693 A.2d 877, 881, 883 (N.J. 1997) (holding that a lawyer violated Rule 3.4(f) by discouraging summoned witness from testifying); Sanderson v. Boddie-Noel Enter., Inc., 227 F.R.D. 448, 452-55 (E.D. Va. 2005) (finding that similar conduct violated Rule 3.4(a) and requiring offending attorney to compensate opposing party for financial costs incurred).

46. *Kemp*, 751 S.E.2d at 449–53.

47. 982 F.2d 1255, 1257–59, 1265 (8th Cir. 1993)*; see also* In re Minnitti, No. 99-11652DWS, 2000 WL 275852, at *3-*5 (Jan. 4, 2000) (citing *Harlan v. Lewis* and sanctioning an attorney for ethics violation when the attorney threatened his client's employer "with sanctions if it released information to [the opposing party]").

48. 414 S.W.3d 412 (Ky. 2013).

49. *Id.* at 414.

complaint and agreed "to refuse to voluntarily assist or to voluntarily provide information" to bar authorities about the bar complaint.[50] The Kentucky Supreme Court held that this conduct violated Kentucky's version of Rule 3.4(f), falling within the literal language of the Rule.[51] The Court reprimanded the unnamed attorney.[52]

Similarly, in *In re Nwakanma*,[53] the Kansas Supreme Court disbarred an attorney for numerous violations of ethical rules, including Rule 3.4(f).[54] The attorney had entered into an agreement with a former client settling a civil matter. As part of the settlement, the former client agreed to refrain from participating in disciplinary proceedings against the attorney. The Court found that this agreement violated Rule 3.4(f)'s ban on requesting a person to refrain from giving information to a third party.[55]

In *In re Stanford,*[56] the Louisiana Supreme Court disciplined two attorneys for a particularly egregious violation of Rule 3.4(f). The two attorneys, Daniel Stanford and John Stockstill, represented a criminal defendant charged, *inter alia*, with aggravated rape. One of the alleged victims was the defendant's sixteen-year-old daughter who had been cooperating with the prosecutor.[57] Subsequently, the daughter indicated that she no longer wanted to testify against her father.[58] The defendant's lawyers then induced the victim to sign several documents, including a "Confidentiality Agreement."[59] The victim was not informed that she could seek a lawyer's advice before she signed the documents. After signing the documents, the victim refused to talk with the prosecutor. The prosecutor was compelled to issue a subpoena.[60]

The Disciplinary Hearing Committee stated that the Confidentiality Agreement was "intended to create an impression in the mind of the victim that she was legally barred from ever discussing the meeting [that had occurred with defendant's lawyer] on penalty of an injunction and other 'liquidated damages.' "[61] The Hearing Committee

50. *Id*.

51. *Id*. at 418. Kentucky's version of Rule 3.4(f) is Rule 3.4(g). It is interesting to note that two Justices dissented from this holding, arguing that the Rule should not extend to settlements. *Id*.at 419-24 (Scott, J., concurring in part and dissenting in part).

52. *Id*. at 419.

53. 397 P.3d 403 (Kan. 2017).

54. *Id*. at 440–41.

55. *Id*. at 427.

56. 48 So.3d 224 (La. 2010).

57. *Id*. at 226.

58. *Id*. at 226–27.

59. *Id*. at 227.

60. *Id*.

61. *Id*. at 229.

found that the defendant's lawyers had violated a number of ethical rules, including Rule 3.4(f).[62] The Louisiana Supreme Court agreed with the Hearing Committee, noting that the lawyers' conduct "had the potential to inhibit the victim from testifying at trial and could have impeded the prosecution of the underlying criminal case."[63]

In *Florida Bar v. Machin*[64]—a disciplinary proceeding—a lawyer had represented a criminal defendant who, as part of a plea agreement, pled guilty to second-degree murder. Prior to the sentencing hearing, the defense lawyer offered to establish a trust fund for one of the victim's children, provided that the victims did not speak in aggravation at the defendant's sentencing hearing.[65] The Florida Supreme Court stated that the attorney's actions constituted "serious misconduct."[66] The Court found that the lawyer had violated several ethical provisions, including Rule 3.4(f), and approved a ninety-day suspension.[67]

In *In re Alcantara*,[68] the New Jersey Supreme Court found that a lawyer violated Rule 3.4(f) when he attempted to persuade two of his client's co-defendants to refrain from testifying against his client.[69] The attorney received a public reprimand for his violation of Rule 3.4(f) and other ethical rules.[70]

In *In re Bone*,[71] the lawyer instructed his staff to delete a recording of a settlement conference from the computer system and then lied to

62. *Id.* at 230.

63. *Id.* at 232. The Court imposed a six-month deferred suspension. Two of the Justices dissented, contending that the sanction should have been more severe. *Id.* at 233–34 (Johnson, J., dissenting and Victory J., dissenting).

64. So. 2d 938 (Fla. 1994).

65. *Id.* at 939.

66. *Id.* at 940.

67. *Id.* at 940–41. Although the lawyer had originally been charged with, *inter alia*, a violation of Rule 3.4(f), the disciplinary referee and the Court based the finding of misconduct on Rule 8.4(d) (conduct prejudicial to the administration of justice) rather than Rule 3.4(f). This is of little consequence, since the lawyer's offending conduct certainly falls within the more specific language of Rule 3.4(f).

68. 676 A. 2d 1030 (N.J. 1995).

69. *Id.* at 1031.

70. *Id.* at 1035. A Virginia ethical opinion also dealt with issues arising from settlement negotiations in a criminal matter. In Virginia Legal Ethics Opinion 1854, the ethics committee considered a hypothetical in which the prosecutor desired to restrict the dissemination of the identity of a witness (Witness X). Va. Legal Eth. Op. 1854, 2010 WL 3974345, at *1. In the hypothetical, the prosecutor makes a settlement offer to the defense attorney, including disclosure of Witness X's name and involvement. The prosecutor conditions the plea agreement on the defense attorney agreeing to keep secret Witness X's name and involvement. If the defense attorney reveals this information to the defendant, the prosecutor will withdraw the plea offer. *Id.* The ethics committee opined that Virginia's version of Rule 3.4(f) (Rule 3.4(h)) prohibited the agreement's secrecy provision. The Rule banned the prosecutor "from requesting a person (the defense counsel) . . . from voluntarily giving relevant information to another party (the defendant)." *Id.*

71. 657 S.E. 2d 244 (Ga. 2008).

the court about the issue. The lawyer admitted that he had violated Rule 3.3(a)(1) by making a false statement to a tribunal and Rule 3.4(f) by instructing his staff to delete the recording. The Georgia Supreme Court gave the lawyer a three-month suspension.[72]

IV. RULE 3.4(F)'S EXCEPTION FOR A CLIENT'S EMPLOYEES

Rule 3.4 (f) contains an exception for a client's employees. An attorney for an organization may, under certain circumstances, request that an employee of the organization "refrain from voluntarily giving relevant information to another party . . ." [73] Relying on this exception, could an attorney make a blanket request to an organizational client's employees asking them to refrain from communicating with opposing attorneys and parties in any and all matters? Model Rule 3.4(f) militates against such a blanket ban. The Rule allows attorneys to advise employees to refrain from voluntarily giving information to an opposing party only if the attorney, "reasonably believes that the [employee's] interests will not be adversely affected by refraining from giving such information."[74] The "reasonable belief" requirement would seem to mandate an individualized assessment, at least in some circumstances. Theoretically, there may be categories of cases (*e.g.*, products liability or securities law) in which a lawyer could reasonably believe that employees would not be harmed by refraining from giving information. However, it is difficult to imagine a blanket work rule, encompassing all categories, that would be understandable to employees and would also distinguish between cases that would pass the "reasonable belief" test and cases that would fail the test. Thus, an attorney must make an individualized determination before asking or instructing a client's employee(s) to refrain from giving information to an opposing party.

In this regard, a state ethics opinion makes a valid distinction. Colorado Formal Ethics Opinion 120[75] discusses Rule 3.4(f)'s requirement that

> a lawyer who represents an organization client may request a non-client constituent to refrain from voluntarily giving information to another party only if, among other things, the lawyer considers the effect not providing such information

72. *Id.* at 245.

73. MODEL RULES OF PROF'L CONDUCT r. 3.4(f) (AM. BAR ASS'N. 2018).

74. *Id.* at r. 3.4(f)(2).

75. Colo. Bar Ass'n, Formal Op. 120 (2008).

> would have on the constituent and only if the lawyer reasonably believes that the person's interests will not be adversely affected thereby.[76]

Noting that the analysis depended on the facts of the particular case, the opinion distinguished between two situations.

In a truck driving accident, such a request of the constituent truck driver ordinarily would be appropriate. In contrast, in a class action alleging race or gender discrimination in employment, such a request of constituents who might have suffered from the discrimination would not be appropriate, because the constituent's interest might be adversely affected thereby.[77]

In the "truck driver" hypothetical, the interests of the truck driver would not be harmed if the driver did not communicate with the accident victim's attorney.[78] However, in the employment discrimination class action, a potential class member's failure to communicate with plaintiffs' counsel could very well harm the former's interests.[79]

This represents a valid distinction. In some cases, such as a run-of-the-mill personal injury action, a lawyer may "reasonably believe" that all employees' "interests will not be adversely affected by refraining from giving . . . information" to the opposing party.[80] In other situations, especially when an employee or former employee is bringing an employment law class action suit against the organization, the corporate attorney will have to make an individualized determination before she requests or instructs employees to refrain from talking to the opposing party.

In a similar vein, two plaintiffs' attorneys have written an article discussing the ramifications of Rule 3.4(f) when employees or former

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76. *Id.*

77. *Id.*

78. In a Model Rules jurisdiction, Model Rule 4.2 would bar the victim/plaintiff's counsel from contacting the truck driver. *See* MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. (barring communications with a represented organization's employees "whose acts or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability"). However, some jurisdictions that have departed from Model Rule 4.2 would not bar plaintiff's counsel from communicating with the truck driver. *See, e.g.,* TENN. RULES OF PROF'L CONDUCT r. 4.2 Cmt. (2018).

79. *See, e.g.*, Utah Eth. Op. Comm. 04-06, 2004 WL 283333, at *3 (Utah St. Bar 2004) (noting that if a "corporate employee had suffered the same discrimination as that complained of in the claim against the corporation," it would be an impermissible conflict of interest for the corporation's attorney to represent the employee as a fact witness in the matter since the "employee's interests might be adversely affected by refraining from giving information to opposing counsel under Rule 3.4.").

80. MODEL RULES OF PROF'L CONDUCT r. 3.4(f).

employees bring a lawsuit against their employer.[81] Based on the "reasonable belief" requirement, the attorneys opined that it would violate Model Rule 3.4(f) for corporate counsel to issue a broad prohibition barring other employees from talking with plaintiff's counsel.[82] According to the attorneys, determining whether an employee's interests would not be harmed by barring the employee from talking to the opposing counsel

> obviously requires an assessment of each witness's situation, including whether the witness's own interests would be aligned with those of her colleagues or those of the employer and whether those interests would be harmed by not communicating with her colleague's lawyer. Such an individualized assessment is improbable. If it were conducted, it is unlikely in the extreme that it could reasonably be concluded that all corporate employees could be restricted from talking to a plaintiff's attorney.[83]

Thus, there are some situations in which Rule 3.4(f) would permit an attorney to request a client's employee to refrain from voluntarily giving information to opposing attorneys. In other situations, Rule 3.4(f) would bar such a request.

V. THREATENING EMPLOYEES WITH TERMINATION FOR TALKING TO OPPOSING PARTIES

Assume, in a given situation, that a lawyer for an organization determined that she could ethically request her client's employees to refrain from voluntarily giving information to an opposing party because the employees' interests would not be adversely affected. Could the attorney, with her client's permission, take matters a step further and tell the employees that they will be *discharged* if they voluntarily give information to the opposing party? There are two potential problems with such a demand. First, would other substantive law preclude such an order? Second, would the ethical rules themselves preclude such a demand?

A. Other Law

A Colorado ethics opinion has stated that "other law" may preclude an attorney from requesting (and presumably ordering) a client's employee to refrain from voluntarily giving information to an opposing

81. Ellen J. Messing & James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plantiff's Attorney's View*, 19 LAB. LAW. 353 (2004).

82. *Id.*

83. *Id.* at 374 n.77.

party.[84] What other laws might a ban on employees' informal contacts with opposing parties run afoul? Possibilities include obstruction of justice statutes, federal and state whistleblower laws, state whistleblower public policy or retaliatory discharge actions, laws protecting contacts with government agencies, and the National Labor Relations Act's ban on interference with employees' concerted activity. These will be discussed in turn.

Would an attorney's order to an organizational client's employee to refrain from voluntarily giving information to an opposing party run afoul of the obstruction of justice laws? Most obstruction of justice statutes would not reach such an order. However, an order, or even a request, to an employee to refrain from *testifying* would illegally obstruct justice.

WellStar Health Systems, Inc. v. Kemp[85] provides an example of attorneys obstructing justice by interfering with witness testimony. In *Kemp*—a medical malpractice action—the trial court had disqualified the defendant hospital's attorneys.[86] The hospital's attorneys had contacted the employer of a physician who intended to serve as the plaintiff's expert witness.[87] The attorneys contacted the physician with the intent of preventing his appearance as a witness. In essence, the hospital's attorneys intended to pressure the physician/expert witness through the physician's employer.[88] The tactic worked—the physician withdrew from testifying.[89] The appellate court affirmed the trial court's disqualification order.[90] The court reasoned that the attorneys' conduct had violated both the state's obstruction of justice statute[91] and ethical rules, including Rule 3.4's provision barring an attorney from requesting individuals other than clients "to refrain from voluntarily giving information to another party . . . ."[92]

In *In re Smith,*[93] another case involving obstruction of justice, expert witness testimony, and unethical conduct, the Oregon Supreme Court disciplined an attorney for his conduct while representing a

84. Colo. Bar Assoc., Formal Op. 120 (2008).

85. 751 S.E. 2d 445 (Ga. Ct. App. 2013).

86. *Id*. at 448.

87. *Id.* at 448–49.

88. *Id.* at 451.

89. *Id*. at 448.

90. *Id.*

91. *Id*. at 451 (citing GA. CODE ANN. § 16-10-93(a)). The statute bars, *inter alia*, "[a] person who, with intent to deter a witness from testifying . . . [from communicating] directly or indirectly, to such witness any threat of injury or damage to the . . . employment of the witness.").

92. *Id*. (quoting GA. RULES OF PROF'L CONDUCT r. 3.4).

93. 848 P.2d 612 (Or. 1993).

worker's compensation claimant.[94] In the underlying worker's compensation case, the employer's insurer had scheduled an independent medical exam of the claimant.[95] The claimant's lawyer prepared a letter for the claimant to deliver to the doctor.[96] In the letter, the lawyer threatened the doctor with a lawsuit if the doctor's report disagreed with the previous opinion of the claimant's chiropractor.[97] The doctor subsequently withdrew from the examination of the claimant.[98] The Oregon Supreme Court held that the lawyer's conduct violated its ethical rule that barred "[conduct prejudicial] to the administration of justice."[99] The Court rested its decision on the fact that the lawyer's conduct—threatening a witness in a legal proceeding—had violated Oregon's witness tampering statute.[100]

However, both *Kemp* and *Smith* involved interference with witness testimony, not requesting or ordering individuals to refrain from voluntarily and informally giving information to opposing parties. The obstruction of justice statutes ban the former, not the latter.

The federal obstruction of justice statues bar intimidating or threatening another person with the intent to "influence, delay, or prevent the *testimony* of any person in an official proceeding."[101] Similarly, the statute bans dissuading a person from "attending or testifying in an official proceeding."[102] Many states have comparable laws. According to one scholar, Nebraska's witness tampering statute is "typical," prohibiting attempts to "cause a witness . . . to '(a) testify or inform falsely; (b) withold any testimony, information, document, or thing; (c) elude legal process summoning him or her to testify or supply evidence; or (d) absent himself or herself from or herself from any proceeding or investigation to which he or she has been legally summoned.' "[103] Thus, an organization lawyer's request or order to an employee to refrain from voluntarily giving information to another

94. *Id.* at 612.

95. *Id.* at 613.

96. *Id.* at 614.

97. *Id.*

98. *Id.* at 613.

99. *Id.* at 613–15 (citing OR. CODE OF PROF'L RESP. DR 1-102(A)(4)).

100. *Id.* at 614–15 (citing citing OR. REV. STAT. § 162.285). The Court noted that the lawyer's threat to sue the doctor over the latter's testimony was "improper, because what a witness says in a legal proceeding is absolutely privileged." *Id.* at 614.

101. 18 U.S.C. § 1512(b)(1) (2012) (emphasis added).

102. *Id.*

103. John F. Decker, *The Varying Parameters of Obstruction of Justice*, 65 LA. L. REV. 49, 91 (2004) (quoting NEB. REV. STAT. § 28-919 (1995)). The current statute contains the same language.

party or that party's lawyer would not, in itself, constitute obstruction of justice.

However, there are other laws that might preclude such a request or order. Such laws may include whistleblower laws, state retaliatory discharge or public policy common law actions, laws protecting communications with government agencies and the protections of the National Labor Relations Act ("NLRA") for certain employee concerted activity.

A "whistleblower" is "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency."[104] State whistleblower laws provide varying degrees of protection to employees from employer retaliation.[105] One commentator described five ways in which state whistleblower laws differ in their protection for employees:

1. Which employees are protected. Some state laws protect only public employees. Others extend protection to private employees.[106] Federal law varies in this regard, depending on which federal statute is at play.[107]
2. Who is a proper receiver of the employee's complaint. Some states require reporting to an external public body, while others require that the employee make an internal complaint before reporting to a public body. The federal approach, and the approach of some states, is broader, protecting both internal complaints and complaints to public bodies.[108]
3. What types of employer activity is targeted by the statute. For example, some states protect employee reports concerning violations of the law. Some states have a narrower approach and some states have a broader approach.[109]
4. Whether the employee must prove that the employer engaged in the complained- of misconduct or whether the employee need only show that he reasonably believed the allegation.[110]
5. What remedies are available to the whistleblowing employee.[111]

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104. *Whistleblower*, BLACK'S LAW DICTIONARY (10th ed. 2014).

105. Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirement*s, 96 CAL. L. REV. 1633, 1633–44 (2008).

106. *Id.* at 1641 n.65.

107. *Id.* at 1641.

108. *Id.* at 1642–43.

109. *Id*. at 1641 n.67.

110. *Id*. at 1641 n.68.

111. *Id.* at 1641–42.

A second area of law that may protect employees who communicate with opposing parties is state retaliatory discharge or public policy common law actions. One commentator has identified the four most common scenarios that various states recognize.[112] These are when an employee is discharged for: refusing to commit a crime, "excercising a statutorily or legally guaranted right, reporting illegal activity, or performing a legal duty."[113]

A third area of law that may bar a lawyer from ordering a client's employee to refrain from communicating with an opposing party are laws protecting contacts with the government. For example, in *Electro Motive Manufacturing Company*,[114] the National Labor Relations Board ("NLRB" or "Board") found that the employee had violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") when it discharged a supervisor for giving a sworn statement to a Board agent.[115] The employer had argued that the supervisor's statement to the Board agent did not fall under the NLRA's protection because the supervisor had not been subpoenaed and had not testified in a hearing but had merely given "a statement in private to a Board investigator."[116] The Trial Examiner rejected this argument, noting that the word "testimony" under the NLRA had been construed broadly and that the NLRA gave protection against retaliation for testimony "regardless of the nature of the proceeding or whether or not the potential witness actually testified."[117]

In *Metal Services,*[118] the Administrative Law Judge ("ALJ") noted that an employer's policy restricting employees from discussing terms and conditions of employment with third parties, such as union representatives and Board agents, violated employees' § 7 rights under the NLRA.[119] The ALJ also found that the employer violated the NLRA when it threatened employees with reprisal if they did not give the employer documents received from the NLRB and if they cooperated with a Board investigation.[120] The ALJ also found that the employer had volated the NLRA by creating "the impression that employees['] contacts with the Board were under surveillance."[121]

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112. *Id.*

113. Brett J. Creson, *Individual Liability for Wrongful Discharge in Violation of Public Policy: An Emerging Trend*, 48 WAKE FOREST L. REV. 1345, 1350 (2013).

114. 158 N.L.R.B. 534 (1966).

115. *Id*. at 534–35.

116. *Id*. at 543.

117. *Id.*

118. 2015 L.R.R.M. (BNA) 176828 (N.L.R.B. Div. of Judges Feb. 18, 2015).

119. *Id*. at 30.

120. *Id*. at 40–42.

121. *Id*. at 42.

Similarly, giving information to the Board in an unfair labor practice case is protected activity.[122] The NLRA protects both employees who testify and employees who informally give information to the Board.[123] The NLRA's protection extends to "an employee who provides information to the Board that assists another employee."[124]

Contacts with the Equal Employment Opportunity Commission (EEOC) provides another example of protections for employee communications with a government agency. Section 704(a) of Title VII bars an employer from discriminating against an employee because the employee has opposed an employment practices that violates Title VII (the "opposition clause") or because the employee "participated in any manner in an investigation, proceeding, or hearing under [Title VII]" (the "participation clause").[125] Courts have interpreted the participation clause broadly,[126] holding that the clauses's protection extends to informal communications with the EEOC about a co-worker's Title VII charge.[127]

A fourth area of law that may bar an organization's lawyer from instructing his client's employees to refrain from giving information to another party is the protection for employees' "concerted activities." Section 7 of the NLRA protects employees' rights to organize, to

122. SPE Util. Contractors, Inc., NO. 7-CA-50767, 2008 WL 5351375 (N.L.R.B. Div. of Judges DEC. 17, 2008); *see also* LVI, Inc., NO. 21-CA-36866, 2006 WL 2647512 (N.L.R.B. Div. of Judges SEPT. 12, 2006).

123. *See* Commerce Concrete Co., 197 N.L.R.B. 658, 660 (1972) (stating that the NLRA "protects employees in the important development stages that fall between the filing of charges and the giving of formal testimony" and also protects employees who give information to the NLRB "informally in connection with a representation proceeding").

124. Metro Networks, Inc., 336 N.L.R.B. 63, 66 (2001).

125. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012).

126. *See* Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173-74 (2d Cir. 2005) (stating that the broad language of the participation clause prevents employers from retaliating against an employee who is a named witness in another co-worker's Title VII lawsuit); Glover v. S.C. Law Enf't Div., 170 F.3d 411, 414 (4th Cir. 1999) (stating that the participation clause "ensure[s] not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses"); Pettway v. Am. Cast Iron Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969) (finding "exceptionally broad protection intended for protestors of discriminatory employment practices").

127. *See* Clover v. Total Sys. Serv., Inc., 176 F. 3d 1346, 1353 (11th Cir. 1999) (explaining that the participation clause protects an employee who participates in an interview with EEOC investigators); Gibson v. Marjack Co., 718 F. Supp.2d 649, 654 (D. Md. 2010) (holding that employee participated in a protected activity when he informed the EEOC investigator that he had witnessed his co-worker's harassment); E.E.O.C. v. Molle Chevrolet, Inc., No. 91-0030-CV-W-BB, 1992 WL 443562 (W.D. Mo. Dec. 22, 1992) (holding employee engaged in protected activity when his employer terminated him for returning a notebook to his co-worker that was going to aid in his co-worker's EEOC investigation).

unionize, to bargain collectively, and "to engage in other concerted activities for the purpose of . . . mutual aid or protection."[128]

If an employee's communications fall within the protection of other substantive laws and an employer cannot legally discharge the employee for such a communication, then a lawyer should not threaten an employee with discharge for making such a communication. There are two considerations that militate against a lawyer making such a threat.

First, if the employer subsequently discharges the employee, the employer may be found liable under whistleblower laws, a common law retaliatory discharge action, the laws protecting communications with government agencies, or the labor laws. Exposing a client to legal liability may very well constitute incompetent representation, a violation of Rule 1.1.[129]

Second, there are ethical problems with an attorney counseling a client in violating the law. Model Rule 1.2(d) states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[130] However, it could be argued that Rule 1.2(d) is not applicable because a violation of the whistleblowing laws, the laws protecting communications with government agencies, the labor laws or liability for retaliatory discharge does not constitute "criminal" or "fraudulent" conduct. But other ethical rules may be involved.

Model Rule 1.16(a)(1) requires that a lawyer withdraw from representing a client if "the representation will result in violation of the rules of professional conduct or other law."[131] Unlike Rule 1.2(d), Rule 1.16(a)(1) is not confined to "criminal" or "fraudulent" conduct. Counseling a client to illegally discharge an employee would appear to fall within Rule 1.16(a)(1).

Furthermore, Model Rule 8.4(d) bars a lawyer from "engag[ing] in conduct that is prejudicial to the adminisitration of justice."[132] The laws discussed above—whistleblower laws, public policy/retaliatory discharge actions, laws protecting communication with government agencies, and the labor laws—all embody important public policy interests. A strong argument can be made that assisting a client or

128. National Labor Relations Act, 29 U.S.C. § 157 (2012). Section 8(a)(1), in turn, makes it "an unfair labor practice for an employer… to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section7]." National Labor Relations Act § 8 (a)(1), 29 U.S.C. § 158(a)(1) (2012).

129. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N. 2018) (requiring that a lawyer "provide competent representation to a client").

130. *Id.* at r. 1.2(d).

131. *Id.* at r. 1.16(a)(1).

132. *Id.* at r. 8.4(d).

counseling a client in violating these laws constitutes "conduct . . . prejudicial to the administration of justice."

On the other hand, one scholar has argued that the "other law" language of Model Rule 1.16(a)(1) should be interpreted consistently with Model Rule 1.2(d).[133] Under this interpretation, Model Rule 1.16(a)(1) would only require an attorney to withdraw when the representation would involve the lawyer in "encountering or participating in a crime, fraud, or violation of the Rules of Professional Conduct."[134] The "other law" language would not include a lawyer's advice to a client to violate the civil law, including advice to discharge an employee. Presumably, the same argument could be made about Model Rule 8.4(d). Arguably, Model Rule 8,4(d)'s "conduct . . . prejudicial to the administration of justice," language should not be interpreted to apply to a lawyer's advising a client to violate the civil law.[135]

B. Interpreting The Parameters Of Model Rule 3.4(f)

To summarize, an argument can be made that under Model Rule 1.16(a)(1) and Model Rule 8.4(d), a lawyer cannot ethically threaten a client's employee with discharge if the discharge would violate other law. However, an argument can also be made that the "other law" language in these two ethical provisions should be limited to criminal or fraudulent conduct. Aside from this issue, should Rule 3.4(f) *itself* be interpreted to bar a lawyer from threatening to discharge a client's employee if the employee voluntarily gave information to an opposing party? An argument that the Rule 3.4(f) would preclude such an order would be based on the general policy favoring informal access to information[136] and the fact that Rule 3.4(f) only expressly permits *requesting* a client's employee to refrain from voluntarily giving information to an opposing party.[137] The arguments that the ethical rules would *not* ban an attorney from informing clients' employees that they will be discharged for voluntarily giving information to opposing parties are threefold. First, Rule 3.4(f)'s exception for a client's employees does not expressly ban such an order.[138] Second, an organization is entitled to vigorous representation and in order to provide vigorous representation the organization's attorney needs to have some control over the flow of information coming from

133. Paul Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L REV. 251, 275–80 (2018).

134. *Id*. at 279.

135. *Cf. id*. at 280–82 (arguing that Model Rule 8.4(e)'s "other law" language should be interpreted consistently with Model Rule 1.2(d)).

136. *See supra* notes 14–16, 24–26 and accompanying text.

137. MODEL RULES OF PROF'L CONDUCT r. 3.4(f).

138. *Id.*

employees.[139] Third, employees have a duty of loyalty to their employers.[140]

There are very few authorities on the question. One treatise takes the position that while a lawyer may request a client's employee, whose interests will not be harmed, to refrain from giving information to an opposing party, the lawyer cannot *forbid* such an employee/witness from being interviewed.[141]

A Washington Supreme Court case, *Wright by Wright v. Group Health Hospital*,[142] took a similar position but is of arguable relevance. In *Wright*, the plaintiffs brought a medical malpractice action against the defendants Group Health Hospital ("Group Health") and Dr. Schaberg, an physician employed by Group Health, alleging that the defendants had committed medical malpractice during the delivery of plaintiff Mrs. Wright's son, plaintiff Jeffery Wright.[143] In defending against medical malpractice actions, Group Health had a policy of instructing the employees who had been involved in the medical care of the plaintiff-patient to not discuss the case with anyone other than Group Health's own lawyers.[144] Group Health gave these instructions to both current and former employees.[145] Plaintiffs' attorneys wanted to conduct *ex parte* interviews of nurses who had cared for Mrs. Wright.[146] Group Health's lawyers contended that the attorney-client privilege and the ethical rules barred such *ex parte* interviews. The plaintiffs' attorney moved for an order stating that he had "both the legal and ethical right to interview ex parte both current and former Group Health employees so long as they were not management employees."[147] The trial court denied the plaintiffs' request, affirming Group Health's "right to give a blanket instruction to its *current* non-party employees not to have ex parte contacts with plaintiffs' attorneys."[148] The trial court held that such contact would violate DR 7-104(A)(1)'s ban on communicating with represented parties.[149]

The Washington Supreme Court first held that the attorney-client privilege did not "in itself bar plaintiffs' attorney from interviewing

139. *See supra* notes 27–30 and accompanying text.

140. *See infra* notes 159–171 and accompanying text.

141. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 3.4–3.7 (2018–19 ed. 2018).

142. 691 P.2d 564 (Wash. 1984).

143. *Id*. at 564–65.

144. *Id*. at 566.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id*.

149. *Id*. DR 7-104(A)(1) was the predecessor to Model Rule 4.2.

[Group Health]'s employees."[150] The attorney-client privilege only protected communications, not facts, and the plaintiffs' attorney only sought to discover facts, not communications.[151] Group Health contended that DR 7-104(A)(1), which barred lawyers from communicating with represented parties, barred communications with any of its current or former employees.[152] The court engaged in a lengthy discussion of the purposes of the ethical rule and the split in authority regarding which employees of a corporate defendant were covered by the rule.[153] The Court held that "the best interpretation of 'party' in litigation involving corporations is only those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, *i.e.*, those employees who have 'speaking authority' for the corporation."[154] Under the court's test, only employees who have "managing authority sufficient to give them the right to speak for, and bind, the corporation" could be considered "parties" for the purposes of the ethical rule.[155] Former employees could not bind the organization and, therefore, the ethical rule applied only to current employees."[156]

In regard to those employees who were outside the protection of DR 7-104(A)(1), the Washington Supreme Court held that it was "improper for [an employer] to advise its employees not to speak with plaintiffs' attorneys."[157] The court held that Group Health's policy instructing employees not to talk with opposing counsel was improper. The Court stated:

> Since we hold an adverse attorney may, under CPR DR 7-104(A)(1), interview ex parte nonspeaking/managing agent employees, it was improper for Group Health to advise its employees not to speak with plaintiffs' attorneys. An 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. This opinion shall not be construed in any manner, however, so as to *require* an employee of a corporation to meet ex parte with adverse counsel. We hold only that a corporate party, or its counsel, may not *prohibit* its nonspeaking/managing agent employees from meeting with adverse counsel.[158]

150. *Id.*
151. *Id.* at 566–67.
152. *Id.* at 566.
153. *Id.* at 567–69.
154. *Id.* at 569.
155. *Id.*
156. *Id.*
157. *Id.* at 570.
158. *Id.*

It is interesting to note how the *Wright* court arrived at its conclusion. At the time, Washington's ethical rules were based on the old Model Code. The Model Code did not contain a provision like Model Rule 3.4(f). The Model Code merely barred a lawyer from suppressing evidence that the lawyer or client had "a legal obligation to reveal or produce"[159] and from advising or causing a person "to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein."[160] The old Model Code, however, did not bar lawyers from requesting a client's employees to refrain from voluntarily talking with opposing counsel. In spite of this, the *Wright* court concluded that since, under its interpretation of the ethical rule on communicating with represented parties (DR 7-104 (A)(1), now Model Rule 4.2), the lawyer opposing the corporation could not be barred from communicating with nonspeaking/managing employees of the corporation, the corporation's lawyer could not instruct the employees to refrain from talking with opposing counsel. The *Wright* court did not rely on any specific language in the ethical rules but simply appeared to rely on its earlier policy discussion in which the court stated that plaintiffs' counsel had a need for "information which may be in the exclusive possession of the corporation and may be too expensive or impractical to collect through formal discovery."[161] It is interesting to note further that, although the state of Washington has subsequently adopted a Model Rules format and adopted most of Model Rule 3.4, the state did not adopt section (f) of that Rule.[162]

In regard to the question of whether, under Model Rule 3.4(f) an attorney for a corporation could order employees, under the threat of termination, to refuse to talk voluntarily to opposing counsel, it could be argued that *Wright* is completely irrelevant to the question because Washington did not, and does not, have a provision like Model Rule 3.4(f). On the other hand, *Wright* supports the general principle that plaintiffs' attorneys should have free access to any witness that has relevant information unless ethical rules bar such contact.

A noted treatise takes the opposite position of the aforementioned treatise and of *Wright*. The treatise presents the following hypothetical:

> Lawyer L represents a small company being sued in tort. At L's suggestion, the owner calls all of the employees into the office for a short meeting, where L tells them that they should not speak to any lawyer or investigator for the plaintiff unless

159. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-109(A) (AM. BAR ASS'N. 1980).

160. *Id*. at DR 7-109(B).

161. *Wright*, 691 P. 2d at 568.

162. *See* WASH. RULES OF PROF'L CONDUCT r. 3.4(f) (2015) (containing subsections (a) through (e); subsection (f) is simply marked "[Reserved.]").

> he, L, is present. The owner adds that anyone who disobeys will be fired immediately.[163]

The treatise states that requesting these employees to refrain from voluntarily giving information to the opposing party is "precisely the conduct that Model Rule 3.4(f) contemplates (and permits)."[164] The treatise then inquires whether L's conduct was coercive and thus improper. The treatise then notes that the comment to Model Rule 3.4 (f) allows the corporation's attorney to advise employees to refrain from talking to the other side "which is certainly stronger than a mere 'request.' "[165] The treatise concludes:

> Although the matter is not free from doubt, L's conduct should be held permissible, even if he suggested the threats himself. Since the client company has a right to maintain silence, it should be held to require its servants to exercise that right on its behalf, in order to prove their loyalty.[166]

Which approach is correct? The first treatise and the *Wright* court's holding that "it was improper for [the employer] to advice its employees not to speak with plaintiffs' attorneys"?[167] Or the second treatise's approach that the lawyer could advise the client to threaten employees with termination if they voluntarily gave information to oppsing parties. I believe the latter approach is better. Employees are agents of their employers[168] and therefore owe their employers a duty of loyalty.[169] The duty of loyalty "is grounded in agency principles"[170] and employers can sue employees for breach of the duty of loyalty.[171] Fiduciary principles require "that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship."[172] An agent

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163. 1 HAZARD & HODES, *supra* note 13, § 30.12 illus. 30-7, at 30-30.

164. *Id*. at 30-25.

165. *Id.* (citing MODEL RULES OF PROF'L CONDUCT r. 3.4(f) Cmt. (AM. BAR ASS'N. 2018)). That comment states, "Paragraph (f) permits a lawyer to *advise* the employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client." (Emphasis added).

166. 1 HAZARD & HODES, *supra* note 13, § 30.12, at 30-25.

167. Wright by Wright v. Grp. Health Hosp., 691 P.2d. 564, 570 (Wash. 1984).

168. *See* RESTATEMENT (THIRD) OF AGENCY §1.01 Cmt. c (2006) (stating that "[t]he elements of common-law agency are present in the relationship between employer and employee.").

169. *Id*. § 801 (2006) (stating that "[a]n agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship"); *id*. § 8.01 cmt. c (stating that "the fiduciary principle is applicable . . . to employees").

170. Wall Sys., Inc. v. Pompa, 154 A.3d 989, 998 (Conn. 2017).

171. *Id.*

172. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (AM. LAW INST. 2006*)*; *see also Pompa,* 154 A.3d at 998 (same).

has a "duty to use reasonable efforts to provide material information to the principal,"[173] must not use his position to benefit himself or a third party,[174] may not "use or communicate confidential information of the principal for the agent's own purposes or those of a third party,"[175] and must "comply with all lawful instructions received from the principal . . . concerning the agent's actions on behalf of the principal."[176] Futhermore, "[a]n agent has a duty not to deal with the principal . . . on behalf of an adverse party in a transaction connected with the agency relationship."[177] The agent's duty of confidentality may extend beyond information "connected with the subject matter of the agency relationship," encompassing information "the agent should reasonably understand the principal expects the agent to keep confidential."[178] However, the "agent's duty of confidentialty is not absolute."[179] Exceptions include an agent's relevations to law enforcement officials about the principal's crimes or intended crimes and the protections afforded by whistleblowing statutes.[180]

The latter exceptions to the employee's duty of loyalty for contacts with law enforcement officials and for whistleblowing statutes provides guidance regarding the parameters of Model Rule 3.4(f)'s exception for a client's employees. If discharging an organizational client's employee for voluntarily giving information to an opposing party would violate other law,[181] then the organizational lawyer's threat to discharge such an employee should be considered a violation of Model Rule 3.4(f).[182] As discussed above,[183] Model Rule 3.4(f) balances the interests of an organizational client's attorney to exercise some control over the flow of information from employees against the interests of opposing parties to have informal access to information. The balance of interests tips against an attorney's threat to discharge a client's employee when the discharge would violate the law. However, if an employee's discharge would not violate other law and the organization's attorney determines that the employee's interests would not be adversely affected by the employee refraining from giving

173. RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. b.

174. *Id*.

175. *Id*. at § 8.05 (2).

176. *Id*. at § 8.09 (2).

177. *Id*. at § 8.03.

178. *Id*. at § 8.05 cmt. c.

179. *Id*.

180. *Id*.

181. For a discussion of such "other law," see *supra* notes 83–122 and accompanying text.

182. Model Rule 3.4(f) should be interpreted to ban this conduct even if Model Rule 1.16(a)(1) and Model Rule 8.4(d) are considered inapplicable. *See supra* 130–134 and accompanying text.

183. *See supra* notes 14–36 and accompanying text.

information to an opposing party, then the balance tips in favor of the organization's interests. Under these circumstances, Model Rule 3.4(f) should be construed to permit the attorney to order the employee, under threat of discharge, to refrain from voluntarily giving information to the opposing party.