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*Witness Preparation and Ex Parte Communications: A Fundamental Discussion* © Do not copy without permission.

By

Michael Z. Green

I. Witness Preparation: A Conundrum Between An Open and Fair Tribunal Process and Zealous Client Advocacy

When we think about witness preparation by attorneys, it sometimes engenders doubts about truthful testimony. These doubts arise as skepticism that the attorney shapes the testimony in a way that may be too suggestive and potentially inconsistent with the actual events at issue. A number of very public events have recently highlighted how attorneys may make suggestions to witnesses under circumstances of preparation that can involve concerns about creating false testimony. And

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1 Professor of Law, Texas Wesleyan University School of Law, 1515 Commerce Street, Fort Worth, Texas 76102, Phone: 817-212-4140, Fax: 817-212-3965 E-mail: mgreen@law.txwes.edu.

2 See generally John Applegate, *Witness Preparation*, 68 Texas L. Rev. 277 (1989); see also Fred C. Zacharias & Shawn Martin, *Coaching Witnesses*, 87 Ky. L.J. 1001, 1010-11 (1999) (“The primary danger of coaching is the possibility that a lawyer may so change a witness’s presentation that the resulting testimony is either false or conveys an incorrect impression about the facts that cross-examination cannot counteract.”).

3 Zacharias & Martin, *supra* note 2, at 1010-1011.

press coverage of a Deposition Preparation document that came from the Baron & Budd law firm and related legal challenges to it as unethical and inappropriate witness preparation. William Hodes also described the commentary by a consistent critic of lawyers, Walter Olson, who argued that the Baron & Budd Deposition Preparation document was just another form of disingenuous lawyering on par with a certain “talking points” preparation document that was given by someone to “White House Aide, Linda Tripp,” and it suggested a change in her original story involving the events surrounding the exit of Kathryn Willey from President William Clinton’s chambers. \textit{Id.; see also} Patricia Kerrigan, \textit{Witness Preparation}, 30 Tex. Tech L. Rev. 1367, 1369 (1999) (referring to President Clinton’s conduct related to testimony and witness preparation in the Monica Lewinsky matter as raising ethical concerns); Richard H. Underwood, \textit{Perjury! The Charges and the Defenses}, 36 Duq. L. Rev. 715, 776-81 nn. 269 & 280 (1998) (discussing difficulties with preparing witnesses and going too far and referring to the “talking points” document may have been a clever attempt to get answers the lawyer wanted without ever suggesting that she lie as a witness). Another high-profile case of questionable witness preparation involved the government prosecution against the defendant, Zacarias Moussaoui, who was the alleged 20th attacker in Al Qaeda’s September 11, 2001 attack and how the case against him almost failed and may have been derailed to a certain extent due to unethical attorney behavior. Felicia Carter, \textit{Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Conduct That Nearly Derailed the Moussaoui Trial}, Geo. J. Legal Ethics 463, 468-70 (2007) (describing ethical implications in terms of witness preparation by attorney Carla Martin that affected the Moussaoui trial when she sent transcripts of trial testimony to upcoming government witnesses and explained to them in e-mail messages how they should testify to counter problems Martin saw in the government’s developing case); Matthew Rosengart, \textit{Preparing Witnesses for Trial: A Post-Moussaoui Primer for Federal Litigators}, 54 Federal Lawyer 34 (Dec. 2007) (describing the widely-criticized actions of government lawyer, Carla Martin, in preparation of witnesses who were testifying against Moussaoui).

\footnote{\textit{See generally} Model Rule 3.3, Candor to the Tribunal (2001). Specifically, Rule 3.3, Candor to the Tribunal, states:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a}
of concerns regarding fairness to the opposing party and counsel, the Model Rules establish that it is inappropriate for an attorney to “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”\textsuperscript{6}

On the other hand, attorneys also have an ethical duty to represent their clients effectively and

witness called by the lawyer, has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

6 Model Rules 3.4 states: Rule 3.4 Fairness To Opposing Party And Counsel

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;
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
(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.
zealously. And some commentators think that the duty to be a zealous advocate can represent a knotty dilemma when compared to the duty to the tribunal to ensure the telling of truth as it relates to preparing a witness to testify in the light most favorable to the client. This dilemma arises because preparation that evolves into shaping the presentation of a witness’s testimony can create negative connotations about the truth of the testimony offered. One commentator has expressed the ethical dilemma regarding witness preparation as follows: “What is the difference between witness preparation which is permissible, and witness coaching which is not?” The slippery nature of delineating the difference between what is proper and what is not proper has raised concern regarding the question of whether such a herculean task can even be accomplished: “Lawyers have long been faced with ethical questions surrounding witness preparation; however, there has been little guidance on how to address these issues…because the troublesome actions are so difficult to detect, making any rules almost impossible to enforce.”

Within the clear mandate of the Model Rules, witness preparation may not, at a minimum,

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7 Model Rule 1.1., Client-Lawyer Relationship, Competence, states: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation (emphasis added). Also, the Preamble to the Model Rules, A Lawyer’s Responsibilities, Comment [2] states: “As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.”

8 See Gerald L. Shargel, Federal Evidence Rule 608(B): Gateway to the Minefield of Witness Preparation, 76 Fordham L. Rev. 1263, 1264-1266 & n.11 (2007) (discussing dilemmas and suggesting that an attorney’s duty to prepare his client to testify trumps his duty of candor to the tribunal); see also Joseph A. Colquitt, Evidence and Ethics: Litigations in the Shadows of the Rules, 76 Fordham L. Rev. 1641, 1666 n. 126 (2007) (referring to how many commentators believe that when attorneys are faced with difficult choices they must focus on being totally committed to the client in terms of “zealous advocacy”). Richard C. Wydick, The Ethics of Witness Coaching, 17 Cardozo L. Rev. 1, 3-4 (1995) (raising concerns about dilemmas that may result from coaching and preparing witnesses even when the attorney clearly has no idea that the client will not tell the truth after having been prepared).


10 See Nicole LeGrande & Kahtleen E. Mireau, Witness Preparation and the Trial Consulting Attorney, 17 Geo. J. of Leg. Ethics 947, 947 (2004); see also Liisa Renee Salmi, Don’t Walk the Line: Ethical Considerations in Preparing Witnesses for Depositions and Trial, 18 Rev. Litig. 135, 138-39 (1999) (discussing difficulties with definitive rules regarding witness preparation); Zacharias & Martin, supra note 2, at 1016-17 (agreeing that it is difficult to create rules to address all conceivable conduct) involved with witness preparation.
stray into the land of creating false testimony.\textsuperscript{11} Accordingly, the clearest and probably the easiest distinction as to what would be unethical behavior would include any preparation that results in the witness lying.\textsuperscript{12} However, the more difficult question arises when the lawyer prepares a witness but does not know that the client has responded to the attorney’s suggestions by offering false testimony.\textsuperscript{13} For these situations, other distinctions have been raised to differentiate ethical from unethical conduct including looking at “how dictatorial the attorney is being with his witness” and overall how much suggestiveness is involved.\textsuperscript{14} Another possible distinction would consider “provid[ing] content” as inappropriate versus “merely shap[ing] and polish[ing] delivery” which would be appropriate.\textsuperscript{15}

But in dealing with the boundaries of effective preparation of a witness on one end and inappropriate preparation leading to untruthful testimony on the other end, there appears to be a vast amount of “gray areas” of discretion between these two polar opposites.\textsuperscript{16} The Preamble to the Model Rules gives guidance to the application of this discretion by stating:

\begin{quote}
Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s \textbf{obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons}
\end{quote}

\textsuperscript{11} See Model Rule 3.4 (a) & (b) (”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; (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law”).

\textsuperscript{12} Shargel, \textit{supra} note 8, at 1271 (“an attorney’s culpability [in unethical witness preparation] increases with his active involvement in propagating lies”).

\textsuperscript{13} Wydick, \textit{supra} note 8, at 4 (raising a key concern with witness preparation as creating false testimony even if the attorney is not certain that the client will lie).

\textsuperscript{14} Shargel, \textit{supra} note 8, at 1271.

\textsuperscript{15} Id.

\textsuperscript{16} Id. (“I do not agonize excessively over gray areas ... because black and white ones abound. Witnesses sometimes say to me, at some sticky point, ‘Tell me what to say’ and are uniformly disappointed when I reply that my role does not include making up answers.”).
involved in the legal system.\textsuperscript{17}

Therefore, in addressing the conundrum between zealous advocacy\textsuperscript{18} when preparing a witness versus professional obligations of openness, courtesy and civility to those involved, an attorney should view all those principles as integrated rather than exclusive.\textsuperscript{19} William Hodes has helpfully explained the difficulties involved: “Legal ethics is hard. You must try to find the line between what is permitted and what is not, and then get as close to that line as you can without crossing over to the bad side. Anything less is less than zealous representation....”\textsuperscript{20}

A. Preparing Witnesses in Employment Litigation: An Ethical Hypothetical on the Way to the Summary Judgment Motion

1. A Hypothetical: Employment Discrimination Harassment Depositions

Imagine the following hypothetical (somewhat related to the discussion that will occur during the panel related to this paper): several female employees believe they have been discriminated against on the basis of sex due to harassment.\textsuperscript{21} Add to this scenario the fact that most of these women are represented by a union where many of the alleged male harassers have roles in union leadership. In such a hypothetical employment litigation case, many important ethical issues regarding witness preparation will arise for the plaintiff’s counsel, the counsel for the union, the in-house counsel who investigated the harassment, and the outside counsel for the


\textsuperscript{18} See Shargel, \textit{supra} note 8, at 1268 (“To zealous advocates, witness preparation is a sacrament.”); Applegate, \textit{supra} note 2, at 279 (finding witness preparation is “a fundamental duty of representation and a basic element of effective advocacy”); Hodes, \textit{supra} note 4, at 1350 (asserting that failing to prepare witnesses would be “unethical and unprofessional, bordering on legal malpractice to boot.”).

\textsuperscript{19} See ABA Model Rules of Professional Conduct, Preamble, A Lawyer’s Responsibilities, Comment [8] (2001) (“A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done....”).

\textsuperscript{20} Hodes, \textit{supra} note 4, at 1366.

\textsuperscript{21} Such class action sexual harassment matters were highlighted by two landmark cases brought by the EEOC a little more than ten years ago. \textit{See, e.g.}, \textit{EEOC v. Dial Corporation}, 156 F. Supp. 2d 926 (N.D. Ill. 2001); \textit{EEOC v. Mitsubishi Motor Manufacturing of America, Inc.}, 990 F. Supp. 1059 (C.D. Ill. 1998).
employer. The plaintiff’s counsel will want to depose key supervisors, key union officials, and the in-house counsel who investigated the alleged harassment. And the attorney for the employer and the attorney for the union will want to depose the plaintiffs.

There is probably no situation in an employment discrimination case that is more important than the deposition of witnesses. Scores of employment discrimination cases have probably been won or lost through the use of deposition testimony to lock in a story and resolve the case through the summary judgment process. Accordingly, it is crucial that attorneys have an opportunity to thoroughly prepare the witnesses participating in a deposition related to an employment discrimination case. And the ethical concerns about improper coaching versus necessary preparation of witnesses will likely arise.

2. Some Help From A Civil Action

Certainly in employment litigation these ethical questions can arise. But it is not limited to employment litigation. An excellent example of how this issue can transcend employment litigation was highlighted by the movie, A Civil Action, based on a true story involving a mass tort litigation case in Woburn, Massachusetts. During a particular deposition scene of the movie, the plaintiff’s class action attorney, Jan Schlichtmann (played by John Travolta), asks a question of an employee of one of the defendants about whether he saw dumping of any chemicals while working for this company. The employee, Al Love (played by James Gandolfini, now more popularly known for his role as Tony Soprano in the television series, the Sopranos), admits that he has seen dumping. After going through several witnesses who had repeatedly denied seeing any dumping, this response initially shocks both Schlichtmann and the defense attorney, William Cheeseman (played by Bruce Norris). Obviously amazed by the response, Schlichtmann then asks

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23 A Civil Action (Touchstone Pictures, Paramount Pictures et al. 1998) (directed by Steven Zaillian).
Love to repeat his answer and Cheeseman asks Love if he would like to take a break before answering again. Then apparently after the deposition has concluded and while outside, Cheeseman suggests to Love that he needs to understand how nobody can be sure that any chemical dumping caused health problems for the residents of Woburn. Love disagrees and asks Cheeseman how does he really know? This excerpt from a Civil Action led me to think about how this situation might arise in relation to our hypothetical sex harassment class action.

Before we do that, initially here are some general thoughts and actual questions about the *A Civil Action* scene. Of course, trying to take a break in the middle of answering a deposition question would possibly violate ethical rules and most likely local and/or pretrial rules regarding the conduct of a deposition. The Federal Rules of Civil Procedure can also be used to control coaching the testimony of witnesses during a deposition. However, the Federal Rules of Civil Procedure don’t address witness preparation directly. So what if the attorney (Cheeseman) believed the witness was making a mistake or had misunderstood what the question was asking? Should the attorney be able to confer with the witness in terms of the preparation required in terms of being a zealous advocate for his client’s interests? This highlights the balance between the ethical concerns related to witness preparation and the concerns about being a zealous advocate. Beyond the situation in *A Civil Action*, these same questions can arise when you prepare a witness in an employment discrimination case deposition.

### 3. Conferring With Witnesses in an Ethical Manner During Our Hypothetical Employment Harassment Depositions

In our hypothetical class action sexual harassment case, certain ethical concerns can arise when a deposition witness says something that differs from what the attorney’s prepared understanding is about the matter. What actions may the attorney take ethically in addressing this issue? Can the attorney confer with the witness immediately? May the attorney advise the witness after a break in the deposition? How about advising the witness after the deposition is over? Could the attorney ask for additional time so that the witness can correct any errors? What about the attorney’s ethical duty to correct any errors in the deposition transcript?

Certainly, it would seem to be inappropriate to try to interrupt a deposition by taking a break in the middle of a question. Such behavior probably establishes why some courts have been willing to issue blanket orders prohibiting attorneys from conferring at all with witnesses during a deposition.

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25 *See Jean M. Cary, Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions, 19 Geo. J. Legal Ethics 367, 373 (2006) (asserting that the Supreme Court should change Federal Rule of Civil Procedure 30(d)(1) to protect against unnecessary attorney disruption and coaching of witnesses by establishing a rule to “prohibit consultation between a deponent and his or her counsel once a question has been posed by the deposing attorney unless a question of privilege has arisen.”).*
However, an attorney’s hands should not be tied when it comes to legitimate reasons for conferring with a witness while a deposition is still in progress. The attorney must be vigilant to make sure that the client’s interests are protected. It should not be about supporting perjury. Instead, the attorney’s actions would be focused on telling the truth while making sure that the information is presented in the light most favorable to the client. Making sure a witness understands all the implications of a question and a response made during a deposition does not appear to be an ethical violation. Rather, the ethical rules (Model Rules 3.3 and 3.4) actually require the attorney to make such an intervention to protect the truth-telling function of the legal process. Only if the attorney was trying to get the witness to change his or her story to one that is not true would it clearly involve an ethical mishap.

In a West Virginia case involving a sex discrimination claim, the lower court had ruled that once a deponent was placed under oath, the deponent’s attorney could not confer with the deponent. In reversing the lower court, the West Virginia Supreme Court of Appeals explained: “The propriety of private conferences during deposition breaks or recesses poses a difficult question for this Court. A conference during a regularly scheduled evening or lunch break obviously would not cause a needless consumption of time during a deposition, nor should it affect the answer to a pending question. On the other hand, the concern implicit in this issue is


28 Id. at 373-74.

29 Id. at 373 n.21 (citing Model Rules 3.3-3.4).

30 See L. Timothy Perrin, The Perplexing Problem of Client Perjury, 76 Fordham L. Rev. 1707, 1708 (2007) (“The Model Rules of Professional Conduct specifically preclude lawyers from knowingly presenting false evidence. . . . The most difficult ethical questions for lawyers arise when these duties collide--when the duty to the court conflicts with the duty to the client.”)

31 State ex rel Means v. King, 520 S.E.2d 875, 878 (W.Va. 1999) (describing an order in the circuit court “that once the Plaintiff [is] placed under oath for her deposition or any other sworn testimony, discussions between Plaintiff and her counsel are inappropriate”).
that such a private conference might permit an attorney or some other person to suggest changes to prior answers or coach the witness about anticipated questions, and, “[c]onsequently, the potential exists that the conference might be used to violate ethical or legal rules against witness coaching.”32 But the court also acknowledged that “prohibiting a client from talking to her attorney during a long break might penalize the client unnecessarily.”33

Attorneys have a responsibility to make sure the deposition record is correct pursuant to the Federal Rules of Civil Procedure but they must do so without unethically coaching the deponent to change their testimony to include falsehoods.34 In one instance, plaintiff’s attorneys attempted to comply with this duty to make sure the deposition transcript was correct and it led them to be subject to major sanctions. In a case initiated in 1994 against Denny’s for sexual harassment, the attorneys for the plaintiff submitted a 63-page errata sheet detailing some 868 corrections to the deposition testimony given by the plaintiff in 1996.35 Yet, by making so many corrections and after the case was dismissed for failure to comply with an order to pay costs of a subsequent deposition after the errata sheet was offered, the employer used the errata sheet as evidence to assert that the plaintiff’s case was frivolous and sought sanctions against plaintiff’s counsel. The federal court agreed and ordered sanctions in the amount of more than $400,000 that was later reversed on appeal and remanded to the trial court because it had rejected the magistrate judge’s finding that there should be no sanctions and the trial court had not held a separate hearing from the magistrate’s to make any separate findings instead.36

Because the plaintiff had only limited English, an interpreter translated the questions into Haitian French Creole for the plaintiff during her eight days of deposition testimony.37 This language problem may have added to issues requiring the 63-page errata sheet detailing 868 corrections.

32 Id. at 882 (W.Va. 1999) (citing A. Darby Dickerson, The Law and Ethics of Civil Depositions, 57 Md. L. Rev. 273, 332 (1998)).

33 Id.

34 See A. Darby Dickerson, Deposition Dilemmas: Vexatious Scheduling and Errata Sheets, 12 Geo. J. Leg. Ethics 1, 52- 65 (1998) (describing how a deponent can make corrections to the transcript by submitting errata sheets under Federal Rule of Civil Procedure 30(e) but raising ethical concerns about improper coaching by attorneys as such corrections may be substantive and because they occur in secret it would be better to just make the corrections on the record at the time of the actual deposition).


37 Id. at 1234-35.
changes to a deposition that had involved a transcript of more than 1200 pages. The magistrate found that plaintiff’s counsel asserted that many of the corrections were necessary because of “a legitimate desire to present their case truthfully and accurately.” One would wonder how things would have transpired if the plaintiff’s counsel had tried to make those clarifications on the record during the deposition. That attempt to repeatedly clarify on the record would have certainly opened them up to challenge for disrupting the deposition and unnecessarily prolonging the process while also being uncivil and even unethical in trying to distort the truth through coaching the witness during the deposition. Either way, it represented a tightrope for the plaintiff’s attorneys to navigate and this situation highlights the difficulties involved with preparing witnesses for depositions in an employment discrimination case.

4. Application of Witness Preparation Ethical Concerns to our Sexual Harassment Depositions Hypothetical

Assuming that we have started full blown discovery in our hypothetical sexual harassment class case, we will highlight two particular situations that may clarify how issues of witness preparation and conferring with the witness at a deposition might arise. Then we will explore some options regarding how to address these ethical concerns about witness preparation matters during discovery in an employment discrimination case. These issues will relate to the depositions of an in-house counsel, Jane, and a union official, Paul, and their respective attorneys, James and Walter.

a. James’ Ethical Deposition Preparation Issues at Jane’s Deposition

Assume that the female plaintiffs’ attorney has given notice that he intends to depose one of the company’s in-house counsel, Jane, who was made aware of the claims of sexual harassment before a charge was filed with the EEOC. Jane investigated the claims of harassment and became mortified when she discovered certain boorish practices going on at manufacturing sites which permeated with unwelcome sexual behavior, gestures, and commentary along with the presence of significant numbers of pornographic materials being displayed throughout the facilities.

In Jane’s opinion, the company did seem to have a pattern and practice of allowing sexual harassment to occur. She reported this to Bob, the General Counsel, who told her that it was her job to correct problems not report them and that she needed to get this mess straightened out. Now she is about to meet with outside counsel, James, to prepare for her deposition:

- During preparation for her deposition, James has instructed Jane not to give her opinion about the validity of the pattern and practice case because the Company only asked her to investigate and report the factual matters related to the harassment allegations and her

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38 Id.

39 Id. at 1237, 1244-45 (describing the magistrate’s finding that the errata sheet filing was aimed at telling an accurate story and it brought to light the difficulties “the plaintiff had in dealing with the discovery process including her depositions”).
conclusions about the law were irrelevant, improper, and wrong. Is James’ instruction ethically appropriate? **ANSWER:** James may be walking the ethical tightrope here. To prepare Jane by telling her what the importance of her investigation was and the limits of that investigation were seems to be putting words in the mouth of Jane. Certainly, if Jane had already stated and agreed that her only official role was to investigate the allegations and report what she found, then James instruction would be merely emphasizing points from Jane’s own prior statements and would not seem inappropriate. But if this is solely James’ assessment from talking with General Counsel Bob and it does not correlate with anything Jane has done or said before or in preparation before James’ instruction, this appears to involve unethical behavior.

- In addition, James asserted to Jane that to the extent she did make conclusions about the law she was giving attorney-client advice that was privileged and instructed her not to divulge her legal conclusion that a pattern and practice had been established. Has James crossed the ethical line by instructing Jane in this manner? **ANSWER:** No, if James believes there is a legitimate basis to assert the attorney-client privilege.

- What if the plaintiff’s attorney deposing Jane asks Jane “what she concluded from her investigation of the harassment allegations” and James asks for a moment to take a break? Did James act unethically? **ANSWER:** Surely if James believes the response calls for privileged information he can seek to prevent any communications made by Jane regarding the legal conclusion from her investigation. However, merely asking to take a break appears to be an attempt to prevent the truth from coming out in violation of the attorney’s ethical duty to the tribunal and the process especially if it is merely a disagreement between him and Jane as to the importance/relevance of her conclusion and not related to seeking a claim of privilege. If it is related to a claim of privilege, James should assert the privilege and instruct Jane not to answer on the record and not request a break in the middle of the deposition question.

- What if Jane blurts out in response to the plaintiff’s attorney’s question just asked : “I was extremely concerned that we would have a pattern and practice class action for sexual harassment on our hands but I knew the General Counsel would not want to hear that.” Has Jane violated any ethical rules? **ANSWER:** Yes, Jane has a duty to keep confidential communications made within the scope of her legal representation of a client. Model Rule 1.6 states: (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b). As a general counsel opining about the legalities of her assigned investigation, it would appear that this is a confidential communication that Jane should not divulge. Nor does the exception expressed in Model Rule 1.6(b) apply as it states that a “lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the
client from committing a criminal act that the lawyer believes is likely to result in imminent
death or substantial bodily harm; or 2) to establish a claim or defense on behalf of the
lawyer in a controversy between the lawyer and the client, to establish a defense to a
criminal charge or civil claim against the lawyer based upon conduct in which the client
was involved, or to respond to allegations in any proceeding concerning the lawyer's
representation of the client.” Jane would not be attempting to prevent any criminal activity
and she is not a party in the lawsuit where she would need to respond to allegations about
the quality of her legal representation. Accordingly, Jane’s legal assessment of the
harassment claims should be kept confidential. However, if she was also a member of the
plaintiff class in this suit or this was a separate lawsuit where she was suing the company
for retaliatory discharge or retaliation under Title VII, this might be a different result in
terms of Jane’s comment no longer being confidential.

b. Walter’s Ethical Deposition Preparation Issues at Paul’s
Deposition

Similar ethical conflicts could arise between the union official, Paul, and the union’s
attorney, Walter, if Paul believes that more should have been done by the union to eradicate the
workplace from sexual harassing behavior. Now Paul is about to meet with Walter so that Walter
can prepare him for his deposition.

• During the preparation, if Walter tells Paul that he needs to stick to the story that the
union did all it was supposed to do by processing all grievances within its duty of fair
representation, would this be an ethical concern? ANSWER: Walter, similar to James
above, may be walking the ethical tightrope here. However, Walter seems even more
likely to fall off that tightrope because in telling Paul what story to stick to it sounds like
blatant coaching on the level of asking Paul to lie or distort the truth.

• Despite Walter’s direction, assume the plaintiff’s attorney, while deposing Paul, asks him
“what he thinks about the union’s efforts to address and respond to sexual harassing
behavior in the workplace?” If Walter asks for a moment to take a break, did Walter act
unethically? ANSWER: As mentioned earlier, merely asking to take a break appears to be
an attempt to prevent the truth from coming out in violation of the attorney’s ethical duty
to the tribunal and the process especially if it is merely a disagreement between him and
Paul as to the importance/relevance of his conclusion and not related to seeking a claim of
privilege. It can also be a violation of a local rule or scheduling order.

• What if Paul blurts out in response to the plaintiff’s attorney’s question just asked: “I was
extremely concerned that the union needed to do more to protect its female members from
workplace harassment but I was clearly in the minority with that opinion.” Has Paul
violated any ethical rules? ANSWER: No, unless Paul is a lawyer and his opinion was
related to his representation of the union as a client. Then similar to Jane, Paul would have
a duty to keep confidential communications made within the scope of his legal
representation of a client. But as provided in general within this hypothetical, Paul, as a
union official, would not be subject to the ethical rules.

B. CONCLUSION:

During a deposition, an attorney may have a legitimate reason to confer with a witness. There is probably no circumstance that would warrant that this conference must occur before the witness answers a pending question. However, at some point, the attorney may need to make sure the witness understands the question that was presented or may want to assert a privilege or have some other legitimate need that involves the attorney performing his job to ethically and effectively prepare witnesses. Because of the crucial aspects of the deposition process in employment discrimination cases as highlighted by the tendency to dispose of these claims through summary judgment, preparation of witnesses has become of paramount importance. However, that need to prepare does not neglect the duty of attorneys to act ethically and with the goal of also protecting the integrity of the tribunal and the relationship of the attorney with other attorneys and parties in the process. Preparation and conferring with a witness during a deposition can be necessary. Blanket orders or rules that absolutely prevent any conference with a deposition witness with her attorney would affect the attorney’s ability to provide effective counsel to the witness.

Even more importantly, blanket orders and rules prohibiting conferences between attorneys and deponents are based upon assumptions that lawyers act unethically and coach their witnesses to lie. Accordingly, the court needs to step in to protect the truth-telling function by ordering that attorneys be prohibited from conferring with deponents once they start to testify under oath. That methodology assumes a quite negative approach about how lawyers do their jobs. Instead, we should assume lawyers will act ethically and they should be allowed to advise their clients until something specifically suggests that we place limits on their conferring with witnesses especially with the high stakes involved in employment discrimination deposition practice. Now clearly breaking in to confer with a witness when a deposition question is pending should not be allowed. Nor should direct coaching of a witness to lie be an appropriate action. Beyond those actions, the ethical attorney must take into account all of the concerns at issue and

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40 See Model Rules of Professional Conduct, Preamble, Comment [9] which states: “In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”
strive to use discretion in zealously advocating for a client through witness preparation as far as possible while not crossing over into unethical conduct. The attorney can walk right up to the line but should get to the point of denigrating the integrity of the tribunal or destroying the fairness to the parties or other attorneys by supporting perjury.
II. Introduction: Ex Parte Communications

Disciplinary Rule 7-104 (A)(1), Communicating With One of Adverse Interest, in the ABA Model Code of Professional Responsibility, states that “[d]uring the course of his representation of a client a lawyer shall not: … [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.” DR 7-104 (A)(1). Likewise, Rule 4.2 of the ABA Model Rules of Professional Conduct states: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” See Model Rules of Professional Conduct Rule 4.2 (2002). Comment [1] to that Rule states that the purpose of this Rule is to “protect[] a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncontrolled disclosure of information relating to the representation.” Id.

Nevertheless, Rule 4.2 creates an irony where a lawyer’s client may be able to do exactly what the lawyer cannot do under Rule 4.2. Comment [4] states that “[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” Id. Although Comment [4] also states that “[a] lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a)[,]” the reality is that the client may still make this communication. Id. A lawyer may not hire an investigator as an agent to talk to an adverse party or individual represented by counsel about the subject of the representation and as a means to possibly discover information relating to the representation without the opposing party’s lawyer being informed. However, a client of that lawyer could hire such an investigator to do the same thing. Once the investigator has communicated ex parte at the direction of the client and not at the direction of the attorney, the client’s attorney may then counsel the client regarding this communication and any information received.

Accordingly, this scenario raises the question of whether employees who sue their employer may have investigators and others gather information via ex parte communications with adverse parties and individuals (the employer and any agents that can bind the employer) represented by counsel. Likewise, one could consider whether employer parties embroiled in employment litigation may contact adverse employee parties or individuals represented by counsel and gather information through ex parte communications. In both scenarios, an attorney can end up having the same information intended to be banned by Rule 4.2. My presentation will explore this subject and any implications for employment counsel.
A. May a Client Make an Ex Parte Communication When the Attorney May Not?

One of the biggest issues with ex parte communications in the employment setting involves the question of whether a plaintiff’s attorney may have ex parte communications with employees of a defendant corporate entity without violating ethical rules. See generally Ellen J. Messing & James S. Weliky, Contacting Employees of an Adverse Corporate Party: A Plaintiff’s Attorney’s View,” 19 Lab. Lawyer 353 (2004). However, this paper focuses on the situation when the employee or employer as clients of a an attorney in a legal dispute attempt to contact adverse represented parties or persons and what ethical concerns that raises or circumvents because the ethical rules prohibit their lawyers from making those same communications.

1 Employee-Plaintiff Clients

For employees who communicate with a corporation’s employees without being advised by their lawyer, Rule 4.2 or its equivalent is not violated. See, e.g., Miano v. AC & R Advertising, Inc., 148 F.R.D. 68, 92 (S.D.N.Y. 1993) (finding that a client in an age discrimination action brought against an employer did not violate the ex parte communication rule by secretly tape-recording conversations with other employees because the client’s lawyer had not “caused” the taping to occur); Schmidt v. New York, 695 N.Y.S. 2d 225, 232-33 (N.Y. Ct. Cl.1999) (because the claimant's attorney did not have knowledge of the representation, the ex parte communications by the investigator did not violate the ethics rule, DR 7-104(A)(1)).

Also, it appears that even where some contacts seem to directly represent improper ethical acts made by others at the direction of an attorney, the courts are unwilling to find a violation when it involves only the observation of general information about the operations of an adverse party viewed by contacting low level employees whilst they perform their normal duties. See, e.g., Hill v. Shell Oil Co., 209 F. Supp.2d 876 (N.D. Ill. 2002)(refusing to issue injunction to prohibit plaintiffs’ counsel from secretly videotaping gas station employees when conversations on tape were not audible); Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp.2d 119 (S.D. N.Y. 1999) (court refused to exclude tape recordings of defendant’s employees that were obtained surreptitiously by undercover investigators hired by plaintiff’s counsel even though the taping seemed to violate the elements of DR 7-104(A)(1) because the investigators only recorded normal business operations and did not talk to the employees or raise any concerns that might destroy the attorney-client privilege); Apple Corps Ltd. v. International Collectors Society, 15 F.Supp.2d 456 (D. N.J. 1998) (plaintiff’s counsel directed a secretary and a private investigator who posed as members of the general public and engaged in normal business transactions as a means to discover the company’s general business practices did not violate Rule 4.2); Fair Automotive v. Car-X Servs. Sys., 471 N.E.2d 554 ((Ill. App. Ct. 1984) (finding investigators hired by a lawyer who posed as customers to gain general information from the defendant did not violate the ethical rule prohibiting ex parte contact by lawyers with parties represented by counsel). Nevertheless, attempts by plaintiff’s counsel to talk with fellow employees about the matters of that representation can constitute a violation of Rule 4.2. See Kole v. Loyola University of Chicago, 1997 WL 47454 (N.D. Ill. 1997) (describing how a faculty member who was denied tenure sued
her law school employer for sex discrimination and the consequences that arose from her
attorney’s actions in making 68 ex parte contacts with various faculty members who had been
involved in the tenure decision).

The case of *Midwest Motor Sports, Inc., v. Arctic Cat Sales, Inc.*, involving a dispute
between a franchisor and a franchisee, provides an excellent example of how Rule 4.2 may be
circumvented on one hand and how that circumvention may result in sanctions for an ethical
violation on the other. Therein, the franchisee secretly taped conversations with the franchisor but
did not violate Rule 4.2 because the tapings were not performed with the knowledge of or at the
2d 1147, 1159 n.3 ((D. S.D. 2001), aff’d, 347 F.3d 693 (8th Cir. 2003); see also Jennifer L.
Borum, *What’s Good for the Goose Gets the Gander in Hot Water*, 23 Franchise Law J. 225,
245 (Spring 2004) (describing this result in *Midwest Motors* and how it “may be viewed as
support for a ‘hear-no-evil, see-no-evil, suffer-no-sanctions’ approach to surreptitious recording
by clients” as long as there is the “absence of evidence of direction or contemporaneous
knowledge on the part of [their] counsel”).

However, the franchisor in *Midwest Motor Sports* also secretly taped conversations with
the franchisee. The difference from what the franchisee did is that the franchisor used a private
investigator to pose as a customer and that investigator acted at the direction of the franchisor’s
attorney in violation of Rule 4.2. *See Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347
F.3d 693, 697-98 (8th Cir. 2003). Under Model Rule 5.3, an attorney is ethically responsible for
the misconduct of his "agent" if the attorney ratifies the conduct including any conduct performed
by an investigator hired by the attorney. *Id.* Furthermore, any action to circumvent the Rules by
inducing another person to make a contact that the lawyer may not make violates Model Rule
8.4(a). *Id.; see also ABA Formal Opinion 95-396* ("A lawyer may not direct an investigative
agent to communicate with a represented person in circumstances where the lawyer herself would
be prohibited from doing so"); *Woodard v. Nabors Offshore Corp.*, 2001 U.S. Dist. LEXIS 177,
at *5-*6 (E.D. La. Jan. 4, 2001) ("a lawyer shall not effect the prohibited communication through
a third party, including the lawyer's client."). The use of undercover investigators will continue to
present thorny ethical issues for attorneys. *See generally* Jennifer B. Bechet, *Undercover Ethics
Working with Private Investigators*, Minority Trial Lawyer 1 (Fall/Winter 2004).

2. Employer-Corporate Defendant Clients

Although most of the concerns about the ex parte contacts ban have focused on
employees’ counsel contacting employees of the employer, an employer may also have to confront
this rule. One classic example of how an employer’s attorney may also find himself in ethical hot
water occurred in *Parker v. Pepsi-Cola Bottlers, Inc.*, 249 F. Supp.2d 1006 (N.D. Ill. 2003). In
that case, two employees had sued their employer for employment discrimination. Shortly after
that complaint was filed, the employer’s counsel deposed one of the *Parker* plaintiffs in a separate
but related lawsuit. The employer’s counsel issued a subpoena for the deposition and served the
*Parker* plaintiff, who appeared for the deposition without counsel. Despite being aware that the
*Parker* plaintiff was represented by counsel, the employer’s counsel had not served notice on that
counsel of the deposition. The biggest mistake that employer’s counsel made was the failure to
get consent from the Parker plaintiff’s counsel before proceeding to depose the Parker plaintiff in the related litigation. At the beginning of that deposition, it was evident that the employer’s counsel knew that the Parker plaintiff was represented by counsel and that counsel had not given the employer’s counsel consent to communicate with the Parker plaintiff without counsel being present. During the deposition, the employer’s counsel also asked the Parker plaintiff about matters related to the Parker litigation although it was a deposition in a case involving related litigation.

Judge Castillo of the United States District Court for the Northern District of Illinois issued sanctions and found that the employer’s counsel had “willfully violated Model Rule of Professional Conduct 4.2” and “close[d] [his] eyes to this obvious [ethical] violation.” Id. at 1008, 1010. The court found it “most regrettable…that an attorney…who is a partner with ten years’ experience at a well-respected law firm, not only engages in these kinds of discovery tactics, but also persists in refusing to take responsibility for his actions by offering flimsy, unsupported defenses in such a contumacious manner.” Id. at 1011 n.2. According to the court, “[t]his kind of behavior does a disservice not only to this Court and the parties to this lawsuit, but also undermines his law firm’s reputation as well as the public’s trust in the sanctity of our judicial system and its discovery process as a means of uncovering the facts underlying a dispute in a fair, even-handed manner.” Id.

Given the results in the Pepsi case, it would appear that an employer’s counsel would do everything she can to stay clear of a Rule 4.2 violation. However, one can ask if an employer or its agents acting as the client for a lawyer may end up becoming more successful in accomplishing what the employer’s counsel may not do? For example, could a high level supervisor or manager meet with the employee suing the company and ask several questions and even record those conversations without it being an ethical violation? If the conversations and recording of those conversations were not advanced at the direction of the employer’s attorney and occurred solely based upon the actions of the client, they would appear to be appropriate. The fact that the employee’s attorney was not present and did not consent would not affect the actions taken solely by the employer as the client when they are not the actions of the employer’s attorney.

Ultimately these issues will boil down to a decision as to whether the attorney was, in fact, aware of the client’s actions and orchestrated the result. See Miano, 148 F.R.D. at 76 (whether the attorney used his client “to circumvent … [his ethical obligations] involves consideration of factors virtually identical to those relevant to determining whether [the attorney] ‘caused’ [his client] to engage in ex parte conversations in violation of DR 7-104(a) (1), i.e., did he use [his client] as his ‘alter ego’, by advising, suggesting or directing the taping”). The court may have to make credibility findings through an evidentiary hearing. Id. at 83 (describing how the court had to hold “an evidentiary hearing” to decide if the attorney had “actually engineered” the client’s conduct of taping conversations with employees and the court “considered all of the evidence, much of which required an assessment of the witnesses’ credibility”).

The difficulty is that “[e]thics opinions allow that attorneys need not prevent clients from
engaging in ex parte or taped conversations with adversaries, and are permitted to counsel clients regarding the scope and ramifications of such conduct.” *Id.* at 89. But when the attorney has more than mere knowledge and actually “encouraged [the client] to obtain affidavits...by advising him of the difference between ‘out of court statements’ and signed affidavits for trial purposes,” the attorney has caused the client to act for the attorney in circumvention of the ex parte contact rule. *See Holdren v. General Motors Corp.*, 13 F. Supp. 2d 1192, 1195-96 (D. Kan. 1998) (describing how an attorney’s advice to a client about how to draft affidavits for communicating with employees demonstrated cause and control by the attorney over the client’s actions in violation of Rule 4.2 even though the client initiated these actions).

**B. Much Ado About Nothing or A Legitimate Ethical Concern?**

Human nature may suggest that when representing parties in a dispute, you want to investigate thoroughly the matters involved in the complaint. However, talking to persons represented by counsel either directly or through your client or another agent as a means to investigate the dispute, when done for either the employer or the employee, may constitute a violation of ethical rules such as Model Rule 4.2 which bans such ex parte communications. Furthermore, a party may not circumvent this requirement by getting a third person to perform the same acts which the lawyer may not do by then “closing his eyes to the obvious.” Model Rule 4.2, Comment 8.

The question of circumvention will have to be resolved by credibility determinations in an evidentiary hearing before the court. Sanctions could be as harsh as default, or possible lesser sanctions including withdrawal of counsel, destroying evidence unethically obtained, denying any use or reference to the evidence unethically obtained and payment of costs for any opposing parties involved in bringing these issues to the attention of the court. No attorney would want to face the public embarrassment or the burdens such violations may place on that attorney’s client in resolving the dispute.

**C. A Few Final Hypothetical Situations**

To further examine these issues, the following hypothetical scenarios will be explored during the presentation:

**Hypothetical 1:** You are a lawyer defending a corporation in a sexual harassment claim by Jane. Jane approaches several supervisors and fellow employees and asks them questions about the corporation’s enforcement of its sexual harassment policy. Can you ethically challenge Jane’s ex parte inquiries?

SUGGESTION: Possibly, if Jane was represented by counsel and her attorney either caused or
directed or engineered or orchestrated Jane’s actions in making these ex parte communications with the employer’s employees and Jane’s attorney knew that they were represented by counsel.

Hypothetical 2: You are a lawyer representing Bob who is suing his employer under a whistleblower claim. Bob thinks that nobody will believe him so he has started to surreptitiously tape record his conversations with upper management. Bob did this on his own accord and without any input or direction from you. Now he has obtained some juicy information that will be very helpful to his claim. What should you do?

SUGGESTION: If you can establish that you did not encourage or direct Bob to make the tapes and the surreptitious recordings do not involve violations of state law in your jurisdiction, you can advise Bob about the use of the tapes. However, be prepared that the opposing attorney may challenge the use of these tapes and question your involvement in how those tapes were generated, especially if Bob continues to make tapes after he disclosed it to you.

Hypothetical 3: You are a lawyer for a company being sued by James for worker’s compensation and retaliatory discharge. You believe that James exaggerated or even lied about the extent of his alleged on-the-job injuries. You hire a private investigator to follow James around and videotape his physical activities to see if he is really as limited as he claims. On his own, the investigator approaches James and pretends to be a local aerobics instructor. He secretly tapes his conversation with James. Can you use the tapes or have the investigator testify?

SUGGESTION: The investigator is deemed an agent of the lawyer and the lawyer is responsible for the investigator’s actions. Even though the investigator initiated the contact on his own, the investigator probably went too far in talking to James and secretly taping their conversation. You could probably use the investigator’s videotaping of James performing normal physical activities as long as there was no questioning that may tend to invade the attorney-client privilege.
Hypothetical 4: You are a lawyer representing a company in a race discrimination claim. You have issued a subpoena for a witness to be deposed. You did not know that the witness was represented by counsel regarding representation concerning matters that you want to address in the deposition, but you learn of this representation at the beginning of the deposition. Can you proceed with the deposition?

SUGGESTION: You should probably stop the deposition immediately and contact the witness’s attorney to see if the attorney will consent to your questioning of the attorney’s client. Otherwise, you may end up losing the right to use any of the information you obtain from the deposition any way as a possible sanction for talking to the witness during the deposition without the witness’s counsel being present.

Overall, circumvention of Rule 4.2 involves very risky business and may place your credibility, your reputation, your firm’s reputation and your client’s interests in jeopardy.
Biographical Sketch:

MICHAEL Z. GREEN
Professor of Law and Associate Dean For Faculty Research & Development
Texas Wesleyan University School of Law
1515 Commerce Street
Fort Worth, TX 76102
Phone: (817) 212-4140
Email Address: mgreen@law.txwes.edu

Michael Z. Green is a tenured full Professor of Law with Texas Wesleyan University School of Law, Fort Worth, Texas where he currently holds the inaugural position of Associate Dean for Faculty Research & Development. He joined the full-time faculty at Texas Wesleyan in August 2003 after working for a number of years as a professor at Florida Coastal School of Law in Jacksonville, Florida. He also served as a Hastie Teaching Fellow at the University of Wisconsin where he lectured in Employment Discrimination. Professor Green has also taught courses at Hamline Law School and at Loyola University of Chicago's Institute for Human Resources & Industrial Relations. He is also currently an Adjunct Professor in the SMU Graduate Program in Dispute Resolution where he teaches Arbitration. He was a visiting professor and taught Evidence and Employment Discrimination at Florida State in Spring 2008.

Professor Green has law practice experience from some of the largest and most respected firms in the states of Illinois and Kentucky where he worked for several years as a member of their labor and employment practice groups including Brown, Todd & Heyburn; Lord, Bissell & Brook; and Franczek & Sullivan. As a law student, he also received excellent labor and employment law experience by working for Dowd & Bloch and Navistar International Corporation. He has represented clients in all areas of labor, employment and school law litigation, including matters before the NLRB, the EEOC, the U.S. Department of Labor, the Illinois Human Rights Commission, the Illinois Public and Educational Labor Relations Boards and both state and federal courts and participated in many ADR proceedings.

Professor Green is also an active labor and employment mediator and arbitrator and serves on the National Labor Arbitration Panel of the American Arbitration Association and the Dallas Area Rapid Transit Trial Board. He is a Neutral Co-Chair of the ABA Section on Labor and Employment Law’s Committee on Ethics & Professionalism Subcommittee on Dispute Resolution. He was recently appointed to be the Co-Chair of the ABA Section of Dispute Resolution’s Committee on Advocacy.

Professor Green received his law degree, cum laude, from Loyola University Chicago, He has received several degrees including a Master of Law (LL.M.) from the University of Wisconsin, a Master of Science in Industrial and Labor Relations from Loyola University Chicago, a Master of Business Administration from California Lutheran University and a Bachelor of Science in Electrical Engineering from the University of Southern California.

Professor Green has also spoken at a number of seminars including many ABA programs. Professor Green has taught courses in Dispute Resolution, ADR in the Workplace, Arbitration, Civil Procedure, Evidence, Employment Discrimination Law, Employment Law and Labor Law. He has several publications including a number of law review articles. He continues to work on new publications regarding novel labor law, employment discrimination, employment law, and dispute resolution issues.