

Your deputy general counsel comes running in breathless: That scummy plaintiff's lawyer interviewed some of your company's current and former employees with respect to the pending litigation?! Wait a second, you think to yourself, he didn't even ask our permission. "Isn't that unethical? Doesn't opposing counsel have a duty to ask whether the employees are represented? Is there something that we can do to prevent opposing counsel from contacting these employees? And didn't we make all employees sign confidentiality agreements? Yessiree, we sure did. I want to know if we can stop him from further interviews, and if we can sue him for tortious interference with contract (the confidentiality agreement) or for causing a breach of fiduciary duty to keep the company's information confidential."

Ex Parte Interviews with Current and Former Employees

BY JOHN K. VILLA

You probably knew that the short answer to all three questions is maybe and it depends on where the case is pending. Of course, if the answers were clear, we wouldn't bother to write about it.

So let's first take a look at the applicable rules.

Every lawyer should know of the ethical prohibition against communicating with a person represented by counsel without the prior consent of that person's lawyer. Referred to as the "no-contact" or "anti-contact" rule, this prohibition is set forth in Rule 4.2 of the *Model Rules of Professional Conduct*, which provides:

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.¹

The purpose of this prohibition is threefold:

1. to prevent overreaching by adverse counsel;
2. to protect the lawyer-client relationship from interference by adverse counsel; and
3. to "reduce the likelihood that clients will disclose privileged or other information that might harm their interests."²

While the no-contact rule applies to both individual and organizational clients,³ its application in the corporate context has been murky—to say

the least—since not all employees are deemed agents of the corporate client and thus are not covered by the rule. As explained in Comment 7 to Rule 4.2, the prohibition only applies to certain categories of employees:

In the case of a represented organization, the Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or 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.⁴

Most jurisdictions follow these guidelines in determining the reach of the no-contact rule.⁵ So, if the employee fell into one of these three categories, the contact was unethical.

How about the interviews of former employees? According to the American Bar Association, individuals who are no longer associated with the corporate client are generally not covered by Rule 4.2.⁶ Thus, the consent of the company's lawyer is not ordinarily required in order for opposing counsel to initiate contact with a former employee.⁷ Some courts, however, have recognized exceptions to this rule—for example, where the employee had been centrally involved in the matter at issue such that her acts or omissions could be imputed to the company,⁸ or where the employee possesses confidential or privileged information concerning the disputed matter.⁹ So before answering this question, we need to know more about the employees or former employees contacted,



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and the state in which the litigation is pending. Remember, even if Rule 4.2 is not applicable, there are other rules that the plaintiffs' lawyer may have violated through *ex parte* contact.¹⁰

Now that we've reviewed the applicable rules, let's address the specific questions of the day.

1. Is there a duty to ask about individual's representation?

The prohibition set forth in Rule 4.2 against contacting an individual represented by counsel applies only when the lawyer *knows* that the person is in fact represented in the matter to be discussed.¹¹ For purposes of this rule, the term "knows" means actual knowledge of the fact of representation.¹² As explained by the ABA, the term "knows" is not the equivalent of the phrase "reasonably should know," which is included in Rule 4.3, governing contacts with unrepresented persons.¹³

Thus, in the absence of the phrase "reasonably should know" in Rule 4.2, the ABA has opined that, unlike Rule 4.3, Rule 4.2 does *not* imply a duty to ask whether an individual is represented by counsel in all circumstances.¹⁴ Such a requirement, the ABA further explains, would not be reasonable from a practical standpoint:

[T]he requirement that [the] lawyer know of the representation serves not to implement the purposes of the Rule but only to frame a rule of conduct that can as a practical matter reasonably be imposed. It would not, from such a practical point of view, be reasonable to require a lawyer in all circumstances where the lawyer wishes to speak to a third person in the course of his representation of a client first to inquire whether the person is represented by counsel: among other things,

such a routine inquiry would unnecessarily complicate perfectly routine fact-finding, and might well unnecessarily obstruct such fact-finding by conveying a suggestion that there was a need for counsel in circumstances where there was none, thus discouraging witnesses from talking.¹⁵

Since actual knowledge may be inferred from the circumstances,¹⁶ however, the ABA cautions that a lawyer cannot avoid the no-contact rule "by closing her eyes to the obvious."¹⁷

Beware: not all courts concur with the ABA's view that there is no duty to inquire as to the fact of representation under Rule 4.2.¹⁸ As explained by one court, "Rule 4.2 suggests that a relevant inquiry is whether a person is represented by counsel since the Rule is only applicable if the lawyer 'knows' that the individual is 'represented by another lawyer.'"¹⁹ But regardless of whether a duty to inquire exists under Rule 4.2, counsel who seeks to contact a current or former employee, who may be confused about whether he is a client of corporate counsel, may be subject to the requirements of Rule 4.3 which, according to the ABA, implies such a duty to inquire.²⁰

2. Can the company prevent contact by opposing counsel?

While counsel may think of her representation as automatically encompassing all employees of her corporate client, blanket assertions of representation are, surprisingly, criticized by some courts,²¹ and ethics commissions.²² Even if corporate counsel does not represent all employees by virtue of her role as corporate counsel, she may ethically request employees not to speak informally with opposing counsel. Although Rule 3.4 generally prohibits a lawyer from requesting a person to refrain from

voluntarily giving relevant information, it permits a lawyer to make such a request where the person is an employee of the client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.²³ As explained in the commentary to Rule 3.4, such a request by corporate counsel is permissible since employees may identify their interests with those of their employer, the client.²⁴

In addition, corporate counsel may ethically seek court enforcement of any confidentiality agreement entered into between her client and its employees. Particularly with respect to former employees, who may not always be protected by Rule 4.2, the existence of a valid confidentiality agreement may preclude opposing counsel's contact with the former employee.²⁵ While confidentiality agreements in the employment context are generally regarded as valid and enforceable,²⁶ some courts have held that a confidentiality agreement cannot be used to preclude a party's former employee from voluntarily answering questions or providing information relevant to an alleged violation of law.²⁷ But in such a situation, the court may fashion an order that attempts to balance the disclosure of relevant information with the protection of confidential information.²⁸

Finally, corporate counsel may seek a protective order that would bar opposing counsel from interviewing certain employees without the presence of corporate counsel. Depending upon the recognized scope of Rule 4.2 (or equivalent rule) in the relevant jurisdiction, such an order could protect from *ex parte* contact both current employees who are officers or managers, or whose acts or omissions would be binding on the corporation,²⁹ as well as former employees who are represented by corporate counsel,³⁰ or who had access to privileged and

confidential information while employed by the client.³¹ Where a total bar against *ex parte* contact is not a possibility, counsel may try to obtain an order from the court that delineates how opposing counsel should proceed in initiating contact with an opponent's employees.³²

3. Can the company sue opposing counsel for tortious interference with confidentiality agreement/inducing breach of fiduciary duty?

The plaintiffs' lawyer may, in principle, be liable for tortious interference with contract if he induces a current or former employee to breach a confidentiality agreement executed as part of the employment contract.³³ One condition, however, is that the contract allegedly violated must be valid and enforceable.³⁴ As we have observed, confidentiality agreements that preclude the disclosure of information concerning alleged or potential violations of law have been found unenforceable as against public policy.³⁵ Thus, as long as the information sought to be protected by a confidentiality agreement does not involve illegal conduct or other conduct that threatens the public interest, it may form the basis for a tortious interference claim.


Rule 4.4 of the Model Rules of Professional Conduct also prohibits a lawyer from using methods for obtaining evidence that violate the legal rights of a third person.³⁶ Inducing an employee to breach a confidentiality agreement may constitute a violation of this rule and subject the attorney to sanctions.³⁷

Now that we have answered these questions, what can we do in the future to protect corporate information away from the plaintiffs' counsel, assuming that we are willing to be aggressive?

- Notify the opposing lawyer in a

letter at the outset of the case that you read 4.2 broadly and that if he attempts to contact any employee that arguably falls within the reach of the Rule without obtaining prior permission of the court, he does so at his own risk.

- Ask all employees to agree to confidentiality provisions as part of their employment agreements.
- Advise all current and former employees that you expect them to honor their confidentiality obligations and ask them not to speak informally with opposing counsel.

Is this conservative advice? No, but litigation is not for the faint of heart. 

Have a comment on this article?

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NOTES

- 1 *ABA Model Rules of Professional Conduct*, Rule 4.2 (2007); see also *Restatement (Third) of the Law Governing Lawyers* § 99 (2000) (containing a similar prohibition).
- 2 *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 95-396 (1995).
- 3 *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1121 (8th Cir. 1997).
- 4 *ABA Model Rules of Professional Conduct*, *supra*, Rule 4.2, cmt. 7.
- 5 *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030, 1035 (1990); but see *Palmer v. Pioneer Inn Assoc., Ltd.*, 118 Nev. 943, 59 P.3d 1237 (2002) (rejecting commentary to Model Rule 4.2, and limiting application of the rule to those employees having the authority to bind the corporation).
- 6 *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 91-359 (1991); see *Aiken v. Bus. and Indus. Health Group, Inc.*, 885 F. Supp. 1474, 1476-1478 (D. Kan. 1995), and cases cited therein.
- 7 *ABA Model Rules of Professional Conduct*, *supra*, Rule 4.2, cmt. 7.
- 8 *See Armsey v. Medshares Management Serv., Inc.* 184 F.R.D. 569, 573-574 (W.D. Va. 1998); *Chancellor v. Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988).
- 9 *See Rentclub v. Transamerica Rental Finance*, 811 F. Supp. 651, 658 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995).
- 10 *See ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 91-359, *supra* (noting that a lawyer seeking to engage in an *ex parte* interview with a former employee is subject to the constraints imposed by Rule 4.4, which prohibits using methods for obtaining evidence that violate the legal rights of a third person, such as inducing the disclosure of privileged communications, and to the requirements of Rule 4.3, which governs contacts with unrepresented persons).
- 11 *ABA Model Rules of Professional Conduct*, *supra*, Rule 4.2, cmt. 8.
- 12 *Id.*; see also *ABA Model Rules of Professional Conduct*, *supra*, Rule 1.0(f) (defining "knowingly," "known," and "knows").
- 13 *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 95-396, *supra*, at Part IV. Pursuant to Rule 4.3, a lawyer who knows or reasonably should know that an unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding. *ABA Model Rules of Professional Conduct*, *supra*, Rule 4.3.
- 14 *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 95-396, *supra*, at Part IV.
- 15 *Id.*, n. 39.
- 16 *ABA Model Rules of Professional Conduct*, *supra*, Rules 1.0(f) and 4.2, cmt. 8.
- 17 *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 95-396, *supra*, at Part IV.
- 18 *See Showell v. Montaire Farms, Inc.*, No. Civ.A.02C-01-016-RFS, 2002 WL 31818512 (Del. Super. Nov. 18, 2002); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013, 1018 (Del. Super. Ct. 1990), *enforcement granted in part and order set aside in part, on other grounds*, 1990 WL 200471 (Del. Super. Ct. Dec. 4, 1990).
- 19 *Monsanto Co.*, 593 A.2d at 1018; *accord. Showell*, 2002 WL 31818512, at *1 ("The first inquiry under Rule 4.2 is whether the person is represented by counsel.").
- 20 *See n.14, supra*.

- 21 See *Terra Internat'l, Inc. v. Mississippi Chem. Corp.*, 913 F. Supp. 1306, 1317 (N.D. Iowa 1996) (rejecting assertion of "automatic representation" by virtue of employment with corporate client).
- 22 See Ohio Bd. Com. Griev. Disp., *Op. No. 2005-3* (Feb. 4, 2005) (describing an assertion of blanket representation by corporate counsel as being "bluster" and "inappropriate"); see also Utah State Bar Ethics Advisory Op. Comm., *Op. 04-06*, 2004 WL 2803333 (Dec. 2, 2004).
- 23 *ABA Model Rules of Professional Conduct*, *supra*, Rule 3.4(f); see Utah State Bar Ethics Advisory Op. Comm., *Op. 04-06*, *supra*, 2004 WL 2803333 at *2 (recognizing that Rule 3.4(f) permits corporate counsel to request current employees, including fact witnesses, to refrain from speaking informally with opposing counsel as long as their interests will not be adversely affected by not speaking).
- 24 *Id.* cmt. 4.
- 25 See *Valassis v. Solomon*, 143 F.R.D. 118, 123 at n.8 (E.D. Mich. 1992) (noting that the existence of a confidentiality agreement may have precluded the *ex parte* interview of the former employee).
- 26 See *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 444 (S.D.N.Y. 1995). Whether a nondisclosure-confidentiality agreement is enforceable depends on whether the restriction on disclosure is reasonably necessary for the protection of the employer's business, whether it unreasonably restricts the employee's rights, and whether it is prejudicial to the public interest. *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 762 (Iowa 1999).
- 27 See *JDS Uniphase Corp. Securities Litig.*, 238 F. Supp. 2d 1127, 1134-1137 (N.D. Cal. 2002); *Chambers* 159 F.R.D. at 444; see also *Sparks v. Seltzer*, No. 05-CV-1061 (NG)(KAM), 2006 WL 2358157, at *4 (E.D.N.Y. Aug. 14, 2006) ("When balanced against the need for discovery in litigation, confidentiality agreements cannot preclude otherwise permissible discovery.").
- 28 See, e.g., *JDS Uniphase Corp. Securities Litig.*, 238 F. Supp. 2d at 1138 (entering order authorizing plaintiffs' counsel to ask former employees certain specified questions, assuring former employees that responding to these questions will not breach confidentiality agreements but admonishing them not to disclose any confidential information, and restricting use of information learned by plaintiffs to litigation at hand).
- 29 See *Niesig*, 558 N.E.2d at 1035-1036.
- 30 See *Terra Internat'l*, 913 F. Supp. at 1315-1316.
- 31 See *Rentclub*, 811 F. Supp. at 658.
- 32 See Benjamin J. Vernia, *Right of Attorney to Conduct Ex Parte Interviews with Former Employees*, 57 A.L.R.5th 633, § 2(b) (1998) (noting that "[a] method suggested in several cases is to establish a script of statements and questions to be followed in all initial contacts with former employees. . . . [i]n such a script, the attorney or investigator advises the interviewee of the existence and nature of the lawsuit and of the identity and interest of their client in the case and asks whether the person remains employed with the corporation and whether he or she is represented by counsel.").
- 33 See *Revere Transducers*, 595 N.W.2d at 763 (holding that confidentiality-nondisclosure agreement was enforceable and that evidence was sufficient to support finding that customer intentionally and improperly interfered with such agreement by inducing plaintiffs' former employees to violate their employment agreement and to start their own company to develop and manufacture competing device to sell to customer).
- 34 See *Restatement (Second) of Torts*, §§ 766, 774 (1979).
- 35 See n. 27, *supra*.
- 36 *ABA Model Rules of Professional Conduct*, *supra*, Rule 4.4(a).
- 37 See *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 91-359, *supra*, n. 11; see also *Rentclub v. Transamerica Rental Finance*, 811 F. Supp. at 655-657 (holding that appearance of impropriety resulting from inference that attorney induced former employee to breach his confidentiality agreement warranted disqualification).

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