The No-Contact Rule and Former Employees

ER 4.2 (Communication with Person Represented by Counsel)[1] provides that a lawyer shall not communicate about the subject of a representation with a party[2] the lawyer knows to be represented in the matter by another lawyer. This is known as "the no-contact rule," and the situations where it applies are usually fairly easy to recognize. But when the situation involves an organizational entity such as a corporation or a limited liability company, it is not always clear whether the organization's "constituents," such as its employees, are deemed to be represented by the organization's lawyer and thereby off limits to contact by opposing counsel. Similar questions have arisen about how former employees of a represented entity should be treated.

Case law and commentaries from other jurisdictions are not exactly uniform.[3] We are fortunate in Arizona to have settled judicial authority on the subject of former employees,[4] as well as an excellent and very recent law review article on Arizona's rule.[5]

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Current constituents of represented party

The general consensus for constituents presently employed is that counsel for the organizational employer may not assert a blanket representation as a means of preventing all *ex parte* contacts. Both courts and commentators have warned that, in the organizational-entity context, the rule must be narrowly construed lest it become a means by which businesses can shelter themselves from lawyers trying to gather information to assess the merits of claims.[6] Thus, Comment [2] to ER 4.2 limits the rule's protections to persons (1) having a managerial responsibility on behalf of the organization, (2) whose acts or omissions in connection with the matter may be imputed to the organization for purposes of civil or criminal liability, or (3) whose statements may constitute an admission on the part of the organization.

These limitations should be read in connection with ER 3.4(f) (Fairness to Opposing Party and Counsel), which allows a lawyer to request that a current employee or other agent of a client refrain from voluntarily giving information to another party. If the employee is not one protected by the no-contact rule and talks to opposing counsel anyway, the usual sanctions for the rule's breach—including disqualification of the lawyer and/or having the witnesses statements held inadmissible—would not apply.

Former constituents of represented party

What if the constituent you want to contact is no longer employed by the organization? Or what happens when the former employee of the opposing party is now a current employee of a corporation you represent? The first question was the very issue before the court in *Lang*, where the plaintiff's counsel had secured affidavits from two former employees of the defendant car dealership, neither of whom was directly involved in the situation that led to the filing of the lawsuit. Plaintiff's counsel contended that although the testimony of the former employees, the finance director and the general sales manager respectively, had no bearing on whether there was a case for breach of contract and misrepresentation in the sale of the used car at issue, their testimony (not specifically disclosed in the opinion) was relevant to the plaintiff's claims for consumer fraud, racketeering, and punitive damages.

The Court of Appeals reversed the trial court's ruling striking the affidavits and ordering counsel to have no further contact with the witnesses. The court viewed the first and third categories discussed in the then-current version of Comment [2] to ER 4.2 to describe persons presently employed by the organization, but that category 2 (persons whose acts or omissions in connection with the matter may be imputed to the organization) was broad enough to cover former employees. After noting authorities that allowed contacts with former employees,[7] the court held that counsel may have *ex parte* contact with

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a former employee of an opposing organizational party represented by counsel without violating ER 4.2 unless the acts or omissions of the former employee gave rise to the underlying litigation (another way of saying they could be imputed to the organization) or the former employee has an ongoing relationship with the former employer in connection with the litigation. The court thus was able to reconcile the proscriptions set forth in Comment [2] to ER 4.2 with the unique situations involving witnesses who are no longer "constituents" in the organizational entity.

Lang is still good law in Arizona and has been viewed to apply even when the former employee becomes a constituent of the client whose lawyer seeks the contact.[8] If the former employee is entitled to the protections of the no-contact rule but is now represented by his or her own counsel, consent by that counsel will suffice to allow the current employer's lawyer to interview the person without having the consent of the former employer's counsel or without having him present.[9]

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. Comment [3] to ER 4.2 states that the rule covers any person, whether or not a "party."
3. George M. Cohen, *Obligations to Third Persons; Ex Parte Contacts*, 30 LAW. MAN. PROF. CONDUCT 807 (Dec. 31, 2014).
4. *Lang v. Superior Court*, 826 P.2d 1228 (Ariz. Ct. App. 1992).
5. Jessica J. Berch & Michael A. Berch, *May I Have a Word With You: Oops, Have I Already Violated the No-Contact Rule?* 6 PHOENIX L. REV. 433 (2013).
6. *See* cases collected at 30 LAW. MAN. PROF. CONDUCT 807 (Dec. 31, 2014) at section "Corporate Immunity."
7. ABA Formal Op. 91-359 (March 22, 1991) and Ariz. Ethics Op. 89-05 (May 17, 1989), Alternative Opinion A.
8. Ariz. Ethics Op. 00-05 (Sept. 2000).
9. *Id.*