



Risky Business Practice

When Conversation Can Hurt Your Case

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ARE THERE PITFALLS in interviewing a former employee of an opposing party when that employer is represented by counsel? Depending on the context, yes.

Cases in the commercial torts field (e.g., theft of trade secrets, fraud, RICO) often turn on the testimony of former employees of the defendant. Such *ex parte* interviews may result in the employee's testimony being stricken and can even result in a bar complaint.

The genesis of the problem is ER 4.2: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so."¹

One part of the ER's comment provides that, in the case of an organization, the rule prohibits communication with any person whose act or omission in connection with the matter may be imputed to the organization. If so imputed, the former employee is usually considered a party, and *ex parte* contact is prohibited.

Cases from other states on the subject disagree.² In Arizona, the court of appeals has adopted a middle position and held that ER 4.2 does not bar such *ex parte* contact unless the acts or omissions of the former employee gave rise to the underlying litigation

or the former employee has an ongoing relationship with the former employer in connection with the litigation.³ If, after reading *Lang v. Superior Court*, you have determined you are allowed to contact the former employee, then you must follow ER 4.3 if the former employee is represented by his own counsel, and ER 4.4 if he is not.

What if that former employee is now a current employee of your client? A recent Arizona Bar Ethics Opinion⁴ sets forth these suggested guidelines:

1. A lawyer is not generally prohibited from conducting an *ex parte* interview of a client's employee concerning litigation against that person's former employer.
2. ER 4.2 will apply to an interview of the client's employee if that person's conduct while formerly employed gave rise to the litigation or if the person has an ongoing relationship with the former employer in connection with the litigation.
3. If ER 4.2 applies, an *ex parte* interview generally will not be permitted without the consent of counsel representing the former employer. If, however, the former employee is separately represented in the matter by his or her own counsel, consent by that counsel will suffice for ER 4.2, and an interview may occur without the presence or consent of the former employer's lawyer.
4. If an *ex parte* interview occurs, to

ensure compliance with ERs 4.3 and 4.4, the lawyer for the current employer must inform the employee of the lawyer's role in the case, the identity of the lawyer's client and the fact that the employee's former employer is an adverse party.

5. In any interview with the employee, the lawyer for the current employer must avoid inquiring into any privileged communications between the employee and counsel for his former employer.

So long as there are differing opinions on the subject, the best course may be to establish with opposing counsel at the outset of litigation what the ground rules will be as to any witnesses who may fall within the proscriptions of ER 4.2. You may be able to force the presence at a deposition of the former employee if opposing counsel will not agree to allow you to interview the former employee directly and *ex parte*. This could be a major problem for your opponent if the former employee is out of state or is extremely hostile. You may want to remind opposing counsel of that when you call to discuss the issue.⁵ ▲

endnotes

1. Rules of Professional Responsibility, Rule 42, ARIZ.R.S.Ct.
2. *Cf. Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990) with *Public Service Electric & Gas v. Associated Electric & Gas*, 745 F. Supp. 1037 (D.N.J. 1990).
3. *Lang v. Superior Court*, 826 P.2d 1228 (Ariz. 1992).
4. Arizona Committee on the Rules of Professional Conduct Formal Opinion 2000-05 (September 2000).
5. See Heidi McNeil & Sara Roberson, *Ex parte Communications With Former Employees of an Adversary: When Are They Permitted?* ARIZ. ATTORNEY, January 1996, at 19.

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