BY ALLISON K. FERRINI
JOHN F. O'BRIEN III AND
DEAN S. RAUCHWERGER
CLAUSEN MILLER P.C.
CHICAGO, ILLINOIS

LANDING THE KNOCKOUT PUNCH:

CONTACTING ANOTHER PARTY'S CURRENT AND FORMER EMPLOYEES WITHIN THE ROPES

He who is not courageous enough to take risks will accomplish nothing in life.

– Muhammad Ali

Winning litigation requires that you and your counsel land the devastating uppercuts at the key moments in the fight. Big opportunities for critical testimony and evidence exist by pursuing permissible *ex parte* contacts with another party's current and former employees. The ethical ropes and practical tips for effectively contacting and interviewing such witnesses are discussed below.

ABA Model Rule 4.2 of the Rules of Professional Conduct, the ABA Rules of Conduct, state equivalents and your jurisdiction's applicable case law provide the ground ethical boundaries for contacting another party's current and former employees. Model Rule 4.2, Communications Between Lawyer And Opposing Parties, 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.

A. Contacting Current Employees Is Potentially "Free-Game"

While current employees of your opponent are generally "free game," certain employees of a represented corporation or other entity are considered to be represented by the corporation or organization's lawyer for purposes of Model Rule 4.2 and are untouchable. A corporation or organization may not assert blanket representation for all of its constituent employees.[1]

The comment to Model Rule 4.2, as amended in 2002, addresses the process for determining the employee's role and authority to identify which current employees are considered off-limits. Comment [7] explains that *ex parte* communications are prohibited with an employee who "supervises, directs or regularly consults with the organization's lawyer concerning the matter, 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."

Accordingly, current employees who are tied to the corporate attorney-client relationship or whose acts and/or omissions give rise to vicarious liability are off-limits. The judicial goal is to ensure that a corporation's legal rights, including the attorney-client privilege and work product doctrine, are protected.[2]

Just because a current member of an organization may hold privileged information or general information about the entity or the incident, does not, by itself, render an *ex parte* contact unethical with that individual under Model Rule 4.2. The key to properly engaging in *ex parte* contacts is appreciating how the ethical rules apply and the appropriate practical steps to follow.

Practical considerations – Proceed with caution before contacting a current employee of an opposing party and diligently observe the ground rules:

Avoid speaking with current employees:

a) who regularly consult with the organization's lawyer regarding the matter;

b) who have the authority to obligate the organization with respect to the matter; and,

c) whose acts or omissions in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

If you contact a current employee:

a) do not use methods of obtaining evidence that violate the corporation's legal rights; and,

b) do not probe into areas subject to attorney-client privilege or work-product doctrine. >>

Preliminary questions one should cover:

a) What is your status at the organization?

b) Are you represented by counsel?

c) Have you spoken to the organization's counsel concerning the matter at issue?

d) Evaluate whether the employee witness was personally involved in the underlying events that may give rise to the employer's vicarious liability for the employee's acts and/or omissions, imputable to the employer.

B. Unraveling Your Opponent's Case – Contacting Former Employees

The majority of courts allow lawyers to interview *ex parte* all former employees, including managers, of corporate parties because former employees cannot bind the organization and their statements cannot be introduced as admissions of the organization. The 2002 version of Model Rule 4.2, Comment [7], states that "[c]onsent of the organization's lawyer is not required for communication with a former constituent." However, contact may be precluded if the former employee's acts or omissions may be imputed to the corporation or if the former employee has an ongoing agency or fiduciary relationship with the corporation.

When contacting former employees, as with current employees, proceed with caution. Model Rule 4.2 Comment [7] cautions that when communicating with a former constituent, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization, such as inquiries seeking to discover privileged information. The ABA Ethics Committee also cautions that when communicating with such persons, counsel must be careful not to induce the former employee to violate any attorney-client privilege that the former employee may have incurred, or had been privy to, during the course of his or her former employment.[3]

Counsel must also comply with ABA Model Rule of Professional Conduct 4.3, requiring the attorney to identify the nature of his or her role in the matter for which counsel is contacting the person. Specifically, Model Rule 4.3 requires that the attorney identify his or her client and that the client is an adverse party to the unrepresented person's former employer and, more importantly, to confirm that the former employee is not represented by personal counsel or by the former employer's counsel.

C. The Winning Mindset

There is a huge strategic opportunity — often ignored and not pursued — to land the big punches by engaging in permissible informal discovery contacts with another party's current and former employees. Despite such enormous case potential, *ex parte* witness contacts are frequently not pursued because of the mistaken perception or belief that such contacts are not ethically allowed or pose too many dangers. While significant boundaries do exist, if you proceed prudently by diligently following the ethical rules and governing law of your state, there is a significant opportunity to score big points. This type of informal investigation may significantly bolster the strength of your case, undercut the other party's positions and go beyond the typical costly deposition process — all of which enables you to "Land the Knockout Punch!"

ENDNOTES

1. See *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 1, 6 (D.D.C. 2004) (holding that counsel for defendant may not use their concomitant right to withhold their consent as a means to prevent plaintiff's counsel from interviewing present or former employees); *Michaels v. Woodland*, 988 F. Supp. 468 (D.N.J. 1997) (holding that an employer cannot unilaterally impose its counsel's representation on all employees).

2. See *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723, 728 (N.D. Ill. 1996) (allowing contact with certain employees but barring any discussion of privileged information); see also *Muriel Siebert & Co. v. Intuit Inc.*, 868 N.E.2d 208, 210 (N.Y. 2007) (applying New York's Code of Professional Responsibility, court found that adversary counsel is prohibited from directly communicating with employees who have the power to bind the corporation in litigation, are charged with carrying out the corporation's attorney's advice or are considered organization members possessing a stake in the representation); but see *Bryant v. Yorktowne Cabinetry, Inc.*, 538 F. Supp. 2d 948, 952 (W.D. Va. 2008) ("While Comment 7 of the Model Rule makes no distinction between managers and line workers, the Virginia version of Rule 4.2 is even clearer and eliminates the possibility of drawing such a distinction, … providing … 'an attorney may communicate *ex parte* with such former employee or agent even if he … was a member of the …control group'").

3. ABA Formal Op. 91-359; see also *Heartland Surgical Specialty Hosp. v. Mid-West Div., Inc.*, No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 53210, at *8 (D. Kan. July 20, 2007) ("where an employee is shown to have had extensive exposure to attorney-client privileged materials and where there is a realistic likelihood that privileged information might be disclosed during an *ex parte* interview, this must be taken into account in deciding whether, or to what extent, to allow *ex parte* interview of that specific former employee" (citations omitted)); see also *Muriel Siebert & Co. v. Intuit Inc.*, 868 N.E.2d at 210 ("so long as measures are taken to steer clear of privilege or confidential information, adversary counsel may conduct *ex parte* interviews of an opposing party's former employee).

WHEN CONTACTING FORMER EMPLOYEES, AS WITH CURRENT EMPLOYEES, PROCEED WITH CAUTION.