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Complex Litigation

Ex Parte Interviews

Treasure trove of information or ethical minefield?

By Brian F. Curley and Sheryl M. Schwartz

You just finished interviewing a prospective new client. Her case looks remarkably promising. She has outlined a pattern of discriminatory employment practices at ABC Co. that have affected her and hundreds of current and former employees.

She presented limited documentary evidence, but tells you that the former plant manager — who is retired from ABC Co. — as well as numerous current and former employees are willing to talk to you about the discriminatory practices.

You realize that the limited documentary evidence she has given you is insufficient basis standing alone to prudently file a complaint. However, you can only confirm her allegations by talking to current or former employees, maybe even the former plant manger.

You know that informing ABC Co. that you are contemplating a lawsuit and want to speak with their current and former employees will defeat the purpose. Are you permitted to directly contact current ABC Co. employees or former employees? Are you permitted to directly contact the retired plant manager?

Contacting current and former employees of an organizational defendant has long been a pragmatic and economical means to develop the facts, before and after the complaint has been filed. Compared with an informal interview, depositions are expensive and inefficient to determine if a potential witness knows anything of value.

Interviewing a current or former employee in the presence of attorneys for the organization is nearly certain to produce a guarded and less than cooperative witness. But the lawyer seeking to contact current or former employees on an ex parte basis must tread a very fine line.

As every lawyer knows, there is a blanket prohibition on communications with a person represented by counsel under Rule of Professional Conduct 4.2. However, when the other party is an organization, determining which current or former employees may be contacted and interviewed on an ex parte basis can become a trap for the unwary.

The caution and circumspection that must attach to ex parte communications with organization employees, as well as the confusion among lawyers as to the scope of RPC 4.2, was most recently highlighted by U.S. District Judge Nicholas Politan in *Andrews v. Goodyear Tire and Rubber Co.*, 2000 U.S. Dist. LEXIS 1485 (D.N.J. Feb. 14, 2000).

In *Andrews*, Politan rebuked plaintiff's counsel for "sloppiness" in his approach of a Goodyear employee. Id. at *81. The defendant's counsel was also chided for the "misimpression" that all management-level employees were presumptively off-limits. Id. at *68. Noting that although a rigidly scripted interview would hinder legitimate investigation, Politan nonetheless commented that "there should be a general format to which an approaching attorney should adhere in confronting a current or former employee of an organization which would insure that an attorney is abiding by his ethical obligations." Id. at *71.

Ex Parte Contacts

The prohibition on ex parte communications was designed to preserve proper functioning of the legal system and to shield parties from improper approaches by adverse counsel, such as negotiations directly with the party so as to diminish contingency fees. See ABA Comm. on Professional Ethics and Grievances, Formal Opinion 108 (March 10, 1934); *Wright v. Group Health Hospital*, 103 Wash. 2d 192, 196 (1984).

Or, more aptly stated, "the skills of a trained advocate should not be matched against someone not trained in the law." See ABA Formal Opinion 91-359, Contact with Former Employees of Adverse Corporate Party (March 22, 1991). Another prominent view is that the prohibition on ex parte communications with employees serves to protect the organization's attorney-client privilege. See "An Ex Parte Rule Both Sides Can Live With," 139 N.J.L.J. 1113, March 20, 1995.

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In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the U.S. Supreme Court extended the attorney-client privilege for an organization to cover lower-level, non-managerial employees. Notably, the high court specifically rejected limiting the attorney-client privilege to members of the corporate "control group" since that limitation was unworkable in practice and would lead to unpredictable results. Id. at 392-93.

Concerns have also been expressed over ex parte interviews with employees whose acts or omissions may impute liability to the organization, such as the valve turner who opens the valve that discharges hazardous waste into a waterway. In a criminal setting, the concerns over admissions by an employee do not arise because an organization does not have a Fifth Amendment privilege against self-incrimination. Wilson v. United States, 221 U.S. 361 (1911).

By contrast in a civil setting, adverse counsel could interview the "valve turner" in a pre-litigation investigation and impute liability to the organization before the organization's lawyers would have a chance to act.

It should be noted however, that in *Upjohn* the U.S. Supreme Court specifically noted that, "the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." 449 U.S. at 395.

Concerns over protecting the interests of the organization balanced against the right of the adversary to the facts led to disparate interpretations of RPC 4.2. In *PSE&G v. Associated Electric & Gas Ins. Services Ltd.*, 745 F. Supp. 1037, 1039 (D.N.J. 1990), Judge Politan ruled that RPC 4.2 prohibited all informal ex parte contacts, even with former corporate employees.

However, four months after Politan issued his decision in *PSE&G*, U.S. District Judge Stanley Brotman rejected a complete prohibition on ex parte contacts in *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77 (D.N.J. 1991). Brotman instead sustained the ruling by Magistrate Judge Jerome Simandle, which prohibited ex parte interviews only if the employee was actually represented, employed on a corporate management level, or had engaged in acts or omissions imputable to the corporate defendant. Id. at 79.

State v. Ciba-Geigy Corp.

Three months after Brotman's decision in *Curley*, New Jersey's Appellate Division tackled the issue of ex parte communications in *State v. Ciba-Geigy Corp.*, 247 N.J. Super. 314 (App. Div. 1991). The Appellate Division looked to the commentary of Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct.

The commentary defined represented employees as "persons having managerial responsibility on behalf of the organization, and with any other person, whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability, or whose statement may constitute an admission."

The Appellate Division expressly rejected the "bright-line" prohibition on all ex parte interviews as overly broad, and rejected limiting the ex parte prohibition only to senior management as too narrow. 247 N.J. Super. at 324. The court instead followed the New York Court of Appeals' holding in *Nesig v. Team I*, 76 N.Y.2d 363 (1990), which, in addition to persons actually represented, proscribed ex parte communications with "corporate alter egos," as well as employees whose acts or omissions were imputable to the corporation for liability, employees implementing the advice of counsel and employees responsible for effectuating the advice of counsel. Id.

Opinion 688

Ciba-Geigy did not address the issue of ex parte contacts with former employees. That issue was subsequently taken up by the Advisory Committee on Professional Ethics, which concluded that the *Ciba-Geigy* holding applied with equal force to former employees. Opinion 688, 132 N.J.L.J. 573 (Nov. 2, 1992).

Mounting concerns over the scope of RPC 4.2 in the wake of Opinion 688 led the New Jersey Supreme Court to review the opinion. As a consequence of its review, the Court appointed a special committee to review RPC 4.2 and reserved its decision pending receipt of a report from the committee. *In re Opinion 688 of the Advisory Committee on Professional Ethics*, 134 N.J. 294, 296-97 (1993).

Pending the special committee's report, the Court issued interim rules that limited application of RPC 4.2 to the "control group," which the Court defined as: "(a) employees of the organization entrusted with the management of the case or matter in question," and "(b) the employee or employees whose conduct, in and of itself, establishes the organization's liability." Id. at 303.

The Court further specified that ex parte contacts with category "(b)" employees were permitted upon notice to adverse counsel (as opposed to consent) and the notice requirement applied only after the complaint or indictment had been filed. Id.

The Special Committee on RPC 4.2

The Special Committee on RPC 4.2 issued its report to the New Jersey Supreme Court on March 20, 1995. See, Report of Special Committee on RPC 4.2, 139 N.J.L.J. 1161, 1193 (March 20, 1995). The committee recommended a three-part approach to the problem of current and former employees.

First, inasmuch as RPC 1.13(a) defined what constituted an organization as a client, the committee recommended that "organization" be defined to include nearly every type of business entity. Id. The committee further revised RPC 1.13(a) to clarify that the organization lawyer is deemed to represent the "litigation control group" for the purposes of RPC 4.2 and 4.3. Id.

Second, the special committee recommended that RPC 4.2 be revised to specifically bar communications with members of the "litigation control group" as defined in RPC 1.13(a). Id. The committee further recommended that RPC 4.2 be revised to require the lawyer to exercise "reasonable diligence" to ascertain whether the potential witness is represented or deemed to be represented as a member of the "litigation control group." Id.

The committee recommended an exception to allow the lawyer to contact the witness for the sole purpose of ascertaining whether the potential witness was in fact represented or a member of the litigation control group and therefore deemed to be represented. Id.

Third, the special committee recommended revising RPC 4.3 to impose an obligation on the lawyer to determine

whether an employee, who is not a member of the litigation control group, is actually represented or had a right to representation by the organization. Id.

The central element to the committee's recommendations was establishing the scope of employees covered under RPC 4.2 and 4.3 by way of the "litigation control group" set forth in RPC 1.13(a). The "litigation control group" was defined as "current and former agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter, whether or not in litigation." Id. Significant involvement was defined as requiring "involvement greater than merely supplying factual information regarding the matter in question." Id.

The committee repeatedly emphasized that the key concept to determining whether an employee was a member of the litigation control group was the employee's role in determining the organization's legal position. Id. The committee further emphasized that employees whose acts or omissions could impute liability to the organization were not part of the litigation control group.

> The fact that an agent or employee may impute liability, in and of itself, does not determine whether he or she is represented by the organization's counsel, thus implicating the ex parte communication bar.
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> Only in those situations where the fact witness would also be significantly involved, in ways other than just supplying information, in determining the organization's legal position would the bar apply. This is consistent with the Committee's decision that status of the agent or employee is not as important as [the] role in determining the organization's legal position.
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> The inclusion of the word "litigation" in the critical phrase "litigation control group" was intended to emphasize that membership in the control group is essentially defined by the person's significant involvement in or the responsibility for determining the organization's legal position in the subject matter. That is to say, it does not include persons whose actions bind the organization or are imputable to the organization or who are responsible for other aspects of organizational policy unless they meet the "legal position" test. Id.

The "reasonable diligence" required under RPC 4.2 presented some problems. The committee recommended "that the communications bar extends not only to persons the attorney knows to be represented but also that it includes those [persons] the attorney should know, by the exercise of due diligence, to be represented." Id. To allow the lawyer to exercise reasonable diligence, the committee carved out a single exception whereby "communication may be made whose sole purpose is to ascertain the fact of representation." Id.

The committee did not give a specific definition of what constituted "due diligence." "Reasonable diligence" clearly required direct inquiry of the witness to ascertain representation status prior to any substantive discussions. Id. But the committee also stressed that direct inquiry was not alone sufficient in every case. Id. The committee recommended that an attorney should "exercise a high degree of caution and circumspection in making the inquiry of a person who may be or presumptively is a member of an organization's litigation control group." Id.

Presumably, the due diligence requirement does not include inquiry of adverse counsel as to whether the person is represented. The committee did not expressly include a requirement that the employee's status be checked with organization counsel. And, for obvious reasons, the benefits of ex parte interviews would be largely negated if adversary counsel was required to check representation status with organization counsel before contacting the potential witness.

The committee recommended revisions to RPC 4.3 to require the adverse attorney to "ascertain by reasonable diligence whether any such persons who are not also members of the litigation control group are in fact represented or have a right to representation." Id. Finally, if the potential witness does not fall under the definitions of RPC 1.13(a) or RPC 4.2, and is therefore not actually or constructively represented, the adverse attorney must advise the person "that insofar as that attorney understands, the organization's lawyer does not represent that person." Id.

Returning to the concerns over ex parte interviews of the "valve turner" employee, under RPC 1.13(a) and RPC 4.2 ex parte communications were permitted with employees whose acts or omissions could establish liability on the part of the organization. The open question was how to treat the "valve turner" who had a right to representation by the organization under RPC 4.3. Was the "valve turner" to be treated as represented even if he had not actually requested representation by the organization?

After the committee submitted its report to the State Bar Association for comment, the committee reconvened and issued a supplemental report in May 1996 to refine its recommendations. Notices to the Bar, 145 N.J.L.J. 318 (July 15, 1996). The committee noted that many objections had been received regarding the inclusion of former employees in the litigation control group. Id.

In particular, the committee noted that in some circumstances the interests of former members of the litigation control group would potentially be in conflict with the interests of the organization, such as in the case of a whistle-blower. Id. Accordingly, the committee amended its recommended revision to RPC 1.13(a) to remove the presumption that a former member of the litigation control group was represented by the organization if the witness disavowed representation by the organization. Id.

The committee also recognized that former members of the litigation control group had a right to seek their own individual representation, especially where their interests may be adverse to the organization. Id. The committee therefore also recommended that RPC 4.2 be amended to allow attorneys adverse to the organization to counsel or represent a current or former member of the litigation control group. Id.

The special committee further recommended that if an ex parte contact is made

for the purpose of ascertaining representation, the attorney making the contact "might wish to consult the script suggested by *In re Prudential Insurance Co. of America Sales Practices Litigation*, 911 F. Supp. 148, 152 fn. 5 (D.N.J. 1995) (Wolin, U.S.D.J.) (decided under provisional rules issued by the New Jersey Supreme Court); and *In re Environmental Insurance Declaratory Judgment Actions*, 252 N.J. Super. 510, 523-24 (Law Div. 1991).

The special committee's recommendations on RPC 4.2 for revisions to RPC 1.13, RPC 4.2 and RPC 4.3 were adopted by the New Jersey Supreme Court on July 15, 1996, effective Sept. 1, 1996.

Recent Cases

The open issue of how to treat the employee who had a right to representation by the organization under RPC 4.3 was addressed by U.S. Magistrate Judge Joel Rosen in *Michaels v. Woodland*, 988 F. Supp. 468 (D.N.J. 1997). In *Michaels*, a medical malpractice case, the plaintiff moved for leave to conduct ex parte interviews with current and former nurses and nurse assistants who participated in her post-operative care in order to identify potential witnesses. 988 F. Supp. at 470.

In reaching his decision to allow the ex parte interviews, Rosen wrote:

> The first determination must be whether the witness is a current or former employee. If the witness is a current employee, in order to determine whether ex parte contact is prohibited it is necessary to analyze two elements: (1) whether the person is within the litigation control group as defined by RPC 1.13; and (2) if not, whether the person has obtained other representation. RPC 4.2. Clearly RPC 4.2 prohibits an adverse attorney to have any ex parte contact with any current employee within the litigation control group. However, if the current employee is not within the litigation control group and has not obtained other representation, ex parte contact is permitted consistent with RPC 4.3. If it is a former employee that the lawyer wants to interview, and that person was within the litigation control group, the witness is presumptively represented by the organization. RPC 1.13. However, the lawyer, pursuant to RPC 4.2, may interview any witness who has disavowed that representation. ... Nothing in the Rules prohibits ex parte communications with a former employee who was not within the litigation control group and who is not otherwise represented by counsel. Id. at 472.

The defendant hospital argued that the witnesses could not be interviewed because the hospital had offered the employees representation, even though there was no record that the employees had accepted the offer. Id. Presumably, the defendant hospital based its argument on the language of RPC 4.3, which required adverse counsel to determine if the witness "has a right to such representation upon request." The argument being that if the witness has a right to representation upon request, then the witness is deemed to be automatically represented and ex parte interviews should not be permitted.

Rosen rejected the hospital's "automatic representation" argument, holding that employees are not assumed to be represented by the organization unless the employee specifically agreed to be represented by the organization. Id. at 473. In other words, an employee not in the litigation control group, who has a right to representation upon request under RPC 4.3, is to be regarded as not represented unless the employee affirmatively exercises the right to representation.

> An organization should not be permitted to impose representation on employees who do not fall within the litigation control group without the consent of those employees. If this court accepted the defendants' argument, the litigation control group could potentially be abrogated whenever an organization "offered" representation to all employees, including those outside of the litigation control group. This result was clearly not intended by the amendments, especially when the Committee was so careful to narrowly define the litigation control group. This determination adequately protects attorney-client communications within the organization by disallowing ex parte contact with any employee who is involved in legal decision-making while at the same time giving effect to the intent of RPC 4.2 not to limit ex parte contact with all employees. Further, it protects any lay employees who are within the litigation control group from manipulation by opposing counsel. Id. at 474.

Rosen then allowed the ex parte interviews subject to the requirements that adverse counsel conduct the interviews in accordance with RPC 4.3 and advise the witnesses that they had the right to refuse the interview. Id.

As discussed earlier, in *Andrews v. Goodyear Tire & Rubber Co., Inc.*, Judge Politan recently revisited the issue of ex parte contacts since his seminal opinion 10 years earlier in *PSE&G v. Associated Electric & Gas Insurance.*

In *Andrews*, an employment discrimination case, plaintiff's counsel contacted a current Goodyear management-level employee who had information relevant to plaintiff's claims. As a result of the ex parte interview, the plaintiff's attorney learned of the existence of an internal Goodyear memo that was highly supportive of the plaintiff's discrimination claims. The plaintiff's attorney subsequently secured a copy of the memo from the Goodyear employee.

After learning of the ex parte interview and deposing the employee, Goodyear's attorney moved to disqualify the plaintiff's attorney and to preclude the plaintiff from using any information gained during the interview, including the Goodyear memo.

U.S. Magistrate Judge Ronald Hedges agreed with Goodyear, finding that the plaintiff's counsel had violated RPC 4.2 by failing to determine whether the witness was part of the litigation control group or represented by counsel before initiating contact with the witness. Hedges ordered that the plaintiff's counsel be disqualified and precluded the plaintiff from using the memo and any

other information gained from the ex parte interview.

Politan reversed, finding that although the plaintiff's counsel was "sloppy," he did in fact exercise reasonable diligence in ascertaining whether the witness was represented for the purposes of RPC 4.2. *Andrews* at *72-79. Politan also found that Goodyear was mistaken in its impression that all management-level employees were presumptively off-limits under RPC 4.2. Id. at *67-68. Politan pointedly noted that the "legal position test" of RPC 1.13(a) focused on the relationship of the witness to the control of the litigation and did not cover all management employees. Id.

Politan further held that the plaintiff's counsel was not under any obligation to determine whether the witness was in the litigation control group or otherwise represented *before* contacting the witness. Id. at *62-67. Citing RPC 4.2, Politan noted that if the attorney does not "know" that the witness is represented, the attorney may contact the witness for the sole purpose of ascertaining if the witness is in fact represented. Id. at *63. Thus, the plaintiff's counsel was free to contact the witness for the purpose of finding out whether the witness was in the litigation control group or otherwise represented. Id. at *67.

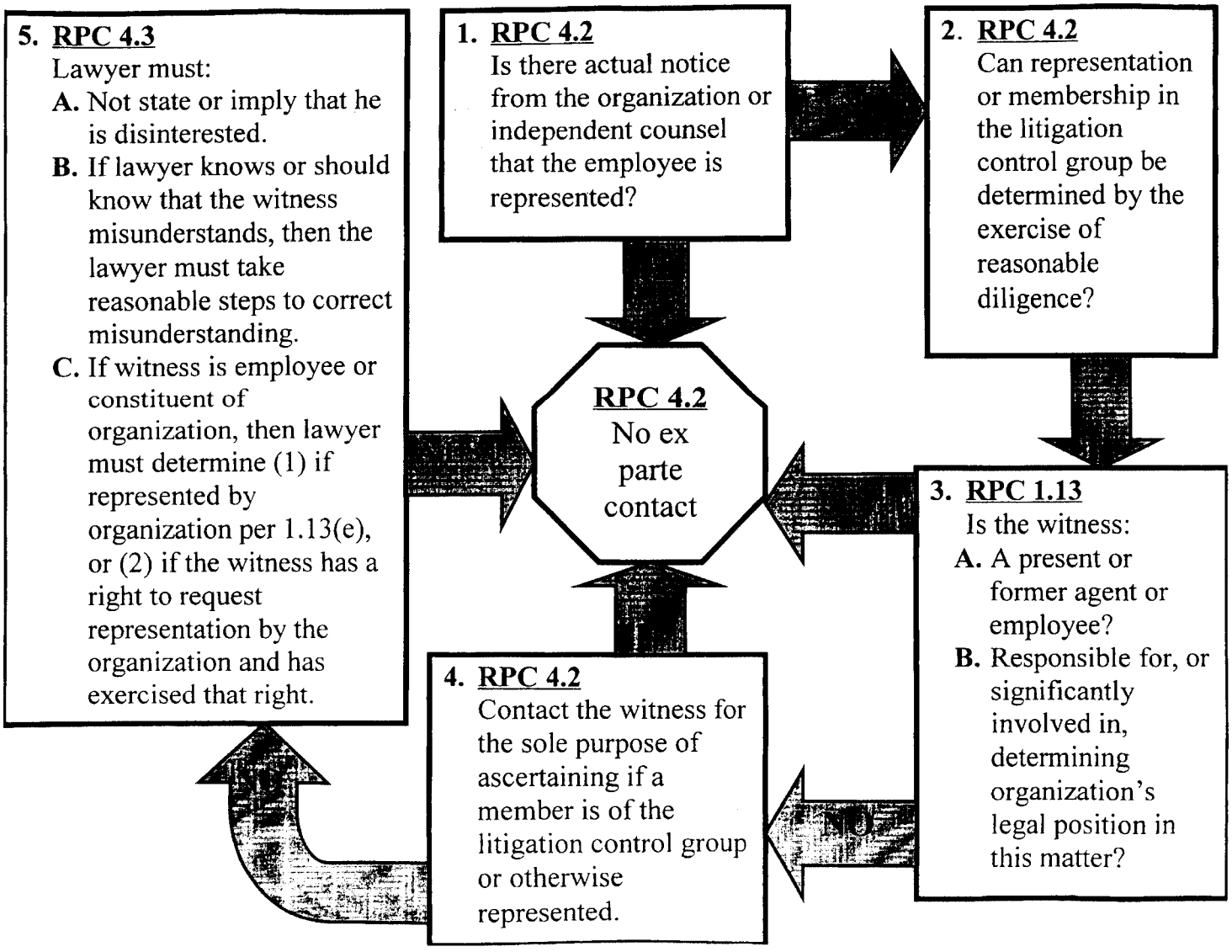
In assessing the procedures employed by plaintiff's counsel, Politan noted that the subject interview took place three months after the plaintiff filed the lawsuit against Goodyear, at which point the witness had not been contacted by Goodyear's attorneys. "Common sense dictates that if [the witness] was in the litigation control group, he would have been contacted by Goodyear's in-house counsel by that time and informed that he was in the litigation control group." Id. at *78. Further undermining Goodyear's argument was the company's admission that the witness was not in the litigation control group. Id. at *79.

Applying the Rules

The process for approaching an ex parte interview can be reduced to a series of steps (see chart below) that will give practitioners some flexibility while at the same time providing a structure that can be justified at a later date if needed.

Step 1. Has there been notice to the attorney that the employee is represented? RPC 4.2

The first step in the process is to review whether there has been notice that the employee is in fact represented, either by the organization or by independent counsel. If so, then no ex parte contact



may be made pursuant to RPC 4.2.

Step 2. Can representation be determined by the exercise of reasonable diligence? RPC 4.2 and 1.13.

Pursuant to RPC 4.2, the lawyer is charged with exercising reasonable diligence to determine if the witness is in the litigation control group or otherwise represented. If the facts and the circumstances of the case leave room for doubt as to whether the witness is represented, the lawyer may contact the witness for the sole purpose of ascertaining the witness' representation status pursuant to RPC 4.2.

To establish that reasonable diligence was exercised prior to substantive discussions with a witness, the lawyer must demonstrate that the witness was questioned by the lawyer with respect to whether the witness is included in the litigation control group or otherwise represented.

However, it should be remembered that questioning the employee alone will not establish reasonable diligence on the part of the lawyer. The lawyer cannot turn a blind eye to facts and circumstances which should indicate that the employee is either represented or a member of the litigation control group.

In questioning the employee for the purpose of ascertaining representation, the lawyer should specifically cover the following areas:

- The lawyer should identify himself, his employer, his client, the nature of the matter, the parties and adversarial character of the matter.
- The lawyer should determine if the witness is a present or former employee.
- The lawyer should inform the potential witness that she need not speak to the lawyer and that she may wish to consult with her own lawyer prior to discussing the matter.
- The lawyer should inquire whether the witness had engaged in any discussions with attorneys representing the organization regarding the matter or facts and circumstances relating to the matter — being careful to avoid discussion of the particulars.
- Has the witness received any other notice from the organization that she is included in the litigation control group?
- Is the witness responsible for, or significantly involved in, determining the legal position of the organization in the matter, beyond supplying information or facts?

If it appears from any of the foregoing that the witness is either a member of the litigation control group or represented by counsel, the interview should terminate without any discussion of substantive issues.

Step 3. Unrepresented current and former employees under RPC 4.3.

If the lawyer determines that the witness is not actually represented or a member of the litigation control group, then the lawyer should take the following steps pursuant to RPC 4.3.

- Not state or imply that he is disinterested. If the lawyer knows, or should reasonably know, that the unrepresented witness misunderstands the lawyer's role in the matter, the lawyer must take steps to correct the misunderstanding.
- If the witness is a director, officer, employee, member, shareholder or other constituent of the organization (but not a member of the litigation control group), the lawyer must determine if the witness is actually represented by the organization's attorney or independent counsel.
- Does the witness have a right to representation by the organization attorneys on request? If so, has the witness actually made a request for representation or is she contemplating making such a request?
- The lawyer must make it known to the witness that the lawyer understands that the person is not represented by the organization's attorneys.

The penalty for having engaged in a prohibited ex parte communication can be severe, including disqualification and suppression of any evidence gained by the communication. Given the potential penalties, the cautious approach is clearly the better approach to ex parte interviews. ■