LJN LAW JOURNAL NEWSLETTERS

LJN'S Product Liability Law & Strategy®

An ALM Publication

Volume 29, Number 6 • December 2010

Ex-Parte Interviews of Former Employees

The Product Memo That Never Goes Away

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Perhaps this sounds familiar. A former employee, years ago, created the fodder for an ongoing series of lawsuits by gratuitously authoring a critical assessment of a product's potential problems in a company memorandum or e-mail. His literary excess was fueled by a creative writing course he was taking on the side, which suggested that embellishment was good for imaginative storytelling. The employee, who continues to stand by the company, is long gone, but his document has taken on a life of its own. Or, perhaps there is a former employee, involved with labor and wage issues in the past, who now sees an opportunity for "pay-back" by claiming that all kinds of interesting transgressions were committed on your production line. Product manufacturers are often faced with the dreaded notice: Plaintiff's counsel seeks to depose these former employees who authored the so-called "bad" document, or left with a grudge. Even worse, a manufacturer finds out, after the fact, that former employees have already been contacted and have given statements. What, if anything, can manufacturers do to protect themselves?

Ex-Parte Interviews

The issue of *ex-parte* interviews of a corporation's former employees can raise tensions on many different levels. This area of law has been dubbed "a veritable minefield" that must be approached with great trepidation. *Plan Comm. Driggs Reorganization Case v. Driggs*, 217 B.R. 67, 70 (D. Md. 1998); *see Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569 (D. Va. 1998). Unfortunately, attorneys and judges are forced to battle these issues without a clear set of "rules of engagement" as each situation and outcome is fact-specific. *Id.; see Camden v. State of Maryland*, 910 F. Supp. 1115 (D. Md. 1996); *H.B.A. Management, Inc. v. Estate of Schwartz By and Through Schwartz*, 913 F. Supp. 1306 (N.D. Iowa 1996).

The majority approach adheres to the letter of the ethics rules, which contain no express prohibition against contacting and interviewing a former employee who is not represented by counsel. The rationale rests mainly on the principle that statements made by a former employee are not binding on, or admissible against, the former employer — which may seem more like a legal fiction in the eyes of a jury. An alternative view, however, suggests that such contacts may be improper in certain circumstances, depending on a variety of factors, including the position of the former employee, the type of information that individual may have, and the role that person played while employed by the corporation. This article examines the different views adopted by various jurisdictions, and offers practical considerations to counsel faced with this predicament, particularly in the context of product liability cases.

The Applicable Rules

Several ethical rules can be considered in the context of governing contacts with former employees. First, Rule 4.2 of the Model Rules of Professional Conduct ("RPC 4.2") ("Communication With Person Represented by Counsel"), provides that:

> 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 to do so by law or a court order.

Comment 7 to RPC 4.2 also merits consideration in this context because it limits the application of Rule 4.2's prohibition to an employee or constituent 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.

Additionally, Disciplinary Rule 7-104(a)(1) of the ABA Model Code of Professional Responsibility ("Communicating With One of Adverse Interest"), which is substantially similar to RPC 4.2, provides:

> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
>
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have reasonable possibility of being in conflict with the interests of his client.

Generally, these rules appear to protect only those individuals who are already represented by counsel. And, if the individual is an employee of a corporation, the comment to RPC 4.2 essentially limits those protections to employees who are likely to possess privileged information or who can bind or impute liability to the

corporation.

The Majority View

Based on the rationale that statements made by a former employee are not binding on, or admissible against, a former employer, the majority of courts have concluded that RPC 4.2 does not prohibit *ex-parte* contact with former employees. These courts favor a strict interpretation of RPC 4.2, and, accordingly, rely upon the language of the rule to guide them in their decisions. In determining that RPC 4.2 does not prohibit *ex-parte* contacts with former employees, courts following this approach have considered several elements of the rule.

First, these courts have reasoned that because RPC 4.2 does not contain an express prohibition against contacting or interviewing former employees who are not represented by counsel, it should not be applied to create one. *See, e.g., Aiken v. Bus. and Ind. Health Group., Inc.*, 885 F. Supp. 1474 (D. Kan. 1995).

Second, a majority of courts have interpreted the word "party" to apply only to persons employed at the time of the communication, and that a former employee with no current relationship to the organization is not a "party" to the litigation. Specifically, these courts have defined "party" to include: 1) persons currently occupying managerial positions; 2) persons whose actions or omissions could impute liability to their employer; and 3) persons who are empowered to make admissions on behalf of their employers. *See, e.g., Valassis v. Solomon*, 143 F.R.D. 118, 123 (E.D. Mich. 1992); *Terra International, Inc. v. Mississippi Chemical Corp.*, 913 F. Supp. 1306, 13-14-15 (D. Iowa 1996); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y 1990).

Third, in analyzing the comments to RPC 4.2, these courts have concluded that the rule was intended to apply only to current employees since statements by former employees are not binding on, and cannot be deemed admissions against, the company. *See H.B.A. Management, Inc. v. Estate of Schwartz*, 913 F. Supp. 1306 (N.D. Iowa 1996).

Last, courts have also recognized that imposing restrictions against contacting former employees, based on a hypothetical possibility that the former employee could impute liability on a corporation, would cause an enormous expenditure of additional time and expense not mandated by RPC 4.2. *See Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77 (D.N.J. 1991) ("The courts cannot permit ethical rules to be used by a party to chill the flow of potentially harmful information to opposing counsel where the danger of an ethical violation is minute").

Subject to the reasoning of the majority of courts, the efforts of product manufacturers to prevent their adversaries from contacting former employees have often been defeated. For example, in *Hanntz v. Shiley, Inc.*, 766 F. Supp. 258 (D.N.J. 1991), the plaintiff brought a product liability action against the company that designed, manufactured and distributed the allegedly defective heart valves that were surgically implanted in him. During pretrial investigation, the plaintiff's attorney contacted one of the defendant's former employees, seeking information relevant to the plaintiff's lawsuit. Initially, the Magistrate Judge concluded that the plaintiff's counsel could not engage in *ex parte* contact with the defendant's former employees, unless the defendant's counsel could be part of the communication. However, on appeal, the plaintiff argued that defendant's counsel's presence would "chill the former employees from revealing relevant information," and convinced the District Judge to reverse the Magistrate Judge's discovery order.

Though the *Hanntz* court clearly adhered to the majority approach, the District Judge's opinion illustrates an important exception that even majority courts are willing to make. The District Judge concluded that under RPC 4.2, *ex-parte* communication with a former employee is permitted "except to the extent a privilege held by the former employee of the corporation would be breached." *Id.* at 263. Thus, although the majority of courts may appear to employ a liberal attitude towards ex parte contacts, courts will take a strict approach when the policy considerations underlying RPC 4.2 are implicated — *i.e.*, protecting privileged communications and information and the sanctity of the attorney-client relationship.

The Minority View

The minority approach is more flexible in that it allows a court to determine whether or not *ex parte* contact with former employees is improper, based on its own evaluation of the facts. As one court noted, "[w]hile matters of this sort may warrant 'bright-line' rules, seldom do such categorical pronouncements survive variant factual application." *Olson v. Snap Products, Inc.*, 183 F.R.D. 539 (D. Minn. 1998).

In essence, the minority approach considers and evaluates a wider array of exceptions, and employs a stricter approach toward protecting against potential intrusions into attorney-client privilege and the disclosure of privileged information. For example, in *Olson v. Snap Products*, the defendant, a product manufacturer, moved to disqualify plaintiff's counsel because of his *ex-parte* contacts with the defendant's former employees. While the Magistrate Judge denied the motion, the court adopted "a flexible approach" and took the additional step of examining "the likelihood that any information gathered by [plaintiff's attorney] actually intruded upon any legally privileged matters." *Id.; See also Spencer v. Steinman*, 179 F.R.D. 484, 491 (E.D. Pa. 1998).

In *Rentclub v. Transamerica Rental Finance*, 811 F.Supp. 651 (M.D. Fla. 1992), aff'd, 43, F.3d 1439 (11th Cir. 1995), in granting the defendant's motion to disqualify the plaintiff's attorney, the court's focus was not only on the nature of the information that was being acquired, but also on the nature of the former employee who was contacted. The court in *Rentclub* asserted, contrary to the majority view, that the word "party" in RPC 4.2 includes former employees because the statements of a former employee could in fact be admissions against the corporation. Accordingly, the district judge concluded that a former employee who acquired privileged information during his employment "will remain a party even after he leaves the corporation because that employee has a memory" and "[t]he corporation continues to have a vital interest in the employee's knowledge of privileged information and its potential release to opposing counsel in litigation after the employee leaves." *Id.* at 658 (citing *American Protection Insurance Co. v. MGM Grand Hotel*, No CV-LV-82-26 HDM (D. Nev. Mar. 13, 1986)); *PPG Industries Inc. v. BASF Corp.*, 134 F.R.D. 118 (W.D. Pa. 1990) (interpreting the comment's ref-

erence to one whose "'act or omission in connection with that matter may be imputed on the organization for purposes … of liability'" to mean that the ethical rule should apply to former employees who fall into this category).

Consistent with the court's reasoning in *Rentclub*, other courts following the minority approach have established that *ex-parte* contacts should be prohibited where former employees occupied particular roles or positions during their employment. For example, in *Curley v. Cumberland Farms,* the court concluded that *ex-parte* contact with former employees of a corporate adversary should be prohibited where the corporation can establish that the former employee "had managerial responsibilit[ies]" while employed by the corporation. Similarly, in *Erickson v. Winthrop Laboratories*, 249 N.J. Super. 137 (Law Div. 1991), the court asserted that a former employee who maintained a "managerial, directorial or high-level position in the corporation while he or she was employed by it," qualified as a "party," and, therefore, could not be contacted by plaintiff's counsel *ex parte*. In conducting this evaluation, minority courts will determine that *ex-parte* contact with a former employee is improper if the former employee's prior position allowed access to privileged or confidential information that could potentially be shared in the context of such contact.

Propriety

Another consideration that contributes to minority courts' decisions regarding the propriety of *ex-parte* contacts with former employees is the role that the former employee has played or continues to play in the instant litigation. For example, the court in *In re Prudential Ins. Co. of America Sales Practices Litigation*, 911 F. Supp. 148 (D.N.J. 1995), held that former employees of the defendant corporation who had "responsibility for or significant involvement in (1) making financial decisions regarding the company's conduct of the instant litigation; or (2) establishing policies or firm-wide procedures" could not be contacted by plaintiff's counsel *ex parte*. Similarly, in *Lang v. Superior Court, In and For County of Maricopa*, 170 Ariz. 602, (Ct. App. Div. 1 1992), the court concluded that *ex-parte* contacts with an opponent's former employees would be prohibited where the former employee has an "ongoing relationship with the former employer in connection with the litigation" for which he/she was contacted.

In addition to the flexibility that the minority approach affords judges, it has been asserted that the minority approach is perhaps more consistent with the policy underlying the ethical rules than the majority approach because it "prohibit[s] an attorney from unfairly taking advantage of unrepresented parties when acting on behalf of a client, while still allowing leeway for the proper search for the truth." *See Olson v. Snap Products, Inc., supra*. Though some courts articulate a clear preference for the minority approach, many jurisdictions still do not have controlling authority on the matter.

Practical Considerations

Based on the clear divergence of opinion among courts, counsel should approach the "minefield" with caution. Though there is no way for a product manufacturer, or any other corporate litigant, to shield itself entirely from probing adversaries, it does have some means of protecting itself. In fact, defense counsel should be sure to request all information regarding any prior contacts with the defendant's former employees, as part of his or her standard discovery demands.

Upon learning that a former employee has been contacted, defense counsel may seek a protective order requesting a variety of remedies depending on the facts surrounding the former employee's prior position, role, connection with the litigation, and the laws of the particular jurisdiction. An appropriate protective order can range from placing a total bar on any communications outside the presence of defense counsel, to placing restrictions or "ground rules" on such future contacts to avoid and prevent any violations, inadvertent or otherwise, of the ethical rules examined above. The restrictions sought in a protective order can also range in severity from requiring a plaintiff's counsel to disclose all notes and records concerning communications with former employees, or disclosing the names of all former employees contacted with dates and times, to simply requiring a plaintiff's counsel to make full disclosure of the attorney's interest and role in the matter, the issues involved in the case, and the party that he or she represents upon initiating such communications.

With these considerations in mind, it can be helpful for a corporation to stay in contact with its former employees through an alumni network or otherwise, and to establish a protocol so that the corporation will be notified when a former employee is contacted. In certain circumstances, a confidentiality agreement may preclude former employees from answering certain questions or providing information. Of course, if the former employee is hired by the defendant as a trial consultant or expert witnesses, or obtains counsel, any further *ex-parte* contact would be expressly prohibited.

Conclusion

Though the area of *ex-parte* contacts with former employees is unpredictable and risky for corporate litigants, the terrain can be more manageable with an attorney who is aware of the dangers and who knows what protections are available to the client. In the end, the attorney who stays informed will be best able to guide his/her corporate clients safely home.

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