

Final

**Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2012-02
Issued February 9, 2012**

FACTS

The inquiring attorney represents a plaintiff in a personal injury lawsuit against a national corporation. The inquiring attorney seeks to communicate with a former employee of the defendant corporation who has personal knowledge regarding the presence of a toxic substance on the company premises. The presence of the substance and the effects of exposure to it are matters at issue in the lawsuit. The former employee also has expertise in the toxic substance and the inquiring attorney is interested in retaining the former employee as an expert witness. The inquiring attorney states that he/she has spoken with the former employee to discuss qualifications as an expert, and to ask whether the former employee would be agreeable to speak with the inquiring attorney about the presence of the substance on the defendant's premises.

ISSUE PRESENTED

The inquiring attorney, who represents a plaintiff in a lawsuit against a corporation, asks whether the Rules of Professional Conduct permit him/her to communicate ex parte with a former employee of the defendant corporation without the consent of opposing counsel.

OPINION

Rule 4.2 permits the inquiring attorney, who represents a plaintiff in a lawsuit against a corporation, to communicate ex parte with a former employee of the defendant corporation without the consent of opposing counsel.

REASONING

Rule 4.2 which prohibits lawyers from communicating with persons represented by counsel, is pertinent to this inquiry. It provides as follows:

Rule 4.2. Communication with person represented by counsel. 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.

Comment [7] to Rule 4.2, which addresses the issue of communicating with constituents of a represented organization, is instructive. The Comment states:

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization 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. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

In 1991, this Panel issued an advisory opinion, stating that the Rules of Professional Conduct do not prohibit attorneys and their agents from conducting ex parte interviews of former employees of an adverse corporate party. R.I. Supreme Court Ethics Advisory Panel Op. 91-74 (1991). Also, in ABA Formal Opinion 91-359 (1991), the American Bar Association Standing Committee on Ethics and Professional Responsibility concluded that Model Rule 4.2, which is identical to its Rhode Island counterpart, does not prohibit communications with former employees of a represented organization. More recently, the ABA Standing Committee noted:

It should be noted that Rule 4.2 does not prohibit contacts with former officers or employees of a represented corporation, even if they were in one of the categories with which communication was prohibited while they were employed. This Committee so concluded in ABA Formal Op. 91-359 (1991.) ABA Formal Op. 95-396, n. 47 (1995).

Courts have similarly determined that ex parte communications with former employees of an opposing party do not violate Rule 4.2. In Clark v. Beverly Health and Rehabilitation Services, Inc., 797 N.E.2d 905 (Mass. 2003), the Supreme Judicial Court of

Massachusetts reasoned that Rule 4.2 was intended to protect only the attorney-client relationship, and not the underlying facts. 797 N.E.2d at 910. The court stated:

The purpose of rule 4.2 would not be served by including former employees within its reach. Rule 4.2 exists “to protect the attorney-client relationship and prevent clients from making ill-advised statements without counsel of their attorney.” (citations omitted.) In the context of organizational entities, it aims to balance, on the one hand, a litigant’s need for information and, on the other, an organization’s need to protect its legitimate interests. (citation omitted.) An organization’s attorney-client relationship is appropriately protected when the no-contact rule is construed to prohibit *ex parte* communication with employees “who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization’s counsel.” (citation omitted.) Preventing the disclosure of unfavorable facts merely because they happen to have occurred in the workplace is not a legitimate organizational interest for purposes of applying rule 4.2. (citations omitted.) *Id.* at 909-910.

Other courts have similarly concluded. See, e.g. P.T. Barnum’s Nightclub v. Duhamell, 766 N.E.2d 729 (Ind. App. 2002) (no limitations on contacts with former employees of adverse party contained in rule 4.2); Orlowski v. Dominick’s Finer Foods, Inc., 937 F. Supp. 723 (N.D. Ill. 1996) (*ex parte* communications between plaintiff’s counsel and former managers of defendant do not violate rule 4.2); Dent v. Kaufman, 406 S.E. 2d 68 (W.Va. 1991) (rule 4.2 does not exist to protect corporate party from the revelation of prejudicial facts.)

In the instant inquiry, the inquiring attorney represents the plaintiff in a lawsuit against a corporate defendant, and seeks to communicate with the corporation’s former employee who has personal knowledge regarding the presence of a toxic substance on the corporation’s premises. The Panel concludes that Rule 4.2 of the Rules of Professional Conduct permits the inquiring attorney to communicate *ex parte* with the former employee of the corporate defendant without obtaining the consent of opposing counsel. The Panel advises the inquiring attorney that in doing so, he/she must abide by other ethical obligations imposed by the Rules.