Traveling In Murky Water: Talking To The Adversary's Former Employee

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Assume that the hypothetical plaintiff suffered injury after his truck ran off the side of a road. Two months earlier he had received notice from the manufacturer of a recall related to the truck's hydraulic steering system. The recall acknowledges that the defect can lead to loss of power steering in the vehicle. Your new client tells you that loss of control in steering caused the accident. Before his accident he had taken the truck in for the subject recall and was told when he picked up the truck the recall had been repaired.. The defendant truck dealer now claims the vehicle was in for a different problem, and was not subject to a recall when he had possession of the vehicle. The dealer's records are non-existent.

The primary issue is how long the dealer had possession of the vehicle. One person who should know is a former mechanic of the defendant dealer. What will he say? Is he a disgruntled employee? Can you talk to him?

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 91-359 on March 22, 1991 regarding contact with a former employee of an adverse corporate party.[1] The starting point of the inquiry begins with Model Rule of Professional Conduct 4.2, which states:

> 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

[1] Formal opinions are on subjects determined by the committee to be of widespread interest or of unusual importance.

> another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[2]

The rationale on which Rule 4.2 was formulated was stated in *Wright v. Group Health Hospital,* 103 Wash.2d 192, 691 P.2d 564, 576 (1984):

> The purpose of the rule against ex parte communications with represented parties are 'preserving the proper functioning of the legal system and shielding the adverse party from improper approaches.'

Citing ABA Formal Opinion 108 (1934).

The inquiry as to present employees becomes whether the employee (a) has "managerial responsibility" on behalf of the employer corporation, or (b) is one whose act or admission in connection with the matter that is the subject of potential communicating lawyer's representation may be imputed to the corporation, or (c) is one whose "statement may constitute an admission" by the corporation. A host of factors including statutory and common law, rules of evidence, and employee handbooks on employees' duties and responsibilities affect this determination.

Neither the Rule nor its Comment purports to deal with former employees of a corporate party. The concerns reflected in the Comment to Rule 4.2 may, however, survive the termination of the employment relationship because corporations necessarily act through people. Under certain circumstances Rule 4.2 has been held to bar ex parte contacts with former employees who, while employed, had "managerial responsibilities concerning the matter in litigation." *Porter v. ArcoMetals,* 642 F.Supp. 1116, 1118 (D.Mont. 1988). Other courts have held Rule 4.2 to bar communications when the

[2] Committee comments to Rule 4.2 makes clear that corporate parties are included within the meaning of "party" and that the rule extends to present employees of corporate parties with managerial responsibility or who could make an admission for the corporate party.

possibility exists that the communications between a former employee and employer may be privileged. *See In re Coordinated,* 658 F.2d 1355, 1361 n.7 (9th Cir.1981).

The circumstances under which Rule 4.2 bars communications with a former employee are rare, and would not apply to the mechanic fact witness. That the Rule generally does not extend to cover former corporate employees is supported by the Committee Comment:

> Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate on the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

Although Rule 4.2 allows you to communicate with the former employee of the corporate defendant, the writer suggests some precautions. Where the defendant might claim the "management" exception applies or, more importantly, that the former employee has the possibility of possessing privileged communications, prudence suggests that you write a letter to your State Bar Ethics Committee requesting an advisory ruling. A letter from the State Bar in the file will head off worry down the road, and can be cited to both opposing counsel and trial judge if a discovery dispute arises.

What if, in your discussions with the former employee, you become aware that he or she possesses knowledge gained during attorney-client discussions with the former employee's counsel? Stop the informal contact immediately! You are at risk of being disqualified out of the case for violating attorney-client privilege of your opponent unless all further contact with that witness is by formal deposition, with opposing counsel present. Prudence here suggests that you tell the former employee at the point of discussion that you do not want to hear about discussions with corporate counsel that he

may have heard or participated in while an employee. The law surrounding attorney disqualification basically says that trial courts should disqualify if there is a close question. The author has learned the hard way about this, as have others. It is an increasing problem.