



MESSING
RUDAVSKY
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— P.C. —



National Employment
Lawyers Association
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THE ETHICS OF INTERVIEWING DEFENDANT'S EMPLOYEES & CANDOR TO THE COURT

Contacting Employees of an Adverse Corporate Party under R. Prof. C. 4.2

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FORMER TEST (PRE-2002): ABA MODEL R. 4.2, CMT. [4]

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No ex parte communications with:

- Persons with “managerial responsibility on behalf of the organization”
- Persons whose act or omission may be imputed to organization for liability purposes
- Persons “whose statement may constitute an admission on behalf of the organization”

FORMER TEST (PRE-2002): ABA MODEL R. 4.2, CMT. [4]

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You represent Client in a sexual harassment case vs. BigCo. Client alleges she was harassed by Manager XYZ in another department. She tells you that her own manager, M, and her coworker, CW, witnessed the harassment.

Q: May you interview M and CW ex parte, obtain their affidavits, and submit them at summary judgment?

- (A) Yes
- (B) No
- (C) It depends

FORMER TEST (PRE-2002): ABA MODEL R. 4.2, CMT. [4]

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Under former rule, answer is (B) No, for M. What about CW?

That depends on whether “admissions” (as in the clause barring interviews with persons whose statements may constitute admissions) has the same meaning in the ethics rule as it does in the hearsay exclusion in Fed. R. Evid. 801(d)(2)(D), under which most employees can make admissions, or has the much narrower meaning in Rest. (3d) §100, cmt. E (incontrovertible “binding” admission that few employees authorized to make)

- Disarray in law, huge split among states
- Advocacy led by NELA to change rule

ABA MODEL RULE 4.2, CMT. [7] TEST

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Ex parte communications prohibited with:

- “Constituents” (employees, directors, shareholders) who direct or regularly consult with organization’s lawyer re matter
- Or who have authority to obligate organization re matter
- Or whose act or omission may be imputed to organization for liability purposes [this section unchanged]
 - “Admissions” language: gone
 - “Managerial responsibility” language: gone

ABA MODEL RULE 4.2, CMT. [7] TEST

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Q: May you interview M and CW ex parte, obtain their affidavits, and submit them at summary judgment?

(A) Yes

(B) No

(C) It depends

Answer: (A), Yes you can! M does not regularly consult with BigCo's lawyer and has no authority to obligate BigCo, and his acts/omissions as a percipient witness can't be imputed to BigCo.

ABA MODEL RULE 4.2, CMT. [7] TEST

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CAUTION: About 43 jurisdictions have the Model Rules test, or a similar or even more permissive test, in effect

But not: Alabama, Alaska, Arizona, Connecticut, Hawaii, Michigan, and Oregon

ABA MODEL RULE 4.2, CMT. [7] TEST

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Q: What if you don't know at the start whether prospective witness passes the Cmt. [7] test?

A: Find out, and protect yourself from inappropriate disclosures. Before obtaining any substantive information from the witness:

ABA MODEL RULE 4.2, CMT. [7] TEST

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- Disclose your role in case
- Ask if witness is independently represented
- Ask if witness considers self represented by company lawyer
- Ask if witness has discussed case with company lawyer (if so, tell witness not to reveal any of those communications to you, and confirm that witness was not supervising or directing lawyer)
- Ensure that witness's role in events was truly as a witness (i.e., not as a perp)

Also, avoid giving witness any legal advice, since there's a possibility of a conflict of interest.

FORMER EMPLOYEES

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In your sexual harassment case, Client tells you that (1) the HR Director and (2) the Executive Vice President were privately very supportive of her while employed. Now both have left BigCo.

Q: Can you interview them?

- (A) Neither of them, given their former roles
- (B) Both of them; they're former employees
- (C) Only the HR Director
- (D) Only the EVP
- (E) It depends

FORMER EMPLOYEES

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A: (E) It depends, although (B) Both of them is often true, but “B” careful!

Cmt. [7] states that communication with a “former constituent” does not require consent from the organization’s lawyer

BUT: cmt. [7] also states that you can’t “violate the legal rights of the organization” in obtaining evidence. And organizations have lots of legal rights! And many of them aren’t in the Rules!

FORMER EMPLOYEES

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RULE 4.4: Can't use methods of obtaining evidence that violate a person's legal rights

Cmt. [1]: “impractical to catalog all such rights,” but they definitely include:

- Can't obtain lawyer/client privileged information
- Can't obtain “confidential” corporate information

FORMER EMPLOYEES

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WHAT DOES THAT MEAN?

If the reason you want to interview the witness is because of witness's access to confidential info: Don't do it!

- Tell witness at outset: Don't tell me anything privileged or confidential

HR Director: does her value lie in her observations of company decision-making/internal investigation? Or of perps' behavior?

- Is the distinction always obvious?

FORMER EMPLOYEES

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- Can you ask HR Director, “who did you interview in the investigation?”
- Or, “were there others you wanted to interview but didn’t?”

If that’s “confidential,” does an overly broad definition of “confidential” improperly burden the HR Director’s exercise of her right to oppose sexual harassment?



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