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# Understanding the Ex Parte Communications Ban in Employment Disputes

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# Understanding The Ex Parte Communications Ban In Employment Disputes



**Michael Z. Green**

*"I shouldn't be talking to you about this, but...."*

**DISCIPLINARY RULE 7-104(A)(1)**, Communicating With One of Adverse Interest, in the ABA Model Code of Professional Responsibility, states that "[d]uring the course of his representation of a client a lawyer shall not:...[c]om-

municate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is au-

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**Michael Z. Green** is Professor of Law, Texas Wesleyan University School of Law. This article is based on a paper the author prepared for a seminar sponsored by the ABA's Section of Labor and Employment Law. The author thanks his research assistants **Adam Burney, Shelley Jeri, Cynthia Gustafson, and Jean Seamen** for their work in compiling some of the key information presented in this article.

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thorized by law to do so." DR 7-104(A)(1). Likewise, Rule 4.2 of the ABA Model Rules of Professional Conduct states: "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." See Model Rules of Prof'l Conduct R. 4.2 (2003). Comment [1] to that Rule states that the purpose of this Rule is to "protect[] a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation." *Id.*

Nevertheless, Rule 4.2 creates a paradox: a lawyer's client may be able to do exactly what the lawyer cannot do under Rule 4.2. Comment [4] states that "[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." *Id.* Although Comment [4]

also states that "[a] lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a)[L]" the reality is that the client may still make this communication. *Id.* A lawyer may not hire an investigator as an agent to talk to an adverse party or individual represented by counsel about the subject of the representation and as a means to possibly discover information relating to the representation without the opposing party's lawyer being informed. However, a client of that lawyer could hire such an investigator to do the same thing. Once the investigator has communicated ex parte at the direction of the client and not at the direction of the attorney, the client's attorney may then counsel the client regarding this communication and any information received.

Accordingly, this scenario raises the question of whether employees who sue their employers may have investigators and others gather information via ex parte communications with adverse parties and individuals (the employer and any agents that can bind the employer) represented by counsel. Likewise, one could consider whether employer parties embroiled in employment litigation may contact adverse employee parties or individuals represented by counsel and gather information through ex parte communications. In both scenarios, an attorney can end up having the same information intended to be banned by Rule 4.2. This article explores this subject and any implications for employment counsel.

**CAN THE CLIENT DO WHAT THE ATTORNEY CAN'T?** • One of the biggest issues with ex parte communications in the employment setting involves the question of whether a plaintiff's attorney may have ex parte communications with employees of a defendant corporate entity without violating ethical rules. See generally Ellen J. Messing & James S. Weliky, *Contacting Employees of an Adverse Cor-*

porate Party: A Plaintiff's Attorney's View," 19 Lab. Law. 353 (2004). However, this article focuses on the situation in which the employee or employer, as clients of an attorney in a legal dispute, attempt to contact adverse represented parties or persons.

### Employee-Plaintiff Clients

For employees who communicate with a corporation's employees without being advised by their lawyers, Rule 4.2 or its equivalent is not violated. See, e.g., *Miano v. AC&R Advertising, Inc.*, 148 F.R.D. 68, 90 (S.D.N.Y. 1993) (finding that a client in an age discrimination action brought against an employer did not violate the ex parte communication rule by secretly tape-recording conversations with other employees because the client's lawyer had not "caused" the taping to occur); *Schmidt v. New York*, 695 N.Y.S. 2d 225, 232-33 (N.Y. Ct. Cl. 1999), *aff'd*, 722 N.Y.S. 2d 623 (N.Y. App. Div. 2000) (because the claimant's attorney did not have knowledge, the ex parte communications by the investigator did not violate DR 7-104(A)(1)).

### Limited Contact At The Attorney's Direction

Also, it appears that even when some contacts seem to directly represent improper ethical acts made by others at the direction of an attorney, the courts are unwilling to find a violation when it involves only the observation of general information about the operations of an adverse party viewed by contacting low level employees while they perform their normal duties. Examples include:

- *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876 (N.D. Ill. 2002) (refusing to issue injunction to prohibit plaintiffs' counsel from secretly videotaping gas station employees when conversations on tape were not audible);
- *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D. N.Y. 1999) (court refused to exclude tape recordings of defendant's employ-

ees that were obtained surreptitiously by undercover investigators hired by plaintiff's counsel even though the taping seemed to violate the elements of DR 7-104(A)(1) because the investigators only recorded normal business operations and did not talk to the employees or raise any concerns that might destroy the attorney-client privilege);

- *Apple Corps Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456 (D. N.J. 1998) (plaintiff's counsel directed a secretary and a private investigator who posed as members of the general public and engaged in normal business transactions as a means to discover the company's general business practices did not violate Rule 4.2);
- *Fair Automotive v. Car-X Service Systems*, 471 N.E. 2d 554 (Ill. App. Ct. 1984) (finding investigators hired by a lawyer who posed as customers to gain general information from the defendant did not violate the ethical rule prohibiting ex parte contact by lawyers with parties represented by counsel).

### Direct Communications By The Attorney

Nevertheless, attempts by plaintiff's counsel to talk with fellow employees about the matters of that representation can constitute a violation of Rule 4.2. See *Kole v. Loyola University of Chicago*, 1997 WL 47454 (N.D. Ill., Jan. 30, 1997) (describing how a faculty member who was denied tenure sued her law school employer for sex discrimination and the consequences that arose from her attorney's actions in making 68 ex parte contacts with various faculty members who had been involved in the tenure decision).

### A Real-Life Example

The case of *Midwest Motor Sports, Inc., v. Arctic Cat Sales, Inc.*, involving a dispute between a franchisor and a franchisee, provides an excellent example of how Rule 4.2 may be circumvented on one hand and how that cir-

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cumvention may result in sanctions for an ethical violation on the other. In this case, the franchisee secretly taped conversations with the franchisor but did not violate Rule 4.2 because the tapings were not performed with the knowledge of or at the direction of an attorney. See *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1159 n.3 (D. S.D. 2001), *aff'd*, 347 F.3d 693 (8th Cir. 2003); see also Jennifer L. Borum, *What's Good for the Goose Gets the Gander in Hot Water*, 23 Franchise L. J. 225, 245 (Spring 2004) (describing this result in *Midwest Motors* and how it "may be viewed as support for a 'hear-no-evil, see-no-evil, suffer-no-sanctions' approach to surreptitious recording by clients" as long as there is the "absence of evidence of direction or contemporaneous knowledge on the part of [their] counsel").

However, the franchisor in *Midwest Motor Sports* also secretly taped conversations with the franchisee. The difference from what the franchisee did is that the franchisor used a private investigator to pose as a customer and that investigator acted at the direction of the franchisor's attorney in violation of Rule 4.2. See *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 697-98 (8th Cir. 2003). Under Model Rule 5.3, an attorney is ethically responsible for the misconduct of his "agent" if the at-

torney ratifies the conduct including any conduct performed by an investigator hired by the attorney. *Id.* Furthermore, any action to circumvent the Rules by inducing another person to make a contact that the lawyer may not make violates Model Rule 8.4(a). *Id.*; see also ABA Formal Opinion 95-396 (July 28, 1995) ("A lawyer may not direct an investigative agent to communicate with a represented person in circumstances where the lawyer herself would be prohibited from doing so"); *Woodard v. Nabors Offshore Corp.*, 2001 U.S. Dist. LEXIS 177, at \*5-\*6 (E.D. La. Jan. 4, 2001) ("a lawyer shall not effect the prohibited communication through a third party, including the lawyer's client"). The use of undercover investigators will continue to present thorny ethical issues for attorneys. See generally Jennifer B. Bechet, *Undercover Ethics: Working with Private Investigators*, 3 Minority Trial Law. 1 (Fall/Winter 2004).

#### **Employer-Corporate Defendant Clients**

Although most of the concerns about the ex parte contacts ban have focused on employees' counsel contacting employees of the employer, an employer may also have to confront this rule. One classic example of how an employer's attorney may also find himself in ethical hot water occurred in *Parker v. Pepsi-Cola General Bottlers, Inc.*, 249 F. Supp. 2d 1006 (N.D. Ill. 2003). In that case, two employees had sued their employer for employment discrimination. Shortly after that complaint was filed, the employer's counsel deposed one of the *Parker* plaintiffs in a separate but related lawsuit. The employer's counsel issued a subpoena for the deposition and served the *Parker* plaintiff, who appeared for the deposition without counsel. Despite being aware that the *Parker* plaintiff was represented by counsel, the employer's counsel had not served notice on that counsel of the deposition. The biggest mistake that employer's counsel made was the failure to get consent from the

*Parker* plaintiff's counsel before proceeding to depose the *Parker* plaintiff in the related litigation. At the beginning of that deposition, it was evident that the employer's counsel knew that the *Parker* plaintiff was represented by counsel and that counsel had not given the employer's counsel consent to communicate with the *Parker* plaintiff without counsel being present. During the deposition, the employer's counsel also asked the *Parker* plaintiff about matters related to the *Parker* litigation, although it was a deposition in a case involving related litigation.

Judge Castillo of the United States District Court for the Northern District of Illinois issued sanctions and found that the employer's counsel had "willfully violated Model Rule of Professional Conduct 4.2" and "close[d] [his] eyes to this obvious [ethical] violation." *Id.* at 1008, 1010. The court found it "most regrettable...that an attorney...who is a partner with ten years' experience at a well-respected law firm, not only engages in these kinds of discovery tactics, but also persists in refusing to take responsibility for his actions by offering flimsy, unsupported defenses in such a contumacious manner." *Id.* at 1011 n.2. According to the court, "[t]his kind of behavior does a disservice not only to this Court and the parties to this lawsuit, but also undermines his law firm's reputation as well as the public's trust in the sanctity of our judicial system and its discovery process as a means of uncovering the facts underlying a dispute in a fair, even-handed manner." *Id.*

### ***Can Another Employee Do What The Attorney Can't?***

Given the results in the *Pepsi* case, it would appear that an employer's counsel would do everything she can to stay clear of a Rule 4.2 violation. But would an employer or its agents acting as the client for a lawyer be more successful in accomplishing what the employer's counsel may not do? For example, could a high-

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level supervisor or manager meet with the employee suing the company and ask several questions and even record those conversations without it being an ethical violation? If the conversations and recording of those conversations were not advanced at the direction of the employer's attorney and occurred solely based upon the actions of the client, they would appear to be appropriate. The fact that the employee's attorney was not present and did not consent would not affect the actions taken solely by the employer as the client when they are not the actions of the employer's attorney.

### ***What Did The Lawyer Know And When Did She Know It?***

Ultimately, these issues will boil down to a decision about whether the attorney was, in fact, aware of the client's actions and orchestrated the result. *See Miano*, supra, 148 F.R.D. at 76 (whether the attorney used his client "to circumvent...[his ethical obligations] involves consideration of factors virtually identical to those relevant to determining whether [the attorney] 'caused' [his client] to engage in ex parte conversations in violation of DR 7-104(a) (1), i.e., did he use [his client] as his 'alter ego', by advising, suggesting or directing the tapping"). The court may have to make credibility findings through an evidentiary hearing. *Id.* at 83 (describing how the court had to hold "an

evidentiary hearing” to decide if the attorney had “actually engineered” the client’s conduct of taping conversations with employees and the court “considered all of the evidence, much of which required an assessment of the witnesses’ credibility”).

### ***What The Lawyer Can Do***

The difficulty is that “[e]thics opinions allow that attorneys need not prevent clients from engaging in ex parte or taped conversations with adversaries, and are permitted to counsel clients regarding the scope and ramifications of such conduct.” *Id.* at 89. But when the attorney has more than mere knowledge and actually “encouraged [the client] to obtain affidavits...by advising him of the difference between ‘out of court statements’ and signed affidavits for trial purposes,” the attorney has caused the client to act for the attorney in circumvention of the ex parte contact rule. *See Holdren v. General Motors Corp.*, 13 F. Supp. 2d 1192, 1195-96 (D. Kan. 1998) (describing how an attorney’s advice to a client about how to draft affidavits for communicating with employees demonstrated cause and control by the attorney over the client’s actions in violation of Rule 4.2 even though the client initiated these actions).

**CONCLUSION: MUCH ADO ABOUT NOTHING OR A LEGITIMATE ETHICAL CONCERN?** • Human nature may suggest

that when representing parties in a dispute, you want to investigate thoroughly the matters involved in the complaint. However, talking to persons represented by counsel either directly or through your client or another agent as a means to investigate the dispute, when done for either the employer or the employee, may constitute a violation of ethical rules such as Model Rule 4.2, which bans such ex parte communications. Furthermore, a party may not circumvent this requirement by getting a third person to perform the same acts that the lawyer may not do by then “closing [his] eyes to the obvious.” Model Rule 4.2, Comment 8.

The question of circumvention will have to be resolved by credibility determinations in an evidentiary hearing before the court. Sanctions could be as harsh as default, or possible lesser sanctions including withdrawal of counsel, destroying evidence unethically obtained, denying any use or reference to the evidence unethically obtained, and payment of costs for any opposing parties involved in bringing these issues to the attention of the court. No attorney would want to face the public embarrassment or the burdens such violations may place on that attorney’s client in resolving the dispute. Overall, circumvention of Rule 4.2 involves very risky business and may place your credibility, your reputation, your firm’s reputation and your client’s interests in jeopardy.

## **PRACTICE CHECKLIST FOR**

### **Understanding The Ex Parte Communications Ban In Employment Disputes**

Every lawyer understands the danger of ex parte communications with represented parties. But in employment disputes, can a client discuss things with a represented employer or represented employees? To understand the issues involved, it can help to think hypothetically.

- Suppose you are a lawyer defending a corporation in a sexual harassment claim by Jane. Jane approaches several supervisors and fellow employees and asks them questions about the corporation’s enforcement of its sexual harassment policy. Can you ethically challenge Jane’s ex parte inquiries?

— Possibly, if Jane was represented by counsel and her attorney either caused or directed or engineered or orchestrated Jane's actions in making these ex parte communications with the employer's employees and Jane's attorney knew that they were represented by counsel.

- Suppose that you are a lawyer representing Bob who is suing his employer under a whistleblower claim. Bob thinks that nobody will believe him so he has started to surreptitiously tape record his conversations with upper management. Bob did this on his own accord and without any input or direction from you. Now he has obtained some juicy information that will be very helpful to his claim. What should you do?

— If you can establish that you did not encourage or direct Bob to make the tapes and the surreptitious recordings do not involve violations of state law in your jurisdiction, you can advise Bob about the use of the tapes. However, be prepared that the opposing attorney may challenge the use of these tapes and question your involvement in how those tapes were generated, especially if Bob continues to make tapes after he disclosed it to you.

- Suppose that you are a lawyer for a company being sued by James for worker's compensation and retaliatory discharge. You believe that James exaggerated or even lied about the extent of his alleged on-the-job injuries. You hire a private investigator to follow James around and videotape his physical activities to see if he is really as limited as he claims. On his own, the investigator approaches James and pretends to be a local aerobics instructor. He secretly tapes his conversation with James. Can you use the tapes or have the investigator testify?

— The investigator is deemed an agent of the lawyer and the lawyer is responsible for the investigator's actions. Even though the investigator initiated the contact on his own, the investigator probably went too far in talking to James and secretly taping their conversation. You could probably use the investigator's videotaping of James performing normal physical activities as long as there was no questioning that may tend to invade the attorney-client privilege.

- You are a lawyer representing a company in a race discrimination claim. You have issued a subpoena for a witness to be deposed. You did not know that the witness was represented by counsel regarding representation concerning matters that you want to address in the deposition, but you learn of this representation at the beginning of the deposition. Can you proceed with the deposition?

— You should probably stop the deposition immediately and contact the witness's attorney to see if the attorney will consent to your questioning of the attorney's client. Otherwise, you may end up losing the right to use any of the information you obtain from the deposition any way as a possible sanction for talking to the witness during the deposition without the witness's counsel being present.

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