“Who Ya Gonna Call?”

A Primer on Ex Parte Contacts with Employees of Adverse Parties.

In the cobwebs of your mind they still nag at you – ghosts lurking in your law school memories. You learned something in Professional Responsibility about restrictions against ex parte contacts with represented adverse parties – but what was it?

Today, you represent a terminated employee. Your client has given you the names of three witnesses whom the client says you must interview – employees of the corporate target defendant. Will you contact these witnesses directly? Shall you seek permission from corporate general counsel? What must you do if the corporation’s counsel calls and says: “I represent the corporation and each of its employees?” When it comes to ex parte contact with employees of a represented adverse party, who are you going to call?

Contacts with represented parties are governed by Rule 2-100 of the Rules of Professional Conduct (“RPC”), a rule that can hardly be described as a model of clarity. In general, the rule restricts a lawyer’s communication with a represented adverse party. Subsection (A) provides that: “While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.”

While the rule sounds fairly straightforward, the lines tend to blur when questions arise about whether or not the person you wish to contact fits within the definition of a “party” and whether that person is “represented by another lawyer in the matter.” The rule is ambiguous, especially when one adds to the mix the drafter’s official comment to the rule, which states that: “Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. (Emphasis added.)” In one place the rule says that it prohibits contact with represented parties, while the official comment states that it prohibits contact with represented persons. Is there a difference?

Ethics issues are not always black and white – the tough ones tend to fall into gray areas. Welcome to Rule 2-100. None of the witnesses you wish to interview are named parties. You don’t quite believe counsel’s statement that he or she represents the corporation and each of its employees. It is a given that the corporation is represented by counsel. Does that mean the employee you wish to interview is a represented “party”?

Dealing first with whether the rule prohibits contact with persons as opposed to parties, there are conflicting authorities. In Jackson v. Ingersoll Rand (1996) 42 Cal.App.4th 1163, 1167, the Court of Appeal dealt with a disqualification motion arising from contacts with a former party that had been dismissed — the spouse of a represented plaintiff. The Court reversed the order of disqualification, finding that the attorney did not have actual knowledge of the former party’s representation by the adverse counsel. However, the Court, in dicta, stated that, as used in Rule 2-100, “party broadly denotes person, and is not limited to litigants.” (Emphasis added). Thus, at least one California decision states that “party” within the meaning of the rule does not mean party in a litigation context, but rather merely any represented person (which...
would include a witness).

One State Bar Court decision reached a distinctly different interpretation of the rule based upon the internal inconsistency in the rule's language. There, the hearing judge determined that discipline for violation of the rule could not be imposed upon an attorney who contacted a convicted criminal defendant to obtain a confession useful in a civil action against other persons, while knowing that the criminal defendant was represented by counsel. The criminal defendant was not a “party” to the case in the sense that the case was initiated by the defendant, the former employer. Suppose a current employee was represented by an attorney who made a request to interview a former employee. Would the rule be violated?

RPC Rule 2-100 makes several assumptions about classes of people who are deemed to be “parties” to the case. The rule provides that a “party” includes: (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is a fact of record or is the basis for any decision to be made.

The Court of Appeal reversed the disqualification on two primary bases, first that the contacted persons were not “parties” within the meaning of the rule, and second, that even if they were “parties” under the rule, the attorney who made the contact did not have actual knowledge that they were represented by counsel. The Court, in a detailed analysis, concluded that managing agents, as used in the rule, are persons in high-level management, not merely supervisory employees. A “managing agent” is a person that exercises substantial discretionary authority over organizational policy of the corporation. (Id., at 1209.)

Snider provides some excellent practice pointers to avoid running afoul of Rule 2-100: We emphasize …that counsel desiring to contact an employee of a represented organization should endeavor to ensure, prior to the contact, that the employee, either because of his or her status within the organization or the subject matter of the proposed communication, does not come within the scope of rule 2-100. Further, once contact is made, counsel should at the outset pose questions designed to elicit information that would determine whether the employee comes within rule 2-100’s scope, and should not ask questions that could violate attorney-client privilege. (Snider, supra., 113 Cal. App. 4th 1187, 1193-1194).

If a question arises that the employee meets the definition of a person covered by Rule 2-100 or possesses privileged information, the conversation should be terminated. (Id., at 1213.)

So, faced with the need to interview current employee/witnesses prior to trial, how does one proceed? A series of questions would assist in the analysis whether the employee meets the defini-
tion of “party” in Rule 2-100(B):

Is the employee a party named, or to be named, in the lawsuit?

Is the employee directly represented by legal counsel in the matter?

Is the employee an officer or director of the company?

Is the employee a managing agent (as defined in Snider), or a person in high level management who has sufficient managing authority to give the employee the right to speak for and bind the company?

Was the employee personally engaged in the allegedly wrongful actions, or one whose acts or statements could be imputed to the organization?

Was the employee a party to privileged communications about the matter at issue?

If any answers are “yes” the employee is most likely a “party” within the rule and should not be contacted absent permission from the corporation’s lawyer. If, on the other hand, the answers to each question are negative, it is likely that the employee is merely a fact witness who may be contacted without such consent.

There are a few other basic principles. It is well established that the prohibition against ex parte contact only applies where counsel actually knows the party being contacted is represented by counsel. (Traill v. Superior Court (1997) 59 Cal.App.4th, 1183, 1188.) Thus, an innocent contact by counsel who does not have actual knowledge that the person contacted is a represented party does not violate the rule. Constructive knowledge is insufficient to violate the rule. Nevertheless, as suggested in Snider, counsel should ask the witness questions necessary to determine whether the contact is appropriate. Thus, Snider implies that there may be a duty to inquire.

Significantly, Rule 2-100 applies only to current employees and/or members of an organization. Ex parte contacts with unrepresented former employees of the adverse organization are permissible without the consent of the corporation’s counsel. (Continental Ins. Co. v. Superior Court (1995) 32 Cal.App.4th 94, 119.) This is consistent with the policy that the rule should not be construed as being so constrictive as to impinge upon the lawyer’s duty of zealous representation. (Id.) It is also permissible to interview unrepresented former managerial employees. (State Farm Fire & Casualty v.

Superior Court (1997) 54 Cal. App. 4th 625, 652.) The State Farm decision warns, however, that in questioning former management employees counsel may not inquire into privileged communications. It is permissible to inquire about relevant facts. (Id.)

What if opposing counsel has claimed to represent all the employees? One California case, Jorgensen v. Taco Bell Corp. ((1996) 50 Cal. App. 4th 1398), suggested, in dicta, that a corporation could avoid having its employees interviewed by having its counsel send a letter warning that its employees are represented by counsel in the matter, and may not be interviewed without consent. (Id., at 1405.) Caution is dictated before corporate counsel simply attempts to limit ex parte contacts by declaring the fact of representation. Undertaking the representation of multiple employees would be likely to trigger actual or potential joint client conflicts requiring written disclosure and informed written consent of each client under RPC Rule 3-310. The relationship must actually exist. A lawyer’s representation that an attorney-client relationship exists when it in fact does not would be dishonest (B&PC section 6106) as well as constitute an improper appearance without authorization. Nevertheless, when faced with such a declaration by corporate counsel, opposing counsel cannot simply choose to disbelieve the representation and proceed with ex parte contact. The absence of the relationship would have to be determined before it would be safe to ethically proceed.

Caution is always dictated in conducting interviews of employees of an adverse party. The attorney who tests the limits of the rule flirts with disqualification, and potentially, even more serious consequences.

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