

## Can We Talk? Communicating With Former Employees of an Adverse Party in Litigation

**T**his article concerns the ability and propriety of an attorney to communicate with former employees of an adverse party in litigation. As a practical matter, former employees of an adverse party are generally a rich source of information about their former employer's business practices, policies, and recordkeeping. Oftentimes, a former employee may have non-privileged information relevant to the case which has not been previously requested or disclosed in discovery. Nevertheless, the attorney communicating with such former employee(s) must be mindful not only of the ethical responsibilities attendant to such communication, but also the appearance of impropriety and the spectre of the attorney's involuntary disqualification which may occur independent of the attorney's otherwise ethical conduct.

### Rule 4-4.2 of the Rules of Professional Conduct

As a threshold matter, Rule 4-4.2 of the Rules of Professional Conduct<sup>1</sup> forbids a lawyer to communicate about the subject of the representation with a person the lawyer knows to be represented in a matter unless the lawyer obtains the permission of that person's counsel. The rule is intended to: 1) prevent situations in which a represented party is taken advantage of through the greater skill of an adversary's attorney; 2) prevent an attorney from circumventing opposing counsel to obtain unwarranted concessions or liability-creating statements or disclosures from a party; 3) preserve the integrity, efficacy, and sanctity of the attorney-client relationship; 4) prevent the disclosure of protected information, most particularly attorney-client communications; and 5) allow a party in

*The attorney communicating with former employees must be mindful not only of ethical responsibilities, but the appearance of impropriety and involuntary disqualification*

by Glenn J. Waldman

litigation to have disclosed to it facts acquired by its adversary, through organized and timely discovery. The comment to the rule states that in the case of an organization (including corporations), the rule prohibits ex parte communication with persons having a "managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." The comment further states that if an agent or employee of the organization is represented by his or her own counsel in the matter, then it is the consent of that lawyer—not the organization's lawyer—that must be obtained prior to the requested communication.<sup>2</sup>

As a general precept, neither the

officers, directors, shareholders or employees of a corporation are parties to an action against the corporation. It is the corporation, not the court nor the opposing party, which decides what agents shall appear and speak for the corporation in litigation.<sup>3</sup> However, as noted above, Rule 4-4.2 makes clear that a nonparty individual in the employ of an organization having 1) a "managerial responsibility," or 2) whose conduct "may be imputed to the organization," or 3) "whose statement may constitute an admission on the part of the organization" may not be contacted about the subject of the representation by the lawyer opposing the organization. Notwithstanding, neither the rule nor the comment specifically addresses the circumstances where the individual who may fall within the above categories has disassociated from the organization. Recent state and federal decisions in Florida concerning the issue of an attorney's communication with former managers and employees of an employer/party are instructive.

### Florida State and Federal Decisions

In *Manor Care of Dunedin, Inc. v. Keiser*, 611 So. 2d 1305 (Fla. 2d DCA 1992), the personal representative of the estate of a resident of the Manor Care of Dunedin nursing home brought suit alleging negligence, wrongful death, and violation of the nursing home resident's rights. The nursing home, Manor Care, sought interlocutory review of the circuit court's order which allowed the plaintiff to contact former Manor Care employees. The Second District Court held that the general prohibition against such contact set forth in Rule 4-4.2 and the comment "ceases to apply once . . . employees leave the corporation." rely-

ing solely upon *Hantz v. Shiley, Inc.*, 786 F. Supp. 258 (D.N.J. 1991).<sup>4</sup> As a result, the appellate court held that the circuit court did not depart from the essential requirements of law in refusing Manor Care's motion for protective order prohibiting the contact of its former employees.

The Second District Court in *Manor Care* noted the decision six months earlier by district Judge Elizabeth A. Kovachevich of the Middle District of Florida, *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992), which contained a review of non-Florida authorities on the issue of *ex parte* contact with an opposing party's former employees. Judge Kovachevich concluded that the class of persons identified as managerial employees and persons whose statements constitute admissions by the corporation are clearly limited to current employees; while those persons whose acts or omissions in connection with the matter at issue which may be imputed to the corporation for liability include former employees. *Id.* at 657. Judge Kovachevich cautioned that "[p]rivileged communications present a distinct problem with respect to contact with former employees . . . [and] thus *ex parte* contact should be barred to prevent disclosure of any inadvertent confidential communications." *Id.* In this regard, Judge Kovachevich held:

The interest of the corporation in protecting privileged information acquired by an employee during the course of employment from disclosure to an opponent in litigation remains after the employee leaves the corporation.

It has been recognized that a former employee who is a "party" because of his position and knowledge will remain a party even after he leaves the corporation because that employee has a memory. The corporation continues to have a vital interest in the employee's knowledge of privileged information and its potential release to opposing counsel in litigation after the employee leaves. (Citation omitted.)

*Id.* at 658.

The Second DCA in *Manor Care* ruled that, in moving for a protective order, Manor Care did not identify specific former employees who might fall within the privileged "managerial" class identified by Judge Kovachevich in *Rentclub*, but sought a blanket pro-

scription against contact with any and all former employees. *Manor Care*, 611 So. 2d at 1308 n.6. Consequently, the plaintiff's contact with Manor Care's former employees was permitted.

### Professional Ethics of The Florida Bar Opinion 88-14

Interestingly, neither the Second District in *Manor Care* nor Judge Kovachevich in *Rentclub*, cited the *Professional Ethics of The Florida Bar Opinion 88-14* (March 7, 1989), which states, in part, that "[a] plaintiff's attorney may communicate with former managers and former employees of a . . . corporation without seeking and obtaining consent of the corporation's attorney." (Emphasis supplied.) The opinion acknowledged that nothing in Rule 4-4.2 or the comment states whether the rule applies to communications with former managers and other former employees. However, to the extent that the comment implies the rule does not apply to these individuals, the implication was construed as contrary to the ethics committee's interpretation of the rule. The opinion further provided:

Rule 4-4.2 cannot reasonably be construed as requiring a lawyer to obtain permission of a corporate party's attorney in order to communicate with former managers or other former employees of the corporation unless such individuals have in fact consented to or requested representation by the corporation's attorney. A former manager or other employee who has not maintained ties to the corporation (as a litigation consultant, for example) is no longer part of the corporate entity and therefore is not subject to the control or authority of the corporation's attorney.<sup>5</sup>

[I]t is ethically permissible for the inquiring attorney to contact former managers and other former employees of the opposing party without obtaining permission from the corporation's attorney unless those former employees are in fact represented by the corporation's attorney. But . . . the attorney should not inquire into matters that are within the corporation's attorney-client privilege (e.g., asking a former manager to relate what he had told the corporation's attorney concerning the subject matter of the representation).<sup>6</sup>

### ABA Committee's Formal Opinion 91-359

Two years after The Florida Bar's opinion, on March 22, 1991, the ABA Standing Committee on Ethics and

Professional Responsibility issued Formal Opinion 91-359, which concluded that the prohibition of the comparable Model Rule 4.2 does not extend to former employees. In this regard, the ABA opinion states:

While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employees, the fact remains that the text of the Rule does not do so and the Comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of the Model Rule 4.2 and its Comments, to expand its coverage to former employees by means of liberal interpretation.

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 about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

ABA Formal Opinion 91-359 at 8.

Forty states (including Florida) and the District of Columbia have either adopted the model rules or their equivalent. The majority of federal decisions hold that former employees are ordinarily deemed outside the reach of the restriction that legal ethics imposes which bars counsel for an adversary of their former employer from approaching current employees directly—and this is so even if the former employees are represented by the employer's counsel. See generally *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259 (S.D. Iowa 1993); *McGrane v. The Reader's Digest Assn., Inc.*, 822 F. Supp. 104 (S.D.N.Y. 1993); *Dubois v. Gradco Systems*, 136 F.R.D. 341 (D. Conn. 1991); *Action Air Freight v. Pilot Air Freight*, 769 F. Supp. 899 (E.D. Pa. 1991); *Hantz v. Shiley*, 766 F. Supp. 258 (D.N.J. 1991); *Curley v. Cumberland Farms*, 134 F.R.D. 77 (D.N.J. 1991); *Public Service Electric & Gas Co. v. Associated Electric*, 745 F. Supp. 1037 (D.N.J. 1991); *Valassis v. Samelson*, 148 F.R.D. 118 (E.D. Mich. 1992); *Shearson Lehman Bros. v. Wasatch Bank*, 139 F.R.D. 412 (D. Utah 1991); *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126 (D.D.C. 1983); *Niesig v. Team I*, 76 N.Y.2d 363, 550 N.Y.S.2d 493, 558 N.E.2d 1030 (1990).

## The Appearance of Impropriety

As noted by Judge Kovachevich in *Rentclub*, the Rules of Professional Conduct do not presently contain an express provision prohibiting the appearance of impropriety. Notwithstanding, Florida law clearly retains this requirement, as pronounced in *State Farm Mutual Automobile Insurance Company v. K.A.W.*, 575 So. 2d 630 (Fla. 1991). In *State Farm*, the Florida Supreme Court ruled that attorneys must still avoid even the appearance of professional impropriety. *Id.* at 633.<sup>7</sup> On this point, Judge Kovachevich wrote that:

Accordingly, it has been held "even an appearance of impropriety may, under appropriate circumstances, require prompt remedial action from the court . . . . Consequently, any doubt is to be resolved in favor of disqualification.

*Rentclub*, 811 F. Supp. at 654 (additional citation omitted).<sup>8</sup>

While, as Judge Kovachevich contends in *Rentclub*, 811 F. Supp. at 658, that the salutary "purpose behind the ethical rule would better be served through the extension of the definition of 'party' to include former employees," The Florida Bar ethics committee apparently does not agree as it has not receded from its 1988 Opinion. Consequently, an attorney seeking to communicate with former managers or employees of a corporation in litigation must give due consideration not only

to the professional ethics involved, but also the prospect of involuntary disqualification by the court.

## Conclusion

Even though there does not presently exist a definitive bright-line test which attorneys and judges can apply in order to balance the dilemma underpinning the ethical considerations, on the one hand, and the possibility of involuntary disqualification, on the other hand, when former managers or employees of an opposing party in litigation have been, or are sought to be, contacted, it seems rather clear that the intentional or even inadvertent receipt of privileged information can result in disqualification. The determination of what other circumstances, whether isolated or cumulative, would similarly give rise to disqualification requires further explication by The Florida Bar and the courts. In the interim, attorneys engaging in such ex parte communications should be particularly mindful not only of the appearance of impropriety, but also the actual impropriety of the receipt of privileged information. □

<sup>1</sup> The Code of Professional Responsibility was replaced by the Rules of Professional Conduct, effective January 1, 1987. *The Fla. Bar Re Rules Regulating The Fla. Bar*, 494 So. 2d 977 (Fla.), opinion corrected

by 507 So. 2d 1366 (Fla. 1986).

<sup>2</sup> The comment to Rule 4-4.2 does, however, provide that:

"[P]arties to a matter may communicate directly with each other and the lawyer having independent justification for communicating where the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."

<sup>3</sup> See *West Stuart Acreage, Inc. v. Hannett*, 427 So. 2d 823 (Fla. 4th D.C.A. 1983); see also ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 *comment*, and CODE OF JUDICIAL CONDUCT at 79 (1983).

<sup>4</sup> In *Hannitz v. Shiley, Inc.*, 766 F. Supp. 258 (D.N.J. 1991), the court stated:

"[I]t cannot be said a former employee is a party because a former employee ordinarily cannot bind the corporation in the sense that an agent binds a principal. Although a former employee can certainly damage a corporation by revealing facts giving rise to liability, that possibility does not implicate the purposes of the . . . [Rule]." *Hannitz*, 766 F. Supp. at 269-70.

<sup>5</sup> It was also noted by the ethics committee that a former manager or employee is no longer in a position to speak for the corporation. Under both the Federal and Florida Rules of Evidence, statements that might be made by a former manager or other former employee during an ex parte interview would not be admissible against a corporation in an evidentiary proceeding. Both FEDERAL RULES OF EVIDENCE Rule 801(d)(2)(D) and FLA. EVIDENCE CODE §90.803(18)(e) provide that a statement by an agent or servant of a party is admissible against the party if it concerns a matter within the scope of the agency or employment and is made during the existence of the agency or employment relationship.

<sup>6</sup> In reaching its decision, the ethics committee recognized that the clear consensus of bar organizations in other states on this issue is that former managers and other former employees are not within the scope of the rule against ex parte contacts. The opinion cited: Alaska Bar Opinion 88-3 (6/7/88) (Former employees are no longer part of corporate entity and no longer can act or speak on behalf of corporation; opposing lawyer, therefore, may contact former employees, including former members of corporation's control group who dealt with subject matter of litigation, but may not inquire into privileged communications.); Colorado Bar Opinion 69 (Revised) (6/20/87) (Former employee cannot bind corporation as matter of law; lawyer may interview opposing party's former employees with regard to all matters except communications within corporation's attorney-client privilege.); Illinois Bar Opinion 85-12 (4/4/85) (Former employees, including those who were part of corporation's control group, may be contacted without permission of corporate counsel; direct communication with former control group employees may elicit information adverse to corporation but that direct contact no more deprives corporation of benefit of counsel than does

Get answers  
to questions on substantive law or procedure from

**SCOPE**  
(Seek Counsel of Professional Experience)  
panel volunteers, or answers to general  
questions on law practice from  
**Silent Partner** volunteers.

Free

300/342-8060 or 904/561-5600  
Projects of the Young Lawyers Division

direct communication with any potential witness.); Los Angeles County, Calif., Bar Opinion 369 (11/23/77) (Although ethical dangers may be posed if the rule prohibiting ex parte contacts is not extended to former controlling employees, no authority is found to support such extension.); Maryland Bar Opinion 86-13 (8/30/85) (A lawyer may communicate with a former employee of an adverse corporate party if the former employee is not represented by counsel.); Massachusetts Bar Opinion 82-7 (6/23/82) (A lawyer may communicate with former employees of corporate defendant regarding matters within scope of their employment; former employees enjoy no current agency relationship that is being served by corporate counsel's representation.); Michigan Bar Opinion CI-597 (12/23/80) (Plaintiff's attorney may communicate with a prospective witness, who is a former employee of corporate defendant, on the subject matter of representation if the employee is unrepresented.); New York Bar Opinion 80-46 (Former employees are no longer part of a corporate entity and may be contacted ex parte.); New York County Bar Opinion 523 (1965) (Although direct communication with any current manager or employee of a defendant corporation is improper, restriction does not apply to communications with former employees); Virginia Bar Opinion 533 (12/16/83) (A lawyer may communicate directly with former officers, directors and employees of an adversary corporation on a subject of pending litigation unless the

lawyer has reason to know those witnesses are represented by counsel.); Wisconsin Bar Opinion E-82-10 (12/82) (A lawyer may contact a former employee of opposing party to obtain material information even though the former employee was a managing agent, if the former employee has severed all ties with the corporation and, therefore, is not in position to commit the corporation.).

<sup>7</sup> See also *Brent v. Smathers*, 529 So. 2d 1267 (Fla. 3d D.C.A. 1988) (disqualification required under current Rules of Professional Conduct to avoid appearance of impropriety).

<sup>8</sup> In *Rentclub*, the defendant/counter-plaintiff, Transamerica Rental Finance Corp. (Transamerica), sought an order from the court disqualifying counsel from further participation for certain co-counterdefendants. The disqualification was predicated on alleged violations of the maxim that attorneys must avoid even the appearance of professional impropriety and FLORIDA BAR CODE OF PROFESSIONAL CONDUCT Rules 4-1.6, 4-4.2, 4-8.4(c) and 4-8.4(d). *Rentclub*, 811 F. Supp. at 653. The law firm which was the subject of the disqualification motion, Trenam, Simmons, Kemker, Scharfo, Barkin, Frye & O'Neill, P.A. (Trenam, Simmons) had retained as a paid "trial consultant" Transamerica's former division finance manager/chief financial officer. *Id.* In that capacity, the former employee was privy to confidential and proprietary information and had access to confidential business documents belonging to Transamerica. *Id.* The

former employee, prior to his disassociation from Transamerica, had also engaged in intra-office communications relating to Rentclub, Inc., and to litigation which was substantially related to the Rentclub/Transamerica case. *Id.* The appearance of professional impropriety arose from and included: 1) Trenam, Simmons' payments to the former employee appeared to have induced him to disclose confidential matters relating to Transamerica's managerial practices and strategies, theories, and mental impressions in the case and/or substantially related litigation; and 2) the appearance of paying the former employee for his factual testimony. See also *Contant v. Kawasaki Motors Corp. U.S.A., Inc.*, 626 F. Supp. 427 (M.D. Fla. 1983) (Kovachevich, J.) (motion to disqualify plaintiff's counsel granted based upon appearance of impropriety). But see *McCallum v. CSX Transportation, Inc.*, 149 F.R.D. 104 (M.D.N.C. 1988) (ex parte contacts by counsel and investigator for plaintiff with defendant corporation's employees entitled defendant corporation to protective order prohibiting use of any statements obtained from employees at trial, but did not warrant disqualification of counsel given that ethical violations were relatively minor and did not prejudice defendant; disqualification should be invoked only when the violation has risen to a level so as to implicate the public interest in the fair administration of justice and seriously undermine public confidence in the bar; citing *Rentclub*, and other authorities).

## AUTHOR

**Glenn S. Waldman of Waldman Felure & Ferrer, P.A., North Miami Beach, is a civil trial lawyer and a civil mediator certified in the county and circuit courts and in the U.S. District Court for the Southern District of Florida. He received his bachelor's degree in economics, magna cum laude, (1980) and his law degree, cum laude, (1983), from the University of Florida, where he was a member of the law review editorial board and Justice Campbell Thornal National Moot Court Board.**

**This column is submitted on behalf of the Young Lawyers Division, Laurence J. Hamilton II, president, and Terrence P. O'Connor, editor.**

## ADVERTISERS INDEX

James G. Atkins & Associates, P.A.	6	MBNA America	13
Attorneys' Title Insurance Fund, Inc.	27	Mead Data Central	Cover 2, 29, 66, 67
Barnett Bank	23	The Michie Company	9
Best Case Solutions	132	National Lawyers Risk Management Association	89
The Bisel Company	10	Northern Lights Software, Inc.	101
Corporation Information Services, Inc.	Cover 3	Overseas Services	98
Earl Productions, Inc.	132	International Corp.	131
Empire Corporate Kit Company	5	Physicians for Quality	93
Excelsior/Midstate	41	Alan N. Potts, CLU	54
The Financial Valuation Group	132	Ramon, Malca, and Jeffrey I. Jacobs	121
First American Title Insurance Company	47	Renaissance International, Inc.	17
Government Liaison Services	131	Shepard's Lexis-Nexis	34
Health Care Auditors, Inc.	132	Silver Insurance Consultants	71
Inter-City Testing & Consulting	131	Southern College	131
International Genealogical Search	1	Specialty Software	7, 37
JuryData, Inc.	35	SunBank	131
Kemp & Associates, Inc.	12	Trademark & Copyright Searches	8
Kolvox Communications, Inc.	33	Transmedia, Inc.	45, 85
Lawyers Cooperative Publishing	3	UCC Filing & Search Services	Wagner, Vaughan, & McLaughlin
Leslie J. Lott & Associates, P.A.	103	West Publishing	Back Cover
Little St. Simons Island	11	Wilson & Mallvaine	105
Matthew Bender	15		

