

CONDUCTING INFORMAL INTERVIEWS OF THE EMPLOYEES OF THE DEFENDANT EMPLOYER

*by Alan H. Schorr
Alan H. Schorr & Associates, P.C.
5 Split Rock Drive
Cherry Hill, New Jersey 08003
(856)874-9090
E-Mail: schorrlawnj@aol.com*

I. The Rules

The interviewing of employees and ex-employees before and during litigation employment litigation is governed by RPC 4.2, 4.3 and 1.13. These rules were amended effective September 1, 1996 with the intention of clarifying the heretofore murky law pertaining to interviews of employees and former employees of the defendant employer. Prior to the 1996 Amendments, RPC 4.2 and 4.3 were silent with regard to organizations. The rules only referred to persons and parties:

RPC 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

RPC 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's roll in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The rule dealing with organizations, RPC 1.13 (a) applied to organizations as a client, by did not relate the organization with respect to RPC 4.2 and 4.3. The original rule read as follows:

RPC 1.13 ORGANIZATION AS THE CLIENT

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officer, employees, members, shareholders or

other constituents.

Due to the deepening confusion caused by the disjointed rules, a special committee was established by the Supreme Court In re opinion 688 of the Advisory Committee on Profession Ethics, 134 N.J. 294 (1993). The Committee's report was published on March 20, 1995, and the three rules were amended effective September 1, 1996. The new rules clarify the RPC with respect to organizations, by adding language that links RPC 4.2 and 4.3 with RPC 1.13 to present a cohesive interpretation of who can be interviewed, and under what conditions. The new rules are set forth below, with revised and added language printed in italics:

RPC 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall communicate about the subject of the representation with a *person* the lawyer knows, *or by exercise of reasonable diligence should know*, to be represented by another lawyer in the matter, *including members of an organization's litigation control group as defined by RPC 1.13*, unless the lawyer has the consent of the other lawyer, or is authorized by law to do so, *or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry or the person at to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.*

RPC 4.3 DEALING WITH UNREPRESENTED PERSON: EMPLOYEE OF ORGANIZATION

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstandings. *If the person is a director, officer, employee, member, or shareholder or other constituent of an organization concerned with the subject of the lawyer's constituent of an organization concerned with the subject of the lawyer's representation by not a person defined by RPC 1.13 (a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13 (e) or who has the right to such representation on request, and, if the person is not so represented or entitled to representation the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.*

RPC 1.13 now adds language specifying who the organization's attorney represented for the purposes of RPC 4.2 and RPC 4.3.

RPC 1.13 ORGANIZATION AS THE CLIENT

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officer, employees, members, shareholders or other constituents. *For the purposes of RPC 4.2 and 4.3, however, the organizations' lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.*

The revisions apparently clarified the rules of great deal, because only one written opinion has been published interpreting the new rules since September 1996. In Judge Rosen's comprehensive Opinion in Michaels v. Woodland, 988 F. Supp. 468 (D.N.J. 1997), analyzed the history and application of the rules governing *ex parte* interviews of current and former history employees of an organization. The Michaels Opinion is annexed in its entirety to this outline.

II. THE ANALYSIS

Employees of the Defendant employer may be the most important and fruitful source of information for a Plaintiff's investigation. It is imperative that the Plaintiff's attorney thoroughly understand the rules of contact and the analysis that must be thoroughly made before initiating such contact.

Step One - Is the witness a current employee or a former employee?

Current Employees - if the witness is a current employee, it must be determined (a) whether the person is within the litigation control group as defined by RPC 1.13: and (2) if not,

whether the person has obtained other representation. The RPC defines members of the litigation control group to include, “current agents and employees responsible for, or whether or not litigation, provided, however, that “significant involvement” requires involvement, greater, and other than, the supplying of factual information or data respecting the matter.

Because there is so little judicial interpretation of this definition, the Plaintiff’s attorney must use cautious common sense in determining whether the witness is a member of the litigation control group. If the witness has no supervisory powers and there is no indication that the witness has any significant input into the legal decisions of the Defendants, then a cautious assumption can probably be made that the witness is not a member of the litigation control group, but rather, is a fact witness. If the witness is an officer, owner, or high level manager that is likely to be participating in the determination of the organization’s legal position, then you should assume that the witness is a part of the litigation control group, and cannot be contacted *ex parte* by the Plaintiff’s attorney, until further clarification of the witness’ duties and responsibilities can be discovered.

Admittedly, there is a gray area relating to supervisory personnel who may or may not be participating in management decisions. These individuals should be analyzed carefully based upon the Supervisors individual responsibilities and duties within the particular organization. Interviewing is to ask a interrogatory requesting the Defendant employer to name those employees or positions which it deems to be part of the litigation control group.

Once you have determined whether the witness is a member of the litigation control group, you must still determine whether that witness is represented by other representation. RPC 4.2 and 4.3 prohibit an attorney from communicating with a person represented by counsel. RPC 4.2 prohibits communication with person represented by counsel. Persons within the litigation

control group are automatically deemed to be represented by the employers counsel. Witnesses who are not a member of the litigation control group, may still have their own independent counsel, and therefore the interviewing attorney must first ask the witness whether he or she is represented by counsel before continuing with any interview. If the witness refuses the interview, or state that they are represented by counsel or wish to, then Plaintiff's attorney should immediately conclude the interview.

Former employees - when interviewing former employees, a similar analysis must be made. Was the former employee a member of the litigation control group? RPC 1.13 states that, "former agents and employees who are members of the litigation control group shall be deemed to be represented in the matter by the organization's lawyer, but may at any time disavow said representation".

When conducting an interview with a former member of a corporation's litigation control group, therefore, the witness should be advised that he or she has the right to be represented by his or her former employer's attorney, but that if they do not wish to be represented by the former employers attorney, then the interview may proceed. Certainly, in all interviews, the Plaintiff's attorney shall identify himself or herself, and explain clearly who they represent and the purpose of the call before even preceding to ask any questions regarding representation.

Former employees who are not members and were not members of the Defendant employer's litigation control group may be contacted as fact witnesses at any time, so long as Plaintiff's counsel identifies themselves and notifies the witness as a purpose of a phone call, and determines whether or not the former employee is represented by his or her own separate counsel.

III. THE FUTURE

There are many area that have been left gray by the rules and their revisions. The case of Michaels v. Woodland, *supra*, has clarified some of those areas, but future litigation will determine the new boundaries. Interrogatories requesting the Defendants to define their litigation control group will be extremely useful in preventing unnecessary litigation in the event of an objected contact. On the other hand, if Plaintiff counsel feels that the Defendants have defined the litigation control group too broadly, Plaintiff's counsel should be hesitant to move the Court for a clarification.

The Courts will ultimately be faced with the difficult task of defining terms like "significant involvement" and whether "determining the corporation's legal position" is different from being the management personnel responsible for the actions being complained of. Courts will have no balance the needs of Plaintiff's attorneys to acquire information with the purpose of th protecting unsophisticated employees from sometimes overeager attorneys.

Another area which remains unclear is whether corporate counsel can instruct employees not to talk to Plaintiff's counsel. While RPC 3.4 (a) prohibits the obstruction of the parties access to evidence, RPC 3.4 (f) contains a loophole for corporation which appears to permit counsel to instruct its "clients" not to talk to Plaintiff's counsel. A logical reading of the new rules would seem to indicate that the "clients" not talk to Plaintiff's counsel. A logical reading of the new rules would seem to indicated that the "client" should be defined in the same way that the "litigation control group" is defined for Plaintiffs. Given the new rules, whether the such instructions are enforceable or violate public policy seems to be open for dispute.

IV. THE SUMMARY

1. RPC 1.13 (a) now defines the "litigation control group" as those who are out-of-bounds.

“Significant involvement” in determining the corporation’s legal position with respect to the particular matter is the test for membership in the litigation control group.

2. RPC 1.13 (a) permits a former member of the employer’s litigation control group to disavow representation by the corporation’s counsel, thus permitting the Plaintiff’s attorney to interview even former members of the litigation control group.
3. RPC 4.2 permits attorneys to make *ex parte* contact with anyone who is not in the litigation control group, so long as they exercise “due diligence” in determining whether the person is, in fact, represented by corporate counsel.
4. RPC 4.3 provides that “due diligence” includes explaining to the employee that he or she may be entitled to corporate representation, but that as far as attorney knows, the person is not part of the litigation control group, and therefore is not represented by the corporation’s counsel.
5. In contrast to the old rules of contract, a guilty perpetrator may now be interviewed, provided that he or she is not a member of the litigation control group.