This practice note provides guidance on ethical considerations and best practices for attorneys representing an individual employee when contacting current and former employees of a defendant employer. It covers topics including the reasons and best practices for an employee's attorney to contact current and former employees, the reasons and best practices for the employer's attorney to object to that contact, and federal and state ethics rules and constraints.

The practice note focuses mainly on the ABA Model Rules of Professional Conduct, since they serve as the model for many jurisdictions and federal courts often apply them when making disciplinary rulings. State ethics rules are also critical, however, since attorneys are subject to the rules in the jurisdictions they practice in, and state and federal courts can apply them when making disciplinary rulings. For those reasons, this practice note also includes a survey of the no-contact rule in various states.

Specifically, this practice note addresses the following topics:

- Ethical Rules and Ex Parte Contact
- Why Contact Current and Former Employees of a Defendant Employer?
- ABA Model Rule 4.2: Application and Exceptions
- Additional Ethical Constraints on Communications with Current or Former Employees
- Key State Ethics Rule Distinctions

For more information on discovery for employee-side attorneys, see Discovery in Employment Discrimination Litigation: What Plaintiffs Can Request and Obtain from Defendants. For a related annotated form, see Discovery Plan (Title VII Discrimination Cases) (Pro-Employee).

Ethical Rules and Ex Parte Contact

Ethics rules generally prohibit ex parte contact with current employees of a represented organization who either:

- Are high-ranking –or–
- Were directly involved in taking actions against your client

While jurisdictions vary, you are generally permitted to contact former employees or current low-ranking employees without first getting the consent of the organization's attorney. Even where ethics rules permit ex parte contact with an organization's current or former employees, however, there are other ethical considerations that may restrict that contact. These include ethics rules regarding contact with unrepresented persons and not violating the rights of third parties.

Why Contact Current and Former Employees of a Defendant Employer?

For an individual employee's attorney, current and former employees can be critical sources of factual information in employment disputes, particularly discrimination and retaliation cases.
For example, a current or former employee could be:

- A participant in the adverse action taken against your client (e.g., termination, demotion, decrease in pay, or hostile work environment)
- A witness to the adverse action or the emotional distress caused by the adverse action—or—
- A comparator to help prove pretext, causation, or damages

**Current and Former Employees as Participants**

In discrimination and retaliation cases, plaintiff employees need to prove that a defendant employer took an adverse action against them because of an unlawful reason. Speaking with a current or former employee who participated in the adverse action (i.e., participants) is often the most direct source of information about the causation element.

For instance, if your client’s supervisor decided to terminate her, a frank conversation with the supervisor about why she made that decision would help you understand whether the termination was discriminatory. At the least, it would help you learn about how the defendant employer may defend against claims of discrimination.

Participants also have information about your client’s work performance, the work performance of comparator employees, the identity and role of other participants, and the defendant-employer’s policies and practices.

**Current and Former Employees as Witnesses**

Current and former employees who were not participants can still have information that is relevant and material to proving your client’s claims.

**Adverse Action**

Although a current or former employee was not a participant in the adverse action against the plaintiff employee, he or she may have information about the decision maker’s motive, such as statements the decision maker made about the adverse action. Witness testimony can also provide context for and explain documentary evidence related to the adverse action, which you may be able to use to counter or undermine the defendant employer’s explanation.

**Emotional Distress**

Such witness testimony can also be helpful for establishing the emotional distress caused by the unlawful conduct. Current and former employees who worked with your client and observed the defendant-employer’s adverse treatment of your client and the effects it had on her are often critical sources of such witness testimony.

**Defense Rebuttal**

Once you can prove that a defendant employer took an adverse action against your client, the defendant employer will inevitably claim that it took the adverse action for a nondiscriminatory, legitimate business reason, often by claiming that your client was a poor performer or violated some company policy. In addition to documentary evidence of your client’s positive performance (e.g., written performance reviews, merit-based awards and bonuses, etc.), current and former employees who can attest to your client’s work performance and conduct at work can help rebut the defendant-employer’s defense.

**Current and Former Employees as Comparators**

As mentioned above, defendant employers routinely defend against claims of discrimination or retaliation by claiming that there was a legitimate business reason for the adverse action against your client. For instance, in a sex discrimination case involving a termination, the defendant employer may claim that your client arrived late to work and thus deserved termination for violating a time and attendance policy. If the case involves a failure to promote, the defendant employer may claim that your client did not have the requisite qualifications or experience for the higher-paying position.

One of the strongest ways to rebut this kind of defense is to find current or former employees who were similarly situated to your client but were treated differently. If you can find employees of the opposite sex who similarly arrived late to work but were not terminated or who had similar qualifications and experience but were promoted, this will help show that the defendant-employer’s asserted reason for its adverse action against your client is pretextual and a potential cover for sex discrimination.

Comparator employees are also important for establishing the economic damages your client has suffered. Taking the example of the sex discrimination case above, in addition to establishing liability, you will need to prove the economic losses that your client has suffered. If you can show that the defendant employer provided raises or enhanced benefits to similarly situated employees subsequent to your client’s termination, you can use that information to increase the economic damages available to your client.

Reasons Defendant Employers Seek to Prevent Ex Parte Contact with Current and Former Employees

Defendant employers are most eager to prevent ex parte contact with current and former employees who participated in the adverse action (i.e., participants). This is primarily because the acts or omissions of those employees may impute liability to the defendant employer.
At the least, the information that participants have can be highly probative evidence in employment disputes. Given the potentially damaging nature of this type of information, defendant employers do not want you to have access to it outside the protective environment of discovery.

Defendant employers also are eager to prevent you from speaking ex parte with potential witnesses or comparators in order to restrict the flow of information that is damaging to the defendant-employer’s interest.

For an annotated form for acquiring such information in discovery, see Document Requests (Plaintiff to Defendant) (Single-Plaintiff Discrimination Action).

ABA Model Rule 4.2: Application and Exceptions

ABA Model Rule 4.2 prohibits you from communicating with a person you know to be represented by another attorney about the subject matter of a representation, unless the opposing attorney has given consent or you are authorized by law or court order to speak with the person. This is often called the “no contact rule.”

Comment 7 to ABA Model Rule 4.2 states that, where the represented person is an organization, the no contact rule extends to any constituent of the organization who:

- “[S]upervises, directs or regularly consults with the organization’s lawyer concerning the matter”
- “[H]as authority to obligate the organization with respect to the matter” –or–
- “[W]hose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability”

Comment 7 specifically permits you to speak with former constituents of the organization. In addition, if a current constituent of the organization has personal counsel in the matter, you can speak with that person so long as you get the personal counsel’s consent.

Contacting Current Employees under ABA Model Rule 4.2

ABA Model Rule 4.2 and Comment 7 prohibit “ex parte communications” (i.e., communications between you and an employee without getting consent from the defendant-employer’s attorney) with current high-ranking employees of the defendant-employer’s organization. These include executive-level employees who can make binding decisions on behalf of the organization.

Comment 7 also extends the no contact rule to current employees who were participants in the adverse action against your client. For instance, suppose a mid-level manager terminated your client’s employment. That mid-level manager would likely not be high-ranking enough to regularly interact with the company’s attorneys or to make decisions on behalf of the organization. However, an admission from that mid-level manager that he or she fired your client because your client complained about sexual harassment would be imputable to the defendant employer for purposes of civil liability.

If a current employee does not fall within the above categories, then ABA Model Rule 4.2 permits ex parte communications. In addition, if current employees fall within one of the above categories but have retained their own counsel, you can communicate with those current employees so long as their personal counsel consents. If their personal counsel consents, you do not need to get consent of the defendant-employer’s counsel.

Furthermore, the no contact rule applies only when you know the defendant employer is represented in the matter at hand. If the defendant employer has not yet retained counsel to handle any legal matters related to your client’s employment, then the no contact rule does not yet apply.

However, any ex parte communications with current employees permissible under ABA Model Rule 4.2 still must comply with the other related ethical obligations, which are discussed below. They also must comply with any applicable state rules, some of which are more restrictive than Model Rule 4.2.

If you were to violate the no contact rule, the defendant employer could seek injunctive relief from a court to prevent any future impermissible ex parte contact. If impermissible ex parte contacts have already produced information related to the matter, the defendant employer may ask a court to prohibit the use of that information during litigation.

The defendant employer may even ask a court to disqualify you as counsel in the matter. Defendant employers might also request the court to award sanctions against you. Courts generally have broad discretion in fashioning sanctions and injunctive relief to match the severity and impact of your unethical conduct. You could also face disciplinary action from the bars in which you are licensed, ranging anywhere from censure to license suspension.

Contacting Former Employees under ABA Model Rule 4.2

ABA Model Rule 4.2 does not prohibit any ex parte communications with former employees. For instance, although you cannot have an ex parte communication with the defendant-employer’s current high-level executives, you can contact them as soon as they resign. Such communications, however, must comply with other related ethical obligations, which are discussed below.
Additional Ethical Constraints on Communications with Current or Former Employees

If you have determined that a current or former employee is not covered by an applicable no contact rule, there are still other ethical rules that might affect your ability to interview the desired witness.

Communications with Unrepresented Persons

ABA Model Rule 4.3 creates guidelines for communication with an unrepresented current or former employee. Rule 4.3 prohibits an attorney from stating or implying that he or she is disinterested and requires the attorney to make reasonable efforts to correct any misunderstanding regarding her disinterest. The rule also prohibits the attorney from giving legal advice to the unrepresented person, other than the advice to secure counsel, if the attorney knows or reasonably should know that there is a possible conflict of interest between the unrepresented person’s interests and the attorney’s client.

To comply with this rule, when first speaking with a current or former employee, you should identify who your client is. You should also explain whether your client has interests opposed to those of the unrepresented person.

To illustrate, in a sexual harassment case, you reach out to a former coworker of your client who still works for the defendant employer. Under Rule 4.2, you are permitted to speak ex parte with this person because he is not high-ranking enough to be covered by the Rule and he was not a participant in the harassment. At the beginning of the call, you identify yourself as representing your client in her sexual harassment claim against the defendant employer.

In response, the current employee discloses that he is eager to speak with you, but that the defendant employer has directed all employees not to speak with your client or her attorney without first contacting in-house counsel. He then asks if it is legal for his employer to stop him from speaking to you or your client. Under Rule 4.3, you must advise the employee that you cannot provide him with legal counsel, since there is a potential difference between your client’s interests and his. You can, however, recommend that he seek the guidance of another attorney as to whether he can speak with you despite the defendant-employer’s instructions.

Individual Employee Representation

ABA Model Rule 4.2 Comment 7 specifically states that you can have communications with any current employee who has personal counsel in the matter without getting consent of the defendant-employer’s counsel. If the current employee has personal counsel, however, ABA Model Rule 4.2 requires you to get the personal counsel’s consent before communicating with that current or former employee about the subject matter of the representation.

It is beneficial to confirm with the defendant-employer’s counsel that none of the relevant high-ranking or participant employees are represented by personal counsel. It is possible that you may have more success in securing the cooperation of a witness if they are represented by personal counsel instead of the defendant-employer’s counsel.

ABA Model Rule 4.2 also imposes an ethical obligation to get the consent of counsel for former employees or lower-level current employees if they have personal representation, even though they might be exempt from the no contact rule as applied to the defendant employer.

Before interviewing any current or former employee, it is a good practice to ask if they have an attorney. If they respond yes, immediately ask them for the attorney’s information and direct all further communication to the attorney.

Using Agents to Communicate with a Represented Party

Not only does ABA Model Rule 4.2 prohibit you from speaking ex parte with a represented party, it also prohibits you from using “the acts of another” to have such communication. See Comment 4 to ABA Model Rule 4.2. This means that you cannot hire an investigator as an agent to talk to employees covered by the no contact rule.

Comment 4 to Rule 4.2, however, states that “[p]arties to a matter may communicate directly with each other, and an attorney is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” This means that your client may speak to an employee covered by the no contact rule, and you can advise the client on the information gained through that communication provided you did not use your client to circumvent the no contact rule.

To avoid violating Rule 4.2’s prohibition on using “the acts of another” to circumvent the no contact rule, you must never direct your client to communicate with represented individuals. It is also a best practice to explain that you are ethically prohibited from communicating directly with represented individuals and that you cannot encourage or direct your client to have communications that are prohibited for you. You can, however, let the client know that the client is not prohibited from communicating directly with represented individuals.

When doing this, be very careful. According to the ABA, “[p]rime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against...
interest without the opportunity to seek the advice of counsel. ABA Formal Opinion 11-461. Any indication that you over-reached could result in sanctions such as:

- Default
- Disqualification as counsel
- Exclusion of evidence unethically obtained—and—
- Payment of an opposing party’s costs

The risk to your client’s case and your professional reputation is real.

Non-disclosure Agreements and Purloined Documents

ABA Model Rule 4.4(a) prohibits you from obtaining evidence in a way that violates the rights of a third person.

Many employers require some or all of their employees to sign non-disclosure agreements (NDAs), preventing the employees from disclosing certain kinds of confidential information. NDAs often remain in effect even after the individuals terminate their employment with the employer. Inducing a current or former employee to breach an active NDA may violate the defendant-employer’s legal rights to confidentiality.

When speaking with a current or former employee, you should avoid asking about confidential information that is likely to be covered by an NDA, such as trade secrets and proprietary business information. Not only may such actions violate your ethical duties, but it may subject you to liability for interference with the defendant-employer’s contractual rights.

You should also avoid requesting or inducing a current employee to purloin company documents, since that would violate the rights of the defendant employer.

Additionally, if you receive a document or electronically stored information that you know or reasonably should know was inadvertently sent, ABA Model Rule 4.4(b) requires you to promptly notify the sender. If a current employee mistakenly sends you a confidential company document, you must let the employee know as soon as you can, although you are not obligated to return the document.

Attorney-Client Privilege

Although the no contact rule generally does not prohibit ex parte communications with former employees, there are many former employees who you know or should reasonably suspect participated in privileged communications with the defendant-employer’s attorneys. Defendant-employers have the legal right to maintain the confidentiality of attorney-client privileged communications, and former employees, no matter how high-ranking, do not have the ability to waive the defendant-employer’s privilege.

Depending on your jurisdiction’s rules on corporate attorney-client privilege, lower-level employees can engage in privileged attorney-client communications when they interact with corporate counsel on certain matters. Thus, current employees who might not be covered by the no contact rule might be aware of privileged information that the defendant employer has a right to keep confidential.

Since you have an ethical obligation not to use methods of obtaining evidence that violate the legal rights of any person, see ABA Model Rule 4.4(a), you should not induce any current or former employees to divulge any confidential information covered by attorney-client privilege.

When interviewing any current or former employee, it is a good practice to advise them not to talk about any communications they had with the defendant-employer’s attorneys or any other information that might be privileged.

Key State Ethics Rule Distinctions

Almost every jurisdiction has a rule that either is a version of ABA Model Rule 4.2 or contains a similar no contact rule. Some jurisdictions have minor variations in how they describe the class of current employees with whom you cannot have ex parte communications. Other jurisdictions include idiosyncratic requirements or exceptions. Before deciding to engage in ex parte communications, you should check the rules of professional conduct for each state in which you are licensed or practicing.

Below is a survey of jurisdictions that have adopted ABA Model Rule 4.2 verbatim, as well as several jurisdictions that have variations of the rule.

Jurisdictions That Have Adopted ABA Model Rule 4.2 Verbatim

Many jurisdictions in the United States have adopted Rule 4.2 and Comment 7 verbatim. These include:

- Colorado
- Delaware
- Idaho
- Illinois
- Indiana
- Kansas
California Rule of Professional Conduct 4.2

California Rule of Professional Conduct (CRPC) 4.2 is written differently from ABA Model Rule 4.2 and Comment 7, although its substantive restrictions on ex parte communications are very similar.

Similar to ABA Model Rule 4.2, CRPC 4.2(a) says a member of the California bar "shall not communicate directly or indirectly 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."

CRPC 4.2(b) defines the scope of the no contact rule as applied to represented corporations, partnerships, associations, and other private or governmental organizations. The rule prohibits communications with:

1. "A current officer, director, partner, or managing agent of the organization" –and–

2. Any "current employee, member, agent, or other constituent of the organization, if the subject of the communication is an act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability"

CRPC 4.2(b) significantly overlaps with the categories of current employees listed in ABA Model Rule 4.2 Comment 7, as officers, directors, and managing agents of a corporation are those employees who typically interact with a corporation’s attorneys and can make binding decisions on behalf of a corporation.

CRPC 4.2 and its Comments do not mention the application of the no contact rule to former employees. However, both subsections to CRPC 4.2(b) specify that the prohibition extends only to current employees. Thus, like ABA Model Rule 4.2, CRPC 4.2 permits ex parte communications with former employees.

Florida Rule of Professional Conduct 4-4.2

Florida Rule of Professional Conduct (FRPC) 4-4.2(a) and the Comment to FRPC 4-4.2 contain language identical to ABA Model Rule 4.2 and Comment 7. Florida, however, has added further details to its Rule 4-4.2 that allow certain limited ex parte contact.

The first sentence of FRCP 4-4.2(a) is identical to ABA Model Rule 4.2: “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.”

FRCP 4-4.2(a) then goes on to state that an attorney may “communicate with another’s client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person.” Any such ex parte communication must be “strictly restricted to that required by the court rule, statute or contract,” and you must provide a copy of the communication to the person’s attorney.

If, for instance, a contract requires your client to provide a written notice of breach to a specific employee of your client’s employer, then you are allowed to provide written notice to that employee without regard to the no contact rule, so long as you also give a copy of the written notice to the employer’s attorney.

FRCP 4-4.2(b) regulates communications with a person who has limited representation. In this circumstance, you can communicate with the person as if the person was unrepresented, unless you receive a written notice that the attorney’s limited representation covers the subject matter of your communication. If you receive written notice, then you may not engage in ex parte communications on any subject matter within the limited scope of the representation.

Maryland Attorneys’ Rule of Professional Conduct 19-304.2

Maryland Attorneys’ Rule of Professional Conduct (MARPC) 19-304.2 contains restrictions very similar to those found in ABA Model Rule 4.2 and Comment 7, although it has a unique addition that provides a good practice to avoid engaging in unethical ex parte communication.

MARPC 19-304.2(b) prohibits ex parte communications with:

• "(C)urrent officers, directors, and managing agents" – and–
• “[C]urrent agents or employees who:
  o “[S]upervise, direct, or regularly communicate with the organization’s attorneys concerning the matter” –or–
  o “[W] hose acts or omissions in the matter may bind the organization for civil or criminal liability”

These categories significantly overlap with the categories of current employees listed in ABA Model Rule 4.2 Comment 7, as officers, directors, and managing agents of a corporation are those employees who typically interact with a corporation’s attorneys and can make binding decisions on behalf of a corporation.

Unlike ABA Model Rule 4.2 and the rules in other jurisdictions, MARPC 19-304.2(b) specifically requires you to make an inquiry of any current employee “to ensure that the agent or employee is not an individual with whom communication is prohibited by this section.” You also have to disclose your identity to the current employee and say that your client has an interest adverse to the defendant employer.

Although most jurisdictions do not specifically require you to ask current employees whether they are high-ranking enough to prohibit ex parte communications, following MARPC 19-304.2(b) as a model is a good practice. Asking first will help you avoid any prohibited ex parte communications.

Like ABA Model Rule 4.2 Comment 7, MARPC 19-304.2 does not prohibit ex parte communications with former employees, but notes that other ethical restrictions apply. Specifically, MARPC 19-304.2 Comment 6 points to MARPC 19-304.4(b), which is substantively identical to ABA Model Rule 4.4(b) (“A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”).

**New York Rule of Professional Conduct 4.2**

New York Rule of Professional Conduct (NYRPC) 4.2(a) and its Comment 7 are, with minor linguistic variation, identical to ABA Model Rule 4.2 and Comment 7. See 22 NYCRR § 1200.0, Rule 4.2(a).

New York, however, has added further details in additional subsections to its Rule 4.2 that detail when an attorney can ethically direct another person to speak with a represented person. See 22 NYCRR § 1200.0, Rule 4.2. NYRPC 4.2(b) specifies that you are allowed to direct your client to have ex parte communications with a represented person, provided that the represented person is legally competent and you give “reasonable advance notice” to the represented person’s attorney that the communication will be taking place. See 22 NYCRR § 1200.0, Rule 4.2(b). Under this rule, you could direct your client to communicate with executives currently employed by the defendant employer, so long as you gave opposing counsel reasonable advance notice, even if opposing counsel never consents to the communication.

NYRPC 4.2(c) addresses the situation of a client who is an attorney (which includes if you are acting pro se). In such a circumstance, the attorney-client may have ex parte communications with a represented person, provided that the represented person is legally competent and you as his or her attorney give “reasonable advance notice” to the represented person’s attorney that the communication will be taking place. See 22 NYCRR § 1200.0, Rule 4.2(c).

**Texas Disciplinary Rule of Professional Conduct 4.2**

Texas Disciplinary Rule of Professional Conduct (TDRPC) 4.02 is not patterned on ABA Model Rule 4.2, although its no contact rule is similar.

TDRPC 4.02(a) states that “a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” This rule is very similar to ABA Model Rule 4.2, although it also specifies that you may not “cause or encourage” someone else to engage in ex parte communications covered by the no contact rule. Comment 1 to the state rule specifically prohibits you from causing or encouraging your client to engage in communications with a represented person.

TDRPC 4.02(b) extends the no contact rule to any “person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation.” Thus, you cannot have ex parte communications with expert witnesses, investigators, or other agents of opposing counsel.

TDRPC 4.02(c) defines the term “organization or entity of government” used in TDRPC 4.02(a). This term includes:

- Those employees or agents of an organization that “presently” have a “managerial responsibility” relating to the subject matter of representation –and–
- Those “presently employed . . . whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission”
The “managerial responsibility” category would largely overlap with two categories of employees covered by ABA Model Rule 4.2:

• Those who regularly consult with a company’s attorneys
  -and-

• Those who have authority to make binding decisions on behalf of the company

Comment 4 to the state rule specifically provides that you may have ex parte communications with former employees, as well as with “a person presently employed . . . whose conduct is not a matter at issue but who might have knowledge concerning the matter at issue.” It also states that, if current employees covered by the no contact rule have their own counsel on that matter, consent of personal counsel is all that is required to comply with your obligations under TDRPC 4.02.

Virginia Rule of Professional Conduct 4.2

Virginia Rule of Professional Conduct (VRPC) 4.2 is verbatim identical to ABA Model Rule 4.2. However, VRPC 4.2 Comment 7 is written very differently from ABA Model Rule 4.2 Comment 7, and thus includes far fewer current employees within its version of the no contact rule.

VRPC 4.2 Comment 7 extends the no contact rule to employees who come within the organization's “control group” as defined by the Supreme Court case, Upjohn v. United States, 449 U.S. 383 (1981), or “who may be regarded as the ‘alter ego’ of the organization.”

As VRPC 4.2 Comment 7 describes, the “control group” or “alter ego” test captures only those employees “who, because of their status or position, have the authority to bind the corporation.” Comment 7 further states that “[a]n officer or director of an organization is likely a member of that organization's ‘control group.’” The “control group” test covers only high-ranking employees who can make decisions on behalf of the corporation. Thus, in Virginia, you can have ex parte communications with lower-level employees like mid-level managers who may have played a decisive role in discriminating against your client, as they are not high-ranking enough to fall within the no contact rule.

VRPC 4.2 Comment 7 specifically exempts former employees from the no contact rule, even where the former employee was formerly a member of the company’s “control group.” Although you cannot speak to the defendant-employer’s current executives without the consent of opposing counsel, you are free to interview them once they resign.

Best Practices for Attorneys Representing Employees

Attorneys representing employees should follow these guidelines for contacting current and former employees of the defendant employer.

Contacting Current Employees

The no contact rule does not apply unless you know that the defendant employer is represented in the matter. Therefore, it is ethical to send an initial communication such as a document preservation letter or a demand letter directly to a current high-ranking employee of the defendant employer. Once a defendant employer’s attorney surfaces, however, the no contact rule is triggered.

Once the defendant employer has legal representation, you should be careful not to contact any current employee that might be covered by the no contact rule. This includes executives, in-house counsel, high-ranking managers, and any lower-level employees who participated in the adverse actions against your client. You should also avoid contacting current employees who you know have broad NDAs with the defendant employer.

If you are going to contact current employees not covered by the no contact rule, it is a good practice to have your client first make contact with the current employees and ask if they would be willing to speak with you. While you are not ethically required to take this step, this practice can avoid witnesses feeling anxious or intimidated by having an attorney reach out to them without any forewarning. If the current employees tell your client they are willing, you should contact them promptly.

It is a good practice to identify yourself, your role as your client’s attorney, and the nature of your client’s dispute with the defendant employer. You should then ask the current employees about their role in the company to ensure they are not covered by the no contact rule. Before asking any questions related to your client’s case, be sure to ask whether the current employees have personal representation and to advise them that they should not share any of the defendant-employer’s privileged information.

If the current employees confirm they do not have personal representation, you can then interview them about facts relevant to your client’s case. Be sure not to ask any questions that might prompt the current employees to divulge privileged information or otherwise violate the legal rights of the defendant employer.
If you would like to contact current employees covered by the no contact rule, you will likely have to wait until you are in litigation and can subpoena them for depositions. While you can always ask the defendant-employer’s attorney for permission to contact the current employees covered by the no contact rule, the defendant-employer’s attorney will almost certainly not consent to any such contact. For more information about taking such depositions, see Deposing Employer Witnesses: How to Prepare in Employment Discrimination Cases (Pro-Employee) and Rule 30(b)(6) Deposition Strategies for Employee-Plaintiffs in Employment Cases. For annotated forms, see Notice of Deposition (FRCP Rule 30(b)(6)) (Plaintiff to Defendant). For a related checklist, see Deposing Employer Witnesses Preparation Checklist.

**Contacting Former Employees**

Since the no contact rule does not apply to former employees of the defendant employer, you do not need to seek permission from the defendant-employer’s attorney before contacting them.

You should still work with your client, however, to identify former employees who are sympathetic to your client’s case. Sympathetic former employees are more likely to be honest and give you useful information. Moreover, former employees who may be antagonistic to your client might decline to speak with you and inform the defendant employer about your contacts. Such an outcome is undesirable because the defendant employer may take action to discourage other more sympathetic current and former employees from speaking with you. It also prematurely alerts the defendant employer to the fact that your client may be bringing claims against it.

You should avoid contacting former employees who you know have broad NDAs with the defendant employer that restrict such communications.

If you are going to contact former employees, it is often beneficial to have your client first make contact with the former employees and ask if they would be willing to speak with you. As explained above, some witnesses can feel anxious or intimidated when an attorney reaches out to them without any forewarning. If the former employees tell your client they are willing to speak, you should contact them promptly.

When you first make contact with a former employee, it is a good practice to identify yourself and your role as an attorney representing your client who has an employment dispute with the defendant employer. You should then confirm that the former employee no longer works for the defendant employer.

Before asking any questions related to your client’s case, be sure to ask whether the former employees have personal representation. You should also advise them that they should not share any of the defendant-employer’s privileged information. This is especially important for former high-ranking employees who may have regularly been in contact with the defendant-employer’s attorneys.

If the former employees confirm they do not have personal representation, you can then interview them about facts relevant to your client’s case. Be sure not to ask any questions that might prompt the former employees to divulge privileged information or otherwise violate the legal rights of the defendant employer.

**Best Practices for Defendant-Employer’s Attorneys**

Attorneys representing the defendant employer should follow these guidelines when an employee’s attorney contacts your client’s current and former employees.

**Preventing Contact with Current Employees**

If you are a defendant-employer’s attorney, it is not unethical for you to instruct your client’s current employees not to speak with the plaintiff’s attorneys, unless you reasonably believe that such an instruction might be adverse to a current employee’s interest. See ABA Model Rule 3.4(f).

While this may seem attractive because it can help limit damaging information from leaking out, think carefully before making such a blanket instruction. It may run afoul of some federal employment statutes, such as the National Labor Relations Act, 29 U.S.C. §§ 151–169. It can also degrade the workplace culture by indicating to employees that the company seeks to bury misconduct instead of address it. This can lead to employees being unwilling to report compliance and legal violations internally, which can increase the company’s potential legal exposure in the future.

If a plaintiff’s attorney makes an ex parte communication with one of your client’s current employees covered by the no contact rule, you should immediately contact the plaintiff’s attorney and tell him or her that you represent the defendant employer in the matter. You should then notify the attorney that you do not consent to any contact with your client’s employees who are covered by the no contact rule.

If the plaintiff’s attorney continues to make unethical ex parte communications with your client’s current employees, you can consider seeking injunctive relief from a court to prevent any further impermissible contacts. If the matter is in litigation, you can also seek sanctions from a court, if appropriate.

**Preventing Contact with Former Employees**

The no contact rule generally does not give you any right to object to a plaintiff’s attorney’s contact with your client’s former employees. You are, however, able to protect your client’s...
If a plaintiff’s attorney induces one of your client’s former employees to violate your client’s legal rights, you should immediately contact the offending attorney. Tell the attorney that you represent the defendant employer in the matter, that the former employee is subject to an NDA, and that you will take all action necessary to protect your client’s rights. You can also consider seeking injunctive relief or sanctions from a court, if necessary and appropriate.