Ex Parte Contacts With Organizational Employees in Missouri

by Garrett Hodes

Introduction

An understanding of the limits of *ex parte* contacts with corporate employees is necessary in order for trial and organizational attorneys to effectively investigate their cases, avoid discovery disputes, and satisfy their clients interests.

Missouri has addressed the issue, and has attempted to define the limits of *ex parte* contacts with organizational employees, all to the confusion of the practicing attorney. This article attempts to clarify some of this confusion that has plagued the courts of Missouri, the organized bar, and practicing attorneys in their attempts to balance effective case investigation and their clients interests with the Rules of Professional Conduct.

II. Model Rule 4.2 of the Model Rules of Professional Conduct

Model Rule 4.2 deals with attorney contacts with persons represented by counsel.[1] An *ex parte* contact takes place when an attorney interviews witnesses and their adversarys current and former organizational employees without the consent of opposing counsel or without giving notice to opposing counsel of the desired contact.[2] Rule 4.2 determines when an adverse attorney is forbidden from making an *ex parte* contact or is required to give notice to opposing counsel so that the opposing attorney will have an opportunity to make objections. Model Rule 4.2 in Missouri states as follows:

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.[3] (emphasis added)

When the opponent is an organization, the attorney who desires to make *ex parte* contacts must know the boundaries of this rule in order to be an effective advocate.

To understand the meaning and intent of Rule 4.2, it is important to understand the policies and rationales that underlie the rule. Rule 4.2 "prevents unprincipled attorneys from exploiting the disparity in legal skills between attorney[s] and lay people;"[4] "preserves the integrity of the attorney-client relationship by preventing an attorney from coming between the opposing attorney and client;" and "prevents the inadvertent disclosure of privileged information."[5] Also, "the Rule advances dispute settlements by channeling communications between lawyers accustomed to the negotiation process,"[6] and "prevent[s] conduct intended to induce the represented party to somehow impair, compromise or settle his or her own case."[7]

Model Rule 4.2 is confusing because it is difficult to determine who a "party" is when the rule is applied to current and former employees of the adversary organization who are the subject of an *ex parte* contact.

III. Ex Parte Contacts in Missouri

A. *Pitts v. Roberts*

State ex rel. Pitts v. Roberts[8] is the seminal case on Rule 4.2s application when an organization is a litigant. *Pitts* involved the determination of when *current* employees of a business entity litigant should be considered as a "party" for purposes of Rule 56.01(b)(3)[9] and Rule -4.2.[10]

In *Pitts,* during investigations for a products liability and negligence case, the plaintiffs counsel took *ex parte* statements of the defendants current employees, two water heater installers.[11] It was alleged that the negligent installation and service of the water heater caused a fire in the plaintiffs mobile home, but suit had not yet been filed.[12] Later, during discovery, the defendants sought the production of the statements taken from its current, non-managerial employees under the authority of Rule 56.01(b)(3).[13] The trial court denied the defendants request.[14]

The *Pitts* Court saw this dispute as an opportunity to delineate the breadth of the term "party" when dealing with an organization that is a litigant. The Courts stated goal was to keep the adversary attorney within the bounds of professional conduct, yet prevent the organization from "stonewall[ing] its adversarys attempts to investigate the facts and/or to deny the adversary the benefit of its work product."[15] In the Official Comment to Rule 4-4.2, the Court found its test:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having the 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.[16]

This test has been called the "managing-speaking agent test."[17] The Court felt that "[t]his test focuses neither upon a bright line hierarchical structure nor a bright line temporal distinction regarding which employee shall be treated as a party, but instead sets out a functional approach designed to be sensitive to the practical considerations of the real world."[18]

Applying the rule with this rationale was easy when dealing with current employees.[19] In *Pitts*, at the time of the contact the employees were employed by the organization and their roles were central to the dispute because their acts and omissions were later the subject of the plaintiffs claim.[20] These employees would have bound the organization by their acts and omissions. Thus, plaintiffs counsel should have treated the two non-managerial employees as a "party" and should not have taken their statements *ex parte*.[21] However, since he did, the court required him to turn the statements over to defendant under Rule 56.01(b)(3).[22]

B. *Tipton v. Sonitrol Security Systems, Inc.*

Three years later, Rule 4-4.2 was further clarified in *Tipton v. Sonitrol Security Sys., Inc.*[23] *Tipton* was an employment case involving claims for sexual harassment, employment discrimination and retaliatory discharge.[24] Here, the defendant sought a protective order which would bar plaintiffs counsel from making *ex parte* contact with an *unrepresented former managerial* employee of the defendant, who was a middle manager and whose acts and omissions were not the subject of plaintiffs claims.[25] The court denied this motion, finding that "neither *Pitts* nor any other case applying Missouri law ha[d] directly addressed" this issue, and would read Rule 4-4.2 to prohibit this kind of contact.[26]

For its analysis, the court first distinguished *Pitts* from *Tipton.* This case involved an unrepresented *former managerial employee* when counsel represented the organization, while *Pitts* involved *current employees* of an organizaton represented by counsel for the matter at issue.[27] The defendant argued that some of the Informal Advisory Opinions written by the Chief Disciplinary Counsel supported their contentions that the *ex parte* contacts were prohibited.[28] The court found that these opinions were non-binding.[29]

Next, the court looked to case law addressing the former employee issue and Model Rule 4.2 and found support for their decision that "[t]he language of Rule 4.2 does not on its face involve, or in any way prohibit, *ex parte* contact with former managerial employees."[30] (emphasis added). Moreover, the *Tipton* court relied on a Formal Opinion written by the American Bar Association for its decision.

C. ABA Formal Opinion 91-359

In 1991, the American Bar Association Standing Committee on Ethics and Professional Responsibility addressed the former employee issue, and found that Rule 4.2 did not prohibit any *ex parte* contact with a former managerial or non-managerial employee.[31] The opinion stated as follows:

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 employers, [sic] 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. . . . 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 corporations lawyer.[32]

This is the majority rule on the issue of *ex parte* contacts with former employees.[33] The *Tipton* court stated that it would be improper to extend the Rule 4.2 definition of "party" beyond its "textual moorings" by including former managerial employees.[34]

D. *U.S. ex rel. OKeefe v. McDonnell Douglas Corp.*

In March of 1997, *U.S. ex rel. OKeefe v. McDonnell Douglas Corp.*[35] was decided. Here, as in *Tipton,* underlying the courts determination of the contact issue was a motion for a protective order. The defendant sought a protective order barring their adversarys attorneys from making *ex parte* contacts with their current and former corporate employees, and for the disclosure of all employees who were the subject of *ex parte* contacts.[36] Unlike *Tipton,* the employees at issue were *both* current and former non-managerial employees.[37]

To begin its analysis, the *OKeefe* court stated that in order to determine whether a defendants employees are persons whose acts or omissions may subject the defendant to liability, the substantive law underlying the action must be analyzed.[38] *Pitts* involved the negligent installation of a water heater by a current employee -- acts and omissions that could impute liability to the defendant organization. *OKeefe* dealt with the False Claims Act, by which the employer can be liable for the acts of its employees under a theory of respondeat superior.[39] Here, McDonnell Douglas sought the protective order after the Department of Justice sent questionnaires to the defendants current and former employees asking if the employees had ever engaged in the "mischarging of labor."[40] The mischarging allegations were central

to the governments cause of action under the False Claims Act.[41] Because the *current* employees actions, mischarging, could impute liability to the corporation, they wer off-limits to *ex parte* contact.[42]

Next, the court discussed the important difference between current employees whose *acts and omissions* may impute liability to the corporation and those current employees who are *fact witnesses* and merely hold information about what they saw others doing.[43] The imputation of liability may arise from what they say they observed, but not how they acted.[44] These fact witnesses are not off-limits to *ex parte* contact.[45]

Next, the court ruled that former employees are generally fair game, with certain restrictions.[46] Former employees who are, in fact, represented by the corporations counsel or their own counsel are off-limits to *ex parte* contact under Rule 4-4.2.[47]

Based on this analysis, the protective order was granted in part, and denied in part, with certain restrictions placed on the allowed *ex parte* contact with the former employees.[48] In Missouri, an attorney making *ex parte* contacts with a *former corporate employee* must: (1) maintain a list of all former employees contacted and the date(s) of the contact(s); (2) "maintain and preserve statements, notes, or answers to questionnaires obtained as a result of the contacts;" and (3) upon request, provide the corporate opponent access to "the lists and notes," subject to work-product limitations.[49] The court established these guidelines "because the statements of some of defendants former employees may subject defendant to liability, . . . [thus] some limits should be placed on the Governments access to these employees."[50] These guidelines are meant to prevent the adversary attorney from obtaining an unfair advantage at trial, an advantage that would be cured by the disclosure of the information to the defendant corporation.[51]

In effect, *OKeefe* seems to imply that while a former employee is not off-limits to an *ex parte* contact, an *ex parte* contact with a former employee will be subject to these guidelines if the former employees statements would be binding if the statements were made by a current employee. Most likely, the *OKeefe* court was confused with the issue of how the former employees acts and omissions done while he was employed could be binding on the organization.

It is important to note that these disclosures mandated by *OKeefe* may be protected intangible work product. In *State ex rel. The Atchison, Topeka and Santa Fe Ry. Co. v. OMalley*, the Supreme Court held that broad interrogatories designed to reveal "the investigative process and relative weight attributed to certain witnesses statements by the opposing side" will be subject to the work product doctrine.[52]

Moreover, if *OKeefe* is read to require the plaintiffs attorney to turn over the notes *and statements* taken from the *ex parte* interview, then in effect in Missouri these former employees are a "party" -- at least under Rule 56.01(b)(3), which entitles a party to a copy of his or her own statement as a matter of right under the rules of discovery.

IV. Points of Interest

A. Former Employees Whose Acts and Omissions Are at Issue

OKeefes limitations -- requiring disclosure of "list and notes" -- should only apply when the defendant organization has a large number of employees whose acts or omissions *while they were employed by the organization* could impute liability to the defendant organization.[53]

Most cases limit the "imputation of liability" to current employees.[54] At the time of the act or omission, the actor was a "current" employee and their act or omission during their employment is at issue. By suing the organization under a theory of respondeat superior, the plaintiff is alleging that the organization is responsible for the acts of the organizations employees done within the scope of the employees employment.[55] Once the employee is fired, he cannot make an admission as a "former employee" under Federal Rule of Evidence 01(d)(2)(D) because he is no longer an agent of the organization, and no longer speaking on a matter within the scope of his employment with the organization during the existence of the employment relationship.[56] He binds the organization by his acts and omissions *at the time of his employment*, not because he is still working for the organization at the time of suit.[57] Any other interpretation of the "imputation of liability" language makes no sense, as an organization could always avoid liability by firing an employee who would bind it by a negligent or wrongful act done within the scope of his employment.

Some cases use the term "non-employee agent" to define who is covered by the second clause of the test.[58] These are "agents whose acts are attributable to an organization but who may not technically be employees."[59] The language and sentence structure of the second clause of the test -- "*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," -- is explained to incorporate agency principles, and to preclude former employees because they are not currently agents.[60]

This seems to confuse a former employee with a current employee. At the time of the act or omission, a current employee is employed by the organization. Former employees have no relevance here. At the time of the *ex parte* contact, a current employee is still employed by the organization, while a former employee is no longer employed by the organization, but was at the time of the act or omission that is at issue.

The imputation of liability under agency law comes from the employees acts or omissions when he was employed, not because they are still employed or acting as an agent for the organization. Thus, because the second clauses two provisions are currently misconstrued, there is a definite advantage given to a plaintiffs attorney who desires to speak to a former employee whose acts and omissions are at issue in the litigation. For example, if the two negligent water heater installers from *Pitts* had been fired by their employer after the explosion and were not represented, then the plaintiffs attorney would face no bar to an *ex parte* contact.

B. Privileged Information

The attorney making *ex parte* contacts must not inquire into any privileged attorney-client communications, because the privilege belongs to the corporation and can only be waived by the corporation.[61] Thus, the attorney must be careful when dealing with former managerial employees -- who may be contacted -- but he or she should not implicate any privileges or any legal strategies to which the former manager might be privy.[62] This conduct will violate Rule 4.4, Respect for the Rights of Third Persons.[63]

It is also important to note that the managerial employees access to privileged information provides the basis for this limitation, not the rule, and that the privilege only *restricts* what is asked during a permissible *ex parte* contact.[64]

C. When is a Party Represented?

The Official Comment to Amended Model Rule 4.2 states that "[t]his Rule applies to communications with any person whether or not a party to a formal adjudicative proceeding, *contract or negotiation*, who is represented by counsel concerning the matter to which the communication relates."[65] Missouris Official Comment does not include the "contract or negotiation" language.

With the use of the term "party" in some states rules, some courts have taken a narrow view and found that the rule only applies after litigation has commenced.[66] Other courts have not gone as far as to limit the application of Rule 4.2 to the point where litigation has been commenced, but have found "that the protections of Rule 4.2 attach only once an adversarial relationship sufficient to trigger an organizations right to counsel arises."[67]

This does not mean that once a potential litigant has retained counsel the rganization can throw up its walls and prevent plaintiffs counsel from his investigation. "An interpretation of Rule 4.2 that limits counsel to (and burdens their clients with the costs of) formal discovery during the investigatory stages of civil litigation is not only fundamentally unfair, but also frustrates the purposes of Rule 11 [of the Federal Rules of Civil Procedure]."[68]

The narrow view conflicts with the American Bar Associations present use of the word "person" in the rule.[69] The practicing attorney should be aware that while the ABA has amended Rule 4.2, Missouri has not yet revised its rules to include the use of the word "person." While the use of the word "party" may have caused some courts confusion in the past, the present formulation of Model Rule 4.2 should make it clear that the rule applies to *any* person or organization who has retained counsel for a matter, and is contacted by an attorney for another person who has also retained counsel for that same matter.

V. Conclusion -- Effective *Ex Parte* Contact

A. Former Employees

The issue is generally settled for former employees. If the employee was working at the time of the alleged incidents, and is no longer working for the organization, then he or she is a former employee. An attorney can make *ex parte* contact without the consent of the organizations attorney for all former employees. Of course, it is also settled that if the former employee has retained his own counsel for the matter, then that person is off-limits to an *ex parte* contact.

The former employee might have retained an attorney because it was his or her acts or omissions that are at issue, or are the subject of the litigation. The issue is whether these former employees can bind the corporation. They cannot by their statements, because they cannot constitute admissions. Under the applicable law, they may possibly bind the organization by their acts or omission while they were employed.[70] These employees are *not* off-limits to an *ex parte* contact.[71]

The plaintiffs attorney has a tremendous advantage in this area under the current interpretation of the rule. In order for the organizations attorneys to cure their disadvantage, they should consult with these persons and attempt to include them in their litigation team or have them sign an agreement to be represented by the organizations attorney.

When there are a large number of employees whose acts and omissions may be at issue under the applicable substantive law, and some of these employees have become former employees, contact will

be limited. The plaintiffs attorney may have to provide a list of names to the organization of the former employees contacted, and may have to turn over the lists, notes, and possibly the statements taken as a result of the contacts.[72] However, work product is protected.[73]

This is a tricky situation, because *OMalley* seems to protect the plaintiffs investigation as intangible work product, while *OKeefe* may require the plaintiffs attorney to turn over the documentation of his investigation. If the plaintiffs attorney is required to turn over a former employees statement, then, in effect, these former employees are treated as a "party" under *OKeefe* and Rule 56.01(b)(3). Moreover, it is worth noting that under the work product rules of discovery, a party does not have to make a showing of undue hardship to obtain a copy of his or her own statements.[74]

Therefore, while *OKeefes* limitations appear to be impractical, they do attempt a solution to the former employee whose acts and omissions are at issue situation. The plaintiffs attorney should make every attempt to contact these former employees, and refuse to provide any information to the organization under the authority of *OMalley*.

B. Current Employees

The clearest bright-line rule for current employees is that managerial employees cannot be the subject of an *ex parte* contact. However, depending on the factual situation, it may e difficult for the plaintiffs attorney to determine whether the employee is "management." For example, middle managers in a large corporation may or may not qualify, depending on the number and types of employees they manage, their discretion outside of established rules and guidelines, and their ability to exercise their own individual judgment.[75]

Next, it may often be difficult for a plaintiffs attorney to distinguish between those employees who are merely "fact witnesses" and those who may bind the corporation by their statements or acts and omissions. Some courts have chosen an "overly expansive reading" to define which employees could bind the organization,[76] and it is probably best for the plaintiffs attorney to do so as well, in order to be on the safe side.

After the plaintiffs attorney has identified the current employees to whom he wishes to speak, and determined their role in the matter -- specifically, whether they can bind the organization by speaking to him -- then he is able to speak to them without the consent of the organizations attorney. The plaintiffs attorney may speak to *any* employee about matters outside the subject of the litigation, matters outside the scope of his representation of his client, or matters outside the scope of the organizations representation of the employee.[77]

C. The *Ex Parte* Contact

If, in the attorneys best professional judgment, he determines that he may make an *ex parte* contact, he should keep the following points in mind: First, he should avoid implicating any information protected by the attorney-client privilege. With most current employees contacted, there should be no privilege, based on the lack of "automatic representation" by the organizations attorney, and because if the current employee is not involved in the matter at issue, he or she will not have contacted the organizations attorney.[78] As for former employees, they may have some privileged information. The plaintiffs attorney should explain to the person contacted that they should not discuss with him any matter that was specifically addressed in a conversation or consultation with the organizations attorney.[79]

Second, while Rule 4.2 says the plaintiffs attorney may contact a prohibited employee with the consent of the organizations attorney, the plaintiffs attorney probably should not seek consent. This will tip off the organizations attorney to the *ex parte* contact, and give them the opportunity to use their massive resources to prevent the contact.[80] It will also give them a chance to seek a protective order from the court--thereby frustrating the purposes and policies underlying the rule.[81]

Finally, the attorney should also keep in mind that other Rules of Professional Conduct might be applicable to the contacts -- such as Rule 4.3, Dealing with an Unrepresented Person, and Rule 4.4, Respect for the Rights of Third Parties -- and act accordingly.

While it is difficult to discern the limits of *ex parte* contacts with corporate employees, it is a necessary evil for both plaintiffs lawyers and organizational defense counsel alike. The plaintiffs attorney must be able to investigate his case and minimize the costs and expenses of litigation at the same time the organization must be able to protect itself from being bound by its employees. If it is possible to achieve a balance between the interests of the respective parties, it will not be with bright-line rules.[82]

Endnotes

1 Model Rule 4.2 is nearly identical to DR 7-104(A)(1). Under the current American Bar Association version of Rule 4.2, the word "person" has been substituted for "party." See ABA Center for Professional Responsibility, *Transactions with Persons Other Than Clients, in* Annotated Model Rules of Professional Conduct 392 (1996).
In August of 1995, the American Bar Association House of Delegates amended Model Rule 4.2 to substitute the word "person" for "party" in an attempt to clarify the confusion around the rule. See *Weider Sport Equipment Co., Ltd. v. Fitness First, Inc.*, 912 F. Supp. 502, 506 (D. Utah 1996). Missouri still uses the word "party." *See* Rule 4-4.2.
2 See *State ex rel. Pitts v. Roberts*, 857 S.W.2d 200, 202 (Mo. banc 1993). *Transactions*, note 1 at 392 (1996); *H.B.A. Management v. Estate of Schwartz*, 693 So.2d 541, 542 n.1 (Fla. 1997).
3 See Rule 4-4.2; *State ex rel. Pitts v. Roberts*, 857 S.W.2d 200, 202 (Mo. banc 1993).
4 *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259, 260 (S.D. Iowa 1993) (citing *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D. N.Y. 1990)); *see also Wright v. Group Health Hosp.*, 691 P.2d 564, 576 (Wash. 1984) (citing A.B.A. Formal Opinion 108 (1934)) (describing the rules purposes as "preserving the proper functioning of the legal system and shielding the adverse party from improper approaches.")
5 *Cram*, 148 F.R.D. at 260 (citing *Polycast*, 129 F.R.D. at 625).
6 *Id.*
7 *Aiken v. Business and Indus. Health Group, Inc.*, 885 F. Supp. 1474, 1479 (D. Kan. 1995).
8 857 S.W.2d 200 (Mo. banc 1993).
9 Rule 56.01(b)(3) entitles a party to obtain a statement concerning the action or its subject matter previously made by that party.
10 *Pitts*, at 201.
11 *Id.* Note that suit had not yet been commenced, a fact which was not discussed by the Court. *Id.; see* § IV.C.; A.B.A. Comm. On Ethics and Profl Responsibility, Formal Op. 95-396 (1995) (Communications With Represented Persons).
12 *Pitts*, at 201.
13 *Id.*
14 *Id.*
15 *Id.* at 201-02.
16 *Id.* at 202; Rule 4-4.2 (Official Comment).
17 See *Wright v. Group Health Hosp.*, 691 P.2d 564, 568-69 (Wash. 1984).

18 *Pitts,* at 202.
19 See *Informal Op. No. 950105,* The Missouri Bar Bulletin, Sept. 1995, at 17. ("The critical issue is the nature of the witness employment at the time of the incident, not the witness present employment.")
20 *Pitts,* at 202. Here, the Court stated, "The acts and omissions of Messman and Bradshaw are the subject of plaintiffs claim for liability on the part of Pitts. They are not merely fortuitous witnesses to an occurrence in which they were not involved and over which they had no control, responsibility or authority." *Id.*
21 *Id.*
22 *Id.*
23 958 F. Supp. 447 (E.D. Mo. 1996).
24 *Id.* at 451.
25 *See Id.* at 449-50.
26 *Id.* at 451-52.
27 *But see* note 11.
28 *Id.* at 451; *see* Rule 5.30, Opinions and Regulations by Advisory Committee.
29 *See id.*; Rule 5.30(b) ("Informal opinions are not binding. Written summaries of informal opinions may be published for informational purposes.").
30 *Tipton,* at 451 (citing *Aiken v. Business and Indus. Health Group, Inc.,* 885 F. Supp. 1474, 1476 (D. Kan. 1995)).
31 *See* ABA Comm. on Ethics and Profl Responsibility, Formal Op. 91-359 (1991).
32 *Id.*
33 *Tipton,* at 452 (citing *Aiken,* 885 F. Supp. at 1477-78). "Forty states and the District of Columbia have adopted the Model Rules or their substantial equivalent." John E. Iole & John D. Goetz, *Ethics or Procedure? A Discovery-Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary,* 68 Notre Dame L. Rev. 81, n. 9 (1992). In fact, no court has adopted another view on the former employee issue since the Formal Opinion was issued in 1991. *Aiken,* at 1478.
34 *Tipton,* at 452.
35 961 F. Supp. 1288 (E.D. Mo. 1997).
36 *Id.* at 1291.
37 *Id.*
38 *OKeefe,* at 1292. *See* ABA Formal Op. 91-359, stating that factors such as "the terms of the relevant statutory and common law of the state of the corporations incorporation; applicable rules of evidence in the relevant jurisdiction; and relevant corporate documents affecting employees duties and responsibilities" will determine whether an employee falls within the proscriptions of the rule.
39 *Id.*
40 *Id.*
41 *Id.; see also* False laims, 31 U.S.C. § 3729 (1996).
42 *Id.* at 1293; *see also Terra Intl, Inc. v. Mississippi Chem. Corp.,* 913 F. Supp. 1306, 1321-23 (N.D. Iowa 1996).
43 *OKeefe,* at 1293 (citing *Terra Intl,* at 1321-22).
44 *Terra Intl,* at 1321-22.
45 *OKeefe* at 1293; *see also Transactions with Persons Other Than Clients,* note 1, at 399.
46 *OKeefe,* at 1295; *see Transactions with Persons Other Than Clients,* note 1, at 396. A Kansas court has stated that this comes from the plain language of the rule, and the fact that had the authors of the Model Rule desired to overturn the traditional view that former employees were not included in the term "party," they could have done so in explicit terms. *See Aiken v. Business and Indus. Health Group, Inc.,* 885 F. Supp. 1474, 1479 (D. Kan. 1995)).
47 *OKeefe,* at 1295.
48 *Id.*
49 *Id.*
50 *Id.*

51 *Id.*
52 *State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. OMalley*, 898 S.W.2d 550, 553 (Mo. banc 1995), *see also* John E. Tyler, III & Douglas R. Dalgleish, *Supreme Court of Missouri Protects Intangible Work Product*, 52 J. Mo. Bar 172 (1996); Kristen Scott Beerly, Note, *An Attorneys Thoughts Remain Inviolate: The Missouri Supreme Court Protects Intangible Work Product*, 62 Mo. L. Rev. 449 (1997).
53 *See U.S. ex rel. OKeefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, 1292-93 (E.D. Mo. 1997).
54 *See, e.g., Cram v. Lamson & Sessions, Co.*, 148 F.R.D. 259, 263-4 (S.D. Iowa 1993).
55 *Id.* at 263; Restatement (Second) of Agency § 219 (1957).
56 *Terra Intl, Inc. v. Mississippi Chemical Corp.*, 913 F. Supp. 1306, 1319 (D. Iowa 1996) (citing *Cole v. Appalachian Power Co.*, 903 F. Supp. 975, 977 (S.D. W.Va. 1995).
57 *See Informal Op. No.* 950105, The Missouri Bar Bulletin, Sept. 1995, at 17. ("The critical issue is the nature of the witness employment at the time of the incident, not the witness present employment.").
58 *See Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 627 (S.D. N.Y. 1990).
59 *Id.*
60 *Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259, 263 (S.D. Iowa 1993) (citing *Hanntz v. Shiley, Inc.*, 766 F. Supp. 258, 269 (D. N.J. 1991) (emphasis added)).
61 *See Transactions with Persons Other Than Clients*, note 1, at 398.
62 *See Terra Intl*, at 1315; ABA Formal Op. 91-359.
63 *See* Mark A. Buchanan, *Ex Parte Interviews with Former Employees After Aiken v. Business and Industry Health Group: No Longer a "Non-Contact" Sport*, J. K.B.A., January 1996, at 39; *see also* Brian Burris and Sheila Reynolds, *Transactions With Persons Other Than Clients, in* Kansas Ethics Handbook (Mark F. Anderson, et al. eds.), at § 9.22.
64 *See Cram v. Lamson & Sessions Co.*, 148 F.R.D. 259, 266 (S.D. Iowa 1993); *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981); *Burris and Reynolds*, note 65 at § 9.22.
65 *Transactions with Persons Other Than Clients*, note 1, at 391 (emphasis added).
66 *See Weider Sports Equip. Co. v. Fitness First, Inc.*, 912 F. Supp. 502 (D. Utah 1996).
67 *Johnson v. Cadillac Plastic Group, Inc.*, 930 F. Supp. 1437, 1440-41 (D. Colo. 1996).
68 *Id.* at 1441. Rule 11 of the Federal Rules of Civil Procedure imposes sanctions on a party for filing a pleading that is later found to be for an improper purpose, or the claims, defenses, and other legal contentions are frivolous, or the allegations and other factual contentions do not have evidentiary support, or are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Fed. R. Civ. P. 11(b).
69 *See* ABA Formal Op. 95-396 at II; Model Rule 4.2 (*as amended* in August 1995).
70 Restatement (Second) of Agency § 219 (1957).
71 *See Terra Intl, Inc. v. Mississippi Chem. Corp.*, 913 F. Supp. 1306, 1315 (N.D. Iowa 1996); *United States ex rel. OKeefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, 1295 (E.D. Mo. 1997); *Aikenv. Business and Indus. Health Group*, 885 F. Supp. 1474, 1478 (D. Kan. 1995); *see also H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541, 546 (Fla. 1997) ("That former employees may have engaged in actions or inactions while they were employed that may give rise to the liability of the employer is simply a matter of historical fact.")
72 *OKeefe*, at 1295.
73 *Id.*
74 *See* § 510.030, RSMo 1997, Rule 56.01(b)(3).
75 *See Carter-Herman v. City of Philadelphia*, 897 F. Supp. 899, 903 (E.D. Pa. 1995); *Terra Intl*, 913 F. Supp. at 1317-19.
76 *Terra Intl*, 913 F. Supp. at 1323.
77 *See* ABA Formal Op. 95-396, at Part V.
78 *See Terra Intl*, 913 F. Supp. at 1317; ABA Formal Op. 95-395, at Part VI, VII.
79 *See* Model Rules of Professional Conduct Rule 4.4 (Respecting the Rights of Third Persons 1994); *Lang v. Reedy Creek Improv. Dist.*, 888 F. Supp. 1143, 1148-49 (M.D. Fla. 1995); Heidi L. McNeil &

Sara R. Roberson, *Ex Parte Communications with Former Employees of an Adversary: When are They Permitted?,* 32 Ariz. Atty 19, 24 (1996).
80 *See* Catherine L. Schaefer, *A Suggested Interpretation of Vermonts DR 7-104(A)(1): The Employment Attorneys Perspective on Contacting Employees of an Adverse Business Organization*, 18 Vt. L. Rev. 95, 101 (1993).
81 *See Weider Sports Equip. Co., Ltd. v. Fitness First, Inc.*, 912 F. Supp. 502, 508 n. 8 (D. Utah 1996). Here, the court stated:
It is simplistic and naive to think that merely asking organizational counsel for permission to speak to an employee would be any more effective in gathering evidence than a prosecutor asking permission of a criminal defense counsel to speak to a defendant. Seeking permission from a company attorney is not realistic, although permission from the court may be more efficacious, but the analysis is standardless.
82 *See, e.g.*, text accompanying note 18; *Lang*, 888 F. Supp. at 1145 (stating the Courts "intent to weigh the Plaintiffs need for informal discovery and the Defendants need for effective legal representation and to avoid both unnecessary impediments to informal discovery and inadequate protection of corporate interests.").

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