Navigating Compliance with Rule 4.2 During An Internal Investigation

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One of the most challenging situations for attorneys who represent employees can be a client who still works for the employer, and has brought accusations of discrimination and/or harassment against his/her employer.

An employee that wants to object to the discrimination has two options: report the discrimination to the company's human resources department or someone else with authority within the company or report the discrimination to the state and/or federal agencies. The circumstances dictate how to advise the employee.

In contrast, an employee that asserts s/he is being subjected to harassment, in most cases, has to report the harassment and give the employer an opportunity to investigate and take corrective action.[1] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

The employee needs to understand that notice triggers the employer's duty to take prompt corrective action that is reasonably calculated to end the harassment. In both circumstances the employee potentially has the unpleasant task of continuing to work with the individual(s) s/he has accused of discrimination and/or harassment.

The employer's response to a complaint will be scrutinized in two ways: (1) "the temporal steps the employer takes to deal with the situation while it determines whether the complaint was justified"; and (2) "the permanent remedial steps the employer takes

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[1] The employer will not be held responsible for harassment if the employer (1) exercised reasonable care to prevent and correct any harassing behavior and (2) the employee unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

once it has completed its investigation." *Jernigan v. Alderwoods Grp., Inc.*, 489 F. Supp. 2d 1180, 1199 (D. Or. 2007). The employer must interview the employee who made the complaint in order to successfully accomplish both of these tasks.

As the attorney for the employee, when your client is interviewed by the company it can feel like you are sending your client into the lion's den. Ideally, a neutral third party conducts the investigation, but many employers rebuff the idea of spending money to hire a third party professional (whose not the company's attorney) to conduct the investigation. Instead, the employer has someone within the company conduct the investigation. So the employee may be interviewed by someone who has never received any training as to how to conduct an interview or an investigation of discrimination/harassment allegations. Consequently, the interviewer may be hostile, may try to intimidate the employee, and/or ask the employee inappropriate questions during the interview.[2] However, in all likelihood the interviewer will be taking cues from the company's attorney. In some cases the company's attorney or attorney's representative will be the interviewer. In that case Rule 4.2 of the Model Rules of Professional Conduct ("Communication with Person Represented by Counsel") applies and the employee's attorney should be permitted to attend the interview.

Notwithstanding who conducts the investigation, an attorney representing the

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[2] For example, in *E.E.O.C. v. Smokin' Joe's Tobacco Shop, Inc.*, CIV. A. 06-01758, 2007 WL 1258132 at *7 (E.D. Pa. Apr. 27, 2007), the court denied the employer's motion for summary judgment because there were questions of fact as to whether the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior. More specifically, the individual responsible for investigating the allegations of sexual harassment had no special training regarding sexual harassment investigations; there was no attempt to keep the sexual harassment complaint confidential and the employer immediately told the accused about the complaint. *Id.* Additionally, the court found the employer conducted its interview of the accuser under intimidating conditions. *Id.* Similarly, in *Clegg v. Falcon Plastics, Inc.*, 174 F. App'x 18, 26 (3d Cir. 2006) there was evidence that during the employee's interview, the interviewer appeared annoyed with her, cursed at her, questioned her job performance, and stated that she and the accused should both be fired. In both instances the court found the employer failed to demonstrate an affirmative defense under *Ellerth and Faragher*.

employee must assist her client in preparation for his/her interview. The employee needs to know what the interviewer can and cannot ask. For example:

- Under most circumstances an employer may not ask the employee to submit to a polygraph. Under the Employee Polygraph Protection Act (EPPA), it is unlawful for an employer "directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test." 29 U.S.C. § 2002(1).

- If your state requires "two-party consent" then the interviewer must get the employee's consent to record the interview. Similarly the employee can not record the interview without the interviewer's permission. If your state is a one-party consent state, the interviewer and/or your client can record the interview without permission. However, if the employer states in its handbook that employees are prohibited from recording any conversations at work, the employee could face disciplinary action by the employer if the employee records his/her interview without permission.

- An employee is under no legal obligation during an internal investigation to turn over his/her diaries.

- An employee is under no legal obligation during an internal investigation to provide the employer with access to the employee's medical records.

- There is also the possibility that the interviewer will ask to have access to the employee's social media or ask the employee to log onto her social media in the presence of the interviewer. In some states this is prohibited. For example in Maryland "an employer may not request or require that an employee or applicant disclose any user name, password, or other means for accessing a personal account or service through electronic communications device." [3]

At the conclusion of the employee's interview, the employee should ask when s/he will be informed about the outcome of the investigation. The employee should confirm that the interviewer is the employee's point of contact regarding the status of the

[3] Other states with similar laws include: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin and West Virginia. States with laws pending include: Alaska, Massachusetts, Missouri and New York.

investigation, and if not, then ask the interviewer to identify who the employee should contact in the future regarding this matter.

Immediately after the employee has been interviewed, s/he should write down everything s/he can recall:

- Who was present;
- How long did the interview last;
- What questions were asked;
- Was the interviewer reading the questions from a piece of paper;
- Was the employee given an opportunity to tell the interviewer everything s/he wanted to share;
- Were the client's responses being recorded and if so how were they recorded (computer or handwritten notes), and;
- What, if anything else the interviewer said during the interview.

This information can provide the employee's attorney with some insight about how the investigation is being conducted. E.g. whether the individual conducting the interview was a mouthpiece for the employer's attorney.

Notice of Representation

Rule 4.2 of the Model Rules of Professional Conduct ("Communication with Person Represented by Counsel") applies when an attorney knows the person is represented by counsel. Rule 4.2 states:

> 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.[4]

If the employee is asked during the interview whether counsel represents him/her, the employee should acknowledge s/he has consulted with an attorney about this matter.

[4] Rule 4.2 of the Model Rules of Professional Conduct has been adopted by all 50 states. In some cases, like Utah, the State Rule provides additional explanation to the applicability of the Rule.

If the interviewer is the employer's attorney then s/he should end the interview to avoid violating Rule 4.2.

Likewise, "A lawyer may not make a communication prohibited by this Rule through the acts of another." Comment 4 to Model Rule 4.2. "Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do." ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 95-396 (1995). If the individual interviewing the employee and working on behalf of the company's attorney discovers that counsel represents the employee then s/he should end the interview to avoid violating Rule 4.2.

The body of Rule 4.2 previously used the term "party," while the title used the word "person." This created controversy as to whether or not the rule applied before formal proceeding was initiated. "Party" is a technical word having a precise meaning in legal phrasing. It refers to those by or against whom a legal suit is brought. Yet, the comment to Rule 4.2 at the time stated, " The rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." American Bar Association Formal Opinion 95-396 addressed this controversy. The opinion noted: "[a] majority of the Committee believe, however, that the term 'party,' as used in Rule 4.2, should not be given so narrow a meaning" because the term "party" "has a broad as well as a narrow sense." *Id.* More significantly, the opinion stated:

> If the Rule is to serve its intended purpose, it should have broad coverage, protecting not only parties to a negotiation and parties to formal adjudicative proceedings, but any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the

> communicating law is acting. Such persons would include targets of criminal investigations, potential parties to civil litigation, and witnesses who have hired counsel in the matter.

Id. at pages 7-8.

Subsequently, the term "party" was replaced in the substance of the rule with "person." This substantive change eliminated the question as to whether the rule applies to an employee represented by counsel during an internal investigation. However, the following jurisdictions have not replaced the term "party" with "person" in the context of the rule: Arizona, Connecticut and Mississippi.

While the company conducts its investigation, the employee's attorney can do some fact finding of his/her own. "The right of counsel for all parties to interview willing nonparty witnesses in private and without a transcript being made is based on 'time-honored and decision-honored principles.' " Susan J. Becker, *Discovery of Information and Documents from A Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 Neb. L. Rev. 868 (2003). Co-workers can be key witnesses in employment cases and counsel for the employee should try to speak to the co-workers in private whenever possible.

The employee's attorney must determine if s/he can approach the co-worker without violating Rule 4.2. The employee's attorney does not want to obtain key information only to have it deemed inadmissible because counsel represented the co-worker. Counsel must familiarize himself or herself with the jurisdiction's interpretation of Rule 4.2 before interviewing co-workers while the company investigates your client's complaint.

Determining which Co-Workers are Approachable

When the defendant is a corporation, the status of representation extends to some of the corporation's employees. The employee's status with the corporation determines whether or not s/he is represented by the corporation's attorney and thus unapproachable. The courts agree that the corporation's attorney cannot assert a blanket representation to insulate all employees from ex parte communication with plaintiff's counsel.

Current Employees

The courts have contemplated which current corporate employees constitute represented parties under Rule 4.2, and have applied several different tests to determine exactly which employees are covered by the Rule. The courts have used the following list of tests: "management-speaking-agent test," "balancing test," "control group test," "blanket test," and "scope of employment test."

In 1995, the American Bar Association issued Formal Opinion 95-396 to clarify the Association's position. The opinion states in pertinent part:

> When a corporation or other organization is known to be represented with respect to a particular matter, the bar applies only to communications with those employees who have managerial responsibility, those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question.

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 at 1 (July 28, 1995).

As a general rule, counsel for the employee should consider whether the co-worker's statement, act or omission bind the company with respect to a particular matter. If not, in many jurisdictions the co-worker **can** be contacted without prior consent of the company's attorney.

Former Employees

In March of 1991, the ABA Committee on Ethics and Professional Responsibility issued a formal opinion that stated Rule 4.2 does not extend to former employees, including managerial employees or employees whose conduct could be the basis for imputing liability to the employer, or whose former statement could be admitted into evidence as an admission by the employer under Federal Rule of Evidence 801(d)(2). ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 at 6 (March 22, 1991).

The Committee, however, warned that attorneys "must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer." *Id.*

Then in February 2002, comment to Model Rule 4.2 was altered. The new comment is as follows:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent.

Comment [7] Rule 4.2.

Prior to the ABA's formal opinion there were some courts that held that a former employee can not have ex parte communication with plaintiff's counsel if the information provided by the former employee can impute labiality on the former employer. Since the ABA issued its March 1991 opinion on this subject, a majority of the courts have held that Rule 4.2 does not ban ex parte communication with former employees who no longer

have any relationship with the company. Some jurisdictions, however, continue to prohibit ex parte communications with former employees. Some jurisdictions allow contact as long as the contacting attorney observes certain limitations and some utilize one of the following tests:

- Control group test
- Management-speaking agent

Whether jurisdictions will adopt the uniform rule set forth in Comment 7 of the Rule that permits at least a presumption in favor of contact with former employees is yet to be determined. Until then, attorneys for the plaintiff should follow their jurisdiction's position on ex parte communications with former employees during an investigation even prior to litigation.

If counsel determines that ex-parte communication with the co-worker is permissible, counsel should follow the following procedure when contacting the co – worker:

- Identify yourself and who you represent
- Inform the co-worker that s/he does not have to speak to you
- Ask the co-worker if they are represented by counsel and if so, who?
- If not, ask additional questions to determine if the employee is part of the employer's litigation control group.
- Privilege does not apply to communication between employer's counsel and a former employer whom counsel does not represent.

If the co-worker is willing to speak to counsel, counsel should be prepared to ask for an affidavit. Counsel must keep in mind that no matter what category the co-worker is in, s/he cannot divulge the employer's confidential information.

Counsel needs to remember Comment 3 to the Rule provides that ex parte contact is prohibited, "even though the represented person initiates or consents to the

communication." ABA–AMRPC § 4.2.4. As has been noted, "by its plain terms, Rule 4.2 is not dependent on the wishes of the 'constituent of the organization,' but on whether that person fits within one or more of the categories specified by the Rule. If [constituent] does, that is the end of the matter, and the individual/constituent is powerless to waive the Rule's explicit prohibition as the run to the attorney." *Goswami v. DePaul Univ.*, 8 F. Supp. 3d 1004, 1009 (N.D. Ill. 2014).

Counsel needs to remember no matter how helpful ex-parte communication with a co-worker is, you are not helping your client if this contact results in a disciplinary complaint, motion to disqualify, motion to exclude testimony, and/or monetary sanctions.