

## Conducting Ex Parte Interviews

Interviewing witnesses outside of the formal discovery process, free from the monitoring of adverse counsel, is a cherished right of trial lawyers. Such informal *ex parte* interviews remain the hallmark of efficient trial preparation. However, ethical and policy considerations place some witnesses outside the realm of informal discovery. Pursuant to basic ethical rules, attorneys cannot, of course, have *ex parte* contacts with adverse, represented parties. Moving beyond this basic rule, the underlying policy considerations, and in some instances, the ethical mandates, become less clear with regard to *ex parte* interviews of: 1) potential class members in class action lawsuits, 2) current and former employees of corporate parties, and 3) treating physicians. (There is a movement afoot to expand the basic rule to include litigation experts, but Indiana law currently does not bar such contracts.)

### Basic Rule on Ex Parte Contacts

Indiana Rule of Professional Conduct 4.2 succinctly states the universal, building-block rule on *ex parte* contacts: “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 by law or a court order.” (Emphasis added). An attorney may not speak with a represented party concerning the matter at issue in the litigation, unless the party’s attorney consents. *See In re Mahoney*, 437 N.E.2d 49 (Ind. 1982). Conversely, the party can never consent. *See Ind. R. Prof. Cond. 4.2, cmt.3*. This basic prohibition expressly applies only to parties and, specifically those parties *in this matter*; therefore, parties outside of the case at hand may be interviewed, even if represented, and witnesses other

than parties to the action are generally not included in the prohibited class. *See Valassis v. Samelson*, 143 F.R.D. 118, 122 (E.D. Mich. 1992). The public policy behind the ethical mandate of Rule 4.2 is protecting the integrity and fairness of the adversary system of justice. *See Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 82 (D.N.J.1991) (Rule designed to, "preserve the integrity of the attorney-client relationship by protecting a represented party from being taken advantage of by adverse counsel."). Attorneys are free to inform clients and witnesses of their right to refuse to answer informal communications by opposing counsel. *See Ex Parte Nichols*, 624 So.2d 1325, 1327 (Ala. 1992); Stephen D. Easton, Can We Talk?: Removing Counterproductive Ethical Restraints Upon Ex Parte Communications Between Attorneys and Adverse Expert Witnesses, 76 Ind. L.J. 647, 738-39 (2001).

### **Class Action Party Members**

Application of the basic rule prohibiting *ex parte* interviews of represented parties becomes hazy in the context of class action lawsuits. Plaintiff class representatives and defendants clearly fall within the realm of the basic prohibition, but inclusion of putative class members varies depending on the stage of the class litigation and purpose of the *ex parte* contact.

Prior to the certification of a class, no plaintiff party exists except for the class representatives. *See Douglas R. Richmond*, Class Actions and Ex Parte Communications: Can We Talk?, 68 Mo. L. Rev. 813, 818 (2003). Therefore, communication with any prospective party member is likely to be acceptable even if the prospective party member is represented by counsel. *Id.* On the other hand, following the opt-out date, class members still involved in the litigation are parties, and may not be

contacted by other counsel if represented by counsel. *Id.*; *See Blanchard v. EdgeMark Fin. Corp.*, 175 F.R.D. 293, 300-05 (N.D. Ill. 1997).

An attorney's ethical obligations during the time-frame after certification but prior to the opt-out date are vague. Obviously, the prospective members may either become a party or choose to opt-out of the litigation without ever obtaining party status. Courts have generally erred on the side of precluding contact with members, especially concerning communications by the opposing party advising prospective class members to opt-out of the litigation. *See Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630-32 (N.D. Tex. 1994); *Fraley v. Williams Ford Tractor & Equipment Co.*, 5 S.W.3d 423, 426-36 (Ark. 1999) (calls by defendants' counsel to putative class members to discuss the merits of the case and attempting to persuade members to opt-out ruled as a violation of the Rule.)

### **Present and Past Corporate Employees**

There has been a great deal of controversy regarding *ex parte* contacts with current or former employees of corporate parties. Many commentators have urged, and some courts have held, that the prohibition extends to all current employees as well as all former employees. *See, e.g., Cagguila v. Wyeth Lab., Inc., Div. Of Am. Home Prods.*, 127 F.R.D. 653 (E.D. Pa 1989); Hume, *supra*, at 972-74. However, an expansion to former employees has been dissuaded by the American Bar Association, and expressly rejected by Indiana courts. *See* ABA Formal Opinion 91-359 at 3; *P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729, 738 (Ind. App. 2002) (As former employees cannot rationally be considered "parties" to the litigation and have no especial interest in the outcome, no prohibition against *ex parte* contact should exist.)

As to current employees, the comments to Rule 4.2 provide Indiana lawyers with critical guidance:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation *with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.* (Emphasis added)

For a discussion of how Indiana courts have applied this language, *See P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729, 732-33 (Ind. App. 2002); *Valassis*, 143 F.R.D. at 122-23. For a more extensive review of the issues raised by attorney interviews of employees, *See Susan J. Becker, Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints*, 51 Md. L. Rev. 239, 273 (1992).

### **Treating Physicians**

In personal injury actions, plaintiffs' treating physicians are often pivotal witnesses. However, under Indiana law, defense counsel are not permitted to have *ex parte* contacts with plaintiffs' doctors. *See Cua v. Morrison*, 626 N.E.2d 581, (Ind. Ct. App. 1993); *Short v. CSX Transp.*, 887 F. Supp. 206 (S.D. Ind. 1995). The purpose behind this prohibition is the preservation of the patient-physician privilege. By statute, Indiana physicians are incompetent to testify regarding matters communicated to them by patients in the course of diagnosis or treatment. *See* I.C. 34-1-14-5. Indiana courts recognize that when patients place their physical condition at issue in a lawsuit, they impliedly waive their privilege to that extent. *See Collins v. Bair*, 268 N.E.2d 95, 101 (Ind. 1971); *Canfield v. Sandock*, 563 N.E.2d 526 (Ind. 1990).

The implied waiver does not, however, extend to defense counsel the right to conduct *ex parte* interviews of treating physicians. The *Cua* Court found that allowing such contacts could seriously compromise the privilege by granting defense counsel the discretion to determine which information is relevant to the personal injury claim and thus discoverable. It is interesting to note that the *Cua* Court rejected the notion that there was a balance to be struck between “seeking the truth and protecting a privilege,” noting that there was no reason to believe that prohibiting *ex parte* conferences in any way interfered with defense counsel’s trial preparation. *See Cua*, 626 N.E.2d at 581.