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United States District Court, N.D. Illinois, Eastern Division.

Mary Ann BREEDLOVE, Joyce Culp, Reba Languis, and Drusilla Massaro, individually and on behalf of all others similarly situated, Plaintiffs,
v.
TELE–TRIP COMPANY, INC., Mutual of Omaha Insurance Company, and Mutual of Omaha Retirement Income Plan, Defendants.

No. 91 C 5702. | Aug. 14, 1992.

Opinion

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

***1** Plaintiffs seek permission from the court for their counsel to conduct *ex parte* interviews with Tele–Trip Company, Inc. ("Tele–Trip") former employees. Defendants allege such interviews would violate the American Bar Association ("ABA") Model Rules of Professional Conduct ("MRPC"). The Northern District of Illinois has adopted MRPC Rule 4.2 which reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Defendants argue that Rule 4.2 encompasses former employees even though they are not parties. According to defendants, plaintiffs may not conduct *ex parte* interviews with former employees because their past actions might be attributed to Tele–Trip. Because Tele–Trip could be liable for the actions of any employee regardless of whether the employee later leaves the company, defendants argue their counsel must be present at any interviews with former employees.

Defendants misunderstand the purpose of Rule 4.2. The rule is not intended to prevent a party from discovering potentially prejudicial facts; rather, it is intended to protect the attorney-client relationship of counsel with a corporate client. Former employees, unlike current ones, cannot be construed as parties or agents of a corporate party and, thus, are not within the scope of the rule. The Comment to Rule 4.2 limits the use of the term party to three types of agents: (1) managerial employees, (2) employees whose acts in the matter can be imputed to the organization, and (3) employees whose admission at trial would be binding on the organization. *Valassis v. Samelson,* 1992 U.S. Dist. LEXIS 10078 (E.D.Mich.). In the instant case, the former employees are not agents of Tele–Trip in any of the above categories and, therefore, cannot be parties for purposes of Rule 4.2.

A formal opinion of the ABA found that a lawyer may communicate "with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer." ABA Formal Op. 91–359, (Mar. 22, 1991). The opinion is based on the rule's plain language which limits counsel's direct contact with *parties.* Like the ABA, the court cannot overlook the plain language of Rule 4.2 which limits its scope to parties.

Defendants point to another aspect of the interpretive Comment to suggest the rule encompasses former employees. The Comment states:

> [T]his Rule prohibits communications by a lawyer for one party concerning the matter in representation with (1) persons having a managerial responsibility on behalf of the organization, and (2) with *any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability* or (3) whose statement may constitute an admission on the part of the organization.

***2** (emphasis added). Defendants read the term "any other person" to include former employees even though the language of the rule itself is specifically limited to parties. The Comment, however, cannot expand on the rule. Therefore, the term "any other person" cannot encompass former employees because they do not qualify as parties or agents of the corporation. *Action Air Freight, Inc. v. Pilot Air Freight Corp.,* 769 F.Supp. 899, 904 (E.D.Pa.1991). Defendants argue that "any other person" must refer to former employees or it would have no meaning; this argument has no merit. The term "any other person" demonstrates that the rule encompasses non-managerial current employees whose actions in a particular transaction could be imputed to the corporate party.

Defendants next urge the court to go beyond the language of Rule 4.2 and adopt a functional approach to its interpretation. Defendants cite cases which apply Rule 4.2 restrictions to former employees whose direct actions may be imputed to the corporations. *See e.g., PPG Industries, Inc. v. BASF Corp.,* 134 F.R.D. 118 (W.D.Pa.1990).[1] Under this minority view, former employees are not merely witnesses where their actions may be imputed to the corporation. The majority view, however, is more persuasive. Because the corporation is not deemed to admit anything said by its former employees, the court sees no more reason to prevent them from speaking with plaintiffs' counsel than it would with any other witness. The statements of the former employees in an *ex parte* interview do not constitute admissions of the corporation because they are no longer agents of Tele–Trip. As one court observed, "A former employee could certainly reveal factual matters which potentially could result in liability of the corporation [but the revelation] does not implicate the attorney-client privilege." *Hanntz,* 766 F.Supp. at 265.

Plaintiffs correctly acknowledge that former employees may have been privy to privileged conversations during their time with Tele–Trip. The interest in preventing inadvertent disclosure of privileged material, however, does not justify a blanket ban on communications with the opposing party's former employees. *Polycast Technology Corp. v. Uniroyal, Inc.,* 129 F.R.D. 621, 627–28 (S.D.N.Y.1990). Plaintiffs are, of course, barred from exploring these communications or other privileged matters with the witnesses. As plaintiffs' counsel are officers of the court, no ruling or order is necessary to hold them to this standard.

IT IS SO ORDERED.

Footnotes

1 Plaintiff correctly observes that defendants' cases notwithstanding, a majority of courts have held that Rule 4.2 does not apply to former employees. *See e.g., Sherrod v. The Furniture Center,* 769 F.Supp. 1021, 1022 (W.D.Tenn.1991); *Hanntz v. Shiley, Inc.,* 766 F.Supp. 258, 263 (D.N.J.1991).