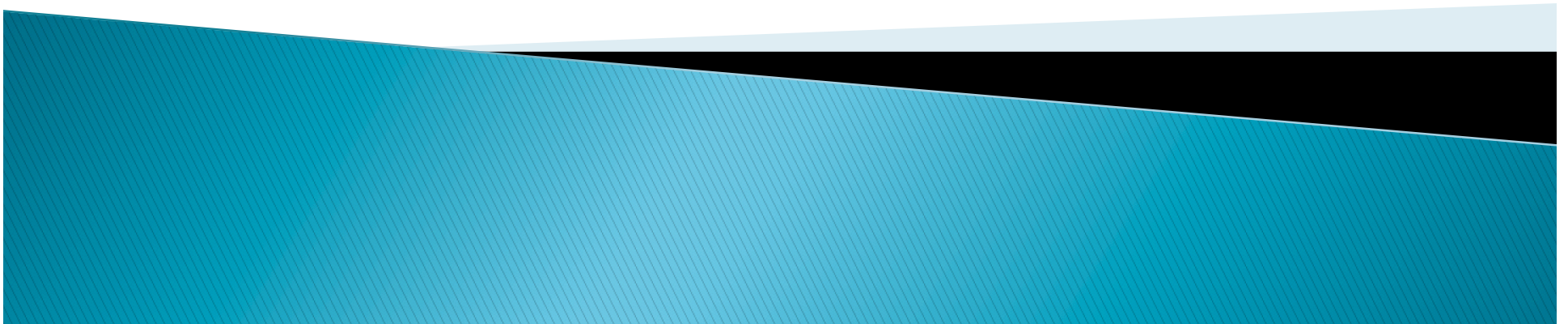


# Do's and Don'ts of Confidential Witnesses

*Kimberly A. Justice*



# Question 1

- ▶ Counsel are conducting an investigation into facts to support plaintiffs' antitrust claims. Which, if any, of the following persons are counsel ethically permitted to contact *ex parte*?
- A: Current administrative assistant to Vice President of Sales of corporate defendant
- B: Former CEO of alleged corporate wrong-doer
- C: Former in-house counsel to alleged corporate wrong-doer
- D: Former pricing manager of alleged corporate wrong-doer



# Determining Applicable Rule of Law

- ▶ Federal law governs the conduct of attorneys practicing in federal court. Generally, that law is embodied in the local rules of each court. *See Top Sales v. Designer Vans*, 1997 U.S. Dist. LEXIS 20347, at \*2 (N.D. Tex. Dec. 11, 1997) (“This court applies federal law to questions of attorney ethics, but state and national standards inform its decision.”); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 624 (S.D.N.Y. 1990).
- ▶ Attorneys must at all times comply with the standards of professional conduct adopted by the licensing authority of the State in which they practice. *See In re Snyder*, 472 U.S. 634, 645 n.6 (1985).



# ABA Model Rule of Professional Conduct 4.2

- ▶ Model Rule 4.2:

[I]n 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 to do so.

- ▶ Model Rule 4.2, comment 7 (effective January 1, 2005) (emphasis added):

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 the 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.*** If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. *Compare* Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.



# ABA Model Rule of Professional Conduct 4.2

- ▶ The majority of states have adopted Model Rule 4.2 and comment 7, in form and/or substance, specifically excluding former employees from the ban on *ex parte* communications (non-privileged matters, of course) (Alaska, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming)
- ▶ Some states expressly allow *ex parte* communications with former employees, but with certain qualifications: North Carolina (unless the former constituent participated substantially in the legal representation of the organization in the matter); Texas (current or formers unless conduct is a matter of issue); California (unless former's act or failure to act may bind the corporation or constitute corporate admission)
- ▶ Remaining states (Alabama, Arizona, Hawaii, Louisiana, Massachusetts, Mississippi, Nevada, New Jersey, New Mexico, Oregon, South Dakota, and Utah) are silent in their respective rules. Must look to case law and state bar association ethics opinions.



# Question 1 – Answers under Model Rule 4.2

- ▶ Counsel are conducting an investigation into facts to support plaintiffs' antitrust claims. Which, if any, of the following persons are counsel ethically permitted to contact *ex parte*?
  - A: Current administrative assistant to Vice President of Sales of corporate defendant (**perhaps**)
  - B: Former CEO of alleged corporate wrong-doer (**yes**)
  - C: Former in-house counsel to alleged corporate wrong-doer (**probably not**)
  - D: Former pricing manager of alleged corporate wrong-doer (**yes**)



## Question 2

- ▶ What, if anything, should counsel advise a potential CW during the *ex parte* interview(s)?
  - Identity and nature of call
  - Information provided may be used in a publically filed complaint
  - Information will be attributed to witness under pseudonym “CW” – possibility that witness identity may later be revealed in litigation
  - Confirm accuracy of any statements attributed to CW in advance of filing
  - Send copy of complaint? When?



# Lessons Learned

- ▶ *Millennial Media Sec. Litig.*, 2015 U.S. Dist. LEXIS 69534 (S.D.N.Y. 2015) (strongly criticizing the plaintiffs' communications with and reliance upon CWs for their complaint)
  - of the 11 witnesses quoted in the complaint, 10 were never told that they would be identified as a CW in a public complaint;
  - none of the 11 witnesses was told that his designation as a CW in a complaint created a possibility that his identity would later be revealed in litigation;
  - at least four of the 11 witnesses claimed to have been misquoted or misleadingly quoted, with at least one witness indicating that he lacked personal knowledge of the facts alleged; and
  - counsel had participated in only one of the interviews with these CWs, the remainder being conducted by in-house or external investigators, and counsel did not attempt to confirm with any of the 11 CWs the quotes attributed to them or that such quotes were presented in fair context, prior to filing.



# Lessons Learned

- ▶ *City of Livonia Employees' Ret. Sys. v. The Boeing Co.*, 711 F. 3d 754 (7th Cir. 2013) (remanding for a determination of appropriate sanctions)
  - plaintiffs' counsel failed to: (1) meet with or even talk to the witness whose statements were relied upon in the complaint (relying instead on an investigator's reports) to confirm the accuracy of the statements pled therein; and (2) show a copy of the complaint to the witness whose statements were relied upon. *Id.* at 760.

