

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

3-2004

Interviewing Ex-employees: One Answer, New Questions

Susan P. Koniak

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Susan P. Koniak, *Interviewing Ex-employees: One Answer, New Questions*, in 48 Boston Bar Journal 6 (2004).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/2132

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.





DATE DOWNLOADED: Fri Sep 2 13:25:23 2022

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 21st ed.

Susan P. Koniak, Interviewing Ex-Employees: One Answer, New Questions, 48 Boston BAR J. 6 (2004).

ALWD 7th ed.

Susan P. Koniak, Interviewing Ex-Employees: One Answer, New Questions, 48 Boston Bar J. 6 (2004).

APA 7th ed.

Koniak, S. P. (2004). Interviewing ex-employees: one answer, new questions. Boston Bar Journal, 48(2), 6-7.

Chicago 17th ed.

Susan P. Koniak, "Interviewing Ex-Employees: One Answer, New Questions," Boston Bar Journal 48, no. 2 (March/April 2004): 6-7

McGill Guide 9th ed.

Susan P. Koniak, "Interviewing Ex-Employees: One Answer, New Questions" (2004) 48:2 Boston Bar J 6.

AGLC 4th ed.

Susan P. Koniak, 'Interviewing Ex-Employees: One Answer, New Questions' (2004) 48(2) Boston Bar Journal 6

MLA 9th ed.

Koniak, Susan P. "Interviewing Ex-Employees: One Answer, New Questions." Boston Bar Journal, vol. 48, no. 2, March/April 2004, pp. 6-7. HeinOnline.

OSCOLA 4th ed.

Susan P. Koniak, 'Interviewing Ex-Employees: One Answer, New Questions' (2004) 48 Boston Bar J 6

Provided by:

Fineman & Pappas Law Libraries

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

By Susan P. Koniak

Interviewing Ex-Employees: One Answer, New Questions



Susan P. Koniak is a professor at Boston University School of Law where she teaches the law and ethics of lawyering and advanced civil procedure. She has written many articles on the law governing lawyers as well as articles on class actions, constitutional law, administrative law and the norms of private groups and organizations. She is one of the co-authors, along with Geoffrey C. Hazard & Roger C. Cramton, of *The Law and Ethics of Lawyering*, now in its 3rd Edition. She has served as an expert witness and is regularly consulted by lawyers, judges and business entities on matters of legal ethics, judicial ethics and corporate governance. She is a graduate of Yale Law School and New York University.

In *Clark v. Beverly Health and Rehabilitation Services, Inc.*, 440 Mass. 270, 797 N.E.2d 905 (2003), the Supreme Judicial Court held that a lawyer for a party may contact former employees of the opposing party without violating Mass. R. Prof. C. 4.2. Lawyers who represent entities with former employees are not happy because, where 4.2 applies, the Rule makes it harder for the other side's lawyers to obtain information that might be damaging to the organization. Understandable. But some purport to be aghast, which is ridiculous. The *Clark* holding is in line with the ABA's position, the text of the Restatement of the Law Governing Lawyers, and the holdings of many (probably most) courts that have considered the question.

Clark means lawyers may now interview former employees of the opposing party without first alerting the opposing party's counsel. Simple enough. But there are two caveats: one quite straightforward; the other, knotty. First, in communications with the former employees of one's opponent, as in communications with all people, lawyers must be honest, Rule 4.1; must be mindful of the requirements of Rule 4.3 (on dealing with unrepresented people), whenever the former employee is not represented by individual counsel; and must abide by Rule 4.2, if the former employee is represented by individual counsel. So now is a good time to sharpen ethical habits as to all communications with non-clients.

The second caveat is much more complicated. The Court said: "[C]ounsel must also be careful [when interviewing former employees of one's opponent] to avoid violating applicable privileges or matters subject to appropriate confidences or protections." Because the categories of information to be avoided are not precisely defined and the steps sufficient to demonstrate due care to avoid the information that is to be avoided (whatever that is) are not described, no one now can speak with certainty about the meaning of *Clark's* second caveat.

Nevertheless, information covered by the attorney-client privilege or that constitutes an opponent's trade secret appears to be at the caveat's core. Thus, when speaking to any former employee, the interviewing lawyer would be wise to take affirmative steps at the beginning of the conversation to remind the former employee not to divulge what that person said (or wrote) to the organization's lawyer (particularly while an employee) or what that lawyer said or wrote to the employee, in the past or recently. The interviewing lawyer may, however, explain that the former employee may discuss a fact that the employee also told the organization's lawyer, but should not tell the interviewer that he told that fact to the organization's lawyer. The interviewing lawyer should also tell the former employee not to divulge any information the employee believes might be the former employer's trade secret or the organization's other confidential information.

If, despite these instructions, the former employee starts revealing conversations with the opponent's counsel, proffers documents that reflect such communications or begins to divulge anything that is likely to be a trade secret, the interviewer should interrupt immediately and return any tendered documents unread beyond the point where their protected nature emerged. Less clear is the lawyer's obligation if the former employee starts divulging material the employee says he promised by contract or court settlement to keep secret. The scant authority that exists, including the Comment to Restatement of the Law Governing Lawyers § 102, which the *Clark* court cites, generally says that the interviewing lawyer may receive such information but there's some chance the courts of this state will decide otherwise when the question is squarely presented. Less clear still is what to do about information that a court might hold is

subject to the former employee's ongoing duty of confidentiality to his former employer. The scope of the former agent's duty of confidentiality under agency law is potentially quite broad and its outlines are imprecise. See Restatement of Agency §396 (former agents). See also §§ 395 (current agents) and 312 (actionable wrong for third party to have encouraged agent's breach).

Lawyers must not encourage or entice others to break the law directly or through the actions of others. Arguably there is no more important ethical precept than that. While it is relatively easy for lawyers to avoid encouraging others to break relatively clear law it is much harder for lawyers, who are rightly prohibited from giving non-clients legal advice, to discuss or even be able to discern when a former agent is breaching the much more nuanced and uncertain duty of confidentiality imposed on former agents under agency law. More

guidance in this area is needed and we can only hope that the Massachusetts courts do a better job at explicating the scope of *Clark's* second caveat than the courts of other states have done. ■

Case Focus provides a timely, in-depth, expert review of a new decision — federal, state, administrative — of particular importance generally, or practice area specific. The analysis focuses on the impact on prior case law or statutory interpretation, the complexities/gray areas of the opinion and what practitioners need to know about the effect the opinion has on their practice.

BRENDAN J. O'BRIEN ASSOCIATES

Investigations and Litigation Support Services

Litigation Strategies From A Position Of Knowledge
Know the Facts
Know the Documents

Specializing in Fact Determination and Investigative Support for:
Complex & Document Intensive Litigation
Criminal & Civil Environmental Matters
White-Collar Defense Investigations
Government Investigations
Root Cause Investigations
Compliance Audits

Licensed in Massachusetts & Connecticut
26 Years Experience as a Federal Criminal Investigator

272 Quinobequin Road, Newton, MA 02468-1816
617-244-4948
BjoAssociates@aol.com

HONORABLE HERBERT ABRAMS

Justice of the Superior Court, retired

AVAILABLE AS A NEUTRAL IN ARBITRATION, MEDIATION, CASE EVALUATIONS AND MINI-TRIALS

Fellow, American College of Civil Trial Mediators,
Harvard Law School Mediation Workshop,
Middlesex Multi-Door Courthouse Panel Member,
Appeals Court Conference Counsel,
Judicial Hearing Officer – National Arbitration
& Mediation,
Member of ABA Section of Dispute Resolution,
Panel Member, American Arbitration Association.

12th Floor
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210

Tel: 617.371.1000 Fax: 617.371.1037