speaking of ethics

By Heather Bupp-Habuda

Ex Parte Contact With Former and Current Employees

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The relevant rule of the D.C. Rules of Professional Conduct that governs communication with an adverse party, Rule 4.2(a), generally prohibits communication about the subject of a representation between a lawyer and a party known to be represented by another lawyer, unless the lawyer has prior consent of opposing counsel. With respect to employees, Rule 4.2(b)–(c) provides:

> (b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer.
> (c) For purposes of this Rule, the term "party" includes any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates.

Lawyers representing or suing organizational, corporate, or governmental clients regularly confront contact issues. Similarly, lawyers representing former or current employees of organizational, corporate, or governmental clients also may encounter these issues.

The D.C. Bar Legal Ethics Committee has published three opinions that primarily address a lawyer's ex parte communication with nonparty former or current employees of a party-opponent. *See* D.C. Bar Legal Ethics Comm. Ops. 287 (1991), 129 (1983), 80 (1979); *see also id.* Ops. 331 (2005), 295 (2000), 274 (1997), 263 (1996), 258 (1995) (all deal with aspects of Rule 4.2 that will not be covered here). (Proposed changes to Rule 4.2 and its comments will not be covered in this article either.) In light of the number of inquiries received by D.C. Bar legal ethics counsel about ex parte contact with former or current employees of a party-opponent, a refresher on these points follows.

Attorneys know that interviews with former and current employees often yield substantial, relevant information that is useful to the representation, regardless of what type of case it is. Any "restrictions on interviews with potential witnesses frustrate the policy that lawyers should be able to gather all relevant facts in an expeditious and economic manner." *Id.* Op. 129.

Comment 3 to Rule 4.2 provides additional clarification on this point:

> The Rule [4.2] does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do *not* also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. [Emphasis added.]

Consistent with comments 2 and 3, the committee opined in Opinions 129 and 287 that if the opposing party is a corporation, a lawyer may interview persons employed by that corporation without opposing counsel's consent if those employees do not have the authority to bind or commit the corporation with respect to the pending litigation. *See Banks v. Office of the Senate Sergeant-at-Arms,* 222 F.R.D. 1 (2004) (citing D.C. Bar Legal Ethics Comm. Op. 129).

In determining who has the authority to bind the organization, the rationale adopted in Opinions 80 and 129 is instructive. The identification of such employees should be no more inclusive than necessary to serve the purposes of the rule, so that there will be no unnecessary hindrance to the search for information or the pursuit of grievances. Essentially, the lines cannot be drawn unjustifiably widely, or one can expect the lines to be challenged.

A reading of Rule 4.2 and its comments raises two competing concerns. "Rule 4.2 is not designed to protect against disclosure of prejudicial facts." D.C. Bar Legal Ethics Comm. Op. 287. A significant concern, however, is that a former employee who was privy to privileged information may be inclined, without counsel present, to reveal a confidence or secret. A lawyer may not solicit information when communicating with former employees of a party-opponent that is reasonably known or that reasonably should be known to the lawyer to be protected from disclosure. *Id.* Nonetheless, in situations where counsel knows that a former employee's disclosure of clearly privileged information is not authorized by the entity holding the privilege, a lawyer may violate Rule 8.4(c) if the lawyer uses the privileged information. *Id.* at n.3.

As a result, it is critical to compliance with Rule 4.2(b) and comment 3 that a lawyer disclose to any employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer. This disclosure should be in writing for numerous reasons. *See* D.C. Bar Legal Ethics Comm. Op. 287.

Upon recently delivering guidance about Rule 4.2(b) disclosures to an attorney calling for ethics assistance, I was met with the apt response, "But no employee will talk to me after I say *that*!" Of course, that is a distinct possibility. Even if Rule 4.2 did not impose disclosure requirements, Rule 4.3 affirmatively proscribes dealing with unrepresented persons in an ambiguous manner. So, from either view, timely disclosures must be made.

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