Re: Advisory Opinion 2004-01
Date: February 17, 2004

SUBJECT: Ex Parte Communication with Former Employees of Corporate Adversary

Facts: The attorney for a plaintiff wishes to communicate with former employees of the corporate defendant. The attorney does not intend to notify the lawyer for the corporate defendant.

Discussion: Arkansas Rule of Professional Conduct 4. 2 bars communication with an adverse party without prior notice to, and the consent of, the attorney for the adverse party. That Rule protects confidential information, prevents intrusion upon the attorney client relationship, and maintains the adversary system of justice.

That rule applies equally, to corporate litigants. The Rule prohibits communications by the attorney for one party with persons having a managerial responsibility in the corporation, and with any other person whose act or omission may be imputed to the corporation for purposes of liability, or whose statement may constitute an admission. Comment 2 to the Rule. Accordingly, the attorney for the plaintiff in a slip and fall accident may not communicate with managers of the defendant, nor with employees who may have been involved or whose statements may constitute an admission of liability. In the absence of the consent of the corporate attorney, the attorney for the plaintiff must proceed through formal discovery methods to obtain information from such employees.

Here the issue, however, is with former employees of the corporate defendant. Neither the rule nor the comments address this situation. But several reasons lead this committee to the conclusion that former employees, no matter what their former position, are to be treated differently.

1) The structure and language of the rule focus on the present tense and restrict communications. Such restrictions should not be extended without clear authorization. Comment 2 is written in the present tense and refers to current employees. Only with forced reading could the language be extended to former employees. Likewise the text of the rule refers to communications with "a party." Former employees are not parties.

2) Formal Opinion 91-359 of the American Bar Association concluded that the rule does not extend protection to former employees.

3) Recent judicial opinions have come to the same conclusion. See, e.g., Clark v. Beverly Health and Reh. Serv. Inc., 797 N.E. 2d 905 (Mass. 2003); P.T. Barnum's Nightclub v. Duhammell, 766 N.E. 2d 729 (Ind. Ct. App. 2002); Smith v. Kansas City Southern Ry. Co., 87 S.W. 3d 266 (Mo. Ct. App. 2002).

4) The August 2002 revisions of the Rules of Professional Conduct contain express language in Comment 7 to Rule 4.2 removing restrictions on contacts with former employees: "Consent of the organization's lawyer is not required for communication with a former constituent." This Professional Ethics committee and the House of Delegates of the Arkansas Bar Association have approved this new language. This language is currently pending before the Arkansas Supreme Court.

5) Some opinions draw a distinction between those former employees who were in the litigation control group or management group and those who were not. For example, Klier v.

Sordoni Skanska Constr. Co., 766 A. 2d 761 (N.J. 2001). However, we find no basis for any distinction except between present employees and former employees. The purpose of 4.2 is to protect the attorney-client representation and the accompanying confidences. However, the former employee is no longer represented by the corporate attorney. The no-contact rule should not be expanded or interpreted in such a fashion that it creates further restrictions on the flow of information.

We do note the limitations of our opinion. Although the plaintiff's attorney is permitted to communicate with those former employees, they are not compelled to speak. Those former employees may be represented by their own counsel in the matter; and upon knowledge of that representation, the plaintiff's attorney must cease communication with them. In addition, other factors may bar the former employees from speaking. For example, former corporate attorneys may remain bound by the evidentiary privilege or the ethical standard of confidentiality. Likewise other corporate officials may be bound by confidentiality agreements. The former employee may be still represented by corporate counsel. The comment to Rule 4.4 emphasizes that the lawyer in seeking information must do nothing that violates the rights of the corporation or is an unwarranted intrusion into a legal relationship. See Proposed Comment 1 to Rule 4.4.

Conclusion: Within the scope of Rule 4.2, an attorney is permitted to communicate in regard to the matter in question with former corporate employees without seeking or obtaining the consent of the corporate attorney.

NOTICE

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ARKANSAS BAR ASSOCIATION

By:_________________________________

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