Can We Talk? Are You My Client? Timeless Ethics Questions for All of Us

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State Bar of Texas Labor & Employment Law Section
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Can We or Can't We? Talk, that is…

- Texas Disciplinary Rules of Professional Conduct
- ABA Model Rules
  - Comments
  - Court Decisions
  - Committee Opinions
  - Roles
    - Client-Lawyer Relationship, Counselor, Advocate, Non-Client Relationships, Law Firms and Associations, Public Service, Information about Legal Services, and "Maintaining the Integrity of the Profession.

Hypothetical

- Plaintiff's counsel issues a pre-suit demand letter alleging that a former sales representative was terminated for taking FMLA leave. The manager who made the allegedly retaliatory termination decision no is longer employed at the company, but while employed, supervised the sales representative and consulted frequently about performance concerns. The demand letter recites several facts about the Company's FMLA program and references the manager as the source of certain facts.
- In-house counsel contacts external counsel with the concern: Was the plaintiff's counsel lawyer permitted to contact the manager to ask her questions about the termination decision?

Ex-Parte Contacts with Represented Person: Texas DRPC 4.02 (a)

- In representing a client, a lawyer shall not:
  - communicate or cause or encourage another to communicate
  - about the subject of the representation
  - with a person, organization or entity of government
  - the lawyer knows to be represented by another lawyer
  - regarding that subject,
  - unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

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Contacts "with a person, organization or entity of government" …

- Policy: protect the attorney-client relationship
- Policy: protect vulnerable swimmers from legendary sharks
- Comment 4:
  - *persons having a managerial responsibility that relates to the subject of the representation*
  - *persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable*
- "This Rule is based on the presumption that such persons are so *closely identified with the interests of the organization or entity of government* that its lawyers will represent them as well."

Contacts “with a person, organization or entity of government” …

- DRPC 4.02(c): For the purpose of this rule, ‘organization or entity of government’ includes persons:
  - *presently* having a managerial responsibility that relates to the subject of the representation,
  - or *employed* by such organization or entity *and* whose act or omission in connection with the subject of representation may create vicariously liable for such act or omission.

Contacts "with a person, organization or entity of government" …

- DRPC 4.02 Comment 4 continues: This Rule does not prohibit a lawyer from contacting:
  - *a former employee* of a represented organization or entity of government
  - a person presently employed whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue
- Can be interviewed by an attorney for an opposing party provided the attorney makes a full disclosure of the connection with the suit and explains the purpose of the interview. Ethics Opinion 461 (October 1988).

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  - **regarding that subject,**
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Ex-Parte Contacts with Represented Person: Texas DRPC 4.02

- Loose ends:
  - Instruct client to contact other party after consultation and engagement
  - Copying client on letter to lawyer
    - No, but….
    - Demand for physical exam-Opinion 358 (December 1971)
  - Unrepresented lawyer as party (*Vickery*)
    - Settlement negotiations--Opinion 653 (January 2016)
    - Rule 8.04(a)(3) (dishonesty, fraud, deceit, misrepresentation)
  - DRPC 4.02(b): expert witnesses
  - DRPC 4.02(d): second opinion

Elephant in the Room

- Permitted to contact, communicate with ex-employees
- Not permitted to breach privileges, nor are they

Upjohn Test

- *Upjohn Co. v. United States*, 449 U.S. 383 (1981) adopted the "subject matter test" to determine whether discussions between *current* employees and a corporation's counsel are privileged.
- A communication is privileged if it:

  1) was made to the corporation's counsel, acting as such;

  2) was made at the direction of corporate superiors, for the purpose of securing legal advice from counsel;

  3) concerned matters within the scope of the employee's corporate duties; and

  4) the employee was sufficiently aware that he/she was being questioned so the corporation could obtain legal advice.

Upjohn Test Applies to Former Employees

- Justice Burger's concurring opinion in *Upjohn* stated that the same test should apply to communications with former employees when a "former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment."
- The vast majority of courts have adopted Justice Burger's position. *See, e.g., Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (collecting cases).
    - And essentially ignored the requirement that the communications were made at the direction of corporate superiors.

What communications with former employees are privileged?

- The focus is not the employment status of the employee, but the content of the communication.
- Communications made for the purpose of learning facts that the former employee "was aware as a result of her employment" are privileged. *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999).
- **Communications that go beyond investigation of the former employee's conduct or knowledge are not attorney-client privileged.**
  - Discussions about how to answer questions during a deposition;
  - Communications about other witnesses' testimony;
  - Conversations about facts developed during the litigation of which the former employee did not have independent knowledge;
  - Legal counsel's opinion of the case.
- Unless separately engaged as counsel.

Hypothetical

- Plaintiff's counsel issues a pre-suit demand letter alleging that a former sales representative was terminated for taking FMLA leave. The manager who made the allegedly retaliatory termination decision no is longer employed at the company, but while employed, supervised the sales representative and consulted frequently about performance concerns. The demand letter recites several facts about the Company's FMLA program and references the manager as the source of certain facts.
- Was the plaintiff's counsel lawyer permitted to contact the manager to ask her questions about the termination decision?

Model Rule 4.02

- In 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 to do so by law or a court order.

Model Rule 4.2 Comment 7

- In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who (1) supervises, directs or regularly consults with the organization's lawyer concerning the matter or (2) has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter.
- Consent of the organization's lawyer is not required for communication with a former constituent.
- But in communicating with a 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, Comment [2].
- 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.

The Majority Rule

- The majority rule: *ex parte* communications between plaintiff's counsel and former employees are permissible.
    - *See, e.g., Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. May 2, 2011); *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996).
- But counsel who speak with a former employee have a responsibility not to inquire into areas that may be subject to the attorney-client or work product privileges, and should be careful not to induce the former employee to divulge any information that might violate the corporation's attorney-client privilege.
    - *See Smith v. Kalamazoo Opthamology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004).

The Minority Rule

- The minority rule: no *ex parte* communications between plaintiff's counsel and a former employee where the former employee's acts or omissions may be imputed to the corporation, or where the former employee possesses confidential or privileged information concerning the disputed matter.
    - *See, e.g., Armsey v. Medshares Mgmt. Serv., Inc.*, 184 F.R.D. 569 (W.D. Va. 1998); *Browning v. AT&T Paradyne*, 838 F. Supp. 1564 (M.D. Fla. 1993); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992).
- These decisions occurred before the 2002 Amendments to the Model Rules, which revised Comment 7 to clarify that "consent of the organization's lawyer is not required for communication with a former constituent."

Elephant in the Room

- Yes, permitted to contact, communicate with ex-employees
- No, not permitted to breach privileges, nor are the ex-employees.
- In light of *Upjohn*, and the breadth of the communications and work product privileges, how does the attorney know which "witnesses" are safe until after the employee has breached the privilege?
- Risk—the ethics question swallows the original dispute.
- *In re RSR Corp. & Quemetco Metals Ltd., Inc.*, Slip Op. No. 13-0499 (decided December 4, 2015)
  - Egregious facts alleged.
  - *In re Meador* identified as proper test for disqualification involving witness providing privileged information.

Disqualification Risk

- *In re Meador, 968 S.W.2d 346 (Tex. 1998)*
  - "Without doubt, there are situations where a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified, even though the lawyer was not involved in obtaining the information. Discovery privileges are an integral part of our adversary system."
  - *List of factors to consider for disqualification*

In re Meador, 968 S.W.2d 346 (Tex. 1998)

- We emphasize that these factors apply only when a lawyer receives an opponent's privileged materials outside the normal course of discovery.
  - 1) whether the attorney knew or should have known that the material was privileged;
  - 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
  - 3) the extent to which the attorney reviews and digests the privileged information;
  - 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
  - 5) the extent to which movant may be at fault for the unauthorized disclosure;
  - 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

Thank You