

The Supreme Court of Ohio

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OPINION 2016-5

Issued August 5, 2016

Withdraws Advisory Opinion 2005-3

Communication With Current and Former Corporate Employees

SYLLABUS: When a corporation is known to be represented with respect to a particular matter, Prof.Cond.R. 4.2 prohibits communication without the consent of the corporate lawyer with a current employee of the corporation who supervises, directs, or regularly consults with the corporation's lawyer concerning the matter, who has authority to obligate the corporation with respect to the matter, or whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability. A lawyer may communicate on the subject matter of the representation with former employees of the corporation, without notification or consent of the corporation's lawyer, as long as the former employee is not represented by counsel. A lawyer representing an interest adverse to a corporation may communicate with certain employees of the corporation without the consent of a corporation's lawyer, even when a corporate lawyer asserts blanket representation of the corporation and all of its current and former employees.

QUESTION: May a lawyer who represents an interest adverse to a corporation communicate with current and former employees of the corporation without the consent of the corporation's lawyer, when the corporate lawyer asserts blanket representation of the corporation and all current and former employees?

APPLICABLE RULES: Prof.Cond.R. 1.6, 4.2, 4.3, and 4.4.

OPINION: A lawyer's communication with current and former employees of the corporation is addressed by Prof.Cond.R. 4.2, which provides:

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.

The rule “provide[s] protection of the represented person against overreaching by adverse counsel, safeguard[s] the client-lawyer relationship from interference by adverse counsel, and reduce[s] the likelihood that clients will disclose privileged or other information that might harm their interests.” ABA, Formal Opinion 95-396 (1995), Prof.Cond.R. 4.2, cmt. [1].

Current employees

Certain categories of current employees of a corporation are considered represented by the corporation’s lawyer and are shielded from contact by adverse counsel. Prof.Cond.R. 4.2, cmt. [7] sets forth three categories of employees an adverse lawyer may not contact without permission of corporate counsel. Specifically, the comment provides that communication is prohibited with current employees who 1) supervise, direct, or regularly consult with the corporation’s lawyer concerning the subject of the representation; 2) have the authority to obligate the corporation with respect to the matter; and 3) employees whose “act[s] or omission[s] in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.” *Id.*

Extreme caution should be observed by adverse lawyers when interviewing current employees, even those employees who do not satisfy the categories set forth in Prof.Cond.R. 4.2, cmt. [7]. When an adverse lawyer interviews current employees, he or she may inadvertently violate Prof.Cond.R. 4.2 because the lawyer typically is not privy to which employees of the corporation regularly consult with the corporation’s lawyer or have the authority to bind the organization. In close cases, it may be appropriate to notify the corporation’s lawyer before making contact with current employees. If a legitimate basis for denying contact is given by the corporate lawyer, the adverse lawyer may need to conduct further investigation through other means or engage in limited discovery before initial contact with a current employee is made.

Former employees

Once a management employee has left the corporation, he or she no longer supervises, directs, or consults with the corporation's lawyer and cannot obligate the organization. Former employees cannot bind the organization and their statements cannot be introduced as admissions of the organization.¹ Geoffrey Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, Sec. 38.7 (3d ed. Supp. 2011). Similarly, under the law of agency, the former management employee is no longer acting on behalf of the organization. See Mich. Op. RI-360 (2013). Consequently, a lawyer may communicate on the subject matter of the representation with any former and unrepresented corporate employees, including those in management, without notification or consent of the corporate lawyer.

Communications are also permitted under Prof.Cond.R. 4.2 with unrepresented former employees whose prior acts or omissions committed while they were employed may be imputed to the organization and give rise to civil or criminal liability. This conclusion is supported by the distinction between current and former employees, referred to as "constituents" in comment [7] to Prof.Cond.R. 4.2. The comment directs that, in the "case of represented organization, [the] rule prohibits communications with a constituent of the organization . . . whose act or omission may be imputed to the organization" (emphasis added.) This sentence is immediately followed by the statement that "[c]onsent of the organization's lawyer is not required for communication with a former constituent," thus clarifying that a lawyer's communication is permitted with former employees, even those whose prior act or omissions may eventually be imputed to the corporation. *Id.* (emphasis added.)

In 1991, the ABA concluded that Model Rule 4.2 did not prohibit communication with any former corporate employee, even if they were in one of the categories under which communication was prohibited while they were employed. ABA Formal Op. 1991-359 (a lawyer may communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.)

The Board previously interpreted former DR 7-104(A)(1), the predecessor to Prof.Cond.R. 4.2, as permitting communication with former employees whose

¹ Statements made by a "party's agent or employee on a matter within the scope of that relationship and while it existed" are non-hearsay statements admissible against the party. Consequently, only communications with current employees of a corporation are prohibited when their admissions would constitute admissions of the corporation under Fed.R.Evid. 801(d)(2)(D).

prior acts or omissions may give rise to corporate or organization liability. Adv. Op. 1996-1. Federal courts are also in accord with the view that contact with all former unrepresented employees is permissible. In *United States v. Beiersdorf-Jobst, Inc.*, 980 F. Supp. 257, 262 (N.D. Ohio 1997) (citing with approval Adv. Op. 1996-1), the court held that contact with former employees was permitted under former DR 7-104(A)(1), based on the premise that the “unimpeded flow of information between adversaries . . . encourage[s] the early detection and elimination of both undisputed and meritless claims.” The court made no distinction between different categories of former employees, *e.g.* management employees, employees with the authority to bind the corporation, or whose prior acts or omissions may be imputed, and suggested no exceptions to its general holding. *See also Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004) (*ex parte* contact with former employees is not subject to Rule 4.2).

Based on the foregoing, the Board reiterates its position in Adv. Op. 1996-1 and concludes that communication with a former employee, even one whose prior acts or omissions may be imputed to the corporation, is permissible under Prof.Cond.R. 4.2.

Before interviewing a former employee, a lawyer should disclose his or her identity, and fully explain that he or she represents a client adverse to the corporation. The lawyer also must immediately inform the former employee not to divulge any privileged communications that the former employee may have had with corporate or other retained counsel. Prof.Cond.R. 1.6, 4.4 (lawyers may not use methods to obtain evidence that violate the legal rights of third parties.) Consequently, a lawyer must endeavor not to solicit information from former employees that the lawyer knows or reasonably knows to be protected by the attorney-client privilege. *See D.C. Bar Op. 287*. Nor may a lawyer communicate *ex parte* with a former employee who is represented by independent counsel, or if the corporation's lawyer has agreed to provide representation in the matter. *See Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d 968 (N.D. Ohio 2008).

Finally, Prof.Cond.R. 4.3 requires a lawyer not to give advice to an unrepresented former employee other than advice to seek counsel in the matter. In essence, the rule requires an adverse lawyer contacting a former employee of an opposing corporate party to identify his or her role in the matter, the identity of the lawyer's client and the fact that the witness's former employer is an adverse party to the litigation.

Blanket representation of representation

A corporate lawyer's blanket assertion of representation of the corporation and all of its current and former employees is unsupported by the Rules of Professional Conduct. Such a declaration by a corporation's lawyer does not, by itself, establish legal representation of all employees and is fraught with potential and inherent conflicts of interest for the corporate lawyer.

A lawyer representing a corporation may not prohibit contact with all current and former employees. A similar view was expressed by the ABA: "[A] lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization." ABA, Formal Op. 95-396 (1995).

CONCLUSION: When representing an interest adverse to a corporation, a lawyer may communicate without the consent of a corporation's lawyer with certain current and any former employees of the corporation. Prof.Cond.R. 4.2 prohibits communications without the consent of the corporation's lawyer with a current employee of the corporation who supervises, directs, or regularly consults with the corporation's lawyer concerning the matter, has authority to obligate the corporation with respect to the matter, or whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability. A lawyer's communication with unrepresented former employees does not violate Prof.Cond.R. 4.2, even if the employee's prior acts and omissions may be imputed to the organization. Subject to the three exceptions described above, a corporate counsel's blanket assertion of representation is not supported by the Rules of Professional Conduct. A lawyer must inform an unrepresented former employee not to divulge any information that is subject to attorney-client privilege and refrain from giving the employee advice.

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.