

ETHICS OPINION

RO-02-03

[Redacted Copy]

QUESTION:

"I have a slip and fall case in a retail store and I would like an opinion as to whether I can contact directly some of the cashiers. It seems that my client slipped and fell in a certain area of the store. After she fell, she says that one of the cashiers told her that a store employee had been mopping or buffing in that area immediately before the fall and had left moisture. I would like to interview the cashiers to get that straight.

I would be grateful if you would give me an opinion as to whether such an interview would be allowed under the circumstances. It is not my understanding that the cashiers were the people who had done the mopping or buffing."

ANSWER:

Pursuant to Rule 4.2 of the Rules of Professional Conduct of the Alabama State Bar, an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable and is not someone whose statement may constitute an admission on the part of the organization. It is the opinion of the Disciplinary Commission of the Alabama State Bar that the third category, i.e., a "person . . . whose statement may constitute an admission on the part of the organization" should be limited to those employees who have authority on behalf of the organization to make decisions about the course of the litigation.

DISCUSSION:

Communication with persons represented by counsel is governed by Rule 4.2 of the Rules of Professional Conduct, which provides as follows:

"Rule 4.2 Communication With Person
Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so."

When the represented party is a corporation or other organization, communication with some of the employees of the organization is also prohibited.¹

The Comment to Rule 4.2 delineates three categories of employees with whom communication is prohibited, viz:

"In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

¹ Obviously, communication is also prohibited with any employee who is individually represented.

The information provided in your letter indicates, and for purposes of this opinion it will be assumed, that the cashier does not fall within either of the first two categories, i.e., she does not have managerial responsibility nor did she engage in conduct for which the organization would be liable. The question, therefore, is whether the cashier falls into the third category, i.e., would her statement to you constitute an admission on the part of the retail store?

There is a significant divergence of opinion among various jurisdictions as to which employees fall within this third category. Some jurisdictions take the position that the prohibition extends broadly to all employees of a corporation. Others have held that the prohibition applies to any employee whose statement would constitute an "admission against interest" exception to the hearsay rule, as provided in Rule 801(d)(2) of the Rules of Evidence. Still others have interpreted the Rule narrowly to prohibit contact with only a "control group", which is limited to the company's highest-level management. There appears to be no case law in Alabama which definitively addresses the issue.

A recent decision of the Massachusetts Supreme Judicial Court provides what the Office of General Counsel considers to be a rationally defensible and well-balanced approach to the question. In *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 764 N.E. 2d 825 (2002), a police sergeant with Harvard's security department sued the school for sex discrimination. The plaintiff's attorney interviewed five Harvard employees who were not accused in the lawsuit, two of whom had supervisory authority over the plaintiff. The trial court ordered sanctions against the attorney for violation of the Massachusetts version of Rule 4.2. The Supreme Judicial Court reversed concluding, in pertinent part, as follows:

"The [trial] judge held that all five employees interviewed by MR&W were within the third category of the comment. He reached this result by concluding that the phrase 'admission' in the comment refers to statements admissible in court under the admissions exception to the rule against hearsay.

* * *

However, other jurisdictions that have adopted the same or similar versions of Rule 4.2 are divided on whether their own versions of the rule are properly linked to the admissions exception to the hearsay rule, and disagree about the precise scope of the rule as applied to organizations.

* * *

Some jurisdictions have adopted the broad reading of the rule endorsed by the judge in this case. (citations omitted) Courts reaching this result do so because, like the Superior Court, they read the word 'admission' in the third category of the comment as a reference to Fed. R. Evid. 801(d)(2)(D) and any corresponding State rule of evidence. *Id.* This rule forbids contact with practically all employees because 'virtually every employee may conceivably make admissions binding on his or her employer.'

* * *

At the other end of the spectrum, a small number of jurisdictions has interpreted the rule narrowly so as to allow an attorney for the opposing party to contact most employees of a represented organization. These courts construe the rule to restrict contact with only those employees in the organization's 'control group,' defined as those employees in the uppermost echelon of the organization's management.

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Other jurisdictions have adopted yet a third test that, while allowing for some ex parte contacts with a represented organization's employees, still maintains some protection of the organization.

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Although the comment's reference to persons 'whose statement may constitute an admission on the part of the organization' was most likely intended as a reference to Fed. R. Evid. 801 (d)(2)(D), this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. We reject the comment as overly protective of the organization and too restrictive of an opposing attorney's ability to contact and interview employees of an adversary organization.

* * *

We instead interpret the rule to ban contact only with those employees who have the authority to 'commit the organization to a position regarding the subject matter of representation.' (citations omitted) The employees with whom contact is prohibited are those with 'speaking authority' for the corporation who 'have managing authority sufficient to give them the right to speak for, and bind, the corporation.'

* * *

This interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

* * *

Our test is consistent with the purposes of the rule, which are not to 'protect a corporate party from the revelation of prejudicial facts' (citations omitted) but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney. Prohibiting contact with all employees of a represented organization restricts informal contacts far more than is necessary to achieve these purposes. (citations omitted) The purposes of the rule are best served when it prohibits communication with those employees closely identified with the organization in the dispute. The interests of the organization are adequately protected by preventing contact with those employees empowered to make litigation decisions, and those employees whose actions or omissions are at issue in the case. We reject the 'control group' test, which includes only the most senior management, as insufficient to protect the 'principles motivating [Rule 4.2].' (citations omitted) The test we adopt protects an organizational party against improper advances and influence by an attorney, while still promoting access to relevant facts. (citations omitted) The Superior Court's interpretation of the rule would grant an advantage to corporate litigants over nonorganizational parties. It grants an unwarranted benefit to organizations to require that a party always seek prior judicial approval to conduct informal interviews with witnesses to an event when the opposing party happens to be an organization and the events at issue occurred at the workplace.

While our interpretation of the rule may reduce the protection available to organizations provided by the attorney-client privilege, it allows a litigant to

obtain more meaningful disclosure of the truth by conducting informal interviews with certain employees of an opposing organization. Our interpretation does not jeopardize legitimate organizational interests because it continues to disallow contacts with those members of the organization who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization's counsel. Fairness to the organization does not require the presence of an attorney every time an employee may make a statement admissible in evidence against his or her employer. The public policy of promoting efficient discovery is better advanced by adopting a rule which favors the revelation of the truth by making it more difficult for an organization to prevent the disclosure of relevant evidence."

The Office of General Counsel hereby adopts the logic and reasoning of the Massachusetts Supreme Judicial Court as quoted above and concludes, therefore, that since the cashier does not "have authority on behalf of the corporation to make decisions about the course of the litigation", you are not ethically prohibited from communicating with her.

However, there is an additional ethical consideration which should be addressed. The conclusion reached above means that the cashier is an unrepresented third person within the meaning of Rule 4.1 and Rule 4.3 of the Rules of Professional Conduct. Those Rules provide, respectively, as follows:

"Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

* * *

"Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

These rules mandate the use of extreme caution to avoid misleading the cashier with regard to any material issue of law or fact, and most particularly, to avoid any misunderstanding on the part of the cashier as to your role in the lawsuit. You should initiate any conversation with the cashier by acknowledging that you are an attorney representing a client with a claim against the cashier's employer and that, by virtue of such representation, you have an adversarial relationship with her employer. If, following such disclosure, the cashier indicates a desire to terminate the conversation, you are ethically obligated to respect the cashier's wishes and immediately discontinue any further attempt at communication.

LGK/vf

10/4/02