



Disciplinary Counsel's Report

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Due to a recent spate of informal ethics opinion requests, our office proffers the following information to assist attorneys regarding the ethical precepts involved in contacting employees of an opposing party.

A. Contacting Present Employee.

Hawaii Rule of Professional Conduct ("HRPC") 4.2 provides:

... 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.

Although the text of HRPC 4.2 makes reference to a "party," the title refers to communication with "persons represented by counsel." Comment [2] to HRPC 4.2 clarifies that "[t]he Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." (Emphasis supplied.)

When an opposing party is a corporate or governmental entity, determination of whether communication is permitted under HRPC 4.2 is more complicated. Comment [2] states:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter . . . 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 . . . liability or whose statement may constitute an admission on the part of the organization. If an . . . employee 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. . . . [Emphasis supplied.]

Comment [2] thus directs that all managerial employees and all employees who can implicate the organization are "off-limits" insofar as direct contact by counsel suing the organization is concerned.

"Managerial" employees are, for purposes of HRPC 4.2, considered those near the apex of authority within an organiza-

tional hierarchy. Such employees would have the power to legally bind the organization concerning the subject litigation and would normally be considered within the entity's "control group."

Application of HRPC 4.2 can, of course, involve practical difficulties. For example, a lawyer seeking an interview with a potential witness may not know in advance whether the interviewee is covered under HRPC 4.2, since only the interview itself may disclose the interviewee's relationship to the organization or to the matter in question. Further, since the rules of *respondeat superior* and vicarious admissions against interest can be unclear, applying HRPC 4.2 may be difficult, even when the facts are otherwise apparent.

Nonetheless, under HRPC 4.2, "a lawyer opposing an organization is prohibited from contacting the control group or those present employees who were direct actors in the underlying transaction or who could 'bind' the organization with their statements."

If communication is undertaken, each representative of the firm who undertakes such contacts must disclose his or her identity, state the purpose of the communication to the employee, and ensure that the employee has not retained counsel for representation in connection with the matter.

B. Contacting Former Employee.

In ABA Formal Opinion 91-359, the ABA Standing Committee on Ethics and Professional Responsibility rejected policy arguments that would have forbidden contact with any former employees or those who, while employed, had managerial responsibilities concerning the matter in litigation. ABA Formal Opinion 91-359 (1991) states:

[A] lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer. [Emphasis supplied.]

ABA Model Rule 4.2 is identical to the rule adopted in Hawaii. The ABA Committee observed that Rule 4.2 does

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not cover former corporate employees, and the Comment "gives no basis for concluding that such coverage was intended." The ABA Committee was also persuaded by the fact that an expanded rule would have the effect of inhibiting the acquisition of information about a case.

However, ABA Formal Opinion 91-359 does place two significant limitations on contacting a former employee. First, an attorney must be careful to avoid inducing the former employee to violate the attorney-client privilege attached to communications between the employee and the former employer's counsel. The privilege belongs to the corporation, not the former employee. Such an attempt could violate HRPC 4.4 (respect for the rights of third persons).

Second, the attorney should comply with HRPC 4.3 (dealing with an unrepresented person). The attorney must make clear his or her role in the matter, the identity of his or her client, and the fact that the witness' former employer is an adverse party.

We hope that this information assists members of the Hawaii bar.

ENDNOTES

1. A "control group" is generally defined as:

[T]hose top management persons who [have] the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis of any final decision.

Fair Automotive Repair, Inc. v. Car-X Service System, Inc., 128 Ill.App.3d 763, 771, 471 N.E.2d 554, 560 (1984).

2. G. Hazard, Jr. & W. Hodes, *The Law of Lawyering* 734 (1991 Supp. 2d ed.).

3. G. Hazard, Jr. & W. Hodes, *supra*, at 737.

4. HRPC 4.3; Connecticut Bar Informal Opinion 86-1 (1986); Nebraska Bar Opinion 91-3 (undated); Wisconsin Bar Opinion E-91-1 (1991); *United States v. Hammond*, 858 F.2d 834 (2d Cir. 1988).

5. See also HRPC 1.6 (confidentiality).