Enduring Ethics Opinions: The Ethics of Interviewing Opposing Party Employees - By Anne-Marie Storey, Esquire - Professional Ethics Commission

Rule 4.2(a) of the Maine Rules of Professional Conduct provides that "[i]n 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 court order." While this rule is fairly easy to understand in theory, application may not always be so easy-- while identifying the client with whom contact is prohibited is fairly straightforward when dealing with a natural person, identifying who is represented may be more difficult when dealing with a corporate entity and its employees.

Crowley v. L.L. Bean, Inc., 143 F. Supp. 2d 38 (D. Me. 2001), illustrates the application of the precursor to Rule 4.2(a) in the context of contacting a defendant corporation's employees. L.L. Bean argued that plaintiff's lawyer violated former Maine Bar Rule 3.6(f), which prohibited communications between an attorney and an adverse party represented by counsel, in obtaining statements from current and former L.L. Bean employees concerning pending litigation. The Court found that there was no violation with respect to the lawyer's contact with the former employees. Id., at 42 n.3. Regarding contact with current employees, the Court noted that the Maine Board of Overseers of the Bar had addressed this issue in the municipal corporate context in Ethics Opinion 94, which states that the rule "reaches only those employees who have responsibility for making decisions on the litigation and matters directly related to it, and employees who have the responsibility of communicating municipal policy and decisions to its attorney, receiving the attorney's advice in the first instance, and directing the work of the municipality's staff in preparing for litigation." Id. (quotation marks omitted). The Court applied the same reasoning to the private sector, concluding that L.L. Bean's employees were "subject to being interviewed unless [L.L. Bean] shows that they are within the scope of representation contemplated by Maine Bar Rule 3.6(f)." Id.

A few years later, in Frank v. L.L. Bean, Inc., 377 F. Supp. 2d 233, 236-39 (D. Me. 2005), the Court reiterated its reasoning in Crowley, again relying on Ethics Opinion 94 in concluding that plaintiff's counsel did not violate Rule 3.6(f) in contacting another former employee regarding pending litigation. The Court explained that "[i]t is self-evident that a former employee is entirely outside the scope of representation suggested by the commission. A former employee cannot be characterized as 'a member of management,' and certainly has no responsibilities or duties to the corporation regarding the litigation. Nor can he or she be deemed in any way to represent the corporation or be capable of making any admissions or 'major capitulations' on behalf of the corporation." Id. at 237.1

In Col v. Me. Med. Ctr., 2012 U.S. Dist. LEXIS 31468 (D. Me. Mar. 8, 2012), the Maine District Court considered Crowley and Frank in its analysis of whether a plaintiff's lawyer could contact some of the defendant's current employees under M.R.Prof. Conduct 4.2(a). The defendant argued for a "three-part definition of client" based on the language contained in Comment 7 to Rule 4.2, which provides that Rule 4.2 "prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization or whose act or omission may be imputed to the organization." M.R.Prof. Conduct 4.2, cmt 7 (emphasis added). The Court declined to expand the scope of Rule 4.2 based on this language, noting that the Reporter's Notes indicate that Rule 4.2(a) and M. Bar R. 3.6(f) are in accord.

In short, Rule 4.2(a) prevents communication with: (1) employees who have responsibility for making decisions on the litigation and matters directly related to it; and (2) employees who have the responsibility of communicating company policy and decisions to its lawyer, receiving the lawyer's advice in the first instance,
and directing the work of the company's staff in preparing for litigation. Of course, even if an employee may be contacted, the employee is under no obligation to speak with plaintiff's counsel unless part of a formal legal proceeding. It is worth noting that Rule 4.2 applies even if a represented person initiates the contact. If a lawyer is contacted by an employee with whom the lawyer may speak as described above, the lawyer is free to do so; however, if the employee is a person that the lawyer could not contact directly, the lawyer must immediately terminate the communication upon learning that the communication is not permitted. See M.R.Prof. Conduct 4.2, cmt 3. While Rule 4.2 does not prohibit communication with a represented person concerning matters outside of the representation, see M.R.Prof. Conduct 4.2, cmt 4, care must be taken in such situation to ensure that the representation is not inadvertently discussed. Finally, if it is unclear whether communication is prohibited by Rule 4.2 or if there are exceptional circumstances, a lawyer may seek a court order to authorize contact. See M.R.Prof. Conduct 4.2, cmt 6.

This appears to presume there is no written agreement (severance or otherwise) between the corporation and the former employee that would factor into this analysis.