Defining the Perimeters of the No-Contact Rule

BY ASHLEY E. TREMAIN

The "no contact" rule is one of the most misunderstood rules governing the practicing litigator. The source of the rule is Texas Disciplinary Rule of Professional Conduct 4.02, which prohibits contact with represented parties.

Rule 4.02 is enforced by the State Bar of Texas—it is not a rule of civil procedure. There should be no difference in the application of Rule 4.02 between state and federal courts. In fact, the Northern District of Texas specifically defines "unethical behavior" warranting disciplinary action as conduct "that violates the Texas Disciplinary Rules of Professional Conduct."

When an attorney represents a corporate or governmental entity, some individuals are automatically "represented" as a result. Those individuals may not be contacted by opposing counsel. Section (c) of Rule 4.02 clearly defines the individuals that are considered "represented," and therefore off-limits: (1) those persons presently having a managerial responsibility…that relates to the subject of the representation, or (2) those persons presently employed…and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

While section (c)(2) is expressly limited to "employees," section (c)(1) arguably includes non-employees such as partners, board members and contractors—so long as they have "managerial responsibility…that relates to the subject of the representation." The second qualification is important—the mere possession of "managerial authority" does not bring an individual within the scope of the rule. The authority must "relate to the subject of the representation." For example: a custodial manager who saw the CFO assault the V.P. of Sales does not have managerial authority "that relates to the subject of the representation," and may be contacted by opposing counsel.

All former employees, as well as individuals "presently employed…whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue," are expressly excluded from coverage. *See Comment 4, Tex. Disc. R. Prof. Cond. 4.02.*

Many practitioners equate the perimeters of the "no contact" rule with the "control group" test. The "control group" test is used to determine who is a "representative of the client" for purposes of determining whether the attorney-client privilege applies. As an initial matter, the Texas Supreme Court abandoned the "control group test" long ago. More importantly, this is *not* the test to determine who is "represented" under Rule 4.02.

If, however, an attorney learns privileged information through communication with a witness not covered under Rule 4.02, he or she may be disqualified from the case—even if Rule 4.02 was not violated. As a best practice, attorneys communicating with witnesses exempted from Rule 4.02 should ensure that they do not request potentially privileged information, and remind witnesses not to disclose such information. Certain witnesses, due to their former positions with the entity, are particularly likely to have information protected by Rule 503. Particular caution should be exercised in attempts to communicate with these witnesses.

Attorneys representing corporate or governmental entities should also observe some "best practices" surrounding Rule 4.02. First, attempts to represent all current employees will expose the attorney to disqualification under Rule 1.06 (Conflicts of Interest), and should be avoided. Many employees are likely to have interests that are "materially and directly adverse" to the interests of the represented entity—particularly if there is any possibility that the employee will testify against the entity.

Second, entities should refrain from prohibiting communications between employees and an individual who has sued the entity. This exposes the entity to claims under the NLRA (making it unlawful to interfere with employees' rights to engage in concerted activities for the purpose of mutual aid or protection). The NLRA is not limited to unionized entities, and it protects communications with former employees. Corporate counsel should tread lightly with attempts to restrict communication between employees and opposing counsel.

The "no contact" rule is designed to protect corporate and governmental entities from undue interference with the attorney-client relationship, and to facilitate efficient discovery from unrepresented fact witnesses. A clear understanding of what is—and is not—prohibited by this rule is essential for effective discovery practice in Texas. **HN**

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