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Ethics:
Can We Talk?

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Jason S. Boulette

Author Contact Information:
Jason S. Boulette
Boulette Golden & Marin LLP
Austin, TX
jason@boulettegolden.com
512-732-8901

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I. INTRODUCTION

While seemingly simple, the question of with whom a lawyer may and may not speak is multifaceted, with a number of rabbit trails tempting an author to one degree or another. Accordingly, in an attempt to provide focus, this paper principally concerns itself with the following:

- When a lawyer may speak with a current employee of a represented employer-opponent;
- When a lawyer may speak with a former employee of a represented employer-opponent;
- The disciplinary rules governing joint-representation;
- A lawyer's obligation upon being provided (by a client or otherwise) privileged or confidential material belonging to an opponent party.

To be clear, other topics (*e.g.*, the rules for anonymous online investigation, the permissibility of communications with class action members before and after certification, organizational clients that direct their attorneys to keep secrets from other parts of the client, romantic relationships between opposing counsel and an employee of a represented employer-opponent, *etc*.) are touched on, but they are not explored in any depth.[1]

II. COMMUNICATING WITH A REPRESENTED PARTY

A. The Basics

Most lawyers—and virtually all litigators—are familiar with the basic rule prohibiting contact with a represented party with respect to the subject matter of the representation without the consent of that person's attorney. Nevertheless, just to be sure, here is Rule 4.02(a), verbatim:

> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

TEX. DISC. PROF'L CONDUCT R. 4.02(a).

At its core, Rule 4.02(a) is designed to preserve the integrity of the attorney-client relationship. TEX. DISC. PROF'L CONDUCT R. 4.02, cmt. 1 ("Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel.") Toward that end, it applies whether the attorney is

[1] If your Google or other search-engine-of-choice query led you to this paper for one of these topics, you have my apologies for providing you with false hope; with any luck, the brief treatment here will provide a starting point for your own, more robust research.

directly involved in the prohibited communication or merely orchestrating it from behind the scenes. *Id*. ("It prohibits communications that in form are between a lawyer's client and another person, organization or entity of government represented by counsel where, because of the lawyer's involvement in devising and controlling their content, such communications in substance are between the lawyer and the represented person, organization or entity of government.").

B. The Organizational Twist

Rule 4.02(a) is relatively straightforward as applied to natural persons. In the case of a represented organization, however, the question becomes with *which* employees contact is prohibited. With this question in mind, Rule 4.02(c) provides as follows:

> (c) For the purpose of this rule, organization or entity of government includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity 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.

TEX. DISC. R. PROF'L CONDUCT R. 4.02(a).

1. Current Employees

As the comment 4 to Rule 4.02 confirms, the Rule 4.02(a) is focused on current employees and other organizational representatives who do not have their own counsel:

> In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel that presumption is inapplicable. In such cases, the consent by that counsel to communicate will be sufficient for purposes of this Rule. Compare Rule 3.04(f).

TEX. DISC. R. PROF'L CONDUCT R. 4.02, cmt. 4.

The scope of this prohibition has been confirmed by way of ethics opinion:

> Opinion 17 (December 1948) held that Canon 9 then in effect did not preclude an attorney from interviewing a potential witness, other than a party to the suit, even though the witness may be an employee of a party to the suit, if the attorney makes a full disclosure of his connection with the litigation and explains the purpose of

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