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The Fine Art of Employment Law: From Compliance to the Courtroom

**From Classical to Contemporary:
Ethics for Today's Lawyers**

Presented by:
Thomas A. Cox, Jr.
Direct: (404) 240-4229
tcox@laborlawyers.com

www.laborlawyers.com

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Formal Advisory Board Opinion

- Issued Opinion 13-2 addresses propriety of a lawyer, as a condition of settlement, agreeing to indemnify opposing party for claims by third persons to the settlement funds.
- Opinion concludes that a lawyer may not ethically agree to indemnify opposing party for such claims as they violate Rule 1.8(e) of Georgia Rules of Professional Conduct, which prohibits a lawyer from providing financial assistance to client in connection with pending or contemplated litigation.

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2

Formal Advisory Board Opinion

- Opinion also concludes a lawyer may not seek to require, as a condition of settlement, that plaintiff's lawyer make a personal agreement to indemnify opposing party from claims by third persons to settlement funds. Such conduct violates Rule 8.4(a)(1) of Georgia Rules of Professional Conduct, which prohibits lawyer from knowingly inducing another lawyer to violate Georgia Rules of Professional Conduct.

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3

Rule Changes

The Supreme Court entered an order on July 9, 2015 approving several changes to the Rules of Professional Conduct. Most of the changes are simple housekeeping amendments. The substantive amendments include:

- Changes to Rule 4-403 allowing proposed formal advisory opinions to be published on Bar's website as alternative to the *Georgia Bar Journal*.
- Amendment to Rule 7.3 eliminating requirement that Bar "certify" lawyer referral services and instead requires lawyers to use only services that meet certain requirements.

Rule Changes (cont'd)

- Changes to Rule 4-213 providing that special master may require Bar to pay for copy of hearing transcript for respondent who has demonstrated an inability to pay.
- Change to Rule 3.5 adding subpart (c) and comment 7, prohibiting communication with a juror or prospective juror after discharge of the jury under certain circumstances.

Rule Changes (cont'd)

- On April 14, 2015, Supreme Court amended Rules 1.15(I), (II) and (III) to require rate parity between IOLTA accounts and similarly-constituted non-IOLTA accounts. Rule will require lawyers to have trust accounts at banks offering rate parity. Effective January 1, 2016, and is fully active based upon Georgia Bar Foundation publishing list of approved financial institutions.

Rule Changes (cont'd)

- On November 3, 2011, Supreme Court of Georgia approved amendments to Georgia Rules of Professional Conduct to bring them more in line with American Bar Association Model Rules. Court approved additional changes on December 1, 2012. Amendments included creation of position of Coordinating Special Master (Rule 4-209.1) and amendment allowing foreign lawyers to serve as in-house counsel (Rule 5.5).
- On June 12, 2013, Supreme Court approved new rule, Rule 6.5, relaxing conflicts requirements for nonprofit and court-annexed legal services programs.

Rule Changes (cont'd)

- On March 21, 2014, Court approved amendments to Rule 7.2 of Georgia Rules of Professional Conduct. Rule 7.2 now requires additional written or oral disclosures for lawyer advertisements, including full address of lawyer's office and prominent disclosures if actors appear in advertisement as either lawyer or client.
- Court also amended rules regarding receivership.
- Court added provision of reimbursement of expenses for lawyer serving as receiver for files of a lawyer who has died, disappeared, or become incapacitated.

Trust Account Overdraft Notification Program

- Office of the General Counsel has operated Trust Account Overdraft Notification Program since January 1996. Program requires banks to notify State Bar of Georgia when lawyer's escrow account check is presented against insufficient funds. Purpose of program is to stop theft of client funds by providing mechanism for early detection of problems in escrow account.
- During 2014-2015, Program received 443 overdraft notices from financial institutions. 285 of those matters were dismissed when lawyer provided satisfactory explanation for overdraft. Others forwarded to Investigative Panel for disciplinary investigation.

Pro Hac Vice Admission (cont'd)

- Supreme Court of Georgia amended Rule 4.4 of Uniform Rules of Superior Court to require out-of-state lawyers applying for *pro hac vice* admission in Georgia to serve a copy of their application for admission on tState Bar of Georgia. In November 2007, judges of Georgia Board of Workers Compensation entered an order making Rule applicable to lawyers practicing before the Board. In June, 2015, Rule became part of the Uniform Rules of Magistrate Court.

Pro Hac Vice Admission (cont'd)

- On September 4, 2014, Supreme Court amended rule to revise fees for admission *pro hac vice*. Applicant must pay \$75 fee to Bar each time he or she applies for admission. In addition, applicant must pay an annual fee of \$200 and must pay that amount every year by January 15th if he or she is still admitted *pro hac vice* before any court in Georgia. Annual fee is also paid to Bar, and a portion is transferred to Georgia Bar Foundation to support the delivery of legal services to the poor.

Pro Hac Vice Admission (cont'd)

Office of General Counsel may object to application or request that court impose conditions to its being granted. Among other reasons, Bar may object to application if lawyer has a history of discipline in their home jurisdiction or if lawyer has appeared in Georgia courts so frequently that he or she should become a member of the bar in this state. Lawyers admitted *pro hac* agree to submit to the authority of the State Bar of Georgia and the Georgia courts. During the last Bar year the Office of the General Counsel reviewed 719 *pro hac vice* applications.

[See, 45th Annual Labor and Employment Law Institute, Referenced with Permission](#)

Contemporary Ethics Update - Hypothetical

- You have been asked to provide legal advice regarding a patent dispute with a competitor. The engineer with the most knowledge of your company's technology retired last month. You need to obtain information from the retired engineer to provide advice to the company.
- Are your communications with the retired engineer protected by the attorney-client privilege?

Upjohn Test

- *Upjohn Co. v. United States*, 449 U.S. 383 (1981) adopted "subject matter test" to determine whether discussions between *current* employees and a corporation's counsel are privileged.
- A communication is privileged if it:
 1. was made to corporation's counsel, acting as such;
 2. was made at direction of corporate superiors for purpose of securing legal advice from counsel;
 3. concerned matters within the scope of the employee's corporate duties; and
 4. the employee was sufficiently aware that he/she was being questioned so the corporation could obtain legal advice.

Upjohn Test Applies To Former Employees

- Justice Burger's concurring opinion in *Upjohn* stated that same test should apply to communications with former employees when "former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment."
- Vast majority of courts have adopted Justice Burger's position. *See, e.g., Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (collecting cases).
 - And essentially ignored the requirement that the communications were made at the direction of corporate superiors.

Former Employee Communications: What Are Privileged?

- The focus is not the employment status of the employee, but the content of the communication.
- Communications made for the purpose of learning facts that the former employee "was aware as a result of her employment" are privileged. *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999).

Former Employee Communications: What Are Privileged? (cont'd)

- Communications that go beyond the former employee's conduct or knowledge are not privileged.
 - Discussions about how to answer questions during a deposition;
 - Communications about other witnesses' testimony;
 - Conversations about facts developed during the litigation of which the former employee did not have independent knowledge;
 - Legal counsel's opinion of the case.

Hypothetical

- You receive a pre-suit demand letter alleging that a former sales representative was terminated for taking FMLA leave. The manager who made the allegedly retaliatory termination decision is no longer employed at the company. The demand letter recites several troubling facts that the lawyer obtained directly from a conversation with the manager.
- Was the lawyer permitted to contact the manager to ask her questions about the termination decision?

Model Rule 4.02

- In 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 a court order.
- In the case of a represented organization, this Rule prohibits communications with (1) constituent of organization who supervises, directs or regularly consults with organization's lawyer concerning matter or (2) has authority to obligate organization with respect to the matter or whose act or omission in connection with the matter.

Comments To The Rules

- Model Rule 4.2 Comment 7
 - "Consent of the organization's lawyer is not required for communication with a former constituent."
 - But in communicating with a former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

Comments To The Rules (cont'd)

- Georgia Advisory Opinion 94-3
 - A lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to information against the organization, provided that (1) the lawyer makes full disclosure as to the identity of his/her client; and (2) the former employee consents.

The Majority Rule

- The majority rule: *ex parte* communications between plaintiff's counsel and former employees are permissible.
 - See, e.g., *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. May 2, 2011); *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996).
 - *In re Domestic Air Transportation Antitrust Litigation*, 141 FRD 556 (N.D. Ga 1992)

The Majority Rule (cont'd)

- But counsel who speak with a former employee have a responsibility not to inquire into areas that may be subject to the attorney-client or work product privileges, and should be careful not to induce the former employee to divulge any information that might violate the corporation's attorney-client privilege.
 - See *Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004).

The Minority Rule

- The minority rule: no *ex parte* communications between plaintiff's counsel and a former employee where the former employee's acts or omissions may be imputed to the corporation, or where the former employee possesses confidential or privileged information concerning the disputed matter.
 - See, e.g., *Armsey v. Medshares Mgmt. Serv., Inc.*, 184 F.R.D. 569 (W.D. Va. 1998); *Browning v. AT&T Paradyne*, 838 F. Supp. 1564 (M.D. Fla. 1993); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992).

Confidentiality Agreements

- May companies utilize a former employee's confidentiality agreement to restrict *ex parte* communications with opposing counsel?
 - "To the extent that [the confidentiality] agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with public policy in favor of allowing even current employees to assist in securities fraud investigations." *In re JDS Uniphase Corp. Sec. Litig.*, 238 F.Supp.2d 1127 (N.D.Cal.2002).

Confidentiality Agreements (cont'd)

- "Absent possible extraordinary circumstances . . . it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law." *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441 (S.D.N.Y. 1995).

Hypothetical

- You are leading a compliance investigation to determine whether your company's Vice President bribed a foreign official. As part of the investigation, you review a finance employee's emails and discover emails between the employee and her attorney. The emails contain advice from the attorney about how the employee can report the bribery to the SEC and recover a bounty.
- What do you do?

Model Rule 4.4(b)

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

- Does Rule 4.4(b) impose a duty to notify opposing counsel in our hypothetical?
- Were our emails "inadvertently sent"?

Court-Recognized Duty To Notify

- Generally, courts have found a communication to be non-privileged—and therefore not creating a legal duty to notify opposing counsel—where the communication is sent through a work email account *and* the employer maintains a policy eliminating the expectation of privacy in work emails.
 - See, e.g., *Scott v. Beth Israel Medical Center, Inc.*, 847 N.Y.S.2d 436 (Sup. Ct. 2007); *Kaufman v. SunGard Investment Systems*, 2006 U.S. Dist. LEXIS 28149 (D.N.J. May 9, 2006).

Court-Recognized Duty To Notify (cont'd)

- But communications have been deemed privileged where the employer did not have a computer use policy or didn't communicate it to its employees.
 - See *TransOcean Capital, Inc. v. Fortin*, 2006 Mass. Super. LEXIS 504 (Mass. Super. October 20, 2006); *Mason v. ILS Technologies LLC*, 2008 U.S. Dist. LEXIS 28905 (W.D.N.C Feb. 29, 2008).

Personal Email Accounts

Does it make a difference if the employee uses work computer to send an email from a personal web-based account?

To some courts, yes, based on a variety of rationales:

- *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010) (communications were privileged because employee had reasonable expectation of privacy in personal web-based emails).
- *Sims v. Lakeside School*, 2007 WL 2745367 (W.D. Wash. 2007) (employer's policy clearly stated that employee had no reasonable expectation of privacy, but public policy favoring confidentiality of communications trumped policy).

Personal Email Accounts (cont'd)

- *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387 (E.D.N.Y. 2006) (emails through personal account were privileged because messages did not go through employer's server).
- Employer's attorney's examination and retention of emails between

Personal Web-Based Email Accounts

But to some courts, there is no difference between a work email account and a personal account.

- *Long v. Marubeni America Corp.*, 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. Oct. 19, 2006) (employees waived the attorney client and work product privileges by using a company computer system to transmit emails from private password protected email accounts).

Key Questions

- Does the employer have a computer use policy that eliminates the employee's expectation of privacy?
- Is the employer's policy reasonably tailored to protect its legitimate business interests?
- Did the employer communicate the policy to the employee?
- Was the communication made on a work email account or personal email account?

Practice Pointer

When in doubt, do not substantively review the emails:

- Preserve emails and notify opposing counsel. If an agreement with opposing counsel cannot be reached, seek an order from the Court before you examine the emails.

Or . . .

- Send the emails to the employee's lawyer with a preservation request, destroy all remaining copies, and use formal discovery procedures to obtain the emails.

Internal Investigation Confidentiality

- Why do companies want to maintain confidentiality of employee interviews?
 - Protect victims, whistleblowers, and the accused;
 - Encourage reporting;
 - Prevent witness collusion;
 - Prevent witness tampering and destruction of evidence;
 - Maintain control over process;
 - Protect attorney-client privileged communications;
 - Maintain secrecy of sensitive business information.

The NLRB's Position

- Section 7 of the NLRA gives employees the right to engage in "protected concerted activities" for their mutual aid and protection.
 - Section 7 rights are afforded to union and non-union employees.

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The NLRB's Position (cont'd)

- *Banner Health System*, 358 NLRB No. 93 (2012):
 - Blanket rules prohibiting employees from discussing ongoing workplace investigations violate Section 8(a) of the NLRA;
 - In every investigation, the employer must identify a specific justification that requires confidentiality: (1) protection from witness harassment or intimidation; (2) danger of evidence destruction; (3) risk of fabricated testimony; or (4) prevention of a cover-up.
 - *Banner Health* covers union and non-union employees, but not supervisors or managers.

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Investigations After *Banner Health*

- Key Takeaway: *Banner Health* imposes a new procedural requirement, but generally will not restrict employers from requiring confidentiality.
 - Consider pre-investigation checklists or forms to ensure procedural compliance.

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Investigations After *Banner Health* (cont'd)

- Other potential justifications for confidentiality:
 - Privacy laws;
 - Need to preserve attorney-client privilege – *BP Exploration (Alaska), Inc.*, 337 NLRB 887 (2002);
 - Danger of theft of trade secrets or misuse of sensitive data;
 - Risk of insider trading;
 - EEOC policy guidance requiring employers investigating complaints of harassment to keep the matter confidential to the extent possible.

Special Privilege Issues In Employment Law

- Employment statutes afford employers significant affirmative defenses based on acting in good faith, which may mean acting on the advice of counsel.
 - “Good faith” defenses under the FLSA;
 - Title VII’s *Farragher-Elterth* defense;
 - FMLA’s “good faith” defense to liquidated damages.
- But the attorney-client privilege cannot be used as a sword and a shield, and offering your “best” evidence to support these defenses may result in a waiver of the attorney-client privilege.

Final Questions

Thank You!

Presented by:

Thomas A. Cox, Jr.
Direct: (404) 240-4229
tcox@laborlawyers.com
