



Fair Game: Communication with Former High-Level Employees

Insights

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Have you ever wanted to contact a former manager, officer, director, or shareholder of an opposing party corporation? Have you ever wanted to protect a former manager, officer, director, or shareholder from your opposing counsel's inquiries? If you answered "yes" to either question, then please listen closely.

Rule 4.2 of the Pennsylvania Rules of Professional Conduct provides that "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 . . ." However, "[c]onsent of the organization's lawyer is not required for communication with a former constituent." Rule 4.2, cmt. [7] (emphasis added). The Rules define "constituents" and provide that "[o]fficers, directors, employees and shareholders are the constituents of the corporate organizational client." Rule 1.13, cmt. [1].

As recently reaffirmed by the Philadelphia Bar Association Professional Guidance Committee, under the Pennsylvania Rules of Professional Conduct, an attorney may contact former high-level employees and executives of an opposing party corporation, and the attorney need not affirmatively advise that former employee that (1) he has the right to refuse to be interviewed, and (2) he has the right to request that his former company's attorney be present at the interview. See Committee Opinion 2014-3. An attorney, however, must identify himself and his interests in the litigation at the outset of the interview, and the attorney is also obligated to advise the potential interviewee of (1) and/or (2), above, if the potential interview inquires.

Practically, these developments effect attorneys on both sides of the bar. A lawsuit could become a race to a particular former employee, and it could turn on who was able to get to that person first and either extract information or prevent information from being extracted. As a corporation responding to litigation, you will want to consult with in-house counsel and review the relevant case documents as early as possible to identify any former employees – including former high-level executives and officers – who have knowledge or possess important information such that you can contact those employees and advise them of their rights before plaintiff's counsel beats you to the punch. Either way, do not lose sight of the fact that, in Pennsylvania, former high-level employees are fair game to be contacted by all attorneys involved.