ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 4.2 and Comment [7]. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 09-01
January 2009

Topic: *Ex Parte* communications with current and former constituent of a represented organization

Digest: A lawyer may communicate with a current constituent of a represented organization about the subject-matter of the representation without the consent of the organization's counsel only when the constituent does not (i) supervise, direct or regularly consult with the organization's lawyer concerning the matter; (ii) have authority to obligate the organization with respect to the matter; or (iii) have acts or omissions in connection with the matter that may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with former constituents about the matter of the representation. If the constituent has his or her own counsel, however, that counsel must consent to the communication.

References: Illinois Rules of Professional Conduct 1.13, 4.2, and 4.4
Illinois State Bar Association Advisory Opinion 85-12
American Bar Association Model Rules of Professional Conduct 1.13 and 4.2
Fair Automotive Repair, Inc. v. Car-X Service System, Inc., 128 Ill.App.3d 763, 471 N.E.2d 554 (Ill. App. 2d Dist. 1984)
Hill v. Shell Oil Co., 209 F.Supp.2d 876 (N.D. Ill. 2002)

Orlowski v. Dominick's Finer Foods, Inc., 937 F. Supp. 723 (N.D. Ill. 1996)
Weibrect v. Southern Illinois Transfer, Inc., 241 F. 3d 875 (7th Cir. 2001)

FACTS

Lawyer represents client adverse to a nursing home. Lawyer desires to contact the nursing home's current and former staff, employees, and other constituents to obtain statements from them regarding client's matter. Lawyer knows the nursing home is represented on the matter by counsel, but lawyer does not know whether the nursing home's counsel represents any of the current or former staff, employees, or other constituents personally in the matter.

QUESTION PRESENTED

When a lawyer handling a matter for a client knows that an organization is represented by other counsel in the matter, under what circumstances may the lawyer communicate with the current or former constituents of the organization about the matter without the consent of the organization's counsel?

SHORT ANSWER

A lawyer representing a client may communicate with a current constituent of a represented organization about the subject matter of the representation (a) without consent of the organization's counsel and (b) without violating Illinois Rule of Professional Conduct 4.2 as long as the current constituent is not someone who (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter; (ii) has authority to obligate the organization with respect to the matter; or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

This prohibition does not apply to communications with former constituents. If the current or former constituent has personal counsel, however, consent must be obtained from that counsel before the communications occur.

In reaching its first conclusion, the Committee believes that the "control-group test" should no longer be used to delineate the proper reach of the anti-contact rule to the constituents of an organizational client. This Opinion therefore supersedes and/or modifies ISBA Advisory Opinion 85-12.

ANALYSIS

Illinois Rule of Professional Conduct 4.2 generally prohibits a lawyer who is representing a client and knows another party has other counsel from communicating or causing another to communicate with that represented party about the subject matter of the representation. IRPC 4.2 states:

> During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

IRPC 4.2.

The present query asks how this IRPC 4.2, also known as the anti-contact rule, limits communications with the present and former constituents of an organization represented by another lawyer (hereinafter a "Represented Organization"). Such questions arise because counsel for an organization represents the organization acting through its duly authorized constituents. IRPC 1.13.[1]

In the following sections, this opinion analyzes separately the anti-contact rule's prohibition on communications with current and former constituents of a represented organization. This Opinion does not address communications with a constituent or former constituent who has separate counsel, because in those circumstances IRPC 4.2 generally requires a lawyer to obtain consent from the constituent's lawyer or other legal authorization before the lawyer could communicate directly with the represented constituent.

I. The ABA Model Rule three-part test establishes the proper scope of the anti-contact rule's prohibition against communications with current constituents of a Represented Organization.

With regard to current employees, IRPC 4.2 does not address when the anti-contact rule prohibits communications with a current or former constituent of a Represented Entity. The Illinois Supreme Court also has not adopted a test to clarify when communications with a constituent of a Represented Organization are prohibited under the anti-contact rule. However, two different tests have been adopted by an Illinois appellate court and Illinois federal courts.

The first test for the anti-contact rule in an organizational setting equates the protections of the anti-contact rule with the scope of the attorney-client privilege for organizations, and prevents communications only with a member of the current "control group" of a Represented Organization. In *Fair Automotive Repair, Inc. v. Car-X Service System, Inc.,* 128 Ill.App.3d 763, 471 N.E.2d 554 (Ill. App. 2d Dist. 1984), the Illinois appellate court held that the anti-contact rule (then codified as Illinois Rule 7-104) would prevent communications only with persons in the organization's "control group." The "control group," in turn, is defined as "those top management persons who had the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis of any final decision." 128 Ill. App. 3d at 771, 471 N.E.2d at 560.

[1] Consistent with the definition of "constituent" in the comment to American Bar Association Model Rule 1.13, this Opinion uses the term "constituent" to include the "[o]fficers and directors, employees and shareholders" of the Represented Organization.

In reaching this conclusion, the *Fair Automotive* court noted that the Illinois Supreme Court had adopted the control-group test for the attorney-client privilege as the proper resolution between the competing interests of "encouraging full and frank consultations between a client and a legal advisor" and "maximizing the amount of relevant factual material which is subject to discovery." 128 Ill. App.3d at 771, 471 N.E.2d at 561. The *Fair Automotive* court believed the "same logic should apply" in determining what constituents of a Represented Organization should be off limits under the anti-contact rule. "If a narrower test were used, the goals of [the anti-contact rule] could be nullified for corporate parties. If a broader test were used, too much relevant information would be barred from the fact-finding process." *Id.*

The second test rejects the control-group test and instead adopts the broader scope for the anti-contact rule for Represented Organizations that the American Bar Association adopted in 2002 amendments to the Comment to ABA Model Rule 4.2. Under this three-part test, the anti-contact rule prohibits communications with three groups of current constituents at a represented organization:

1. Constituents of the organization who "supervise[], direct[] or regularly consult[] with the organization's lawyer concerning the matter;

2. Constituents who "ha[ve] authority to obligate the organization with respect to the matter"; and

3. Constituents whose "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

ABA Model Rule 4.2 cmt [7].

The Illinois Supreme Court has not adopted comments for its Rules of Professional Conduct, and no published Illinois appellate opinion has adopted this test – referred to herein as the "Model Rules three-part test" – as the proper rule for which current constituents of a Represented Entity are protected from communications under the anti-contact rule.

Several Illinois federal courts, however, have adopted the Model Rule's three-part test as the proper scope of the anti-contact rule for represented organizations. These courts feel empowered to select the Model Rule three-part test over the control-group test for several reasons, including that *Fair Automotive* interpreted a prior version of the Illinois rules and that it is not clear that an Illinois court would still apply the control-group test. *Weibrecht v. Southern Illinois Transfer, Inc.*, 241 F.3d 875, 882 (7th Cir. 2001).

More compelling for our purposes, however, is that the Illinois federal courts recognize that the policies underlying the IRPC 4.2 anti-contact are not identical to those that support the attorney-client privilege. While, as *Fair Automotive* notes, the attorney-client privilege is intended to "encouraging full and frank consultations between a client and a legal advisor," this is not the purpose of the anti-contact rule, which regulates instead communications between a client

and other counsel. Rather, the anti-contact rule is intended to "[1] prevent lawyers from circumventing opposing counsel to get careless statements from adverse parties; [2] protect the integrity of the attorney-client relationship; [3] prevent the inadvertent disclosure of privileged information; and [4] facilitate settlement by channeling disputes through lawyers familiar with the negotiation process." *Hill v. Shell Oil Co.*, 208 F.Supp.2d 876, 878 (N.D. Ill. 2002) (interpreting the Northern District of Illinois Rule of Professional Conduct 4.2, which includes the Model Rule three-part test in a comment) (bracketed numbers inserted to replace a "to" in each phrase).

The separate purposes for the anti-contact support require adoption of protections broader than the control-group test. For example, persons not in the control group may make careless statements and inadvertently disclose privileged information to counsel if not protected by the anti-contact rule. An anti-contact rule that reached only the control group would not afford the Represented Organization any protection in such circumstances.

In light of these separate policy justifications for the anti-contact rule, several Illinois federal courts and the Committee itself believe that the Model Rule three-part test, and not the control-group test, delineates the proper scope of the anti-contact rule for organizational clients under Illinois law. In reaching this conclusion, the Committee notes that the Illinois State Bar Association/Chicago Bar Association Joint Committee on Ethics 2000 has already recommended that the Illinois Supreme Court adopt the portion of the comment to Model Rule 4.2 that contains the three-part test.

Therefore, with regard to current constituents of a Represented Organization (in the facts supplied to the Committee, the nursing home), the lawyer may communicate with current constituents of the Represented Organization about the subject matter of the representation unless those constituents fit within one or more of the following three categories:

1. Constituents of the organization who supervise, direct or regularly consult with the organization's lawyer concerning the matter;

2. Constituents who have authority to obligate the organization with respect to the matter; and

3. Constituents whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

When the constituent does not fall within one of these categories, and does not have his or her own counsel, the constituent should be treated as an unrepresented person. *See, e.g.*, IRPC 4.3 (rules for dealing with unrepresented persons).

Further, a lawyer who is allowed to communicate with a constituent may not invade the privileges of the Represented Organization. *See* IRPC Rule 4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person"); *see also* ABA Model Rule 4.2 cmt [7] ("In communicating with a current or former

constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See [Model] Rule 4.4").

It may sometimes be difficult to assess whether a particular constituent would be protected by the anti-contact rule. And even when the anti-contact rule does not apply, the Illinois Rules of Professional Conduct still protect both the constituent from being misled and the organization from having its confidences improperly obtained. *See* IRPC 4.3 and 4.4. Thus, a lawyer should exercise some caution whenever the lawyer seeks to communicate *ex parte* with a constituent of a Represented Organization.

II. The anti-contact rule does not prohibit communications with former constituents of a Represented Organization.

The query also asks whether the anti-contact rule prohibits communications with former constituents of a represented entity. The Committee has previously determined that the prior version of the anti-contact rule did not limit communications with the former constituent of a represented entity. *See* ISBA Opinion 85-12. Several courts in Illinois have similarly concluded that the prior and current versions of the anti-contact rule do not limit communications with former constituents of a Represented Organization. *See*, *e.g.*, *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996).

While prior portions of this Opinion modify or supersede other portions of ISBA Opinion 85-12, the Committee believes that ISBA Opinion 85-12 remains correct with regard to communications with former constituents of a Represented Organization. Specifically, the anti-contact rule does not limit communications with former constituents of a Represented Organization.

The policies that support adoption of the broader Model Rule three-part test similarly support adoption of a rule that the anti-contact rule does not limit communications with former constituents. Former constituents would have less access to privileged and confidential information of the Represented Organization. Also, former constituents would be unable to settle cases, and their statements would be unlikely to bind the organization. *See Orlowski*, 937 F. Supp. at 728 (explaining that the "possibility that former employees may reveal damaging information, which may give rise to a corporation's liability, is insufficient to implicate Rule 4.2," and "former employees . . . unlike current employees . . . cannot bind the corporation in the sense that an agent binds a principal.") (internal citations and quotations omitted).

This conclusion that the anti-contact rule does not limit communication with former constituents is generally consistent with the law in other jurisdictions. Most jurisdictions other than Illinois have adopted a rule that the anti-contact rule does not limit communications with the former constituents of a represented entity. In 2002, the ABA supported adoption of such a rule when it modified the comment to Model Rule 4.2 to clarify that Model Rule 4.2, upon which IRPC Rule 4.2 is based, does not limit communications with the former constituents of a Represented Organization. The language added to the comment to Model Rule 4.2 states, "Consent of the organization's lawyer is not required for communication with a former constituent." ABA Model Rule 4.2 cmt [7].

This modified language in the comment to Model Rule 4.2 has been adopted in numerous states, including (for example) the neighboring states of Indiana, Iowa, and Missouri. Accordingly, the Committee notes that Illinois law comports with the current trend and a solid majority of states when it refuses to extend the protections of the anti-contact rule to former constituents of a represented organization.

As a final caution, the protections for the Represented Organization's confidences and for unrepresented persons contained in IRPC 4.3 and 4.4 and discussed in Section I govern a lawyer's dealing with former constituents as well as current constituents not protected by the anti-contact rule. Accordingly, a lawyer should likewise exercise some caution when seeking to communicate *ex parte* with a former constituent of a Represented Organization.

CONCLUSION

For the reasons stated in this opinion, a lawyer who is representing a client adverse to a nursing home and knows the nursing home is represented in the matter may communicate with current constituents of the nursing home without permission from the nursing home's counsel as long as the current constituent (a) does not supervise, direct or regularly consult with the nursing home's lawyer concerning the matter; (b) does not have authority to obligate the nursing home with respect to the matter; and/or (c) is not a person whose act or omission in connection with the matter may be imputed to the nursing home for purposes of civil or criminal liability.

The lawyer may communicate with former constituents of the nursing home who do not have separate representation without regard for the anti-contact rule. In all circumstances, however, communications may not seek to invade the nursing home's privileges and must observe other rules that govern communications with unrepresented persons.

Finally, consent of counsel or other legal authorization is required if the constituent is personally represented by the nursing home's lawyer or separate counsel.

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