OPINION 2006-05

SYNOPSIS

(1) A lawyer who is representing a terminated employee in litigation against the company that formerly employed her may communicate with a manager of the company if the sole topic of discussion is whether the lawyer will represent the manager in the manager's separate claim against the company and so long as no information protected by V.R.E. 502 is disclosed.

(2) A former manager is not a "representative" of the company as defined by V.R.E. 502, but the anti-contact provisions of Rule 4.2, as interpreted by the Vermont Supreme Court in *Baisley v. Young*, may restrict a lawyer who has commenced an action against the company on behalf of a former employee from discussing that action with the former manager if the former manager remains a company employee.

(3) A lawyer may represent a former manager and a former employee in separate actions against the company that employed both, but if the former manager is later called as a witness by the company to testify against the former employee, such circumstance may require the lawyer to withdraw from further representation of one or both clients depending on the circumstances existing at the time and whether each client consents to the lawyer's continued representation of both clients.

FACTS

The requesting lawyer represents a former employee of Company X in a wrongful termination suit. Company X is represented by counsel in that matter. The requesting lawyer has also agreed to represent a former manager of the same company (hereinafter "Doe") in a separate matter arising from disputes that have arisen between Doe and Company X. Doe had no direct supervisory responsibilities over the requesting lawyer's other client.

At the time of his first contact with the requesting lawyer, Doe was still a manager of

Company X, although his status with the company was in flux. Shortly after the first contact between requesting lawyer and Doe, Company X confirmed that the Doe's manager responsibilities had been terminated. Within a week of removing Doe's management responsibilities, Company X terminated Doe's employment. Determining the exact timing of Doe's loss of managerial responsibilities or employment is not necessary to this opinion.

During the time that Doe held management status within the company, he was involved in management discussions with counsel for Company X regarding the requesting lawyer's other client and regarding issues related to the other client's suit against the company. The requesting lawyer has confirmed that he has not discussed with Doe any communications between Doe and Company X's counsel regarding the action brought by the requesting attorney's other client.

Counsel for Company X has asserted:

(1) that the requesting lawyer may not communicate with Doe due to the prohibitions of the anti-contact rule (Rule 4.2);

(2) that the requesting lawyer may not represent both Doe and the former employee because Doe is likely to be a witness for the company against the former employee;

(3) that the requesting lawyer may not represent Doe because Doe has a duty not to discuss with requesting lawyer the case brought by the requesting lawyer's other client; and

(4) that the requesting lawyer must withdraw from further representation of his other client and must not pass on any information learned in discussions with Doe.

The requesting lawyer asks whether he may represent Doe, whether the anti-contact rule prohibits him from communicating with Doe about matters pertaining to his other client's case, and whether withdrawal from the representation of either or both clients is now required. His query requires examination of V.R.P.C. 4.2., commonly referred to as the anti-contact rule, and of

V.R.P.C. 1.7. which addresses conflicts of interest. Each will be addressed in turn.

ANALYSIS:

1. **The anti-contact provisions of Rule 4.2.**

Rule 4.2 states as follows:

Rule 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

> 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 by law to do so.

(emphasis added)

Because Doe's employment position changed from the time he first sought counsel from requesting lawyer to the date of this request, the anti-contact issues must be separately analyzed with respect to each change in Doe's employment status. Under the Rule 4.2 analysis, the "*client*" being represented by requesting lawyer is not Doe but is the requesting lawyer's other client. The "*subject of the representation*" is the other client's termination by Company X, and "*the matter*" is the pending lawsuit by the other client against Company X. The "*person*" the lawyer knows to be represented by another lawyer in the matter is Company X.

a. *Application of the Rule when Doe retained managerial responsibilities:* Company X has asserted that Rule 4.2 prohibits requesting lawyer from communicating with Doe because Doe is represented by Company X's counsel by virtue of Doe's managerial position. However, Company X's counsel does not represent Doe in connection with Doe's possible action against Company X, so the provisions of Rule 4.2 do not apply to Doe's consultation with requesting lawyer about Doe's action against Company X.

For so long as Doe remained in a management position with Company X, the anti-contact

rule precluded the requesting attorney from discussing with Doe the requesting lawyer's other client's case against Company X because Doe was within the scope of Company X's counsel's representation of Company X.

b. *Application of the anti-contact rule once Doe lost his manager status:* Once Doe lost his management status, the issue under the anti-contact rule is whether Doe remained "a person ... represented... in the matter." Resolving that issue requires consideration of V.R.E. 502 which defines the term "representative of a client" and consideration of the Vermont Supreme Court's decision in *Baisley v Young*, 167 Vt. 473 (1998).

Rule 502 (a)(2) of the Vermont Rules of Evidence provides a definition of persons who are deemed to be represented by counsel in the corporate settling. The Rule states in pertinent part as follows:

RULE 502. LAWYER-CLIENT PRIVILEGE

(a) **Definitions.** As used in this rule:

> (2) A "representative of the client" is (A) a person having authority to obtain professional legal services or act on advice rendered pursuant thereto, on behalf of the client, or (B) any other person who, while acting in the scope of employment for the client, makes or receives a confidential communication necessary to effectuate legal representation for the client. In case of a corporation, the officers and directors and those persons who have the authority to control or substantially participate in a decision regarding action to be taken on the advice of a lawyer are also "representatives of the client."

Later sections of the Rule make clear that a representative of a client is within the scope of the client's lawyer-client privilege and that a corporate client has the authority to enforce the privilege against such a representative.

If the Rule 502 definition were the only consideration, the anti-contact rule would not appear to apply to Doe after he lost his management status with Company X, but the reach of the anti-

contact Rule was broadened by the court in *Baisley*, and the *Baisley* decision may bar requesting lawyer from speaking with Doe about requesting lawyer's other client for so long as Doe remains employed by Company X.

In *Baisley*, the court reviewed the parameters of the anti-contact rule. The court eschewed a "blanket ban" rule that would prohibit communications between adverse counsel and a company employee in favor of a more nuanced "balancing test," but the court then ruled that the anti-contact rule barred plaintiff's counsel in *Baisley* from communicating about the case with a cemetery caretaker employed by the defendant Cemetery Association even though the caretaker had no apparent managerial responsibilities. The court's ruling appeared to rely on the official Comment to the Rule which states in pertinent part:

> In the case of an organization, the rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, *and with any other person whose ... statement may constitute an admission on the part of the organization. (emphasis added).*[1]

In holding that Rule 4.2 barred *ex parte* contact between the caretaker and plaintiff's counsel, the court noted that the caretaker's statements would "likely be admissible against his employer pursuant to V.R.E. 801 (d)(2)(D)."[2]

The unusual circumstance in *Baisley* that the caretaker was the only employee of the defendant association may have played a role in the court's decision, but the court does not mention that as a consideration. In the matter subject to this opinion request, Doe may be considered a

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[1] In the 2002 amendments to the ABA Model Rule this portion of the official comment was deleted. Our court has not yet made corresponding revisions to the Vermont rule.

[2] V. R.E. 801 (d)(2)(D) states in pertinent part that a statement is an admission if it is "offered against a party and is ... (D) a statement by his ... *servant* concerning a matter within the scope of his ... employment, made during the existence of the [employment] relationship." (emphasis added).

"person represented in the matter" because, as in *Baisley*, any statements made by Doe while Doe remained employed by Company X could be deemed admissions under V.R.E. 801(d)(2)(D). The court's conclusion in *Baisley* appears inconsistent with the court's rejection of a "blanket ban" rule that would prohibit all *ex parte* communications by adverse counsel with a represented party-corporation's employees, but until the court clarifies its decision, great uncertainty remains.

c. *Application of the anti-contact rule after Doe's employment was terminated:* Now that Doe is no longer employed by Company X, Doe is no longer a person represented by another lawyer in the matter (the matter being the other client's claim against the company) because Doe's statements cannot be deemed admissions under V.R.E. 801(d)(2)(D). That section only applies to statements made "during the existence of the [employment] relationship." Requesting lawyer may not discuss with Doe any information or communications that are subject to Company X's lawyer-client privilege which were made or received while Doe was a "representative of a client" as that term is used in V.R.E. 502(a)(2).

2. **The conflict of interest provisions of Rule 1.7.**

Rule 1.7 states in pertinent part:

RULE 1.7. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely

affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

In seeking guidance on these issues, the requesting lawyer has confirmed that Doe had no supervisory or direct managerial responsibility for the requesting attorney's other client. We have no information as to whether Company X would call Doe as a witness in the requesting attorney's other case. Doe would likely be a hostile witness to Company X and, based on the information received from requesting lawyer, is not likely to have first-hand information regarding the job performance of the requesting attorney's other client. Nonetheless, if Doe is called as a witness, the requesting lawyer may be required to withdraw from the further representation of one or both clients to avoid a conflict of interest under Rule 1.7. It is too speculative at this point to reach any conclusion in that regard or to decide whether any conflict would be waivable by consent of the clients under Rule 1.7(a)(2) or (b)(2).

There is no *per se* rule that prohibits a lawyer from cross-examining one client in connection with representing another client. The Comment to Rule 1.7 states that Rule 1.7(a) "prohibits represent[ing] opposing *parties* in litigation," (emphasis added), but the Rule is silent about representing one client in a case where another client may testify as an adverse witness.

If Doe is called as a witness by Company X, requesting lawyer will then need to determine whether the standards of paragraph (a) or (b) of Rule 1.7 apply. If the Rule does apply, the lawyer will need to determine whether the conflict is sufficiently minor that it can be waived by each client as provided for by paragraph (a)(2) and (b)(2) of the Rule.

Our prior opinions on this issue were analyzed under the Code of Professional

Responsibility. See Opinions 84-1, 87-10, 88-2, 88-7, 90-7 and 98-13. Although the opinions predominate on the side of not permitting representation of one client when another client will be an adverse witness, the guidance gleaned from these prior opinions is that the conflict issue must be analyzed under the particular facts of each case. The potential conflict here should be discussed with each client, and consent should be obtained from each client. If it becomes likely that Doe will be called as a witness at trial, requesting lawyer must consider the circumstances then existing to determine whether continued representation of each client will (1) adversely affect the requesting lawyer's relationship with either client or (2) impair the requesting lawyer's performance on behalf of his other client. If either of those situations exist, the requesting lawyer will need to withdraw from Doe's representation and, absent Doe's consent, likely from his other client's representation as well. If the continued representation of both of the requesting attorney's clients is not likely to have an adverse affect on the requesting lawyer's relationship with the other client and if the continued representation is not likely to be materially limited by the requesting lawyer's relationship with the other client, then the requesting lawyer will be able to continue to represent both if each consents.

CONCLUSIONS:

1. On the facts presented, the requesting lawyer may represent both a former employee and a former manager with respect to each client's individual employment claim against a company.

2. The requesting lawyer may not discuss with a former manager privileged communications between the former manager and the company's lawyer that may be relevant to the former employee's case.

3. For so long as the former manager remained a company employee, the requesting lawyer may discuss only the representation of the former manager and may not discuss with the

former manager facts relating to the former employee's claim against the company.

4. Once the former manager's employment with the company is terminated, the requesting lawyer may discuss with each client the facts of either client's case subject to the limitations contained in V.R.E. 502, so long as both clients consent.

5. After a client's employment by the company is terminated, the lawyer-client privilege continues in full force with respect to privileged information learned by the client while employed by the company.

6. If the former manager is called by the company as a witness to testify against the former employee, the requesting lawyer must determine whether consent to continued representation of both clients is permitted under Rule 1.7 and may need to withdraw from one or both clients' cases.