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CLIENT ALERT

By Nicole J. Benjamin

Ethics Advisory Panel Concludes that Ex Parte Communications with Adversary's Former Employee Are Permitted in Rhode Island

In January, Rhode Island Lawyers Weekly identified the Most Important Decisions of 2012. Among the featured decisions was the Rhode Island Supreme Court Ethics Advisory Panel's Opinion No. 2012-02, a decision that adds yet another tool in the Rhode Island litigator's toolbox.

The Advisory Opinion was issued in response to an attorney's query as to whether Rhode Island's Rules of Professional Conduct permit an attorney to have ex parte communications with an adversary's former employee without consent of opposing counsel.

The Supreme Court Ethics Advisory Opinion confirmed that Rule 4.2 of Rhode Island's Rules of Professional Conduct permits counsel to communicate ex parte with an adversary's former employee without the consent of opposing counsel.¹

In so advising, the Advisory Panel engaged in an analysis of Rule 4.2, which provides:

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 to do so by law or a court order.

R.I. R. Professional Conduct, Art. V, Rule 4.2. The Advisory Panel also found instructive Comment 7 to Rule 4.2, which provides:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's

¹ The Ethics Advisory Panel addressed this issue once before when, in 1991, it issued Advisory Opinion #91-74 and concluded that the Rhode Island Rules of Professional Conduct did not "prohibit attorneys and their agents from conducting ex parte interviews of former employees of an adverse corporate party." Ethics Advisory Panel Opinion #91-74.

lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter 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 a former constituent.* If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). 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.

R.I. R. Professional Conduct, Art. V, Rule 4.2 cmt. 7. This commentary was modeled after and is identical to the commentary that accompanies the American Bar Association Model Rules.

In reaching its decision, the Advisory Panel relied on an opinion from the ABA Standing Committee on Ethics and Professional Responsibility, which concluded “Rule 4.2 [of the ABA Model Rules] does not prohibit contacts with former officers or employees of a represented corporation, even if they were in one of the categories with which communication was prohibited while they were employed.” ABA Formal Op. 95-396 n.47 (1995) (citing ABA Formal Op. 91-359 (1991)).

The Advisory Opinion also found persuasive the Massachusetts Supreme Judicial Court's decision in *Clark v. Beverly Health and Rehabilitation Services, Inc.*, 797 N.E.2d 905 (Mass. 2003). In that case, the court held that under Massachusetts law, ex parte communications with former employees of an opposing party are permissible. *Id.* at 910. In so holding, the Massachusetts Supreme Judicial Court noted that Rule 4.2 exists “to protect the attorney-client relationship and prevent clients from making ill-advised statements without counsel of their attorney.” *Id.* The court reasoned that such purpose would not be served by including former employees within its reach. *Id.*

The Ethics Advisory Panel's confirmation that Rhode Island's Rules of Professional Conduct allow an attorney to communicate ex parte with his or her adversary's former employees provides Rhode Island litigators with a useful informal discovery tool.²

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² The Ethics Advisory Opinion cautioned that when an attorney engages in ex parte communications with an adversary's former employees, he or she must abide by all other ethical obligations imposed by the Rules of Professional Conduct.