

Can We Talk? Are You My Client?
Timeless Ethics Questions for All of Us

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In the course of representing clients, each of us faces from time-to-time the often-perplexing interplay of duties owed because of our privileged status as members of the State Bar. Different from many professions, we are charged with multiple responsibilities in our varying roles, and these are set out in the Texas Disciplinary Rules of Professional Conduct (“DRPC”).¹ A duty of advocacy for clients is tempered by other duties arising out of other obligations that attach to being a Texas attorney, including protections of the process of advocacy, of the privileges of the client relationship, of candor toward others in our professional dealings, and the integrity of the profession overall.

The Texas DRPC, similar to the American Bar Association Model Rules of Professional Conduct (“ABA Model Rules”),² are organized in a manner to reflect the various roles: “Client-Lawyer Relationship,” “Counselor,” “Advocate,” “Non-Client Relationships,” “Law Firms and Associations,” “Public Service,” “Information about Legal Services,” and “Maintaining the Integrity of the Profession.” A final section of the Texas DRPC, “Severability of Rules,” notes the interrelated nature of the various rules and assures that the invalidation of any one of the rules shall not affect the continuing validity of the remaining rules.

This paper looks at practical aspects of a question concerning professional responsibility that frequently arises in the employment law context: The question concerns restrictions on contacts by a lawyer with non-clients during the adversarial process, including non-clients who are current or former employees of an adverse party or who have a special relationship to the particular litigation. This includes review of the existence of the attorney-client relationship, or not, under *Upjohn* as that status may realistically impact the decision whether to go forward with an *ex-parte* communication that otherwise may be permitted.

1. The Guiding Framework for Ex-Parte Contacts by Counsel: Texas Disciplinary Rule of Professional Conduct 4.02

Texas DRPC 4.02 sets out the basics for *ex-parte* communications with non-clients. It has various sub-clauses directed to different scenarios:

a. DRPC 4.02(a)’s “No Contact” with Client Restriction

Texas DRPC 4.02(a) concerns communications with persons, organizations, or entities of government known to be represented by another attorney, and prohibits communications concerning the subject matter of the representation except with the consent of the other attorney or by authorization of law.³

¹ The Texas DRPC are found at the following URL:

<https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=27271>

² The ABA Model Rules are found at the following URL:

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

³ TX DRPC 4.02(a): “In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be

i. Organizations and Entities of Government—Managerial Responsibility Relating to the Subject of the Representation, and Current Employees whose Conduct May Give Rise to Vicarious Liability, including under DRPC 4.02(b)

Comment 4 to DRPC 4.02 fairly-directly identifies the scope of the restriction on communications in the case of an organization or entity of government, specifying:

In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with [1] persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and [2] with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel, the presumption is inapplicable. (Emphasis added.)

Clearly, Comment 4 to DRPC 4.02 contemplates two, separate categories of persons protected from communications with opposing counsel *based specifically on their identification with the interests of the party involved*: (1) those with managerial responsibility that *relates to the subject of the representation* (without specifying whether the responsibility was past or present) AND (2) *current employees* whose actions/omissions *may give rise to vicarious liability for the matter at issue*.

Thus, even the scope of the restriction on communications differs between these two categories of persons: for those with “managerial responsibility,” it extends not just to the matter then in dispute but beyond to “the subject of the representation”—a broader description. Current employees, presumably non-managerial as to the subject of the representation, are protected from contact only if their own conduct would give rise to liability for the organization or entity.

In some respects, this seems straightforward, in part because it parallels what would seem to be the *Upjohn* extension of the control group concept for privilege: It would extend to the past and current managers who could set policy or take action on behalf of the organization or entity with respect to the subject matter affected, and the individuals who “may” or “might” implement policy or take the actions that could result in liability.

Further, the specific description of one of the categories of protected persons as those “currently employed,” and the presumably deliberate omission of that descriptor for the category of persons with “managerial responsibility” that “relates to the subject of the representation” would ordinarily indicate that employment is not a requirement as to the latter category of persons protected from contact by counsel for an adverse or other party.

represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

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However, while there is no Texas case law directly applying Comment 4 in the context of this issue, the scope of “an organization or entity of government” is narrower than Comment 4 initially might indicate, because of the application of DRPC 4.02(c), which clarifies:

For the purpose of this rule, ‘organization or entity of government’ includes: (1) those persons *presently* having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons *presently* employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission. (Emphasis added.)

Consistent with this narrowing of the definition of the persons that comprise an “organization or entity of government” for purposes of DRPC 4.02 generally, Comment 4 continues on to say:

Moreover, this Rule does not prohibit a lawyer from contacting *a former employee* of a represented organization or entity of government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue. (Emphasis added.)

Comment 4’s final sentence seems to provide unrestricted license to contact “former employees” without regard for whether *such persons are closely identified with the interests of the organization or entity of government such that its lawyers will represent them as well*—which is the policy touchstone of Comment 4’s initial description of the persons protected from contact under DRPC 4.02.

ii. Selected Ethics Opinions Addressing Managers and Ex-Employees

A number of Opinions have issued that discuss the scope of access to former employees of an organization or government agency. Two opinions dealing with municipalities

OPINION 474 (June 1991)

Statement of Facts

Plaintiff has sued a municipality. The city attorney of the municipality represents the city and is engaged in settlement negotiations with plaintiff through plaintiff’s counsel. Defendant, with the city counsel’s approval, has offered a certain sum in settlement. Plaintiff has taken the position that the amount offered is inadequate. Unbeknownst to the city attorney’s office, plaintiff’s counsel telephones an individual counsel member to express his disapproval of the city’s settlement offer. When questioned about the propriety of such contact, plaintiff’s counsel refuses to acknowledge that the prohibition of such contact with the opposition’s client is applicable when the client is a municipality.

Question Presented

Is the communication by plaintiff’s counsel with city counsel members described above a violation of Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct?

Discussion

Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct provides in part as follows:

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) For the purpose of this rule, “organization or entity of government” includes:

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1. those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or
2. those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

Conclusion

Yes. These provisions of Rule 4.02 prohibit communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation.

OPINION 492 (June 1992)

Statement of Facts

A "labor organization" as defined by Vernon's Ann.Civ.Stat. art. 5154c, section 5, has on its staff non-attorney advocates who represent municipal employees in presentation of grievances and assist employees in nonjudicial resolution of workplace problems. This labor organization also employs an attorney whose duties and obligations are not substantially different from the nonattorneys in being responsible for assisting in the nonjudicial resolution of workplace issues. No representatives of the union claim a right to strike and all, including the attorney, are licensed "labor organizers" as required by art. 5154a. The type of work includes:

1. Arranging meetings between supervisors and employees to informally work out problems;
2. Contacting Personnel Managers and staff at the Human Resources Department to initiate, inquire about, or expedite application for City benefits such as Return to Work programs, Sick Leave Transfer benefits, Wage Continuation Benefits, Reclassification and Transfer requests or other programs which the City operates for the benefit of employees;
3. Discussing with upper management and City Council members proposed policy initiatives and procedures for their implementation;
4. Lobbying City Council members;
5. Representing employees at informal disciplinary hearings before his or her supervisor and upward through the process on appeal to a Department head and possibly to a Grievance Panel;
6. Investigating facts and collecting statements from employees, both rank and file as well as supervisory, in preparation for effective representation.

The Charter for the Municipality reads:

"The city attorney shall be the legal advisor of, and attorney for, all of the officers and departments of the city, and he or she shall represent the city in all litigation and legal proceedings."

The city attorney has informed the labor organization's attorney that he may not communicate with, nor cause another to communicate with, any city employee who has "managerial responsibility which relates to the subject of the representation." This prohibition is based upon the city attorney's reading of Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct. In further reliance upon Rule 4.02, the city attorney has enjoined the labor organization's attorney from communicating, directly or indirectly, "with any city employee whose act or omission make the city liable for such act or omission" without the consent of the city attorney.

Question Presented

Do the prohibitions of Rule 4.02 apply to an attorney who represents a union member in resolving grievances or other concerns arising out of municipal employment, or who negotiates on policy matters, where there is neither litigation in progress nor contemplated?

Discussion

The Texas Disciplinary Rules of Professional Conduct, Rule 4.02 provides that:

- a. In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized to do so ...

[b]For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or

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omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

This rule applies to all attorneys licensed by the State of Texas and practicing in Texas. It prohibits the above-described communications without the other lawyers' consent unless otherwise "authorized by law." This new rule incorporates DR 7-104 of the former Texas Code of Professional Responsibility and the interpretation of that rule by the Professional Ethics Committee most recently published in Ethics Opinion 461 (January 1989).

In addition, comment three to Rule 3.10 concerning advocates in nonadjudicative proceedings addresses the representation of a client in a negotiation or other bilateral transaction with a governmental agency by referring the lawyer to rules 4.01 through 4.04. Therefore, despite the fact that litigation is neither in progress nor contemplated, the prohibitions of Rule 4.02 apply.

Vernon's Ann.Civ.St. art. 5154c §6 states that "[t]he provisions of this Act shall not impair the existing right of public employees to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative that does not claim the right to strike." The Texas Supreme Court has interpreted the term "representative" to include attorneys. *Sayre v. Mullins*, 681 S.W.2d 25 (Tex.1984). A city may not deny the employee's chosen representative, including an attorney, the right to represent an aggrieved city employee at any stage of the grievance procedure, so long as the employee has designated that representative and that representative does not claim the right to strike. *Lubbock Professional Firefighters v. City of Lubbock*, 742 S.W.2d 413, 417 (Tex.App.—Amarillo, 1987 ref. n.r.e.).

Therefore, to the extent that an attorney is acting as a city employee's designated representative within a grievance procedure, the attorney may communicate with city employees involved in that procedure.

Apart from participation in the designated grievance procedure, which is communication "authorized by law" within the meaning of Rule 4.02(a), the attorney representing a municipal employee is bound by the same disciplinary rules as any other attorney in the State of Texas in representing his client. The attorney must obtain consent from the city attorney prior to communicating with any city employee presently having managerial responsibility relating to the subject of the representation or with those persons presently employed by the city whose act or omission in connection with the subject of the representation may make the city vicariously liable for such act or omission. As previously discussed by the committee in Opinion 461 in a similar situation, if the employee with whom communication is made is not an officer or managing employee of the city and if the conduct by the employee is not the subject of the controversy, then he may be interviewed by the attorney provided the attorney makes full disclosure of his connection with the matter and explains the purpose of the interview.

Conclusion

The city employee has an absolute right to be represented by his designated representative including an attorney, at any stage of the grievance procedure, either formal or informal. Outside the communications made as part of the grievance procedure, the attorney is subject to the constraints imposed by the Texas Disciplinary Rules of Professional Conduct regarding communication with one represented by counsel.

Both opinions above, although not expressly considering the question whether former managerial employees who are so closely aligned with management interests through their role while employed may be contacted by an adverse counsel, reiterate that the protections of the "no-contact" rule apply specifically to currently-employed managers.⁴ Thus, there is no prohibition under DRPC 4.02 on contacting former managerial employees merely because of their former managerial status.

Similarly, a current employee who is not an officer or managing employee of the corporate defendant and whose conduct is not the subject of the controversy may be interviewed by an attorney

⁴ Ethics opinions collected by the University of Houston Texas Ethics Reporter may be found at the following web site, indexed by subject and number: <http://www.law.uh.edu/libraries/ethics/opinions/ethicssubjectindexb.html> . Additionally, both current and superseded versions of the rules of conduct for Texas attorneys and the applicable disciplinary procedure, may be found here. <http://www.law.uh.edu/libraries/ethics/homepage.html>

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or a party opposing the corporation “provided the attorney makes a full disclosure of his connection with the suit and explains the purpose of the interview.” *See, e.g.,* Ethics Opinion 461⁵ (October 1988).

iii. Contact Authorized by Law

Significantly, per Ethics Opinion 492, set out above, the representative of a grievant who happens to be an attorney is not constrained at all by the no-contact obligations of DRPC 4.02(a) when acting within the scope of the statutorily-authorized grievance process, but has the same access to municipal employees as any other person selected to represent the grievant during the process. This is because the role of the representative of the grievant is “authorized by law,” requiring no consent.

Contacts with “governmental agents or employees such as police” are identified as persons who may be contacted without consent of counsel “due to their obligations to the public at large.” *See* Comment 3, DRPC 4.02.

iv. Consent

While the safest and, therefore, the preferable course would be always to obtain consent expressly and in writing, there is not a specific requirement to do so set out in the Rule. Comment 2 recognizes that “[c]onsent may be implied as well as express,” giving as an example a “private placement memorandum⁶ or similar document” that is intended for multiple recipients. This appears to reflect tolerance of impersonal communications not targeting the represented person.

⁵ **OPINION 461** (October 1988). **Question:** Does the Texas Code of Professional Responsibility prohibit the plaintiff’s attorney from questioning present employees of a corporate defendant concerning matters within the scope of their employment that are the subject of the pending litigation? **Factual Background:** The plaintiff brought suit in a state court in Texas against a defendant corporation, seeking damages for personal injury alleged to have been caused by negligent acts committed by employees of the defendant in the course and scope of their employment. No individual employee was named as a defendant. After the defendant appeared and answered through its attorney, the plaintiff’s attorney, personally or through his employees or agents, contacted present employees of the defendant to question them concerning matters within the course and scope of their employment which are the subject of the suit. **Discussion:** Answer to the question presented is governed by DR 7-104, the pertinent portion of which reads as follows: “DR 7-104. *Communicating With One of Adverse Interest.* (A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.” **Opinion 17** (December, 1948) held that **Canon 9** then in effect did not preclude an attorney from interviewing a potential witness, other than a party to the suit, even though the witness may be an employee of a party to the suit, if the attorney makes a full disclosure of his connection with the litigation and explains the purpose of the interview. That opinion was qualified, however, by Opinion 342 (March, 1968) with the following modification: (1) If the employee being interviewed is the person for whose acts or omissions the defendant is sought to be held liable, such employee should be considered as a party and he should not be interviewed without the consent of the attorney for the corporate defendant by whom he was employed. (2) If the employee being interviewed is an officer or managing employee with authority to bind the corporate defendant, he should likewise be considered a party within the meaning of Canon 9. We do not read prior Opinion 342 as prohibiting communication by a lawyer with the employee of a corporate defendant who is represented by an attorney if, and only if, *both* conditions set out in Opinion 342 are met. If either condition exists, the prohibition applies. **Conclusion:** During the course of his representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with the employee of an adverse party without consent of opposing counsel if (1) the employee is an officer or managing employee or (2) the conduct (act or omission) of the employee is the basis of the litigation. If the employee with whom communication is made is not an officer or managing employee of the corporate defendant and the conduct by the employee is not the subject of the controversy, he may be interviewed by an attorney or a party opposing the corporation provided the attorney makes a full disclosure of his connection with the suit and explains the purpose of the interview.

⁶ A private placement memorandum is a legal document provided to prospective investors when selling stock or another security in a business that states the objectives, risks and terms of an investment involved with a private placement; it typically includes items such as a company’s financial statements, management biographies, a detailed description of the business operations, etc.

One commentator has noted that other jurisdictions have permitted more personal contact under “implied” circumstance of consent. See Schuwerk, Robert P. & Hardwick, Lillian B., *48A Tex. Prac., Tex. Lawyer & Jud. Ethics* § 9:2 (2016 ed.). However, Schuwerk indicates a “totality of the circumstances” test was applied by the court in that instance to determine whether implied consent actually had been given, which from a practical perspective, reflects that the “implied consent” was challenged. This makes plain the practical benefit—if not necessity—of express, written consent when personally contacting a represented party.

v. Shall Not Cause or Encourage Another

DRPC 4.02(a) forbids an attorney not only from personally contacting represented parties about the subject on which the person, organization, or governmental entity is represented, but also prohibits an attorney from “causing or encouraging another” to so communicate. See, e.g., *Vickery v. Comm’n for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App.—Houston [14th] 1999) (upholding suspension and fine for attorney who, among other things, solicited another to contact represented ex-spouse directly to attempt settle post-divorce dispute).

Comment 2 to DRPC 4.02 clarifies that paragraph (a) does not, however, prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Further, under circumstances where a client has an existing business relationship with an organization and no lawsuit or claim has been filed in the client’s behalf by the attorney, at least one Ethics Opinion permits an attorney to advise the client to contact the adverse or potentially-adverse organization to secure information to which the client otherwise is entitled without disclosure of the attorney’s counsel to do so and without regard for whether or not the organization has in-house counsel:

OPINION 488
December 1992

Question Presented

Is it proper for an attorney to advise his client (a debtor) to contact the client's creditor to obtain a written statement of the client's account if the client does not inform the creditor that the client is represented by counsel and that the statement of account will be reviewed by the client's attorney? Would a different answer be required if the creditor had an in-house attorney?

Facts

An attorney is contacted by a purchaser of consumer goods under a retail installment contract regarding a potential breach of warranty and fraud claim associated with the purchase and potential improper or questionable late fees charged by a finance company which purchased the contract and the finance company's failure to timely credit payments on the contract.

An attorney-client relationship is formed and the attorney advises the client (the purchaser of consumer goods) of several options that might be available to the client and that the client should request a statement of his account from the finance company to determine the client's current account balance and to allow the client to make an informed decision as to which option to pursue.

The client then contacts an employee of the finance company and requests a written statement of his account but does not tell the finance company's employee that he has consulted or is represented by an attorney. The employee later prepares and sends the client a written statement of his account, which is delivered by the client to his attorney.

No litigation was pending between the parties when the client requested the statement of his account.

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Questions

1. If the creditor is not represented by an attorney, is this a prohibited communication by an attorney with an unrepresented person without disclosing his role as an attorney?
2. If the creditor has an in-house attorney, is this a prohibited communication with a represented party without the consent of that party's attorney?

Discussion

Rules 4.01, 4.02, 4.03 and 4.04 govern the conduct of attorneys in nonclient relationships.

DR 4.01 relates to the truthfulness of statements by an attorney to others. No fact presented indicates or implies that the attorney made or advised his client to make any false statement of fact or law to the employee of the finance company. Under the facts presented, it was not necessary to disclose to the finance company the fact that the client was represented by an attorney, to avoid making the attorney a party to a criminal act or assisting a fraudulent act perpetuated by the client. No criminal or fraudulent act was contemplated or perpetuated by the client or his attorney. DR 4.01 was not violated under the facts.

DR 4.02 prohibits an attorney from communicating or encouraging or causing another to communicate about the subject of representation with another person, organization or entity known by the attorney to be represented by an attorney. If read literally, this Rule seems to prohibit any direct or indirect contact by an attorney with any other person known by the attorney to be represented by an attorney, without the consent of the attorney for the other party, unless authorized by law to do so. Under the facts presented, the client was entitled to request the finance company to provide him with his account balance and a copy of a statement of his account. The fact that his attorney advised him to do so did not violate DR 4.02, even if his attorney knew that the finance company had in-house counsel.

DRs 4.03 and 4.04 have no application under the facts presented.

Conclusion

No Disciplinary Rule was violated if the attorney advised the client only to request a statement as to his account balance and a written statement of his account, and bring it to him for review, regardless of whether the finance company had in-house or outside counsel, or no attorney.

Significantly, even though the contact by the client appears directly contrary to the language of DRPC 4.02(a)—and the Ethics Opinion notes this specifically—because “the client [already] was entitled to request the finance company to provide him with his account balance and a copy of the statement of his account,” the fact that the attorney “advised him to do so did not violate [DRPC] 4.02, *even if his attorney knew that the finance company had in-house counsel.*” Ethics Opinion 488 (Emphasis added.)

Per Comment 2, DRPC 4.02(a) does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government, although at one time the Ethics Opinions held strongly to the contrary. *See, Opinion 339* (March 1968).⁷

⁷ “ABA Canon 16 provides that ‘A lawyer should use his best efforts to restrain and prevent his clients from doing those things which the lawyer himself ought not to do,’ and under that Canon the ABA Professional Ethics Committee ruled in Informal Decision 524 that an attorney should use his best efforts to restrain and prevent his clients from communicating with the other party without consent of opposing counsel.

“Since Texas has not adopted ABA Canon 16, it might be argued that under the Texas Canons an attorney has no ethical duty to take affirmative action to prevent improper communications by his client but it is our opinion that the scope of Canons 9 and 19 is sufficiently broad to impose such duty and we therefore rule that an attorney should exercise reasonable efforts to prevent improper communications by his client with the adverse party. (8-0.)

“Two members of the Committee further feel that if the client persists in improper communications with the adverse party, his attorney should disqualify from further handling of the matter.”

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vi. In-House Counsel

Professor Schuwerk, in his treatise, also notes that because a purpose of Texas DRPC 4.02 is to “preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer,”⁸ the prohibition on contact “does not apply to an attorney who contacts in-house counsel for an opposing party when the lawyer knows that party is represented by outside counsel with respect to the matter, as in-house counsel is presumably as capable of protecting his or her client's interests as outside counsel is.” Schuwerk, *48A Tex. Prac., Tex. Lawyer & Jud. Ethics* § 9:2 (citing ABA Formal Op. 06-443 (2006)). Thus, there is something of a “no harm, no foul” approach here.

Still, the Texas Supreme Court has made clear that it considers the ABA Committee interpretive guidance to be only “guidance,” and not binding. See, *In re Dana Meador, Relator*, 968 S.W.2d 346 (Tex. 1998) (Texas DRPC and opinions from Texas courts and the State Bar of Texas interpreting those rules provide the disciplinary standards for Texas attorneys; ABA opinions are advisory only).⁹ Thus, ignoring an organization’s designated outside counsel for a matter to communicate with in-house counsel seems a deliberate violation of Rule 4.02, notwithstanding the ABA Opinion. Further, with large in-house law departments, the presumption that a particular in-house lawyer is properly in position to protect interests of the corporation, rather than the designated outside counsel, also seems a risky assumption in the face of the plain language of the Texas Rule. For example, with respect to particularly sensitive or highly-confidential matters, only an outside attorney or limited in-house counsel may be properly informed to respond—or who even are aware of the engagement of outside counsel on a particular matter. Thus, if an outside counsel has been identified on a transactional matter or to defend litigation, notwithstanding the ABA opinion, the compliant course is to communicate with that designated counsel as the counsel of choice of the corporate organization.¹⁰

vii. “Known” to be Represented

Rule 4.02(a) applies only when a person, organization or entity is known to be represented by counsel. *In re Users System Services, Inc.*, 22 S.W.3d 331 (Tex. 1999) (attorneys who met and settled lawsuit with opposing party who had provided written affirmation that he was no longer represented—but who had not yet informed his own lawyer that he had been discharged—did not violate DRPC 4.02).

⁸ *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App. 1999).

⁹ The Texas Supreme Court cites ABA opinions frequently, notwithstanding *Meador’s* discussion of the merely advisory nature of those opinions. See, e.g., *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 467–68 (Tex. 1994); *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834–35 (Tex. 1994).

Additionally, in federal court, motions to disqualify are governed by standards of both the state and national professions. See, e.g., *Cramer v. Sabine Transp. Co.*, 141 F. Supp.2d 727 (S.D. Tex 2001).

¹⁰ One example of the further perils of a communication directed to in-house counsel is *Helvand v. Coane*, 12 S.W.3d 152 (Tex App.—Houston [1st Dist.] 2000, no pet. h.). In this case, the defense attorney took umbrage with correspondence sent by plaintiff’s counsel to in-house counsel, copying defense counsel, complaining of defense counsel’s litigation tactics, resulting in a separate defamation lawsuit against plaintiff’s counsel over the communications.

viii. Contact by the Represented Non-Client

Further, DRPC 4.02(a) assumes circumstances where the lawyer initiates contact with the non-client, represented person. The Schuwerk treatise remarks on an interesting case from another jurisdiction, *Zaug v. Virginia State Bar ex rel. Fifth Dist.-Section III Committee*, 737 S.E.2d 914, 915 (Virginia 2013), where the non-client, represented party contacts the opposing counsel prior to a deposition, seeking to cancel the deposition. The lawyer receiving the call required a few moments to realize to whom she was speaking, and she let the represented party continue to speak briefly before advising that she (the lawyer) could not speak to the caller without her lawyer's permission; even then, the caller continued to seek to continue the conversation. After a short time, the lawyer terminated the call. The caller's lawyer, when learning of the call, filed a complaint under the equivalent "no-contact" rule in Virginia. The disciplinary authority imposed a minimal sanction, but the attorney appealed, arguing that her conduct did not violate the Virginia disciplinary rule. The Virginia Supreme Court, while acknowledging that the rule commentary requires that a lawyer must "immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule," nonetheless held that the brief interaction that occurred while the attorney sought a polite way to terminate the conversation did not violate the ethical duty. Specifically, the court noted that "the Rule does not require attorneys to be discourteous or impolite" in dealing with represented persons who initiate contact with them. *Id.* at 919. Absent evidence that the attorney either sought or obtained any advantage from the unsolicited call, and did not deliberately or affirmatively prolong it, no violation occurred. *Id.*

ix. Contact of Represented Party by Unrepresented Lawyer

A lawyer who is a party in a legal matter but who does not represent any other party in the matter may communicate directly with the represented adverse party without the consent of the adverse party's lawyer to discuss settlement. See Ethics Opinion 653 (January 2016). DRPC 4.02(a) does not bar communications between the parties as long as a party's lawyer "does not cause or encourage the communication without the consent of the lawyer for the other party," per Comment 2. The Committee concluded that a lawyer who is a party to the transaction but does not represent any other party to the transaction or legal matter is not prohibited by Rule 4.02(a) from acting like any other unrepresented person. The Committee's reasoning is that viewing a lawyer who is a party in a matter "as part lawyer and part client with the lawyer part representing the client part in the matter is to strain the language of the Rule beyond its intended meaning." EO 653 (January 2016), at 2. In taking this position, the Committee acknowledged its departure from some court holdings and treatises, including the *Vickery* case:

The Committee notes that some court decisions have taken the contrary interpretation and ruled that a lawyer who is a party in a matter is at least in some circumstances to be viewed as a lawyer representing a client (himself) for purposes of making Rule 4.02(a) applicable. With this interpretation, the lawyer/party who communicates concerning the legal matter with an adverse party who is represented by another lawyer will violate Rule 4.02(a) if the communication is without the consent of the adverse party's lawyer. See *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App. – Houston (14th Dist.) 1999, pet. denied); see also American Bar Association Committee on

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Professional Ethics, Informal Opinion 982 (1967). This interpretation, however, is rejected in Restatement (Third) of the Law Governing Lawyers (2000) Section 99(1)(b), which takes a position consistent with the position of the Committee in this opinion (the prohibition on communications with another represented party without consent of the party's lawyer does not apply in the case of a lawyer who is a party in a legal matter and who represents no other party in the matter).

Ethics Opinion 653 (January 2016), at 2. The Committee is clear to note that while DRPC 4.02(a) may not apply to these communications, other of the rules will:

Because of the risk that a lawyer's direct communication with a party who is not a lawyer could in some cases be a means of misrepresentation or intimidation by the lawyer, a lawyer/party who chooses to communicate directly with another party without consent of that party's lawyer must exercise particular care to avoid any communication with the adverse party that in the circumstances would constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Rule 8.04(a)(3).

Id.

x. Matters Outside the Subject of Representation

DRPC 4.02(a) does not prohibit client communications concerning matters outside the subject of the representation, although it is difficult to imagine circumstances where it would be appropriate in an adversarial context other than perhaps an inadvertent social occasion.

xi. Demand for Physical Examination of Party

Opinion 358 (December 1971) responds to the question, "Is it proper for an attorney to send copies of letters written to opposing counsel to the opposing counsel's client?" by stating:

"As a general rule, an attorney should not send copies of his letters that written to opposing counsel to opposing counsel's client; however, an attorney may send to the opposing counsel and to the opposing party a demand that such party submit to a physical examination."

This opinion rests upon an earlier opinion, Opinion 139 (December 1956), which states that because the demand for a physical examination is not a "negotiation" of settlement (for which a joint letter would be barred), but is for an examination that is not a matter of right but is a subject for proper impeachment relating to claims of injury if the examination were rejected by the plaintiff, and for which the plaintiff could claim ignorance unless the letter is sent to the plaintiff directly. This likely is an outdated opinion in light of the procedures for securing a physical examination.

b. DRPC 4.02(b) – *Ex Parte* Contacts with Consulting or Retained Experts

Texas DRPC 4.02(b) concerns communications with consulting or retained experts in litigation:

In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a

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lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Somewhat surprisingly, there are few cases nor any Texas ethics opinions that concern this circumstance, likely because the procedural rules that govern litigation are well-developed regarding discovery of an opposing party's expert evidence.

c. DRPC 4.02(c) – Scope of Persons Who Constitute an “Organization or Entity of Government”

See pp. 2-7, *supra*.

a. DRPC 4.02(d)

Texas DRPC 4.02(d) expressly provides for a represented party to secure a “second opinion” without requiring that the second attorney first secure the consent of the represented party's existing counsel, stating:

When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Comment 2 to DRPC 4.02 makes clear that providing a second opinion can include “discussing employment in the matter if requested to do so.” At the same time, Comment 2 invokes the restrictions on communications concerning the prohibition of “false or misleading communication(s) about the qualifications or the services of any lawyer or firm,” noting that such a communication is “false or misleading” if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;
- (3) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;
- (4) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official: or
- (5) designates one or more specific areas of practice in an advertisement in the public media or in a written solicitation unless the advertising lawyer is competent to handle legal matters in each such area of practice.

See Texas DRPC 7.02, Communications Concerning a Lawyer's Services.

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2. Practical Considerations Arising Out of Texas Disciplinary Rule of Professional Conduct 4.02

a. Disqualification Risks/Costs

- i. *In re RSR Corp. & Quemetco Metals Ltd., Inc.*, Slip Op. No. 13-0499 (decided December 4, 2015)

Plaintiff RSR Corp. sought mandamus as to the trial court disqualifying plaintiffs' counsel Bickel & Brewer because counsel "worked so closely" with a defendant's former finance manager, Hernan Sobarzo. Treating the finance manager like a side-switching paralegal, the trial court applied *In re American Home Products Corp.*, 985 S.W.2d 68 (Tex. 1998) (orig. proceeding), and found Bickel & Brewer should have screened Sobarzo from participating in the case. The Court held that the *American Home Products* screening requirement does not govern a fact witness with information about his former employer if his position with that employer existed independently of litigation and he did not primarily report to lawyers. To the extent the fact witness discloses his past employer's privileged and confidential information, the factors outlined by *In re Meador*, 968 S.W.2d 346 (Tex. 1998) (orig. proceeding), should guide the trial court's discretion regarding disqualification.

In this instance, the record indicates that Sobarzo, who was a defendant Inppamet's finance manager for three years, was integrally involved in reviewing the financial relationship between his employer and RSR, including calculating payments under a contract with RSR. His position involved working with Inppamet's lawyers and company officers, collecting information for Imppamet's auditors and lawyers, and reviewing invoices for legal services. Sobarzo's contract contained a confidentiality provision that forbade his disclosure of confidential information obtained through employment even after employment.

When Sobarzo resigned from Imppamet, he took around 2.3 gigabytes of data, including 15,000 to 17,000 emails consisting of personal communications and communications with Inppamet's lawyers, managers, and directors.

A few months later, RSR's counsel contacted him, and multiple meetings with RSR's counsel followed. Reportedly there were at least two international trips between Chile and New York to meet, for 19 meetings and 150 hours. It is disputed what occurred at the meetings, including the nature and number of documents reviewed. RSR contends that Bickel & Brewer "always told Sobarzo not to reveal Inppamet's privileged or confidential information during their interviews." It is contended that Bickel & Brewer looked on as Sobarzo displayed documents on his computer and that RSR's Chilean counsel, also present at the meetings, possesses a pen drive with many Inppamet documents. Sobarzo charged \$1600 per day for his time with Bickel & Brewer, four times his then-current salary—although RSR contends that Sobarzo merely misled counsel as to his then-current salary. A contract for \$1 million dollars was executed..

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Because the trial court improperly disqualified RSR's counsel under *American Home Products*, mandamus relief was conditionally granted. The district court will be required to apply *Meador* to evaluate whether disqualification is appropriate under these circumstances.

ii. *In re Meador*, 968 S.W.2d 346 (Tex. 1998)

The issue in this original mandamus proceeding is whether the trial court abused its discretion by refusing to disqualify plaintiff Dana Meador's counsel. Defendants, which Meador sued for multiple employment claims, contend that the Meador's lawyer improperly used privileged documents which the lawyer's client Peterson (in another lawsuit) secretly removed from defendants' offices, where Peterson had been employed.

The Court held that, under the facts and circumstances of this case, the trial court did not abuse its discretion by refusing to disqualify the lawyer. The court of appeals therefore abused its discretion in granting mandamus relief compelling disqualification. The Court conditionally granted mandamus relief against the court of appeals, while articulating certain standards for disqualification proceedings:

A lawyer who uses privileged information improperly obtained from an opponent potentially subverts the litigation process. While we do not exercise our rulemaking authority via judicial opinion, see *State Dep't of Highways v. Payne*, 838 S.W.2d 235, 241 (Tex.1992), we nonetheless agree with the court of appeals that ABA Formal Opinion 94–382¹¹ represents the standard to which attorneys should aspire in dealing with an opponent's privileged information. The ABA's approach reflects the importance of the discovery privileges, and ensures that the harm resulting from an unauthorized disclosure of privileged information will be held to a minimum.

968 SW.2.d. at 349.

Without doubt, there are situations where a lawyer who has been privy to privileged information improperly obtained from

¹¹ That opinion provides:

A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

ABA Formal Op. 94–382.

the other side must be disqualified, even though the lawyer was not involved in obtaining the information. Discovery privileges are an integral part of our adversary system. By protecting attorney-client communications and an attorney's work product, they encourage parties to fully develop cases for trial, increasing the chances of an informed and correct resolution. See generally *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 200–03 (Tex.1993). As the United States Supreme Court has recognized:

Were [an attorney's work product] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385, 393–94, 91 L.Ed. 451 (1947). See also *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex.1997) (explaining similar rationale underlying the consulting-expert privilege).

Id. at 351-52.

In sum, the trial court, giving due consideration to the importance of our discovery privileges, must consider all the facts and circumstances to determine whether the interests of justice require disqualification. In this exercise of judicial discretion, a trial court should consider, among others, these factors:

- 1) whether the attorney knew or should have known that the material was privileged;
- 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
- 3) the extent to which the attorney reviews and digests the privileged information;
- 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
- 5) the extent to which movant may be at fault for the unauthorized disclosure;

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6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

We emphasize that these factors apply only when a lawyer receives an opponent's privileged materials outside the normal course of discovery. If a lawyer receives privileged materials because the opponent inadvertently produced them in discovery, the lawyer ordinarily has no duty to notify the opponent or voluntarily return the materials. Rather, the producing party bears the burden of recovering the documents by establishing that the production was involuntary. *See Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 226 (Tex.1992). Also, we express no opinion on the proper standard for disqualifying an attorney who was directly involved in wrongfully procuring an opponent's documents.

Id. at 351-52.

b. Scope of the Attorney-Client Privilege / Work Product Doctrine

- i. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)

The General Counsel for Upjohn, when informed that one of its foreign subsidiaries had made questionable payments to foreign government officials to secure government business, initiated an internal investigation. As part of this investigation, Upjohn's attorneys sent a questionnaire to all foreign managers seeking detailed information, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by Upjohn disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons demanding production of the questionnaires, memoranda, and notes of the interviews. Upjohn refused to produce the documents, claiming protection from disclosure by the attorney–client privilege and constituted the work product of attorneys prepared in anticipation of litigation.

The United States filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded that the attorney–client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work–product doctrine. The Court of Appeals rejected the finding of a waiver of the attorney–client privilege, but held that under the so–called “control group test” the privilege did not apply “[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice ... for the simple reason that the communications were not the

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'client's.' " The court also held that the work-product doctrine did not apply to IRS summonses.

The Supreme Court held:

The communications by Upjohn's employees to counsel are covered by the attorney-client privilege insofar as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context it will frequently be employees beyond the control group who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

(b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.

(c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.

(d) Here, the communications were made by Upjohn's employees to counsel, at the direction of corporate superiors to secure legal advice from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.

Further, the work-product doctrine applies to IRS summonses

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(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work–product doctrine.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work–product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney–client privilege. To the extent they do not reveal communications they reveal attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney's mental processes, and *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship.

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