

What About Bob?

Communications With Former Supervisors Generally Permitted

Consider this scenario: You represent Mary Jones in an employment-related lawsuit against the Stephens Company, where Mary had worked for many years. Her performance had always been excellent. When Mary turned 55, the Stephens Company increased her workload, and assigned her to a different supervisor, who was highly critical of her performance. Mary's new supervisor, Ellen Wilson, hired numerous young employees, whom she openly favored.

Mary no longer had contact with her prior supervisor, Bob Harrison, with whom she worked very well. After a few months of working for Ellen, Mary was fired. Her employer said it was letting her go because of her unsatisfactory performance and her failure to work well with her co-workers. In response, Mary filed an age discrimination claim and this lawsuit.

After she was fired, and while the lawsuit was pending, Mary's old supervisor, who had also left the company, contacted her. He said he wanted to "give her information that would make her case a slam dunk." Mary immediately called and asked you to meet with Bob.

Are you ethically permitted to contact Bob? And if so, must you interview Bob with counsel from the Stephens Company present? The Philadelphia Bar Association Professional Guidance Committee recently addressed this situation in Opinion 2014-3, and concluded that (1) you may contact Bob and (2) you are not required to notify counsel for the Stephens Company.

In its Opinion, the Committee cited Pennsylvania Rules of Professional Conduct Rules 4.2 ("Communications with Persons Represented by Counsel"), 4.3 ("Dealing with Unrepresented Person") and 4.4 ("Respect for Rights of Third Persons") and Pennsylvania Bar Association Committee on Legal



Ethics and Professional Responsibility Formal Opinions 90-142 and 2005-200. Regarding Opinion 2005-200, which addressed only changes to Rule 4.2 since the Committee issued Opinion 90-142, the Committee concluded, *inter alia*, that:

- (a) The rule applies to any "person" represented by counsel in the matter, even if that person is not a party to litigation.
- (b) An attorney may need to seek a court order granting permission to contact a represented person or entity in exceptional circumstances.
- (c) A lawyer is not prohibited from advising a client concerning communications the client might have initiated with the

opposing represented party.

- (d) Counsel may generally communicate with former employees of a represented organization.
- (e) When an organization is represented by counsel, the opposing lawyer may not communicate with a person "who supervises, directs or regularly consults with the organization's 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."

The Philadelphia Bar Association Opinion agreed with these conclusions. In doing so, the Committee explained that Rule 4.2 was amended to “explicitly remove former constituents from the category of persons deemed to be represented by corporate counsel. These former constituents, therefore, are treated as unrepresented persons with whom attorneys may communicate subject to the ethical obligations set forth in Rule 4.3. This Rule and its comments do not require an attorney to advise a former constituent – or any unrepresented individual – that they have a right to be interviewed with company counsel or, more generally, an attorney present.” Consequently, the Committee concluded that attorneys communicating with unrepresented former constituents are not required to affirmatively advise them that they have a right to refuse to be interviewed or to be interviewed with company’s counsel present.

Opinion 2014-13 explains that there is no requirement in the Rules of Professional Conduct or the accompanying comments that an attorney seeking to interview an unrepresented

individual is obligated at the outset to affirmatively advise Bob that he has the right to refuse to be interviewed. But, to the extent that you, the lawyer, recognize that Bob does not appreciate your role, Rule 4.3(c) requires you to make reasonable efforts to clarify your role. Depending on the circumstances, you may have to advise Bob that he can end the interview, but such advice is not required at the opening of every such interview.

The Professional Guidance Committee also referred to *State Farm Mutual Automobile Ins. Co. v. Sanders*, Civ. A. No. 12-3052, 2013 U.S. Dist. LEXIS 137829 (E.D. Pa. Sept. 25, 2013). In this case, State Farm alleged that the defendant had engaged in “systematic and widespread” medical insurance fraud, and sought discovery from former employees of a law firm that represented more than 100 of the defendant’s patients in personal injury lawsuits. The Court denied the defendant’s request for a protective order preventing State Farm from directly contacting those former employees. In its decision, the Court specifically relied upon the express

language in Comment [7] to Rule 4.2, that consent “of the organization’s lawyer is not required for communication with a former constituent,” and refused to impose any additional conditions on the discovery.

The Professional Guidance Committee also explained that the communications you desire are “subject to the overarching provisions of Rule 4.4(a), that prohibit a lawyer from using methods of obtaining evidence that violate the legal rights of third persons or that have no substantial purpose other than to embarrass, delay or burden a third person.” ■

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