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[ETHICS watch]

In Search of Consistency in Ethics Rules

by BRUCE A. CAMPBELL

The practice of law continues to become more mobile. On any business day, you can walk the courthouse corridors and regularly see lawyers communicating by cell phone, smart phone or personal digital assistant with persons who can be anywhere in the world. Today it is more common for lawyers to represent clients in matters that cross state boundaries. As lawyers cross state lines, they can only hope for consistent ethics rules that govern their conduct. Unfortunately, that is rarely the case.

In an attempt to promote uniform ethics rules among American jurisdictions, the American Bar Association undertook a thorough review and revision of the ABA Model Rules of Professional Conduct, which is commonly referred to as "Ethics 2000." After more than five years of drafting, the ABA released the revised Model Rules in February 2002 for ratification by the states.

Although, many states have adopted some or all of the ABA's changes, others, including Texas, have not or are still in the process of evaluating whether to adopt some or all of the rules. In Texas, the state Supreme Court asked two committees to evaluate the ABA revised rules: The State Bar of Texas Committee on the Disciplinary Rules of Professional Conduct and the Texas Supreme Court Task Force on the Disciplinary Rules of Professional Conduct are studying and will make recommendations on the proposed revised rules.

Although each committee has propounded its evaluation, Texas lawyers are still a long way from a State Bar of Texas referendum vote on potential adoption, in whole or in part, of the revised rules. Even among the jurisdictions that have considered the revised model rules, there is a lack of uniformity in adoption. There likely will remain a lack of uniformity in the ethics rules applied to lawyer conduct throughout America.

An example of the lack of uniformity can be seen in a rule often referred to as the no-contact rule. When it comes to representing individuals, the vast majority of lawyers would agree that it is improper to contact another lawyer's client without the consent of the other lawyer, at least on the matter of the representation. Interpreting the no-contact rule becomes more complicated when applied to lawyers' ex parte contacts with current and former employees of organizations that other lawyers represent. The revised ABA Model Rule 4.2 provides:

> 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.

Comment 7 to the revised model rule 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 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. (Emphasis added.)

In contrast, current Texas Disciplinary Rule of Professional Conduct 4.02(c) is consistent with ABA Model Rule 4.2 in part, but is potentially more expansive because it applies to:

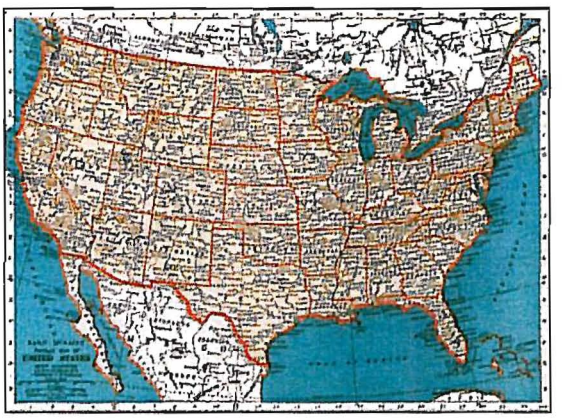
> (1) those persons *presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation*, or (2) those persons *presently employed by such organization or entity and whose act or omission in connection with the subject of representation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

Unlike the ABA rule, which is limited to those who supervise, direct or regularly consult with the organization's lawyer, the Texas version of the no-contact rule is not limited to those who are in the zone of dealing with the entity's lawyer. The Texas version thus has the potential to reach much further into the organization and include those having managerial responsibility that relates to the subject of the representation or those who could make an entity vicariously liable.

The challenge under any formulation of the no-contact rule is to identify precisely which employees or constituents a lawyer cannot contact without risking the twin evils of disqualification or disbarment. Alternatively, an interpretation of the no-contact rule that is too narrow can force counsel to be timid and forgo obtaining evidence for their clients that may otherwise be available.

In *Sanchez v. Brownsville Sports Center* (2001), the lone reported Texas case focusing on the issue of managerial responsibility, the Corpus Christi Court of Appeals opined that an attorney who had contact with a sales representative of a car dealership, who was the son of the owner, violated Rule 4.02 by attempting to elicit admissions relating to the subject of litigation. The crux of the court's decision rested on the fact that the sales representative was acting with some managerial responsibility and that his words might bind the organization to liability.

In Florida, the courts have been willing to extend the no-contact rule to apply to nonmanagerial co-workers. In *Lang v. Reedy Creek Improvement District* (1995), the defendants argued that co-workers who were still employed by the defendants could make statements that might be admissible against the defendants, and therefore, the employees were "parties" under the ethical rules and ex parte contact with them was prohibited. The U.S. District Court for the Middle District of Florida stated that it would not permit such contact "[b]ecause of the increased risks of prejudice to the Defendants that would arise from ex parte communications with current employees."



Some states have adopted treatment that is different from the ABA's version of the "no contact" rule. In New Jersey, the "no contact" rule applies to members of a corporation's "litigation control group." Current agents and employees responsible for the determination of the organization's legal position generally are part of the litigation control group. In *In Re: Complaint of PMD Enterprises Inc.* (2002) the U.S. District Court for the District of New Jersey said that former agents and employees who were members of the litigation control group are presumptively deemed to be represented in the matter by the organization's lawyer but may at any time disavow the representation.

It appears likely that the ABA's efforts through Ethics 2000 to create a uniform system of ethics rules will fall short of the mark. Unfortunately, that will leave lawyers to determine on each matter that potentially falls outside a single state's boundaries to try to predict whose rules will apply, who may be contacted and who may not. Given the degree of variance among the jurisdictions on the no-contact rule, American lawyers are a long way from reaching the goal of consistent ethics rules that apply to their conduct. As a result, lawyers must continue to evaluate which state's law will apply to the particular circumstances of each case. Failure to do so may put the unaware lawyer at unnecessary risk of substantial harm. TNL

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