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Ethical Considerations in Interviewing Third Parties in the Course of a Surety Investigation: Applying the Rules of Professional Conduct and the Code of Professional Responsibility to Sureties and their Counsel

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ETHICAL CONSIDERATIONS IN INTERVIEWING THIRD PARTIES IN THE COURSE OF A SURETY INVESTIGATION: APPLYING THE RULES OF PROFESSIONAL CONDUCT AND THE CODE OF PROFESSIONAL RESPONSIBILITY TO SURETIES AND THEIR COUNSEL

I. INTRODUCTION

Attorneys who represent sureties, whether in private practice or in house, routinely have direct communications with a variety of lay persons including principals, representatives of both public and private obligees, payment bond claimants, bonding agents, completion contractors, architects, engineers, etc. At the time of these communications, the surety's relationship with any of these parties may be cooperative or adversarial or simultaneously cooperative and adversarial. At times during or subsequent to these communications, the surety might be in litigation with any of these parties.

The rules of professional responsibility which govern the ethical obligations of lawyers closely regulate a lawyer's conduct in communicating with represented and unrepresented lay persons. On their face, these rules may appear to be straightforward. In fact, the gloss that has been imposed on these rules by the courts and

state bars is complicated and may not be entirely consistent with the normal practices in the surety industry. The risk that this poses is that a well intentioned surety lawyer who aspires to act in an ethical fashion might be confronted with allegations of misconduct which are brought either in good faith or in an attempt to gain a tactical advantage.

This paper provides an overview of the law that governs a lawyer's communications with represented and unrepresented lay persons. Its purpose is to alert surety lawyers, both in house and in private practice, to possible problem areas so that counsel will be able to identify and plan for potential pitfalls. The precedents cited herein are merely a sampling of the relevant case law and are intended as a starting point for research regarding specific issues that may arise.

II. COMMUNICATIONS WITH LAY PERSONS WHO ARE REPRESENTED BY COUNSEL

The Code of Professional Responsibility addresses communications to represented persons through Disciplinary Rule 7-104(a)(1):

> During the course of his representation of a client a lawyer shall not ... [c]ommunicate or cause another to communicate with a party [the lawyer] 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.

In states which have adopted the Rules of Professional Conduct the analogue to DR 7-104(a)(1) is Rule 4.2:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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.

These provisions are designed to: (1) prevent a represented party from being taken advantage of through the greater skill of an adversary's attorney; (2) prevent an attorney from circumventing opposing counsel in order to obtain concessions or damaging statements; (3) preserve the integrity of the attorney client relationship; (4) prevent the disclosure of privileged facts and communications; and (5) assure that information disclosures are directed through the orderly and controlled discovery process.[1]

This paper will address four issues that are posed by these provisions: (1) When are these rules operative? (2) Who is a

[1] ***See United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983); *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 75 (S.D.N.Y. 1993), *approved and adopted*, 834 F. Supp. 632 (S.D.N.Y. 1993).**

"party" with whom contact is regulated? (3) When is a party represented by counsel? and (4) What constitutes knowledge that a party is represented?

1. When are these rules operative?

Communications by lawyers with represented persons are subject to regulation whenever there appears to be an adversary relationship between the lawyers's client and the represented party. The no-contact rule is operative at the time of litigation and is equally apposite during the pre-suit investigatory stage of a ripening controversy.[2]

2. Who is a party?

a. Current Employees of an Adversary

The case law is in accord that the "no contact" rule applies to certain employees of a represented party. The cases are in conflict, however, as to which employees of a represented party are subject to the prohibition.

Under the most restrictive view, ex parte contacts between an attorney and a current employee of a represented party are

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[2] ***See Miano v. AC & R Advertising, Inc., supra, 148 F.R.D. at 77; Shoney's, Inc. v. Lewis, 875 S.W.2d 514 (Ky. 1994).***

prohibited if the employee (1) has managerial responsibilities, (2) is one whose actions or admissions with respect to the disputed matter may be imputed to the employer for purposes of liability, or (3) is one whose statements might constitute admissions by the employer.[3]

The first category noted above contemplates those employees who are members of the "control group" of the employer.[4] The second category references respondeat superior principles, focusing on those employees whose actions are the basis for the claim against the employer.[5] The third category incorporates evidentiary rules addressing the circumstances under which a statement by an employee constitutes an admission of the employer. For instance, under Rule 801(d)(2)(D) of the Federal Rules of Evidence, the statements of an employee bind the organization if the subject

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[3] See, e.g., McCallum v. CSX Transportation, Inc., 149 F.R.D. 104, 109 (M.D.N.C. 1993); University Patents, Inc. v. Kligman, 737 F.Supp. 325 (E.D.Pa. 1990); Chancellor v. Boeing Co., 678 F.Supp. 250 (D.Kan. 1988); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36 (D.Mass. 1987). See also Comments to Rule 4.2 of the Model Rules of Professional Conduct.

[4] Hazard and Hodes, The Law of Lawyering, pp. 734-37.

[5] Id.

matter of the statement addresses matters within the scope of the employee's employment, irrespective whether the employee is authorized to speak on behalf of the employer.[6]

Under this restrictive view, the "no contact rule" would extend to employees who are members of the control group, who participated in the challenged act, or whose job responsibilities relate to the challenged act. This would not preclude ex parte contacts with employees who witnessed the challenged act, so long as the employees were not of a managerial rank and witnessed acts falling outside of the scope of their employment.[7] In sum, fact investigation is impeded only where the employee's acts or conduct may be imputed to the employer.[8]

This view of the "no contact rule" is not unanimously held. In some jurisdictions, the no-contact rule prohibits contacts with current employees solely where the employees are members of the

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[6] ***See McCallum v. CSX Transportation, Inc., supra,* 149 F.R.D. at 111.**

[7] ***See McCallum v. USX Transportation, Inc., supra,* 149 F.R.D. at 111; *Polycast Technology Corp. v. Uniroyal, Inc.,* 129 F.R.D. 621, 624 (S.D.N.Y. 1990); *Frey v. Department of Health and Human Services,* 106 F.R.D. 32, 37, n.2 (E.D.N.Y. 1985).**

[8] ***Id.***

control group or are responsible in some fashion for the challenged act.[9] In a minority of jurisdictions, the rule apples solely to ex parte contacts with members of the control group.[10]

b. Former Employees of an Adversary

Though there are early decisions to the contrary, the current trend is to permit ex parte contacts with former employees so long as the contacts are not deceptive in content and there is no intrusion upon the employer's attorney-client privilege.[11]

3. When is a party "represented"?

The "no contact rule" is inapposite unless the "party" that is approached by an adversary's attorney has contacted a lawyer

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[9] See Strawser v. Exxon Co., 843 P.2d 613, 621 (Wyo. 1992); State v. CIBA-GEIGY Corp., 247 N.J. Super. 314, 589 A.2d 180 (1991); Nieseg v. Team I, 76 N.Y. 2d 363, 559 N.Y.S. 2d 493, 558 N.E.2d 1030 (1990).

[10] See Wright v. Group Health Hospital, 103 Wash.2d 192, 691 P.2d 564 (1984).

[11] See, e.g., Shearson Lehman Brothers, Inc. v. Wasatch Bank, 139 F.R.D. 412 (D.Utah 1991); Hanntz v. Shiley, Inc., 766 F. Supp. 258, 271 (D.N.J. 1991); DuBois v. Gradco Systems, Inc., 136 F.R.D. 341, 346-47 (D.Conn. 1991). Contra, Public Service Electric & Gas Co. v. Associated Electric and Gas Insurance Services, Ltd., 745 F. Supp. 1037 (D.N.J. 1990); Matter of Advisory Committee, 134 N.J. 293, 633 A.2d 959 (1993); But see Monsanto Co. v. Aetna Casualty & Surety Co., 593 A.2d 1013 (Del. Super. 1990). (Holding that former employees are not parties under Rule 4.2, but imposing rules governing the interviewing of these persons by opposing counsel in the course of litigation against their prior employer).

regarding the matter at issue. In the case of a current employee of a party, the "no contact rule" would therefore not apply unless the employer had consulted an attorney about the particular matter in dispute.

It has been argued that a business or individual is represented by counsel as to the matter in dispute if it employs general counsel or a counsel on a general retainer, irrespective whether counsel has been consulted about the particular matter at issue.[12] This argument has been rejected by the courts on the theory that it would create an unfair advantage for corporations or wealthy individuals who could effectively immunize many of their current employees from fact investigations by employing or retaining a general counsel.[13] There is a split of opinion on this issue among the ethics committees of the state bars.[14]

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[12] *See Miano v. AC & R Advertising, Inc., supra, 148 F.R.D. at 79-81; Federal Savings and Loan Insurance Corp. v. Hildenbrand, 1989 WL 107377 (U.S. Dist. Ct. D. Colo. 1989).*

[13] *Id. See also United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988).*

[14] ***Compare Colorado Bar Association, CBA Revised Ethics Opinion No. 69 (June 20, 1987) (An organization is a "party" for purposes of the "no contact rule" only if it has specifically retained counsel to represent its interests regarding the subject or has specifically referred the matter to house counsel.) with Florida State Bar Association, Committee on Professional Ethics, Opinion No. 78-4 (A closely divided panel holds that an individual or***

4. What constitutes knowledge by a lawyer that an opposing party is represented?

On face, an attorney's communication with a represented party violates the "no contact rule" only if the attorney is aware that the other party is represented by counsel.

There is a suggestion in the case law that the rule may prohibit both negligent and intentional bypass of counsel.[15] The New York State Bar Association has determined that to prevent willful ignorance of whether a person is represented by counsel, a lawyer seeking to interview a "party" must advise the party that his/her communications to the party should be referred to that person's counsel, if any.[16] However, there is case law which suggests that an attorney investigating a possible claim need not render Miranda warnings to each person interviewed who could

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corporation that retains general counsel is represented on all matters for purposes of the no-contact rule irrespective whether counsel ha been consulted regarding the matter at issue.).

[15] <u>See</u> <u>United States v. Jamil</u>, 546 F.Supp. 646, 652 (E.D.N.Y. 1982), <u>rev. on other grounds</u>, 707 F.2d 638 (2d Cir. 1983).

[16] New York State Bar Assoc., Committee on Professional Ethics, Opinion No. 607 (February 15, 1990).

conceivably be an adverse party.[17]

5. Considerations for Surety Lawyers

The "no contact rule" does not entirely account for the realities of a surety practice. Surety lawyers practicing in house or in private practice regularly have discussions with payment bond claimants, obligees, principals, bonding agents, architects, the principal's accountant, etc. At the time of these contacts, the surety may not yet have an adversary relationship with any of these persons and the purpose of the contact may be to generally gather facts rather than to circumvent the role of counsel. Nonetheless, surety counsel may be aware at the time of the contact that any of these persons could become "a party" under the "no-contract rule" since an adversary relationship could hypothetically be imagined. If an adversary relationship does later develop, the surety's attorney may find himself or herself charged with ethical violations even if the third person was not a target of the surety as of the time of the ex parte communication. The only apparent means for a surety lawyer to immunize himself or herself from such

[17] ***See Federal Savings and Loan Insurance Corp. v. Hildenbrand,* 1989 WL 107377 (U.S.Dist. Ct. D. Colo. 1989). *Accord Miano v. AC & R Advertising, Inc., supra,* 148 F.R.D. at 81, n.12.**

a risk would be to regularly transmit the equivalent of Miranda warnings to all persons contacted wherever there was even a hypothetical possibility that the party and the surety could later find themselves in an adversary relationship.[18]

III. COMMUNICATIONS WITH AN UNREPRESENTED PERSON

Assuming that a person is unrepresented for purposes of Rule 4.2 or DR 7-104(A)(1), contacts by an attorney with the unrepresented person are governed by Rule 4.3 of the Rules of Professional Conduct and DR 7-104(A)(2) of the Code of Professional Responsibility:

> DR 7-104(A)(2)
>
> (a) During the course of his representation of a client a lawyer shall not:
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> . . .
>
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

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[18] ***As an attorney may not circumvent the ethical rules by diverting tasks to lay persons, it is doubtful that the above referenced ethical exposure can be obviated by having interviews conducted by lay agents or consultants who work under the direction of the surety's counsel. See, e.g., Miano v. AC & R Advertising, Inc., supra, 148 F.R.D. at 81-83.***

Rule 4.3

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

It is self evident that an attorney may not mislead, give advice to, or otherwise take advantage of an unrepresented person. It could be argued that where an attorney plans to sue an unrepresented third party, it may be misleading to meet with the third party without disclosing the likelihood of litigation. The more difficult question is whether these provisions require the attorney to administer a Miranda warning to an unrepresented person if there is no available evidence indicating the likelihood that an adversary relationship could develop between the third party and the attorney's client but if it was nonetheless a hypothetical possibility that such an adversary relationship could later develop.

In Federal Savings and Loan Insurance Corp. v. Hildenbrand,[19]

[19] *1989 WL 107377 (U.S. Dist. Ct. D. Colo. 1989) (hereafter "Hildenbrand").*

lawyers were retained by the FSLIC to investigate the failure of a Savings and Loan. One aspect of the failure involved commodities trading conducted for the failed Savings and Loan by a brokerage firm. The FSLIC lawyers interviewed a broker from the brokerage firm who was later sued by the FSLIC. The broker was not represented by counsel at the time of the interview. It is unclear from the court's opinion whether the broker was a prime suspect of the FSLIC prior to the time of the interview, or was simply being interviewed for purposes of gathering facts.

The broker brought ethical allegations against the FSLIC attorneys after he was sued by the FSLIC for his conduct regarding the Savings and Loan. The court ruled that the FSLIC attorneys had fulfilled their ethical obligations by advising the person at the outset of their interview that they represented the FSLIC and were investigating the circumstances of the Savings and Loan failure. The court indicated that the attorneys were not obligated to disclose that he was a potential litigant or to advise the person of his right to counsel.

In contrast, certain courts have required that where an attorney, in the course of litigation, interviews former employees

of an adverse party or current employees who are not subject to the "no contact rule", the attorney must accurately identify who s/he represents, state the purposes of the interview and also inform the person that he or she could have their own counsel attend the interview.[20] However, these cases may not be in conflict with Hildenbrand as they address contexts where the adversary relationship of the parties is clearly established as opposed to a situation where an attorney interviews a nonrepresented person who is not then an adverse party of the attorney's client but who could become an adverse party at a later time depending upon the results of the attorney's investigation or the development of further facts.

From the surety's perspective, it is not unusual for counsel to communicate with persons such as a principal, an obligee, or a bonding agent at a time when the surety's relationship with these parties is not adverse. However, in light of the unpredictability of the surety's relationships with other persons having a connection to the bonds on the bonded project, counsel for the

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[20] ***See Upjohn Co. v. Aetna Casualty & Surety Co.*, 768 F. Supp. 1186 (W.D. Mich. 1991); *Monsanto Co. v. Aetna Casualty & Surety Co., supra*, 593 A.2d 1013.**

surety needs to carefully consider the ethical, implication of all contacts with unrepresented parties.

III. SANCTIONS

Where a party establishes a violation of any of the foregoing ethical provisions, a court may impose a range of penalties including the suppression of wrongfully obtained evidence and the disqualification of the offending counsel.[21]

The courts are reluctant to impose penalties for alleged ethical violations since this responsibility properly rests with a state bar and there is a risk that ethical charges can be used as a potentially time consuming litigation tactic.[22] There is also a recognition that suppressing evidence undermines the truth seeking process and the disqualification of counsel imposes a serious penalty on an innocent client who is deprived of the counsel of its choice. On the other hand, the courts recognize an obligation to properly supervise the conduct of litigation to

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[21] *See W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir. 1976), MMR/Wallace Power & Industries v. Thames Associates, 764 F.Supp. 712 (D.Conn. 1991); Shoney's Inc. v. Lewis, supra, 875 S.W. 2d 514.*

[22] *Id.*

insure the integrity of the ajudicatory process.[23]

In reconciling these competing concerns, the courts tend not to disqualify counsel or suppress evidence unless the alleged ethical violations are egregious and threaten to taint the trial process.[24] In the absence of such taint, the courts tend to view state grievance mechanisms as the proper forum for the resolution of ethics allegations.[25]

III. CONCLUSIONS

Surety attorneys face a complicated task in reconciling the standard practices in the industry with ethical prescriptions relating to communications with represented and unrepresented lay persons. A surety's relationship with third persons is often equivocal; the surety and the third person may be in cooperation one day and in conflict the next or their relationship may be simultaneously cooperative and adversarial. ***Although the case law suggests***

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[23] *Id.*

[24] *Id.*

[25] *Id.*

that it is the fact of an adversarial relationship that triggers significant ethical concerns, it is unclear whether a purely hypothetical possibility of conflict requires surety counsel to treat a third party as an adversary for purposes of communications. What is clear is that a lawyer who attempts to act fairly toward third parties but who is not intimately familiar with the pertinent case law interpreting the ethical rules may find himself or herself facing allegations of ethical misconduct.

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