PROFESSIONAL RESPONSIBILITY

REYNOLDS v. *DEPARTMENT OF TRANSPORTATION, STATE OF ALABAMA, ET AL.*

*BY CHRISTOPHER WELLER**

Case No. 03-13681 (11TH Cir. Oct. 13, 2004) – Communications Between Plaintiffs' Class Counsel and Managerial Class Member Employees.

For years courts have struggled with the scope of an attorney's right to communicate with an opposing party's employees. Many of the cases are determined by the status of the employee, *e.g.,* whether the individual is a managerial employee or member of the so-called "control group." Recently, however, in an unpublished opinion that merits greater attention, the Eleventh Circuit Court of Appeals added a further layer of complexity to this vexing ethical dilemma in the context of class actions. In particular, the court found that, consistent with Rule 4.2 of the Model Rules of Professional Conduct, a plaintiffs' class counsel may communicate with an individual who is both (1) a managerial employee of the opposing party and (2) a member of the plaintiff class.

1. The Provisions of Rule 4.2

A review of Rule 4.2 of the Model Rules of Professional Conduct is the starting point for addressing the permitted scope of communications with a represented party in the context of institutional litigation. Rule 4.2 of the ABA Model Rules of Professional Conduct provides:

> 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.

Courts and commentators have noted that Rule 4.2 is designed "to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact."[1]

As the court observed in *Public Serv. Elec. & Gas Co. v. AEGIS*:

> [Rule 4.2] "serves two distinct but related purposes. It preserves the integrity of the lawyer/client relationship by prohibiting contact, absent consent or express legal authorization, with the represented party. It also recognizes that without such a bar the professionally trained lawyer may, in many cases, be able to win, or in the extreme case, coerce damaging concessions from the unshielded layman.[2]

The Official Comment to Rule 4.2, which explains the definition of "party" in the context of institutional defendants, provides in relevant part,

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The test for determining whether an employee falls within the prohibitions of Rule 4.2 "is not a pure one for attorney/client privilege as it would be if we were dealing with a single individual defendant, but rather is much broader than that. The crucial question is the relationship of the employee to the agency which is represented and does have an attorney/client privilege."[3]

The ABA has also endorsed a broader definition of "control group" for determining which corporate employees are off-limits to opposing counsel. For example, Formal Opinion 95-396 provides in relevant part:

> The bar against [*ex parte*] communication covers not only the "control group" - those who manage and speak for the corporation - but in addition anyone "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." (citing Comment to Rule 4.2).[4]

In other words, according to the committee, "if an employee cannot by statement, act or omission, bind the organization with respect to the particular matter, then that employee may ethically be contacted by opposing counsel without the consent of in-house counsel."[5] By utilizing a broader definition of "control group" in conjunction with the language from the Comment to Rule 4.2, the committee appears to have repudiated effectively the "control group" test in favor of the "managing-speaking" test.[6]

With respect to the case discussed herein, Alabama adopted the "managing-speaking agent" test in 1983 and has specifically held that *ex parte* contacts with current employees who are in a position to bind the employer by their testimony are forbidden.[7]

Rule 4.2 and the corresponding Comment recognize that just as an adversary's attorney may take advantage of an individual party either by extracting uncounseled admissions or damaging statements from him, by dissuading him

from pursuing his claim, or by negatively influencing his expectation of succeeding on the merits, the same may occur in the case of an institutional or corporate party.[8] In other words, Rule 4.2 is necessary to prevent major capitulation of a legal position on the part of a momentarily uncounseled, but represented party.[9]

In sum, the underlying policy and Official Comment to Rule 4.2 firmly establish that the rule is intended to forbid *ex parte* communications with all institutional employees whose acts or omissions could bind or impute liability to the organization or whose statements could be used as admissions against the organization, presumably pursuant to Federal Rule of Evidence 801(d)(2)(D).[10] As the court in *McCallum v. CSX Transp., Inc.* cogently stated:

> [I]f the employee is somehow involved in a matter which is the subject of dispute between the parties, the employee's statements may constitute an employer admission and an attorney should not interview the employee without permission. This may even include employees who have not been directly involved in the decision, but are involved in similar decisions.[11]

But what if the managerial employee is also a member of a plaintiff class? Does the plaintiff class counsel have the right to communicate with his client about his/her individual claim even if that class member is a managerial employee of the defendant? What is the scope of that right? Can class counsel discuss with the class member/managerial employee the inner workings of the defendant's company or the defendant's litigation strategy? What protections against uncounseled disclosures does an institutional defendant have when its managerial employee is also a class member? The Eleventh Circuit addressed those issues to some extent in the *Reynolds* decision.

2. The *Reynolds* Decision

A. Background of the Underlying Lawsuit.

In 1985, African American employees and former employees of the Alabama Department of Transportation ("ALDOT") commenced a racial discrimination class action against ALDOT, the Department of Personnel ("SPD") and various state officials. The lawsuit alleged ALDOT and SPD had racially discriminated against current and former ALDOT employees through the use of discriminatory hiring and promotions procedures as well as through the use of other discriminatory practices designed to prevent the advancement of African-Americans in the workforce. After litigating the case for almost a decade, the parties entered into an extensive and complex consent decree that mandated, among other things, implementation of a temporary special training program for African-American ALDOT employees.

Roslyn Cook-Deyampert, an African American, was the Chief of ALDOT's Training Bureau and was responsible for overseeing the development and implementation of the training program mandated by the decree. Ms. Cook-Deyampert also was a member of the plaintiff class.[12] As part of her duties, she was responsible for demonstrating to the district court and the parties ALDOT's compliance with the training requirement. In furtherance of her obligations, she prepared reports that were submitted to the court and the parties and met with counsel for the parties to address questions about the progress of the training program.

B. The June 2001 Compliance Hearing and The Discovery of Deception.

The problem arose in June 2001 when Ms. Cook-Deyampert testified before the district court at a compliance hearing to determine whether ALDOT had complied with the training mandate. During the course of her direct testimony, Ms. Cook-Deyampert testified about ALDOT's creation of programs designed to provide training opportunities. During cross-examination by the plaintiffs' counsel, however, much to ALDOT's surprise, she testified that ALDOT had not fully complied with the training requirements.

Several months after the hearing, ALDOT discovered that Ms. Cook-Deyampert had engaged in substantial communications with the plaintiffs' counsel prior to the June 2001 hearing without ALDOT's knowledge or presence. Furthermore, ALDOT discovered a list of talking points entitled "Points for Roslyn" prepared by the plaintiffs' counsel and provided to Ms. Cook-Deyampert. Those talking points included the damaging testimony that plaintiffs' counsel elicited during his cross-examination of Ms. Cook-Deyampert during her purported cross-examination at the June 2001 compliance hearing. In sum, the plaintiffs' counsel met with Ms. Cook-Deyampert without ALDOT's consent or knowledge; prepared (or coached) her to present binding testimony in her managerial capacity that would be damaging to ALDOT's claim that it had complied with the mandated training requirement; and then presented that testimony as if it had been begrudgingly elicited from her during her cross-examination.

On learning of these objectionable contacts, ALDOT moved to disqualify plaintiffs' counsel from the case and for a permanent injunction enjoining plaintiffs' counsel from violating the Alabama Rules of Professional Conduct. In particular, ALDOT asserted that plaintiffs' counsel had violated Rule 4.2 of the Alabama Rule of Professional Conduct[13] by communicating with a managerial employee whose acts or omissions could be imputed to ALDOT. Plaintiffs' counsel argued, however, that their communication with Ms. Cook-Deyampert was not subject to the restrictions of Rule 4.2 because, as a member of the class, she was their client; that as their client, they had the right to communicate with Ms. Cook-Deyampert about any ALDOT-related issue.

3. The District Court Holding

The district court agreed with ALDOT, that plaintiffs' counsel had communicated with Ms. Cook-Deyampert, prepared her testimony, and presented that testimony as if it had been elicited through a proper and adverse cross-examination. The court described Ms. Cook-Deyampert as a "Fifth

Column" within ALDOT, secretly passing documents to plaintiffs' counsel. The court further criticized the conduct of plaintiffs' counsel as an "affront" to it and a deception and betrayal. Moreover, the district court stated that it had given particular weight to Ms. Cook-Deyampert's June 2001 testimony because the court was under the impression that she was ALDOT's employee who was highly critical of ALDOT despite her managerial responsibility. The district court further stated that it "would have had a different impression if it had been informed that [Ms. Cook-Deyampert's testimony] was critical because of coaching from the plaintiffs' attorneys."

On the other hand, the district court recognized the added layer of complexity in determining the limits of Rule 4.2 because of Ms. Cook-Deyampert's dual role as (1) a member of the plaintiff class and, therefore, plaintiffs' client, and (2) a managerial ALDOT employee who could bind ALDOT through her testimony. The district court rejected positions of both parties as extreme. In rejecting ALDOT's position that Rule 4.2 required that plaintiffs' counsel seek ALDOT's consent before communicating with a managerial employee, the district court held that the communication might be permissible under Rule 4.2 if the managerial employee communicated purely factual information. On the other hand, the district court found that the circumstances of this case established that Ms. Cook-Deyampert had conveyed more than mere facts to plaintiffs' counsel; that plaintiffs' counsel had violated the spirit if not the letter of Rule 4.2 in their contact with Cook-Deyampert. The district court chided plaintiffs' counsel for their conduct; agreed to consider drawing a negative inference from Ms. Cook-Deyampert's testimony; and established guidelines governing future communications between plaintiffs' counsel and managerial employees of ALDOT employees.[14] However, the district court denied ALDOT's motion to the extent that it sought disqualification of plaintiffs' counsel from continued representation of the class. Furthermore, the district court refused to enjoin plaintiffs' counsel from engaging in future communications with ALDOT's managerial employees, finding that any "rule the court comes up with is either too broad to be embodied in an injunction … or it is too specific (in that it does not allow for the unforeseeable circumstances of the future.") Consequently, ALDOT appealed the district court's judgment.

On appeal, the Eleventh Circuit, reviewing the district court's order under an abuse of discretion standard, affirmed the judgment. In particular, the court held that the district court did not abuse its discretion in application and interpretation of the relevant ethical standards either with respect to its denial of ALDOT's motion for disqualification and injunctive relief or in its determination that plaintiffs' counsel had violated the spirit, if not the letter of Rule 4.2.

Conclusion

Although it is obvious from the opinions that neither the district court nor the Court of Appeals approved the specific conduct engaged in by plaintiffs' class counsel, nevertheless, both courts appear to conclude that, at a minimum and consistent with the restrictions of Rule 4.2 of the Model Rules of Professional Conduct, a plaintiffs' class counsel may communicate with class members who are also managerial employees under Rule 4.2 when those communications relate to factual information in the underlying litigation. Allowing some contacts between managerial employees who are members of a certified plaintiff class and class counsel without identifying limits on those contacts, however, creates potential problems for employers. For now, the precise limit of permissible contacts remains undefined and likely will be the subject of future litigation.

* Christopher W. Weller was admitted to the Alabama State Bar in 1987, and practices in the area of commercial and business litigation. Mr. Weller is grateful to attorney Jack Park for his assistance in preparing this article.

Footnotes

[1] Frey v. Department of Health & Human Servs., 106 F.R.D. 32, 34 (E.D.N.Y. 1985).

[2] 745 F. Supp. 1037, 1039 (D.N.J. 1990) (relying upon Powell v. Alabama, 287 U.S. 45 (1932)); *see also* University Patents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990). *See also* Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 145-46 (1977); Leubsdorf, *Communications with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683 (1979).

[3] Butta-Brinkman v. Financial Collection Agencies, Inc., 1996 WL 5194 *4 (N.D. Ill. 1996). *See also* ABA Formal Opinion 91-359.

[4] In ABA Formal Opinion 95-396, the Standing Committee on Ethics and Professional Responsibility submitted a proposed amendment to Rule 4.2, which was adopted by the ABA House of Delegates, to substitute the word "person" for the word "party." Significantly, this amendment, paired with a corresponding amendment to the comment, extends the rule's scope beyond named parties to the litigation or proceeding to include any persons known to be represented by counsel with respect to the subject matter of the intended communications. In this case, amended Rule 4.2 was effective because the Middle District and the Eleventh Circuit have adopted the Model Rules as promulgated by the ABA. *See* USCS Ct. App. 11th Cir., R. 1(A)(1995) (unless otherwise provided by a specific rule of the Court, attorneys practicing before the Court shall be governed by the American Bar Association Rules of Professional Conduct and the Rules of Professional Conduct adopted by the highest court of the state(s) in which the attorney is admitted to practice to the extent that they do not conflict with the Model Rules in which case the Model Rules shall govern).

[5] *Id.*

[6] In Massa v. Eaton Corp., 109 F.R.D. 312 (W.D. Mich. 1985), which extended the applications of *ex parte* prohibition to communications with any managerial level employee of a corporate party, the court criticized the "control group" test, applying the logic of Upjohn Co. v. United States, 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court held that the "control group" test in the context of attorney-client privilege considerations was too narrow and concluded that communications between corporate counsel and employees of the corporation for the purpose of determining the potential civil or criminal liability of the corporation were subject to the protection of the attorney-

client privilege. The court in *Massa* reasoned that the logic of *Upjohn* carried over to the circumstances involving *ex parte* contacts.

[7] *See* Alabama State Bar Ass'n, Ethics Opinion No. RO-83-81 (1983); *see also* Alabama State Bar Ass'n, Ethics Opinion No. RO-02-03 (holding that Rule 4.2 prohibits *ex parte* communications with employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation); Alabama State Bar Ass'n, Ethics Opinion No. RO-92-12 ("There can be no *ex parte* contact when the employee is an executive officer of the adverse party or could otherwise legally bind the adverse party by his/her testimony, or if the employee was the actual tortfeasor or person whose conduct gave rise to the cause of action. In any of these situations, prior consent of counsel for the adverse party would be required."); *see also Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 43 F.3d 1439 (11th Cir. 1995) (under the managing-speaking test, *ex parte* communications are prohibited with employees who have managerial responsibility, whose acts or omissions in connection with the matter in litigation may be imputed to the corporation for purposes of civil or criminal liability, or whose statements may be an admission on the part of the corporation).

[8] *University Patents*, 737 F. Supp. at 327-28.

[9] *See* McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 110 (M.D.N.C. 1993) (ethical rules have the purpose of preventing counsel from overreaching and exploiting uncounseled employees into making ill-considered statements or admissions).

[10] *Id. See also* Chancellor v. Boeing Co., 678 F. Supp. 250, 251-53 (D. Kan. 1988).

[11] 149 F.R.D. 104, 111 (M.D.N.C. 1993); *see also* Carter-Herman v. City of Philadelphia, 897 F. Supp. 899 (E.D. Pa. 1995) (holding that there could be no *ex parte* communications with any current employee or member of the police department having managerial responsibility).

[12] In the Defendants' view, Ms. Cook-Deyampert had no remaining claims for relief at the time she conferred with plaintiffs' counsel because she had already attained the highest classification possible for her position and, therefore, could not obtain equitable relief in the form of a promotion or instatement.

[13] Rule 4.2 of the Alabama Rules of Professional Conduct provides that "[i]n 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." The commentary to Rule 4.2 explains that the rule prohibits communications with the employee of an adverse party if (1) the employee exercises managerial responsibility for the employer, (2) the employee's acts or omissions may impute liability to the employer, or (3) the employee's statements would constitute an admission.

[14] The district court directed plaintiffs' counsel to inform ALDOT's counsel of the fact, but not the content, of contacts between plaintiffs' counsel and any managerial level employee of ALDOT. Additionally, the district court required that although plaintiffs' counsel could meet with a managerial plaintiff class member who had confidential information relating to an individual or class matter without revealing the contact to ALDOT, they would be required to document carefully such contact for review by the district court to assure that plaintiffs' counsel engaged in the confidential contact in good faith.