Committee Opinion
January 27, 2006

LEGAL ETHICS OPINION 1820 — CAN AN ATTORNEY EMPLOYEE OF A RAILROAD COMMUNICATE WITH INJURED RAILROAD WORKERS WHO ARE REPRESENTED BY COUNSEL?

You have presented two hypotheticals involving the employees of a railroad. The underlying situation in each is that an employee was injured on the job. That employee hires an attorney, who notifies the railroad claims department of his representation. The claims department has employees who investigate the claims made by injured employees. That department is supervised by a member of the Virginia State Bar. Some, but not all, of the employees in the claims department are also members of the Bar.

In the first scenario, a nonlawyer claims agent contacts the injured employee to confirm that the lawyer does represent him. That claims agent asks why the injured employee wants a lawyer and recommends that he not use one. At no time has the department supervisor instructed the claims agent not to communicate with represented claimants.

In the second scenario, the claims department has an office entitled, "Disability Support Services." An employee of that services department, who is a Bar member, contacts the injured employee after receipt of the notice of representation, seeking medical records from the injured employee and offering rehabilitation services. If the injured employee does not respond to that offer, the department employee will testify that rehabilitation was offered and declined. If the injured employee *does* respond, the claims agent asks for a direct interview and broad access to medical records. The claims agent may then testify against the injured employee regarding statements made during the interview.

The claims agents may also consult with the in-house counsel and the railroad's retained counsel who serve as defense counsel in the matter. The railroad claims those conversations are within the protection of the attorney/client privilege.

With regard to these scenarios, your request poses the following questions:

1) Is the claims department prohibited from contacting the employee after receiving notice of representation, as the supervisor of the department is a Bar member?

2) Is the claims department permitted to contact an employee for purposes of "verifying" legal representation after receiving notice from counsel?

3) If that contact is permitted, may a representative of the claims department question the represented employee regarding why he hired counsel and advise the employee that he would be better served by dealing directly with the claims department without the assistance of an attorney?

4) May the claims department contact a represented employee directly in order to request medical records, offer job retraining, or offer vocational services?

5) May the Bar member/claims agent contact a represented employee for purposes of requesting medical records, offering job retraining, or vocational services?

6) While working for an attorney-supervised claims department, is a Virginia attorney bound by the Rules of Professional Conduct, even though maintaining that he is merely offering disability support services?

Before addressing your specific questions, it would be helpful to clarify the ethical responsibilities of the individuals in the differing roles outlined in your scenario. In all instances, the Virginia Rules of Professional Conduct govern conduct only of licensed attorneys. The rules do not govern the conduct of nonlawyers. Regulation of nonlawyers is governed by the Virginia State Bar and the Unauthorized Practice Rules. Interpretation of the Unauthorized Practice Rules is not within the purview of this Committee.[1] Thus, in the discussion of this opinion request, this Committee can apply pertinent provisions of the Rules of Professional Conduct to the *lawyers* in the scenario, not to the nonlawyer employees, or to corporate departments. In answering the questions, this Committee will not be determining whether the conduct of the lawyers, if performed by nonlawyers, would constitute the unauthorized practice of law. Such an issue is outside the purview of this Committee. The remarks in this opinion will focus specifically on whether the outlined conduct of the attorneys employed by this railroad is permissible under the Rules of Professional Conduct.

The crux of the presented scenario and questions is whether these contacts by railroad claims agents with the injured workers are permissible. The pertinent provision in the ethics rules is Rule 4.2, which states as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyers 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 portion of the rule especially at issue here in resolving the questions presented is the phrase, "in representing a client." The plain language of this rule suggests that the prohibition is only triggered when the lawyer actually represents a client in the matter to be discussed. Reviewing the various attorneys in the scenario, which come within that language? Of the in-house counsel, the claims department head, and the attorney/claims agents, which actually represent the railroad such that Rule 4.2 governs their communications with the injured workers?

Whether an attorney/client relationship has been formed in any particular situation is a fact-specific determination. The Rules of Professional Conduct do not specifically

[1] Issuing opinions interpreting the Unauthorized Practice Rules is the task of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law.

contain a definition of "attorney/client relationship". This Committee has consistently relied upon the definition found in the Unauthorized Practice Rules:

> Generally, the relation of attorney and client exits, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge.

That definition looks to the nature of the work performed more than to some formalistic requirement of an express agreement by the client to retain the lawyer as his attorney. Consistent with that approach, this Committee found in LEO 1819 that a lawyer who works as a lobbyist may have created an attorney/client relationship with his lobbying customers if he provided them with legal advice as part of the lobbying services. Similarly, in LEO 1803, this Committee opined that an institutional attorney assisting prison inmates created attorney/client relationships with those inmates for whom he provides legal advice regarding the inmates' legal documents as well as those for whom he actually drafted their documents. In LEO 1592, this Committee concluded that an attorney/client relationship was established where the attorney hired to represent an uninsured motorist carrier had also provided legal advice and assistance to the *pro se* driver. Similarly, in LEO 1127, this Committee found an attorney/client relationship where the attorney provided legal assistance on items such as discovery requests for *pro se* litigants. In each of these opinions, the Committee focused on the nature of the services provided.

Applying this concept to the present scenario, the Committee notes that the in-house counsel represents the railroad. Regarding the head of the claims department, the Committee opines that he also represents the railroad with regard to these injured workers' claims. That attorney operates his claims department to, among other things, assist the railroad in gathering information from the claimants for the use of the railroad and its litigation attorney, the in-house counsel, and in persuading the claimants to fire their retained counsel. Such work is squarely within the concept of furnishing "to another advice or service under circumstances which imply his possession and use of legal knowledge;" the standard from the above-quoted definition. For the same reason, the work of the attorney/claims agents also constitutes representing the railroad in these matters. Those attorney/agents gather information potentially useful in any litigation that develops out of these claims and try to dissuade the claimants from legal representation. If the railroad hired a lawyer specifically for those tasks, there would be no question that the law firm was providing legal representation to the railroad. That instead the railroad places these lawyers in-house and labels them claims agents does not change the underlying character of their work. The claims management work performed by the attorneys employed by the railroad involves legal representation of the railroad. As these claims lawyers, both the department head and the claims agents, are providing legal services to the railroad, their communications with represented persons is limited by Rule 4.2.

The attorney serving as department head in this scenario has additional responsibilities in this context. The Rules of Professional Conduct establish obligations regarding how he supervises his staff. First, in considering communications with the represented workers, he must consider the interplay of Rule 8.4(a) with Rule 4.2. Rule 8.4(a) declares it impermissible for an attorney to:

> Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another.

Thus, the attorney/department head, where precluded from communicating with a represented claimant by Rule 4.2, could not permissibly direct his staff to do so. *See* LEOs ##233, 1375.

Also establishing ethical obligations regarding this department head's staff supervision are Rules 5.1 and 5.3, which govern the supervision of attorney staff and nonattorney staff respectively[2]. While the precise details of each rule differ, both rules direct the

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[2] Those rules state as follows:

> RULE 5.1 Responsibilities of Partners and Supervisory Lawyers
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> (a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
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> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
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> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
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> (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
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> RULE 5.3. Responsibilities Regarding Nonlawyer Assistants**. —** With respect to a nonlawyer employed or retained by or associated with a lawyer:
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> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

supervising attorney to supervise his staff in a manner consistent with his own ethical obligations. This attorney cannot establish and implement a procedure for his staff to routinely contact represented workers when the initiation of that contact as well as the content of the communications are incompatible with the attorney's responsibilities under Rule 4.2.

While the in-house counsel was not the focus of your inquiry, the Committee notes that this same point applies equally to the in-house counsel. Because the claims department is housed within her legal department, she also has ethical obligations stemming from her supervisory responsibilities regarding the activities of the claims department.

Based on the general principles established above, the Committee answers your particular question as follows:

1) Is the claims department prohibited from contacting the employee after receiving notice of representation, as the supervisor of the department is a Bar member?

The Virginia Rules of Professional Conduct govern members of the Virginia State Bar. The rules do not apply to corporations, or departments of corporations, such as the claims department of this railroad. Accordingly, the provision in the rules, Rule 4.2, regarding contact with a represented party does not apply to the claims department. However, see the response to Question 3, below, for discussion of application of the rule to the individual lawyers in the claims department, including the department head.

2) Is the claims department permitted to contact an employee for purposes of "verifying" legal representation after receiving notice from counsel?

The answer to Question 1 also addresses this second question.

3) If that contact is permitted, may a representative of the claims department question the represented employee regarding why he hired counsel and advise the employee that he would be better served by dealing directly with the claims department without the assistance of an attorney?

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

For this third question, the identity of the particular "representative of the claims department" is important. If the representative is a nonlawyer, the rules do not directly apply to that employee's conduct. However, if the representative is a member of the Virginia State Bar, the rules do apply to his activities. The Committee has consistently opined that lawyers working in other fields nevertheless may be subject to the authority of applicable Rules of Professional Conduct.[3] This is no less true for these lawyers working in the railroad's claims department.

As discussed earlier, the particular rule at issue is Rule 4.2, governing contact with represented persons. The Committee reiterates that the lawyer/claims agents *are* providing legal services to their employer, the railroad. The conversations between claims agents and the injured workers include the lawyer/agent's analysis of the legal needs of the worker and advice regarding each worker's case. When a lawyer/claims agent tries to persuade a worker that he does not need a lawyer and that his claim will be better resolved without one, that agent is providing legal analysis and advice. The Committee opines that such a service comes within the reach of Rule 4.2. Accordingly, the lawyers operating as railroad claims agents should only be communicating with workers known to have counsel if that counsel has already provided consent to that communication. The attorney/agents in the present scenario have improperly failed to obtain that consent.

A final note regarding the issues raised in these first three questions. The counsel in each instance has already written the railroad to provide notice of the representation. There is suggestion that the purpose of the claims department's contact with the injured workers is to confirm that they are represented. That stated reason for these contacts cannot justify the communications. First, written notice from counsel is sufficient; the attorneys should rely upon that and begin any contact in these matters with counsel, and not the represented workers. Second, even if written notice was less than clear for some reason, these contacts should begin with an inquiry as to whether each worker is represented. When the workers answer that they do have counsel, the communication should stop at that point. Any further communication regarding the matter would need to be redirected to counsel. Requests for information and advice regarding the worth of legal representation would be improper.

For this third question, the role of the "representative of the claims department" is determinative. If the representative is a nonlawyer, the rules do not directly govern that individual. If the representative is a member of the Virginia State Bar, the rules do apply to his activities; the lawyer/claims agents must work within the communication

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[3] *See* 1819 (lobbying firm);1764 (attorney fee sharing with finance company); 1754 (attorney selling life insurance products); 1658 (employment law firm/human resources consulting firm); 1647 (employee-owned title agency); 1634 (accounting firm); 1579 (serving as fiduciary such as guardian or executor);1584 (partnership with non-lawyer); 1368 (mediation/arbitration services); 1442 (lender's agent); 1345 (court reporting); 1318 (consulting firm); 1311 (insurance products); 1254 (bail bonds); 1198 (court reporting); 1163 (accountant; tax preparation); 1131 (realty corporation); l083 (non-legal services subsidiary); 1016 (billing services firm); 187 (title insurance).

restriction established by Rule 4.2. Furthermore, the department head attorney's supervision of and/or interaction with his staff must not contradict his Rule 4.2 ethical obligation.

4) May the claims department contact a represented employee directly in order to request medical records, offer job retraining, or offer vocational services?

As with Questions 1 and 2, above, this question is outside the purview of this Committee as the Rules of Professional Conduct do not apply to the railroad's claims department. However, the analysis in Question 3 regarding the individual members of the claims department is equally applicable here. If the member of the department is a nonlawyer, the Rules do not regulate his or her conduct. If the member of the department is a lawyer, any contact with the represented worker is impermissible if in violation of Rule 4.2. That would include communications requesting medical records as well as offering job training and/or vocational services as such requests and offers are part of the negotiation of the particular claim for which the worker has legal counsel.

5) May the Bar member/claims agent contact a represented employee for purposes of requesting medical records, offering job retraining, or vocational services?

The discussion in answer to Question 4 responds to this fifth question.

6) While working for an attorney-supervised claims department, is a Virginia attorney bound by the Rules of Professional Conduct, even though maintaining that he is merely offering disability support services?

The Committee fully discussed this question in the introduction to this opinion as well as in the response to Question 3. The attorney/claims agents are bound by the Rules of Professional Conduct while providing these claims management services. The Committee notes that offering disability support services is within the subject matter of the representation for purposes of Rule 4.2 as those services are in response to the claims of the injured workers.

Finally, the Committee would like to comment on two issues not asked expressly in one of the questions but nonetheless suggested by the facts presented. First, the facts note that the railroad does have a legal department, with an in-house counsel who represents the railroad generally and therefore, presumably, in these claims cases. That attorney would, in line with the discussion presented in response to Questions 3, 5, and 6, above, need to limit all communications with the represented workers in the claims cases to conform to Rule 4.2. Also, that attorney should be mindful of Rule 8.4(a), which precludes an attorney from violating the Rules through the acts of another. Thus, the Committee cautions that the attorney in the legal department cannot circumvent the requirements of Rule 4.2 by directing members of the claims department to initiate communications the attorney himself is precluded from conducting. Any factual determination as to whether, in a particular instance, the communication by a claims agent occurred with sufficient involvement of the in-house counsel as to trigger Rules 4.2

and 8.4(a) would depend on facts far more detailed than those provided in the present hypothetical.

Finally, the Committee clarifies that in no way do the conclusions of this opinion prohibit *parties* from direct communication. As pointed out in Comment 1 to Rule 4.2, "parties to a matter may communicate directly with each other." In many instances such communication can be effective in speedy resolution of the dispute. However, a lawyer communicating on behalf of a client, even where that client is his employer, is not a party to the dispute but instead is counsel for a party. In the context of attorneys employed in various capacities by party employers, there may be circumstances where it is unclear whether particular communication derives from the lawyer as counsel or from the party itself. As discussed throughout this opinion, the Committee opines that the present context of the railroad employees is not one of those cases that are hard to determine. The Committee reiterates that both the attorney department head and the attorney claims/agents represent the railroad in negotiating these claims. Accordingly, their communications with the represented, injured workers come within the prohibition of Rule 4.2 rather than the allowance in Comment One for parties to communicate directly with each other.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.