ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2011-2

PROPRIETY OF COMMUNICATION WITH AN EMPLOYEE OF A CORPORATE OR GOVERNMENT ENTITY BY A LAWYER ENGAGED IN LITIGATION AGAINST THAT ENTITY

QUESTION PRESENTED

What constitutes "managerial responsibility" discussed in the Comment to ARPC 4.2 concerning communications with a represented person?

CONCLUSION

Employees of an organization who have sufficient authority to speak on behalf of the organization and thus legally bind the organization, are subject to the provisions of Rule 4.2. Other employees are not.

DISCUSSION

Bar counsel has frequently received inquiries regarding when it is appropriate for an attorney to contact an employee of a corporation, governmental entity or other organization during the course of a lawsuit. The question implicates Alaska Rule of Professional Conduct 4.2, which provides:

> **Communication with Person Represented by Counsel.**
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party or 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.

The problem lies in drawing a line between those employees of an organization that are be covered by the rule, and thus cannot be contacted, and those employees who are not covered, and are thus accessible to opposing counsel. Too strict an interpretation will make reasonable investigation of claims unnecessarily difficult, while too lenient an interpretation runs the risk of interfering with the attorney client relationship between the organization and its attorneys, or destroying the right of the organization to the protections of the attorney client privilege.[1]

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[1] As one court has stated:

> The Rule's protections undisputedly extend to organizational parties, who must act through their directors and employees. Accordingly, at least some of the organization's agents must be viewed as the equivalent of a "party" for the rule to have any effect. A

For example, an attorney would be prohibited from interviewing the president of a company regarding an automobile accident, because the president of the company would have authority to bind the company with his or her statements. But is the attorney also prohibited from interviewing the employee who was actually driving the automobile involved in the accident?

The Commentary to the Alaska Rules of Professional Conduct addresses this issue:

> In the case of a represented organization, this Rule prohibits communications by a lawyer concerning the matter with persons having managerial responsibility on behalf of an organization.

ARPC 4.2, Comment at paragraph 6. Thus, according to the commentary, the Rule prohibits a lawyer from contacting anyone having "managerial responsibility" in litigation involving an organization. At the same time, the corollary also appears to be true: it is permissible for an attorney to contact employees of an organization who do not have "managerial responsibility."

Although the language of Rule 4.2 as adopted in Alaska is identical to the language of Rule 4.2 under the Model Rules, the Alaska commentary to Rule 4.2 appears to narrowly define the scope of the rule as it applies to organizational entities. In contrast, the commentary to the Model Rule suggests a broader interpretation of the Rule:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or 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.

Model Rules of Professional Conduct, Rule 4.2, Comment [7]. [2]

> conflict between policies arises, however. On one hand, the rule's protective purposes are best served by defining this pool of agents broadly. On the other hand, defining the pool more narrowly fosters the use of informal discovery methods…. The question then becomes how to apply the rule in a way that best balances the competing policies.

Palmer v. Pioneer Inn Assocs. Ltd. 59 P.3d 1237, 1240-41 (Nevada 2002)(footnotes omitted).

[2] The application of the Model Rule and its commentary has resulted in diverse interpretations and applications in jurisdictions across the country. For example, some jurisdictions have found that statements constituting an admission of a party opponent under Federal Rule of Evidence 801(d)(2)(D) qualify as acts or omissions to be "imputed to the organization" under the commentary to the model rules. *See Richards v. Holsum Bakery, Inc.*, 2009 WL 3740725 (D. Ariz. Nov. 5, 2009). ("Statement is admission for purposes of Rule 4.2 if

The Alaska Supreme Court's choice to adopt different language cannot be ignored. The Court chose to adopt a different and much narrower commentary, a signal that the Court intended the bar on contacting non-managerial employees to be narrower than in the Model Rules.

Several jurisdictions have used an approach which appears to satisfy the requirements of Rule 4.2 and which is consistent with the commentary adopted in Alaska. The so-called "managing-speaking agent test" interprets the prohibition against contacting corporate or agency employees narrowly. Under that test, only employees who have authority to legally bind the corporation or agency are protected from contact by opposing counsel. This test was first articulated in *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984). The Washington Supreme Court found that current employees of the defendant would be considered parties under Rule 4.2 "if, under applicable Washington law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation." *Id.* at 201.

The court made it clear that for purposes of the Rule employees who did not have authority to "speak for, and bind, the corporation" could be contacted without violation of Rule 4.2.

> We hold the best interpretation of "party" in litigation involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, i.e., those employees who have "speaking authority" for the corporation. This interpretation is consistent with the declared purpose of the rule to protect represented parties from the dangers of dealing with adverse counsel.… We find no reason to distinguish between employees who in fact witnessed an event and those whose act or omission caused the event leading to the action. It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts.

Id.

Nevada has adopted a similar test:

> In applying this test, we specifically note that an employee does not "speak for" the organization simply because his or her statement may be admissible as a party-opponent admission. Rather, the inquiry is whether the employee can bind

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it constitutes an admission of a party opponent under Arizona Rules of Evidence). Other jurisdictions have concluded that the Rule prohibits contact with persons who, although not part of the management of the organization or agency, are employees "whose conduct is at issue" in the litigation. *See Brown v. State, Department of Corrections,* 173 F.R.D. 265, 268 (D. Ore. 1997). Still other courts have adopted other tests interpreting the rule. *See, e.g., Weibrecht v. Southern Illinois Transfer, Inc.*, 241 F.3d 875, 883 (7th Cir. 2001) (Employee whose actions would be imputed to corporation for purposes of finding corporate negligence protected under Rule 4.2).

> the organization with his or her statement. Also, an employee for whom counsel has not been retained does not become a "represented party" simply because his or her conduct may be imputed to the organization; while any confidential communications between such an employee and the organization's counsel would be protected by the attorney-client privilege, the facts within that employee's knowledge are generally not protected from revelation through ex parte interviews by opposing counsel.

Palmer v. Pioneer Inn Associates, Ltd., 59 P.3d 1237, 1248 (Nev. 2002).

Absent additional guidance from the Alaska Supreme Court regarding Alaska's Rule 4.2 and commentary, the Committee believes that the "managing-speaking agent" test comes closest to expressing the sense of Rule 4.2 as it applies to represented organizations in Alaska. Thus, only those employees of the organization who hold a position of sufficient authority or responsibility so that they can be considered to be speaking on behalf of the organization with respect to the matter at issue, and in so doing are able to legally bind the organization, are covered by the restrictions of Rule 4.2.

This formula strikes an appropriate balance between the need to protect the clear right of an organization from inappropriate contact by opposing counsel and the ability of opposing counsel to conduct investigations, including informal investigations, necessary to properly represent the counsel's client.

This test also appears to be consistent with this Committee's prior ethics opinions on the subject.[3]

It is important to note that the managing-speaking agent rule does not do away with the attorney-client privilege. Investigating counsel cannot ignore the possibility that a witness may also be represented by an attorney at the time of the interview. Counsel may neither ask nor permit a current or former employee to disclose privileged communications. *See Brown v. State of Oregon, Dept. of Corrections*, 173 F.R.D. 265, 269 (D. Ore. 1997). Nor may counsel ignore the other ethical obligations that may apply to interviews with employees of organizations, including the ethical obligations with respect to unrepresented persons. *See, e.g,* Alaska Rule of Professional Conduct 4.4 (dealing with respect for rights of third persons); Alaska Rule of Professional Conduct 4.3 (dealing with unrepresented person); Alaska Rule of Professional Conduct 4.1 (regarding truthfulness in statements to others). Accordingly, the Committee believes that prudent counsel wishing to interview employees of an organization will take care to

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[3] *See* Ethics Opinion No. 71-1 (a lawyer may communicate with employees of a government entity so long as the communication is not made with employees of the entity who may be reasonably thought of as representing the entity in the matter in controversy); Ethics Opinion 84-11 (attorney representing opposing party may informally interview agency employee who is not "representing the entity in matters related to the matter in controversy" and does not have "managerial responsibility" on behalf of the agency).

ensure that nothing in such interviews elicits privileged information or is misleading in any way regarding the nature and purpose of the interview.

Approved by the Alaska Bar Association Ethics Committee on December 2, 2010.

Adopted by the Board of Governors on January 27, 2011.