UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In re:	:	
	:	No. 3:01GP6 (SRU)
GRIEVANCE PROCEEDING	:	

MEMORANDUM OF DECISION

The question presented by this grievance proceeding is whether an attorney violates Rule 4.2 of the Rules of Professional Conduct by communicating with the in-house general counsel of an opposing party concerning litigation in which the opposing party is represented by outside counsel. After receiving two letters from the plaintiff's counsel ("Respondent"), the general counsel for the defendant corporation ("Complainant") referred Respondent to the Grievance Committee for the United States District Court for the District of Connecticut ("Grievance Committee"), alleging that the letters constituted impermissible communication with a represented party in violation of Rule 4.2. The Grievance Committee concluded that the Respondent had not violated any of the Rules of Professional Conduct and recommended that the court dismiss the Complaint. For the reasons set forth below, that recommendation is approved and the grievance proceeding is dismissed.[1]

Background

Complainant alleges that Respondent violated Rule 4.2 by sending Complainant two letters. First, on December 15, 2000, Respondent copied Complainant on a letter addressed to the defendant corporation's outside counsel regarding ongoing settlement negotiations. The letter

[1] When the District of Connecticut dismisses a grievance, the matter generally remains private. This decision will be made public, while maintaining the confidentiality of the parties involved, in order to improve understanding of and compliance with the Rules of Professional Conduct.

addressed both procedural settlement issues as well as more substantive disagreements that arose in the course of settlement negotiations. In a letter dated January 4, 2001, the defendant corporation's outside counsel responded in writing to the December 15 letter, in part by stating "please do not send mail or direct any communications concerning this case directly to [the defendant corporation] or to its employee [Complainant], as you did with your letter of December 15, 2000."

Second, on February 28, 2001, Respondent sent Complainant a letter directly, notifying Complainant of the outside counsel's failure to respond to Respondent's inquiries. The letter stated:

> Once again, it has been several weeks since I have been able to get in touch with your client's attorney. Please advise if the firm still represents your client. If so, I would appreciate some response either on settlement or discovery. Thank you.

Thereafter, on June 22, 2001, Complainant filed the Verified Complaint Alleging Attorney Misconduct.

On November 7, 2001, the Grievance Committee filed a recommendation with this court to dismiss the grievance proceeding. The recommendation stated that: "After thorough consideration of the submissions, the Federal Grievance Committee is of the opinion that [Respondent] has not violated any of the Rules of Professional Conduct."

Analysis

Federal courts have the inherent power to sanction attorneys admitted to practice before them for violations of the ethical standards adopted by their respective jurisdictions. See In re Snyder, 472 U.S. 634, 645 n.6 (1985) ("Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law."); Hull v.

Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); MMR/Wallace Power & Indus., Inc. v. Thames Associates, 764 F. Supp. 712, 717 (D. Conn. 1991). The Rules of Professional Conduct, as approved by the Connecticut Superior Court on October 1, 1986 and subsequently adopted by the judges of the District of Connecticut, express the standards of professional conduct for lawyers practicing in the District of Connecticut.[2] D. Conn. L. Civ. R. 3(a)(1). Rule 4.2 of the 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." Rules of Prof'l Conduct R. 4.2 (2002).

The purpose of Rule 4.2 is to protect the lawyer-client relationship by preventing opposing counsel from taking advantage of a non-lawyer's relative unfamiliarity with the law or prompting a non-lawyer's inadvertent disclosure of information against interest. See CBA Comm. on Prof'l Ethics, Informal Op. 92-6 (1992) ("Rule 4.2 . . . is intended to preserve the integrity of the lawyer-client relationship by protecting the represented party from superior knowledge and skill of the opposing lawyer."); see also Dubois v. Gradco Systems, 136 F.R.D. 341, 344 (D. Conn. 1991) (stating that the "policy underlying Rule 4.2" is to prevent "undercutting or 'end-running' an on-going lawyer-client relationship."); Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 236 (1990) ("The purpose of this restriction is to preserve the integrity of the lawyer-client relationship by protecting the represented party from the superior

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[2] Local Rule of Civil Procedure 3(a) provides that: "The interpretation of said Rules of Professional Responsibility by any authority other than the United States Supreme Court, the United States Court of Appeals for the Second Circuit and the United States District Court for the District of Connecticut shall not be binding on disciplinary proceedings initiated in the United States District Court for the District of Connecticut." D. Conn. L. Civ. R. 3(a).

knowledge and skill of the opposing lawyer. The rule is designed to prevent situations in which a represented party may be taken advantage of by opposing counsel."); 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 4.2:101 (2d ed. 1998) ("Rule 4.2 prevents a lawyer from taking advantage of a lay person to secure admissions against interest or to achieve an unconscionable settlement of a dispute . . . [and] prevents a lawyer from nullifying the protection a *represented* person has achieved by retaining counsel.") (emphasis in original). The rule's primary concern is to avoid overreaching caused by disparity in legal knowledge; it is designed to protect lay parties.

When the represented party is an individual, application of Rule 4.2 is straightforward. A lawyer cannot communicate about a matter with an individual who is represented by counsel in that matter, unless the lawyer has authorization from the court or the opposing counsel to do so. When the represented party is a corporation, however, determining which employees or individuals constitute the corporate "party" for purposes of Rule 4.2 is less clear. Generally, opposing counsel may not communicate with current employees who have managerial responsibilities within the corporation or who have the power to bind the corporation. Comments to Rule 4.2 provide that, with respect to organizations, "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 corporation, and with any other person 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." Rules of Prof'l Conduct R. 4.2 cmt. (2002). According to leading commentators, this comment to Rule 4.2 means that "those who can hurt or bind the organization with respect to the matter at hand are

off limits except for formal discovery or except with the consent of the entity's lawyer." 2 G. Hazard & W. Hodes, supra, at § 4.2:105.

A general counsel, however, does not fall within the plain meaning of "party" for purposes of Rule 4.2. The extent to which a general counsel has managerial responsibility or power to commit the corporation is ordinarily attributable wholly to his or her authority as counsel for the corporation. See CBA Informal Op. 92-6, supra ("While the general counsel has authority to negotiate on behalf of and to commit the corporation to a particular course of action, that authority is derived from his position as counsel for the corporation."). Hiring an outside counsel changes neither the source nor the nature of the general counsel's authority and, therefore, generally will not transform the general counsel from attorney to party for purposes of Rule 4.2 analysis.

More importantly, communication with a general counsel generally will not raise the same concerns as communication with a lay employee. The general counsel's training in the law helps ensure a level playing field of legal expertise in communications with opposing counsel. Accordingly, under the circumstances present here, the purpose of Rule 4.2 is simply not implicated, and the Rule 4.2 does not prohibit Respondent's contact with Complainant.

The ruling in this proceeding is not intended to affect in any way the scope of the attorney-client privilege. Whether a general counsel constitutes a "party" for purposes of Rule 4.2 is wholly independent of the question whether he or she constitutes a client, with respect to the outside counsel, for purposes of the attorney-client privilege. At the same time, the extent to which a person within an organization possesses privileged information does not determine whether communications with that person are appropriate under Rule 4.2. See, e.g., Dubois, 136

F.R.D. at 343 ("In the case of an organization, the Rule prohibits communications by a lawyer for one party concerning the matter in representation [1] with persons having a managerial responsibility on behalf of the organization, and with any other person, [2] whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability, or [3] whose statement may constitute an admission on the part of the organization."); id. at 347 (During ex parte contact, "plaintiff's counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy."). Rule 4.2 does not prohibit communication merely *because* a person possesses privileged information.[3]

For these reasons, protecting the attorney-client relationship does not require a general prohibition on communication with corporate general counsel and the corresponding limitation on the adversarial process that such a prohibition would entail. The court therefore concludes that, at least under the circumstances present here, a general counsel of a corporation does not constitute a "party" for purposes of Rule 4.2. See Restatement (Third) of the Law Governing Lawyers §100 cmt. c (2000) (inside legal counsel for a corporation is generally not considered to

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[3] The Rules of Professional Conduct do prohibit counsel from attempting to obtain privileged information from represented parties in the absence of a waiver from the organization, but it is Rule 4.4 that prohibits this directly, not Rule 4.2. See Dubois, 136 F.R.D. at 346-47 ("[I]nformation that might be protected under the attorney-client privilege . . . could pose problems with respect to *ex parte* contact with former employees. . . . [P]laintiff's counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy. . . . [E]fforts by plaintiff's counsel to induce or listen to privileged communications may violate Rule 4.4 of the Model Rules of Professional Conduct, which requires respect for the rights of third persons."). Rule 4.4 provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."). Rules of Prof'l Conduct R. 4.4 (2002).

be a current employee or other agent of the corporation for purposes of the limitation on attorney communication with represented parties regarding the subject of the representation). Rather, the general counsel by definition is a corporation lawyer and, absent notice that the general counsel is acting in a role other than as a lawyer with respect to a particular matter, opposing counsel can communicate with him or her. See CBA Informal Op. 92-6, supra ("Even though the corporation may have an outside, private lawyer handling a piece of litigation, this does not exclude general counsel from also acting as the corporation lawyer. ... [The general counsel] remains the corporation's attorney and, as such, can contact or be contacted by defendant's lawyer."); *cf.* In re James Finkelstein, 901 F.2d 1560 (11th Cir. 1990) (vacating a district court order suspending an attorney who communicated directly with the opposing general counsel regarding settlement because the attorney could not have been on notice that his conduct violated ethical standards).

Conclusion

The court accepts the Recommendation of the Grievance Committee and the grievance proceeding is hereby DISMISSED. The clerk is instructed to close this file.

It is so ordered.

Dated this ___ day of July 2002 at Bridgeport, Connecticut.

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Stefan R. Underhill
United States District Judge