Contact with Former Employee of Opposing Party

Disgruntled former employees of an opposing party in litigation provide a tempting source for information to help the cause of one's client. After all, Pennsylvania's version of the Rules of Professional Conduct provides support for the premise that approaching such a source, whether directly or through an intermediary such as a private investigator, can be proper. For example, although Rule 4.02(a) prohibits communication with a person or organization "the lawyer knows to be represented by another lawyer regarding that subject," "this prohibition extends to certain 'persons *presently* having a managerial responsibility' in the organization or '*presently* employed' by the organization." See *In re RSR Corporation et al.,* 474 S.W.3d 775, 781 (Tex. 2015) (quoting Tex. Disciplinary Rules of Professional Conduct, Rule 2.02(a) and Comment 4. See, Rule 4.2 of the Pennsylvania Rules of Professional Conduct, Explanatory Comment [7]. But that is as far as the rule goes with respect to employees of the opposing party. The rule does not per se prohibit contact with the opposing party's former employees and, therefore, raises the question as to the nature and extent that such contact may occur.

The *RSR* case addresses an instance where a former finance manager employed by a defendant in the lawsuit had been engaged in financial issues having to do with payments made by his employer to the plaintiff. Defendant manufactured anodes used in the mining industry, and plaintiff licensed its proprietary information to defendant for a fee for every anode sold. Plaintiff contended that defendant was underreporting the number of anodes utilizing plaintiff's proprietary information and, as a result, was underpaying plaintiff.

According to the former employee, "[h]e had access to data regarding [defendant's] financial statements, foreign trading and government reports" and he had gathered the information for defendant in response to an audit requested by plaintiff concerning defendant's payments to it in 2009. He also claimed to have "discussed the audit with [defendant's] lawyers and company officers," as well as having discussed "litigation strategy with company officers, communicated with [defendant's] lawyers, and reviewed invoices describing the attorneys' work." The former employee had also signed a contract with defendant in which he had acknowledged that "all information [that he] obtained during his employment was confidential and could not be disclosed to third parties, even after his employment ended."

When the employee resigned his job with the defendant, he took with him approximately 2.3 gigabytes of data. This included between 15,000 and 17,000 emails, which included some of his "personal communications, as well as emails between defendant's lawyers, managers, and directors."

After the former employee left his position with defendant, counsel for plaintiff contacted him, leading to several meetings between the two and other counsel for plaintiff, including two trips by the former employee from his home in Chile to meet with plaintiff's counsel in New York City. In all, the former employee met with plaintiff's counsel "at least 19 times for a total of more than 150 hours." The parties involved dispute what exactly happened at these meetings, but an audit participated in by the former employee was discussed, among other things. Moreover, plaintiff's counsel looked on as the former employee "displayed [defendant's] documents on his computer, and [plaintiff's] counsel possesse[d] a pen drive with many of [defendant's] documents." Although the parties to this case dispute the number and nature of the documents revealed, plaintiff contended that its counsel "always told [the former employee] not to reveal [defendant's] privileged or confidential information during their interviews." Defendant, to the contrary, contended that plaintiff's counsel "freely viewed the documents [that the former employee] took from defendant, many of which were privileged and confidential." The litigants also disputed both the extent to which plaintiff's counsel reviewed the contents of the pen drive and whether defendant had taken adequate measures to guard its privileged documents against unwanted viewing.

In addition, the former employee, at his own insistence, was compensated for his time in meeting with plaintiff's counsel at a daily rate that was, according to plaintiff, "four times his current salary," based upon his misrepresentation of his actual salary. One of the law firms that represented plaintiff entered into a consulting agreement with the former employee, which, among other things, guaranteed him $1 million "by the time the contract's three-year term passed."

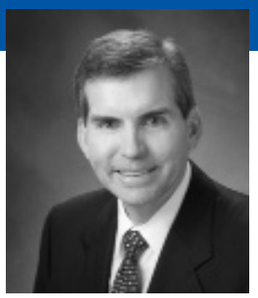
Two months after signing it, defendant's former employee cancelled the agreement. He thereafter signed an affidavit in which he recanted his accusations against defendant and asserted that it had never underpaid plaintiff.

Defendant moved to disqualify plaintiff's counsel for their exposure to defendant's former employee and the documents in his possession. The trial court, relying upon the Texas Supreme Court's decision in *In re American Home Products Corp.*, 985 S.W.2d 68 (Tex. 1998) — a case that involved a paralegal who had switched law firms on the opposite side of a case — disqualified plaintiff's law firm. The court found that plaintiff's law firm was " 'irreparably tainted' by hiring [defendant's former employee] and reviewing his documents." After Texas' intermediate appellate court denied defendant's petition for mandamus relief, the Texas Supreme Court agreed to hear the dispute.

The Texas Supreme Court granted mandamus relief, conditioned upon the event that the trial court refused to vacate its order and consider the issue based upon application of what the Supreme Court considered the appropriate standard. The Supreme Court found that the trial court had incorrectly relied upon the principles stated in *American Home Products*, applicable to paralegals and legal assistants who had switched sides in a lawsuit, instead of the principles stated in *In re Meador*, 968 S.W.2d 346, 352 (Tex. 1998), applicable to "when attorneys receive […] an opponent's privileged materials outside the normal course of discovery." In *Meador*, the court had applied six criteria, which included, "whether the attorney knew or should have known that the material was privileged" when determining whether "a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified, even though the lawyer was not involved in obtaining the information." The Texas Supreme Court gave the trial court the opportunity to reconsider the disqualification motion by applying the criteria under *Meador* instead of the standard under *American Home Products*. In deciding whether the *Meador* test or the *American Home Products* test applied, the Texas Supreme Court stated that "we take a functional approach, looking not only to labels and job titles but also to the side-switching employee's duties at the original employer. Nonetheless, we examine whether the tasks 'performed were the same as those that might be executed by a legal assistant as a full-time employee of a law firm or by a legal assistant in the legal department of a party.' " The court recognized that, per Rule 3.04(b), the witness could receive "reasonable compensation for travel expenses and the witness's loss of time."

Perhaps it is stating the obvious, but what *RSR* teaches is that contacting former employees of an opposing party outside of the formal discovery process can be fraught with peril.

Avoiding Liability



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