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Beyond Discipline: Litigation Remedies for “No Contact” Rule Violations

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The “no contact” rule, ABA Model Rule 4.2, generally prohibits lawyers from contacting parties or witnesses who are represented in the matter involved. The rule has been around in various forms since the original ABA Canons of 1908 and has had an equally long history as a staple of lawyer disciplinary decisions. Discipline alone, however, may not be a particularly useful remedy if your case has been affected by improper contact by opposing counsel. Although less prominent than the extensive body of disciplinary case law, courts have developed practical litigation remedies for violations of the “no contact” rule. In this column we’ll look at the two primary remedies available in civil litigation: disqualification and exclusion of evidence.

With both, the key prerequisite to the remedy is being able to prove to the court’s satisfaction that the lawyer or firm concerned violated the rule (see, e.g., *E.E.O.C. v. Hora, Inc.*, 239 Fed. Appx. 728 (3d Cir. 2007) (reversing disqualification by finding no violation)). The question of violation can turn on the specific facts of the case involved and the nuances of the particular “no contact” rule in the jurisdiction concerned. Although most states have “no contact” rules patterned on ABA Model Rule 4.2, “model” does not necessarily mean “uniform” and even geographically contiguous states can have rules that vary in important

ways. Washington, for example, limits the prohibition in the corporate context to employees who are classified as “speaking agents” of the corporation under corresponding evidence law (see *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984)). Oregon, by contrast, contains no such limitation (see Oregon State Bar Formal Ethics Op. 2005-80 (2005)). Finally, the merits of any litigation remedy notwithstanding, courts can and sometimes do simply refer asserted “no contact” rule violations to state bar disciplinary authorities (see, e.g., *Pioneer Resources Corp. v. Nami Resources Co., LLC*, No. 6:04-465-DCR, 2006 WL 1464785 (E.D. Ky. May 22, 2006) (unpublished)).

Disqualification

Although disqualification is a remedy that is frequently sought for violations of the “no contact” rule, courts typically caution that it is not automatic (see, e.g., *Mori v. Saito*, 785 F. Supp.2d 427, 431-33 (S.D.N.Y. 2011); *American Plastic Equipment, Inc. v. Toytrackerz, LLC*, No. 07-2253-DJW, 2009 WL 902424 (D. Kan. Mar. 31, 2009) (unpublished) at *7-*10). Rather, disqualification is usually reserved for situations in which opposing counsel used an impermissible contact to invade attorney-client privilege or work product protection—such as confidential litigation or settlement strategy—that would affect the fundamental fairness of the proceeding (see generally *In re Korea Shipping Corp.*, 621 F. Supp. 164, 169-71 (D. Alaska 1985)).

Hammond v. City of Junction City, Kan., 126 Fed. Appx. 886 (10th Cir. 2005), for example, involved an employment action against a city where the plaintiffs' attorney contacted the city's personnel director who was directly involved in the events at issue in the litigation and was also involved developing investigative work product. In light of the director's position and role, the court found a violation of Kansas RPC 4.2 and disqualified the lawyer and her firm.

When courts examine disqualification as a potential remedy for "no contact" rule violations, they most often frame their analysis against the backdrop of their jurisdiction's general standards for disqualification (see, e.g., *Mori v. Saito*, 785 F. Supp.2d at 431-33; *American Plastic Equipment, Inc. v. Toytrackerz, LLC*, 2009 WL 902424 at *7-*10). These usually include predicate issues such as standing, burden of proof and the adequacy of lesser sanctions and defenses such as laches.

Exclusion

Exclusion is by far the most common litigation remedy for violations of the "no contact" rule. The particular methods of exclusion range from striking declarations (see, e.g., *Engstrom v. Goodman*, 271 P.3d 959, 962-64 (Wash. App. 2012)) to sealing deposition testimony (see, e.g., *Parker v. Pepsi-Cola General Bottlers, Inc.*, 249 F. Supp.2d 1006, 1013 (N.D. Ill. 2003)) to barring use of any information resulting from an impermissible contact (see, e.g., *American Plastic Equipment, Inc. v. Toytrackerz, LLC*, 2009 WL 902424 at *10).

In *Engstrom*, for example, counsel for plaintiff, who had won an arbitration award, contacted the defendant directly and obtained a declaration that ran counter to the request for trial de novo that the defendant's lawyer had just filed. The attorney who made the impermissible contact withdrew when the surrounding circumstances surfaced and, therefore, disqualification was moot. Instead, defense counsel moved to strike the declaration. The trial court found a violation of Washington RPC 4.2 and granted the motion to strike. The Washington Court of Appeals affirmed, holding that the exclusionary remedy was well within the trial court's discretion.

Summing Up

Disqualification and exclusion of evidence can be important practical remedies for "no contact" rule violations that supplement regulatory discipline.

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