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Corporate Contact: In-House Counsel and the "No Contact" Rule

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The "no contact" rule—American Bar Association (ABA) Model Rule of Professional Conduct 4.2 and its state rule counterparts—generally prohibit contact with a represented person concerning the matter in which the person is represented. In the corporate context, comment 7 to Model Rule 4.2 extends the prohibition to officers, directors, and other senior managers by including them within corporate counsel's representation. Comment 7, however, does not specifically address a management position that is usually central to the operation of a corporation: in-house counsel. The leading ABA ethics opinion on the application of Model Rule 4.2 to in-house counsel—Formal Ethics Opinion 06-443 (2006)—puts them on the "lawyer" rather than the "client" side of the divide and permits direct contact from opposing counsel. Formal Ethics Opinion 06-443 also addresses exceptions to this general approach. In this column, we'll first survey the general approach adopted by Formal Ethics Opinion 06-443 and next move to the principal exceptions. We'll then conclude with a note on contact with former in-house counsel.

The General Approach. Formal Ethics Opinion 06-443 summarizes the reasons for classifying in-house counsel as lawyers rather than clients under the "no contact" rule:

> The protections provided by Rule 4.2 are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization. When communications are lawyer-to-lawyer, it is not likely that the inside counsel would inadvertently make harmful disclosures. The purpose of Rule 4.2 is to prevent a skilled advocate from taking advantage of a non-lawyer. To forbid an opposing lawyer from contacting inside counsel is inimical to the way the legal system works through communications between counsel regarding matters in dispute. Unlike non-lawyer constituents, inside counsel ordinarily are available for contact by counsel for the opposing party.

Id. at 2 (footnotes omitted).

Although court decisions analyzing Formal Ethics Opinion 06-443 are few, those that do generally agree with its approach—with *Scanlan v. Eisenberg*, 893 F. Supp. 2d 945, 950 (N.D. Ill. 2012), and *In re Woodham*, 769 S.E.2d 353, 356–57 (Ga. 2015), being two prominent examples. The *Restatement (Third) of the Law Governing Lawyers* (2000), in comment c to section 100, and several state and local ethics opinions, also take this tack, including District of Columbia Bar Ethics Opinion 331 (2005), and Philadelphia Bar Association Ethics Opinion 2000-11 (2000).

***Exceptions*.** Formal Opinion 06-443 notes two principal exceptions.

First, the lawyer may have provided business rather than legal advice in the matter involved, and the lawyer, therefore, may be a fact witness rather than legal counsel. In that circumstance, lawyers are generally put on the "client" side of the ledger, and direct contact is prohibited if the lawyer was acting in a management role that falls within the entity counsel's representation of the corporation. North Carolina State Bar Ethics Opinion 128 (1993), for example, reaches this conclusion, using the illustration of an in-house lawyer who was acting in a management capacity for an insurance carrier in a coverage dispute. This exception is also analogous to cases in the attorney–client privilege context holding that purely business advice provided by in-house lawyers may not be privileged. Summarizing case law on this point, *Chandola v. Seattle Housing Authority* noted: "[W]here in-house counsel is involved . . . they often act in both a legal and non-legal business capacity, and communications made in this latter capacity are not privileged." 2014 WL 4685351, at *3 (W.D. Wash. Sept. 19, 2004) (unpublished).

Second, although comparatively rare, the lawyer may be separately represented in the matter concerned. This might occur, for example, in a securities or other investigation of corporate conduct that included potential individual liability. In this scenario, the lawyer could not be contacted directly by opposing counsel regarding the matter involved.

Former In-House Counsel. Under comment 7 to Model Rule 4.2, former employees of all stripes can be contacted directly as long as they do not have personal counsel in the matter involved. That same comment cautions, however, that the contacting lawyer cannot "use methods of obtaining evidence that violate the legal rights of the organization." In other words, a contacting lawyer cannot invade the former corporate employer's privilege in discussions with former employees. Although this injunction applies to former employees generally, former in-house counsel present a particularly sensitive application. States vary in their treatment of whether post-employment communications with former employees are privileged or not, with Oregon State Bar Formal Ethics Opinion 2005-80 (rev. 2016), illustrating the former, and *Newman v. Highland School District*, 381 P.3d 1188 (Wash. 2016), illustrating the latter. But, as the *Restatement (Third) of the Law Governing Lawyers* (2000) discusses, in section 73 and its accompanying comments, a corporation's privilege—absent waiver—remains intact for confidential, attorney–client communications that took place *during* a now-former in-house counsel's employment.

Model Rule 4.4(a) incorporates the prohibition against improper invasion of privilege into a specific rule. Violating that prohibition can expose a lawyer to discipline. It can also lead to sanctions in the matter being litigated, ranging from exclusion of evidence to disqualification. *Foss Maritime Co. v. Brandewiede*, 359 P.3d 905 (Wash. Ct. App. 2015), catalogs the range of sanctions available for the

asserted improper invasion of privilege, and *In re Examination of Privilege Claims*, 2016 WL 8669870 (W.D. Wash. July 22, 2016) (unpublished), discusses disqualification in particular for alleged improper invasion of privilege through a former in-house counsel.

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