The No-Contact Rule in Massachusetts Post Messing

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A recent decision by the Supreme Judicial Court gives lawyers broad permission to contact employees of a corporate adversary.

The rules governing lawyers' ethics in Massachusetts prohibit a lawyer from communicating with a person if that person is represented by counsel. Rule 4.2 of the Massachusetts Rules of Professional Conduct, adopted in 1998 by the Supreme Judicial Court, reads: "In representing a client, a lawyer shall not communicate about the subject of the representation with a 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 by law to do so." When the represented "person" on the other side of a dispute is an individual, the rule is easy to understand and to enforce. When the "person" on the other side of the dispute is a constituent of an organization such as a corporation, the rule is anything but easy to understand or enforce.

The obvious challenge in organizational contexts is discerning which agents or employees ought to qualify as "persons" covered by Rule 4.2. With this Spring's decision of a divided Supreme Judicial Court in Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347 (2002), Massachusetts lawyers have much clearer guidance about which corporate employees may be contacted, and which may not. The SJC in Messing limited the scope of Rule 4.2 to organizational agents "who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts in issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation." Id. at 357-58.

Messing provides a narrow interpretation of Rule 4.2, while creating some new questions about which employees remain covered by the rule. It leaves open, for now, the question of which, if any, former employees might be covered by Rule 4.2. The most likely prediction is that the SJC will hold, in a case now before the court, that former employees are not covered by the rule.

Some Background

For ease of discussion, let us imagine a plaintiff's lawyer preparing a litigation matter against a corporate defendant. Before the Messing decision, the plaintiff's lawyer wishing to prepare for litigation might contact selected employees ex parte, without notice to the defendant's counsel. In deciding whom to contact, the plaintiff's lawyer would rely on the language of Comment 141 to Rule 4.2, which defines the organizational agents covered by the prohibition. That Comment, at the time of the Messing opinion, read in relevant part as follows: "In the case of an organization, this Rule prohibits communications by a lawyer for another person or an entity concerning the matter in representation with persons having managerial responsibility on behalf of the organization, with regard to the subject matter of the representation, 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." (As we see below, this comment was rewritten by the SJC on June 5, 2002.)

Before Messing, authorities were mixed about the breadth of the last phrase of Comment 4, referring to "admissions." Some federal courts, and a much-cited 1982 Massachusetts Bar Association's Ethics Committee Opinion 82-7 (construing DR 7-104(A)(1)), read the no-contact rule expansively. By that reading, Rule 4.2 covers any employee whose

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statements would be admissible in court, when offered against the employer, as an exception to the hearsay rule under Proposed (or Federal) Rule of Evidence 801(d)(2)(D) and Ruszcyk v. Secretary of Public Safety, 401 Mass. 418 (1988)—that is, any employee whose statements concern a matter within the scope of his employment, made while an employee. As several courts noted, this interpretation encompasses most employees, and is broadly protective of the defendant corporation.

Other authorities interpreted the "admissions" clause more narrowly, covering only employees who may make binding admissions on the part of the organization, which represents a much smaller group, usually comprised of senior management. (Rule 801(d)(2)(D) admissions are not binding on a party.) See, e.g., Restatement (Third) of the Law Governing Lawyers § 100 Comment e (1998).

A plaintiff's lawyer seeking to interview co-workers ex parte before Messing faced some uncertainty, then, given the competing interpretations of the rule.

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make admissions binding on her employer," Messing at 355; and writing that "this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation," the Messing opinion explicitly jettisoned entirely the "admissions" language in Comment 4.

Because Comment 4 is, by the terms of the Rules of Professional Conduct, only advisory (see Scope, [9]), and because the Rules themselves are entirely within the province, the Court has authority to make such an interpretive change. Still, the Court's rejection of the Comment's explicit language might seem perplexing, as that very language was debated (and openly opposed by the plaintiffs' bar) before the SJC in 1997, but accepted by the Court at that time.

Cowin's opinion "reject[s] the comment's 'admissions' clause as overly protective of the organization and too restrictive of an opposing attorney's ability to contact and interview employees of an adversary organization." Messing, at 357. The Court's new "interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts in issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation." Id. The Court relied heavily on the leading New York case of Niesig v. Team I, 76 N.Y.2d 363 (1990), and the Restatement § 100, both of which arrive at a similar test.

In reviewing the contacts made by the plaintiff's counsel in the Messing case, the court concluded that none of those communications would be barred under the court's new test. The court therefore reversed the Superior Court's sanctions award. Justice Robert Cordy wrote a dissent in which he argued for maintaining a ban on contact with employees whose statements would be admissible under Rule 801(d)(2)(D), but with a narrower interpretation of what matters are within the scope of the individual's employment for purposes of the evidentiary rule.

Because its opinion effectively nullified language in Comment 4, the SJC on June 5, 2002 amended that Comment. The revised Comment 4 "prohibits contact only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful act, or who have authority on behalf of the organization to make decisions about the course of the litigation."

The No-Contact Doctrine After Messing

Current Employees

The Messing opinion clarifies for Massachusetts lawyers that Rule 4.2 does not bar communications with current organizational constituents solely because those constituents might make statements which would qualify, if offered at trial against the organization, as non-hearsay under Rule 801(D)(2)(d). The SJC implies, rather strongly, that such statements indeed would be admissible at trial if offered against the organization, both by its broad description of the reach of Rule 801(D)(2)(d) and by its reversing the trial court's sanctions order against MR&W prohibiting use of the employee statements obtained by that firm.

However, Massachusetts Superior Court Judge Christopher Muse, writing after the Messing decision, has ordered that such employee statements shall not be used against the organization as a party admission exception to the hearsay rule. Otis v. Arbella Mutual Ins. Co., No. 99-2907-F (Mass. Sup. Ct., April 4, 2002). Many earlier reported no-contact rule decisions permit such use. See, e.g., Morrison; Siguel.

Advocates for organizational clients may worry about a reading of Messing that deems rank and file employees "non-parties" for Rule 4.2 purposes but "parties" for Rule 801(D)(2)(d) admissions purposes. The worry is understandable, but may be overstated. Any "admissions" under the hearsay exception are not binding on an organization (despite some misleading references to that term in several federal court opinions), and may be rebutted by the organization by its own direct evidence. Further, the admissions, by definition, are offered only when the interviewed employee does not testify directly at the trial, a circumstance that is both rare and not the most compelling evidence from the proponent's standpoint.

In response to Messing, corporate counsel will consider instructing its client's employees not to speak with the plaintiff's lawyer, an instruction permitted generally under Rule 3.4(f). See Restatement § 116(4)(A). Such an instruction may be viewed as unlawful interference with the rights of employees, however (see, e.g., M.G.L. c. 151B § 4(4)(protecting employees' rights to report discrimination)), or, in circumstances involving ongoing criminal investigation, possibly obstruction of justice.

Rule 4.2's no-contact principle does apply to "managing-speaking agents," those persons who truly do bind the organization and speak for it in an official way. In most instances, whether an employee is "empowered to make litigation decisions" (Messing at 358) will be relatively apparent to both parties. In some settings, though, a prudent plaintiff's lawyer will choose to seek ex ante court permission to speak to a person, such as a manager, whose status as a managing-speaking agent is unclear.

Finally, Rule 4.2 bars contact with employees who may have been responsible for the actions which are the subject of the litigation, or contemplated litigation. The SJC's revised Comment 4 alters, seemingly intentionally, the definition of this group. The original Comment 4 barred contact 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" (emphasis added). The SJC's new 2002 Comment 4 limits contact with "agents or employees ... who are alleged to have committed the wrongful acts at issue in the litigation" (emphasis added). By replacing the phrase "may be imputed" with "are alleged to have committed," the SJC appears to have narrowed the group of organizational agents covered by this ban.

If this literal reading is reliable, then a plaintiff's lawyer may contact a person whose actions might have been imputed to the organization for liability purposes as long as neither side has alleged (or, presumably, is likely to allege) that the person has committed the wrongful acts in question.

Former Employees

The Messing opinion leaves unresolved the status of former employees within the jurisprudence of Rule 4.2. Several Massachusetts courts as well as the majority of other authorities (including the ABA)* have concluded that Rule 4.2 simply has no applicability to former employees, as it is a rule intended to encompass current organizational agents. Other authorities imply that Rule 4.2 might cover former employees if those employees' acts or omissions (when they were employed) may be imputed to the organization for purposes of civil or criminal liability. The SJC will decide this question, having granted direct appellate review in...
4.2. After the Intergen same conclusion, but the organization, it is odd to conclude the flow of information or to shield one Rockland Thist, relationship presented party to somehow impair, compromise, or settle his or her own case," and to "prevent disruption of the attorney-client relationship by opposing counsel." Rockland Trust, at *5 (citations omitted). Its purpose is not to permit control over the flow of information or to shield one party from unfavorable evidence. If a person is no longer an agent of a party, and cannot control the litigation or bind the organization, it is odd to conclude that the person nonetheless is a member of the organizational client for Rule 4.2 purposes. Judge Keeton has expressed the same conclusion, but post-Messing. Intergen N.V., at 2. In June, 2002, the Massachusetts Bar Association Ethics Committee concluded, similarly, that former employees are not covered by Rule 4.2 after the Messing opinion and after the SJC's amendment to Comment [4] of Rule 4.2. See MBA Op. 2002-3.

Protection of the Attorney-Client Privilege

After Messing, lawyers have greater (or at least clearer) permission to talk with employees of organizations. That authorization, however, cannot be confused with permission to inquire about information which may be protected by the attorney client privilege. Employees, both current and former, may be outside the scope of Rule 4.2 but still possess information protected by the attorney-client privilege. A lawyer speaking with an employee of a represented organization has an obligation, independent of Rule 4.2 and fully enforceable by the courts, to refrain from seeking or learning protected information.11

(Endnotes)

1 I thank Ellen Messing and Pat Sharkey for their kindness in reviewing an earlier draft of this article. I also thank J. Miguel Flores for his helpful research assistance. All errors of judgment or analysis are of course mine.

2 Rule 4.2 is effectively identical to its predecessor, Disciplinary Rule 7-104(A)(1).

3 Obviously, Rule 4.2 applies as well to defendants opposing a corporate plaintiff, or to corporate plaintiffs opposing a corporate defendant, and to parties engaged in transactional work.


6 The opinion quoted in re Air Crash Disaster, 909 F. Supp. 1116, 1121 (N.D. Ill. 1995). It is puzzling that the SJC quotes an Illinois opinion which claims that 801(d)(2)(D) admissions are "binding" on an employer, when, as noted earlier, such admissions are always rebuttable. See lacos et al., HANDBOOK OF MASSACHUSETTS EVIDENCE § 2 (7th ed. 1999). There is no reason to believe that the SJC, in quoting this language, intended to change substantive evidence law in Massachusetts.

7 When a plaintiff's attorney prepares her case by contacting persons now free from Rule 4.2's restrictions after Messing, that contact ought to be treated entirely as the plaintiff's work product. Judge Rya Zobel, in a post-Messing order in Schwartz v. Camp Robin Hood, CA 01-12032-RWZ (May 8, 2002), has concluded to the contrary. Judge Zobel, after permitting a plaintiff's lawyer to contact employees, both current and former, of a summer camp to investigate a swimming injury, ordered plaintiffs' counsel "to make detailed and complete notes of the interviews which he shall provide to counsel for defendant after the interviews have been concluded." Id., at 4. Judge Zobel's order only makes sense if viewed as a condition imposed by the court when authorizing contact with organizational agents who otherwise would be off limits under Rule 4.2.


11 See Rockland Trust, supra, at *6 FN7; Amarin Plastics, supra, 116 F.R.D. at 42; RESTATEMENT § 101.