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Georgia Defense Lawyers Stirred Up Over Proposed Opinion on Contacting Ex-Employees

"If a former disgruntled employee wants to get back at a former employer, this is one way to do it," Jeff Ward, president of the Georgia Defense Lawyers' Association, said.

BY MEREDITH HOBBS

Courtesy photos/ALM

Colin Kelly of Shook, Hardy & Bacon, Jeff Ward, president of the Georgia Defense Lawyers Association, and Lyle Warshauer of Georgia Trial Lawyers' Association.

The Georgia defense bar is up in arms over a seemingly simple change to a State Bar of Georgia formal advisory opinion that provides guidance on opposing counsel contacting a company's former employees.

The proposed new formal advisory opinion, 20-1, says plaintiffs attorneys may contact ex-employees of a company without first notifying or securing consent from the company's lawyer. It also specifies disclosure rules for the lawyer contacting the ex-employee, in more detail than formal advisory opinion 94-3, which the proposed rule would replace.

"This has gotten a lot of folks in the defense bar, and the business community, quite concerned," said Jeff Ward, president of the Georgia Defense Lawyers' Association and a partner at Drew Eckl & Farnham. "If a former disgruntled employee wants to get back at a former employer, this is one way to do it."

Twenty-two defense bar groups, companies, industry trade associations and two large law firms—Shook, Hardy & Bacon and Troutman Pepper—have signed a letter opposing the proposed opinion, saying they want plaintiffs attorneys to first notify the company's lawyers before contacting a former employee.

Numerous other defense law organizations sent separate objection letters to the State Bar before the public comment period ended Dec. 16. The proposed opinion then goes to the Georgia Supreme Court for final approval.

The letters' signatories say any former employee should still be considered as represented by the organization's lawyer to protect potentially privileged corporate information.

The GDLA, one of the signatories, sent its own letter to the Bar opposing the proposed new opinion. Ward said the big concern

for GDLA is protecting potentially privileged organizational information.

"Our position is that there should be no difference between current and former employees," Ward said, because former employees, whether low-level or midlevel management, may not know whether information is privileged. "Privilege does not belong to the individual. It belongs to the company, so it survives the employment relationship."

What 20-1 Says

But Opinion 20-1 does address privileged information—the sticking point for the defense bar.

"In particular, the lawyer must refrain from inquiring into information that may be protected by the attorney-client privilege or some other evidentiary privilege," the opinion says.

It also cautions that attorneys contacting former employees must disclose their client's identity, the nature of the client's interest in the former employer, the reason for the communication and the information being sought.

The GDLA letter acknowledges this part of the opinion, but says it falls short.

"Proposed FAO No. 20-1 would prohibit a lawyer from inquiring about privileged information, but this is not an adequate protection because it prohibits only direct inquiries. This would not provide any protection from a seemingly innocuous question that results in the former employee disclosing privileged information."

Shook Hardy's Atlanta managing partner, commercial litigator Colin Kelly, said 20-1 does not take into consideration a scenario where the former employee does not know information is privileged.

Kelly said Ethics Rule 4.2, which addresses lawyers contacting company employees ex parte, is "largely silent" on distinguishing between current and former employees. For that reason, he said, many plaintiffs lawyers have "erred on the side of asking for permission to contact former employees if [they were] a high-level decision-maker likely to have been involved in privileged discussions with outside or in-house counsel.

"This process was often transparent, professional, and avoided ex parte discussions that stumble into privileged discussions or disclosures," he said.

Kelly's concern is that plaintiffs lawyers will instead contact former employees directly, if 20-1 is issued as written.

"Many of the current professional courtesies will very likely end and we will be left to just trust the ethics of adverse lawyers to make their required disclosures under 20-1—something that will be difficult confirm after the fact," he said.

Company lawyers will also have to "hope, rather than confirm from the start of the contact process, that the former employee understands what is a trade secret, company confidential, privileged, work product and what is not and why it should be protected," he added.

Nothing New

But David Lefkowitz, the chairman of the State Bar's Formal Advisory Opinion Board, said 20-1 isn't materially different from 94-3, the opinion it would replace. Lefkowitz, of The Lefkowitz Firm in Athens, spoke on behalf of the FAO board at the request of the Bar's Office of General Counsel.

"Nothing has changed and nothing is new," he said, noting that 94-3 similarly addressed the issue of contacting ex-employees without first going through a company's lawyer. Proposed FAO 20-1 addresses the defense bar's objections in language that echoes the earlier language of 94-3.

"Counsel for an organizational client undoubtedly would prefer that an adverse lawyer not be permitted to communicate with former employees of the organization for the purpose of obtaining

information that could be used against the organization," proposed FAO 20-1 says.

But 20-1 also adds that this would make "information control" too one-sided.

"However, prohibiting such communications by a lawyer, without the consent of the organization's counsel, would give that counsel a right of information control that is not supported by any rule of professional conduct," it says.

The opinion also addresses Rule 4.2, which Kelly mentioned, and concludes that it does not apply to former employees. It explains that Comment 4A of Rule 4.2, "does not anywhere suggest that a former employee comes within Rule 4.2's protections. The only reasonable conclusion to draw from this omission is that Rule 4.2 does not apply to former employees."

Lefkowitz said the only reason the board decided opinion 94-3 needed to be replaced by 20-1 was because 94-3 was based on an FAO from 1987 that had been withdrawn for unrelated reasons. "This was done independently by us without any formal request from any member of the bar," he said.

"The board determined that 94-3 needed to be redrafted with the same exact conclusion. It was redrafted—and it passed the board unanimously," Lefkowitz said.

As for ex parte communications, he said, the guidance in 20-1 is unchanged.

"In both opinions you have to tell the former employee why you are calling and ask if the person is represented by counsel. If they are represented, the conversation stops," Lefkowitz said.

Not on Plaintiffs Bar Radar

While the proposed new opinion has stirred up the defense bar, many lawyers on the plaintiffs' side weren't even aware of it.

"It has not been on our radar at all," said the Georgia Trial Lawyers Association's president, Lyle Warshauer, of Warshauer Law Group. "We wouldn't have sought it, but we don't object to it."

"I think it's kind of humorous that they're objecting to this," she added, because her view is that defendant organization's get more protection from 20-1's more detailed disclosure requirements for the lawyer contacting the former employee.

"Now disclosures that were formerly merely implied are mandatory," Warshauer said.

The new opinion "puts very specific parameters around what the attorney must disclose and what communication can happen," she said, noting that lawyers must now disclose the reason for their communication and the information they are seeking.

Consequently, opinion 20-1 provides "more hurdles to go through for someone to get information from a former employee," she said.

Warshauer added that ex-employees having privileged corporate information would be more of an issue in business-to-business disputes, rather than in a typical personal injury case. That may explain why it was not on GTLA's radar.

The defense bar's objections "read privilege very broadly," she added, noting that there are ways for a company to protect privileged or trade secret information when an employee leaves, such as a nondisclosure agreement.

"The onus is on the company to protect that privilege in other ways than putting a muzzle on everything that is not remotely privileged," she said. "They can't make a rule saying no lawyer can talk to a former employee."

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