THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS

Proposed Opinion PO 2026-5

Posted for Public Comment November 3, 2026

QUESTIONS PRESENTED

1. May a Plaintiff's lawyer cause or encourage his client to communicate with a Defendant entity represented by counsel in an employment discrimination case by applying for various positions with the Defendant?

2. Under the same facts, may the Defendant's lawyer cause or encourage the Defendant's employees to respond to or interview the Plaintiff?

STATEMENT OF FACTS

A former employee ("Plaintiff") sued his former private employer ("Defendant"), alleging that the Defendant's failure to rehire the Plaintiff constitutes retaliation for the Plaintiff's previous and/or pending EEOC charge against the Defendant. While the litigation is pending and after the Defendant answered through counsel, the Plaintiff submits several applications for employment with the Defendant. After receiving the applications, Defendant's lawyer considers whether to advise Defendant's employees to respond to the Plaintiff and to interview the Plaintiff to gather information that may help defend the case.

DISCUSSION

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct, sometimes referred to as the "no-contact" or "anti-contact" rule, provides:

> In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment 1 to Rule 4.02 provides:

> Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations, or entities of government and their respective counsel. It prohibits

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> communications that in form are between a lawyer's client and another person, organization or entity of government represented by counsel where, because of the lawyer's involvement in devising and controlling their content, such communications in substance are between the lawyer and the represented person, organization or entity of government.

One Texas court has observed that Rule 4.02's purpose is "to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer." *In re News Am. Pub., Inc.*, 974 S.W.2d 97, 100 (Tex. App.—San Antonio 1998, orig. proceeding); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99, comment b (2000) (noting that the no-contact rule "also protects the relationship between the represented nonclient and that person's lawyer and assures the confidentiality of the nonclient's communications with the lawyer").

Answer to Question 1: Plaintiff's lawyer may not cause or encourage Plaintiff to send the employment applications to Defendant.

In evaluating a potential Rule 4.02(a) violation, the primary questions are:

1) Is the lawyer communicating or causing or encouraging the client to make a communication?

2) Is the communication about the subject of a representation?

3) Is the communication with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject?

4) Does the lawyer have the consent of the other lawyer?

5) Is the lawyer authorized by law to make the communication?

For the reasons discussed below, the Committee concludes that the Plaintiff's lawyer will violate Rule 4.02(a) if the lawyer causes or encourages the Plaintiff to communicate with the represented Defendant by submitting employment applications.

"Cause or encourage" the communication. Under the assumed facts, Plaintiff is communicating information to Defendant via employment applications, presumably with the intent to be interviewed or otherwise to engage with Defendant's employees. Plaintiff's lawyer is not communicating directly with Defendant. But Rule 4.02(a) is not limited to direct communications between a lawyer and a represented party; it also provides that a lawyer may not "cause or encourage" another to engage

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in a communication prohibited by the Rule. *See also* Comment 2 to Rule 4.02 ("Paragraph (a) does not, however, prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party….".).

The terms "cause" and "encourage" are not defined in the Rules. For purposes of Rule 4.02(a), the Committee concludes that "cause" means to bring about or effect the communication in question, such as by directing, commanding, or motivating the communication, and "encourage" means to instigate, incite, embolden, or help, such as by promoting, recommending, or urging the communication. *See generally,* Black's Law Dictionary (12th ed. 2024). Provided that the other elements of Rule 4.02(a) are satisfied, Plaintiff's lawyer may not cause or encourage Plaintiff to submit the employment applications, whether as a litigation strategy or otherwise. Further, Plaintiff's lawyer may not devise or control the content of the Plaintiff's communication with a represented party so that the communication is, in essence, a communication from the lawyer. *See* Comment 1 to Rule 4.02; Professional Ethics Committee Opinion 703 (2024).

On the other hand, if the Plaintiff decides on his or her own to make the applications, the lawyer has no affirmative duty to discourage the Plaintiff. *See* Comment 2 to Rule 4.02 (the Rule "does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government"). Moreover, the lawyer may advise the client that the law does not prohibit the client's communication with a represented opposing party, provided the lawyer does not cause or encourage such communications.

Subject of the representation. In the circumstances described in Question 1, the employment applications concern the subject of the representation. Plaintiff alleges in the lawsuit that Defendant's failure to rehire the Plaintiff is in retaliation for a previous and/or pending EEOC complaint.

Knowledge of Defendant's representation by counsel. Rule 4.02(a)'s prohibition on communications with represented persons applies only when the lawyer *knows* that the person is in fact represented in the matter. The term "knows," as used in the Rules, "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *See* Rules "Terminology." Under these facts, the applications occurred after the Defendant answered the lawsuit through its counsel; thus, actual knowledge may be inferred from these circumstances.

Communications with an organization's employees. When, as here, the represented party is an organization, the no-contact rule applies only to communications with certain constituents of that organization. Rule 4.02(c) provides:

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> For the purpose of this rule, organization or entity of government includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

Rule 4.02(c) is based on the presumption that such persons are so closely identified with the organization's interests that its lawyers will represent them as well. *See* Comment 4 to Rule 4.02.

In the circumstances of Question 1, this standard is met. Individuals with managerial responsibility typically make employment decisions, and the subject of the representation includes adverse employment decisions (retaliation). Further, any adverse employment decision may affect Defendant's liability in the ongoing litigation.

Consent by the other lawyer. Under the assumed facts, the Defendant's lawyer has not consented to the communication to Defendant.

Authorized by law exception. Rule 4.02 contains an exception for communications "authorized by law." In the employment context, this Committee found that this exception may apply when applicable state law governing public employee grievances permits communications between a labor organization's lawyer and city employees involved in workplace grievances. Opinion 492 (December 1992). Without such a statutorily authorized communication, the Committee concluded that a lawyer must obtain the city attorney's consent before communicating with any city employee subject to Rule 4.02.

Under the facts presented here, the Defendant is a private employer, and there is no indication that Plaintiff's communication with Defendant's employees is authorized by law. Therefore, the exception is inapplicable.

In conclusion, Plaintiff's lawyer may not cause or encourage his client to apply for employment or otherwise communicate with Defendant's managerial employees in the circumstances described. However, the lawyer has no affirmative obligation to discourage Plaintiff from communicating with the Defendant's employees, including by submitting new employment applications.

> **Question 2: The Defendant's lawyer may not cause or encourage Defendant's employees to respond to or interview Plaintiff.**

For the same reasons, Defendant's lawyer may not cause or encourage Defendant's employees to communicate with Plaintiff about the subject matter of the

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representation knowing that Plaintiff is represented by counsel in the matter. This means Defendant's lawyer may not cause or encourage Defendant's employees to respond to Plaintiff's employment applications or to interview Plaintiff regarding those applications without the Plaintiff's lawyer's consent. Defendant's lawyer does not violate Rule 4.02(a) if Defendant's employees contact Plaintiff without encouragement or direction from the lawyer. The lawyer may advise the client that the law does not prohibit the client's communication with an opposing party, but the lawyer may not cause or encourage such communications.

CONCLUSION

A lawyer may not cause or encourage the lawyer's client to communicate with employees of an entity defendant in pending litigation that the lawyer knows is represented by counsel if those employees have managerial responsibility related to that matter, or if their acts or omissions may make the organization vicariously liable, unless the organization consents or the communication is authorized by law. However, the lawyer has no affirmative duty to discourage independently initiated client communications. The lawyer may neutrally explain that clients may communicate directly, provided that the lawyer does not cause or encourage the communication.

Similarly, a lawyer representing an employer may not cause or encourage the employer or its employees to communicate about the subject of the representation with a represented opposing party, including by conducting an interview, unless the opposing party's lawyer consents or the communication is authorized by law. However, the lawyer has no affirmative duty to discourage independently initiated communications and may provide neutral advice that clients may communicate directly, provided that the lawyer does not cause or encourage the communication.

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