RENDERED: December 10, 1999; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002027-OA

HUMCO, INC., d/b/a HUMANA
HOSPITAL-LEXINGTON — PETITIONER

v. ORIGINAL ACTION
REGARDING FAYETTE CIRCUIT COURT

HONORABLE MARY C. NOBLE, JUDGE
FAYETTE CIRCUIT COURT — RESPONDENT

AND

MARY COLEMAN — REAL PARTY IN INTEREST

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OPINION AND ORDER

DENYING CR 76.36 RELIEF

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: The Court has considered the petition for writ of mandamus and the response thereto and, being sufficiently advised, ORDERS the petition be DENIED.

Petitioner, Humco, Inc. d/b/a Humana Hospital-Lexington (Humana), contends that the decision of the respondent trial court denying its motion to disqualify counsel for the real party in interest, Mary Coleman (Coleman), is in error. Humana argues

that Coleman's former and current counsel made *ex parte* contacts with some of its managerial and non-managerial employees — with the knowledge that Humana was represented by counsel, but without the knowledge or consent of that counsel. It submits that those *ex parte* contacts violate SCR 3.130 and Rule 4.2, and it relies on Shoney's Inc., v. Lewis, Ky., 875 S.W.2d 514 (1994) as controlling precedent. Humana also contends that the trial court should have granted its motion to suppress the statements made by those employees. Id.

The record discloses that Coleman is a nurse who was employed by Humana between 1988 and 1995. The contacts made by her attorneys occurred in the course of her deposition in 1997. Humana learned the names of those individuals in September 1998 — after the trial court had granted its motion to compel. In total, it appears that Coleman's counsel had communications with several then current, and also former, Humana employees on four separate occasions.

Humana filed a motion to disqualify and to suppress on February 5, 1999.[1] The trial court based its denial of the motion on a finding that two of the interviewed employees were not in management when initially contacted and were no longer employed by Humana when subsequently contacted; and that another individual was no longer employed by Humana at the time of the communication.

[1]In its petition, Humana indicates that a supporting memorandum was appended to the motion. However, the memorandum was not made part of the record that Humana provided to the Court.

Coleman's former counsel, Virginia Morris Anggelis (Anggelis), spoke to five then current employees in September 1995. Humana claims that Anggelis had become aware that Humana was represented by counsel when she received a letter dated July 19, 1995 (in response to a letter that she had sent) from the President and Chief Executive Officer of the Lexington Hospital — prepared on the letterhead of Jewish Hospital HealthCare Services with a notation on its face that it was copied to Lois Hess, its house counsel. Humana contends that this letter with copy to legal counsel served and sufficed to place Anggelis on notice that Humana was represented by counsel and, therefore, that contacts with its employees should have been made with its consent and that of its legal counsel.

Coleman's current counsel, Albert F. Grasch, Jr., and Theodore E. Cowen (Grasch and Cowen), spoke to several former employees between September 1996 and December 1998. Humana argues that those contacts violate Rule 4.2 on the premise that two of those individuals were managers who were directly involved in Coleman's termination; others were rank-and-file, who were interviewed about matters within the scope of their employment and relating to the subject matter of Coleman's lawsuit, thereby placing them off limits for *ex parte* contacts.

Humana argues that as far as the managers are concerned, Shoney's sets forth a sweeping rule that it matters not whether the individuals were current or former managers at the time of contact if the contact had to do with the subject of representation and if the managers had personal knowledge of the

matter in dispute which could be imputed to the employer. In addition, the confidential nature of the information possessed by such individuals remains confidential — both during and after employment.[2]

Humana further contends that as far as non-managerial employees are concerned, they may not be contacted *ex parte* if their acts or omissions may be imputed to the organization or if their statements may constitute an admission on the part of the organization. Humana relies on a Formal Ethics Opinion of the Kentucky Bar Association, KBA E-382, which analyzed the application of Rule 4.2 to non-managerial, prohibited employees.

Having considered the parties' arguments and the appended record, the Court has determined that this original action does not merit the relief sought. SCR 3.130, Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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.

The Commentary to the Rule provides in pertinent part:

> [2] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, 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

[2]Humana relies on Public Service Electric and Gas Company v. Associated Electric & Gas Insurance Services, LTD, 745 F.Supp. 1037 (D. N.J. 1990), and attached a copy of the case to its petition that the Court reviewed.

on the part of the organization. ...

Applying the Rule and its Commentary to the facts of this case, we hold that the contacts made by Anggelis with Humana employees did not violate Rule 4.2 because there is no evidence that Humana was formally represented by counsel when the communications took place or that Anggelis knew that Humana was represented by counsel at that time. The Court notes that the letter received on Jewish Hospital HealthCare Services letterhead did not state (or even imply) that Humana was represented by counsel in the matter. In her deposition, the author of the letter indicated that after receiving Anggelis's letter, "what [she] did was consult or notify Lois Hess who is house counsel at Jewish Hospital Health Care Services, drafted a response to Ms. Anggelis and sent that back ... ." The crux of her letter was to open an avenue of resolution for Coleman's grievance through the organization's Director of Human Resources. We believe that the foregoing facts are insufficient to establish Humana's legal representation for purposes of activating Rule 4.2 in the context of Anggelis's contact of the employees.[3]

In addition, Coleman attached to her response an affidavit of Anggelis in which she stated that she did not know

[3]In her response, Coleman cites Miano v. AC & R Advertising, Inc., 148 F.R.D. 68, 80 (S.D.N.Y. 1993), which advances that "the mere existence of general counsel, without any particular involvement in the matter in issue, is insufficient to render a corporation 'represented.'" According to Miano the "particular involvement" occurs when the organization "has specifically referred the matter to house counsel." Id. See also Jorgensen v. Taco Bell Corp., 50 Cal. App. 4th 1398, 58 Cal. Rptr. 2d 178 (1996).

that Humana was represented by counsel at the time of her receipt of the letter and "did not know Humana Hospital-Lexington was represented in this matter until March, 1996, after suit had been filed, when William Rambicure entered his appearance as counsel for Humana Hospital-Lexington." Neither the petition nor the response indicates that any other lawyer retained by Humana contacted Coleman's counsel between the date of the letter (July 19, 1995) and the date of the filing of the complaint (March 6, 1996). The alleged *ex parte* communications had taken place in September 1995.

Coleman relies on K-Mart Corp. v. Helton, Ky., 894 S.W.2d 630 (1995), for the proposition that "[k]nowing that corporations have in-house attorneys is not enough to provide such actual knowledge." We agree. In Helton, the Kentucky Supreme Court opined

> that the continued representation of an individual after the conclusion of a proceeding is not necessarily presumed and that the passage of time may be a reasonable ground to believe that a person is no longer represented by a particular lawyer. Rule 4.2 is not intended to prohibit all direct contact in such circumstances.

Id. at 631. The plaintiff's counsel was not contacted by any attorney on behalf of K-Mart until nearly one year after he had conducted the interview of the K-Mart employee that precipitated the controversy. The "passage of time" was a determining factor in Helton. In fact, Comment 4 to Rule 4.2 includes language nearly identical to that cited above.[4] We believe that the

[4]Professor William H. Fortune, College of Law, University of Kentucky, conducted an analysis of Helton and contrasted its

"passage of time" as set forth in the reasoning of Helton underscores the fact that Anggelis did not violate Rule 4.2 under the circumstances of this case.

Humana relies heavily upon KBA E-382 in arguing that Grasch and Cowen violated Rule 4.2. Humana is correct in stating that the Kentucky Supreme Court has often adopted Formal Ethics Opinions of the Kentucky Bar Association and "has found them persuasive in resolving interpretative questions regarding the scope and application of the Rules of Professional Conduct, including SCR 3.130." See, e.g., Shoney's, supra; American Ins. Ass'n v. Kentucky Bar Ass'n, Ky., 917 S.W.2d 568 (1996). However, since KBA E-382 expressly relates to "present employees who are 'off limits'," we are of the opinion that it is inapplicable to the contacts with former employees made by Grasch and Cowen.

Coleman has cited another Formal Ethics Opinion, KBA E-381, which expressly relates to an "unrepresented former employee of the organizational party ... ." (Emphasis added.)

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import with that of Shoney's. He wrote the following:

> *Helton* significantly limits *Shoney's*. A lawyer investigating a possible claim against a corporation may assume that the corporation is not represented in the matter-even though everyone knows that large corporations have in-house counsel or counsel on retainer to protect their interests. Proceeding on the assumption that the corporation is not represented, the attorney may interview its employees without notice to the corporation, until the corporation notifies plaintiff's counsel that it is represented in the matter.

86 Kentucky Law Journal 849, 860 (1997-98), The Kentucky Law Survey, Professional Responsibility, William H. Fortune.

That Opinion provides that *ex parte* communications with those employees is not a violation of Rule 4.2. The Opinion states in pertinent part:

> We note that a former employee is no longer subject to the control of the organization nor in a position to speak for the organization, and cannot make vicarious admissions under the state and federal evidence rules.

KBA E-381 refers to a Formal Opinion of the American Bar Association, ABA Formal Op. 91-359 (1991). That Opinion recognizes that while courts have interpreted Rule 4.2 "in various ways,"[5] it nonetheless concludes that the lawyer representing a client in a matter adverse to the corporation may contact the corporation's former employees "without the consent of the corporation's lawyer." KBA E-381 also includes a reference to Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Corp., 6 Cal. App. 4th 1256 (1992), which provides that *ex parte* communication with a former member of a corporation's "control group" is allowed by that state's Rules of Professional Conduct. The Court, this Court adopts as its own the interpretation of Rule 4.2[6]

[5]In that regard, the Court has researched Annotation, 57 ALR 5th 633 "*Ex Parte* Contact-Former Employees" that was cited in Coleman's response.

[6]It is important to note, however, though that neither KBA E-381 nor the other cited authority stands for the proposition that counsel conducting the ex parte interview may lead the former employee into violating the attorney/client privilege that might attach to communications with counsel for organization. Humana's motion to disqualify and to suppress did not invoke the privilege. Humana has claimed that the managers interviewed by Grasch and Cowen possessed confidential information. KBA E-381 makes it clear that "[i]t is incumbent on the party who knows that its former employees possess privileged information to utilize confidentiality agreements and/or seek protective

embodied by KBA E-381 and concludes that the contacts made by Grasch and Cowen with Humana's former employees were not improper. While authority is split in the disposition of similar cases by certain other jurisdictions, we follow the directive of the Kentucky Supreme Court that the manner in which other jurisdictions may interpret the Rules of Professional Conduct is of no binding consequence here and that the interpretation of those Rules by Kentucky courts shall ultimately turn upon our analysis of Kentucky law. American Ins. Ass'n, supra at 571.

As a final note, it is important to stress that KBA E-381 maintains the requirement included in Comment 2 to Rule 4.2; *i.e.*, that a lawyer who seeks to interview a former employee of an organization must disclose his/her identity and must advise the individual to be interviewed that he/she represents a party who has a claim adverse to the organization. In the case before us, we do not find that Grasch and Cowen failed to comply with that requirement.

ALL CONCUR.

ENTERED: December 10, 1999

/s/ Sara Combs
JUDGE, COURT OF APPEALS

orders."

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