THE DAILY RECORD

Monday, September 17, 2018 / Volume 110 / Number 180 / $2.00 • Western New York's trusted source for legal and real estate news

Civil LITIGATION

Representing a corporation: who is the client?

In theory, the attorney-client privilege is pretty straightforward. A client retains an attorney, and thereafter that relationship is imbued with certain rights and benefits. These benefits include an expectation of confidential communications between attorney and client, as well as a prohibition on opposing counsel contacting a party that he or she knows to be represented by counsel.

The prohibition on contacting a represented party is clear and obvious when the party is an individual. However, what if an attorney is representing a corporation or other large business? To whom do the benefits of the attorney-client relationship extend? Many people are surprised to learn that there is typically no prohibition on opposing counsel contacting "fact" employees of a corporation to discuss the subject matter of a legal issue or dispute. Rather, many businesses (and attorneys) believe that the attorney-client relationship applies to everyone from top level executives to the night watchman. This is simply not the case.

The New York State Court of Appeals first addressed the issue of which employees of a corporate party should themselves also be considered "parties" in Niesig v. Team I, 76 N.Y.2d 363 (1990). Niesig involved a personal injury litigation where plaintiff's counsel sought to privately interview a number of the corporate defendant's employees who witnessed the accident. The defendant objected to the efforts by plaintiff's counsel to privately interview its employees. The defendant sought a blanket rule that the attorney-client relationship applied to each and every employee of a corporate party. Conversely, the plaintiff sought to limit the definition of "party" to a small "control group," i.e., only the highest level executives.

In framing the dispute, the Court noted that while the rules relating to the attorney-client relationship unquestionably covered corporate parties, they did not adequately define who was a "party." The Court of Appeals ultimately determined that the test that best balances those interests was one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. Id.

By COLIN D. RAMSEY
Daily Record Columnist

> "In light of this precedent, a corporation (and both corporate counsel and outside counsel) should ensure that employees are clearly advised that they are under no obligation to speak with opposing counsel, and if contacted should refer opposing counsel to either corporate or outside counsel."

Put another way, the decision in Niesig means that the only individuals who are off limits to contact by opposing counsel are those (1) who have the legal power to bind the corporation in the matter at hand, (2) who are responsible for implementing the advice of corporate counsel, or (3) individual employees whose own interests are directly at stake in the matter.

The Court concluded that it was not necessary to shield all employees from contact by opposing counsel. It noted that a corporate party has many tools at its disposal to prevent the disclosure of harmful information. More specifically, a corporation has access to its documents and employees, the earliest and best opportunity to gather the facts and elicit information from its employees, and the ability to advise them that they are under no obligation to cooperate if contacted by opposing counsel. The progeny of Niesig has only entrenched this precedent — though the attendant risks and benefits of the decision continue to be misunderstood.

Again, subject to the limits set forth in Niesig, there is no prohibition on opposing counsel contacting a corporate party's employees. There is no obligation on the part of any fact employee to speak or otherwise engage with opposing counsel. To that end, an employee can essentially avail themselves of the benefits of the attorney-client relationship enjoyed by the corporation at large, but must affirmatively exercise the right to do so.

In light of this precedent, a corporation (and both corporate counsel and outside counsel) should ensure that employees are clearly advised that they are under no obligation to speak with opposing counsel, and if contacted should refer opposing counsel to either corporate or outside counsel. Conversely, opposing counsel should not hesitate to reach out to "fact" employees in an attempt to gain information that could be useful to his or her client's case.

In the event that there has not been a warning or instruction to such employees, many are willing to give information that may be relevant to the case. At worst, the employee will refuse to talk to the attorney, or refer them to counsel. However, due to the widespread misunderstanding of the scope of the attorney-client relationship in the corporate context, these potential sources of information are often not explored.

Colin D. Ramsey is a partner in Underberg & Kessler's Litigation Practice Group. He concentrates his practice in civil litigation, with an emphasis on insurance defense and business torts.