EMERGING ETHICAL ISSUES: SPOLIATION OF EVIDENCE, MULTIPLE REPRESENTATION, INTERVIEWING EMPLOYEES

Martha P. Owen
with special thanks to Nicholas Brunick
Wiseman, Durst & Owen, P.C.
1004 West Avenue
Austin, Texas 78701

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Spoliation of evidence, representation of multiple clients, and interviewing employees of a party you are suing can present some of the more complex ethical issues which attorneys are likely to deal with on a regular basis.

I SPOLIATION OF EVIDENCE

A Introduction

Spoliation of evidence is technically defined as the unauthorized destruction or alteration of evidence. However, under modern law, spoliation claims can reach negligent or even unintentional losses of evidence. Unfortunately, spoliation occurs regularly in our legal system and is a serious problem.[1] At the risk of stating the obvious, spoliation of evidence is a serious issue because access to evidence by both sides to a lawsuit is a key to the effective and just functioning of our adversarial system. Spoliation is properly treated as a serious interference with the administration of justice and the workings of our legal system.[2] As a result, jurisdictions are recognizing this offense more often and broadening the scope of remedies to address it.[3] In this regard, Texas is something of an anomaly because its courts’ approach to dealing with spoliation has tended to be more limited and narrow.[4] Nevertheless, it is a serious issue fraught with potential traps and penalties which can affect the success of one’s case and one’s legal and professional standing.

In 1998, in Trevino v. Ortega[5], the Texas Supreme Court ruled that spoliation offenses should be rectified within the context of the lawsuit in which they occur, not by an independent cause of action. Accordingly, the Court refused to recognize spoliation of evidence as a separate, actionable tort. The Court determined that since spoliation does not cause damages independent of the cause of action in which the spoliation occurs, it was more appropriately remedied through the original suit.

In Offshore Pipelines, Inc. v. Schooley,[6] the Houston Court of Appeals articulated the duty of a party not to spoliate evidence:

A party may not subvert the discovery process and the fair administration of justice simply by destroying evidence of an adverse claim. Thus, once a party had notice of a potential claim, that party has a duty to exercise reasonable care to preserve information relevant to that claim. Because of this duty, a party who intentionally or negligently fails to preserve relevant information may be held accountable for the loss of such evidence.[7]

Attorneys, too, will be held accountable for any part which they might play in the spoliation of evidence. This paper will address the ethical obligations which attorneys have with respect to preserving (and not destroying) evidence under the Texas Disciplinary Rules of Professional Conduct, and then will address various aspects of the legal duty not to spoliate evidence.
B Disciplinary Rules Barring Spoliation.

The Texas Disciplinary Rules of Professional Conduct, Rule 3.04(a), Fairness in Adjudicatory Proceedings, prohibits a lawyer from obstructing another party from obtaining evidence and also forbids, in anticipation of litigation, the alteration, destruction, or concealment of material that a competent lawyer would believe has potential or actual evidentiary value. Clearly, under Rule 3.04, spoliation of evidence can be deemed a violation of a lawyer’s ethical duties.

These ethical duties are reinforced by a lawyer’s duty of candor to the court under Rules 3.03, which even trump the attorney’s duties of confidentiality to the client under Rule 1.05. If an attorney has knowledge of his client destroying or concealing evidence, the Disciplinary Rules demand a response, either to persuade your client to stop, to disclose any fraud, and if unsuccessful, to withdraw and possibly disclose any frauds perpetrated on the tribunal. See Rule 3.03. Moreover, in a more general way, Rules 8.04(a)(3) and (4) would also prohibit spoliation since acts of spoliation could very well involve A dishonesty, fraud, deceit, or misrepresentation and are considered Aconduct constituting obstruction of justice.@

In addition to these ethical duties, an attorney could also be subject to potential criminal liability if his or her actions rose to a level of tampering with physical evidence, once the attorney knows that an investigation or official proceeding is in progress or is pending.[8]

C Spoliation by a Party to a Lawsuit.

The Texas courts have developed a line of cases outlining the responsibilities of parties not to engage in the spoliation of evidence. As described by Justice Baker in his concurring opinion in Trevino v. Ortega,[9] the general Aspoliation analysis addresses three major issues:

1) Is there a duty of the accused party to preserve the evidence?
2) Did the party negligently or intentionally spoliate the evidence?
3) Did the spoliation prejudice the other party?

Under this analysis, whether the party has a duty to preserve the evidence usually turns on whether litigation is Areasonably foreseeable.@ Obviously, if the destruction takes place after the litigation is filed, that is foreseeable.[10] The more difficult question is whether the duty to preserve evidence begins even when litigation has not been filed. Generally speaking, the Texas courts of appeals have not been as expansive as other jurisdictions and some have failed to adopt the majority test of Areasonably foreseeable litigation.@[11] Justice Baker indicated that the Supreme Court would apply a test borrowed from another context: the determination of whether a party should be allowed to assert an investigative privilege because it Aanticipated litigation.@[12] Justice Baker stated, AAccordingly, in spoliation cases a party should be found to be on notice of potential litigation when, after viewing the totality of the circumstances, the party either actually anticipated litigation or a reasonable person in the party’s position would have anticipated litigation.@[13]

If litigation was reasonably foreseen or anticipated, another issue is what evidence should be preserved. Again, Justice Baker suggests a broad test. AA party that is on notice of either potential or pending litigation has an obligation to preserve evidence that is relevant to the litigation.@[14]

If relevant evidence was altered, destroyed or for some other reason not produced, the
court must determine whether the spoliating party should be penalized. The threshold inquiry is whether the non-spoliating party has been prejudiced. This analysis turns on: 1) the relevancy of the missing evidence; 2) the harmful effect of the evidence; and 3) the availability of other evidence to take the place of the missing information. Remember, a litigant is entitled to a remedy only when the evidence spoliation interferes with its ability to present its case or defense. If the court=s conclusion is that prejudice to the other party has resulted, then the court will turn to a consideration of the appropriate sanction.

In determining which remedy is appropriate, the court has tremendous discretion and makes a fact-specific decision.[15] Sanctions can include anything from penalties for discovery abuses to an order prohibiting the defendant-spoliator from using or presenting certain evidence to the death penalty of dismissing a plaintiff=s suit. However, in two decisions, the Texas Supreme Court has limited the most severe sanction, dismissal, to extreme circumstances of bad faith and flagrant action causing excessive prejudice. The most common remedy is still the presumption, either on its own or as a jury instruction, that the withheld or destroyed evidence is harmful to the spoliator=s case. This is the classic remedy, in which Athe factfinder deduces guilt from the destruction of presumably incriminating evidence.@[16] A typical jury instruction would be as follows:

You are instructed that if the plaintiff has established by a preponderance of the evidence that the defendant or its agents or employees destroyed, negligently misplaced, or discarded any evidence, then you must presume that the missing evidence would have been unfavorable to the defendant and favorable to the plaintiff.[17]

D Examples of Spoliation Case Law in Texas

Spoliation cases in Texas tend to fall within one of two categories 1) intentional spoliation of evidence and 2) failure to produce. Intentional spoliation under Texas law is a rare occurrence and is found only where the accused party clearly and intentionally destroyed the evidence and has no legal justification or explanation for doing so.

AFailure to produce@ spoliation is more common. A party moving for spoliation sanctions must show that one party has introduced evidence harmful to its opponent, that the opposing party cannot produce the tangible evidence which has been lost or destroyed due to spoliation, and the non-producing party can present no legitimate or reasonable explanation for the non-production.[18] Even though this is easier to establish than intentional spoliation, Texas courts have been strict in its application.

I Intentional spoliation

Intentional spoliation of evidence cases involve actions where parties intentionally destroy evidence in their possession despite the foreseeability of future litigation or notice of pending litigation. The seminal case in Texas for spoliation of evidence is H.E. Butt Grocery v. Bruner, in which an elderly plaintiff slipped on a smashed@, Along and juicy@ onion top that looked as if it had been on the floor awhile.[19] She fell and hit her head on the floor while leaving the grocery store. An employee of the store directed his fellow co-workers to Aget her up quick@ and to Aget rid of that thing@ referring to the onion top that had caused her spill.[20] In Texas, the courts have usually limited recognition of an Aintentional act of spoliation@ to situations as blatant as this, where litigation is clearly foreseeable and the spoliators were clearly acting in bad
Two fact scenarios where courts failed to find that a party had committed intentional spoliation involved reasonable explanations by the accused spoliators for loss or destruction of evidence. In Ordonez v. McCurdy, the plaintiff was rear-ended and sued the driver of the van and his employer.[21] The driver’s log book, a key part of the plaintiff’s case, was destroyed by the employer, intentionally, as part of the firm’s regular business practice to destroy all log books after 6 months. The plaintiff sent notice of an impending lawsuit to the defendant four days after the accident and the employer himself testified in his deposition that he Apossibly@ received such notice.[22] Nevertheless, the court ruled that because it was a regular business practice to destroy the log books and there was no proof that the employer engaged in such destruction out of an intent to deceive the plaintiff, there was no basis for a spoliation presumption. In a footnote, the court also stated that a Afailure to produce@ spoliation claim would fail under these facts as well, because the plaintiff had not presented any evidence that there was any harmful information in the log book.[23]

In Tucker v. Terminix International Co.[24], the defendant, an exterminator, sought a spoliation jury instruction against the plaintiff, a homeowner, for the destruction of soil samples that were key to the case. Tests of the soil samples showed traces of insecticide, a key piece of proof for the plaintiff. The testing center, which had received the sample from the plaintiff with instructions to preserve it for litigation, destroyed the sample after testing pursuant to government regulations. The court ruled that the spoliation instruction given to the jury on behalf of the exterminator, an instruction giving a presumption that the soil sample was harmful to the plaintiff and thus fatal to their case, was in error. The Court of Appeals basically decided that, since no one had done anything wrong and since the defendant had failed to put on evidence that the sample showed otherwise, spoliation did not occur. AWe find no basis in law for a spoliation instruction where it is agreed that the non-producing party did not destroy prospective evidence and, in fact, made an effort to prevent destruction of prospective evidence.@[25]

2 AFailure to Produce@ Spoliation

Despite the rather forceful language of Tucker and Ordonez, Texas courts have recognized that a jury instruction directing a presumption that the destroyed evidence was unfavorable to the spoliating party may be warranted in cases where parties fail to produce evidence in their possession. Two of the most significant cases are Watson v. Brazos Elec. Power Corp, Inc. and Brewer v. Dowling.[26] In Watson, Watson=s property suffered fire damage after electric poles collapsed and exposed electric wires started a fire. Watson blamed wood-pecker damaged, faulty cross-arms on the electric poles. Watson produced a witness who testified that he had seen woodpecker holes in the cross-arms, thus verifying Watson=s claim and presenting harmful evidence against the defendant. Brazos refused to respond to this damaging testimony by producing the cross arms, instead producing an employee who said there were no woodpecker holes. The court gave the presumption instruction to ignore the employee=s testimony.

In Brewer, a medical malpractice suit, a lost internal fetal monitor strip was the source of the spoliation controversy. The plaintiff=s expert testified that the strip would have shown distress and would provide support for the plaintiff=s contention that the medical staff was guilty of malpractice. However, the doctors and nurses had documented their readings of the internal monitor strip during the birth and testified as to the positive indicators they received during the procedure. As a result of this testimony, the court found any spoliation presumption to have been rebutted and refused to issue the presumption instruction.
One may ask why Brewer came out differently than Watson. Maybe it=s better to have doctors as witnesses than electric utility employees. Clearly, spoliation cases are very fact-specific and can turn on subjective judgments about whose testimony should be believed and when and where blame should be laid for lost or destroyed evidence.

Two more recent cases provide further guidance in this area. In Kang v. Hyundai Corporation,[27] the plaintiff brought a products liability lawsuit after he was in a one-car accident in his Hyundai allegedly due to steering malfunctions. Unfortunately, the car was vandalized and stolen after the accident and before the defendant could inspect it. The defendant argued that without the car, it could not present a defense, and in addition, the plaintiff could produce no evidence to support her claims. The defendant argued, then, that summary judgment was the correct remedy for the spoliation of evidence.

The court noted that there was no evidence that the plaintiff intentionally destroyed the vehicle or even acted negligently. However, the court did say that the plaintiff could be subject to spoliation sanctions for failure to produce the car. This would have been the classic scenario for a presumption against the plaintiff that his failure to produce the car should be taken as proof that the car would have contained evidence unfavorable to the plaintiff=s claim. However, the court deemed summary judgment in this case to be an inappropriate remedy for spoliation of evidence.

In Offshore Pipelines, Inc. v. Schooley,[28] a barge worker brought suit against his employer for an intestinal tumor that he claimed he developed while drinking contaminated water as he was working on the barge. The medical records, which would have shed some light on the situation, were lost after the defendant received notice of the suit. After the court determined that the employer was the legal custodian of the medical records, that the records were highly relevant to helping the plaintiff respond to the defendant=s defenses, and that the defendant had no explanation for their disappearance, the court of appeals ruled that the lower court was justified in issuing a spoliation instruction to the jury. Offshore shows that sanctions for failure to produce is alive and well in Texas.

E Defending Against a Charge of Spoliation.

What should you do in response to a motion by the opposing party for sanctions or a jury instruction raising a presumption that the evidence you failed to produce or destroyed is unfavorable to your case? There are a number of defense strategies available:[29]

$ Attempt to show good faith. Courts are less likely to invoke sanctions when a party has not intentionally taken action to destroy or refuse to produce evidence out of fear of losing a lawsuit.

$Attempt to show actions reflecting the regular course of business. Courts are less likely to impose sanctions for actions taken pursuant to an established policy or in routine actions that make-up the Aordinary course of business.@ The court in Ordonez did not sanction a party for the destruction of evidence, even though the party was on notice of the lawsuit, when a regular business practice was established.

$ Attempt to show that the opposing party was not prejudiced by the spoliation. Here, you may have quite a difficult time, but if you can show that the opposing party had an opportunity to study the evidence and failed to take advantage of it or had or has the ability to acquire access to the same or equivalent evidence, the court is less likely to impose sanctions. The court in Tucker
held against the defendant exterminator company that it failed to go get its own soil samples or to ask immediately for tests upon the plaintiff=s samples.

$ Attempt to show that your destruction of evidence was not motivated by the Aconsciousness of a weak case.@ The court in Brewer sided with the doctors because they had a reliable explanation which overcame any suspicion that they were trying to cover up their case.

To this end, present any and all evidence explaining why the material was discarded or why the testimony that you can give in place of such evidence is reliable. Remember, it seemed pretty careless and highly damaging when the doctors lost the fetal strip in Brewer, but their documentation and testimony proved to be enough to fight off a spoliation sanction or presumption.

F Being AProactive@ is the Best Defense.

What if you have a client that has kept all business documents (hundreds of thousands of them) for the past twenty years, covering every transaction, involving companies and clients that no longer exist. Due to storage problems, the client would like to destroy every document that is older than 5 years. He asks for your advice. What can you to do to help him avoid a charge of spoliation?

$Determine if your client has been notified of any litigation. If he has, identify any evidence with Apotential value@ for that lawsuit and make sure that it is maintained. Since spoliation cases are extremely fact-specific and Apotential evidentiary value@ is a potentially broad term, one should err on the cautious side and keep all documentation that may be relevant.

$Determine if the client has been involved in litigation in the past or if there is any Apotential@ litigation likely to come forward in the near future. If the client has been extensively involved in litigation in the past, the court is likely to expect him to preserve more documentation. If there are issues or incidents which a reasonable attorney would expect to lead to litigation, the court will expect him to keep that information as well.

$ If you cannot identify any areas that could lead to litigation in the near future, then you should have the client destroy the material and then prepare a document noting that an attorney was consulted before destruction to determine if there was any chance of future litigation. This can help to show ongoing business practice and a lack of bad faith.

Over the long run, the best way for a business or other type of entity to avoid spoliation trouble when it comes to business documents is to develop a strong retention and destruction policy. How can you help your client do this in order to protect it and you from spoliation sanctions?

$ Assist all clients to prepare regular document retention and destruction programs as a regular business practice and to do so before litigation is in sight. This shows good faith and establishes a practice of document destruction and retention.
$ Do not put together a document destruction program in response to litigation, destroy materials sporadically, or develop a document destruction program to eliminate items prematurely (i.e., a national park eliminating first-aid logs before the 2 year statute of limitations has run).

$ On the other hand, do not rigidly follow such a policy in the face of all circumstances. This may be less important in Texas given the Ordonez decision, but since spoliation cases are so fact-specific, one should exercise caution. If there is pending litigation for the company on sexual harassment claims and such litigation will not begin for another six months, even if it is the company=s regular policy to dispose of complaint forms every three months, it would obviously be best not to follow the policy under those circumstances.

$ Routine document disposal will be okay in most cases, so long as litigation is not reasonably foreseeable, even if it is possible.

II The Ethical Representation of Multiple Clients

Lawyers undertake representation of multiple clients in numerous ways, which can easily present intricate issues of potential conflicts and duties to different legal parties. In an employment law context, an attorney=s duties are often brought into question when representing both an entity and an employee in the same lawsuit. Unlike scenarios in which the lawyer=s first duty is clearly to the entity (as where an attorney is representing an employer or a labor union) or to the individual client (as in a third-party payor context), the issue of representation of multiple clients in the same lawsuit raises unique concerns.

Multiple representation can be undertaken ethically by following the text and comments of Rule 1.06 (the conflict rule) of the Texas Disciplinary Rules of Professional Conduct.[30] Rule 1.06 is meant to prevent the attorney from serving two masters. However, it allows multiple clients to consent to dual representation, provided that: 1) the client is given a full disclosure by the attorney of how the representation will proceed and the implications of such a representation, including the fact that conflicts may arise causing the attorney to withdraw; 2) the client consents; and 3) it is obvious to the attorney that she can adequately represent both clients without conflict. Rule 1.06.[31] In determining whether it is Aobvious@ whether the attorney can represent the two clients, the court will look at the type of litigation, whether the client can protect his interest, and whether he will likely be damaged by the dual representation.[32] If there are any doubts as to the ability of a lawyer to adequately represent two clients, the doubts should be resolved in favor of not representing those two clients together.

However, multiple representation has its benefits.[33] It can save time and money for the organization and the individual. Having a united front and a single lawyer may provide an opportunity for the entity to exercise more control, in contrast to the restrictions of Rule 1.08 and the third-party payor relationship. It may also promote a sense of solidarity among the entity=s employees, members or other constituents.

While there are benefits to joint representation, particularly for the organizational client, the potential for conflicts of interest are great. These conflicts can undermine the attorney=s ability to represent both clients with adequate zeal, can damage one or the other parties, and eventually enforce the attorney to withdraw. In the employer-employee example, for instance, the employer may want to take remedial action against the employee to protect the employer from liability while the employee may want to shift liability to the employer by asserting that a
supervisor directed the employee=s actions. One of the most obvious conflicts is that sharing information with the employer entails significant risks for the employee, including the risk of being fired as a result of admissions to the lawyer. Under Rule 1.06, not all conflicts may be resolved by consent; joint representation is allowed with consent only if the lawyer reasonably believes that the representation will not be adversely affected. Rule 1.06(c).

Assuming that the conflicts are Aconsentable@ under Rule 1.06(c), how can you minimize the risk of conflict and trouble down the line? The first step is obvious: identify the clients and the scope of services to be provided, preferably in writing, and have the understanding signed by both parties.

An agreement of dual representation upheld by the Texas Commission on Professional Ethics (hereinafter the Commission)[34] provides an example of how an attorney can agree to represent both an employer and an employee, and at the same time, preserve her right to continue to represent the employer, should conflicts later arise.[35] There, the employer and employee were named as defendants in a lawsuit. The law firm had been representing the employer for several years in labor and employment matters and the employer enlisted the law firm to represent both itself and the employee. Prior to entering into the representation, the law firm held separate consultations with the employee and the employer to discuss the implications of dual representation. After these discussions, both parties signed an agreement with the following provisions:

1. There are no known or suspected conflicts of interest between employer and employee at this time.
2. Employer and employee and law firm reasonably believe that none will arise.
3. Both employer and employee declare that they have revealed to each other all information they are aware of that may indicate a conflict of interest or a potential conflict of interest between them.
4. In this suit, employer and employee are generally aligned in interest. The expense of separate representation and unlikelihood of a conflict indicate that it would be a prudent use of employer=s resources for law firm to represent both employer and employee in this common lawsuit.
5. It is understood the remote possibility of a future conflict of interest does exist.
6. Law firm may discover confidential information about either employer or employee that may damage employer=s relationship with employee, thereby causing a conflict of interest. In the event such information is discovered, such information is to be revealed to both employer and employee as soon as the conflict is recognized.
7. Both employer and employee understand the revelation of such information may result in employee=s termination or a cause of action by employer against employee.
8. Law firm will not subsequently represent either employer or employee in any suit against the other unless and until consent is obtained from both parties.
Law firm may continue to represent employer in the present litigation even though that representation may adversely affect employee.

Through the course of the dual representation, the law firm found that the employee, though innocent of the particular charge against him, was not a suitable supervisor. Pursuant to the agreement, this information was revealed to both the employer and employee, the employee was subsequently terminated. The Commission held that the law firm could continue to represent the employer given that the employee had been fully informed of the implications of dual representation. Also, because the conflict related to the employee’s termination and not the subject of the suit, Rule 1.06 did not prohibit the dual representation initially.

The joint statement of facts test, adopted by the District of Columbia Bar, is another method by which an organizational lawyer may identify the client, clarify the scope of services, and disclose fully the consequences of potential conflicts.[36] The test is as follows:

1. The co-parties agree to a single comprehensive statement of facts describing the occurrence.

2. The attorney reviews the statement of facts from the perspective of each of the parties and determines that it does not support claims against one another.

3. The attorney determines that no additional facts are known by each party which might give rise to an independent basis of liability against the other or against themselves by the other.

4. The attorney advises each party as to the possible theories of recovery or defense which each may be foregoing through this joint representation based on the disclosed facts.

5. Each party agrees to forego any claim or defense against the other based on the facts known by each at the time.

6. Each party agrees that the attorney is free to disclose to the other party, at the attorney’s discretion, all facts obtained by the attorney.

7. The attorney outlines potential pitfalls in multiple representation and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation. Each party consults separate counsel or advises that no separate consideration is desired.

8. Each party acknowledges that the facts not mentioned now but later discovered may reveal differing interests, which if no compromise is possible, may require the attorney to withdraw from the representation of both without injuring either.

9. Each party agrees that the attorney may represent both in the litigation.

If the lawyer fails to secure a comprehensive agreement like those described above, joint representation is not prohibited. When conflicts arise, however, the lawyer may have to withdraw from representing both parties, including the entity. This was the unfortunate situation discussed
in another Commission opinion in which an insurance company retained a law firm to defend a suit brought against an insured employer and two of the insured=s former employees.[37] When the firm solicited discovery from the three defendants, it recorded the conversations on tape. During these conversations, one of the former employees indicated hostility towards the former employer. Then, that same employee refused to verify his completed discovery, arranged for another attorney, and instructed the firm to withdraw from his defense. As if that were not enough, he suggested that his recollection of the facts might change if there was no Afinancial reward@ offered by his former employer.

The firm immediately withdrew from representing the employee. There remained, however, the question of how to continue with the two remaining parties. Were the lawyer to continue to represent them, the lawyer would be forced to choose between thoroughly representing its remaining clients and maintaining the confidentiality of information obtained from the former client. In this case, because there was no prior agreement, Rule 1.09 makes the choice for the lawyer by protecting the former client and requiring the lawyer to withdraw from representing the other parties. Also, the lawyer may not reveal the tape to anyone unless it is necessary to reveal it to the court to avoid assisting the client in committing perjury.

Comparing the above opinion with the one where the parties entered into an agreement prior to representation, the moral is that the lawyer without an agreement between the clients may be left with nothing; whereas the lawyer who does the advance preparations for an agreement between all parties gets to save face and continue representing the organizational client.

III INTERVIEWING THE EMPLOYEE OF A COMPANY YOU ARE SUING.

Effective representation of clients in employment matters requires aggressive investigation. One cannot possibly hope to adequately present an employment discrimination case, for example, unless an extensive investigation into the actions past and present of the employing entity in question is undertaken. Indeed, zealous advocacy is an ethical duty of all lawyers. Such zealous advocacy and investigation may require speaking to other employees of the entity that one is suing. However, lawyers also have ethical duties when it comes to interviewing and speaking to individuals who are represented by counsel. Rule 4.02. Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct forbids attorneys from speaking to individuals about the subject of a lawsuit when such individuals are represented by another lawyer, unless consent has been gained from that other lawyer. Rule 4.02(a) and (d).

So, when can an attorney just pick up the phone and call an employee of the company that she is suing? Of course, one can always pick up the phone and call an employee of a defendant if you have consent from opposing counsel. As a practical matter, though, opposing counsel would refuse the request and one would not even want to ask. An attorney needs to be able to make this determination on her own.

The matter is (fairly) straight-forward and is explicit addressed in Rule 4.02. There are also two Ethics Commission opinions which are particularly helpful. If the employee you wish to interview is a managerial employee or an employee that, through his or her actions or omissions can vicariously impart liability to the employer, then you must obtain consent from the entity=s attorney beforehand.[38] Obviously, the rule is meant to prevent attorneys from speaking to parties who are so closely aligned to the entity that one can assume that they are effectively represented by the entity=s lawyers.[39] But, the Rule is not intended to prevent a lawyer from contacting a former employee or from contacting an employee of the company who does not meet
the managerial or vicarious liability tests. Comment 2, Rule 4.02. When it comes to those types of employees, then, as long as the lawyer makes a full disclosure to the employee about the nature of the interview and who the attorney is representing, you can interview them without consent of opposing counsel. Rules 4.02, 4.03.

The courts have been similarly straight-forward in their application of the rule. In Herrera v. Mobil Oil, Inc.,[40] an unpublished opinion from a federal district court in Texas, one finds a good illustration of the application of Rule 4.02. A plaintiff and his attorney were suing Mobil Oil under Title VII. The attorney deposed a number of employees determined to be members of Mobil management. After the deposition was over, the plaintiff and his attorney drove to the residence of one of the management employees for the purpose of questioning him about his testimony and the testimony of another management employee. The United States District Court for the Western District of Texas found this to be a clear violation of Rule 4.02. Not surprisingly, the pair were enjoined from contacting or interviewing any of Mobil=s management employees, unless the following conditions were met:

The employees had already left Mobil;
The communications were authorized by opposing counsel; or
The employees entered into an attorney-client relationship with the plaintiff=s attorney.

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