December 16, 2020

By Hand Delivery

Mr. John J. Shiptenko
State Bar of Georgia
Formal Advisory Opinion Board
104 Marietta St. NW, Suite 100
Atlanta, Georgia 30303

Re: *Proposed Comments and Changes to Formal Advisory Opinion No. 20-1*

Dear Mr. Shiptenko:

We, the undersigned, are the leading Georgia and national organizations representing lawyers who primarily represent defendants in civil litigation. We are also leading businesses, civil justice, and public policy organizations. Our members include countless Georgia employers.

It is vital to us that the Georgia Rules of Professional Conduct and corresponding formal Advisory Opinions are fair to all potentially impacted parties—including former employees and employers large and small. Under O.C.G.A § 1-3-3(14), the Georgia General Assembly defines "persons" as including corporations. Individuals and corporations are equal in the eyes of the law.[1] We acknowledge that there is inherent tension between various ethical duties for lawyers practicing in Georgia (*e.g.,* zealously representing clients under Georgia Rule of Professional Conduct 1.3 while still maintaining candor toward the tribunal under Rule 3.3d).

As set forth below in more detail, the undersigned do not support the Proposed Formal Advisory Opinion No. 20-1 (the "Opinion") as drafted since it does not include language necessary to ensure that a company's attorney-client privilege, work product, and trade-secret materials are protected from disclosure and/or waiver under O.C.G.A §24-5-501(a)(2). Likewise, the Opinion does not acknowledge the reality that former employees who are contacted directly by adverse counsel (rather than through company counsel) may not understand they have no obligation to cooperate and what they say may bind or waive privileges that the law grants to their former employer. And they may feel pressure to cooperate either because they cannot afford to consult their own counsel and/or are unaware that their former employer may be willing to retain counsel on their behalf. The ethical disclosure obligations in the Opinion No. 20-1 will not meaningfully reduce the risk that a former employee unknowingly discloses protected company information.

The central question under consideration by the Formal Advisory Opinion Board is summarized below:

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[1] The issue of whether corporations have the same or similar protections as individuals was established in 1886 and affirmed in multiple subsequent U.S. Supreme Court opinions *See Santa Clara v. S. Pac. R.R. Co.,* 118 U.S. 394 (1886) (establishing the concept of "corporate personhood" as being equal to individuals "under the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws"); *see also Citizens United v. FEC*, 130 S. Ct. 876 (2010) (in the context of in the public speech); *FCC v. AT&T, Inc.,* 131 S. Ct. 1177 (2011)(same).

Can a lawyer properly communicate with a former employee of a represented organization to acquire relevant information, without obtaining the consent of the organization's counsel?

We believe that the only way to ensure that an organization's privilege, work product, and/or trade secret information can be protected and not waived or disclosed by a former employee is to answer the posited question as follows:

A lawyer seeking information from a former employee of an organization who the lawyer knows or determines is represented by counsel, should seek permission from the organization's legal counsel and avoid ex parte communications to ensure that the organization's attorney-client, work product, and trade secret privileges are adequately protected under Georgia law.

At a minimum, the lawyer seeking information from a former employee of an organization should be precluded from contacting officers or managerial level employees whose statements might be taken as admissions by the corporation. Further, at a minimum, lawyer seeking information from a former employee of an organization should be required to reveal that (a) their client is seeking to hold the corporation liable for damages or injunctive relief and that they are therefore contacting the employee with the intent of having the employee act potentially contrary to their employer's interests, (b) the employee should not speak with counsel if the employee has previously spoken with counsel for the employer, or someone acting on that counsel's behalf, about the matter and thereby may have attorney-client privileged information, and (c) the employee is free to contact the employer's counsel before talking to the attorney who has contacted them.

This helps clarify Georgia Rule of Professional Conduct 4.2 and ensures that organizational privilege is more fairly equivalent to those privileges afforded to individual Georgia citizens.

Instead, as drafted, Formal Advisory Opinion No. 20-1 provides the exact opposite directive (emphasis added):

A lawyer may communicate with a former employee of an organization that is represented by counsel **without obtaining that counsel's consent**, provided that the lawyer fully discloses to the former employee, before initiating the communication, the following information: (1) the identity of the lawyer's client and the nature of that client's interest in relation to the organization (i.e., the former employer); and (2) the reason for the communication and the essence of the information sought. After making these disclosures, the lawyer must also obtain the former employee's consent to the communication.

The Formal Advisory Opinion Board rationalizes that "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." Privilege is a statutory and common law protection that is referenced and acknowledged in Georgia Rule of Professional Conduct 1.3.[2] Georgia law is clear that the *organization*—not any individual

[2] Georgia Rule of Professional Conduct 1.3, comment 5 recognizes that "[t]he principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which

employee or even its legal counsel—controls all privileged, work product, and/or trade secret information.[3] That control survives the departure of an employee (and even death).[4] However, such protected information can be quickly and inadvertently disclosed and the privileges waived by even a well-meaning former employee during the course of an *ex parte* contact with an adverse lawyer. As written, the Opinion does not give organizations the opportunity to investigate the threshold issue of whether any state privileges or trade secrets need to be protected. It likewise does not acknowledge that many former employees may not fully understand the scope of the company's privileges and would benefit from a brief discussion with company counsel first.

Other states have more reasonable ethical restrictions on a lawyer's ability to contact former employees. The State Bar of California Ethics Rule 2-100 allows lawyers to contact former employees "so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability."[5] Arizona has similar protections for organizations.[6] At a minimum, the Formal Advisory Opinion Board should include similar protective language in Opinion 20-1.

Georgia should join other states in providing appropriate protections to organizations that would be adversely impacted by the current draft of Advisory Opinion 20-1. The above proposed revisions and comments will better ensure that former employees do not unknowingly (or maliciously) waive or disclose an organization's information that is protected from disclosure under longstanding privileges, work product protections, and/or trade secret protections—all of which are central to every organization's fair and equal treatment under Georgia law.

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includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics."

[3] *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000) (overruled on other grounds by *Duke v. State*, 829 S.E.2d 348 (Ga. 2019)).

[4] *Smith v. Smith*, 222 Ga. 694, 152 S.E.2d 560 (1966) (holding that once the privilege attaches, it is permanent).

[5] *See* drafters' note to California Ethics Rule 2-100; *see also Cont'l Ins. Co. v. Superior Court,* 32 Cal. App. 4th 94, 118, 37 Cal. Rptr. 2d 843 (1995).

[6] *See* Comment 2 to Ethics Rule 4.2 which provides that "[i]n 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 on the part of the organization. If an agent or employee of the organization is represented in the matter by counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule." Arizona courts have interpreted the prohibitions in this comment to be broad enough to apply to former employees whose acts or omissions may be imputed to a company or organization for liability purposes. *See Lang v. Superior Court, In & For Cty. of Maricopa*, 170 Ariz. 602, 605, 826 P.2d 1228, 1231 (Ct. App. 1992).

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