Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR PROTECTIVE ORDER DENIED: March 18, 2004

GSBCA 16247

GEO-MARINE, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Paul W. Searles and Holly L. Clarke of Haynes and Boone, LLP, Dallas, TX, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

DeGRAFF, Board Judge.

Geo-Marine, Inc. moves the Board for a protective order prohibiting any Government employee from having any contact with any former employee of Geo-Marine unless counsel for Geo-Marine is afforded the opportunity to be present when the contact occurs. We deny the motion because neither the facts nor the weight of legal authority support granting the relief requested.

Background

The subject matter of this appeal is the General Services Administration's (GSA's) July 2003 termination for default of Geo-Marine's performance of a contract which required Geo-Marine to provide services to the United States Air Force Safety Center. A GSA employee other than counsel asked an Air Force employee to comment on the allegations contained in the complaint and, in turn, the Air Force employee asked two former Geo-Marine employees for their comments on the complaint. When one of the former Geo-Marine employees provided his comments to the Air Force employee, he included one page of comments made by the person who had been Geo-Marine's Chief Operations Officer (COO) until May 2003. One sentence in the former COO's comments purports to be a summary of advice given to Geo-Marine by unidentified attorneys regarding a patent matter.

Geo-Marine asserts Air Force employees are conducting unauthorized discovery and inducing former Geo-Marine employees to disclose attorney-client privileged material. Geo-Marine also surmises GSA counsel or someone working on his behalf initiated the events that led to the disclosure, perhaps by providing the Air Force with a copy of Geo-Marine's complaint. In addition, Geo-Marine predicts the Government will seek to use privileged material against Geo-Marine. As a result, Geo-Marine asks us to prohibit any Government employee from having any contact with any former employee of Geo-Marine unless Geo-Marine's counsel is given the opportunity to be present when the contact occurs.

Discussion

As part of our inherent authority to direct proceedings, we can issue protective orders to govern the conduct of counsel and other individuals. Geo-Marine has the burden of demonstrating grounds exist for issuing an order prohibiting any Government employee from having any contact with any former Geo-Marine employee. It has to establish the existence of facts from which we could find someone has engaged or is likely to engage in the conduct Geo-Marine seeks to prohibit. In addition, Geo-Marine has to show such conduct should be prohibited. Although Geo-Marine established an Air Force employee contacted two former employees of Geo-Marine, it has not demonstrated grounds exist for issuing the order it requests.

In support of its request for a protective order, Geo-Marine calls our attention to the American Bar Association (ABA) Model Rules of Professional Conduct, and in particular, Model Rule 4.2, which reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.

Model Rules of Prof'l Conduct R. 4.2. Geo-Marine also calls our attention to the official comment to the model rule, which provides:

> [T]he Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Id. cmt. 7. Relying upon the model rule, the official comment, and several court decisions, Geo-Marine asserts the rule operates to bar any Government employee from communicating with any former Geo-Marine employee unless Geo-Marine's counsel is given the opportunity to be present.

In order to evaluate Geo-Marine's position, it is helpful to consider a brief history of the application of the model rule. In 1991, the model rule read substantially the same as it

does today.[1] The official comment to the rule did not say whether the rule applied to a communication with a former employee of an organizational party. Examining either the rule or its similarly-worded antecedent, Disciplinary Rule 7-104 of the Code of Professional Responsibility, some courts concluded it applied to such a communication while other courts reached the opposite conclusion. See Curley v. Cumberland Farms, Inc., 134 F.R.D. 77 (D.N.J. 1991); PPG Industries, Inc. v. BASF Corp., 134 F.R.D. 118 (W.D. Pa. 1990); Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990) (all citing cases).

On March 22, 1991, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 91-359, which concluded the prohibition set out in the model rule did not extend to communications with unrepresented former employees of an opposing corporate party. The same committee repeated its conclusion in Formal Opinion 95-396, issued July 28, 1995. In opinions handed down after the issuance of Formal Opinion 91-359, a majority of courts concluded neither Model Rule 4.2 nor Disciplinary Rule 7-104 prohibited an attorney from communicating with a former employee of an organizational party.[2] A minority concluded the rule did apply to such communications.[3]

In February 2002, the ABA House of Delegates amended Model Rule 4.2 and the official comment to the rule. The rule, as amended, is quoted above in full. The official comment, as amended, is quoted above in part and continues as follows:

> Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the

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[1] In August 1995, the ABA House of Delegates amended the model rule to prohibit communication with a person rather than a party. In February 2002, the House of Delegates amended the rule to allow communications authorized by court order, as well as by law.

[2] Centennial Management Services, Inc. v. Axa Re Vie, 193 F.R.D. 671 (D. Kan. 2000); Davidson Supply Co., Inc. v. P.P.E., Inc., 986 F. Supp. 956 (D. Md. 1997); United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257 (N.D. Ohio 1997); Terra International, Inc. v. Mississippi Chemical Corp., 913 F. Supp. 1306 (N.D. Iowa 1996); Aiken v. Business and Industry Health Group, Inc., 885 F. Supp. 1474 (D. Kan. 1995); Cram v. Lamson & Sessions Co., 148 F.R.D. 259 (S.D. Iowa 1993); Brown v. St. Joseph County, 148 F.R.D. 246 (N.D. Ind. 1993); Goff v. Wheaton Industries, 145 F.R.D. 351 (D.N.J. 1992); Valassis v. Samelson, 143 F.R.D. 118 (E.D. Mich. 1992); In re Domestic Air Transportation Antitrust Litigation, 141 F.R.D. 556 (N.D. Ga. 1992); Shearson Lehman Brothers, Inc. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991); Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. 899 (E.D. Pa. 1991), appeal dismissed, 961 F.2d 207 (3rd Cir. 1992) (table); Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991); Dubois v. Gradco Systems, Inc., 136 F.R.D. 341 (D. Conn. 1991).

[3] Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996); Rentclub, Inc. v. Transamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff'd, 43 F.3d 1439 (11th Cir. 1995).

> matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Model Rules of Prof'l Conduct R. 4.2 cmt. 7.[4] The official comment to the model rule is consistent with the two Formal Opinions issued by the ABA Committee on Ethics and Professional Responsibility and with the majority of court decisions issued in the past several years.

The official comment to Model Rule 4.2 eliminates any uncertainty as to the application of the rule. The model rule allows GSA counsel and anyone acting on his behalf to communicate with former employees of Geo-Marine, so long as the former employees are not represented by counsel. Thus, Model Rule 4.2 does not provide support for Geo-Marine's motion.

Even though Model Rule 4.2 does not support Geo-Marine's request for a ban on communication between Government employees and former Geo-Marine employees, we would use our inherent authority to direct the conduct of these proceedings by entering an appropriately-tailored protective order if the facts established a Government employee induced or planned to induce any former Geo-Marine employee to divulge attorney-client privileged information. However, we find no such facts.

Geo-Marine believes GSA counsel or someone working on his behalf initiated the events that led its former COO to disclose a privileged communication, perhaps by providing the Air Force with a copy of Geo-Marine's complaint. If GSA counsel provided the Air Force with a copy of Geo-Marine's complaint, this is nothing more than the Clerk of the Board would have done, if asked. The complaint is, after all, a public document. In addition, there is nothing improper about counsel for GSA asking those familiar with the contract to comment on the allegations made by Geo-Marine in its complaint. Geo-Marine also believes GSA will seek to use attorney-client privileged material against Geo-Marine. This, however, is speculation and we have no reason to suppose it is true.

Geo-Marine believes Air Force employees are conducting unauthorized discovery and inducing former Geo-Marine employees to divulge attorney-client privileged material. So far as we know, the Air Force employee who asked the two former Geo-Marine employees to comment on the allegations contained in the complaint did not induce them to reveal attorney-client privileged material. The two former Geo-Marine employees, not Government employees, contacted the former COO and apparently asked him to comment on the allegations contained in the complaint. There is no evidence to show anyone asked or prompted or encouraged the former COO to divulge any attorney-client privileged information. In addition, the facts do not establish whether anyone could have reasonably anticipated attorney-client privileged information would be likely to come to light in the course of contacting the former COO about the matter at issue in this case. The former COO left Geo-Marine in May 2003, and GSA terminated Geo-Marine's performance in late July

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[4] In its motion, Geo-Marine did not quote these sentences, even though they immediately follow the sentences it called to our attention.

2003. It seems unlikely the former COO would have been privy to any attorney-client privileged communications regarding, for example, how to respond to the termination notice, identifying the grounds for filing an appeal from the notice, or mapping out a strategy for pursuing this appeal.

The facts do not establish whether the contact with Geo-Marine's former COO actually resulted in a disclosure of attorney-client privileged communication. Although Geo-Marine says the sentence authored by the COO reveals privileged information, it also reserves the right to refute the statement. In other words, Geo-Marine does not confirm the communication related by its former employee actually occurred. If there was no such communication, there is nothing that merits the protection afforded by the attorney-client privilege. Thus, Geo-Marine has not established any privileged communication was divulged to anyone by its former COO.

No doubt Geo-Marine's former employees know a great many facts regarding Geo-Marine's performance of the contract and regarding the events that led up to the termination. Facts, however, are not shielded from disclosure by the attorney-client privilege.

Although we deny the motion for a protective order, we expect counsel for the parties and anyone acting on their behalf to abide by all ethical rules when dealing with former employees. These rules include, for example, those governing dealing with unrepresented parties (Model Rule 4.3) and respect for the rights of third persons (Model Rule 4.4). In addition, we expect counsel and those acting on their behalf will abide by the provisions of Model Rule 4.2 if a former employee is represented by counsel. We expect neither counsel nor anyone acting on their behalf will solicit or listen to disclosures of privileged communications.

The motion for a protective order is **DENIED**.

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MARTHA H. DeGRAFF
Board Judge