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Downey v. Achilles Medical Device Company

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Downey v. Achilles Medical Device Company

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BETTS & FLORES
Attorneys at Law
300 Stanton St.
Franklin City, Franklin 33705

MEMORANDUM

To: Examinee
From: Hiram Betts
Date: February 25, 2020
Re: *Downey v. Achilles Medical Device Company*

Our client, Achilles Medical Device Company (AMDC), is the defendant in a case in which the plaintiffs allege that AMDC manufactured and sold defective walkers during the years 2010–2015. The plaintiffs are attempting to bring the case as a class action; we intend to oppose the motion for class certification.

This case presents a professional responsibility issue regarding contacts with represented persons. Despite the fact that we represent AMDC, the plaintiffs' lawyers are seeking to speak with one former AMDC employee and four current AMDC employees regarding their knowledge of the manufacture and sale of the allegedly defective walkers. An investigator for the plaintiffs' lawyers has contacted these individuals, without first obtaining our consent to speak with them.

Likewise, despite the fact that opposing counsel represents the named plaintiffs, we want to talk to people, including the named plaintiffs, who purchased and used the walkers in question. Doing so would help us prepare our defense.

We need to know whether the Franklin Rules of Professional Conduct (FRPC) permit these communications. (The FRPC are identical to the ABA Model Rules of Professional Conduct.) Please draft a memorandum to me analyzing two issues:

(1) Whether the plaintiffs' lawyers or their representatives may communicate, without our consent, with the current and former AMDC employees regarding their knowledge about the manufacture and/or sale of the walkers. Discuss each individual separately and explain your conclusions.

(2) Whether we, as AMDC's attorneys, or our representatives may communicate with any named plaintiffs or potential members of the class without the consent of opposing counsel.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your analysis, discuss the applicable legal authorities, and explain how the facts and law support your conclusions.

BETTS & FLORES
Attorneys at Law

FILE MEMORANDUM

From: Hiram Betts
Date: January 23, 2020
Re: *Downey v. Achilles Medical Device Company*

I just received a call from Ron Gilson, president of Achilles Medical Device Company (AMDC). We represent AMDC in a class-action lawsuit and are in the early stages of litigation. The plaintiffs allege that AMDC negligently manufactured and then sold defective walkers. The plaintiffs claim that, due to manufacturing defects, the walkers collapsed when the plaintiffs tried to use them and that the plaintiffs were injured as a result. Five named plaintiffs, led by Marie Downey, are attempting to bring a class action "on behalf of themselves and all other persons who bought and used AMDC walkers (model 2852) manufactured in 2010 and marketed and sold between 2010 and 2015 and who were injured when attempting to use the walkers." We intend to oppose the plaintiffs' motion for class certification. We would like to contact as many potential members of the class as possible before class certification.

Gilson told me that one former employee and four current employees have been approached by an investigator employed by the plaintiffs' law firm. The investigator has attempted to speak directly with the former employee and current employees without our consent. Gilson is very concerned about these contacts and wants to know if the plaintiffs' lawyers are doing anything wrong.

Gilson provided a list of the former and current AMDC employees. Marilyn DePew, an associate with our firm, has spoken with each of these individuals about their interactions with the plaintiffs' investigator.

Note that Gilson does not believe that there was a problem in the design or manufacture of the walkers. He would like us to contact as many purchasers as possible to find out about their experiences with the AMDC walkers.

BETTS & FLORES
Attorneys at Law

FILE MEMORANDUM

From: Marilyn DePew
Date: January 25, 2020
Re: *Downey v. Achilles Medical Device Company*: Interviews

Ashley Parks, an investigator employed by the law firm that represents the plaintiffs in *Downey v. Achilles Medical Device Company*, contacted one former employee and four current employees of AMDC. I have interviewed those former and current employees and, with their permission, recorded the conversations. What follows are the transcripts of the relevant portions of those interviews.

INTERVIEW WITH RON ADAMS

Q: Mr. Adams, are you a current employee or agent of Achilles Medical Device Company, commonly known as AMDC?

A: No.

Q: Have you ever been an employee of AMDC?

A: Yes, I worked for AMDC from 2003 to 2017. I was director of quality control during that time. Now I am happily retired.

Q: When you were at AMDC, what were your responsibilities as director of quality control?

A: I was in charge of the quality control department. Employees in my department, whom I supervised, inspected every product that left the manufacturing plant and was made available for sale. I am very proud of the work we did.

Q: So the department for which you were responsible would have inspected the walkers that were manufactured in 2010 and sold between 2010 and 2015?

A: Yes.

Q: Do you have any specific knowledge about the walkers that are alleged to have been defective?

A: No, not specifically. I do know that every piece of equipment that left the factory was inspected. If it did not meet company standards, it was rejected. I would like to know what the purchasers are complaining about.

Q: What do you mean by "rejected"?

A: The item was not released for sale and either was put in the trash or was refurbished and then inspected again to make sure it met company standards.

Q: Do you have any knowledge of what is happening in the quality control department at AMDC now?

A: No, not really.

Q: It is my understanding that you were contacted about the class-action litigation regarding the walkers. By whom were you contacted?

A: I received a phone message from Ashley Parks, who said she was an investigator employed by the law firm that represents the plaintiffs in the case of *Downey v. AMDC*. She said she wanted to talk to me about the quality inspection of the walkers.

Q: How did you respond to this request?

A: I haven't called her back yet. Quite honestly, I am happy to talk with her. I didn't do anything wrong.

INTERVIEW WITH GUS BARTHOLOMEW

Q: Mr. Bartholomew, how long have you been employed by AMDC?

A: I have worked there continuously since 2003.

Q: Have you had the same job during all that time?

A: Yes, for all that time, I have been employed as the executive assistant to the president of the company. We have had several presidents during my tenure, but I've stayed in my position.

Q: What are your responsibilities as executive assistant to the president of AMDC?

A: I am basically the president's administrative assistant. I do word processing, answer the phone, organize the president's schedule, get the president organized, and anything else the president wants.

Q: Do you attend meetings of the board of directors of AMDC?

A: Yes, I sit in on the meetings and take the meeting notes. I don't say anything—I just record exactly what is said during the meeting and then provide my notes to the board secretary and president for approval.

Q: Have you taken notes on discussions between the lawyers for AMDC and the board?

A: Yes.

Q: Have any of those discussions involved AMDC's response to the *Downey* litigation?

A: Yes.

Q: Do you have a vote on the matters before the board of directors?

A: No, I do not.

Q: Do you see or hear communications between the president of AMDC and counsel for AMDC?

A: Sometimes. I type and proofread all written letters sent by the president to the company's lawyers. I also open and review any incoming mail from the lawyers. I have access to the president's emails and frequently review them. I do not listen in on my boss's—the president's—phone conversations.

Q: Did anyone contact you about the litigation involving the walkers that AMDC manufactured in 2010 and sold between 2010 and 2015? These are the walkers at issue in the class-action lawsuit *Downey v. AMDC*.

A: I received a phone message from an Ashley Parks. She said she was an investigator who is employed by the plaintiffs' lawyers in the *Downey* case. She said she wanted to talk to me about the case. I haven't returned the call yet.

INTERVIEW WITH AGNES CORLEW

Q: Ms. Corlew, how long have you been employed by AMDC and what is your position with the company?

A: I have been employed since January of 2017, and I am head of the public relations department.

Q: What are your responsibilities as AMDC's head of public relations?

A: I am responsible for the team that responds to all media requests, writes and publishes all written materials about the company, and answers public inquiries about the company. I am, in essence, the voice of the company. I don't make the company's policies, but I frequently communicate the official position of the company to the public.

Q: Is it your job to answer questions about pending litigation?

A: Yes, I answer questions from the press and the public about pending litigation.

Q: Do you play any role in decisions about the litigation?

A: No. I present only the information that has been provided to me and has been approved by the president's office.

Q: Have you ever met with counsel for AMDC regarding the *Downey* case?

A: Absolutely not.

Q: Has anyone associated with the plaintiffs' lawyers in the *Downey* case tried to contact you?

A: My assistant told me that I had a call from Ashley Parks, an investigator who works for the plaintiffs' law firm. I haven't returned the call.

INTERVIEW WITH ELISE DUNHAM

Q: Ms. Dunham, what is your job with AMDC and how long have you worked there?

A: I am the plant manager at AMDC. I have been employed in that position continuously since March of 2009.

Q: What are your responsibilities in that position?

A: I oversee all the manufacturing at the plant. I also make sure that every product meets our quality control standards.

Q: So the director of quality control reports to you?

A: Yes, as does the director of manufacturing.

Q: So you were manager of the plant at the time AMDC manufactured the walkers, model 2852, that are alleged to have been defective in the *Downey* case.

A: Yes, although I honestly don't remember anything about those particular walkers.

Q: Have you been contacted by any of the plaintiffs' counsel or their representatives?

A: I received a note from Ashley Parks, an investigator with the plaintiffs' law firm, saying that she wanted to speak with me. Since then, I've hired a lawyer, and I called Ms. Parks to give her my lawyer's name and contact information.

INTERVIEW WITH PENNY ELLIS

Q: Ms. Ellis, I understand that you are employed by AMDC and have been employed by the company since 2008. But I also understand that your responsibilities have changed over that time period. Could you explain the different responsibilities you have had since you began working at AMDC?

A: Sure. From 2008 to 2016, I was director of marketing for AMDC. Essentially, I was responsible for all sales of all products. Of course, I had a staff that worked for me. In 2016, I changed positions and am now chief financial officer of the company.

Q: So, from 2010 to 2015, did your responsibilities include sales of the walkers that are at issue in the *Downey* case?

A: Yes, definitely.

Q: Do you remember anything specifically about the walkers?

A: No, we had a lot of products that were sold while I was head of marketing.

Q: Currently, do you have any responsibility for sales, marketing, or anything else regarding walkers or any other equipment?

A: No, I manage the company's financial actions, including cash flow and budgeting, and help shape the company policy.

Q: As chief financial officer, are you a member of the board of directors of AMDC?

A: Yes, I serve as treasurer.

Q: Does the board have any involvement in the lawsuit?

A: The lawyers from your firm, Betts & Flores, consult with the board about the litigation and seek input from the board. I really don't know anything about law, so I mainly listen when they discuss the litigation. I would be involved in the financial aspect only if there were a settlement or if there were a judgment against the company.

Q: Are you a voting member of the board of directors of AMDC?

A: Yes. I have a vote on every issue that comes before the board.

Q: Does that include voting on issues related to the *Downey* litigation?

A: Yes.

Q: Have you been contacted by anyone associated with the plaintiffs' law firm in the *Downey* matter?

A: Yes, I was called by a woman named Ashley Parks. She told me that she was an investigator working for the plaintiffs' law firm and that she wanted to speak with me about the walkers. I told her I would call her back. What should I do?

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Excerpts from the Franklin Rules of Professional Conduct

Rule 1.0(f)

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

. . .

Rule 4.2 Communication with Person Represented by Counsel

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.

> **Comment [1]:** This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.
>
> . . .
>
> **Comment [3]:** The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
>
> . . .
>
> **Comment [7]:** In the case of a represented organization, this 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. 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 matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

. . .

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

. . .

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

FRANKLIN BOARD OF PROFESSIONAL CONDUCT
Ethics Opinion 2016-12

We have been asked to give a formal ethics opinion on the interpretation of Franklin Rule of Professional Conduct (FRPC) 4.2. Specifically, we have been asked to provide some guidance as to the interpretation of Comment [7] to the Rule.

Franklin Rule of Professional Conduct 4.2 provides: "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" without the prior consent of the represented person's counsel. Rule 4.2 applies equally to organizations and to individuals. Comment [7] to Rule 4.2 states that such unauthorized communications with agents or employees of an organization are prohibited in three situations: (1) where the agent or employee of the organization "supervises, directs or regularly consults with the organization's lawyer concerning the matter"; (2) where the agent or employee of the organization has "authority to obligate the organization with respect to the matter"; and (3) where the agent's or employee's "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Importantly, Rule 4.2 prohibits such unauthorized communication only with *current* agents and employees of the organization. Counsel may communicate freely with former agents and employees of an organization without the consent of the organization's lawyer regardless of the role the agent or employee may have played in the matter.

The first prong to Comment [7] prohibits unauthorized communication (i.e., communication without prior consent of the organization's lawyer) with a person in the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter. This generally includes the people who are giving and receiving information from the lawyer and directing the lawyer's actions in the matter, as well as those who have power to compromise or settle the matter in consultation with the lawyer. In a corporation, persons under this prong would generally include the "control group"—that is, the board of directors and top management officials. However, the analysis under this prong is functional. One must determine whether particular members of the board and other top officials actually do consult with or direct the actions of counsel concerning the matter.

The second prong prohibits unauthorized communication with a person in the organization who has "authority to obligate the organization with respect to the matter." This includes only

those agents or employees who have authority to enter into binding contractual settlements on behalf of the organization. An agent's authority may be actual or apparent. An agent can bind a principal when given actual authority to do so, either through express words or through implication. In addition, an agent may have apparent authority if it reasonably appears to an outsider that the agent has been given authority to bind the principal. Only those agents or employees who have either actual or apparent authority to settle litigation on behalf of the organization are covered under this prong. Obviously, this prong overlaps with the first prong, as it may include members of the board of directors as well as those agents and employees who have been given explicit authority by the organization's rules or bylaws to settle the matter on behalf of the organization. But this prong, unlike the first, also covers those who have the apparent authority to settle the matter as well as those with actual authority.

The third prong of Comment [7] prohibits unauthorized communication with an agent or employee of the organization whose "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Whether an agent's or employee's conduct may be so imputed must be determined with reference to the specific facts and circumstances of the case; it is not simply a fanciful construct of potential liability. The focus is on the conduct of the agent or employee and whether, based on that conduct, a fair-minded person could foresee imputation of liability. Communication is prohibited only when the agent's or employee's act or omission is obviously relevant to a determination of corporate liability. In other words, the agent or employee has acted in the matter on behalf of the organization and, save for the separate legal character of the organizational form, would be directly named as a party in a lawsuit involving the matter. By focusing upon acts or omissions, this prong precludes unauthorized communications only with actors, not mere witnesses. If it is not reasonably likely that the agent or employee is a central actor for liability purposes, nothing in FRPC 4.2 precludes unauthorized contact with the agent or employee. Only those agents or employees whose actions or omissions are the subject of the litigation—or those individuals who supervised or approved the actions or omissions of those persons—are covered by the Rule.

Importantly, even if Rule 4.2 does not prohibit counsel from speaking with an employee or former employee of an organization, counsel must be careful not to speak with that agent or employee about any information that might be protected by attorney-client privilege. Attorney-client privilege protects any communications between counsel and client for the purpose of

obtaining legal advice. For purposes of this ethics opinion, the client would be the organization. If a lawyer seeking to speak with an employee or former employee has reason to believe that the employee or former employee is privy to communications protected by the attorney-client privilege, counsel must make every reasonable effort not to breach that privilege. Indeed, counsel is prohibited from asking directly or indirectly about any of those communications.

Mahoney et al. v. Tomco Manufacturing
Franklin Court of Appeal (2010)

Robert Mahoney and 12 other named plaintiffs filed a lawsuit on behalf of themselves and all other persons who purchased allegedly defective lawn mowers manufactured by Tomco Manufacturing. The motion for class certification has been granted, and notice has been given to all persons who purchased the allegedly defective lawn mowers during the applicable time period. The plaintiffs filed a motion seeking an order from the trial court preventing Tomco's lawyers or their representatives from speaking with any current or potential members of the class without the permission of the plaintiffs' counsel. At the time the plaintiffs filed this motion, the potential class members had been given six months to let the court know if they wished to be excluded from the class (typically referred to as "opting out").

Although courts are not bound by the Franklin Rules of Professional Conduct in matters other than attorney disciplinary proceedings, the trial court relied on FRPC 4.2 in making its determination. Rule 4.2 prohibits a lawyer from communicating "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." This prohibition applies equally to agents of the lawyer or persons acting at the lawyer's behest. *See* FRPC 5.3. Based on Rule 4.2, the trial court issued an order prohibiting Tomco's counsel, or their agents or representatives, from communicating with any persons who purchased a Tomco lawn mower (model 350) during the period 2005–2007; that is, all persons who could have been members of the class.

While we find no error in the trial court's reliance on Rule 4.2, we do find the order to be overly broad. Rule 4.2 prohibits communication only with persons the lawyer "knows" to be represented by counsel. "Knowledge" is a high standard. There must be more than "reason to believe" or "assumption." There must be actual knowledge. Very clearly, the named members of the class are known by Tomco's lawyers to be represented by plaintiffs' counsel. Each of those named class members has an attorney-client relationship with the lawyers representing the class. Tomco's lawyers know about that relationship. However, the trial court's order is overly broad because it also prohibits Tomco's lawyers from communicating with *potential* members of the class. Until the end of the "opt out" period, only the named plaintiffs are considered to be represented by the class counsel.

There is no way that Tomco's lawyers could know whether the potential class members were represented by counsel. Indeed, those potential class members still had six months to decide whether to opt out of the class. To Tomco's lawyers' knowledge, these potential class members were not represented by a lawyer, nor had they entered into a lawyer-client relationship with plaintiffs' counsel.

We therefore hold that the trial court's order is modified to prohibit Tomco's counsel, or their agents or representatives, from engaging in unauthorized communications only with the named plaintiffs in the lawsuit. Communication with potential members of the class, without the permission of the class counsel, is not prohibited by this order. Once the time period for opting out is completed, Rule 4.2 would prohibit Tomco's lawyers from communicating, without opposing counsel's consent, with any class member who has not chosen to opt out of the litigation.

Reversed in part and modified.

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MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.