

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-381
Issued: July 1995

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Comment 2 of Rule 4.2, which was substantially amended and renumbered to Comment 7. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a lawyer representing a client in a matter adverse to an organizational party that is represented by another lawyer, without violating Rule 4.2, communicate about the subject matter of the representation with an unrepresented former employee of the organizational party without the consent of or notification to the organization's lawyer?

Answer: Yes.

References: ABA Formal Op. 91-359(1991); *Nalian Truck Lines v. Nakano Warehouse & Transp. Corp.*, 6 Cal. App. 4th 1256, 8 Cal. Rptr. 2d 467 (Cal. App. 1992) review denied by Supreme Court of California 1992 Cal. Lexis 4234 (1992); ALI/ABA Civil Practice and Litigation in Federal and State Courts (6th ed. 1994), Vol. II, G-1, 20-22 (collecting cases and law review articles); Underwood and Fortune, Trial Ethics (Little Brown & Co., 1988), sec. 5.4.1.

OPINION

This question is coming up with increasing frequency. The Committee is of the opinion that ABA Formal Op. 91-359 provides the correct answer. That opinion collects and reviews the authorities and arguments, and we need not recite them at length. It is sufficient to state that after recognizing that neither Rule 4.2 nor the Comments thereto deal with former employees, the Committee concluded that Rule 4.2 does not bar ex parte contacts with an organization's former employees. We note that a former employee is no longer subject to the control of the organization nor in a position to speak for the organization, and cannot make vicarious admissions under the state and federal evidence rules.

A lawyer seeking information from a former employee of an organizational party should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organizational party. See Rule 4.3 and Comment (2) to Rule 4.2. It is incumbent on the party who knows that its former employees possess privileged information to utilize confidentiality agreements and/or seek protective orders. See e.g., *Nalian Truck Lines* at 472.

We also emphasize that if the former employee is personally represented by counsel in that matter, then counsel may not be bypassed.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.