

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-382
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.

A lawyer who has filed a civil* lawsuit against an organization or who plans to file such an action asks the following questions:

Question 1: May the lawyer, knowing that the organization is represented by counsel in that matter, interview an employee who has a management position in the organization without the consent of the organization's counsel?

Answer: No.

References: Rule 4.2 and Comment (2); Shoney's Inc. v. Lewis and Herr, 875 S.W.2d 514 (1994), 1994 WL 23608 (Ky. 1994); KBA E-213 (1979).

Question 2: May the lawyer interview a non-managerial employee whose acts or omissions in connection with the matter cannot be imputed to the organization for purposes of civil liability or whose statement will not constitute an admission on the part of the organization - that is, an employee whose conduct did not give rise to the claim against the organization and whose statements do not relate to the scope of the employee witness's employment, without notifying the organization's counsel?

Answer: Yes.

References: Rule 4.2 and Comment (2); KBA E-213 (1979); Mass. Op. 82-7 (1982); NYC Op. 80-46 (n.d.); Ohio Op. 90-20 (1990); Oregon Op. 1991-80 (1991); Wisconsin Op. E-91-1.

Question 3: May the lawyer, knowing that the organization is represented by counsel in that matter, interview a non-managerial employee regarding matters within the scope of that employee's employment, whose act or omission in connection with that matter may be imputed to the organization, or whose statement may constitute an admission on the part of the organization, without the consent of the organization's counsel.

Answer: No.

References: Rule 4.2 and Comment (2); Mass Op. 82-7; NYC Op. 80-46 (n.d.); Ohio Op. 90-20 (1990); Oregon Op. RI-120 (1992); San Diego Op. 1984-5 (1984); Wisconsin Op. E-91-1 (1991). See also ABA Formal Op. 91-359 (1991).

OPINION

The Committee has concluded that the first two questions and answers are not controversial and that further discussion of the answers is not necessary. Question 3 presents some difficulties in the interpretation of Rule 4.2.

Shoney's did not reach this question. KBA E-213 (1979), applying the old Code of Professional Responsibility, employed a managerial/nonmanagerial distinction; and so long as the employee's conduct did not give rise to the litigation there seems to be little question that such interviews were permitted prior to the adoption of Rule 4.2.

However, Rule 4.2 grants the organizational party more protection in light of the expansion of the hearsay exception for vicarious admissions. See Federal Rules of Evidence 801(d)(2)(D) and Kentucky Rules of Evidence 801(A)(2)(D). See also Underwood & Fortune, Trial Ethics (Little Brown & Co., 1988), sec. 5.4.1. Comment (2) states that there are three categories of present employees who are "off limits":

(1) Persons having managerial responsibility on behalf of the organization:

(2) [A]nd any other person,

(a) whose act or omission in connection with that matter may be imputed to the organization, or

(b) who statement may constitute an admission on the part of the organization.

While the Comments are interpretive and not binding, the intent of the drafters seems clear. See opinions from other jurisdictions cited above. In this instance the Comments should not be ignored.

To illustrate, assume that the Acme Storage Company has four employees: Al the president, Bob a loader, Carl a loader and Diana a secretary. One day there is an accident on the loading dock in which Pete, who was delivering goods, was injured by the alleged negligence of Bob. Carl was working on the dock and observed the accident. Diana was taking a break on the loading dock to have a smoke and also observed the accident. Pete's lawyer notifies Acme of his intent to sue Acme for the negligence of Bob and Acme's lawyer notifies Pete's lawyer that none of the Acme employees are to be interviewed without his consent. Pete's lawyer:

- 1) may not interview Al without consent because Al has managerial responsibility;
- 2) may not interview Bob without consent because his act (driving the truck) may be imputed to Acme;
- 3) may not interview Carl without consent because it is contemplated that he will be asked about matters within the scope of his employment (the operation of the loading dock) and

any statement he makes in that regard will be an evidentiary admission of Acme under KRE 801A(d)(2)(D);

- 4) may interview Diana without consent because it is not contemplated that Diana will be asked any questions about matters within the scope of her employment.

* The Committee does not address the application of Rule 4.2 in criminal cases.

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.