

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-392
Issued: September 1996

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 1 of Rule 4.2 which was revised and renumbered to Comment 4. 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 counsel for a corporation communicate with a corporate employee about the subject matter of a case brought by the employee against the corporation, if the corporate counsel knows that the employee is represented by another lawyer in the matter and does not have the consent of that lawyer to contact the represented employee?

Answer: No.

References: KRPC 4.2

OPINION

Several lawyers have contacted the committee regarding the propriety of corporate counsel contacting represented employees who have cases against their corporate employers. This opinion is intended to affirm the obvious, that KRPC 4.2 applies to all lawyers. On the other hand, we take the opportunity to comment on the limits of the committee's role.

We recently issued opinions on the propriety of plaintiff's counsel contacting present and former employees of a corporate defendant. See KBA Es - 382 and 381. Nothing in the language of KRPC 4.2 suggests that corporate counsel are exempt from the restrictions of KRPC 4.2.

Of course, we note that the application of KRPC 4.2 is fact sensitive. The rule applies to a lawyer acting in the course of representing a client. See comment (1) to KRPC 4.2 ("a lawyer having independent justification for communicating with the other party is permitted to do so"). If the lawyer representing the corporation is in doubt about the propriety of his or her conduct, then that lawyer may request an advisory opinion.

We again advise the membership that the committee tries not to issue advisory opinions for "offensive" purposes - to be used against alleged malefactors. Our role is to give advisory opinions to requesting lawyers regarding their own future conduct. See KBA E-297 (1984). This rule of restraint is arguably self-imposed, but it is consistent with the language of SCR 3.530.

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.