

ETHICS OPINION

RO-92-12

Lawyer may contact former employee of opposing party ex parte unless contact is intended to deal with privileged matter

QUESTION:

"I have filed two (2) complaints against Acme ("Acme"), copies enclosed. The suit in Any County is a proposed class action which alleges improper mortgage balances and interest rates charged to Acme customers. The suit charges Acme with fraud and breach of contract. The crux of the complaint filed in Low County is outrage, slander, invasion of privacy and intentional infliction of emotional distress arising out of the branch manager's treatment of an Acme customer.

The credit union President, John Don, has been named as a defendant in both suits. Mr. Don's former secretary, Amy Honey has retained our firm to represent her in connection with sex discrimination arising out of Mr. Don's treatment of Mrs. Honey when she became pregnant and took maternity leave. Upon return after maternity leave, Mrs. Honey learned that she had been replaced.

As stated, Mrs. Honey was employed by Acme as Mr. Don's secretary. She types correspondence to and received correspondence from Acme's legal counsel pertaining to the two (2) cases I already have pending. She also had specific conversations with Mr. Don about the two (2) cases I have pending.

We need a written opinion as to whether Rule 4.2 or any other rule of Professional Conduct precludes me from asking Mrs. Honey about facts or information she knows concerning the two (2) previously filed cases."

ANSWER:

You are not precluded from communicating with this former employee under the set of facts you have described in your request.

DISCUSSION:

Rule 4.2 of the Rules of Professional Conduct prohibits communication about the subject matter of the representation with a "party" known to be represented by other counsel

Consent of the other counsel obviates the problem. Rule 4.2 is a successor to Alabama DR 7-104(A)(1) and two provisions are substantially identical. In RO-88-34 (also published in *The Alabama Lawyer*), the Disciplinary Commission held that a plaintiff's counsel in a tort claim action could contact and interview current corporate employees/witnesses. There can be no ex parte contact when the employee is an executive officer of the adverse party or could otherwise legally bind the adverse party by his/her testimony, or if the employee was the actual tortfeasor or person whose conduct gave rise to the cause of action. In any of these situations, prior consent of counsel for the adverse party would be required.

Ex parte contact with a former employee, as here, is not subject to the same scrutiny. In fact, there is a strong argument that Rule 4.2 does not even apply to former employees at any level. A former employee cannot speak for the corporation. The ABA Committee on Ethics and Professional Responsibility in Formal Opinion 91-359 (1991) stated that former employees of a corporation may be contacted without consulting with corporation's counsel because they are no longer in positions of authority and thus, cannot bind the corporation. The Disciplinary Commission believes that contact with a former employee is ethically permissible, unless the ex parte contact is intended to deal with privileged matter, i.e., the inquiring counsel is asking the former employee to divulge prior communications with legal counsel for the adverse party, and these communications were conducted for purposes of advising the adverse party in the litigation or claim. If the former employee was the actual person giving rise to the cause of action, contact is also permissible so long as that person is not represented by counsel.

MLM/vf

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