

ETHICS OPINION

RO-93-05

QUESTION:

"I am writing to request an opinion from the Alabama State Bar Association in reference to the application of Rule 4.2 which states:

'In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party 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 by law to do so.'

We are currently Plaintiff's counsel in a lawsuit against F M Company in T, Alabama. The lawsuit involves allegations that F has polluted a plant site and surrounding land since 1960. The plant has been closed for many years. We propose to take the statements of several FORMER F employees whose testimony is factual in nature. We are not seeking admissions from these employees which would effectively bind F. We are simply trying to ascertain the facts from these former employees concerning what happened and what they saw or know. None of these individuals have a current relationship with F. They were dismissed when the plant was closed in the mid-1980s.

F's attorneys have advised me of their intent to invoke Rule 4.2 of the Alabama Rules of Professional Conduct and to seek sanctions if we attempt to interview these employees. I do not agree with F's position that this Rule should shield them from the consequences of their own wrongdoing and muzzle statements and disclosures of fact from people who have not been employees of F for many years. Nevertheless, I feel compelled to write the Bar Association regarding any potential impropriety of taking these statements and whether we will be allowed to take them. We will, of course, abide by any guidelines you suggest if we are allowed to take the statements.

I will await taking these statements until I obtain an opinion from the State Bar. However, time is extremely of the essence since our case is set for trial in September 1993."

ANSWER:

Rule 4.2, Alabama Rules of Professional Conduct, does not prohibit plaintiff's counsel from contacting former employees of a corporate defendant.

DISCUSSION:

In RO-92-12, the Disciplinary Commission held that Rule 4.2 of the Rules of Professional Conduct prohibits communication about the subject matter of the representation only with a "party" known to be represented by other counsel. In RO-88-34, the Disciplinary Commission had held that plaintiff's counsel in a tort claim action could contact and interview certain current corporate employees without the necessity of obtaining permission from the defendant or giving notice to the defendant's attorney. Plaintiff's counsel may not, without notice and permission, interview current employees who are in a position to bind the corporate defendant. However, ex parte contact with a former employee is not subject to the same scrutiny applied to current employees of a corporate defendant.

As the Commission stated in RO-92-12, "...there is a strong argument that Rule 4.2 does not even apply to former employees at any level." The one qualification might be, as discussed in Hazard and Hodes in the treatise The Law of Lawyering, those employees who occupied a managerial level position and were involved in the underlying transaction and being privy to privileged information, including a work product, which would prohibit plaintiff's counsel from accessing said information without a valid waiver by the organization and/or discovery and evidence rules. However, such an exception would be restricted to situations wherein these facts exist.

The instant holding of the Disciplinary Commission is supported by ABA Formal Opinion 91-359 (1991), a copy of which is attached hereto. Therein, the ABA Committee on Ethics and Professional Responsibility determined that former employees of a corporation could be contacted by plaintiff's counsel without consulting with the corporate defendant's counsel since the former employees were no longer in a position of authority, and, thus, could not "bind" the corporation.

## ABA Formal Opinions

The ABA Standing Committee on Ethics and Professional Responsibility issues both formal and informal opinions. Formal opinions are on subjects determined by the committee to be of widespread interest or of unusual importance. They appear here in full text and are copyrighted by the ABA.

Formal Opinion 91-359  
March 22, 1991

Contact With Former Employee Of  
Adverse Corporate Party

*The prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.*

The Committee has been asked for its opinion whether a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without the consent of the corporation's lawyer, communicate about the subject of the representation with an unrepresented former employee of the corporate party.

The starting point of our inquiry is Model Rule of Professional Conduct 4.2, which states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

The rule is, for purposes of the issue under discussion, substantially identical to DR 7-104(A)(1), which states, as follows:

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer

in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The comment to Rule 4.2 makes clear that corporate parties are included within the meaning of "party" in that Rule, and is helpful in defining the contours of that rule as it applies to present employees of corporate parties:

[1] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[2] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to

the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 the purposes of this Rule. Compare Rule 3.4(f).

[3] This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

The rationale on which Rule 4.2 was formulated was identified in *Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564, 576 (1984).

The purposes of the rule against ex parte communications with represented parties are "preserving the proper functioning of the legal system and shielding the adverse party from improper approaches." (Citing ABA Formal Opinion 108 (1934)).

The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law. As discussed at Law. Man. Prof. Conduct 71:302,

... The rule against communicating with the opposing party without the consent of that party's lawyer does not admit of any exceptions for communications with "sophisticated" parties; *Maru*, 10861 (Fla. Bar Op. 76-21 (4/19/77)). See also *Waller v. Kotzen*, 567 F. Supp. 424 (E.D. Pa. 1983) (plaintiff's counsel contacted insurance company directly, after insurer was represented by counsel); *Estate of Vasfades v. Sheppard Bus Service*, 469 A.2d 971 (N.J. Super. 1983) (negotiations were conducted with insurance company for defendants).

*cf. Meat Price Investigators Assn. v. Iowa Beef Processors*, 448 F.Supp. 1, 3 (S.D. Iowa 1977) (while leaving question of culpability of counsel's conduct to disciplinary authorities, court declined to disqualify counsel for interviewing an officer of an opposing party who was a "sophisticated businessman who was openly willing to share his knowledge of the beef industry with attorneys he knew to be plaintiff's counsel.") See also Code of Professional Responsibility EC 7-18:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person....

The comment to Rule 4.2 limits those present corporate employees covered by this rule to:

persons having a managerial responsibility on behalf of the organization, and ... any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The inquiry as to present employees thus becomes whether the employee (a) has "a managerial responsibility" on behalf of the employer-corporation, or (b) is one whose act or admission in connection with the matter that is the subject of the potential communicating lawyer's representation may be imputed to the corporation, or (c) is one whose "statement may constitute an admission" by the corporation.

Whether an employee falls into any of these three categories is inevitably an is-

sue affected by a host of factors, the exploration of none of which need detain us. These include at least the terms of the relevant statutory and common law of the state of the corporation's incorporation; applicable rules of evidence in the relevant jurisdiction; and relevant corporate documents affecting employees' duties and responsibilities.

At least insofar as the test of imputable act or omission is concerned all of these factors, in turn, would have to be applied within the context of "the matter in representation" to determine whether the acts or omissions of the employee can be imputed to the corporation with respect to that particular matter. That requires a determination of the scope of the subject matter of the potentially communicating lawyer's representation.

The comment—by defining three categories of unrepresented corporate employees with whom communication "concerning the matter in representation" is prohibited absent the consent of the corporation's counsel or authorization of law—clearly implies that communication with all other employees on "the matter in representation" is permissible without consent, subject only to such other rules and other law as may be applicable. (E.g., Rule 4.1, requiring truthfulness in statements to others and Rule 4.3, addressing a lawyer's dealings with unrepresented persons.)

Neither the Rule nor its comment purports to deal with former employees of a corporate party. Because an organizational party (as contrasted to an individual party) necessarily acts through others, however, the concerns reflected in the Comment to Rule 4.2 may survive the termination of the employment relationship.

(It is appropriate to note here that those addressed by the Comment are not denominated "employees" but "persons." The Rule presumably covers independent contractors whose relationship with the organization may have placed them in the factual position contemplated by the

Comment. Because the issue this Opinion addresses deals expressly with former employees, we need not explore the ramifications of this expansive terminology.)

While Rule 4.2 does not purport by its terms to apply to former employees, courts confronting the issue have interpreted Rule 4.2 (as illuminated by its comment) and DR 7-1-4(A)(1) (which does not have such a comment or comparable discussion in any Ethical Consideration) in various ways.

Most recently, in an aside in a case dealing with current employees under DR 7-104(A)(1), the New York Court of Appeals noted its agreement with the Appellate Division that the rule applies "only to current employees, not to former employees." *Niesig v. Team I et al.*, 76 N.Y.2d 863, 558 N.E.2d 1030 (1990). See also *Wright by Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 691 P.2d 564 (1984) (reasoning that former employees could not possibly speak for or bind the corporation, and therefore interpreting DR 7-104(A)(1) as not applying to them); and *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990) (holding that DR 7-104 does not bar contacts with former corporate employees, at least in absence of a showing that the employee possessed privileged information).

On the other hand, other courts have held that former employees are covered (it is usually phrased that they will be considered "parties" for *ex parte* contact purposes) under certain circumstances. Thus, Rule 4.2 has been held to bar *ex parte* contacts with former employees who, while employed, had "managerial responsibilities concerning the matter in litigation." *Porter v. Arco Metals*, 642 F.Supp. 1116, 1118 (D. Mont. 1988). In *Amarin Plastics v. Maryland Cup Corp.*, 118 F.R.D. 36 (D. Mass. 1987) the Court, while recognizing the possible applicability of Rule 4.2 to former employees, declined to apply it on the facts of that case. It noted, however, the additional

possibility that communications between a former employee and his former corporate employer's counsel may be privileged. *Id.*, at 41. See also *In re Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), cert. denied, 455 U.S. 99 (1982) (noting that the rationale of *Upjohn v. United States*, 449 U.S. 383 (1981), with respect to corporate attorney-client privilege applies to former as well as current corporate employees). In *Public Service Electric and Gas Company v. Associated Electric and Gas Ins. Services, Ltd.*, 745 F. Supp. 1037 (D. N.J. 1990) the court interpreted Rule 4.2 to cover all former employees.

Commentators on the subject of *ex parte* contacts with former employees have likewise urged application of the prohibition on contacts to at least some former corporate employees. See, e.g., Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 Wash. & Lee L. Rev. 1181 at 1227 (1987), recommending a functional approach deeming

any present or former employee who is identified with an enterprise, either for purposes of resolving disputed issues or effective representation of the enterprise, to be a party representative for discovery purposes. Any other rule would put enterprises at a distinct and unfair disadvantage and may effectively deny enterprises the full benefit of representation by counsel....

See also Miller and Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 Bus. Law. 1053 at 1072-73 (1987).

[C]ourt authorization or opposing counsel's consent to *ex parte* contact should be required if the former employee was highly-placed in the company (such as a former officer or director) or if the former employee's

actions are precisely those sought to be imputed to the corporation.

While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.

Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

With respect to any unrepresented former employee, of course, the potentially communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer's counsel are protected by the privilege (a privilege not belonging to or for the benefit of the former employee, by the former employer). Such an attempt could violate Rule 4.4 (requiring respect for the rights of third persons).

The lawyer should also punctiliously comply with the requirements of Rule 4.3, which addresses a lawyer's dealings with unrepresented persons. That rule, insofar as pertinent here, requires that the lawyer contacting a former employee of an opposing corporate party make clear the nature of the lawyer's role in the matter giving occasion for the con-

tact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party. See, e.g., *Brown v. Peninsula Hospital Centers*, 64 A.D.2d 685, 407 N.Y.S.2d 586 (App. Div. 1978) (attorneys for defendant hospital should have disclosed potential conflict of interest before talking to treating physician and producing him for deposition as hospital's representative); ABA Informal Opinion 908 (1986).

Formal Opinion 91-360  
July 11, 1991

**Prohibition of Partnerships with Nonlawyers: Extrajurisdictional Effect**

A lawyer who is licensed both in a jurisdiction that prohibits partnerships with nonlawyers, as in Model Rule 5.4(b), and in a jurisdiction that permits lawyers to form partnerships with nonlawyers, but who practices only in the latter jurisdiction, should not be subject to the prohibition of the jurisdiction where the lawyer does not practice. On the other hand, if a lawyer licensed in two such jurisdictions is engaged in practice in the jurisdiction that prohibits such partnerships, the lawyer must adhere to the restrictions of that jurisdiction.

The ethical prohibition on a lawyer practicing law in partnership with a nonlawyer that is embodied in Rule 5.4(b) of the ABA Model Rules of Professional Conduct has until very recently been in force in every American jurisdiction.<sup>1</sup> This unanimity, however, was bro-

<sup>1</sup>The ABA's formal prohibitions against lawyer partnerships with non-lawyers date back to 1928, when Canon 33 was added to the Canons of Ethics. Canon 33 provided, in pertinent part, that "partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." Canon 34 prohibited fee splitting with nonlawyers. Canon 35 warned against lawyers being "controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."

In 1989, the Model Code of Professional Responsibility replaced the Canons of Ethics. DR 8-103 car-

ried over Canon 33's prohibition against lawyers forming partnerships with nonlawyers but phrased the prohibition in mandatory rather than merely precatory language. DR 8-102 continued Canon 34's prohibition against fee-splitting with nonlawyers, with certain limited exceptions. DR 8-107(C) prohibited lawyers from practicing law with or in the form of a professional corporation if "(1) a non-lawyer owns any interest therein...; (2) a non-lawyer is a corporate director or officer thereof; or (3) a non-lawyer has the right to direct and control the professional judgment of a lawyer."

In 1983, the ABA Model Rules of Professional Conduct supplanted the Model Code. Model Rule 5.4 incorporated traditional restrictions against lawyer and nonlawyer associations. Rule 5.4(b) reproduced verbatim DR 8-103(A)'s prohibition of lawyer partnerships with nonlawyers. The Model Rule as originally proposed by the Commission on Evaluation of Professional Standards (commonly known as the Kutak Commission) included a proposed Rule 5.4 that would have allowed nonlawyer partners in law firms on somewhat broader terms than those contemplated by the District of Columbia version of Rule 5.4(b); but that proposal was rejected by the ABA House of Delegates in 1983. See *The Legislative History of the Model Rules of Professional Conduct, Their Development in the ABA House of Delegates 160* (ABA Center for Professional Responsibility 1987). Rule 5.4(a) continued the Code's prohibition against fee-splitting with nonlawyers. Rule 5.4(d) is substantially identical to DR 8-107(C).

For a detailed treatment of the history of the ABA restriction on lawyer collaboration with nonlawyers as well as a close consideration of the various arguments for and against such collaborations, see Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 Hastings L.J. 577 (1989).

The history of the D.C. version of Rule 5.4(b) is described in S. Ollbert and L. Lampert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 Georgetown J. Legal Ethics 283 (1988). The D.C. Rules of Professional Conduct, including the variant version of Rule 5.4(b), were adopted by order of the District of Columbia Court of Appeals March 1, 1990, effective January 1, 1991.