

**PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE**

Opinion 2014-3
(May 2014)

The inquirer asks what his obligations are in contacting a former employee of an opposing party. More specifically, the inquirer asks whether he must inform the former employee that s/he has the right to be interviewed with the former employer's counsel present.

The pertinent Pennsylvania Rules of Professional Conduct ("the Rules") are Rules 4.2, 4.3 and 4.4.

Rule 4.2 **Communications with Persons Represented by Counsel** provides:

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

Comment [7] to Rule 4.2 states:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with that matter may be imputed to the organization of the purposes of civil or criminal liability. *Consent of the organization's lawyer is not required for communication with a former constituent*¹.... (Emphasis added.)

The italicized sentence of Comment [7] was added in 2005 and mirrors the language of the Model Rule.

Rule 4.3 **Dealing with Unrepresented Person**, governs communications with unrepresented persons and provides in pertinent part:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure

¹ Officers, directors, employees and shareholders are the "constituents" of a corporate organization. See Rule 1.13, cmt. [1]. In the case of an organization that is not a corporation, a "constituent" means individuals who hold positions equivalent to officers, directors, employees and shareholders. *Id.*

counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interest of the lawyer's client.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Finally, Rule 4.4, **Respect for Rights of Third Persons** provides:

(a) in representing a client, a lawyer shall not use...methods of obtaining evidence that violate the legal rights of [a third] person.

This inquiry is based on the conditions set forth in Formal Opinion 90-142, "Communicating with Employees and Former Employees of Adverse Party," issued by the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility (the "Pa. Bar Committee") in December 1990.² Section V of that opinion sets forth the following four conditions for an attorney's communication with an organization's unrepresented former employees:

(1) the attorney (or anyone under her direction) is prohibited from eliciting or using information that may be protected by the attorney-client privilege;

(2) the attorney immediately must disclose her capacity to the former employee;

(3) if the person contacted requests that her personal attorney or the company's attorney be present for the interview, the request must be honored: and

(4) the attorney should advise such persons that they have the right to refuse to be interviewed or, if they wish, to be interviewed with the company's counsel present. See Pa. Bar Committee Formal Op. 90-142, at pp. 13-14.

This Committee agrees that conditions (1) through (3), as set forth by the PA Bar Committee in 1990 and reaffirmed in 2005, are appropriate. The Committee concludes, however, that to the extent condition (4) was considered mandatory for such communications, that is no longer the case.

First, there is no requirement in the Rules of Professional Conduct or the accompanying comments that an attorney seeking to interview an unrepresented individual is obligated at the outset to advise that individual, affirmatively, that he or she has the right to refuse to be interviewed. Rule 4.3 and the comments to that Rule specifically address the ethical obligations surrounding an attorney's communication with an unrepresented

² The Pa. Bar Committee subsequently issued Formal Opinion 2005-200 to supplement Formal Opinion 90-142 in light of changes to the Rules. Formal Opinion 2005-200, however, did not amend the earlier opinion with respect to the application of Rule 4.2 to *ex parte* communications with former employees. This Committee's opinion is limited to that specific issue.

individual, and they impose no such obligation. To the extent the lawyer comes to know that the unrepresented party does not appreciate the lawyer's role, Rule 4.3(c) provides that the lawyer should make reasonable efforts to clarify his role. In certain contexts, in that circumstance, advising the unrepresented person that she can end the interview may be one of several available corrective steps in order to comply with his or her ethical obligations under this Rule. It is not required, however, at the opening of every such interview.

Second, the changes in the language of Rule 4.2 and supporting comments since 1990, specifically the addition of the language regarding former employees in Comment [7], explicitly remove former constituents from the category of persons deemed to be represented by corporate counsel. These former constituents, therefore, are treated as unrepresented persons with whom attorneys may communicate subject to the ethical obligations set forth in Rule 4.3. This Rule and its comments do not require an attorney to advise a former constituent – or any unrepresented individual – that they have a right to be interviewed with company counsel or, more generally, an attorney present. Accordingly, this Committee concludes that attorneys communicating with unrepresented former constituents are not required to advise them affirmatively that they have a right to refuse to be interviewed or to be interviewed with company's counsel present.

When the Pa. Bar Committee issued Formal Opinion 90-142, the text of Rule 4.2 was similar to the current text, but there was no distinction in the comments between current and former constituents. The current language of Comment [7], quoted above, expressly permits *ex parte* communications with former employees without requiring the attorney to seek the consent of the organization's attorney. The attorney's conduct during such an interview, however, must comply with Rule 4.3, which governs communications with unrepresented individuals and Rule 4.4 prohibiting violating the rights of third persons.

Ethics opinions from other jurisdictions with analogous rules, which have considered this issue since 2005, have consistently affirmed an attorney's right to have *ex parte* communications with former employees of an opposing party corporation, without any suggestion that attorneys advise these former employees that they may refuse to be interviewed or insist on having company counsel present. See *generally*, III. State Bar Assoc. Advisory Op. 09-01 (January 2009) (consent of the organization's lawyer is not required for communication with former constituents about the matter of the representation; cautioning only that the lawyer should exercise care when communicating *ex parte* with a former constituent of a represented organization); Louisiana State Bar Assoc. Rules of Prof. Conduct Committee Public Opinion 07-RPCC-014 (Oct. 12, 2007) (affirming that *ex parte* communications with unrepresented former employees of an organization is not prohibited by Rule 4.2; lawyer must avoid implication that lawyer is disinterested, make reasonable efforts to correct any such misunderstanding, give no legal advice and avoid invasion of the attorney-client privilege).

Most recently, the decision in *State Farm Mutual Automobile Ins. Co. v. Sanders*, Civ. A. No. 12-3052, 2013 U.S. Dist. LEXIS 137829 (E.D. Pa. Sept. 25, 2013), further supports the view that condition (4) no longer applies. In pursuing discovery on its claim that the defendant engaged in “systematic and widespread” medical insurance fraud, *Id.* at *1-2, State Farm sought discovery from former employees of a law firm that represented more than 100 of defendant’s patients in personal injury lawsuits. The Court denied the defendant’s request for a protective order preventing State Farm from directly contacting those former employees. The Court specifically relied on the express language in Comment [7] to Rule 4.2, that consent “of the organization’s lawyer is not required for communication with a former constituent.” *Id.* at *6-7. In allowing these contacts, the Court did not impose any additional conditions.

Of course, these communications are subject to the overarching provisions of Rule 4.4(a), that prohibit a lawyer from using methods of obtaining evidence that violate the legal rights of third persons or that have no substantial purpose other than to embarrass, delay or burden a third person.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.