

**ETHICS OPINION NUMBER 215
OF THE MISSISSIPPI BAR
RENDERED MARCH 4, 1994**

EX PARTE CONTACT WITH FORMER EMPLOYEES OF A REPRESENTED PARTY – In representing a client, a lawyer may ethically communicate, ex parte, with an unrepresented individual that was formerly employed by a represented party. Neither the text nor the comments to Rule 4.2 prohibits such contacts; however, other professional rules of conduct proscribe the attorney's conduct in dealing with unrepresented individuals

BACKGROUND

At the Spring, 1992, meeting of the Board of Bar Commissioners Ethics Opinion Nos. 189 and 192 (previously adopted and published as Formal Interpretive Opinions in *The Mississippi Lawyer*) were withdrawn. An ad hoc committee of three was formed and charged to recommend to the Ethics Committee reconsideration of the opinions. The opinions arose in the context of whether Rule 4.2 prohibited ex parte contacts by an attorney with a former employee of a corporate "party" known to be represented by counsel. According to the Working Draft Committee Report on the matter, the members of the committee discovered two distinctly polar views between which lay variations of both. At one end is the view that there is an ethical prohibition of any contact with any former employee of a party represented by counsel, no matter the level of authority of the former employee or the former employee's involvement in the subject matter in litigation. At the other end is the view that Rule 4.2 of the Rules of Professional Conduct does not prohibit such contact. Although the ad hoc committee did not report a consensus view, it, significantly, recognized that a blanket prohibition on ex parte contact was not justified by the Rule, reason, or prior decisions.

PRIOR OPINIONS

In Opinion No. 189 the issue of whether ex parte contacts with former employees would be permissible in all instances was not reached as it was unnecessary to resolve the issue presented by the request. Under the factual scenario presented, the low-level former employee could be interviewed since they would not have fit within the proscriptions of the comment of Rule 4.2 even while employed. The Opinion did note that other rules, Rules 4.1, 4.3, and 4.4, would govern the manner in which such ex parte interview would be conducted.

In Opinion No. 192, rendered less than three months after Opinion No. 189, it was opined that it was improper, under Rule 4.2, for a lawyer to conduct an ex parte interview of a former employee of a represented party if the former employee's actions could be imputed to the corporation for the purposes of civil liability or whose statements might constitute an admission on the part of the corporation. This conclusion was reached, in part, because the former employee possessed testimony that could either exonerate or implicate his former employer.

Although not withdrawn and not addressed by the ad hoc committee, Ethics Opinion No. 141 allows a lawyer representing a personal injury claimant to communicate with an unrepresented party concerning the facts of the claim and the availability of liability coverage. The Opinion noted that Rule 4.2 was inapplicable to the situation presented because, at the time of the contact, the adverse party was not actually represented by a lawyer in the matter.

THE RULE

Rule 4.2 of the Mississippi Rules of Professional Conduct states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyers knows to be represented by another lawyer in the matter, unless the lawyer has consent of the other lawyer or is authorized by law to do so.

In situations involving individual private parties, the proscription of Rule 4.2 is clear: Unless otherwise authorized by law, contact cannot occur absent consent of the opposing counsel. The comment to the Rule notes that it applies to any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Thus, it seems clear to the Committee that the primary purpose of Rule 4.2 is to prevent improper approaches of those known to be represented by counsel and to protect the attorney/client relationship. See, e.g., *Curly v. Cumberland Farms, Inc.*, 134 F.R.D. 77, (D.N.J. 1991); *Polycast Technology Corp. v. Uniroyal Inc.*, 129 F.R.D. 621 (S.D. N.Y. 1990); Kansas Ethics Opinion No. 92-07, rendered October 23, 1992. Contrarily, the Rule's purpose is not to control the free flow of factual information or impede the time-honored tradition of informal investigation by a lawyer. The Rule is no more designed to protect a corporate enterprise from informal disclosure, by a former employee, of information that damages the enterprise than it is to prevent informal disclosure, by the same former employee, of information that exonerates the enterprise. The issue is not whether the former employee possesses information that exonerates or implicates the enterprise.

The issue is whether the former employee is a person contemplated by the text or comment of Rule 4.2.

As stated above, Rule 4.2's proscription is clear in the context of private parties. The analysis becomes more complicated when one of the parties is a corporate enterprise or other organization. The identification of who is a "party" represented by counsel is less than clear. In this regard, the comment to Rule 4.2 states:

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. (emphasis added)

The issue, then, is whether the above comments to Rule 4.2 could be interpreted broadly enough to include some, all, or none of the former employees of the represented organization.

The Committee finds it significant that the above comment is identical to the comment to ABA Model Rule 4.2 and that the ABA Professional Responsibility Committee, in Formal Opinion No. 91359, declined to expand the application of Rule 4.2 to prohibit ex parte contact with all former employees. The ABA Committee noted:

...the fact remains that the text of the rules 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 loathe, given the text of Model Rule 4.2 and its comments, to expand its coverage to former employees by means of liberal interpretation.

Other states have rendered ethics opinions which allow the contact, including Alaska, Colorado, Oklahoma, and Wisconsin. Additionally, there are numerous reported cases allowing contact and only one case has adopted the view that the Rule prohibits all ex parte contact. While not bound by the reasoning from any other jurisdiction, the Committee finds it persuasive that the majority approach allows for contact, albeit with some proscriptions attached. The proscriptions address the argument that the extension of the corporate attorney/client privilege to lower level employees in the landmark decision of *Upjohn Company v. United States*, 449 U.S. 383 (1981), justifies

cautioning the interviewing lawyer to steer clear of discussions of privileged communications. There is a valid concern in preventing former corporate employees from inadvertently disclosing to an interviewing attorney privileged material obtained or given by them during the course and scope of their employment. This interest does not, however, justify a blanket ban on communications and can be guarded by less stringent measures. See *Polycast Technology Corp. v. Uniroyal Inc.*, 129 F.R.D. at 627-28; Alaska Ethics Opinion No. 91-1 (Jan. 1991). This approach is further supported by the fact that the attorney/client privilege only protects disclosure of communications not underlying facts. In other words, a former employee should not be asked what they said or communicated to the corporate attorney but, rather, inquiries should be limited to what the witness saw or knows about the matter being investigated. Any concern about the likelihood that some former employees will reveal privileged information can best be addressed on a case-by-case basis. It seems clear that counsel for the corporation would be aware of the former employees that possess such information and, in those circumstances, could seek court protection.

CONCLUSION

It is the Committee's opinion, after thorough review of the varying analysis and approaches, that no former employees are "off limits" under Rule 4.2, unless, of course, they are known to be represented by counsel concerning the matter at issue. As noted in Opinion No. 141, the lawyer, in conducting such an interview, must not knowingly make a false statement of material fact or law (Rule 4.1), must not state or imply that the lawyer is disinterested and must never give advice to the unrepresented person other than the advice to obtain counsel (Rule 4.3). Of course, the interviewing lawyer has an affirmative duty under Rule 4.3 to clear up any misunderstanding by the unrepresented party about the lawyer's role. The lawyer must make clear that he is not disinterested and must stick to facts.