

KANSAS RULE OF PROFESSIONAL CONDUCT 4.2

**EX PARTE COMMUNICATION WITH CURRENT
AND FORMER EMPLOYEES OF AN
ORGANIZATION**

**JOHNSON COUNTY BAR ASSOCIATION
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**Isaac Keppler
Colantuono Bjerg Guinn LLC
7015 College Blvd, Suite 375
Overland Park, Kansas
ik@ksmolaw.com**

Every lawyer must investigate his or her case. We learn more about our cases when we are able to speak with individuals who are close to the facts. However, we must be aware of who we can speak with and under what circumstances, as there can be serious consequences for improper ex parte communication with a represented party.

With that in mind, we will discuss Rule 4.2 and the issue of ex parte contacts in the context of an imaginary (but perhaps familiar) set of facts.

Kansas Rule of Professional Conduct 4.2: *“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 a court order.”*

FACT PATTERN

I recently had an interesting consultation with the former office administrator for a small paper company. Her name is Pamela Weasley. Pam told me that she has witnessed and experienced a shocking amount of sexual harassment at work, primarily by her boss – the Regional Manager. For example, the Regional Manager routinely makes inappropriate comments about Pamela’s appearance, has once tried to kiss her, and makes Pamela uncomfortable with “that’s what she said jokes.” Now, I’ve decided to represent Pamela. But, she told me some things that seemed outlandish, and I have a duty to investigate these facts. So I asked Pam for a list of witnesses who could corroborate these outlandish facts. Pam listed several potential witnesses, including:

- The Assistant to the Regional Manager;
- The Human Resources Director (Mr. Flanderson);
- A former corporate employee who has previously worked with in-house counsel and human resources to discipline the Regional Manager (Jen Levinson)

WITNESS #1: Assistant to the Regional Manager. Apparently this gentleman considers himself a very close friend of the regional manager and would have witnessed much of the harassing conduct that will be part of Pam’s case. ***Despite his title***, I’m told he does not direct or supervise counsel, does not authority to “obligate” the organization and, does not routinely consult with counsel for the organization, although he has been interviewed by the Company’s lawyer concerning this matter. He does not have his own lawyer in this matter.

- Does Rule 4.2 prohibit contact with this witness?

Rule 4.2., Comment 7: “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 the matter may be imputed to the organization for purposes of civil or criminal liability”

The Assistant to the Regional Manager:

- Does not supervise, direct or regularly consult with the organization’s lawyer concerning the matter
- Does not or has authority to obligate the organization with respect to the matter
- But, may his acts or omissions in connection with the matter be imputed to the organization for purposes of civil or criminal liability?

WITNESS #2: Mr. Flanderson is the Human Resources Director and regularly consults with the organization’s attorneys and corporate management on issues such as sexual harassment and specific issues such as the regional manager’s behavior. Mr. Flanderson left me a voicemail saying he has all the dirt and knows where all the bodies are buried and wants to help Pamela.

- Can I communicate with Mr. Flanderson?

Prior rule illustrated by Hammond v. City of Junction City, Kansas, 126 Fed. Appx. 886 (Tenth Circuit, 2005) (Unreported Decision).

IMPORTANT: IN 2007, KANSAS AND MISSOURI BOTH ADOPTED AN AMENDED RULE AND THE COMMENTS. PRIOR TO THE AMENDMENT, AS REFLECTED BY *HAMMOND*, THE ANALYSIS OF CONTACTS WITH EMPLOYEES WAS A “MANAGEMENT-SPEAKING TEST” FOCUSED ON WHETHER THE EMPLOYEE HAD MANAGERIAL RESPONSIBILITIES OR IF THE EMPLOYEE’S STATEMENT MAY CONSTITUTE AN ADMISSION OF THE ORGANIZATION.

Hammond pre-dates the 2007 Amendment to the rule. In this case, Plaintiff’s counsel represented city employees in a putative class action. The HR manager would have been a member of that class. Plaintiff’s counsel engaged in ex parte communications with the HR Manager, and the Defendants filed a motion to DQ and sanction counsel. The Court had determined that the HR manager had “managerial status” but also had a direct role in gathering facts and obtaining documents specific to the litigation. **THE HR MANAGER IN *HAMMOND* WOULD HAVE BEEN OFF-LIMITS UNDER THE CURRENT VERSION OF THE RULE AS WELL.**

BECAUSE OF THE EX PARTE COMMUNICATIONS, THE JUDGE DISQUALIFIED PLAINTIFF'S COUNSEL FROM REPRESENTING ANY CLASS BASED ON THE ALLEGATIONS IN THE CASE.

- Does it make a difference that Mr. Flanderson called me?

Rule 4.2, Comment 3: *"The Rule applies even though the represented person initiates or consents to the communication."*

- What if I called Mr. Flanderson back, not knowing who he was, and during the conversation I learn that Mr. Flanderson is the Company's Human Resources Director?

Rule 4.2, Comment 3 (continued) *"A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule."*

WITNESS #3: Jen Levinson is a former corporate Company employee who previously worked directly with HR and in-counsel to discipline the regional manager for the conduct that would be the subject of Pam's lawsuit. I am told she is no friend to the Regional Manager and has offered to talk to me at my convenience.

- Can I contact Jen about this case?

Digital Ally, Inc. v. Z3 Tech., LLC, No. 09-2292-KGS, 2010 WL 11489136, at *3 (D. Kan. Feb. 3, 2010) (Honorable K. Gary Sebelius).

Digital Ally was a breach of contract case (allegations of defective computer modules). In *Digital Ally*, the Plaintiff identified one of its former employees (a lead software engineer) as a person with knowledge of its claims. Without seeking permission, the Defendant's attorney contacted the former employee to discuss the alleged problems with the computer modules. The Plaintiff filed a motion to disqualify defense counsel and a protective order prohibiting the witness from being deposed. The Court denied the motion.

The Court noted that since 2007, Rule 4.2, Comment 7 is clear up the prior dispute: ***"Consent of the organization's lawyer is not required for communication with a former constituent."*** BEFORE THE AMENDMENT, IT WAS MUCH MORE UNCERTAIN WHETHER CONSENT WAS REQUIRED TO COMMUNICATE WITH A FORMER EMPLOYEE.

- I decided to speak with Jen on the phone and she specifically wants to discuss communications she had with the Company's lawyer while she was employed by the Company. Can we discuss these communications?

Rule 4.2, Comment 7 also requires, ***“[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.”***

Kansas Rule of Professional Conduct 4.4 provides, ***“a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”***

Digital Ally, 2010 WL 11489136, at *3. ***“Although an attorney may have ex parte contact with an unrepresented former employee of an organizational party, counsel must ‘take care not to seek to induce or listen to disclosures by former employees of privileged communications.’”***

Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164 MLBDWB, 2007 WL 2122438, at *1 (D. Kan. July 20, 2007)(Honorable Donald W. Bostwick). ***“[W]here an employee is shown to have had extensive exposure to attorney-client privileged materials and where there is a realistic likelihood that privileged information might be disclosed during an ex parte interview, this must be taken into account in deciding whether, or to what extent, to allow ex parte interview of that specific former employee.”***

- I have heard Jen is involved in a current lawsuit against the paper Company involving the same inappropriate conduct of the regional manager. Knowing this, can I still contact Jen directly to discuss?

Rule 4.2, Comment 8: ***“The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.”*** Rule 1.0(g) (definition: “actual knowledge of the fact in question.”)

IMPORTANT: Rule 4.2, Comment 6: ***“A lawyer who is uncertain whether the communication with a represented person is permissible may seek a court order.”*** These questions are too

significant to get wrong. If you're involved in a lawsuit and one of these questions arise, ask the Court to make the decision – better to ask ahead of time than to be arguing why you should not be disqualified from a case.

TOPICS FOR DEBATE (TIME PERMITTING):

TOPIC #1: The lawyer for the Company already knows I represent Pamela and emailed me: “You are instructed that you may not speak to any Company employees at any time.” Does counsel for the Company have authority to prohibit me from speaking with any employees, even those outside the definition of Comment 7?

How would you handle?

TOPIC #2: What if the attorney copies her client on emails she sends to me? Do you reply all?

TOPIC #3: What circumstances would be “otherwise permitted by law”?

TOPIC #4: How has social media complicated this analysis?

SUMMARY

When representing a client, Ex parte communication with a represented party about the subject of the representation is generally prohibited unless you obtain consent from the other party's attorney. You are not prohibited from communicating with the party about *different* topics, and you need not obtain consent to communicate with a former employee. However, be careful that you do not elicit information that is privileged.