Question: May a lawyer representing a client in a matter adverse to an organizational party that is represented by another lawyer, without violating Rule 4.2, communicate about the subject matter of the representation with an unrepresented former employee of the organizational party without the consent of or notification to the organization’s lawyer?

Answer: Yes.


OPINION

This question is coming up with increasing frequency. The Committee is of the opinion that ABA Formal Op. 91-359 provides the correct answer. That opinion collects and reviews the authorities and arguments, and we need not recite them at length. It is sufficient to state that after recognizing that neither Rule 4.2 nor the Comments thereto deal with former employees, the Committee concluded that Rule 4.2 does not bar ex parte contacts with an organization’s former employees. We note that a former employee is no longer subject to the control of the organization nor in a position to speak for the organization, and cannot make vicarious admissions under the state and federal evidence rules.

A lawyer seeking information from a former employee of an organizational party should disclose the lawyer’s identity and the fact that the lawyer represents a party with a claim against the organizational party. See Rule 4.3 and Comment (2) to Rule 4.2. It is incumbent on the party who knows that its former employees possess privileged information to utilize confidentiality agreements and/or seek protective orders. See e.g., Nalian Truck Lines at 472.

We also emphasize that if the former employee is personally represented by counsel in that matter, then counsel may not be bypassed.
Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.