

Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-445
Issued: March 16, 2018

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

Question: with the permission of a government agency may an agency lawyer provide information to members of the public?

Answer: Qualified yes. SCR 3.130(4.3)

Discussion: Some government agencies employ lawyers whose job's description includes a responsibility to answer questions from the general public about the agency's rules and regulations. In Kentucky lawyers are not permitted to give legal advice to a non-client; however, an agency's lawyer may provide general information about her agency's procedures, rules and regulations when general advice is requested. See SCR 3.130(Rule 4.3). The distinction is between providing the non-client with general information about the availability of various options (which is permitted) and advising or recommending to the non-client which option to choose (which is not permitted).

In 2002, following the practice in a majority of states, the ABA Ethics 2000 Commission recommended that Rule 4.3 be amended to allow a lawyer representing a client to give advice to a non-client except when "the lawyer knows or reasonably should know the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." ABA Rule 4.3Comment [2] distinguishes between situations involving unrepresented parties whose interests may be adverse to the client and those in which person's interests are not in conflict with the client." A lawyer may advise a non-client whose interests are not in conflict with the client but may not advise one whose interests are in conflict.

In 2009, however, the KBA Ethics 2000 Committee rejected the ABA proposal and recommended a rule, which was subsequently adopted by the Supreme Court of Kentucky, that prohibits giving advice to non-clients:

In dealing on behalf of a client with a person who is not represented by counsel, the lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest the unrepresented person secure a lawyer.

However, Comment [2] to Kentucky Rule 4.3, copied from the ABA comment to 4.3, suggests that lawyers may provide information, but not advice, to non-clients. The last sentence of Comment [2] provides that so “long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the client’s position as to the meaning of the document or explain the lawyer's view of the underlying legal obligations.” Hence, if a lawyer may provide legal information to an adverse party it follows that a government lawyer may, with the consent of the agency, provide general legal information to members of the public.

Further, if consistent with the interests of the unrepresented person, Rule 3.4(g) permits a lawyer to ask family members and certain employees not to speak to the opposing party or its lawyer. Reading Rule 3.4(g) and Rule 4.3 together, a lawyer may *request*, but may not *advise* an unrepresented person to refrain from giving information to an adverse party.

Many times lawyers for government agencies are called upon to respond to inquiries from the public and, assuming that the government lawyer is acting with the knowledge and consent of her agency, the lawyer may respond to the inquiry if 1) the inquirer is not represented by a lawyer in the matter (or the person’ lawyer has authorized the contact); 2) the lawyer makes it clear to the inquirer that the lawyer is not representing the inquirer; and 3) the lawyer makes it clear to the inquirer that the lawyer is permitted to provide general information but is prohibited from giving advice to any specific course of action. If the inquirer’s questions raise a concern in the government lawyer’s mind that the inquirer’s interests appear to be adverse to the agency, then the lawyer must advise the inquirer to get their own lawyer and warn the inquirer that the agency holds the attorney client privilege.

In Kentucky, although it may be difficult to draw the line between permitted responses to the general public and providing legal advice, the government lawyer is obligated to make every reasonable effort to assure that such distinction is drawn. In those cases where it is not clear,

then the government lawyer and the agency are better served by the government's lawyer not giving advice other than suggesting to the inquirer that they seek the advice of their own lawyer.

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. This Rule provides that formal opinions are advisory only.