

Ethics Informational Packet

COMMUNICATION WITH ADVERSE PARTY

Courtesy of
The Florida Bar
Ethics Department

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FLORIDA BAR ETHICS OPINION
OPINION 09-1
December 10, 2010

Advisory ethics opinions are not binding.

A lawyer may not communicate with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. A lawyer may communicate with other agency employees who do not fall within the above categories, and may communicate with employees who are considered represented by State Agency's lawyer on subjects unrelated to those matters in which the agency lawyer is known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party in making those contacts. Lawyers communicating with agency personnel are cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. If a lawyer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, the lawyer should ask State Agency's lawyer if the person is represented in the matter before making the communication.

Note: This opinion was approved as revised by the Board of Governors at its December 10, 2010 meeting.

RPC: 4-4.2, 4-4.3

Opinions: 78-4, 87-2

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the Inquiring Lawyer's letter are as follows.

Inquirer's firm represents financial institutions in applying for charter approvals and other necessary approvals with State Agency and federal regulatory agencies, and also in regulatory issues that may arise with such agencies. Occasionally, Inquirer's firm may represent clients in administrative or judicial proceedings in which State Agency is the opposing party.

Inquirer's firm currently is representing four clients in administrative or judicial proceedings involving State Agency which handles state regulatory matters involving the licensing, examination, and supervision of financial institutions. Legal counsel for State Agency has advised Inquirer's firm that all communications to any employee of State Agency from any lawyer in the firm pertaining to any of the firm's clients must go through the legal department of State Agency, even when such client matters are not connected in any way to the four litigation cases. The Inquirer asks whether Inquirer's firm is prohibited by Rule 4-4.2 from directly communicating with all employees of State Agency, when such communications do not pertain to any adversarial proceeding between the firm's clients and State Agency.

Rule 4-4.2 of the Rules of Professional Conduct of The Florida Bar is the governing ethical standard:

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. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

The Comment to the rule states, in relevant part:

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter...and the uncounseled disclosure of information relating to the representation.

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

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 for purposes of civil or criminal liability...

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. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

Several issues must be considered in responding to the requested advisory opinion. The first is whether all persons within an organization are deemed to be represented by the organization's counsel for the purposes of this rule. As indicated in the comments to Rule 4-4.2 quoted above, a lawyer would be ethically precluded from communicating with employees of governmental entities or agencies who are considered represented by the government's lawyer for purposes of this rule with regard to matters on which the agency is known to be represented by a lawyer unless the entity's lawyer consents to the communication.

Florida Ethics Opinion 78-4 addresses this sometimes difficult question of who within an organizational structure is considered to be a "party" within the meaning of the rule. (Opinion 78-4 was decided under the old Code of Professional Responsibility, which prohibited ex parte contacts with a "party" represented by counsel. While the current rule refers to a "person" represented by counsel, the rationale of the opinion nevertheless remains applicable here.) Attempting to balance one party's need to conduct pre-suit investigation by interviewing certain members of the opponent corporation against the organization's interest in preventing the unadvised disclosure of particular information, the Committee declined to adopt a rule that would prohibit all contacts with organizational employees no matter how removed from the conduct in question. Instead, the Committee found ex parte communications improper only with regard to employees who are "officers, directors or managing agents" but not other employees "unless they have been directly involved in the incident or matter giving rise to the investigation or litigation." In Florida Ethics Opinion 87-2, the Committee extended the rationale of Opinion 78-4 to government entities and noted that the Comment to Rule 4-4.2, in addition to precluding direct contact with an agency's management, also would preclude unauthorized communications with persons whose acts or omissions in connection with the matter could be imputed to the organization.

Thus, regarding a matter in which State Agency is represented, Inquirer and the firm must obtain the consent of State Agency's lawyer before communicating with State Agency's officers, directors or managers, or employees who are directly involved in the matter, or with public officials or employees whose acts or omissions in connection with the matter can be imputed to State Agency.

The second issue that must be addressed is when the prohibition arises. Rule 4-4.2 is not limited to matters in litigation and may extend to matters on which litigation has not yet commenced, as well as to specific transactional or non-litigation matters on which the agency's lawyer is providing representation. Pursuant to the language of the Comment, however, direct communications with represented persons, including protected employees, on matters other than specific matters for which the agency lawyer is providing representation are permissible. See Florida Ethics Opinion 94-4. Moreover, the Comments limit the scope of the Rule to those circumstances where "the lawyer knows that the person [agency] is in fact represented in the matter to be discussed." Thus, an agency lawyer need not enter a formal appearance in order to "in fact" represent his or her agency on a particular matter, nor must the agency lawyer give other lawyers formal notice of such representation. However, as suggested by the Comment, there must be actual knowledge by the non-agency lawyer of representation by the agency lawyer on the matter being discussed in order for Rule 4-4.2 to apply; but such actual knowledge may be inferred from the circumstances. As a consequence, Inquirer and the firm are not precluded from communicating with employees or any other employee of State Agency

regarding subjects unrelated to those specific matters on which the representation of the State Agency's lawyer is known to Inquirer and the firm. In this instance, however, the Inquirer or members of the firm may be required to identify himself or herself as a lawyer representing a client to comply with Rule 4-4.3 Dealing with Unrepresented Persons.

The final question that must be resolved is whether, because State Agency has a general counsel, the general counsel is effectively representing the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the State Agency's public officials and employees on all subjects. The Comments described above suggest that this is not the intent of the Rule. In addition, the Comments to the Rule expressly recognize that lawyers with an "independent justification" may communicate with a represented party.

Florida Ethics Opinion 78-4 also addresses this issue. The Professional Ethics Committee addressed two questions:

(1) When is a party sufficiently "represented by a lawyer" to require application of DR 7-104(A)(1) so as to prohibit communication with the party and, in specific, must litigation have commenced for the DR to apply? (2) Where a potential suit or pending suit involves a corporation, who in the corporate structure is considered to be a "party" within the meaning of the (Rule)?

The Committee's unanimous answer to the first question is that representation of a party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced. In the opinion of the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney.

Florida Ethics Opinion 87-2 extended the rationale of Opinion 78-4 to government agencies, as discussed above, and made no exception for contacts with personnel of government agencies.

In view of the Comments' clarification that there must be knowledge that the other party is represented in a particular matter and that the bar on communications does not apply to matters outside the representation, Rule 4-4.2 should not be read to bar all communications with government officials and employees merely because the government entity retains a general counsel or other continuously employed lawyers. Conversely, the rule cannot be read to allow lawyers representing a client to approach represented public officials and employees to make inquiry about a matter, the status of a matter, or obtain statements about a matter without affording such officials and employees an opportunity to discuss with government counsel the advisability of entertaining the communication. If the lawyer representing a client knows that the public official or employee is represented in the matter, the lawyer must obtain the prior consent of the government lawyer. If the lawyer representing a client does not know that the public official or employee is represented in a matter, the lawyer should inquire whether the person is represented in the matter. In all instances, to comply with other provisions of the

Rules, the lawyer must identify himself or herself to the public official or employee as a lawyer who is representing a client. Rule 4-4.3 and Florida Ethics Opinion 78-4.

In conclusion, Rule 4-4.2, as clarified by its Comments, prohibits communications with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. The Rule does not prohibit a lawyer from communicating with other agency employees who do not fall within the above categories, nor does it prohibit a lawyer from communicating with employees who are considered represented by State Agency's lawyer for purposes of this rule on subjects unrelated to those matters in which the agency lawyer is actually known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party. Rule 4-4.3 and Florida Ethics Opinion 78-4.

Lawyers communicating with agency personnel must be cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. The right to communicate directly with agency personnel about matters unrelated to those on which the agency lawyers are providing specific legal representation must not be used as a vehicle for engaging in communications that are barred by the rule. If the Inquirer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, Inquirer should ask State Agency's lawyer if the person is represented in the matter before making the communication. In all instances, the Inquirer may be required to identify himself or herself as a lawyer who is representing a client.

FLORIDA BAR ETHICS OPINION
OPINION 90-4
July 15, 1990

Advisory ethics opinions are not binding.

Florida Rule 4-4.2 (communication with person represented by counsel) contains no exception for activities of U.S. Department of Justice attorneys.

- RPC:** 4-4.2
- Opinions:** 78-4, 87-2, 88-14; Alabama Opinion 89-108
- Cases:** *Suarez v. State*, 481 So.2d 1201 (Fla. 1985); *United States v. Hvass*, 355 U.S. 570, 78 S.Ct. 501 (1958); *United States v. Klubock*, 639 F.Supp. 117 (D.Mass. 1986), aff'd 832 F.2d 664 (1987)
- Misc:** Supremacy Clause, U.S. Constitution; Rule 1-3.2(a), Rules Regulating The Florida Bar; ABA Model Code DR 7-104(A)(1); ABA Model Rule 4.2; Rule 4(K)(1), General Rules of the U.S. District Court for the Northern District of Florida; Rule 2.04(c), Rules of the U.S. District Court for the Middle District of Florida; Rule 4B., Rules of Disciplinary Enforcement for the Southern District of Florida

A member of The Florida Bar has requested the Committee's view regarding the applicability of Rule 4-4.2 to attorneys employed by the United States Department of Justice. The member's inquiry was prompted by a 1989 memorandum issued by the United States Attorney General to all Justice Department litigators. In that memorandum, the Attorney General expressed his belief that DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct, should not be read in an "expansive" way that would prohibit certain Justice Department communications with suspects or witnesses who are represented by counsel. The memorandum stated that the issue of the applicability of these rules has arisen in primarily two situations: (1) covert contacts (or, less frequently, overt interviews) with a suspect after the suspect has retained counsel; and (2) multiple representation situations (i.e., where a single attorney purports to represent either several individuals or a corporation and all of its employees).

The memorandum advances two primary reasons why a state's version of DR 7-104(A)(1) or Rule 4.2 should not apply to Justice Department attorneys in the above situations. First, the memorandum asserts that such communications are expressly excepted from those rules because they are "authorized by law." Second, the memorandum states that the Supremacy Clause of the United States Constitution prohibits states from interfering with Justice Department attorneys in the performance of their duties.

The relevant Florida Rule of Professional Conduct is Rule 4-4.2, Rules Regulating The Florida Bar, which 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.

Florida's Rule 4-4.2 differs in two significant respects from the corresponding ABA Model Rule. The Florida rule governs communication with "a person" represented by counsel, while the ABA rule applies to communication with a represented "party." (The Report of the Florida Bar Special Study Committee on the Model Rules of Professional Conduct indicates that this change was a deliberate one, designed to broaden the scope of the rule.) And, more importantly in the Committee's view, the Florida rule does not contain the "or is authorized by law" exception that is found in the ABA rule.

The Committee is of the opinion that Rule 4-4.2 applies to *all* members of The Florida Bar (as well as to those nonmembers practicing in Florida pursuant to Rule 1-3.2(a)), including Justice Department attorneys in the situations described in the memorandum. Rule 4-4.2 contains no exceptions for particular categories of attorneys and the Committee declines to read into the rule any such exceptions. Moreover, the Supreme Court of Florida has stated that the rule applies to the conduct of prosecutors in criminal cases. See *Suarez v. State*, 481 So.2d 1201 (Fla. 1985).

The two arguments advanced in the memorandum do not compel the Committee to reach a different conclusion. As noted, Florida Rule 4-4.2 does not contain the exception for communications "authorized by law" that is relied upon so heavily in the memorandum. Furthermore, the Supremacy Clause argument is not persuasive for two reasons. In the federal district courts for all three Florida districts (Northern, Middle, and Southern Districts), the *Florida* Rules of Professional Conduct govern the conduct of attorneys admitted to those federal bars. See Rule 4(K)(1), General Rules of the U.S. District Court for the Northern District of Florida; Rule 2.04(c), Rules of the U.S. District Court for the Middle District of Florida; Rule 4B., Rules of Disciplinary Enforcement for the Southern District of Florida. Because Florida Rule 4-4.2 has been adopted by those federal courts, it is considered federal law. See *United States v. Hvass*, 355 U.S. 570, 574-75, 78 S.Ct. 501, 504 (1958). Thus there can be no Supremacy Clause problem in applying Rule 4-4.2 to the activities of Justice Department attorneys practicing in Florida.

Additionally, the Committee is of the opinion that the Supremacy Clause argument is unpersuasive for the reason expressed by the federal district court in *United States v. Klubock*, 639 F.Supp. 117, 126 (D.Mass. 1986), *aff'd* 832 F.2d 664 (1987). In evaluating a claim by federal prosecutors that a state court rule was invalid under the Supremacy Clause, the court stated that regulation of the legal profession is a proper exercise of state power and that a Supremacy Clause problem would arise only if the state's rule regulated the federal attorneys' conduct in a manner that created an actual conflict with some provision of federal law.

The Committee acknowledges the potential problems raised in the memorandum, but believes that Rule 4-4.2 can be applied in a manner that minimizes or eliminates those concerns. In covert investigation situations, for example, applying the rule according to its express terms should not impede most covert investigations. A Justice Department attorney's knowledge that a person is represented in connection with a particular matter is required before the rule is triggered. In the case of an undercover investigation, it seems unlikely that the typical suspect will be represented with respect to that particular matter because at that time he or she usually will not be aware that there is a "matter." The memorandum also raises the concern that career criminals will retain "house counsel" in an effort to use Rule 4-4.2 to frustrate investigations. The Committee believes that a relatively small number of criminals have "house counsel" on

permanent retainer; with respect to those few who do, it can be argued that the rule would not be triggered until the suspect referred the particular matter in question to his or her “house counsel.” (In this respect, the committee notes that its Opinion 78-4, concerning communication with someone’s general counsel, should be limited to the civil context.)

Regarding multiple representation situations, the Committee’s previous opinions clearly indicate that not all corporate employees are considered to be represented by the corporation’s counsel for purposes of Rule 4-4.2. See Opinions 78-4; 87-2. See also Comment to Rule 4-4.2; Opinion 88-14. With regard to conflict of interest situations (e.g., where a corporate employee believes that corporate counsel is not representing his or her interests, or where one of several individuals represented by a single attorney believes that the attorney is not representing his or her interests), the Committee agrees with the position expressed by the Alabama State Bar Disciplinary Commission in its Opinion 89-108. In that opinion, the Commission concluded that it was not unethical for a federal prosecutor, despite corporate counsel’s objections, to communicate directly with a corporate officer about possible criminal conduct in which the officer and the corporation had engaged after the officer’s personal attorney had initiated contact with the prosecutor and had given permission for the communication.

This opinion was adopted by unanimous vote of the Committee.

FLORIDA BAR ETHICS OPINION
OPINION 88-14
March 7, 1989

Advisory ethics opinions are not binding.

A plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of corporation's attorney.

Note: This opinion was approved by the Board of Governors at its March 1989 meeting. While opinion 88-14 permits certain direct contacts with former employees of a represented corporation, it does not purport to address the possibility of disqualification in litigation. See *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So.2d 541 (Fla. 1997). But see, *Rentclub v. Transamerica*, 811 F.Supp. 651 (M.D. Fla. 1992), aff'd 43 F.3d 1439 (11th Cir. 1995).

RPC: 4-4.2; ABA Model 4.2
CPR: DR 7-104(A)(1)
Opinions: Alaska 88-3, Colorado 69, Illinois 85-12, Los Angeles Co. 369, Maryland 86-13, Massachusetts 82-7, Michigan CI-597, N.Y. City 80-46, N.Y. County 528, Virginia 533, Wisconsin E-82-10
Case: *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984)
Statutes: F.S. 90.803(18)(e); Florida Evidence Code
Misc: Fed.R.Evid. 801(d)(2)(D)

The inquiring attorney's law firm represents the plaintiffs in a civil action against a corporation. The attorneys wish to have ex parte interviews with former employees of the defendant corporation who were employed by the corporation during the period when the actions or decisions on which the suit is based occurred. The former employees may include some who had managerial responsibilities and some whose acts or omissions during their employment might be imputed to the corporation for purposes of civil liability. As is usually the case, the defendant corporation objects to ex parte contacts with its former employees.

The issue is whether Rule 4-4.2, Rules Regulating The Florida Bar, proscribes the plaintiffs' attorneys from contacting former managers and other former employees of the defendant corporation except with the permission of the corporation's attorneys. As regards former managers and other former employees who have not maintained any ties with the corporation—who are no longer part of the corporate entity — and who have not sought or consented to be represented in the matter by the corporation's attorneys, the answer must be in the negative.

Rule 4-4.2 is substantially the same as its predecessors in the Code of Professional Responsibility (DR 7-104(A)(1)) and the earlier Canons of Professional Ethics (Canon 9). (The American Bar Association's "code comparison" for Model Rule 4.2 states that the rule is "substantially identical" to DR 7-104(A)(1).)

The rule forbids a lawyer to communicate about the subject of the representation with a person the lawyer knows to be represented in the matter unless the lawyer obtains the permission of the person's counsel. The comment to the rule states that in the case of organizations (including corporations), the rule prohibits ex parte communications 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." The comment further states that if an agent or employee of the organization is represented by his or her own counsel in the matter, then it is the consent of that lawyer—not the organization's lawyer—that must be obtained.

Nothing in Rule 4-4.2 or the comment states whether the rule applies to communications with former managers and other former employees. To the extent that the comment implies that the rule does apply to these individuals, it is contrary to ethics committees' interpretation of the rule.

Rule 4-4.2 cannot reasonably be construed as requiring a lawyer to obtain permission of a corporate party's attorney in order to communicate with former managers or other former employees of the corporation unless such individuals have in fact consented to or requested representation by the corporation's attorney. A former manager or other employee who has not maintained ties to the corporation (as a litigation consultant, for example) is no longer part of the corporate entity and therefore is not subject to the control or authority of the corporation's attorney. In many cases it may be true that the interests of the former manager or employee are not allied with the interests of the corporation. In such cases the conflict of interests would preclude the corporation's attorney from actually representing the individual and therefore would preclude the corporation's attorney from controlling access to the individual. As the comment indicates with regard to current employees, if a former manager or former employee is represented in the matter by his personal attorney, permission of that attorney must be obtained for ex parte contacts, including contacts by the corporation's attorney.

A former manager or employee is no longer in a position to speak for the corporation. Further, under both the federal and the Florida rules of evidence, statements that might be made by a former manager or other former employee during an ex parte interview would not be admissible against the corporation. Both Rule 801(d)(2)(D), Federal Rules of Evidence, and Section 90.803(18)(e), Florida Evidence Code, provide that a statement by an agent or servant of a party is admissible against the party if it concerns a matter within the scope of the agency or employment and is *made during the existence of the agency or employment relationship*.

This Committee has not previously had occasion to issue an opinion on the question of communicating with former managers and employees but, as indicated above, bar ethics committees in a number of states have done so. The clear consensus is that former managers and other former employees are not within the scope of the rule against ex parte contacts. Alaska Bar Opinion 88-3 (6/7/88) (Former employees are no longer part of corporate entity and no longer can act or speak on behalf of corporation; opposing lawyer therefore may contact former employees, including former members of corporation's control group who dealt with subject matter of litigation, but may not inquire into privileged communications); Colorado Bar Opinion 69 (Revised) (6/20/87) (Former employee cannot bind corporation as matter of law; lawyer may

interview opposing party's former employees with regard to all matters except communications within corporation's attorney-client privilege); Illinois Bar Opinion 85-12 (4/4/86) (Former employees, including those who were part of corporation's control group, may be contacted without permission of corporate counsel; direct communications with former control group employees may elicit information adverse to corporation, but that direct contact no more deprives corporation of benefit of counsel than does direct communication with any potential witness); Los Angeles County, Calif., Bar Opinion 369 (11/23/77) (Although ethical dangers may be posed if rule prohibiting ex parte contacts is not extended to former controlling employees, no authority is found to support such extension); Maryland Bar Opinion 86-13 (8/30/85) (Lawyer may communicate with former employee of adverse corporate party if former employee is not represented by counsel).

Also, Massachusetts Bar Opinion 82-7 (6/23/82) (Lawyer may communicate with former employees of corporate defendant regarding matters within scope of their employment; former employees enjoy no current agency relationship that is being served by corporate counsel's representation); Michigan Bar Opinion CI-597 (12/22/80) (Plaintiff's attorney may communicate with prospective witness, who is former employee of corporate defendant, on subject matter of representation if employee is unrepresented); New York City Bar Opinion 80-46 (Former employees are no longer part of corporate entity and may be contacted ex parte); New York County Bar Opinion 528 (1965) (Although direct communication with any current manager or employee of defendant corporation is improper, restriction does not apply to communications with former employees); Virginia Bar Opinion 533 (12/16/83) (Lawyer may communicate directly with former officers, directors and employees of adversary corporation on subject of pending litigation unless lawyer has reason to know those witnesses are represented by counsel); Wisconsin Bar Opinion E-82-10 (12/82) (Lawyer may contact former employee of opposing party to obtain material information even though former employee was managing agent, if former employee has severed all ties with corporation and therefore is not in position to commit corporation).

See *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984). In *Wright*, the Washington Supreme Court ruled that because former employees cannot possibly speak for a defendant corporation, the rule against communicating with adverse parties does not apply. The court found no reason to distinguish between former employees who witnessed an event and those whose act or omission caused the event. The court said the purpose of the communication rule is not to protect a corporate party from revelation of prejudicial facts, but rather to preclude interviewing of employees who have authority to bind the corporation.

As stated above, it is ethically permissible for the inquiring attorney to contact former managers and other former employees of the opposing party without obtaining permission from the corporation's attorney unless those former employees are in fact represented by the corporation's attorney. But as indicated by some of the ethics committees cited above, the attorney should not inquire into matters that are within the corporation's attorney-client privilege (e.g., asking a former manager to relate what he had told the corporation's attorney concerning the subject matter of the representation).

FLORIDA BAR ETHICS OPINION
OPINION 87-2
May 1, 1987

Advisory ethics opinions are not binding.

When the opposing party is a government agency represented by counsel, an attorney may not communicate concerning the matter with the agency's management or any other employee whose act or omission in connection with the matter may be imputed to the agency or whose statement may constitute an admission on the part of the agency, unless consent of the agency's counsel is obtained.

CPR: DR 7-104(A)(1)

RPC: 4-4.2

Opinions: 68-20, 78-4

The inquiring attorney seeks clarification of Florida ethics opinions on the issue of communications with officials and staff of a government entity that is the opposing party in litigation or some other controversy. The opinions in question primarily are staff opinions issued subsequent to the Committee's Opinion 78-4, which addresses communications with corporate parties.

The attorney provides representation for certain individuals committed to a state hospital. This representation includes habeas corpus petitions challenging the legality of a client's continued commitment to the hospital. The hospital administrator is the named defendant. An issue, or the issue, in this litigation is the content or implementation of the hospital's habilitation plan for the client (a habilitation plan is required for any mentally retarded person committed to the hospital). Another issue in the litigation may be the medication prescribed or given to the client.

The attorney's position appears to be that although he should obtain the consent of the hospital's counsel before interviewing hospital administrators or staff who "have authority to speak and to bind the hospital administration by what they say and do," he should not have to obtain counsel's consent to interview hospital staff who provide professional or direct care services to the patients. These employees include psychologists and social workers, who apparently are the staff responsible for developing and implementing the habilitation plans and the staff who administer medication.

DR 7-104(A), which was superseded by Rule of Professional Conduct 4-4.2 on January 1, 1987, provided:

During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

For corporate parties, the Professional Ethics Committee in Opinion 78-4 applied the disciplinary rule as follows:

(1) If a corporation has a general counsel representing it in all legal matters, the opposing lawyer must communicate with the general counsel regarding the matter in question unless he has the general counsel's prior consent to communicate with the corporate party.

(2) The restriction on communications applies for officers, directors, managing agents and "*other employees* [who] have been *directly involved in the incident or matter* giving rise to the investigation or litigation." [Emphasis supplied.]

(3) The opposing party's attorney, in communicating with a corporate representative or employee, should make no statement that would mislead or deceive that employee, and he (or his agent) must identify the capacity in which he is conducting the investigation.

In Opinion 78-4 the committee distinguished or overruled its earlier Opinion 68-20 [since withdrawn] as being too restrictive, particularly when litigation has not yet commenced, of opposing counsel's right to interview a party's employees "who are sufficiently removed from the management of the company and from the potentiality of themselves being a defendant . . . so as to not reasonably be considered a 'party' to be represented by the corporation's counsel."

Opinion 68-20 [since withdrawn] found "no impropriety in an attorney representing a party in dealings with the State Road Department contacting any member of the State Road Board, or its staff in connection with the interests of his client, so long as the matter in issue has not been referred [by] the Board or its staff to its legal department." The Committee continued: "Of course, when such matters are referred to the legal department (which of course would be true in the case of all litigation) the attorney should deal *only with the legal division* of the State Road Department." [Emphasis supplied.]

The Committee cautioned that "because of the wide variation in function, composition, and jurisdiction of state and other public agencies," its opinion was limited to the State Road Department. The Committee has never returned to the matter of communications with officials and employees of government agencies to develop any distinctions between types of agencies or entities.

The Comment RPC 4-4.2, which is essentially the same as DR 7-104(A)(1), supports the Committee's interpretation of the disciplinary rule's application to corporate parties. The Comment also indicates that the proposed rule applies to any "organization," including government agencies. The Comment states in pertinent part:

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 supplied.]

It appears that other states commonly apply the corporate party rule to government agencies. It further appears that the Committee's approach to communications with corporate officials and employees is the mainstream approach. Some ethics committees and courts have stated a more liberal rule, while others are much more restrictive of communications with employees.

Opinion 78-4 is a thoughtful attempt to balance an attorney's need to properly prepare and investigate litigation and a corporate/government/organizational party's interest in avoiding opposing counsel's elicitation of damaging uncounseled statements from officials or employees whose statements would commit, bind or be deemed admissions of the entity. Such entity representatives include not only management, but also those employees whose acts or omissions are at issue in the litigation (in the words of Opinion 78-4, those employees who were "directly involved in the incident or matter"). *Not* included are employees who are mere witnesses, having no responsibility for the matter in question. Opposing counsel is free to interview the latter employees without the prior consent of the entity's counsel.

It appears to be the inquiring attorney's position that at least some government agencies should be treated differently from corporations. Specifically, he appears to be contending that because of the "nature" of his clients' commitment to the hospital and "the lack of alternative resources for information," the hospital's professional and direct care staff should be accessible without the prior consent or presence of the hospital's counsel, and without resort to formal discovery, even if they are the individuals directly responsible for the matter at issue and would be treated as parties under Opinion 78-4.

In terms of the "lack of alternative resources for information," the attorney does not seem to be in a position different from that of most attorneys representing any client against any party, whether an individual or some kind of organizational entity. Further, the attorney does not explain how or why the "nature" of his clients' commitment justifies or warrants a departure from the guidelines provided by Opinion 78-4.

Public policy arguments (based on government agencies' unique responsibility to the public at large and to the particular segments of society served by those agencies) can be made for granting attorneys greater access to employees of government-agency defendants than to employees of corporate defendants. See Note, "DR 7-104 of the Code of Professional Responsibility Applied to the Government 'Party,'" 61 Minnesota L. Rev. 1007-1034 (1977). However, that result is not suggested by Rule 4-4.2.

In conclusion, the guidelines set out in Opinion 78-4 for communications with managers and employees of corporate parties apply to government-agency parties as well. Under these guidelines, if the professional and direct care staff in question have been directly involved in the matter underlying the litigation, the inquiring attorney must obtain the consent of the hospital's counsel before the interviews them about the matter.

**FLORIDA BAR ETHICS OPINION
OPINION 78-4**

Advisory ethics opinions are not binding.

For purposes of the rule on communicating with a party, representation of a party commences whenever an attorney-client relationship has been established with regard to a particular matter, regardless of whether litigation has commenced. If an individual or corporation has general counsel representing that party in all legal matters, communications must be with the attorney. A corporate party's officers, directors and managing agents are "parties" for purposes of communications, but other employees of the corporation are not unless they have been directly involved in the incident or matter giving rise to the investigation or litigation.

Note: This opinion was decided under the former disciplinary rules, which were replaced by the Rules of Professional Conduct in 1986. DR7-104(A)(1), quoted in its entirety in this opinion, contains the "authorized by law" exception which does not appear in Rule 4-4.2.

CPR: DR 7-104(A)(1)
Opinions: 68-20, ABA Informal Opinion 1362

Mr. Richman stated the opinion of the committee:

The Committee is asked two questions concerning the application of DR 7-104(A)(1), which states:

During the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The two questions are: (1) When is a party sufficiently "represented by a lawyer" to require application of DR 7-104(A)(1) so as to prohibit communication with the party and, in specific, must litigation have commenced for the DR to apply? (2) Where a potential suit or pending suit involves a corporation, who in the corporate structure is considered to be a "party" within the meaning of the DR?

The Committee's unanimous answer to the first question is that representation of a party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced. In the opinion of the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney. This, of course, presupposes that, as required by DR 7-104(A)(1), the lawyer "knows" of the existence of such representation. In the opinion of four dissenting members of the Committee, where general counsel is involved there would be no bar to communication until the particular matter has been referred to general counsel for handling by the party.

The second question presents greater difficulty with regard to where or whether to draw the line as to a corporation. The closest precedent in Florida is Opinion 68-20 [since withdrawn] which found that:

There is no impropriety in an attorney representing a party in dealings with the State Road Department contacting a member of the State Road Board or its staff in connection with the interest of his client, so long as the matter and issue have not been referred by the Board or its staff to its legal department.

The present Committee is sharply divided on this question. The majority would distinguish this prior opinion or overrule it to the extent of holding that it is too restrictive upon the right to interview certain members of a corporation when balanced against the need to properly prepare and investigate litigation, particularly where litigation has not yet commenced.

By way of example, prior to instituting litigation, plaintiff's attorney has both a need and an obligation to gather sufficient facts to determine whether to commence litigation. In addition, particularly in a large corporation, there may be numerous employees who are sufficiently removed from the management of the company and from the potentiality of themselves being a defendant in the potential or actual litigation so as to not reasonably be considered a "party" to be represented by the corporation's counsel.

Accordingly, in the opinion of the majority of the Committee, DR 7-104(A)(1) will apply to officers, directors, or managing agents of the corporation but will not apply to other employees of the corporation unless they have been directly involved in the incident or matter giving rise to the investigation or litigation. The Committee further suggests that to comply with the spirit of DR 7-104(A)(1) and in drawing the line at this point, the attorney should make no statement which would have the effect of deceiving or misleading the employee, and the attorney or the attorney's agent must specifically identify the capacity in which they are conducting the investigation.

The several dissenting members of the Committee would follow ABA Informal Opinion 1362 and the minority view of a number of ethics opinions relating to this subject as issued by other states to the effect that no employee of a corporation, no matter how remote, can be the subject of communication once litigation has commenced or once the attorney knows, as set forth in Florida Opinion 68-20 [since withdrawn], that the matter in issue is being addressed or considered by an attorney for the corporation.

FLORIDA BAR ETHICS OPINION
OPINION 76-21
April 19, 1977

Advisory ethics opinions are not binding.

A lawyer who suspects that opposing counsel's client is not receiving settlement offers and other vital information concerning pending litigation may not himself transmit such information to the adverse party.

Canons: 8, 9, Canons of Professional Ethics
CPR: DR 1-102, 1-103; EC 7-7, 7-8, 7-11; DR 7-104(A)(1)
Opinions: 74-52, 76-26; ABA Formal 124, 326

Vice Chairman Lehan stated the opinion of the committee:

A lawyer strongly suspects that opposing counsel is not conveying to the opposing counsel's client, which is an insurance company, information such as a settlement offer, concerning a dispute between the lawyers' clients. He inquires whether he may, without the consent of opposing counsel and in the face of a specific request from opposing counsel that he not do so, send opposing counsel's client copies of letters written by him to opposing counsel containing such information.

He recognizes the existence of DR 7-104(A)(1) as to restrictions on communicating with one of adverse interest. But he suggests that the intent of DR 7-104(A)(1), in its provision as to a lawyer not being permitted to "communicate" with the other lawyer's client, may be to prohibit only discussions with that client out of the presence, and without the knowledge, of opposing counsel. He further suggests that communications to a relatively sophisticated adverse party, such as an insurance company, may not be covered by DR 7-104(A)(1).

The Committee answers the Inquiry in the negative.

DR 7-104(A)(1) provides:

During the course of his representation of a client a lawyer shall not . . . [c]ommunicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

To exclude from the proscriptions of those provisions of the Code letters to an adverse party, and include only discussions as suggested by the inquiring attorney, would not only be contrary to the specific terms of DR 7-104(A)(1) but would emasculate the meaning and intent of its provisions. To "communicate" information is to transmit that information, whether or not the information is discussed with the party to whom it is communicated. The purpose of DR 7-104 is to promote the best functioning of the legal system through advice or assistance being given to a party by his own counsel who represents that party's interests and not by counsel with adverse interests. See EC 7-11.

DR 7-104(A)(1), in its reference to communicating with “a party,” does not exclude insurance companies or any other party who might be thought to be relatively “sophisticated.” To interpret the Disciplinary Rule to exclude from its provisions such a party would also emasculate its meaning because a lawyer with adverse interests could thereby avoid the Rule by making his own subjective determination, however debatable, as to who is “sophisticated” and who is not, whether the party be a natural person or a business entity. Sophistication, like beauty, is in the eye of the beholder.

This conclusion is supported by Opinion 74-52. See also Opinion 76-26. The headnote of ABA Formal Opinion 124, decided under former Canon 9, also states that, “an attorney may not negotiate a settlement with an adverse party represented by counsel without the knowledge and consent of such counsel.”

Under the present inquiry the grounds for the attorney’s strong suspicion that opposing counsel is not conveying information to his client are not given, and we have not been presented with, and do not decide, any question as to possible ethical violation by the counsel for the insurance company. But we note the provisions of DR 1-103 and DR 1-102 as to a lawyer’s obligation to report ethical violations to a grievance committee and ABA Formal Opinion 326, decided with reference to EC 7-7, EC 7-8 and former Canon 8, stating that “a lawyer should inform his client of all settlement offers made by the opposing party.”

FLORIDA BAR ETHICS OPINION
OPINION 70-33
November 16, 1970

Advisory ethics opinions are not binding.

It is permissible for a plaintiff's attorney to negotiate with adjusters of an insurance carrier that is represented by defense counsel in the matter, provided such negotiations are with knowledge and consent of the defense counsel.

Opinions: 63-19, 65-62

Chairman Massey stated the opinion of the committee:

An inquiring attorney advises he represents a client in a wrongful death suit while the defense counsel is representing the active tortfeasors who are natural persons and also the insurance carrier. He is confronted with the insurance carrier requiring that settlement negotiations be handled through an adjuster employed by the insurance carrier who is not a member of The Florida Bar. The question posed is whether it is unethical to negotiate with the adjuster, or, alternatively, whether he is required solely to handle settlement with the defense counsel.

The Committee advises consistent with Florida Opinion 63-19 [since withdrawn] that it is not improper for a plaintiff's attorney to negotiate with adjusters of an insurance carrier in settlement negotiations after all parties to the litigation are represented by counsel, providing such negotiations are with the knowledge and consent of the defense counsel. This does not preclude, nor should it preclude, plaintiff's counsel from negotiating settlement with the attorney representing the insured, particularly if the insured has interests apart from the insurance company.

Florida Opinion 65-62 is also reaffirmed and is not altered by the adoption of the Code of Professional Responsibility.

FLORIDA BAR ETHICS OPINION
OPINION 67-26
October 20, 1967

Advisory ethics opinions are not binding.

In the course of negotiation with a liability insurance company, an attorney for the claimant may forward to the insured copies of correspondence addressed to the insurance company if there is no indication that an attorney has been retained to act for the insurance company and the insured.

Canon: 9

Chairman MacDonald stated the opinion of the committee:

A member of The Florida Bar inquires whether in negotiating a claim with a liability insurance company, where there is no indication that an attorney has yet been retained to act for the insurance company or for the interests for the individual insured, it is proper under Canon 9 to forward copies of correspondence addressed to the insurance company to the insured.

We see no objection per se to this practice so long as the stated assumption, i.e., the absence of counsel representing both the insurer and the insured, is correct. In other words, in context of the question we do not construe Canon 9 as precluding an attorney from contacting an individual even though the individual's interests might then be represented by an insurance company or a claims representative acting on its behalf. Naturally, the attorney should always be sensitive to the requirement of Canon 9 precluding advising or misleading a party not represented by counsel. Accordingly, any letter a copy of which is to be furnished to the insured must be framed in this light. Inasmuch as the inquiry does not outline the precise nature of the correspondence, it is not possible for us to apprehend in advance whether a particular letter would offend that portion of Canon 9.

**THIS OPINION WAS AFFIRMED BY THE PROFESSIONAL ETHICS COMMITTEE
OF THE FLORIDA BAR AT ITS JANUARY 1992 MEETING**

NOTE: This advisory ethics opinion was authored in response to a specific inquiry and, therefore, might not be applicable to a factual situation other than that presented by the inquiring attorney.

**STAFF OPINION TEO91001
August 23, 1990**

The inquiring attorney has requested an opinion whether it would be permissible to direct a request for public records to the Records Custodian of a city that is represented by counsel in pending litigation with his client. Presumably the request is in connection with the matter in litigation.

Rule 4-4.2 of The Rules Regulating The Florida Bar states:

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.

The Florida rule is based on ABA Model Rule 4.2. The ABA rule, unlike the Florida rule, provides for an exception if the communication is authorized by law. The rule states:

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 by law to do so.

[Emphasis added.]

In June of 1989 the Professional Ethics Committee published a proposed ethics opinion incorporating the additional ABA language "or is authorized by law to do so" into our rule. In response to comments from Bar members the Committee narrowed the language of the opinion. The final opinion, Opinion 89-6, permits an attorney to strictly comply with a statute requiring notice or service of process directly on the adverse party. The opinion states that the attorney should provide opposing counsel with a copy of any document served upon the adverse party. The Committee intentionally omitted the exception for communications authorized by law. Furthermore, the Committee's most recent opinion regarding the communication rule, Opinion 90-4, relies upon Florida's omission of the "or is authorized by law" exception.

Therefore, under our rules and ethics opinions, any communication concerning the subject matter of representation to a represented person must go through that person's attorney unless (1) the attorney consents or, (2) a statute requires notice or service of process directly on the adverse party. Accordingly, the request for public records must be directed to the attorney for the city unless a statute requires notice or service of process directly on the city. (Whether Chapter 119, F.S. does require such direct contact is a question of law, beyond the scope of an ethics opinion.)