

PROPOSED FORMAL ADVISORY OPINION NO. 20-1
(Redrafted Version of Formal Advisory Opinion No. 94-3)

QUESTION PRESENTED:

Whether a lawyer may properly communicate with a former employee of a represented organization to acquire relevant information, without obtaining the consent of the organization's counsel.

SUMMARY ANSWER:

Generally, a lawyer may communicate with a former employee of an organization that is represented by counsel without obtaining that counsel's consent, provided that the lawyer fully discloses to the former employee, before initiating the communication, the following information: (1) the identity of the lawyer's client and the nature of that client's interest in relation to the organization (i.e., the former employer); and (2) the reason for the communication and the essence of the information sought. After making these disclosures, the lawyer must also obtain the former employee's consent to the communication.

Furthermore, in communicating with the former employee, the lawyer must not utilize methods of obtaining information that would violate the legal rights of the former employee or the represented organization, such as inquiring into information that may be protected by the attorney-client privilege or other evidentiary privilege.

Finally, if the lawyer knows or at any point determines that the former employee is individually represented by counsel in the matter, the lawyer may not communicate with the former employee, unless authorized by law or court order to do so, without obtaining the former employee's counsel's consent.

OPINION:

The question presented relates to the propriety of a lawyer seeking to obtain information from a former employee of an organization that is represented by counsel. Counsel for an organizational client undoubtedly would prefer that an adverse lawyer not be permitted to communicate with former employees of the organization for the purpose of obtaining information that could be used against the organization. However, prohibiting such communications by a lawyer, without the consent of the organization's counsel, would give that counsel a right of information control that is not supported by any rule of professional conduct.

Georgia Rule of Professional Conduct 4.2, commonly known as the anti-contact rule, only addresses a lawyer's ability to communicate about the subject matter of a representation with a person who is represented by counsel in the matter. Specifically, Rule 4.2(a) provides:

A lawyer who is representing a client in a matter 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 court order.

Rule 4.2 prohibits communication with some but not all of the constituents of the organization. Comment 4A to Rule 4.2 explains which constituents fall within the rule's anti-contact protections—

In the case of an organization, this Rule prohibits communications with an agent or employee 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 Comment does not anywhere suggest that a former employee comes within Rule 4.2's protections. The only reasonable conclusion to draw from this omission is that Rule 4.2 does not apply to former employees.¹

That, however, does not fully address a lawyer's ethical obligations in this context. While a lawyer may communicate with a former employee of an organization without first obtaining the consent of that organization's counsel, the lawyer must comply with Rule 4.3 and make it clear that he or she is not disinterested and explain the nature of and reasons for the communication with the former employee.² In particular, the lawyer must fully disclose to the former employee, before initiating the communication, the following information: (1) the identity of the lawyer's client and the nature of that client's interest in relation to the organization (i.e., the former employer); and (2) the reason for the communication and the essence of the information sought. After the required disclosures are made, the lawyer must secure the former employee's consent

¹ It is also instructive to note that Georgia Rule 4.2(a) and ABA Model Rule 4.2 are identical (except for one stylistic difference) and that Comment [7] to the ABA rule expressly states that “[c]onsent of the organization's lawyer is not required for communication with a former constituent.” ABA MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [7] (2019) [hereinafter “MODEL RULES”]. *See also* ABA Formal Op. 91-359 (March 22, 1991) (“The prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.”).

² Rule 4.3 addresses a lawyer's duties in dealing with an unrepresented person:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

- a. state or imply that the lawyer is disinterested; when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
- b. give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client

GEORGIA RULES OF PROF'L CONDUCT, R. 4.3 (2020) [hereinafter “GEORGIA RULES”].

to the communication. If the former employee refuses to consent, the lawyer must proceed through the formal discovery process in order to obtain the desired information.

The lawyer must also exercise caution in communicating with the former employee and avoid utilizing methods of obtaining information that would violate the legal rights of the former employee or the represented organization.³ In particular, the lawyer must refrain from inquiring into information that may be protected by the attorney-client privilege or some other evidentiary privilege.⁴ Along the same lines, before initiating the communication, the lawyer should ensure that the former employee is not personally represented by counsel in the matter. If the lawyer knows or determines that the former employee is individually represented by counsel, the lawyer must comply with Rule 4.2 and obtain the consent of the former employee's counsel, unless the lawyer is otherwise authorized by law or court order to make the communication.

Finally, while this opinion focuses on a lawyer communicating with a former employee of an organization that is represented by counsel, the guidance it provides is also instructive for navigating the same situation when the organization is not represented by counsel. A former employee under such circumstances likewise has a right to know the identity of the lawyer's client and the nature of and reasons for the lawyer's communication. Therefore, even when the organization is not represented by counsel, a lawyer should make full disclosure to the former employee as set forth in this opinion and obtain the former employee's consent before engaging in any other communication.

³ See GEORGIA RULES, R. 4.4(a); see also MODEL RULES, R. 4.2, cmt. [7] (“In 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.”) (emphasis added).

⁴ See GEORGIA RULES, R. 4.4(a), cmt. [1] (“Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships.”) (emphasis added).