

Ethics Advisory Opinion

From the State Bar of New Mexico's Ethics Advisory Committee

Formal Opinion: 2015-01

Topic:

Lawyer's Ability to Communicate Directly with Former Managerial Employees of Opposing Party

Rules Implicated:

16-402, 16-403 NMRA

Disclaimer:

The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising inquiring lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued (the "Rules") to the specific facts as supplied by the inquiring lawyer or, in some instances, upon general issues facing members of the bar. The Committee does not investigate facts presented to it and generally assumes the facts presented are true and complete. The Committee does not render opinions on matters of substantive law. Lawyers are cautioned that should the Rules subsequently be revised or facts differ from those presented, a different conclusion may be reached by the Committee. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the issue.

Question Presented:

May a lawyer have direct (*ex parte*) contact with a former managerial employee of an opposing party?

Summary Answer:

Yes, a lawyer may communicate directly with former constituents of an organization; only communication with current constituents is prohibited by the Rules.

Analysis:

Rule 16-402, Communication with person represented by counsel, is the applicable rule. It 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 to do so by law or a court order. Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel.

The Committee notes that this rule is stated in the present-tense, prohibiting communication only with those managerial personnel "having" such responsibility on behalf of the organization. Official Comment 7 to the Rule states in part:

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. ***Consent of the organization's lawyer is not required for communication with a former constituent.*** (emphasis added).

This statement is consistent with, and modeled after, the ABA Model Rules, Model Rule 4.2, Comment 7. It is also noted that United States Federal District Court Judge James Browning has recognized in at least one Memorandum Opinion the propriety of communicating with former employees under Rule 16-402 NMRA. See *Todd v. Montoya*, No. CIV 10-0106 JB/WPL, 2011 U.S. Dist. LEXIS 14435 (D.N.M. Jan. 12, 2011).

While the Committee agrees that such communication is permissible, it does caution the attorney to follow the guidelines in Rule 16-403 when communicating with unrepresented parties. As the ABA noted in its Formal Opinion 91-359 (1991):

The lawyer should also punctiliously comply with the requirements of Rule 4.3, which addresses a lawyer's dealings with unrepresented persons. That rule, insofar as pertinent here, requires that the lawyer contacting a former employee of an opposing corporate party make clear the nature of the lawyer's role in the matter giving occasion for the contact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party.

Finally, it is noted that while still employed, a former managerial employee may have had confidential communications with the organization's attorney and that those communications remain confidential and should not be requested from the former employee. It is also not uncommon for former managers to be contractually constrained by a confidentiality agreement with their former employer. If the lawyer is aware of the existence of confidentiality agreement, it would be improper to act in a way to cause the former managerial employee to breach the agreement.

Conclusion:

For the reasons set forth above, the Committee concludes that a lawyer may contact former managerial employees of an opposing party, though he or she should be certain those communications comply with the rules for communicating with unrepresented persons and include full disclosure of his or her role in relation to the former employer. The lawyer must not act in a way that would cause the former managerial employee to violate any duty of confidentiality that applies to the matter at hand.