



## ETHICS ADVISORY OPINION

### 11-04

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

#### **Factual Background:**

Inquirer is a member of the South Carolina Bar currently working as an employee for a U.S. federal agency with the title of "Federal Investigator." Inquirer's job involves conducting administrative investigations of potential violations of certain federal laws. Where violations are found, Inquirer administers fines and/or collects money from the violator on behalf of aggrieved persons. Inquirer's involvement with a target ends once litigation is initiated. Performance of these duties entails understanding and applying statutes and regulations and interacting on an adversarial basis with attorneys who represent the targets of investigations. While some investigators are attorneys, there is no requirement that investigators be attorneys, and many of them are not.

Some of the attorneys with whom Inquirer deals are unresponsive to Inquirer's requests for information or opposed to Inquirer's investigative findings. Inquirer has been encouraged by different supervisors to contact targets directly to convince them of the seriousness of the situation and attempt to resolve the investigation expeditiously. In the case of attorneys who are unresponsive, another factor is that the statute of limitations on the claim is running.

#### **Question Presented:**

May Inquirer directly contact a target of an investigation who is represented by counsel?

#### **Summary:**

Yes. Rule 4.2 prohibits communication with a represented party by an attorney who is "representing a client." As a federal investigator, Inquirer is not "representing a client," and therefore the prohibition does not apply. However, Inquirer should take care to avoid overreaching.

## **Opinion:**

Rule 4.2, Communication with Person Represented by Counsel, 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 or is authorized to do so by law or a court order.

(emphasis added). Rule 4.2 is intended to protect represented persons from “overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client lawyer relationship and the uncounseled disclosure of information relating to the representation.” Comment 1.

An attorney is bound by the applicable Rules of Professional Conduct regardless of whether he or she is acting as an attorney at any given point in time. Ethics Adv. Op. 86 10. Certain rules, however, by their terms apply only when a lawyer is acting in a representative capacity. Rule 4.2 is one such rule: the prohibition against communications with a represented person does not apply to an attorney who is not “representing a client.”

The ABA addressed the scope and application of Rule 4.2 at length in Formal Opinion 95-396 (1995). Although Opinion 95-396 primarily concerned the applicability of Rule 4.2 to pre-arrest investigations of criminal activity by prosecutors, it included a discussion of attorneys’ vicarious responsibility for the conduct of investigators. In that context, the ABA noted that “investigators themselves are not directly subject to Rule 4.2, even if they happen to be admitted to the Bar (as many FBI agents are), because they are not, in their investigative activities, acting as lawyers: they are not ‘representing a client.’” See also 28 C.F.R. § 77.2(a) (excluding “attorneys employed as investigators” from the definition of “attorney for the government”).

This Committee addressed a question similar to the present inquiry in Ethics Opinion 92 07. There, an attorney wished to contact his wife’s former husband, who was represented by counsel, about matters concerning the attorney’s step-children. Recognizing that “Rule 4.2 appears to apply only to communications made by a lawyer while representing a client,” the Committee opined that because the attorney was not representing his wife, Rule 4.2 did not apply. Other jurisdictions have applied this reasoning to various situations in which an attorney’s communications with a represented person are not made in a representative capacity. See, e.g., *In re Mettler*, 748 P.2d 1010 (Or. 1988) (securities examiner); Phil. Bar Ass’n Prof’l Guidance Comm’n Op. 2010-3 (court-appointed child advocate); N.D. Bar Ass’n Ethics Comm., Op. No. 09-04 (bankruptcy trustee); Conn. Bar Ass’n Ethics Op. 97-23 (equal employment opportunity counselor/investigator).

The Committee concludes that Rule 4.2 does not forbid contact with a represented person by a federal investigator simply because the investigator happens to be an attorney (provided he or she is not acting at the direction of an attorney who represents the agency, see Rule 4.2 cmt. 4). At the same time, the mere fact that an attorney’s title is “investigator” does not make Rule 4.2 per se inapplicable. See Cf. Phila. Bar Ass’n Prof’l Guidance Comm’n Op. 2010-3 (concluding that Rule

4.2 applies to a guardian ad litem whose duties “are in many respects coextensive with legal representation”).

Additionally, Inquirer should be mindful of the policies underlying the rule and thus should take care to avoid overreaching and should not act in a manner that undermines a target’s relationship with counsel. The Committee also advises that Inquirer is bound by other applicable Rules of Professional Conduct, including Rule 8.4.