

Digest of Ethics Advisory Panel  
Opinion #91-74, Request #194  
Issued October 30, 1991

An attorney seeks Panel advice as to permissible conduct by attorneys when performing discovery involving former employees of parties in litigation.

The Panel takes the position that the Rhode Island Rules of Professional Conduct do not prohibit attorneys and their agents from conducting ex parte interviews of former employees of an adverse corporate party. Also, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 91-359 entitled "Contact with Former Employee of Adverse Corporate Party" which concludes that Rule 4.2 does not prohibit ex parte interviews of former employees of an adverse corporate party. Courts have recognized that Rule 4.2 was not meant to cover a corporate party's former employees, but is applicable only when a "party" witness is involved. Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990), Amland Properties v. Alcoa, et al., Civ. No. 86-1830 (D.N.J. January 28, 1991).

Rule 4.3, entitled "Dealing with Unrepresented Person," requires only that when dealing with a person who is not represented by counsel, the lawyer shall 1) make no misrepresentation of disinterest and 2) if the lawyer becomes aware that there is a misunderstanding, then the lawyer shall make reasonable efforts to correct the misunderstanding.