



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I represent a corporate client in litigation. May I instruct or ask the client's employees not to speak to opposing counsel about the case? May I instruct or ask the client's former employees not to speak to opposing counsel about the matter?

A: The question primarily implicates Model Rule 3.4, but Rule 4.2 is also relevant. Rule 3.4(f) states that a lawyer shall not request "a person other than a client to refrain from voluntarily giving relevant information to another person," unless (1) the person is a relative, or an employee or agent of a client; and (2) the lawyer reasonably believes the person's interests will not be adversely affected by refraining from giving such information. Thus, under Rule 3.4, such a request would be appropriate in most circumstances as to current employees, but no provision is made for a request to former employees.

Rule 4.2 covers the other side of a potential conversation, defining who the opposing lawyer can communicate with. It bars the opposing lawyer (without consent) from speaking with persons "the lawyer knows to be represented . . . in the matter." In the case of the corporate client in this question, this encompasses any "constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter, or whose act or omission in connection with the matter may be imputed to the organization for the purpose of civil or criminal liability." Rule 4.2, Cmt. 7. It does not encompass former employees. Consent for a conversation may be given by the company's lawyer or by the individual constituent's lawyer.

Although neither of these rules authorizes the company's lawyer to shield former employees of an organization, it remains appropriate for the company's lawyer to communicate with unrepresented former employees about the matter, and to remind former employees that any privileged information they obtained during their employment belongs to their former employer and should not be divulged. If a former employee is sufficiently important to the matter, and is amenable to it, an engagement of separate counsel for them as an individual may also provide some protection to them under Rule 4.2, as well as independent legal advice. Joint defense or common interest agreements may also be a useful way to proceed.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.