Missouri Informal Advisory Opinions: 2011-2014

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2011-01

Rule 4-1.15

Question: Upon closure of the law firm and reconciliation of the trust account, firm's trust account contains funds not belonging to clients. May the funds be disbursed to the firm's former partners?

Answer: Under Rule 4-1.15, the balance may be disbursed to the appropriate attorneys only if the funds constitute earned fees and the attorneys overseeing the trust account have documentation supporting that conclusion. Complete documentation of the disbursement must be maintained. If ownership of the balance cannot be determined and supported, the attorneys must hold the funds separately, in trust, and relinquish the funds in accordance with Missouri's Uniform Disposition of Unclaimed Property Act, as explained in Formal Opinion 118.

2011-02

Rule 4-5.4

Question 1: May Attorney, the sole shareholder of a professional corporation (PC) law practice, own the corporate stock jointly with Attorney's Spouse or add Spouse as a separate shareholder?

Answer 1: No. Under Rule 4-5.4, a lawyer cannot form a partnership for the practice of law with a nonlawyer who owns an interest in the firm, nor can a lawyer share legal fees with a nonlawyer.
Question 2: May attorney designate Spouse as a transfer on death (TOD) beneficiary of the stock?
Answer 2: Whether Attorney may designate Spouse as a TOD beneficiary of the PC's stock is a question of law outside the scope of the Rules of Professional Conduct.

2011-03
Rule 4-4.2
Question: May Attorney communicate with Attorney's parents about the parents' litigation, where the parents' counsel does not consent to the communication, Attorney is seeking to intervene in the matter pro se, and further litigation concerning the matter is likely in the future?
Answer: No. In representing a party, Rule 4-4.2 prevents a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer, unless the other lawyer consents or unless authorized to do so by law or court order. The rule's prohibition applies to a lawyer who is involved in a matter as a party or a person with interests.

2011-04
Rule 4-8.3
Question: Does Attorney have an obligation to self-report Client's allegation of misconduct by Attorney toward Client?
Answer: No. Rule 4-8.3 does not require an attorney to self-report a violation of the Rules of Professional Conduct or an allegation of a violation by that attorney.

2011-05
Rule 4-1.12
Question: Attorney formerly served as Guardian Ad Litem in an action filed by Mother against Grandparents (Child's guardians) in which Mother sought visitation rights with Child. May Attorney subsequently represent Grandparents in a suit for termination of Mother's parental rights and adoption of Child?
Answer: Rule 4-1.12 governs the participation of a lawyer in a matter in which the lawyer previously served as a third-party neutral, which includes Attorney's service as Guardian Ad Litem, as the Guardian Ad Litem acts as part of the court. Attorney is

prohibited from representing Grandparents in the current action unless all parties to the proceeding give informed consent, confirmed in writing.

2011-06
Rule 4-1.9
Question: May Attorney represent the public administrator as guardian and conservator of Attorney's former estate planning Client, where Client was represented by another attorney in the guardianship/conservatorship action, and where there is no issue as to Client's competency to have engaged in the estate planning for which Attorney represented Client?
Answer: Yes. Because the interests of the public administrator are not materially adverse to the interests of Client, Rule 4-1.9 does not prohibit the representation.

2011-07
Rule 4-3.4
Question: Attorney's corporate Client is preparing for binding arbitration of several pending matters. The testimony and pre-arbitration assistance of one fact witness, now a retired, former employee of Client with years of involvement in the matters in dispute, will be essential to establishing Client's case. May Attorney advise Client to enter into a consulting agreement with the witness to reimburse the witness for out-of-pocket expenses and to pay the witness an hourly rate for case preparation and time spent testifying?
Answer: Unless the arrangement is prohibited by law, Attorney would not violate Rule 4-3.4(b) by advising Client to enter into the proposed consulting agreement with the witness. Fact witnesses may be compensated for preparation time, including pre-trial meetings with attorneys and time spent on review and research. The rate of compensation must be reasonable and based on a realistic assessment of the fair market value of the witness's time or on actual lost wages or some other reasonable rate. Whether the compensation agreement comports with applicable law is a matter outside the scope of this opinion.

2011-08
Rules 4-1.2 & 4-1.16
Question: May Attorney refuse to take additional depositions requested by Client, where Attorney believes the depositions will be helpful but not essential to competent representation, and where Client has failed to fulfill his duty under the fee agreement to compensate attorney for previous depositions in the case?

Answer: Under Rule 4-1.2, Attorney must consult with Client regarding the means used to pursue Client's objectives, including whether additional depositions should be taken. If Attorney does not believe, after consulting with Client, that taking additional depositions is the best tactical decision for achieving Client's objectives, Attorney must inform Client of that decision. Pursuant to Rule 4-1.16, if Client is not reimbursing Attorney for expenses as agreed, Attorney may withdraw from the representation after warning Client that failure to fulfill the obligation will result in Attorney's withdrawal. It is not permissible for Attorney to stop working on the case until Attorney is reimbursed.

2011-09

Rule 4-4.2

Question 1: Does Rule 4-4.2 prohibit Attorney who is a Chapter 13 Bankruptcy Trustee from communicating with a debtor who is represented by counsel in a bankruptcy proceeding, without consent of the debtor's counsel?

Answer 1: If, as part of Trustee's duties in a bankruptcy case, Trustee files one or more motions and/or responses that may be considered adverse to the Chapter 13 debtor's position, Trustee is "representing a client" for purposes of Rule 4-4.2 and may not communicate with a represented debtor without the permission of the debtor's attorney, unless authorized by law or court order. Trustee may communicate directly with a represented debtor without violating Rule 4-4.2 when Trustee is serving in a purely administrative role pursuant to Trustee's duty in the Bankruptcy Code to advise a debtor about non-legal matters and assist in performance under the plan. This opinion does not purport to interpret the Bankruptcy Code or any other law that may authorize Trustee to communicate with a debtor pursuant to Rule 4-4.2.

Question 2: Does an attorney representing the Chapter 13 Bankruptcy Trustee violate Rule 4-4.2 by communicating with a represented debtor without consent of the debtor's attorney?

Answer 2: An attorney representing the Chapter 13 Bankruptcy Trustee violates Rule 4-4.2 by communicating directly with a person the attorney for Trustee knows to be represented by counsel, unless the debtor's attorney consents to the communication or the attorney for Trustee is authorized to do so by law or court order.

2011-10

Rules 4-1.7 & 4-1.0(e)

Question: May Attorney and Attorney's firm continue to represent Clients in the possible appeal of litigation stemming from the discharge of Clients' debts in bankruptcy, where Clients have filed a negligence claim against Attorney for Attorney's representation of

Clients in the bankruptcy, where the interests of Clients and Attorney are aligned in the possible appeal of the related litigation, and where Clients signed a document entitled "Waiver" in which they gave consent to Attorney's representation notwithstanding the conflict of interest based on Attorney's personal interest in the outcome of the appeal?
Answer: Pursuant to Rule 4-1.7, Attorney may represent Clients in an appeal of the bankruptcy-related litigation notwithstanding Attorney's personal interest conflict of interest stemming from Clients' concurrent action for negligence against Attorney, provided Clients' giving of informed consent complies in all respects with the definition of informed consent in Rule 4-1.0(e) and provided Clients are advised to consult independent legal counsel regarding the giving of consent and are given a realistic opportunity to do so before signing the writing, as discussed in Comment [6] to Rule 4-1.0.

2012-01
Rule 4-1.6
Question: Is Attorney required by the Rules of Professional Conduct to include a disclaimer on e-mails sent by Attorney to Client that e-mail is not a secure form of communication and that Attorney is communicating to Client via e-mail because Client has consented to the use of e-mail for Attorney-Client communication?
Answer: No. The Rules of Professional Conduct do not require Attorney to use a disclaimer on e-mails sent to Client. As with any form of communication with Client, Attorney must take reasonable precautions to prevent the unintended interception of confidential information, as explained in Comments [15] and [16] to the Confidentiality of Information Rule, 4-1.6. Special circumstances or the need to transmit highly sensitive information may require special security measures in order to comply with Rule 4-1.6. For further information about the use of e-mail for client communication, Attorney may consult Informal Opinions 990007, 980137, 980029, 970010, and 970161.

2012-02
Rules 4-7.1 & 4-7.5
Question: May Attorney be "of counsel" with Law Firm and general counsel to a bank?
Answer: Attorney may be "of counsel" with Law Firm and general counsel to a bank, provided Attorney discloses the relationship with Law Firm and with the bank everywhere Attorney is held out to the public, pursuant to Rules 4-7.1 and 4-7.5.

2012-03

Rule 4-1.6(b)(3)

Question: Pursuant to Rule 4-1.6(b)(3), may Attorney disclose information related to Attorney's representation of Former Client without Former Client's consent, where disclosure is necessary to establish proof of a claim on behalf of Attorney in an action by Attorney against Former Client?

Answer: Rule 4-1.6(b)(3) permits limited disclosure of information otherwise protected by Rule 4-1.6 to the extent necessary to establish a claim, but only where disclosure adverse to the client's interest is no greater than necessary to accomplish the purpose and the disclosure is made with appropriate safeguards, as described in Comment [12] to Rule 4-1.6.

2013-01

Rule 4-4.2, 4-4.3 & 4-4.4(b)

Question: Attorney represents Plaintiffs in employment discrimination actions against a represented organization. Does Rule 4-4.2 prohibit Attorney from contacting unrepresented former managerial employees of Defendant without the consent of Defendant's counsel?

Answer: Provided Attorney does not know that the former employees are represented by counsel, Rule 4-4.2 does not prohibit Attorney from communicating with Defendant's former managerial employees about the subject of the representation without consent of Defendant's counsel, as explained in Comment [7]. In accordance with Rule 4-4.3, Attorney must clearly identify Attorney's role in the matter and ask whether the former managerial employees are represented by counsel. If any of the former managerial employees are represented by counsel, then Attorney must have that counsel's consent or be authorized by law or court order to communicate with the former employees. This opinion does not address any limitations at law on Attorney's contact with former employees, but Comment [7] to Rule 4-4.2 prohibits the use of methods of obtaining evidence that violate the legal rights of the organization as set forth in Rule 4-4.4(b).

2013-02

Rule 4-1.6(b)(3)

Question: May Attorney reveal information received from Former Client in the course of Attorney's representation of Former Client for the purpose of opposing the bankruptcy discharge of Former Client's judgment debts for services rendered to Attorney?

Answer: Pursuant to Rule 4-1.6(b)(3), Attorney may reveal information related to the representation of Former Client to establish a claim on behalf of Attorney in the bankruptcy matter. If Attorney is entitled to a fee, the rule also permits Attorney to prove

services rendered in an action to collect the fee, as described in Comment [9]. Any disclosure of information related to the representation must be protected and made only to the extent Attorney reasonably believes necessary to establish the claim. Protective measures should be used to limit the information revealed, as described in Comment [12].

2013-03

Rules 4-1.13, 4-1.6, & 4-1.7

Question: May Attorney for a three-member Limited Liability Company (LLC) disclose to one member information related to the representation, where a majority of the members have instructed Attorney not to disclose the information to the member unless that member signs a non-disclosure agreement?

Answer: Pursuant to Rule 4-1.13, Attorney represents the LLC acting through its duly authorized constituents. Attorney may not disclose to a constituent of the organization information protected by Rule 4-1.6 unless the disclosure is explicitly or impliedly authorized by the LLC in order to carry out the representation, as permitted by Rule 4-1.6. If a majority of the members of the LLC is required to take action on behalf of the organization, Attorney may not disclosure confidential information to one member unless instructed by the majority to do so, as explained in Comment [2] to Rule 4-1.13. Pursuant to Rule 4-1.13(e), Attorney may represent the LLC and also represent one of its members, subject to Rule 4-1.7. If consent to the dual representation is required by Rule 4-1.7, consent must be given by an appropriate official of the LLC other than the individual seeking representation.

2014-01

Rule 4-1.5, 4-1.8(i) & 4-1.16

Question: May Attorney ethically file against Former Client or against Client upon withdrawal a Notice of Attorney's Lien and Motion for Judgment on Attorney's Lien for unpaid attorney's fees and collect on the lien or judgment?

Answer: Pursuant to Rule 4-1.5, all fees agreed to, charged, or collected, including those asserted via an attorney's lien, must be reasonable, and their bases must be communicated in accordance with Rule 4-1.5. The rule also requires Attorney to conscientiously consider participating in the appropriate fee dispute resolution program if a fee dispute has arisen between Attorney and Client. Rule 4-1.8(i) expressly prohibits the filing of an unfounded attorney's lien or one that is invalidly asserted under Missouri law. The rule does permit Attorney's acquisition of a lien "authorized by law" to secure fees and expenses. Proper bases for a valid attorney's lien and the procedures for its filing and collection are governed by statute and relevant case law and are outside the

scope of the Rules of Professional Conduct. When withdrawing from representation, Attorney should be mindful to follow all obligations in Rule 4-1.16, including giving adequate notice to Client, giving required notice to or seeking required permission from the tribunal, and taking reasonable steps upon termination to protect Client's interests.

2014-02

Rule 4-4.4, 4-1.6 & 4-3.4(a)

Question 1: Does Attorney have an ethical obligation regarding metadata in electronic documents sent by an opposing party or counsel to inform the sender that the document contains metadata of which the sender may or may not be aware?

Answer 1: Metadata embedded in an electronic document received by Attorney may constitute a document inadvertently sent, governed by Rule 4-4.4(b). Whether a lawyer "knows or reasonably should know" the inclusion of the metadata was inadvertent will depend on the facts and circumstances surrounding each transmission. If Attorney believes the metadata was inadvertently sent, Rule 4-4.4(b) requires Attorney to promptly notify the sender.

Question 2: Does Attorney have an ethical obligation regarding metadata in electronic documents sent by an opposing party or counsel to refrain from mining or reviewing and/or using the metadata?

Answer 2: Rule 4-4.4 does not address Attorney's ability to seek, review, or use metadata, except to prohibit Attorney from obtaining evidence illegally. According to Comment [3] to Rule 4-4.4, where applicable law does not require Attorney to return a document inadvertently sent, the decision as to whether to do so is governed by Attorney's independent professional judgment. Whether applicable law requires Attorney to return a document containing metadata or refrain from affirmatively seeking, reviewing, or using metadata is outside the scope of this informal opinion.

Question 3: Does Attorney have an ethical obligation to make good faith efforts to prevent the inadvertent electronic transmission of embedded metadata to opposing party or counsel in the context of litigation?

Answer 3: Pursuant to Rule 4-1.6, Attorney must use reasonable care to ensure no information related to the representation of Attorney's client is revealed without client consent, and this obligation requires Attorney to use reasonable care to ensure no confidential information is contained in embedded metadata. This may require "scrubbing" documents before transmitting them or using alternative methods of transmission. Efforts to protect confidential information must be exercised in light of Attorney's obligation pursuant to Rule 4-3.4(a) not to unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal evidence. Removing metadata

with evidentiary value before transmitting certain documents may constitute a violation of laws governing discovery and therefore violate Rule 4-3.4(a). This informal opinion does not render an opinion about the existence of discoverable evidence in particular metadata or about the effect on substantive legal privileges of the pre-transmission removal or lack of removal of metadata.

2014-03

Rule 4-3.7

Question: Attorney is Plaintiff and co-counsel of record in a lawsuit that may become a class action, and Attorney may be a necessary witness at trial. May Attorney handle pre-trial matters, sit at counsel table during trial, and listen to arguments and conferences with the judge that are outside of the jury's hearing?

Answer: If Attorney is likely to be a necessary witness, Rule 4-3.7 prohibits Attorney from acting as an advocate at trial where none of the three exceptions to the rule are present. Attorney should avoid any actions at trial that could mislead or confuse the trier of fact as to Attorney's role as witness rather than advocate. Participating in arguments and in conferences with the judge or engaging in other trial activity traditionally reserved for attorneys would constitute advocacy prohibited by Rule 4-3.7. The rule does not prohibit Attorney from being an attorney of record in the case.

2014-04

Rule 4-1.2, 4-1.4, & 4-8.4

Question: May Attorney ethically assist Client in setting up an enterprise for the production and distribution of a product, as authorized by Missouri law, where one or more of the activities of the enterprise would violate the federal Controlled Substances Act?

Answer: Whether Client's enterprise would violate state or federal law is a question of law outside the scope of this opinion. Rule 4-1.2(f) prohibits Attorney from counseling or assisting Client in conduct Attorney knows is criminal or fraudulent. Pursuant to Rules 4-1.2(g) and 4-1.4(a)(3), Attorney should consult with Client regarding the relevant limitations on Attorney's conduct. In keeping with Rule 4-1.4(b), Attorney should explain to Client any inconsistencies between state and federal law to the extent reasonably necessary to allow Client to make informed decisions about the representation. Rule 4-1.2(f) allows Attorney to discuss with Client the legal consequences of any proposed conduct and to counsel or assist Client in making a good faith effort to determine the validity, scope, meaning, or application of the law. In light of possible inconsistences between state and federal law in this matter, Attorney should

consider limiting the scope of the representation and Attorney's role pursuant to Rule 4-1.2(c). The rule requires Client's informed consent (*see* Rule 4-1.0(e)) in a writing (*see* Rule 4-1.0(n)) signed by Client to the essential terms of the representation and Attorney's limited role. Under Rule 4-8.4, it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct or to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Nothing in this informal opinion purports to restrict the appropriate disciplinary authority from prosecuting an attorney for a violation of this rule or other applicable Rule(s) of Professional Conduct.

2014-05

Rule 4-1.15

Attorney accepts credit card payments for legal services.

Question 1: If a credit card processing company will allow deposits and debits out of only one account, is it ethically permissible to allow credit card payments of advanced funds for fees and expenses to be deposited into the operating account and immediately transferred into the trust account?

Answer 1: No. Pursuant to Rule 4-1.15(a) and (c), a client's advance payment of fees and expenses must be deposited in the trust account, and those funds may not be held, even temporarily, in Attorney's operating account. Funds should be withdrawn promptly from the trust account as fees are earned or expenses incurred, pursuant to Rule 4-1.15(c) and Formal Opinion 128.

Question 2: Is it permissible for Attorney to allow the credit card company to take debits from Attorney's operating account only and make deposits in either Attorney's trust account or operating account, as designated by Attorney as either earned fees or advance payment of fees and expenses?

Answer 2: Yes. This method complies with Rule 4-1.15(a) and (c). And in accordance with Rule 4-1.15(a)(3), it is not permissible for chargebacks to come from the trust account.

Question 3: Is it permissible for Attorney to place all deposits from a credit card transaction into the trust account but take all debits from the operating account?

Answer 3: Yes, this method complies with Rule 4-1.15, provided Attorney removes from the trust account any funds that represent earned fees within a reasonably prompt period of time.