# Missouri Informal Advisory Opinions: 2015

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## 2015-01

Rules 4-3.1, 4-3.3 & 4-1.0

**Question:** May an Attorney for a workers' compensation claimant ethically plead, as the average weekly wage for the claim, the maximum amount allowed by law, where Attorney is not aware at the time of pleading the claimant's average weekly wage, and where upon receiving a wage statement from the employer/insurer, Attorney submits the actual average weekly wage to the court prior to disposition?

**Answer:** Rule 4-3.1 prohibits Attorney from asserting an issue in a proceeding unless there is a basis in law and fact for doing so that is not frivolous. Rule 4-3.3 prohibits Attorney from knowingly making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact previously made to a tribunal by Attorney. An administrative agency acting in an adjudicative capacity is a tribunal per Rule 4-1.0(m). It is Attorney's obligation to ensure that all information Attorney provides to the tribunal on the claim form is in accord with Attorney's duties under Rules 4-3.1 and 4-3.3.

**2015-02**

Rules 4-1.9(c) & 4-1.6

**Question:** Where Attorney plans to testify as an expert witness, may Attorney answer questions about Attorney's prior representation of a client, where Attorney was ordered by a court in the previous case to testify about confidential information, and where Attorney's testimony in the present matter would be similar to the testimony now contained in the public record?

**Answer:** Information related to Attorney's representation of a former client is confidential and protected from disclosure by Rules 4-1.9(c) and 4-1.6. Even if the information is a matter of public record, it is nevertheless confidential information and must not be disclosed by Attorney except pursuant to a valid exception to Rule 4-1.6. *See* Comment [10]. Attorney is permitted to disclose information related to the former representation to the extent reasonably necessary to comply with other law or a court order. Rule 4-1.6(b)(4). Whether other law requires disclosure of the information is a matter outside the scope of the Rules of Professional Conduct. If the court in which Attorney testifies orders Attorney to reveal confidential information without former client consent, Attorney should oppose the order and assert all nonfrivolous claims that the order is not authorized by other law or that the information is protected by privilege or other applicable law. Comment [11]. The ethical obligation to protect confidential information is broader than the attorney-client privilege. *See* Mo. Informal Ethics Op. 20030016 (2003). Attorney should seek to ensure that any order is as specific as possible and limits access to the testimony to those with a need to know. Rule 4-1.6, Comment [12]. Unless review is sought, Attorney is permitted to comply with the order.

**2015-03**

Rules 4-1.2, 4-1.4 & 4-1.15

**Question:** May Attorney ethically sign a portion of a subrogation agreement issued by Client's employee benefit plan in which Attorney acknowledges the plan's subrogation and lien rights, agrees to treat Attorney's lien on any recovery as subordinate to the plan's lien for reimbursement, and agrees not to disburse funds from the proceeds of any settlement or judgment Client receives until the fund's subrogation, assignment, lien and reimbursement claims have been satisfied?

**Answer:** Because one of the terms of the agreement requires Attorney not to disburse any funds from settlement or judgment until the fund's claims are satisfied, Attorney must obtain Client's informed consent prior to signing the agreement. *See* Rules 4-1.2 and 4-1.15(d). In seeking consent, Rule 4-1.4 requires Attorney to discuss the matter with Client to the extent reasonably necessary to permit Client to make informed decisions

about the representation. Following settlement or recovery, if Client disputes the fund's claimed right to any part of the proceeds, Rule 4-1.15(e) requires Attorney to keep the disputed portion of the proceeds separate until the dispute is resolved. If Client instructs Attorney not to pay the fund from the proceeds, Attorney must hold the funds in trust for a reasonable time to allow resolution of the dispute. If the dispute is not resolved within a reasonable period of time, Attorney must seek guidance from a court, which may take the form of an interpleader action. *See* Mo. Formal Ethics Op. 125. Whether meeting Attorney's ethical obligations would require Attorney to violate any legal obligations under the agreement, and whether the terms of the agreement are lawful and enforceable, are matters of law outside the scope of an informal ethics opinion.

**2015-04**

Rules 4-1.7, 4-2.1, 4-1.8(a) & 4-5.7

**Question:** May Attorney enter into an agreement with a company that provides law-related services whereby Attorney receives a referral fee from the company, measured by a percentage of the fee charged by the company to Client, for each client successfully referred to the entity by Attorney?

**Answer:** Whether Attorney may ethically accept a referral fee in this context depends on whether, under the circumstances of each potential referral, Attorney complies with Rules 4-1.7, 4-2.1, 4-1.8(a), and 4-5.7. The referral arrangement constitutes a personal interest conflict of interest under Rule 4-1.7(a)(2). *See* Comment [10]. Attorney may engage in the referral during the representation of Client only if the conditions in paragraph (b) of Rule 4-1.7 are met. In obtaining Client's informed consent to the representation, Attorney must fully disclose Attorney's relationship to the company and the potential for Attorney to receive a financial benefit as part of a successful referral. In Attorney's role as Advisor per Rule 4-2.1, Attorney must exercise independent professional judgment and render candid advice to Client. If Attorney's personal interest in obtaining a percentage of the proposed fee would jeopardize this obligation, Attorney may not engage in the referral in the course of the representation, regardless of Client consent. Whether the referral fee arrangement would violate any law is a question outside the scope of an informal ethics opinion. The referral fee arrangement constitutes a business transaction with Client, requiring Attorney to comply strictly with the requirements of rule 4-1.8(a). *See* Comment [1]. If the referral fee arrangement constitutes the provision of law-related services to Client by Attorney or the exercise of any degree of control by Attorney over the company providing the law-related services, Rule 4-5.7 is applicable to Attorney.

**2015-05**

Rules 4-1.5(e) & 4-5.4(a)

**Question:** Where Attorney entered into an agreement for a division of a fee with a lawyer from another firm in accordance with Rule 4-1.5(e), and the other lawyer was disbarred before settlement, may Attorney divide the fee with the disbarred lawyer without violating Rule 4-1.5(e) or Rule 4-5.4(a)?

**Answer:** Attorney may divide the fee with the disbarred lawyer if the lawyer's share is for work performed while the lawyer was licensed to practice law in Missouri, even though actual payment is made after the disbarment.

**2015-06**

Rule 4-3.7, 4-1.7 & 4-1.9

**Question:** Is Attorney precluded by Rule 4-3.7 from representing Client where another Member of Attorney's firm formerly represented Client and is likely to be a necessary witness at trial, and opposing party's claim relates to matters that occurred after Member ceased the representation and while Attorney was the sole attorney in the firm representing client?

**Answer:** Based on the facts presented, it appears Attorney is not likely to be a necessary witness at trial and therefore is not prohibited by Rule 4-3.7 from acting as an advocate at trial. However, if Attorney is called as a witness at trial, only a court would have the right to determine if Attorney may act as an advocate at the trial. Rule 4-3.7(b) also requires Attorney to consider if he is precluded from acting as an advocate at trial by Rule 4-1.7 or Rule 4-1.9.

**2015-07**

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

**Question:** May Attorney ethically make a public records request of a state agency where the state agency is an adverse party in a current claim by Attorney's client against the agency and where the agency is represented by counsel in the matter?

**Answer:** The prohibition in Rule 4-4.2 of communication by an attorney about the subject of the litigation with a person the lawyer knows to be represented by counsel, absent consent of the other lawyer, or certain exceptions, extends to employees of a represented organization who supervise, direct, or consult with the organization's lawyer; employees who have authority to bind the organization; and employees whose acts or omissions may be imputed to the organization. Comment [7]. Represented organizations whose employees are protected from contact by the rule include both public and private entities. Comment [1]. To the extent the public records request would constitute

communication with an individual in one of the above categories, the communication is governed by Rule 4-4.2. Per Rule 4-4.2, communication by Attorney with represented persons without the other lawyer's consent is not prohibited where the communication is authorized by law or court order. *See also* Comments [4] and [5]. Whether any law authorizes Attorney's client to request the information is a matter outside the scope of an informal opinion. Attorney is prohibited from violating Rule 4-4.2 through the acts of another. Comment [4]. If Attorney is unsure whether a communication with a represented person is permissible, Attorney may seek a court order. Comment [6]. If the person with whom Attorney would be communicating is not an individual in one of the three categories of Comment [7] or otherwise represented, Attorney must take care to ensure the communication complies with Rule 4-4.3. Any conduct in the course of representing a client, including communication, must also comply with Rule 4-4.4(a).

**2015-08**

Rule 4-1.9

**Question:** May Attorney represent Father against Mother in various motions related to custody, family access, and contempt, where Attorney previously represented Mother and Father jointly in a financial transaction and for estate planning?

**Answer:** Mother is Attorney's former client under Rule 4-1.9. If any one of Father's pending matters is "the same or a substantially related matter" to any of the previous representations of Mother by Attorney, Attorney must have Mother's informed consent, confirmed in writing, to represent Father in the matter(s). For purposes of Rule 4-1.9, matters are substantially related "if there . . . is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Comment [3]. Whether any one of the actions is substantially related to a prior matter for which Attorney represented Mother is a factual question about which an informal opinion cannot be issued without additional facts. Regardless of whether the matters are substantially related, Attorney is prohibited by Rule 4-1.9(c) from using or revealing information relating to any prior representation of Mother except as the Rules would permit or require with respect to a client.

**2015-09**

Rules 4-1.6, 4-1.4 & 4-1.9(c)

**Question:** May Attorney, a federal officer or employee, disclose client names on a public financial disclosure form which requires Attorney to list payments to Attorney exceeding a particular sum, and the names of those making the payments, in the two years prior to

Attorney's appointment as a federal officer or employee, where the information would include the names of clients and information about clients' legal fees?
**Answer:** The name of a client, and the fact that the client's legal fee exceeds a particular sum, are confidential under Rule 4-1.6 as information related to the representation. Attorney may not disclose the information without the client's informed consent or if Attorney is complying with "other law or a court order." Rule 4-1.6(b)(4). Whether other law requires disclosure and whether it supersedes Rule 4-1.6 are matters of law outside the scope of the Rules of Professional Conduct, as explained in Comment [10]. If other law appears to require disclosure, Attorney must discuss the matter with the client to the extent required by Rule 4-1.4. If a court, other tribunal, or governmental body claiming authority pursuant to other law orders disclosure, Attorney must assert on behalf of the client all nonfrivolous claims that the order is not authorized by law or that other applicable law protects the information. Rule 4-1.6, Comment [12]. If other law does authorize disclosure, the disclosure may only be made to the extent reasonable necessary to comply with the applicable law. The duty of confidentiality continues after the client-lawyer relationship has ended. Comment [17], citing Rule 4-1.9(c).

**2015-10**
Rule 4-1.16(d), 4-1.22 & 4-1.15(e)
**Question 1:** Where an attorney is departing a law firm and has jointly represented two clients in a matter using a single file, and only one of the clients directs the firm to transfer the closed file to the departing attorney, may the firm comply with the client's request?
**Question 2:** If so, who bears the cost of copying the file?
**Answer 1:** According to Missouri Formal Opinion 115, the file belongs to the client, cover to cover, with limited exceptions not applicable here. Upon termination of the representation, an attorney is obligated to surrender papers and property to which the client is entitled. Rule 4-1.16(d). In the absence of a client request or another agreement with the client, a lawyer shall securely store the file in compliance with Rule 4-1.22. Where two or more clients have one file in common, the lawyer or firm who is custodian of the file must continue to comply with the custodian's obligation under R. 4-1.22. In response to a file request to the firm from one client only, the firm may release a copy of the file's contents to the requesting client or to the departing attorney per the client's direction and maintain the original file per the Rule.
**Answer 2:** The Rules of Professional Conduct do not address the issue of who bears the cost of copying a file under these circumstances. If a lawyer in the firm is making a copy of a file for the lawyer or firm's own use or protection, the lawyer or firm must bear the

costs of copying the file. Mo. Formal Op. 115. If the client file becomes the subject of a dispute between the jointly represented clients, Rule 4-1.15(e) requires the lawyer or firm to distribute any portion of the file as to which there is no dispute and hold the disputed portion separately until the dispute is resolved. If the dispute is not resolved within a reasonable period of time, the lawyer or firm may file an interpleader action. *See, e.g.,* Mo. Informal Ops. 990152 and 990150.