

**IN THE SUPREME COURT  
STATE OF GEORGIA**

**IN RE:**

**Formal Advisory Opinion No. 20-1**

**(Redrafted Version of Formal Advisory No. 94-3)**

**Supreme Court Docket No. S21U0879**

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**STATE BAR OF GEORGIA'S PETITION  
FOR DISCRETIONARY REVIEW**

SUBMITTED this 31st day of March, 2021.

Counsel for the State Bar of Georgia

John J. Shiptenko  
Senior Assistant General Counsel  
State Bar of Georgia  
State Bar Number 643200

OFFICE OF THE GENERAL COUNSEL  
State Bar of Georgia  
104 Marietta Street, NW  
Suite 100  
Atlanta, Georgia 30303  
(404) 527-8720

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On January 20, 2021, the Formal Advisory Opinion Board (hereinafter “Board”) issued Formal Advisory Opinion No. 20-1 pursuant to Bar Rule 4-403 (d), and requested that the Office of the General Counsel for the State Bar of Georgia petition this Court for discretionary review of Formal Advisory Opinion No. 20-1. A copy of Formal Advisory Opinion No. 20-1 is attached hereto as “Exhibit 1.” The State Bar of Georgia respectfully files this Petition for Discretionary Review.

**JURISDICTION**

On January 20, 2021, the Board made a final determination that Formal Advisory Opinion No. 20-1 should be drafted and filed. Pursuant to Bar Rule 4-403 (d), the opinion shall be filed with the Supreme Court of Georgia and republished either in an official publication of the State Bar of Georgia or on the website of the State Bar of Georgia. A copy of the rules relating to formal

advisory opinions is attached hereto as “Exhibit 2.” Formal Advisory Opinion No. 20-1 was republished on the State Bar of Georgia’s website on March 25, 2021, and, pursuant to Bar Rule 4-403 (d), advanced notice of the republication was provided to State Bar members by email on March 24, 2021. The State Bar of Georgia filed Formal Advisory Opinion No. 20-1 with this Court on March 25, 2021. Bar Rule 4-403 (d) provides that either the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review of a formal advisory opinion with the Supreme Court of Georgia within 20 days of the filing of the Formal Advisory Opinion, or the date the publication is mailed to members of the State Bar of Georgia, whichever is later. The State Bar of Georgia now timely files this petition for discretionary review.

### **FACTS**

On September 9, 1994, the Supreme Court of Georgia issued Formal Advisory Opinion No. 94-3. A copy of Formal Advisory Opinion No. 94-3 is attached as “Exhibit 3.” Formal Advisory Opinion No. 94-3 discusses and interprets Standard of Conduct 47 in answering the question “May a lawyer properly contact and interview former employees of an organization represented by counsel to obtain information relevant to litigation against the organization?”

On June 12, 2000, this Court issued an order adopting the Georgia Rules of Professional Conduct, which replaced the Standards of Conduct and eliminated the Canons of Ethics. Subsequent to the adoption of the Georgia Rules of Professional Conduct, the Board reviewed each formal advisory opinion to determine what impact, if any, the adoption of the Georgia Rules of Professional Conduct had on the opinions. With regards to Formal Advisory Opinion No. 94-3, the Board determined that the substance and conclusion reached in the opinion remained the same under the applicable Georgia Rules of Professional Conduct. Accordingly, in September 2004, as allowed by this Court, the Board added a headnote to Formal Advisory Opinion No. 94-3 that references Georgia Rules of Professional Conduct 4.2 and 4.3, which correlate to the Standard of Conduct and the ethics issues addressed in the opinion. The headnote version of Formal Advisory Opinion No. 94-3 is currently an opinion of this Court, binding on all members of the State Bar of Georgia.

On June 26, 2018, the Disciplinary Rules and Procedures Committee of the State Bar of Georgia asked the Board to consider redrafting Formal Advisory Opinion No. 87-6 to clarify that when a corporation is represented by a lawyer in a matter, the consent discussed in the opinion must come solely from the corporation's lawyer rather than consent from either the corporation

or the corporation's lawyer as explained in the opinion. After considering the Disciplinary Rules and Procedures Committee's request, the Board determined that redrafting the opinion was not necessary because Georgia Rule of Professional Conduct 4.2 clearly addresses the issue presented in the opinion and that a redraft of the opinion would simply be a reiteration of that rule. Instead of redrafting the opinion, on September 21, 2018, at the request of the Board, the Office of the General Counsel petitioned this Court to withdraw Formal Advisory Opinion No. 87-6. By order of this Court, Formal Advisory Opinion No 87-6 was withdrawn on February 18, 2019.

Formal Advisory Opinion No. 94-3 includes two references to Formal Advisory Opinion No. 87-6. Initially, when the Board considered how the withdrawal of Formal Advisory Opinion No. 87-6 would impact Formal Advisory Opinion No. 94-3, the Board believed it would be best to add language to the Formal Advisory Opinion No. 94-3 headnote that would reference the withdrawal of Formal Advisory Opinion No. 87-6. This course of action was mentioned to the Court in the State Bar of Georgia's petition for withdrawal of Formal Advisory Opinion No. 87-6.

After this Court ordered the withdrawal of Formal Advisory Opinion No. 87-6, the Board reevaluated how the withdrawal of Formal Advisory Opinion No. 87-6 impacted Formal Advisory Opinion No. 94-3. On October

24, 2019, the Board decided that adding further statements to the Formal Advisory Opinion No. 94-3 headnote was not the best way to address the withdrawn opinion. The Board determined that Formal Advisory Opinion No. 94-3 should be redrafted and commenced with redrafting the opinion. In doing so, the Board's primary goal is to remove the references to Formal Advisory Opinion No. 87-6. Formal Advisory Opinion No. 20-1 is the redrafted version of Formal Advisory Opinion No. 94-3. Pursuant to 4-403 (d), Formal Advisory Opinion No. 20-1 appeared for first publication on the State Bar of Georgia's website on November 16, 2020. The Board received 15 comments in response to the first publication of the opinion. On January 20, 2021, after a careful review of the comments, the Board made a final determination that Formal Advisory Opinion No. 20-1 should be drafted, approved as drafted, and filed with this Court.

Although the question presented language in Formal Advisory Opinion No. 20-1 is slightly different from that of Formal Advisory Opinion No. 94-3, Formal Advisory Opinion No. 20-1 addresses the same ethics issue that is addressed in Formal Advisory Opinion No. 94-3, but does so by providing an interpretation of the Georgia Rules of Professional Conduct rather than the Standards of Conduct. Formal Advisory Opinion No. 20-1 reaches the same conclusion as Formal Advisory Opinion No. 94-3.

## ARGUMENT AND CITATION OF AUTHORITY

Ultimate authority regarding the practice of law and the ethical conduct of lawyers licensed to practice law in the State of Georgia is vested with the Supreme Court of Georgia. *See, Wallace v. Wallace*, 225 Ga., 102, 166 S.E. 2d 718, cert. denied 396 U.S. 939 (1969) (The Supreme Court shall have the authority by appropriate orders, upon recommendation made by the State Bar of Georgia, to adopt rules and regulations for the organization and government of the unified state bar). The State Bar of Georgia now requests that this Court exercise its ultimate jurisdiction over the question presented in the formal advisory opinion issued by the Board.

The purpose of formal advisory opinions is to provide guidance to attorneys as they consider ethical issues and apply ethics rules to their practice of law. This Court recognized the relevance of the ethical issue addressed in Formal Advisory Opinion No. 94-3 when it issued that opinion. However, with the withdrawal of Formal Advisory Opinion No. 86-7, and the fact that Formal Advisory Opinion No. 94-3 includes references to Formal Advisory Opinion No. 86-7, Formal Advisory Opinion No. 94-3 no longer provides clear ethical guidance. Formal Advisory Opinion No. 20-1 deals with the ethics issues addressed in Formal Advisory Opinion No. 94-3 without referencing Formal Advisory Opinion No. 87-6. Formal Advisory Opinion

No. 20-1 also provides the most current ethical guidance based on an interpretation of the Georgia Rules of Professional Conduct, whereas Formal Advisory Opinion No. 94-3 interprets the Standards of Conduct. Eventually, Formal Advisory Opinion No. 20-1, if reviewed and approved by this Court, would replace Formal Advisory Opinion No. 94-3.

Bar Rule 4-403 (d) requires that this Petition “concisely state the manner in which the petitioner is aggrieved.” Rule 4-403 (d) states that “Unless the Supreme Court of Georgia grants review as provided hereinafter, the opinion shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.” Additionally, Bar Rule 4-403 (e) states that “If the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.” Therefore, without review from this Court, Formal Advisory Opinion No. 20-1 is binding only on the State Bar of Georgia. As such, if this Court does not grant review, Formal Advisory Opinion No. 20-1 would become an opinion of the Formal Advisory Opinion Board binding only on the State Bar of

Georgia and Formal Advisory Opinion No. 94-3 would remain an opinion of this Court binding on all members of the State Bar of Georgia.

One measure of the broad interest in the underlying ethics issue is the 15 comments the Board received after the first publication of Formal Advisory Opinion No. 20-1. If this Court grants review of the opinion, in compliance with Bar Rule 4-403 (d), the State Bar of Georgia will file those comments with the Court, they become a part of the record in this matter, and all who are interested will be heard.

The State Bar of Georgia is seeking this Court's review, and eventually this Court's approval, of Formal Advisory Opinion No. 20-1 to ensure that members of the State Bar of Georgia have clear and current ethical guidance for the question presented in Formal Advisory Opinion No. 94-3 and there are not two opinions, with different binding effects, dealing with the ethics issue addressed in Formal Advisory Opinion No. 94-3. Accordingly, the State Bar of Georgia seeks the Court's review of Formal Advisory Opinion No. 20-1.

### **CONCLUSION**

For all of the reasons stated above, the State Bar of Georgia requests that this Court grant this petition for discretionary review of Formal Advisory Opinion No. 20-1.

Filed this 31<sup>st</sup> day of March, 2021.

*[signature on next page]*

Counsel for the State Bar of Georgia

A handwritten signature in black ink, appearing to read 'John J. Shiptenko', with a long horizontal line extending to the right.

John J. Shiptenko  
Senior Assistant General Counsel  
State Bar of Georgia  
Georgia Bar No. 643200

**OFFICE OF THE GENERAL COUNSEL**

State Bar of Georgia  
104 Marietta Street, NW  
Suite 100  
Atlanta, Georgia 30303  
(404) 527-8720

**FORMAL ADVISORY OPINION NO. 20-1**  
**(Redrafted Version of Formal Advisory Opinion No. 94-3)**

**QUESTION PRESENTED:**

Whether a lawyer may properly communicate with a former employee of a represented organization to acquire relevant information, without obtaining the consent of the organization's counsel.

**SUMMARY ANSWER:**

Generally, a lawyer may communicate with a former employee of an organization that is represented by counsel without obtaining that counsel's consent, provided that the lawyer fully discloses to the former employee, before initiating the communication, the following information: (1) the identity of the lawyer's client and the nature of that client's interest in relation to the organization (i.e., the former employer); and (2) the reason for the communication and the essence of the information sought. After making these disclosures, the lawyer must also obtain the former employee's consent to the communication.

Furthermore, in communicating with the former employee, the lawyer must not utilize methods of obtaining information that would violate the legal rights of the former employee or the represented organization, such as inquiring into information that may be protected by the attorney-client privilege or other evidentiary privilege.

Finally, if the lawyer knows or at any point determines that the former employee is individually represented by counsel in the matter, the lawyer may not communicate with the former employee, unless authorized by law or court order to do so, without obtaining the former employee's counsel's consent.

**OPINION:**

The question presented relates to the propriety of a lawyer seeking to obtain information from a former employee of an organization that is represented by counsel. Counsel for an organizational client undoubtedly would prefer that an adverse lawyer not be permitted to communicate with former employees of the organization for the purpose of obtaining information that could be used against the organization. However, prohibiting such communications by a lawyer, without the consent of the organization's counsel, would give that counsel a right of information control that is not supported by any rule of professional conduct.

Georgia Rule of Professional Conduct 4.2, commonly known as the anti-contact rule, only addresses a lawyer's ability to communicate about the subject matter of a representation with a person who is represented by counsel in the matter. Specifically, Rule 4.2(a) provides:

A lawyer who is representing a client in a matter 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 court order.

Rule 4.2 prohibits communication with some but not all of the constituents of the organization. Comment 4A to Rule 4.2 explains which constituents fall within the rule's anti-contact protections—

In the case of an organization, this Rule prohibits communications with an agent or employee of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

The Comment does not anywhere suggest that a former employee comes within Rule 4.2's protections. The only reasonable conclusion to draw from this omission is that Rule 4.2 does not apply to former employees.<sup>1</sup>

That, however, does not fully address a lawyer's ethical obligations in this context. While a lawyer may communicate with a former employee of an organization without first obtaining the consent of that organization's counsel, the lawyer must comply with Rule 4.3 and make it clear that he or she is not disinterested and explain the nature of and reasons for the communication with the former employee.<sup>2</sup> In particular, the lawyer must fully disclose to the former employee, before initiating the communication, the following information: (1) the identity of the lawyer's client and the nature of that client's interest in relation to the organization (i.e., the former employer); and (2) the reason for the communication and the essence of the information sought. After the required disclosures are made, the lawyer must secure the former employee's consent

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<sup>1</sup> It is also instructive to note that Georgia Rule 4.2(a) and ABA Model Rule 4.2 are identical (except for one stylistic difference) and that Comment [7] to the ABA rule expressly states that “[c]onsent of the organization’s lawyer is not required for communication with a former constituent.” ABA MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [7] (2019) [hereinafter “MODEL RULES”]. *See also* ABA Formal Op. 91-359 (March 22, 1991) (“The prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.”).

<sup>2</sup> Rule 4.3 addresses a lawyer's duties in dealing with an unrepresented person:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

- a. state or imply that the lawyer is disinterested; when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
- b. give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client

GEORGIA RULES OF PROF'L CONDUCT, R. 4.3 (2020) [hereinafter “GEORGIA RULES”].

to the communication. If the former employee refuses to consent, the lawyer must proceed through the formal discovery process in order to obtain the desired information.

The lawyer must also exercise caution in communicating with the former employee and avoid utilizing methods of obtaining information that would violate the legal rights of the former employee or the represented organization.<sup>3</sup> In particular, the lawyer must refrain from inquiring into information that may be protected by the attorney-client privilege or some other evidentiary privilege.<sup>4</sup> Along the same lines, before initiating the communication, the lawyer should ensure that the former employee is not personally represented by counsel in the matter. If the lawyer knows or determines that the former employee is individually represented by counsel, the lawyer must comply with Rule 4.2 and obtain the consent of the former employee's counsel, unless the lawyer is otherwise authorized by law or court order to make the communication.

Finally, while this opinion focuses on a lawyer communicating with a former employee of an organization that is represented by counsel, the guidance it provides is also instructive for navigating the same situation when the organization is not represented by counsel. A former employee under such circumstances likewise has a right to know the identity of the lawyer's client and the nature of and reasons for the lawyer's communication. Therefore, even when the organization is not represented by counsel, a lawyer should make full disclosure to the former employee as set forth in this opinion and obtain the former employee's consent before engaging in any other communication.

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<sup>3</sup> See GEORGIA RULES, R. 4.4(a); see also MODEL RULES, R. 4.2, cmt. [7] (“In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.”) (emphasis added).

<sup>4</sup> See GEORGIA RULES, R. 4.4(a), cmt. [1] (“Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships.”) (emphasis added).



# State Bar of Georgia

## FORMAL ADVISORY OPINION RULES

### **Rule 4-223. Advisory Opinions.**

(a) Any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person. Formal Advisory Opinions which have been approved or modified by the Supreme Court pursuant to Rule 4-403 shall also be binding in subsequent disciplinary proceedings which do not involve the person who requested the opinion.

(b) It shall be considered as mitigation to any grievance under these rules that the respondent has acted in accordance with and in reasonable reliance upon a written Informal Advisory Opinion requested by the respondent pursuant to Rule 4-401 or a Formal Advisory Opinion issued pursuant to Rule 4-403, but not reviewed by the Supreme Court of Georgia.

### **Rule 4-401. Informal Advisory Opinions.**

The Office of the General Counsel of the State Bar of Georgia shall be authorized to render Informal Advisory Opinions concerning the Office of the General Counsel's interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts. The Informal Advisory Opinion should address prospective conduct and may be issued in oral or written form. An Informal Advisory Opinion is the personal opinion of the issuing attorney of the Office of the General Counsel and is neither a defense to any complaint nor binding on the State Disciplinary Board, the Supreme Court of Georgia, or the State Bar of Georgia. If the person requesting an Informal Advisory Opinion desires, the Office of the General Counsel will transmit the Informal Advisory Opinion to the Formal Advisory Opinion Board for discretionary consideration of the drafting of a Proposed Formal Advisory Opinion.

### **Rule 4-402. The Formal Advisory Opinion Board.**

(a) The Formal Advisory Opinion Board shall consist only of active members of the State Bar of Georgia who shall be appointed by the President of the State Bar of Georgia, with the approval of the Board of Governors of the State Bar of Georgia.

(b) The members of the Formal Advisory Opinion Board shall be selected as follows:

- (1) Five members of the State Bar of Georgia at-Large;
- (2) One member of the Georgia Trial Lawyers Association;
- (3) One member of the Georgia Defense Lawyers Association;
- (4) One member of the Georgia Association of Criminal Defense Lawyers;
- (5) One member of the Young Lawyers Division of the State Bar of Georgia;

- (6) One member of the Georgia District Attorneys Association;
- (7) One member of the faculty of each American Bar Association Accredited Law School operating within the State of Georgia;
- (8) One member of the Investigative Panel of the State Disciplinary Board;
- (9) One member of the Review Panel of the State Disciplinary Board; and
- (10) One member of the Executive Committee of the State Bar of Georgia.

(c) All members shall be appointed for terms of two years subject to the following exceptions:

(1) Any person appointed to fill a vacancy occasioned by resignation, death, disqualification, or disability shall serve only for the unexpired term of the member replaced unless reappointed;

(2) The members appointed from the Investigative Panel and Review Panel of the State Disciplinary Board and the Executive Committee shall serve for a term of one year;

(3) The terms of the current members of the Formal Advisory Opinion Board will terminate at the Annual Meeting of the State Bar following the amendment of this Rule regardless of the length of each member's current term; thereafter all appointments will be as follows to achieve staggered, two-year terms:

(i) Three of the initial Association members (including the Georgia-Trial Lawyers Association, the Georgia Defense Lawyers Association, the Georgia Association of Criminal Defense Lawyers, the Young Lawyers Division of the State Bar and the Georgia District Attorneys Association) shall be appointed to one-year terms; two of the initial Association members shall be appointed to two-year terms. As each initial term expires, the successor appointee shall be appointed for a term of two years;

(ii) Two of the initial members appointed from the State Bar of Georgia at-large (the "At-Large Members") shall be appointed to one-year terms; three of the initial At-Large members shall be appointed to two-year terms. As each initial term expires, the successor appointee shall be appointed for a term of two years;

(iii) Two of the initial members from the American Bar Association Accredited Law Schools shall be appointed to one year terms; two of the initial law school members shall be appointed to two-year terms. As each initial term expires, the successor appointee shall be appointed for a term of two years;

(4) All members shall be eligible for immediate reappointment to one additional two-year term, unless the President of the State Bar of Georgia, with approval of the Board of Governors of the State Bar of Georgia, deems it appropriate to reappoint a member for one or more additional terms.

(d) The Formal Advisory Opinion Board shall have the authority to prescribe its own rules of conduct and procedure.

**Rule 4-403. Formal Advisory Opinions.**

(a) The Formal Advisory Opinion Board shall be authorized to draft Proposed Formal Advisory Opinions concerning a proper interpretation of the Georgia Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts. The Proposed Formal Advisory Opinion should address prospective conduct and may respond to a request for a review of an Informal Advisory Opinion or respond to a direct request for a Formal Advisory Opinion.

(b) When a Formal Advisory Opinion is requested, the Formal Advisory Opinion Board should review the request and make a preliminary determination whether a Proposed Formal Advisory Opinion should be drafted. Factors to be considered by the Formal Advisory Opinion Board include whether the issue is of general interest to the members of the State Bar of Georgia, whether a genuine ethical issue is presented, the existence of opinions on the subject from other jurisdictions, and the nature of the prospective conduct.

(c) When the Formal Advisory Opinion Board makes a preliminary determination that a Proposed Formal Advisory Opinion should be drafted, it shall publish the Proposed Formal Advisory Opinion either in an official publication of the State Bar of Georgia or on the website of the State Bar of Georgia, and solicit comments from the members of the State Bar of Georgia. If the Proposed Formal Advisory Opinion is published on the State Bar of Georgia website only, the State Bar of Georgia will send advance notification by e-mail to the entire membership that have provided the State Bar with an e-mail address, that the proposed opinion will be published on the State Bar of Georgia website. Following a reasonable period of time for receipt of comments from the members of the State Bar of Georgia, the Formal Advisory Opinion Board shall then make a final determination to either file the Proposed Formal Advisory Opinion as drafted or modified, or reconsider its decision and decline to draft and file the Proposed Formal Advisory Opinion.

(d) After the Formal Advisory Opinion Board makes a final determination that the Proposed Formal Advisory Opinion should be drafted and filed, the Formal Advisory Opinion shall then be filed with the Supreme Court of Georgia and republished either in an official publication of the State Bar of Georgia or on the website of the State Bar of Georgia. If the Proposed Formal Advisory Opinion is to be republished on the State Bar of Georgia website only, the State Bar of Georgia will send advance notification by e-mail to the entire membership that have provided the State Bar with an e-mail address, that the proposed opinion will be republished on the State Bar of Georgia website. Unless the Supreme Court of Georgia grants review as provided hereinafter, the opinion shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only. Within 20 days of the filing of the Formal Advisory Opinion or the date the official publication is mailed to the members of the State Bar of Georgia, (if the opinion is published in an official publication of the State Bar of Georgia), or first appears on the website of the State Bar of Georgia (if the opinion is published on the website), whichever is later, the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia. The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court of Georgia grants the

petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the State Bar of Georgia. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court of Georgia Rule 10, counting from the date of the order granting review. The final determination may be either by written opinion or by order of the Supreme Court of Georgia and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

(e) If the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only. If the Supreme Court of Georgia grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court of Georgia approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the official Georgia Reports. The Supreme Court of Georgia shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

(f) The Formal Advisory Opinion Board may call upon the Office of the General Counsel for staff support in researching and drafting Proposed Formal Advisory Opinions.

(g) The name of a lawyer requesting an Informal Advisory Opinion or Formal Advisory Opinion will be held confidential unless the lawyer otherwise elects.

**Rule 4-404. Immunity.**

The members of the Formal Advisory Opinion Board, as well as staff personal and counsel assisting the Board and its members, including, but not limited to staff counsel, advisors and the State Bar of Georgia, its officers and employees, members of the Executive Committee, and members of the Board of Governors, shall have absolute immunity from civil liability for all acts performed in the course of their official duties.



# State Bar of Georgia

## Formal Advisory Opinion No. 94-3

State Bar of Georgia  
Issued by the Supreme Court of Georgia  
On September 9, 1994  
Formal Advisory Opinion No. 94-3

For references to Standard of Conduct 47, please see [Rule 4.2](#).

This opinion also discusses issues addressed by [Rule 4.3](#).

For an explanation regarding the addition of headnotes to the opinion, [click here](#).

### QUESTION PRESENTED:

May a lawyer properly contact and interview former employees of an organization represented by counsel to obtain information relevant to litigation against the organization?

### SUMMARY ANSWER:

A lawyer may properly contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to litigation against the organization provided that: (1) the lawyer makes full disclosure as to the identity of his/her client; and (2) the former employee consents.

### OPINION

The question presented involves attempts to obtain information from former employees of an organization represented by counsel and is an aspect of the perennial problem of information control by lawyers engaged in litigation. Lawyers do not want their adversary colleagues to contact and interview employees of their client organization for the purpose of obtaining information that may be used against the organization. But a rule prohibiting such contact without consent of the organization's lawyer gives that lawyer a right of information control, a right that is easily subject to abuse. Therefore, strong policy reasons must support such a rule.

The problem is an outgrowth of the rule that a lawyer shall not communicate about the subject of the representation with a person represented by a lawyer without the prior consent of the lawyer. Standard 47, Ga. Bar Rule 4-102. This rule has been widely adopted, see, e.g., Rule 4.2, ABA MRPC, and is deemed to represent sound policy. Lawyers should not be able to contact and attempt to manipulate the clients of fellow members of the bar, especially when the lawyer's purpose in doing so is to serve his or her own self-interest in disregard of the welfare of the other lawyer's client.

This policy explains why Standard 47 applies to the employees of organization clients when those employees have the power to bind the organization by what they say or do. Formal Adv. Op. 87-6 (July 1989). The words of a former employee can provide only information, and those words cannot have a binding effect on the former employer. Since neither words nor actions of a former employee can bind the organization, the policy relied on in Formal Adv. Op. 87-6 is not applicable to former employees. When the purpose of the rule ends, the rule itself ends. Therefore, a lawyer may contact and interview the former employees of an organization to obtain non-privileged information to use against that organization in a dispute.

That, however, does not conclude the matter. Just as a rule prohibiting such contact would be an example of information control unsupported by any valid policy considerations, so the lawyer's contact and interview without informing the employee of the purpose would be an example of information control in the same category. A former employee may not wish to give information against the former employer, and since he or she is entitled not to do so, it would be unethical to use deceit and false pretenses to deny the former employee his or her right. Consequently, the former employee is entitled to know the identity of the lawyer's client, the reason for the contact, the purpose of the interview and any other information necessary under the circumstances to make the interview not misleading. A refusal of the former employee to grant the interview means only that the lawyer must resort to the normal discovery processes and witness procedures.

It follows, then, that while a lawyer may contact a former employee of an organization for the purposes of an interview, before proceeding with the interview, that lawyer must make full disclosure and obtain the consent of the former employee.

While this opinion has not dealt with the situation in which the organization is not represented by a lawyer, it is well to note two things. First, there is no rule of ethics prohibiting the contact in such a situation; second, even when there is no lawyer representing the organization, the former employee still has a right to know the reason for the contact and the purpose of the interview. Therefore, it would be unethical for a lawyer to attempt to obtain information without full disclosure. In this context as in others, a lawyer's attempt to obtain information under false pretenses or by the use of deceit is unethical.