Committee Opinion
April 1, 1996

LEGAL ETHICS OPINION 1670 — CONTACT WITH FORMER EMPLOYEE OF ADVERSE PARTY.

You have presented a hypothetical situation in which an attorney represents Defendant in a dispute concerning the right to goods. Defendant bought the disputed goods from Seller, who contends that Plaintiff released its lien prior to the sale to Defendant. Plaintiff says the lien was not released. Officer, an employee of Plaintiff, signed documents which Seller says were intended to release the lien. Seller says Officer's subsequent actions were consistent with a release of the lien, and Seller believes Officer's testimony would be favorable to Defendant. Officer no longer works for Plaintiff and is not represented by counsel.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the Defendant's attorney communicating *ex parte* with Officer to determine Officer's recollections concerning matters at issue in a lawsuit pending in a Virginia Circuit Court.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:7-103(A)(1) which states that during the course of representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by counsel in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The committee has previously opined that it is permissible to contact, *ex parte*, employees of an adverse corporation as long as the attorney first discloses their role as an adversary to the corporation in litigation and second the employee does not occupy a position within the corporation such that he or she could commit the corporation to specific courses of action that would lead one to believe the employee is the corporation's “alter ego”, i.e., that said employees are members of the corporation's “control group” as defined in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Under the alter ego test, any employee who because of their status or position might bind the corporation by their acts or admissions must be contacted only through formal discovery channels and not by *ex parte* methods. (See LE Op. 347, LE Op. 530 and LE Op. 801).

In prior opinions, this committee has adopted the “control group” test as a standard for defining a group of employees to be treated as a “party” for purposes of DR:7-103(A)(1) and who opposing counsel may not interview without the consent of counsel for the corporate entity. Under the control group test it is not improper for an attorney to communicate directly with the employee of an adverse party if that employee is not a member of the control group and is not able to commit the organization to specific courses of action that would lead one to believe the employee is the corporation's alter ego. (See LE Op. 1504). Clearly, an officer of a corporation would be a likely member of the corporation's control group or alter ego under this definition.

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In the facts you present, the committee believes that the termination from employment by Officer in this hypothetical is a pivotal point which distinguishes the analysis of this hypothetical. A corporation acts through its employees. However, once an employee who is also a member of the control group separates from the corporate employer by voluntary or involuntary termination, the restrictions upon direct contact cease to exist because the former employee no longer speaks for the corporation or binds it by his or her acts or admissions. In fact, this committee has previously held that it is ethically permissible for an attorney to communicate directly with the former officers, directors and employees of an adverse party unless the attorney is aware that the former employee is represented by counsel. (See LE Op. 533, LE Op. 905 and LE Op. 1589). Counsel for the corporation represents the corporate entity and not individual corporate employees. (See EC:5-18). In the instance where it is necessary to contact unrepresented persons, a lawyer should not undertake to give advice to the person, except to advise them to obtain a lawyer. (See EC:7-15).

The committee is mindful that some circuit courts and federal courts in Virginia have interpreted DR:7-103(A)(1) differently. Some courts have applied a Model Rules approach and prohibited *ex parte* contacts not only where the control group or alter ego theory applies, but also where the activities or statements of an employee are part of the focus of litigation or would make the employer vicariously liable as a result of the employee's statements or activity. *Queensberry v. Norfolk & Western Ry.*, 157 F.R.D. 21 (E.D. Va. 1993); *Nila Sue DuPont v. Winchester Medical Center, Inc.* — Winchester Circuit Court Law No. 92-171. The committee also recognizes that a different opinion might result if the facts of this hypothetical were analyzed under Rule 4.2 of the Model Rules[1] which adopts a broader prohibition of *ex parte* contacts than DR:7-103(A)(1). Nevertheless, the committee must apply the rules of conduct which Virginia has adopted to this hypothetical and leave specific legal rulings involving other rules of ethical conduct to the presiding trial judges of Virginia based upon the facts presented before them.[2]

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[1] ABA Model Rule 4.2 is quite similar to DR:7-103(A)(1). Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

However, the Comment under Rule 4.2 provides that where the represented party is an organization, the Rule prohibits communications by opposing counsel with persons having managerial responsibility and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

[2] Even so, Rule 4.2 would not prohibit ex parte contacts by opposing counsel with former employees, including persons who occupied positions within the “control group” of their former employer. Former employees of a corporation may be contacted without consulting the corporation's counsel as they are no longer in positions of authority and, therefore, cannot bind the corporation. ABA Formal Op. 91-359 (1991).