

Nebraska Ethics Advisory Opinion for Lawyers
No. 91-3

I. AS COUNSEL FOR A PLAINTIFF, AN ATTORNEY MAY NOT ETHICALLY INTERVIEW PRESENT OR FORMER EMPLOYEES OF A DEFENDANT CORPORATION IF:

(a) THE EMPLOYEES ARE OFFICERS OR MANAGEMENT EMPLOYEES, OR EMPLOYEES WHOSE STATEMENTS MAY BIND THE CORPORATION IN A LEGAL SENSE.

II. BEFORE INTERVIEWING PRESENT OR FORMER EMPLOYEES NOT WITHIN THE CATEGORY AS OUTLINED IN I (a) ABOVE, PLAINTIFF'S ATTORNEY SHOULD:

(a) IDENTIFY HIM/HERSELF AS AN ATTORNEY FOR THE PLAINTIFF AND IDENTIFY THE LITIGATION SO THAT THE INDIVIDUAL CLEARLY UNDERSTANDS COUNSEL'S ROLE. IF THE PROSPECTIVE WITNESS IS PRIVY TO A PRIVILEGED COMMUNICATION WITH DEFENDANT'S COUNSEL, PLAINTIFF'S COUNSEL SHOULD NOT MAKE INQUIRY CONCERNING SUCH PRIVILEGED COMMUNICATION. SUBJECT TO THE ABOVE, CURRENT EMPLOYEES MAY BE INTERVIEWED CONCERNING FACTS TO WHICH THEY WERE WITNESS IF THEIR STATEMENTS ARE NOT BINDING UPON THE CORPORATION.

(b) FORMER EMPLOYEES MAY BE INTERVIEWED, SUBJECT TO THE LIMITATIONS SET OUT ABOVE CONCERNING PRIVILEGED COMMUNICATION.

III. PLAINTIFF'S COUNSEL SHOULD NOT SANCTION THE EFFORT OF AN OFFICER OF THE PLAINTIFF CORPORATION TO PREVENT EMPLOYEES FROM TALKING WITH ATTORNEYS FOR THE DEFENDANT IF THOSE EMPLOYEES FALL WITHIN THE PERMISSIBLE GUIDELINES SET FORTH ABOVE AND IT IS THE DECISION OF THE EMPLOYEES TO TALK WITH DEFENDANT'S ATTORNEYS. A LAWYER MAY NOT CIRCUMVENT A DISCIPLINARY RULE THROUGH THE

ACTIONS OF ANOTHER. SEE DR 1-102 (A) (2).

FACTS

You represent a plaintiff corporation and wish to interview present employees and former employees of the defendant corporation concerning facts related to a pending case. The employees involved range from officers and managing agents of the corporation to employees who have no such authority. Your client is also a corporation and one of the officers has proposed issuing instructions to employees of your client that they should not talk with attorneys for the defendant and if they do so they may be terminated. You ask 1) whether you may interview present and/or former employees of the defendant corporation and, 2) whether you have any ethical obligation to prevent or object to the memorandum proposed by the officer of your client.

APPLICABLE CODE PROVISIONS

DR 7-104 Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

EC 7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the

unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

EC 7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

DISCUSSION

Historically, Canon 9 "Negotiations with an Opposite Party" provided: "A Lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should only deal with his counsel". Canon 9 was succeeded by Disciplinary Rule 7-104 and Ethical Consideration 7-18. The Model Rules of Professional Conduct [not adopted in Nebraska] treat the problem in Model Rule 4.2 as follows:

"In representing the 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 lawyer or is authorized by law to do so. "

With reference to organizations, i.e. corporations or partnerships with employees, Model Rule 4.2 prohibits communications by a lawyer for one party concerning the matter in representation with persons having managerial responsibility on behalf of the organization, 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. Under Disciplinary Rule 7-104

(A) (1), where the opposing party is a corporation or governmental entity, an officer or other employee with the authority to commit the corporation is considered "a party" for the purposes of the Rule.

A more difficult question is whether an employee of a corporation or partnership is a "party" under DR 7-104 (A) (1). ABA Informal Opinion 1377 states that "No communication with an employee of a municipal corporation with power to commit the municipal corporation in the particular situation may be made by opposing counsel unless he has the prior consent of the designated counsel of the municipal corporation or unless he is authorized by law to do so." Parenthetically, it is noted that some jurisdictions add the requirement that the attorney disclose his identity, his representation of the opposing party, and the connection between the representation and the communication. See Alaska Bar Association Opinion 71-1 and Arizona State Bar Opinion 203 (1966). The rule has been the subject of comment by a number of commentators. See, generally, Note, "DR 7-104 of the Code of Professional Responsibility applied to the government 'party' "; 61 Minn. Law Review, 1007 (1977); "Communicating With Another Lawyer's Client: The Lawyers' Veto and the Client's Interest", 127 U. Pa. L. Rev. 683 (1979); and "Exparte Contact With Employees and Former Employees of a Corporate Adversary: Is it Ethical?", Miller & Cathlow, The Business Lawyer (Aug. 1987).

Several State Bar Advisory Committees have issued opinions which are in some conflict. For example, Alabama ruled a lawyer who is involved in a medical malpractice action against a hospital may interview, without the consent of the lawyer representing the hospital, certain nurses who will be witnesses in the case, if these nurses are non-official, non-managerial hospital employees without authority to speak for or bind the hospital. Opinion 83-81. Colorado has held that a lawyer may not interview a present or former employee of an adverse party organization without the prior consent of the adverse party's counsel if the employee "has or had the legal authority to commit the organization to a position regarding the subject matter

of the litigation." Such an employee, as alter ego of the corporation, constitutes the "party". Colorado Opinion 69 (1985). Maryland has held that a lawyer for the plaintiff in a malpractice action against a corporation hospital may not communicate with a past or present employee of the hospital without the consent of the hospital's counsel if the employee shares a certain degree of identity with the hospital. Corporate officers, directors and managing agents clearly share that identity. If the employee does not share the identity with the hospital, the lawyer has no obligation to secure the consent of the hospital's counsel. Opinion 83-81 (5/23/83). Michigan has published an opinion that an attorney who represents a plaintiff in a case against a municipal corporate employer may discuss the case with a corporate defendant's non-management employees outside the presence and without the consent of defense counsel provided the attorney identifies himself as an attorney for a party in pending litigation involving the corporate employer, states the purpose of the communication to the corporate employee, and determines that the corporate employee is not a party to the litigation and/or is not represented by an attorney. When an officer or employee of the municipal corporate employer has authority to commit the municipal corporation, opposing counsel must view the officer or employee as an integral component of the corporate party and may not communicate on the subject of the representation with the officer or employee without the prior consent of the attorney representing the corporate party, or unless authorized by law to do so. Opinion CI-535, 6/18/80. Ohio's Opinion 81-5, (4-27-81) concluded that a plaintiff's lawyer may communicate with employees of a defendant corporation without the consent of the corporation's lawyer if the employee lacks the authority to make statements binding the corporation.

Tennessee Opinion 83-F-46 (a) and (b) states that an attorney may interview non-management or non-administrative personnel of a corporate defendant, without the knowledge or consent of the corporation, or its lawyer, provided that prior to the interview the lawyer identifies himself and informs the employee of

the controversy and the reason for the inquiry. These personnel are considered as witnesses, while management and administrative employees are considered and treated as adverse parties. However, any communication between the corporate lawyer and employee is subject to the attorney/client privilege. The Virginia Bar has opined that a lawyer may communicate with employees of the adverse party provided the lawyer discloses his adversarial role and the employee does not occupy a position in the corporation with the authority to commit the corporation to a course of action that would lead one to believe that the employee is the corporation's alter ego. Opinion 530 (11/23/83). Wisconsin has issued an opinion that a lawyer may contact a former employee of an opposing party to obtain material information, even though the former employee was a managing agent, where the employee has severed all relationship with the corporation and is therefore not in a position to commit the corporation. See Opinion E-82-10 (12/82).

The Massachusetts Bar has decided that a lawyer may not interview current employees of a corporate defendant without the consent of opposing counsel where the proposed interview concerns matters within the scope of the employee's employment. In such a situation those employees would be "parties within the rule". The lawyer may discuss incidents relating to a pending case involving a particular corporation so long as the subject of the inquiry is not part of the particular employee's corporate responsibilities. Opinion 82-7 (6/23/82).

The Los Angeles Bar Association concluded in Formal Opinion 410 (3-24-83) that neither an attorney nor his investigator may interview ex-parte a defendant corporation's employee. Such contact may either directly or indirectly prejudice the employee.

The Advisory Committee for New York City has held that an important measure of whether the employee should be treated as a party is whether the employee has the power to commit the corporation since the corporation's right to representation would be undermined if those

employees with power to commit the corporation in a particular situation were not viewed as the alter ego of the corporation itself. The scope of the rule permits interviews with all employees concerning their knowledge of factual matters outside the scope of their employment and interviews of former employees since they are no longer part of the corporate entity. See Opinion 80-46, New York City.

In a 1986 case, the Washington Supreme Court held that an adverse attorney may conduct ex-parte interviews with current corporate employees who do not have managing authority sufficient to speak for and bind the corporation. See *Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564. *Wright* was a malpractice action in which plaintiff's counsel sought the right to interview, ex-parte, current and former nurses of the defendant. During the lawsuit, the defendant had instructed all of its current and former employees not to discuss the case with anyone other than defendant's counsel. The court found that current employees of the corporate defendant should be considered parties only if "they have managing authority sufficient to give them the right to speak for, and bind the corporation." *Id.* at 200. The court found no reason to distinguish between non-managerial employees who witnessed an event, such as the nurses at issue, and employees whose acts or omissions caused the events leading to the action. The court in *Wright* held that former employees could not possibly bind the corporation and therefore the rule did not apply to them.

Commentators have criticized the *Wright* opinion on several grounds. First, Rule 801 (d) (2) (D) of the Federal Rules of Evidence contains a hearsay exception which reads in part "A statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship". The commentator points out, under this Rule, statements by persons other than those specifically authorized to speak for the corporation can be admissions against that corporation and therefore "binding". See "Ex-parte Contact with Employees and Former Employees of a Corporate Adversary: Is It

Ethical?" *The Business Lawyer*, Volume 42, Pg. 1058. Some sources have argued that all current employees should be considered parties under the Rule because they may very well be privy to privileged communications with their attorneys even though not management level employees. *Id.* at 1064-1066.

The subject matter was reviewed in an opinion by Robert B. Collins, United States Magistrate of the United States District court for the District of Massachusetts in *Mompoin v. Lotus Development Corp.*, 110 F.R.D. 414. The Magistrate refused to apply a rule requiring an absolute prohibition in all instances against interviews with corporate employees concerning matters within the scope of the employee's employment. He cited competing interests and concluded that a court must be able to "strike a balance in individual cases which takes a count of the competing interests." The court found that in the particular factual situation "the balance tilts in favor of allowing plaintiff's counsel to interview the female employees out of the presence of Lotus' counsel. Put another way, I do not find 'good cause' for the entry of a protective order which would prohibit plaintiff's counsel from interviewing the female employees outside of the presence of Lotus' counsel." *Id.* at 419. The court required that plaintiff's counsel identify himself and his capacity in the litigation. The court further ordered that Lotus should advise its employees that they may, if they wish, agree to be interviewed by plaintiff's counsel and that no disciplinary action or other adverse action would be taken by Lotus against them. Lotus was also free to advise its employees that they could refuse to meet with plaintiff's counsel but it was their decision. The court also advised both counsel that the employees should be told that they may have their own counsel present or counsel for Lotus present if that was their desire. *Id.* at 420.

The court's position on allowing individuals freedom to decide on their own whether to talk with counsel or not reflects the majority position on that issue. For example, Colorado has opined that a lawyer may not directly or indirectly advise or imply to a potential witness to refuse a pretrial interview by opposing counsel. See Opinion 65

(3/17/84). Maryland has opined that a lawyer may advise a witness not to talk with an insurance company but in so doing must make it clear to the witness that it is in the discretion of the witness to decide whether to talk to the representatives. See Opinion 85-69 (undated).

CONCLUSION

I. It is the opinion of the Advisory Committee that you, as counsel for the plaintiff, may not ethically interview present or former employees of the defendant corporation if:

(a) The employees are officers or management employees, or employees whose statements may bind the corporation in a legal sense.

II. Before interviewing present or former employees not within the category as outlined in I (a) above, you should:

(a) Identify yourself as an attorney for the plaintiff and identify the litigation so that the individual clearly understands your role. If the prospective witness is privy to a privileged communication with defendant's counsel, you should not make inquiry concerning such privileged communication. Subject to the above, current employees may be interviewed concerning facts to which they were a witness if their statements are not binding upon the corporation.

(b) Former employees may be interviewed, subject to the limitations set out above concerning privileged communication.

III. It is the opinion of the Advisory Committee that you should not sanction the effort of an officer of the plaintiff corporation to prevent employees from talking with attorneys for the defendant if those employees fall within the permissible guidelines set forth above and it is the decision of the employees to talk with defendant's attorneys. A lawyer may not circumvent a disciplinary rule through the actions of another. See DR 1-102 (A)

(2).

Nebraska Ethics Advisory Opinion for Lawyers
No. 91-3