

THE ADVISORY COMMITTEE

APPOINTED BY
THE NEBRASKA SUPREME COURT
FOR THE
NEBRASKA STATE BAR ASSOCIATION

1500 WOODMEN TOWER
OMAHA, NEBRASKA 68102

ADVISORY OPINION 94-5

Former employees of a corporate party may be interviewed by adverse counsel without the permission of corporate counsel if the former employees are not individually represented. Any such interviews should not inquire as to privileged attorney-client communications.

FACTS

In Opinion 91-3 the Committee addressed the issue of whether a plaintiff's attorney may ethically interview present or former employees of a defendant corporation. The Committee has been requested to clarify its position regarding interviews of former employees of a corporation by adverse counsel.

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.

In recent years a number of advisory opinions have been rendered indicating that an attorney for a plaintiff may ethically interview former employees of a

defendant corporation without the permission of the corporate counsel. For example, in Alaska Opinion 88-3, 901:1303 ABA/BNA Lawyers Manual on Professional Conduct, it was determined that former managerial employees of a defendant corporation may be interviewed unless the former employees were individually represented by counsel. The opinion reasoned that since the former employees can no longer bind the corporation, such communication does not violate the rule prohibiting communication with an adverse party. The plaintiff's lawyer may not, however, obtain confidential attorney-client information in such interviews. Similar conclusions were reached in Maryland Opinion 90-29, 901:1303 ABA/BNA Lawyers Manual on Professional Conduct; North Carolina Opinion 81, 901:6614 ABA/BNA Lawyers Manual on Professional Conduct; Ohio Opinion 90-20, 901:6868, ABA/BNA Lawyers Manual on Professional Conduct and Oregon Opinion 529, 901:7106 ABA/NBA Lawyers Manual on Professional Conduct.

ABA Formal Opinion 91-359, 901:140 ABA/BNA Lawyers Manual on Professional Conduct also addressed this issue and concluded that the prohibition does not extend to former employees of an opposing corporate party. The opinion stated the following in regard to pertinent case law [Model Rule of Professional Conduct 4.2 is substantially identical to DR 7-104 (A)]:

Most recently, in an aside in a case dealing with current employees under DR 7-104 (A) (1), the New York Court of Appeals noted its agreement with the Appellate Division that the rule applies "only to current employees, not to former employees." *Niesig v. Team 1 et al*, 76 N.Y.2d 363, 558 N.E.2d 1030 (1990). See also *Wright by Wright v. Group Health Hosp.* 103 Wash. 2d 192, 691 P.2d 564 (1984) (reasoning that former employees could not possibly speak for or bind the corporation, and therefore interpreting DR 7-104 (A) (1) as not applying to them); and *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990) (holding that DR 7-104 does not bar contacts with former corporate employees, at least in absence of a showing that the employees possessed privileged information).

On the other hand, other courts have held that former employees are covered (it is usually phrased that they will be considered "parties" for ex parte contact purposes) under certain circumstances. Thus, Rule 4.2 has been held to bar ex parte contacts with former employees who, while employed, had "managerial responsibilities concerning the matter in litigation." *Porter v. Arco Metals*, 642 F.Supp. 1116, 1118 (D.Mont. 1988). In *Amarin Plastics v. Maryland Cup Corp.*, 116 F.R.D. 36 (D.Mass. 1987) the Court, while recognizing the possible applicability of Rule 4.2 to former employees, declined to apply it on the facts of that case. It

noted, however, the additional possibility that communications between a former employee and his former corporate employer's counsel may be privileged. *Id.*, at 41. See also *In re Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), *cert. denied*, 455 U.S. 99 (1982) (noting that the rationale of *Upjohn v. United States*, 449 U.S. 383 (1981), with respect to corporate attorney-client privileges applies to former as well as current corporate employees. In *Public Service Electric and Gas Company v. Associated Electric and Gas Ins. Services, Ltd.*, 745 F.Supp. 1037 (D.N.J. 1990) the court interpreted Rule 4.2 to cover all former employees.

The ABA opinion concluded by stating:

Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2 communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

With respect to any unrepresented former employee, of course, the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as former employee with his or her former employer's counsel are protected by the privilege (a privilege not belonging to or for the benefit of the former employee, by the former employer). Such an attempt could violate Rule 4.4 (requiring respect for the rights of third persons).

CONCLUSION

The Committee is in substantial agreement with ABA Formal Opinion 91-359 and is of the opinion that former employees of a corporate party may be interviewed by adverse counsel without the permission of the corporate counsel if the former employees are not individually represented in the same matter. Any such interviews should not inquire as to privileged attorney-client communications.

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