

THE WEST VIRGINIA STATE BAR

**LEGAL ETHICS INQUIRY 87-1
Letter dated January 12, 1987**

Reference is made to your letter of December 22, 1986, requesting our opinion regarding contacts with personnel of a corporation which is an adverse party in a matter in which you are employed.

DR 7-104(A) provides that 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.
- (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

We agree with your position that you are permitted communications with employees of an adverse corporate defendant other than directors, officers, managing agents and persons designated under the rules to speak on behalf of the corporation. Any other employee may be ethically contacted. Similarly, all directors, officers and managing agents who are employed at the time of the incident giving rise to the lawsuit are not subject to inquiry absent approval of the corporate attorney or as otherwise authorized by law. Other former employees or directors, officers and managing agents from other time periods are subject to such inquiry.

I am enclosing for your information a copy of ABA Informal Opinion 1410 (2/14/78) which provides basic guidelines for determining whether an officer or employee should be considered a party for the purposes of the rule.

AMERICAN BAR ASSOCIATION
COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Informal Opinion 1410

February 14, 1978

(1) Communication Between Plaintiff's
Attorney and Officers and Employees of
Defending Corporation Without Prior
Consent of Defendant's Counsel

(2) Acceptance of Clients Referred by
Another Client Regarding Similar
Lawsuits

(3) Representation of a Client Who Was
Recently Employed by Opposing Party

You have requested the opinion of our Committee in regard to three questions. We shall answer these seriatim in the order in which presented. You state:

First, our Firm represents an individual plaintiff who has filed an action against a large corporation which has officers nationwide. We propose to interview certain officers and employees of the defendant corporation in an effort to determine what, if any, facts they know which would shed light on our client's claims. Of course, we contemplate disclosing to the proposed interviewees the fact that we represent a plaintiff who has brought an action against their employer. We would appreciate the Committee's opinion as to whether we may properly conduct these interviews without the prior knowledge or permission of the defendant corporation's counsel.

American Bar Association Committee on Ethics and Professional Responsibility, 1155 East 60th Street, Chicago, IL, 60637. Telephone: (312) 947-3890. CHAIRMAN: Lewis H. Van Dusen, Jr., Suite 1100, Philadelphia National Bank Building, Philadelphia, PA, 19107. COMMITTEE: Betty B. Fletcher, Seattle, WA; Thomas Z. Hayward, Jr., Chicago, IL; Henry M. Kittleson, Lakeland, FL; L. Clair Nelson, Stamford, CT; Harold L. Rock, Omaha, NE; John Joseph Snider, Oklahoma City, OK; Sherman S. Weipton, Jr., Los Angeles, CA. STAFF DIRECTOR: C. Russell Twist, 1155 East 60th Street, Chicago, IL, 60637.

The Code of Professional Responsibility addresses this question:

DR 7-104(A) 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.

Generally a lawyer may properly interview witnesses or prospective witnesses for opposing sides in any civil or criminal action without the prior consent of opposing counsel--unless such person is a party. If the officers and employees that you propose to interview could commit the corporation because of their authority as corporate officers or employees or for some other reason the law cloaks them with authority, then they, as the alter egos of the corporation, are parties for purposes of DR 7-104(A)(1). The right of the corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the corporation. Where an officer or employee can commit the corporation, opposing counsel must view the officer or employee as an integral component of the corporation itself and therefore within the concept of a "party" for the purposes of the Code.

It, accordingly, is the opinion of this Committee that no communication with an officer or employee of a corporation with the power to commit the corporation in the particular situation may be made by opposing counsel unless he has the prior consent of the designated counsel of the corporation, or unless he is authorized by law to do so. See also Informal Opinion No. 1377 of this Committee dated June 2, 1977.

You next state:

Second, our Firm represents an individual who has brought an employment discrimination action against his former employer. Several of our client's friends and former business associates have now requested that we represent them in bringing similar actions against the same employer. Although we did not solicit these

additional representations and did not request or suggest that our client do so, our client did refer these individuals to us. We would appreciate the Committee's opinion as to whether we may properly undertake these additional representations.

We see no objection to your firm representing other individuals in an employment discrimination action against their former employers where they are referred to you by a client that you are then representing. You state that you did not solicit these additional representations and did not request or suggest that your client do so, so you have not taken any action proscribed by the Code of Professional Responsibility.

Lastly you state:

Third, our Firm represents an individual who has brought an employment discrimination action against his former employer, a large corporation. In the course of the litigation we noticed the deposition of a certain employee of the defendant corporation. Prior to the deposition, the employee contacted us without the knowledge or permission of the corporation or its counsel and requested that his deposition be canceled. He advised us that he too had a claim against the defendant corporation and would like for us to represent him. At that time we declined to represent him or cancel the deposition, which we subsequently took as noticed. This employee has now contacted us again and requested that we represent him in bringing an employment discrimination action against his employer. We would appreciate the Committee's opinion as to whether we may properly represent this individual.

We see no objection ethically to your undertaking employment of the employee whom you previously declined to represent and whose deposition you took in representing a former employee of the same corporation. We assume that you would have no conflict of interest in representing him against the corporation along with the other employees whom you previously were employed to represent.

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December 22, 1986

West Virginia State Bar
Legal Ethics Committee
Room E-400
State Capitol
Charleston, West Virginia 25305

Re: Legal Ethics Inquiry

Dear Sir:

In my practice I have, on numerous occasions, come across a situation in which I find myself unsure of the legal ethics requirements and request your assistance in resolving this matter.

Disciplinary Rule 7-104 provides, in paragraph A, that "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.

(1) When an adverse party in a suit is a corporation, is it a violation of this disciplinary rule or any other rule or ethical consideration for me to communicate with employees of that corporation?

(2) Rule 37(d) of the West Virginia Rules of Civil Procedure as well as the same rule of the Federal Rules of Civil Procedure seems to recognize that an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party is so closely

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identified with the corporation as to expose it to sanctions should they fail to appear for the taking of their deposition. The identification of such persons in these Rules would seem to place them in a different category from a regular employee. If so, is this distinction important in your response to the preceding question, that is, if communication with the employees of an adverse corporation is proper, does this include all employees or does this exclude a class of employees such as those described in the Rule or those in the "control group" as defined in Hickman v. Taylor?

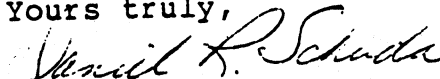
(3) Finally, are there any prohibitions in the ethical rules regarding communications with a former employee of an adverse corporate party and, if so, does the category of employment of that former employee during his employment have any effect upon your response.

My interpretation of the disciplinary rule, ethical considerations and rules of civil procedure have caused me to believe that I am permitted communications with employees of an adverse corporate defendant other than directors, officers, managing agents and persons designated under the rules to speak on behalf of the corporation. It is my interpretation that these persons are so closely identified with the corporation as to, in effect, be the alter ego of that corporation and, therefore, to be the client of the lawyer within the meaning of DR 7-104. Any other employee is, in my interpretation, fair game. Likewise, as to all directors, officers and managing agents who were employed at the time of the incident giving rise to the lawsuit, my interpretation would be that they are not subject to inquiry absent approval of the corporate attorney or as otherwise authorized by law. Other former employees or directors, officers and managing agents from other time periods are subject to such inquiry and, of course, designated persons as identified above, whether former employees or not, are not subject to private inquiry absent approval of opposing counsel.

Any interpretation you could give on this matter would be greatly appreciated as well as any relevant citations to any written material that might be available to you.

Awaiting your reply, and with best regards, I remain

Yours truly,



Daniel R. Schuda

DRS/jd