

## ETHICS OPINION

RO-94-11

### QUESTION:

"This is to request a formal opinion concerning the rather unusual situation which I discussed with you by phone on August 31, 1994, concerning contact with prospective witnesses employed by the defendant.

I primarily represent plaintiffs in employment discrimination cases and presently have about twenty cases pending against one particular defendant. Of those twenty cases, twelve to fourteen are consolidated cases based upon the 'Americans With Disabilities Act'; two or three involve race discrimination claims; two of the cases involve sex claims; and one of the cases involved a national origin claim. Each type claim is unrelated to the other claims. The ADA claims are hourly employees and the other clients are managerial employees. I have represented the managerial employees for some time and began representing them prior to my undertaking the representation of the plaintiffs in the ADA cases.

All of the cases which are addressed above are continuing matters upon which I must communicate with my clients on a fairly regular basis.

Recently, the defendant's attorney designated one of my clients in the sex case as defendant's prospective witness in the ADA cases and noted that this individual should not be contacted by me because conversations would be protected by the defendant's attorney-client privilege.

Obviously, it will be necessary for me to continue to have ex parte communications with my clients who are managerial/supervisory personnel. I can advise these individuals that they are not to discuss the ADA case or each others' cases with me. This causes some real practical problems, particularly since one particular supervisory employee has referred several of the plaintiffs to me and advised me in doing so of his belief that they have been the subject of discrimination.

**In light of the aforesaid, I need to have an opinion with respect to the following:**

- 1. What are my ethical obligations with respect to discussions with my managerial/supervisory clients who have knowledge of the defendant's general employment policy matter; and**
- 2. What are my ethical obligations with respect to discussions with my managerial/supervisory clients who have referred other employees to me, who may have knowledge of specific discriminatory acts which may have been committed by higher managerial employees; and**
- 3. What are the defendant's ethical obligations with respect to speaking to my managerial/supervisory clients concerning other individuals' cases.**

**As these cases are presently pending, I would appreciate your advising as to what I should do in this rather complicated situation."**

**ANSWER:**

**Whether you can talk with your so-called "managerial/supervisory clients" about matters outside their own cases depends on the level of their authority within the defendant's personnel structure. The defendant can talk with your clients about unrelated cases involving the defendant because they are not represented in those matters.**

**DISCUSSION:**

**In RO-88-34, the Disciplinary Commission essentially held that ex parte contact of an organization's employees was not ethically proper under DR 7-104(A)(1) if the employee was an executive officer; or, someone who by virtue of their position,**

could bind the organization by their testimony, or someone for whose conduct the organization could be held vicariously liable. On January 1, 1991, the Alabama Rules of Professional Conduct became effective. Rule 4.2 deals with the issue of communicating with a person represented by counsel. The Comment to Rule 4.2 states as follows:

**"In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a 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."**

In analyzing these three categories of "protected" employees, it is the Disciplinary Commission's understanding that "persons having a managerial responsibility on behalf of the organization" was intended to cover employees who have been given the authority to formally act or speak for the organization, and can legally bind it. Employees of this status are usually found in the "control group" of the organization. While many employees may have a supervisory position of one sort or another, they are not necessarily authorized to speak for the organization in an official sense. Only those employees are protected by this rule.

The other two exceptions referred to in the Comment cover persons actually responsible for the conduct giving rise to the organization's potential liability regardless of status in the organization and employees whose statements would

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**be admissible under evidentiary rules like Rule 801(D)(2)(d) of the Federal Rules of Evidence dealing with admission by a party-opponent.**

**If your clients with "managerial/supervisory" duties are not in the control group of the organization, then you can talk with them about anything regarding the ADA cases, either general or specific to the cases. If the clients are protected by application of the above discussion, then you can only talk to them about their own particular cases. Defense counsel can talk with your managerial/supervisory clients about the cases of others because your clients are not represented by you or anyone else in those matters.**

**MLM/vf**

**9/22/94**