ETHICS OPINION

RO-88-34

[redacted]

QUESTION:

"Our firm represents a plaintiff who has a tort claim against a corporation. Certain employees of the defendant witnessed the incident and possess facts which we need to know in order to properly prepare our client's case. The defendant, of course, has the advantage of immediate and informal access to these witnesses.

Our question is whether there is any ethical prohibition forbidding us to directly contact and interview these witnesses? Is the opinion altered if the contact is initiated and (1) before suit is filed and (2) after suit is filed and counsel has appeared for the defendant corporation?"

ANSWER:

The Disciplinary Commission has addressed this question previously and has, in Opinions RO-84-160, 86-125, and RO-88-27, among others, established certain guidelines in this area. Specifically, you may directly contact and interview certain employee witnesses of the defendant, without the necessity of obtaining permission from the defendant or giving notice to the defendant's attorney. You may not interview, without notice and permission, witnesses who are in a position to bind the defendant (RO-84-160, citing ABA Informal Opinions 1377 and 1410). The Disciplinary Commission has stated in RO-88-27, when discussing the permissibility of obtaining information from the employee of a corporate defendant that the attorney need not "... obtain the consent of counsel for the corporation and/or the officer by whom the prospective witness is employed. However, we further note that in reaching this conclusion, we have accepted the premise that the employee who is to be interviewed is not an agent of the corporation and is not in a position to act in a binding capacity for the corporate defendant."

Further, such contact may be initiated without reference to whether suit has been filed or is merely anticipated. It is noted that in Opinion RO-86-125, the Commission addressed the issue of direct contact not only with a potential witness but also with a prospective non-represented defendant. A copy of that opinion is also attached.

DISCUSSION:

You have stated in your request for opinion that the employees you wish to interview are "low level" employees who do not fall into any of the three following categories, to-wit: employees who are executive officers of the adverse party; employees who, by virtue of the terms of their employment or position, could bind the adverse party by their testimony; or, witnesses who are actually the tort feasors and for whose conduct the adverse party could be held liable. Given the number of opinions on this subject cited above, and the limitations indicated in your request, your contact with the prospective witnesses would be permissible and would entail no ethical prohibitions other than those noted.

AWJ/vf

6-30-88

ETHICS OPINION

RO-84-160

[redacted]

QUESTION:

An understanding of this request for opinion requires the reading of a series of letters directed to the office of General Counsel and from J[redacted] P. A[redacted], attorney for the City of B[redacted], (City) and R[redacted] F[redacted], Jr., attorney for B[redacted] Firefighters Association, Local 117 (Union) as follows:

1. A[redacted] letter dated September 29, 1983
2. F[redacted] letter dated October 17, 1983
3. A[redacted] letter dated October 14, 1983
4. F[redacted] letter dated October 17, 1983
5. F[redacted] letter dated October 25, 1983
6. A[redacted] letter dated October 25, 1983
7. A[redacted] letter dated November 3, 1983
8. F[redacted] letter dated November 7, 1983
9. A[redacted] letter dated November 8, 1983
10. F[redacted] letter dated September 25, 1984

We have carefully perused these items of correspondence and no single letter succinctly states the precise issue presented, but from the overall content of the correspondence and the arguments contained therein, we perceive the issue and request for opinion to be accurately stated as follows, and based upon this conclusion, will attempt to answer the same as hereinafter stated.

"May an attorney representing the Union whose membership includes Fire Battalion Chiefs and Fire Captains interview Fire Battalion Chiefs and Fire Captains concerning an issue involving litigation between the Union and the City when such Fire Battalion Chiefs and Fire Captains have certain supervisory and management duties within the organization of the City of B[redacted]'s Fire and Rescue Service and may be consulted formally or informally and make recommendations concerning promotions among the personnel of the City of B[redacted]'s Fire and Rescue Service to the Fire Chief and Deputy Fire Chief but have no power to 'commit' the City 'in a particular situation' with regard to the promotion of personnel in the City of B[redacted]'s Fire and Rescue Service?"

ANSWER:

In our opinion counsel for the Union may interview Fire Battalion Chiefs and Fire Captains without violating Disciplinary Rule 7-104(1) since although Fire Battalion Chiefs and Fire Captains serve in certain managerial and supervisory capacities and may, formally or informally, make recommendations concerning the promotions of personnel, they do not have authority to "commit" the City in this respect (ABA Informal Opinion 1377 and 1410).

DISCUSSION:

Ethical Consideration 7-18 provides:

> "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."

Disciplinary Rule 7-104(A)(1) provides:

> "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."

The American Bar Association Committee on Ethics and Professional Responsibility in Informal Opinion 1410 (1978) made the following observation:

> "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 purposes of the Code." (emphasis added)

The American Bar Association Committee on Ethics and Professional Responsibility in Informal Opinion 1377 (1977) dealt with a situation where a city was named as a defendant in a lawsuit for property damage arising from the alleged defective construction of a sewer system. The issue involved the propriety of the attorney for the plaintiffs questioning the City Building Marshal who had complete authority, including police power, to inspect, require correction and enforce the Building Code. In the opinion the committee stated:

* * *

> "According to your facts, the sewer construction is regulated by a building code and enforced by the Metropolitan Government's Building Marshal,

who has complete authority, including police power, to inspect, require correction and enforce the Building Code.

* * *

The Building Marshal is questioned about his conclusions as to the cause of the structure failure in the sewer.

* * *

You further state that the Building Marshal is an officer of the municipal corporation.

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 Building Marshal in the hypothetical case presented would be in a position to commit the municipal corporation in the particular situation because of his authority as a corporate officer or because for some other reason the law cloaks him with authority, then he, as the alter ego of the corporation, is a party for purposes of DR 7-104(A)(1). The right of the municipal corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the municipal corporation. Where an officer or employee can commit the corporation, opposing counsel must view the officer or employee as an integral component of the municipal corporation itself and therefore within the concept of a 'party' for the purposes of the Code.

It is the opinion of this Committee 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." (emphasis added)

We also agree with the reasoning of the Ethics Committee of the District of Columbia Bar as set forth in Opinion number 80 cited in the request for opinion by counsel for the Union in the instant case. True, this ethics committee recommended a modification of DR 7-104 so as to narrow its scope of operation. However, we agree with the following comments contained in the opinion concerning the application of DR 7-104 to officers or employees of a municipal corporation or other governmental unit. In the opinion the committee stated:

* * *

"The officials who are deemed to be governmental parties with whom communications under the rule are restricted are quite limited, including only those persons who have the power to commit or bind the government with respect to the subject matter question, whether it be the initation or termination of litigation, execution or approv-

al of a contract, issuance of a license, award of a government grant, or a rule-making function; . . .

* * *

The critical question in this connection is, which governmental official or officials should be considered to be the 'party,' within the meaning of DR 7-104(A)(1), with whom communications by opposing counsel are restricted? The government itself, or an agency of government, may be the named party in litigation, or a prospective 'party' to a contract being negotiated, in a technical sense, but of course one cannot communicate with such an abstract entity, any more than with a corporation or other legal creature, except through some individual person. The problem is to identify the governmental officers who, for purposes of the rule, are deemed to stand for the governmental party.

It is of course important that the identification of such officials be no more inclusive than necessary to serve the purposes of the rule, so that there will be no unnecessary hindrance to the search for information or the pursuit of grievances. The lines may not be drawn so widely as to include all government employees at whatever level of responsibility, for of course not all employees can speak for or commit their employer, whether it be public or private. Nor should the rule extend to government employees who are merely witnesses, or otherwise sources of information, but who have no decisional authority with regard to the subject matter of the representation, for such an extension would inhibit the search for truth without protecting any governmental interest legitimately sought to be protected by the rule.

The line of limitation cannot be described in perfectly precise terms, for it will necessarily depend in part on the facts of each particular situation where DR 7-104(A)(1) may be called into play, and the possible factual variables are too numerous to be encompassed in any concise formula. The guiding principles can nonetheless be easily enough stated in general terms. The persons who stand in the stead of a government party for purposes of the rule should be those, and only those, who have power to commit or bind the government with respect to the subject matter in question: that is, the authority to institute, compromise or terminate litigation (or to authorize any of these), to settle claims short of litigation (or to authorize their settlement), to execute contracts or approve their terms, to make substantive (as opposed to ministerial) decisions concerning the issuance of licenses and the award if government grants, or to perform statutorily authorized rule-making functions.

The limited circle of officials so described is, we think the minimum necessary to serve the policy purposes of the rule. It is the actions such persons can take, purportedly on behalf of - and in any event binding on - the ultimate public client, which should have the benefit of the public's counsel where such counsel has been assigned. It is the insulation of those actions from

> the undue influence of counsel for a private interest which the rule would properly provide for; and no more." (emphasis added)

We are of the opinion that both counsel for the City and counsel for the Union in the various letters directed to the office of the General Counsel candidly and in good faith represented the situation as each viewed it concerning the functions in the City of B[redacted]'s Fire and Rescue Service of Fire Battalion Chiefs and Fire Captains. Certain statements contained in letters from the attorney representing the City are pertinent. In his letter of September 29, 1983, counsel for the City states:

> "Persons holding the rank of Battalion Chief and Fire Captain are supervisory and managerial employees of the City of B[redacted]'s Fire and Rescue Service."

In his letter of October 14, 1983, counsel for the City states:

> "...exhibit 'D' to Chief G[redacted]'s affidavit makes clear that affiants, James B[redacted] and G[redacted] T[redacted], in fact completed formal evaluations of then - Lieutenant J[redacted] in the regular and routine course of their duties."

In this letter counsel for the City further states:

> "The records created by the affiants, and the judgments made by them and communicated internally were part of the record relied upon by the Fire Chief in making his decision. The representation that 'the persons involved (presumably the five affiants) had no role in the challenged actions of the City' is simply not supported and by the very affidavits which were proffered; in fact, they indicate the contrary. The fact that the final decision to appoint rests in the Fire Chief, or more accurately, the Mayor of the City, begs the question." (emphasis added)

In the same letter the counsel for the City in arguing that opinion 404 of the Committee on Professional Ethics of the New York State Bar Association is not applicable in the instant case observed:

> "The affiants in this case are managerial officers, not persons appointed or elected to a decision-making board. While a Battalion Chief certainly has the prerogative to disagree with policies of the City of B[redacted] in his personal capacity, he does

not, in his offical capacity, vote upon it." (emphasis added)

In his letter of November 3, 1983, counsel for the City states:

> "It is certainly accurate, as far as I am now aware, that the Battalion Chiefs and the Fire Captains were not specifically consulted about the decision to promote J[redacted]" (emphasis added)

We agree with counsel for the Union that the case of Upjohn Co. et al. v. United States et al., 449 U.S. 383 is not particularly pertinent to the present inquiry. This case involved the privileged nature of certain communications to attorneys and to the privileged nature of the attorneys "work-product." The case did not involve the specific question, namely, the right of counsel to interview various officers or employees of a defendant corporate entity. In the opinion the court stated:

> * * *
>
> "We can and do, however, conclude that the (1) attorney-client privilege protects the communications involved in this case from compelled disclosure and that the (2) work-product doctrine does apply in tax summons enforcement proceedings.
>
> * * *
>
> The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:
>
> > '[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (ED Pa. 1962).
>
> See also Diversified Industries, 572 F. 2d at 611; State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 580, 150 N.W. 2d 387, 399 (1967) ('the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer'). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them." (emphasis and parenthetical numbering added)

* * *

We are in agreement with counsel for the City that opinion 404 of the Committee on Professional Ethics of the New York State Bar Association is not particularly pertinent. In this opinion the committee held that where a board of education is split on a decision, an attorney representing a petitioner reviewing that decision may contact the minority members of the board in connection with such proceedings without the consent of the board's attorney. In the opinion the committee stated:

* * *

> "The speficic issue raised herein is whether, in the absence of consent from the board's designated attorney, counsel may discuss a matter in controvery with a member of the board who voted against the decision being contested." (emphasis added)

* * *

Since it is apparent to us that in the instant situation the Fire Battalion Chiefs and the Fire Captains did not, and could not, vote on the promotion of Fire Lieutenant J[redacted], the rationale of opinion 404 is not particular pertinent to the pending request for opinion.

Counsel for the City states the question presented as follows:

> "May the attorney for an employee association contact supervisory personnel of a municipality about disputed issues where the association is a party plaintiff in an action against the municipality, where the supervisors concerned are members of the plaintiff association and where the contact is made without notice to, or the participation of, the attorneys for the defendant municipality?"

Counsel for the City further states in his letter of September 29, 1983:

* * *

> "A municipality, of course, is a legal fiction and it can only act through its officials. In that respect, it is not unlike a corporation; unequivocally, opposing counsel cannot communicate with a corporation's supervisors and managers about a disputed issue."

* * *

Counsel for the City then cites ABA Informal Opinion 1410 and 1377. These opinions limit the application of DR 7-104(A)(1) with regard to officers or employees of a private corporation or a governmental entity to those who have power "to commit" the corporation or governmental

entity.

Counsel for the City in his September 29, 1983, letter further states:

* * *

> "We believe the impropriety of contacting supervisory personnel by an attorney with adverse interest is well understood."

In his motion to strike certain affidavits obtained by counsel for the Union, counsel for the City emphasizes that the affiants:

> "...effectively recommend discipline or discharge and otherwise implement the management policies of the [redacted] Fire and Rescue Service." (emphasis added)

We agree with the observation of United States District Judge Pointer that the decision and opinion of the Supreme Court of Alabama in the case of Federation of City Employees v. Arrington, 432 So. 2d 1285 (Ala. 1983) is not decisive of the issue raised in this request for opinion. The Supreme Court of Alabama held that an order of the mayor which forbade supervisory, managerial, or confidential employees from associating with rank and file employees, defined the terms "supervisory" and then implemented the policy by finding all classification other than entry level to be supervisory was invalid since the appropriate statutes vested in the city counsel alone power to "determine policies." Assuming that the Fire Chief and Deputy Fire Chief are free to join the B[redacted] Firefighters Association, if they have the power "to commit the municipal corporation in the particular situation" DR 7-104(A)(1) would prevent counsel for the Union from interviewing them without the consent of counsel for the City.

We are persuaded to the conclusion that merely because an employee of a municipal corporation has certain managerial and supervisory power does not prevent an attorney for an adverse party from interviewing such employees unless the employees have "power to commit the municipal corporation in the particular situation" (ABA Informal Opinion 1377).

In any large organization, be it a military unit, a private corporation or a governmental entity, there will inevitably exist a certain chain of command. Many of the persons comprising such an organization will have supervisory and managerial authority over other members of the

organization, except those that comprise the very lowest echelon.

Furthermore, we are of the opinion that merely because certain employees of a municipal corporation are consulted by their superiors, formally or informally, concerning the performance of fellow employees and as a result thereof, have certain imput as to the decisions of the municipal corporation with regard to employment and promotion does not mean that such employees have "power to commit the municipal corporation in the particular situation." It is signeificant that the job description of a Fire Battalion Chief merely states that a Fire Battalion Chief "recommends personnel changes for approval of superior officers." (emphasis added) The job description of Fire Captain does not formally vest Fire Captains with this authority to recommend although in all probability such Fire Captains are consulted by their superiors.

True, as stated in the letter of counsel for the Union of October 7, 1983, the line between managerial personnel and rank and file in the private sector is governed by the Taft-Hartley Amendments to the National Labor Relations Act (29 U.S.C. Section 152) and federal statutes draw the line between management and labor among federal employees (5 U.S.C. Section 7103). Whether or not this demarcation by statute between management and rank and file employees would be controlling in determing the applicability in a given case of DR 7-104(A)(1) is an issue which we need not determine.

In conclusion, we do not believe that DR 7-104(A)(1) would preclude counsel for the Union from interviewing Fire Battalion Chiefs and Fire Captains.

The scope of this opinion is very narrow. We are without jurisdiction or authority to determine the admissibility, vel non, of affidavits obtained by counsel for the Union from Fire Captains and Fire Battalion Chiefs. We make no comment, of course, upon the merits of the dispute between the Union and the City of [redacted]. We merely hold that counsel for the Union will not be subject to discipline for interviewing the Fire Battalion Chiefs and Fire Captains based upon the facts revealed in the request for opinion as evidenced by the several letters received from counsel for the City and counsel for the Union.

WHMjr/vf

11-8-84

ETHICS OPINION

RO-86-125

[redacted]

QUESTION:

"I represent a person who plans to file a lawsuit against a clearly identified defendant. My client has engaged me to investigate the matter and file suit against the defendant. I believe the defendant to be insured. If suit is filed, I am confident that the defendant will be represented by counsel. May I take a statement from the defendant prior to the time suit is filed? If I may do so, may I tell the defendant that the suit will be against his insurance company and his personal assets will not be involved?

I would appreciate your opinion as to whether the above-captioned conduct would constitute conduct under DR 7-104 since I know that the defendant will be represented by counsel once I file suit. Also, I would appreciate your discussion of any other involved ethical considerations."

ANSWER:

Since the clearly identified prospective defendant is not presently represented by counsel, there would be no impropriety in your taking a statement from this clearly identified prospective defendant if (1) you identify yourself and (2) advise that you represent the prospective plaintiff.

We are of the opinion that you can advise the clearly identified prospective defendant, in view of his insurance coverage, that he may consult with an attorney concerning his possible personal liability.

DISCUSSION:

Old Canon 9 of the former ABA Canons of Professional Ethics 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 deal only with his counsel It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Ethical Consideration 7-18 provides:

> "The legal system in its broadest sense functions best when persons in need of legal advice or assis-

tance 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."

Disciplinary Rule 7-104 provides:

"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.

(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."

In construing old Canon 9, the ABA Committee on Ethics and Professional Responsibility in Informal Opinion 670 held that it is proper for a plaintiff's attorney who has not placed the negligent matter in suit to make inquiry of the prospective defendant as to the limits of his liability insurance coverage if the prospective defendant is advised upon whose behalf the inquiry is being made.

In Informal Opinion 908 the ABA Committee on Ethics and Professional Responsibility in construing Canon 9 held that there is nothing unethical in the attorney for a potential plaintiff interviewing the potential defendant and taking his statement when the potential defendant is not represented by an attorney, if the attorney advises the potential defendant that he is conducting the interview and attempt to take the statement in his position as attorney for the claimant.

We are in agreement with the holdings of the above-cited ABA opinions and do not believe that there have been any changes in the present Code of Professional Responsibility of the Alabama State Bar and the old ABA Canons

of Professional Ethics that would persuade us to any different conclusion.

WHMjr/vf

12-23-86

ETHICS OPINION

RO-88-27

[redacted]

QUESTION:

"This is to ... formally request an opinion concerning whether an attorney is obligated to contact counsel for an adversary in litigation before communicating with an employee of the adversary concerning matters relevant to the litigation. The essential facts and question posed are set out below:

FACTS:

Secretary works directly for an officer of a corporation that is a party to several lawsuits involving claims of breach of contract, fraud, interference with business relations, etc. In some cases, the officer is a party in his individual capacity. As a result of her position, secretary has prepared numerous documents and become personally familiar with certain events, transactions and records that are either the subject of or important to the issues and claims involved in the lawsuits. Through a third-party, secretary has indicated a willingness to meet and discuss her recollection of said documents, events and transactions with counsel for the corporation's adversaries in the lawsuits, but does not want her employer to know about the meeting out of fear of reprisals.

Would it violate any ethical consideration or disciplinary rule if counsel for corporation's adversaries meet or talk with secretary concerning the lawsuits without first contacting counsel for the corporation and/or officer by whom she is employed?"

ANSWER:

You may ethically contact this potential witness and obtain from this witness information concerning the pending lawsuits without first contacting counsel for the corporation and/or the officer by whom she is employed. In reaching this conclusion we have accepted the premise that the employee who is to be interviewed iis not an agent of the corporation and is not in a position to act in a binding capacity for the corporate defendant.

DISCUSSION:

The Disciplinary Commission of the Alabama State Bar, in interpreting the Code of Professional Responsibility, has previously held in RO-87-74 that an attorney may contact prospective witnesses for an opposing party, including expert witnesses, on the subject matter of the pending litigation. The Commission admonished that such contact should be conducted

in such a way as to preclude overreaching and that the attorney interviewing such witnesses should practice no fraud or deceit and should not misrepresent the capacity in which he is acting.

The Disciplinary Commission has relied upon two Formal ABA Opinions, those being Formal Opinion 117 issued in 1934 and Formal Opinion 127 issued in 1935, and has further relied upon ABA Informal Opinion 892 issued in 1965 as to the matter of the involvement of opposing counsel. An Alabama opinion, No. 320, has expanded this further by stating that it is ethically permissible for a criminal defense attorney to interview the state's witnesses prior to trial for the purpose of obtaining factual information as to the alleged crime said defense attorney's client committed without (1) obtaining the consent of the prosecuting attorney or (2) causing subpoenas to be issued to the state's witnesses. Based upon this principle we hold that you do not need to obtain the consent of the counsel for the corporation and/or the officer by whom the prospective witness is employed. However, we further note that in reaching this conclusion we have accepted the premise that the employee who is to be interviewed is not an agent of the corporation and is not in a position to act in a binding capacity for the corporate defendant.

Attached hereto is Disciplinary Commission Opinion RO-87-74 which provides the authority for this opinion.

AWJ/vf

5-3-88

ETHICS OPINION

RO-87-74

[redacted]

QUESTION:

"I have come across a situation on two or three occasions while representing an injured plaintiff, be it in worker compensation context or simple negligence context, the attorney for the defendant has, without permission or prior authorization of the employee, contacted and met with the plaintiff/employee's physician.

I am concerned about the ethical propriety of this conduct from the standpoint of the attorney and I am also concerned about whether or not the doctor/patient relationship with respect to confidentiality is impaired by this conduct?

Re: Under what circumstances is it ethical or unethical for an attorney representing a defendant, be it an insurance company or an individual or corporate insured to meet with and talk to or otherwise correspond with the physician of the plaintiff even if he was compensated by the insurance company of the defendant for services performed on the injured individual/employee such as in the context of a worker compensation case or personal injury suit, without first receiving prior authorization or permission from the plaintiff?

If you need any further information or some other form of request, please do not hesitate to let me know."

ANSWER:

We perceive no ethical impropriety in an attorney for a defendant interviewing prospective witnesses for the plaintiff, be they expert witnesses or otherwise, nor do we perceive any ethical impropriety in the attorney for the plaintiff interviewing prospective witnesses for the defendant, be they expert witnesses or otherwise. Furthermore, we are of the opinion that it is immaterial by whom the prospective witnesses is compensated for his services as an expert, or in the case of a physician for his services in the capacity as a physician. The attorney interviewing such witnesses should practice no fraud or deceit and should not misrepresent the capacity in which he is acting.

DISCUSSION:

Canon 39 of the old Canons of Professional Ethics and Responsibility of the American Bar Association provided:

> "If the ascertainment of truth requires that a lawyer should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client."

In Formal Opinion 117 (1934) the American Bar Association Committee on Ethics and Professional Responsibility held that an attorney for the plaintiff may properly interview employees of the defendant who were witnesses to the incident upon which the suit is based so long as no deception is practiced and the employees are informed that the person interviewing them is the attorney for the plaintiff.

In Formal Opinion 127 (1935) the American Bar Association Committee on Ethics and Professional Responsibility held that it is not improper for an attorney representing a widow suing for compensation for the death of her husband to interview a physician who attended the husband although the physician has been subpoenaed as a witness on behalf of the defendant.

In Informal Opinion 892 (1965) the American Bar Association Committee on Ethics and Professional Responsibility held that the defendant's counsel may ethically interview the plaintiff's attending physician without the presence of the plaintiff's counsel.

The foregoing opinions construed the old Canons of Professional Ethics of the American Bar Association, but we do not find anything in our present Code of Professional Responsibility which would lead us to a different conclusion.

In Ethics Opinion 320 the Disciplinary Commission addressed a fact situation somewhat analogous to that set forth in your request for opinion. In this opinion the Disciplinary Commission held that it is ethically permissible for a criminal defense attorney to interview the State's witnesses prior to trial for the purpose of obtaining factual information as to the alleged crime said defense attorney's client committed without (1) obtaining the consent of the prosecuting attorney or (2) causing subpoenas to be issued to the State's witnesses.

As a portion of the discussion herein we attach hereto as Exhibit "A" a copy of Ethics Opinion 320.

(Note: Your request for opinion raises some question about a possible physician/patient confidentiality. This poses a question of law rather than of ethics and we express no views concerning the same. See McElroy's Alabama Evidence, Third Edition, Section 413.01.)

WHMjr/vf

6-2-87

5-8-80 - D.C. concurred

ETHICS OPINION

RO-320

Re: [redacted]

QUESTION:

"Please send me your opinion as to the propriety of a criminal defense attorney interviewing the state's witnesses prior to trial for the purpose of obtaining factual information as to the alleged crime said defense attorney's client committed as relates to the above referenced disciplinary rule. Specifically, I need answers to the following questions, to wit:

1. Is it ethically mandatory that a defense attorney obtain the District Attorney's consent in his district before interviewing the state's witnesses for the sole purpose of obtaining factual information concerning the alleged criminal conduct of his client?

2. Is it ethically mandatory that a criminal defense attorney subpoena the state's witnesses before proceeding to interview said witnesses?

I would appreciate a response to this letter as soon as possible as I am presently handling a number of cases for which answers to the above are essential to the preparation of a defense.

ANSWER:

It is ethically permissible for a criminal defense attorney to interview the state's witnesses prior to trial for the purpose of obtaining factual information as to the alleged crime said defense attorney's client committed without 1) obtaining the consent of the prosecuting attorney or 2) causing subpoenas to be issued to the state's witnesses.

DISCUSSION:

It would appear that you are concerned with the applicability of Disciplinary Rule 7-104(A)(1). This rule provides:

> "During the course of his 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 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."

The above-quoted rule has no application to the questions which you pose. As stated by the Committee on Professional Responsibility of the American Bar Assocation in Formal Opinion 101 (1933):

> "The witnesses to be called by the prosecution on the trial are not clients of the district attorney or prosecutor."

In Formal Opinion 12 (1928) the American Bar Association Committee held that it is not unethical for an attorney whose client has been convicted of a crime to seek a retracting affidavit from the prosecution's principle witness if the attorney has reason to believe that the witness committed perjury, and further held that if the attorney does endeavor to obtain such an affidavit, it is not required that he notify the prosecution attorney of his intention.

In the opinion the Committee stated:

> "The lawyer owes to his client the duty of the utmost honorable effort in his behalf. In recognition of this, the American Bar Association adopted Canon 15.
>
> If A's attorney, having no reason to believe and not believing that B testified falsely, visited B with the purpose of inducing him, by personal influence, suggestion, or otherwise, to retract by affidavit that testimony he has given against A, such conduct would be most reprehensible. If, however, A's attorney has been advised that the witness B desires solemnly to retract false evidence given by him at the trial, or if A's attorney has reason to believe and does believe that B committed perjury at the trial, because of which his client stands convicted, then it is not only proper but it is the duty of A's attorney to endeavor honorably to obtain B's retraction, if he thinks there is any likelihood he can obtain it. Neither is he under any obligation in such circumstances to advise the United States District Attorney of his purpose. B, having served the government, is nothing more to the prosecutor. No relation of trust exists between him and the prosecutor, in no sense is he the prosecutor's client, and in no aspect has the United States Government, or its prosecuting attorney, a vested interest in or ownership of the witness. It is never considered improper for a United States Attorney to talk with a witness and obtain his affidavit, and no one expects him to notify the defendant's attorney of his purpose to do so."

In Formal Opinion 101 (1933), the American Bar Association Committee held that an attorney representing a client charged with a crime may interview witnesses called from a prosecution or previous trial of another alleged participant, even if the attorney has a complete transcript of the witnesses' testimony from the first trial. In the opinion the Court stated:

> "The witnesses to be called by the prosecution on the trial are not clients of the district attorney or prosecutor, and it was not a violation of Canon 9 for the attorney for the second defendant to be tried to interview the witnesses called for the prosecution on the previous trial of the alleged joint principal. Indeed, that may have been the duty of the attorney for the second defendant if he had reason to believe that the witnesses had misstated the facts in any way prejudicial to his own client or had failed to disclose all the information which might be needed for the proper protection of his client's interest. Part of Canon 39 reads as follows:
>
> > If the ascertainment of truth requires that a lawyer should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.
>
> Of course in the interviewing of the witnesses who had been called for the prosecution in the previous trial the lawyer for the second defendant should not endeavor to persuade the witnesses to change their testimony contrary to the truth. We are only considering whether, if the interview with the witnesses is otherwise carried on in an honorable way, there is any impropriety in having the interview because of the relation of those witnesses to the previous trial of the other defendant. We see no impropriety in the lawyer seeking and obtaining such an interview."

In Formal Opinion 127 (1935) the American Bar Association Committee held that it is not improper for the attorney representing a widow seeking compensation from the death of her husband to interview a physician who attended the husband although the physician has been subpoenaed as a witnesses on behalf of the defendant. The fact that one party has subpoenaed a witness does not give that party vested interest in that witness and prevent the attorney from the other party from interviewing the witness. This would be true in a criminal as well as in a civil case.

Of course, an attorney cannot interview a party with respect to the facts of a case even though the party will be a witness in the case, if the party is represented by counsel. See Formal Opinion 187 (1938) of the American Bar Association Committee.

The American Bar Association Committee, in the Informal Opinion 581 (1962), was asked to answer the following question: "Where a defense counsel or investigator for a defense counsel is investigating a case pending before a criminal court, is it necessary for such defense counsel or investigator to inform a witness that he is interviewing that he comes from the defense to avoid any unethical conduct?"

The Committee held that it was not only proper for a defense counsel to interview such a witness but stated that only if inquiry is made by the witness as to whom the investigator represents would it be the duty of the investigator to disclose that he comes from the defense. In this opinion the Committee stated:

> "There is no inhibition in the Canons against an attorney in a criminal case, or an investigator for him, interviewing a prospective witness. Canon 39 reads as follows:
>
> 'A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In so doing, however, he should scrupulously avoid any suggestions calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."
>
> In Formal Opinion 101 this Committee held that when a client is charged with a crime, his lawyer may interview a witness called for the prosecution on a previous trial of another alleged participant. As pointed out in that Opinion, the witnesses to be called by the prosecution on the trial of a case are not clients of the district attorney or prosecutor, and accordingly no violation of Canon 9 is involved. Indeed, it would be the duty of the defense counsel as well as of the prosecutor, to interview witnesses so as to know in advance what the testimony will show and what witnesses are available.
>
> Canon 19 enjoins that a lawyer should always treat adverse witnesses . . . with fairness and due consideration; and we therefore think if inquiry is made by the witness of the investigator as to whom he represents, it would be the duty of the investigator to disclose that he comes from the defense. Absent such inquiry, we think there is no duty on defense counsel or his investigator to inform the witness of whom he is representing.
>
> In giving this Opinion, we have also assumed that the witne had not been indicted jointly with the defendant as a co-defendant, co-conspirator, or accessory. Other considerations would be present in such a situation."

Nothing in the present Code of Professional Responsibility of the Alabama State Bar has language which is precisely like that of Old Canon 39 quoted in Informal Opinion 581, supra. However, it is the opinion of the General Counsel, concurred in by the Disciplinary Commission, that a lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party and that such interviews may be made without necessity of resorting to the power of subpoena.

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ABA Formal Opinions

The ABA Standing Committee on Ethics and Professional Responsibility issues both formal and informal opinions. Formal opinions are on subjects determined by the committee to be of widespread interest or of unusual importance. They appear her in full text and are copyrighted by the ABA.

Formal Opinion 91-359
March 22, 1991

Contact With Former Employee Of Adverse Corporate Party

The prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.

The Committee has been asked for its opinion whether a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without the consent of the corporation's lawyer, communicate about the subject of the representation with an unrepresented former employee of the corporate party.

The starting point of our inquiry is Model Rule of Professional Conduct 4.2, which 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.

The rule is, for purposes of the issue under discussion, substantially identical to DR 7-104(A)(1), which states as follows:

> (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.

The comment to Rule 4.2 makes clear that corporate parties are included within the meaning of "party" in that Rule, and is helpful in defining the contours of that rule as it applies to *present* employees of corporate parties:

> [1] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.
>
> [2] 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. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for the purposes of this Rule. Compare Rule 3.4(f).
>
> [3] This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

The rationale on which Rule 4.2 was formulated was identified in *Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564, 576 (1984).

> The purposes of the rule against ex parte communications with represented parties are "preserving the proper functioning of the legal system and shielding the adverse party from improper approaches." (Citing ABA Formal Opinion 108 (1934)).

The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law. As discussed at Law. Man. Prof. Conduct 71:302,

> The rule against communicating with the opposing party without the consent of that party's lawyer does not admit of any exceptions for communications with "sophisticated" parties. Maru, 10861 (Fla. Bar Op. 76-21 (4/19/77)). See also *Waller v. Kotzen*, 567 F. Supp. 424 (E.D. Pa. 1983) (plaintiff's counsel contacted insurance company directly, after insurer was represented by counsel); *Estate of Valiades v. Sheppard Bus Service*, 469 A.2d 971 (N.J. Super. 1983) (negotiations were conducted with insurance company for defendants); *cf. Meat Price Investigators Assn. v. Iowa Beef Processors*, 448 F.Supp. 1, 3 (S.D. Iowa 1977) (while leaving question of culpability of counsel's conduct to disciplinary authorities, court declined to disqualify counsel for interviewing an officer of an opposing party who was a "sophisticated businessman who was openly willing to share his knowledge of the beef industry with attorneys he knew to be plaintiff's counsel.") *See also* Code of Professional Responsibility 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....

The comment to Rule 4.2 limits those *present* corporate employees covered by this rule to:

> persons having a managerial responsibility on behalf of the organization, and ... 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.

The inquiry as to present employees thus becomes whether the employee (a) has "a managerial responsibility" on behalf of the employer-corporation, or (b) is one whose act or admission in connection with the matter that is the subject of the potential communicating lawyer's representation may be *imputed* to the corporation, or (c) is one whose "statement may constitute an admission" by the corporation.

Whether an employee falls into any of these three categories is inevitably an is-

sue affected by a host of factors, the exploration of none of which need detain us. These include at least the terms of the relevant statutory and common law of the state of the corporation's incorporation; applicable rules of evidence in the relevant jurisdiction; and relevant corporate documents affecting employees' duties and responsibilities.

At least insofar as the test of imputable act or omission is concerned all of these factors, in turn, would have to be applied within the context of "the matter in representation" to determine whether the acts or omissions of the employee can be imputed to the corporation with respect to that particular matter. That requires a determination of the scope of the subject matter of the potentially-communicating lawyer's representation.

The comment—by defining three categories of unrepresented corporate employees with whom communication "concerning the matter in representation" is prohibited absent the consent of the corporation's counsel or authorization of law—clearly implies that communication with all *other* employees on "the matter in representation" is permissible without consent, subject only to such other rules and other law as may be applicable. (*E.g.*, Rule 4.1, requiring truthfulness in statements to others and Rule 4.3, addressing a lawyer's dealings with unrepresented persons.)

Neither the Rule nor its comment purports to deal with *former* employees of a corporate party. Because an organizational party (as contrasted to an individual party) necessarily acts through others, however, the concerns reflected in the Comment to Rule 4.2 may survive the termination of the employment relationship.

(It is appropriate to note here that those addressed by the Comment are not denominated "employees" but "persons." The Rule presumably covers independent contractors whose relationship with the organization may have placed them in the factual position contemplated by the Comment. Because the issue this Opinion addresses deals expressly with former *employees*, we need not explore the ramifications of this expansive terminology.)

While Rule 4.2 does not purport by its terms to apply to former employees, courts confronting the issue have interpreted Rule 4.2 (as illuminated by its comment) and DR 7-1-4(A)(1) (which does not have such a comment or comparable discussion in any Ethical Consideration) in various ways.

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 I 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 employee 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 privilege 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.

Commentators on the subject of *ex parte* contacts with former employees have likewise urged application of the prohibition on contacts to at least some former corporate employees. *See, e.g.*, Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 Wash. & Lee L. Rev. 1181 at 1227 (1987), recommending a functional approach deeming

> any present or former employee who is identified with an enterprise, either for purposes of resolving disputed issues or effective representation of the enterprise, to be a party representative for discovery purposes. Any other rule would put enterprises at a distinct and unfair disadvantage and may effectively deny enterprises the full benefit of representation by counsel....

See also Miller and Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 Bus. Law. 1053 at 1072-73 (1987):

> [C]ourt authorization or opposing counsel's consent to ex parte contact should be required if the former employee was highly placed in the company (such as a former officer or director) or if the former employee's actions are precisely those sought to be imputed to the corporation.

While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.

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 a 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).

The lawyer should also punctiliously comply with the requirements of Rule 4.3, which addresses a lawyer's dealings with unrepresented persons. That rule, insofar as pertinent here, requires that the lawyer contacting a former employee of an opposing corporate party make clear the nature of the lawyer's role in the matter giving occasion for the con-

tact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party. *See, e.g., Brown v. Peninsula Hospital Centers*, 64 A.D.2d 685, 407 N.Y.S.2d 586 (App. Div. 1978) (attorneys for defendant hospital should have disclosed potential conflict of interest before talking to treating physician and producing him for deposition as hospital's representative); ABA Informal Opinion 908 (1966).

Formal Opinion 91-360
July 11, 1991

Prohibition of Partnerships with Nonlawyers: Extrajurisdictional Effect

A lawyer who is licensed both in a jurisdiction that prohibits partnerships with nonlawyers, as in Model Rule 5.4(b), and in a jurisdiction that permits lawyers to form partnerships with nonlawyers, but who practices only in the latter jurisdiction, should not be subject to the prohibition of the jurisdiction where the lawyer does not practice. On the other hand, if a lawyer licensed in two such jurisdictions is engaged in practice in the jurisdiction that prohibits such partnerships, the lawyer must adhere to the restrictions of that jurisdiction.

The ethical prohibition on a lawyer practicing law in partnership with a nonlawyer that is embodied in Rule 5.4(b) of the ABA Model Rules of Professional Conduct has until very recently been in force in every American jurisdiction.[1] This unanimity, however, was broken at the beginning of 1991 when a different version of Rule 5.4(b), allowing lawyers to practice in partnership with nonlawyers in certain circumstances, came into effect in the District of Columbia.[2] In this Opinion we address the question of what ethical rule should govern when lawyers are partners in a law firm that, as permitted by the D.C. rule, includes nonlawyer partners, but are also members of the bar of another juris-

[1] The ABA's formal prohibitions against lawyer partnerships with non-lawyers date back to 1928, when Canon 33 was added to the Canons of Ethics. Canon 33 provided in pertinent part that "[p]artnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." Canon 34 prohibited fee splitting with nonlawyers. Canon 35 warned against lawyers being "controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."

In 1969, the Model Code of Professional Responsibility replaced the Canons of Ethics. DR 3-103 carried over Canon 33's prohibition against lawyers forming partnerships with nonlawyers but phrased the prohibition in mandatory rather than merely precatory language. DR 3-102 continued Canon 34's prohibition against fee-splitting with nonlawyers, with certain limited exceptions. DR 5-107(C) prohibited lawyers from practicing law with or in the form of a professional corporation if "(1) a non-lawyer owns any interest therein...; (2) a non-lawyer is a corporate director or officer thereof; or (3) a non-lawyer has the right to direct and control the professional judgment of a lawyer."

In 1983, the ABA Model Rules of Professional Conduct supplanted the Model Code. Model Rule 5.4 incorporated traditional restrictions against lawyer and nonlawyer associations. Rule 5.4(b) reproduced verbatim DR 3-103(A)'s prohibition of lawyer partnerships with nonlawyers. The Model Rule as originally proposed by the Commission on Evaluation of Professional Standards (commonly known as the Kutak Commission) included a proposed Rule 5.4 that would have allowed nonlawyer partners in law firms on somewhat broader terms than those contemplated by the District of Columbia version of Rule 5.4(b), but that proposal was rejected by the ABA House of Delegates in 1983. *See The Legislative History of the Model Rules of Professional Conduct, Their Development in the ABA House of Delegates* 160 (ABA Center for Professional Responsibility 1987). Rule 5.4(a) continued the Code's prohibition against fee-splitting with nonlawyers. Rule 5.4(d) is substantially identical to DR 5-107(C).

For a detailed treatment of the history of the ABA restriction on lawyer collaboration with nonlawyers as well as a close consideration of the various arguments for and against such collaborations, see Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rule?*, 40 Hastings L.J. 577 (1989).

[2] The history of the D.C. version of Rule 5.4(b) is described in S. Gilbert and L. Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 Georgetown J. Legal Ethics 383 (1988). The D.C. Rules of Professional Conduct, including the variant version of Rule 5.4(b), were adopted by order of the District of Columbia Court of Appeals March 1, 1990, effective January 1, 1991.