

ETHICS OPINION

RO-90-79

Lawyer may not communicate with employee of opposing party if employee has managerial responsibility on behalf of the opposing party and can bind the opposing party

QUESTION:

A lawsuit has been filed against a defendant nursing home corporation. This nursing home corporation is represented by an attorney. During the course of a deposition, it was discovered that an employee of the nursing home had possible information that would be vital to the outcome of the case. It is also possible that this employee was the employee who actually committed the alleged negligent act. My client has asked our firm to take a statement from this employee. Is it an ethical violation to take a statement from this employee of the nursing home when the nursing home itself is represented by another attorney? At this time, I do not believe the individual employee has retained an attorney. It is my understanding this person is not a supervisor, but please render an opinion as to the ethical implications if this person were:

- a. A supervisor.**
- b. A nurse's aide.**
- c. An LPN.**

My understanding is the determining issue is whether or not this person can in any way bind the corporation by her statement. Please render an opinion as to the ethical implications mentioned above."

ANSWER:

In several recent opinions the Disciplinary Commission has opined that it is permissible for an attorney to take a statement from an employee of a defendant corporation when that employee is not "in a position to bind" the defendant. These opinions are based upon the Commission's understanding of case law in Alabama and further upon an application of Disciplinary Rule 7-104(A)(1), which states as follows:

"DR 7-104 * * *

(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 determination of whether an employee of a corporation is in a position to bind that corporation is a legal determination and is beyond the scope of this opinion or the authority of the Commission to decide. Accordingly, we can do no more in response to your query than to state, as we have in the past, that it is ethically permissible for you to speak with the employee of a defendant corporation, without the knowledge or consent of the attorney for that corporation, if the person with whom you speak is not in a position to bind that corporation and is not the alleged tort-feasor or person whose actions have predicated the lawsuit. You should also be mindful that additional investigation is indicated, on these facts, as to the issue of whether this employee is the actual tortfeasor since contact, in that event, would be improper.

We believe that it would also be appropriate at this time to indicate that by so holding we are not flashing a green light at Alabama lawyers and endorsing this practice. The Code of Professional Responsibility and the Rules of Professional Conduct both impose an ethical responsibility upon a lawyer to respect the rights of third persons. Rule 4.4 of the Alabama Rules of Professional Conduct provides that a lawyer, in representing a client, shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. In addition, Rule 4.3, which is entitled "Dealing With Unrepresented Person", states as follows:

"In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows

or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

Accordingly, while contact with such an employee may be permissible, it is not recommended and should be undertaken with a clear view of the ethical mandate of Rules 4.3 and 4.4.

DISCUSSION:

The Comment to Rule 4.2 of the Alabama Rules of Professional Conduct, which is analogous to DR 7-104(A)(1) previously cited, states in pertinent part, as follows:

"... this Rule prohibits communication 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 purposes of this Rule."

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For purposes of this opinion we adopt the terms of this Comment to the Rules of Professional Conduct as a part of the standard to be observed when operating pursuant to this opinion.

AWJ/vf

6/28/90