

ETHICS OPINION

RO-94-04

[REDACTED]

QUESTION:

"Approximately one week ago, we discussed with you by telephone our concern in talking directly with employees that were employed by an adverse corporate litigant. You indicated to us that we should forward you some of the facts relating to the matter and put our inquiries in the form of an ethics opinion request. In this matter the facts are as follows:

1. The pending civil action, which has been filed in federal court, was initiated after the United States Department of [REDACTED] permanently disqualified the plaintiffs, a corporation and an individual who is the president and sole shareholder of the corporation, from participating as a retail grocer in the federal food stamp program.
2. The plaintiffs are suing the United States of America for the purpose of having the district court review the propriety of the determination of the Department of [REDACTED].
3. The propriety of the disqualification can be supported by evidence that employees of the corporation exchanged food stamp coupons for cash. If, after hearing the testimony, the court determines that employees did in fact exchange food stamp coupons for cash, the court would be required to affirm the penalty imposed administratively by the agency. This would permanently disqualify the plaintiff from participation as a retailer grocer in the food stamp program.
4. Since the initiation of the civil proceeding, counsel for the United States has been contacted by several employees of the plaintiffs and they have requested that counsel for the United States talk with them concerning the matters in litigation.
5. Counsel for the United States confirmed on February 10, 1994, that counsel for the plaintiffs does not represent any of the former employees or the current employees; however, counsel for the plaintiffs has confirmed that the employees have not been informed of this fact and have not been advised that they could seek counsel of their own choosing.
6. Counsel for the plaintiff has also indicated to the undersigned that the employees are free to voluntarily talk to counsel for the United States, but that counsel for the United States may be prohibited by Rule 4.2 from 'communicating' with any employee unless counsel for the employee consents. Although it appears that the employees are free to talk to counsel for the United

States, counsel for the plaintiff has directed counsel for the United States not to contact or communicate with any employee.

Based on these facts, we would request a formal ethics opinion on the following questions:

1. Assume that the unrepresented employee makes an unsolicited contact with counsel for the United States. Can that counsel comply with Rule 4.3 and advise them to obtain counsel without that being an improper 'communication' with an employee of the plaintiffs within the terms of Rule 4.2?
2. Assume that after counsel for the defendant complies with Rule 4.3 and advises the employee to obtain counsel and the employee voluntarily desires not to obtain counsel.
 - a. Can the employee voluntarily act as his or her own counsel?
 - b. If the answer to 'a.' is 'Yes', can this option be communicated to the employee by counsel for the United States?
 - c. If the answer to 'a.' is 'Yes', can the employee act as his or her counsel for the purposes of the United States having the requisite consent under the comments to Rule 4.2?
3. Assume that prior to counsel of the United States being informed of their unrepresented status, the employees who contacted counsel for the United States expressed a willingness to talk directly with said counsel.
 - a. Knowing now that any former and current employee is unrepresented and that they have not been advised of same by counsel for the plaintiffs, can counsel for the United States initiate contact with said employees for the purpose of complying with Rule 4.3?
 - b. If the answer to 'a.' is 'Yes', will this conduct be an improper 'communication' with an employee of the plaintiffs within the terms of Rule 4.2?"

* * *

ANSWER:

Counsel for the United States can talk with these employees ex parte if counsel for the plaintiff/employer consents. The employees are not required to have independent counsel before you can communicate with them.

The Comment to Rule 4.2 sets out three categories of employees with whom an attorney adverse to the employer may not communicate with ex parte. These are:

- (1) An employee who has "managerial responsibility";
- (2) An employee whose acts or omissions are relevant to the employer's liability, either civil or

criminal; and

- (3) An employee whose statement may constitute an admission on the part of the employer.

If the attorney for the employer consents to your ex parte communications with these categories of employees, you may contact them. There is no additional requirement under Rule 4.2 that in addition to the employer's consent, the employee(s) must be represented by independent counsel. The Comment to Rule 4.2 implies that if an employee is represented by his/her own counsel, then consent by that attorney would be required. The employer's only objection is based upon apparent misunderstanding of Rule 4.2, with respect to "independent counsel". The employer has already advised you that the employees are free to talk with you but for the perceived problems with Rule 4.2. Absent any other valid objection you are free to communicate with them regardless of which of three categories they would come within.

The Disciplinary Commission is of the opinion that Rule 4.3 has no application to this situation. The issues that arise when a lawyer seeks to interview an unrepresented corporate employees are covered by Rule 4.2 as discussed above.

MLM/vf

2/17/94