

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 96-1

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: While representing a client in a matter adverse to a corporation, an attorney may communicate on the subject matter of the representation with former employees of the corporation without notification or consent of corporate counsel. Such communication would not violate DR 7-104(A)(1) when conducted within the boundaries set forth. An attorney may not communicate ex parte if a former employee is represented by his or her own counsel in the matter, unless that counsel consents. An attorney may not communicate ex parte if a former employee has asked the corporation's counsel to provide representation in the matter, unless that counsel consents. An attorney must obtain the consent of the former employee to the interview. An attorney must inform the former employee not to divulge any communications that the former employee may have had with corporate or other counsel. An attorney must fully explain to the former employee that he or she represents a client adverse to the corporation. Under DR 7-104(A)(2), an attorney must not give advice to the unrepresented former employee other than advice to seek counsel in the matter.

OPINION: This opinion addresses ex parte communications between attorneys and former employees of a corporation.

While representing a client in matters adverse to a corporation, is it proper for an attorney to communicate on the subject matter of representation with former employees of the corporation without notification or consent of corporate counsel?

Ex parte communication with current and former employees was addressed by this Board in Opinion 90-20. In Opinion 90-20 the Board advised that

[I]t is our opinion that when litigation against a corporation is contemplated or after a lawsuit is filed, a lawyer representing an interest adverse to the corporation must notify the corporation's counsel when seeking to interview management employees, employees who can "speak for" or bind the corporation, employees whose opinions form the basis of management decisions and employees whose act or omission in connection with the controversy may be imputed to, or an admission of, the corporation. **Most other present employees and most former**

employees, who are not themselves represented by counsel, may be interviewed ex parte. However, notification of the corporation's counsel may be required before interviewing former employees who were privy to privileged communications with the corporation's counsel or employees whose conduct gives rise to the claim against the corporation. In all instances, a lawyer conducting interviews must carefully avoid misleading the interviewees. [Emphasis added].

Thus, the Board's restrictions as to ex parte communication with current employees were clearly defined in Opinion 90-20. Attorneys were required to notify the corporate counsel when seeking to interview current employees in any of the following categories: management employees, employees who "speak for" or bind the corporation, employees whose opinions form the basis of management decisions, and employees whose act or omission in connection with the controversy may be imputed to or be an admission of the corporation.

However, the Board's restrictions as to ex parte communication with former employees were less clear. Because the Board said notification "may" be required to interview certain former employees, there has been uncertainty as to when notification is required and whether notification also implies that consent is needed. For this reason, the Board reconsiders the issue of ex parte communication with former employees of a corporate employee.

The ethical rule that governs communication with adverse parties is DR 7-104 of the Ohio Code of Professional Responsibility.

DR 7-104 COMMUNICATING WITH ONE OF ADVERSE INTEREST

(A) During the course of his [her] 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 [she] knows to be represented by a lawyer in that matter unless he [she] 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.

An explanation of the underlying purpose of DR 7-104 is found in 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 [her] client with a person

he [she] knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he [she] has the consent of the lawyer for that person."

The ABA Model Rule 4.2 is similar to DR 7-104(A), with the exception that in August 1995 the word "party" was replaced by the word "person."

RULE 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 Comment to this rule sets forth categories of employees within an organization with whom ex parte communication would be improper, but makes no reference to former employees. In pertinent part, the Comment states that

In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity 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.

Twice, the ABA ethics committee has advised that Model Rule 4.2 does not prohibit contacts with former employees of a represented corporation, even if those former employees were in one of the categories in which communication was prohibited while employed. See ABA, Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) f.n. 47 and Formal Op. 91-359 (1991). Albeit, these opinions preceded the change in the rule's language from "party" to "person." But if a former employee was not considered a "party" represented by corporate counsel under the old rule, it follows that the former employee would not be considered a "person" represented by corporate counsel under the new rule.

Similar to the ABA approach, some states permit contact with all former employees of a corporation without the permission of corporate counsel, but most add cautionary language that it is proper so long as the former employee is not represented in the matter by counsel and the attorney does not inquire into matters that may be privileged. See Alaska Bar Ass'n, Op. 91-1 (1991); Nebraska State Bar Ass'n, Op. 94-5 (undated), Oregon State Bar, Op. 1991-80 (1991); Philadelphia Bar Ass'n, Op. 93-9 (1993). One state cautions that the former employee must consent to the interview after the lawyer has fully explained the lawyer's purpose. State Bar of Georgia, Op. 94-3 (1994). Other states caution that a lawyer may not state or imply that he or she is disinterested. Maryland State Bar Ass'n, Op. 90-29 (1990), Mississippi State Bar, Op. 215 (1994), State Bar of North Dakota, Op. 92-13 (1992), Ethics Advisory Panel of Rhode Island SupCt, Op. 91-74 (1991).

In contrast, other states maintain the view that there is a category of former employees with whom ex parte contact is improper. These states prohibit ex parte communication with former employees whose acts or omissions in connection with the matter may be imputed to the corporation. Kansas Bar Ass'n, Op. 92-7 (1992), Advisory Comm. of Professional Ethics, New Jersey SupCt, Op. 668 (1992) (advising that it is also improper if the former employee has access to litigation confidences), South Carolina Bar, Ops. 94-25 (1994) and 92-31 (1992).

In Ohio, the issue has received attention from two federal courts. In Kitchen v. Aristech Chemical, 769 F. Supp. 254 (S.D. Oh. 1991), the court rejected defendant's motion to disqualify plaintiff's counsel for ex parte communication with the former employee of a defendant chemical company, but the court did not resolve the issue of whether the communication violated DR 7-104 because in the court's view the conduct was not so egregious to warrant disqualification, even assuming arguendo that it did violate the rule. Kitchen, 769 F. Supp at 258. In Summers v. Rockwell International Corp., No. C-2-92-301, slip op. at 6 (U.S.D.C., S.D. Ohio Apr. 9, 1993), the magistrate chose a case-by-case approach, rejecting the defendant's request for adoption of a "bright-line" test prohibiting ex parte contact with all former employees. Instead, the magistrate permitted ex parte contact with former employees under conditions that the plaintiff's counsel would provide written notice making certain disclosures to former employees in advance of the interview and obtain the employees' consent. Summers, slip op. at 6-11.

In construing DR 7-104(A), this Board's view is that notification and consent of corporate counsel is not required prior to interviewing a former employee of a corporation. A former employee is no longer part of the corporation and no longer speaks for the corporation. A former employee may have interests that differ from the corporation. A former employee may have obtained his or her own counsel in the matter or may have chosen to represent himself or herself. For these reasons, a former employee of a corporation is not considered a party for purposes of the rule.

Therefore, this Board is modifying the view expressed in Opinion 90-20 that notification may be required before interviewing former employees who were privy to privileged communications with the corporation's lawyers and former employees whose conduct gives rise to the claim against the corporation. Such advice leaves uncertainty among the bar and may at times unnecessarily impede discovery in legal matters. It is the Board's view that ethical concerns are better addressed by establishing the proper boundaries within which the communication may occur.

In conclusion, this Board advises that while representing a client in a matter adverse to a corporation, an attorney may communicate on the subject matter of the representation with former employees of the corporation without notification or consent of corporate counsel. Such communication would not violate DR 7-104(A)(1) when conducted within the boundaries set forth. An attorney may not communicate ex parte if a former employee is represented by his or her own counsel in the matter, unless that counsel consents. An attorney may not communicate ex parte if a former employee has asked the corporation's counsel to provide representation in the matter, unless that counsel consents. An attorney must obtain the consent of the former employee to the interview. An attorney must inform the former employee not to divulge any communications that the former employee may have had with corporate or other counsel. An attorney must fully explain to the former employee that he or she represents a client adverse to the corporation. Under DR 7-104(A)(2), an attorney must not give advice to the unrepresented former employee other than advice to seek counsel in the matter.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.