

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 90-20

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Modified- by Opinion 96-1 on Feb. 2, 1996; by Opinion 2005-3 on Feb. 4, 2005]

SYLLABUS: When litigation is contemplated or after a lawsuit is filed a lawyer representing an interest adverse to a corporation must notify opposing counsel when seeking to interview management employees, employees who can speak for the corporation and employees whose opinions form the basis of management decisions. Other present and all former employees may be interviewed ex parte; notification may be required before interviewing former employees who were privy to privileged communications with the corporation's lawyers or employees whose conduct gives rise to the claim against the corporation. In all interviews, the lawyer must be clearly identified to the interviewee.

OPINION: We have before us your request for an opinion on the following questions:

1. Under what circumstances may an attorney who is contemplating filing a lawsuit against a corporation or other business entity interview the past and/or present employees of the corporation or other business entity while investigating the facts of the case?
2. Is there any distinction made between classes of employee, i.e. management vs. laborers?
3. Does it matter if the interviewee is a past or present employee?
4. Can any interview be performed without the presence of counsel or notifying management?
5. What sanctions are available against the attorney or law firm who so investigates?

You have also indicated interest in the same questions where a lawsuit or action has commenced.

In regard to your last question, any violation of the Disciplinary Rules may lead to sanctions determined on a case-by-case basis. Improper direct contact with an opposing party may also lead to disqualification in a particular case. This Board, however, does not consider specific, potential sanctions or address primarily legal questions. Therefore, this opinion will not further discuss question 5.

The controlling rule is 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 the matter unless he has 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.

Interviews Before Suit

This rule may bar interviews with an opposing party's current or former employees, either before or after a lawsuit has been filed, depending on the individual circumstances of each case. Prospective parties are entitled to protection from deception and overreaching by a lawyer interviewing them. R. Underwood & W. Fortune, Trial Ethics 179 (Little, Brown 1988). When interviewing someone prior to the filing of a lawsuit, the lawyer or investigator must therefore clearly state his or her identity and the client's identity. Id. at 180. If the person being interviewed is represented by counsel, then that counsel must consent to the interview.

The American Bar Association agrees that a lawyer may properly interview and take a statement from a potential defendant, not yet represented by counsel, if the attorney advises the person he or she is conducting the interview as counsel for the plaintiff. ABA Committee on Ethics and Professional Responsibility Informal Op. 908 (1966). The attorney or investigator must carefully avoid misleading the interviewee. ABA committee on Ethics and Professional Responsibility Informal Op. 670 (1963).

The Second Circuit Court of Appeals held a corporation's lawyers in interrogation of an employee of the corporation without informing the employee that a suit had already been filed against him by the corporation to be "inappropriate and not to be encouraged" in Grant v. Haines, 531 F.2d 671 (1976).

Interviews After Suit

Distinctions between classes of employees or past and present employees in terms of who may be interviewed without notifying opposing counsel occur most often after a lawsuit has been filed. Because DR 7-104 (A) (1) prohibits interviews with unrepresented parties, the question becomes who is considered a party when your opponent is a corporation?

We will begin by discussing whether current employees of the corporation are parties to an action against the corporation. If an employee can "speak for" the corporation or commit the corporation to a position, then he or she is considered a party under DR 7-104 (A) (1). See, e.g., ABA Committee on Ethics and Professional Responsibility Informal Op. 1410 (1978), Ohio State Bar Association Informal Op. 81-5 (1981). This prohibition is "necessary in order to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches." ABA Committee on Ethics and Professional Responsibility, Informal Op. 1498 (1983).

Further, it is "unequivocal that you may not talk to anyone currently employed by an adverse party at the managerial level." Wyeth, Talking to the Other Side's Employees and Ex-Employees, 15 ABA Litigation 9 (Summer 1989). The anticontact provision protects anyone in the "control group," which includes top management who make final decisions and employees whose advisory roles to management are such that a top decision cannot be made without their opinions or advice or whose opinions form the basis of any final decision. ABA/BNA Lawyers Manual on Professional Conduct 701:304 (1988).

Finally, opposing counsel is also precluded from contacting a current employee whose act or omission in connection with the controversy 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. ABA Model Rule of Professional Conduct, 4.2 Official Commentary (1983). Although not adopted in Ohio, we concur with this commentary to Model Rule 4.2.

Therefore, it is permissible to interview a current employee who is not involved with the controversy in litigation, not able to bind the corporation and not a managerial employee without notifying the corporation's counsel. However, "it seems reasonable for counsel to ask for permission to contact employees in close cases." R. Underwood & W. Fortune, Trial Ethics 184 (Little, Brown 1988). Moreover, if the employee is represented by counsel, then that counsel must consent to the interview.

Although former employees are no longer able to bind the corporation, you cannot always assume that it is proper to interview an ex-employee without advising opposing counsel. Wyeth, Talking to the Others Side's Employees and Ex-Employees, 15 ABA Litigation 11 (Summer 1989). As Wyeth's article points out, there are two types of former employees who may be considered parties under DR 7-104 (A): 1) employees who were privy to privileged communications with the corporation's lawyers about the case; and 2) employees whose conduct gives rise to the claim against the corporation. Id. Interviewing these types of former employees may require the permission of the corporation's counsel, depending upon the circumstances of the particular former employee and the case involved.

Determining whether the ex-employees can be interviewed ex-parte on a case-by-case basis can be difficult. Wyeth recommends "one way to avoid disqualification is to seek an order in advance permitting you to interview certain classes of current or former employees." Wyeth, Talking to the Others Side's Employees and Ex-Employees, 15 ABA Litigation 59 (Summer 1989).

In conclusion, it 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.

This is an informal, non-binding advisory opinion based upon the Code of Professional Responsibility and limited to the questions asked.