

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

## **OPINION 2005-3** Issued February 4, 2005

***Withdrawn by Adv. Op. 2016-5 on August 6, 2016***

**SYLLABUS:** Counsel representing an interest adverse to a corporation may communicate without the consent of a corporation's lawyer with certain current employees and former employees of the corporation, even when corporate counsel asserts blanket representation of the corporation and all its current and former employees.

As to communication with current employees of a corporation, these guidelines apply. When a corporation is known to be represented with respect to a particular matter, DR 7-104(A)(1) prohibits communications without the consent of corporate counsel with an employee of the corporation who supervises, directs or regularly consults with the corporation's lawyer concerning the matter, or has authority to obligate the corporation with respect to the matter, or whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability. This modifies Opinion 90-20.

As to communication with former employees of a corporation, these guidelines apply. 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 following boundaries. 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 an attorney's communication, without the consent of a corporation's lawyer, with current and former employees of a

corporation when opposing corporate counsel asserts blanket representation of the employees and the corporation.

Is it proper for counsel who represents an interest adverse to a corporation to communicate without consent of the corporation's counsel with certain current and former employees of the corporation, when the corporate counsel asserts blanket representation of the corporation and all current and former employees?

DR 7-104 is the anti-contact rule in the Ohio Code of Professional Responsibility.

DR 7-104

(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 [her] client.

EC 7-18 broadly explains the reason for the anti-contact rule: "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." In practice, the rule protects represented clients from overreach by opposing counsel who might elicit information harmful to the client and protects unrepresented persons from receiving advice that might not be in their best interest. And, as explained in ABA, Formal Opinion 95-396 (1995), "the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privilege or other information that might harm their interests" (citing Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 325 n. 4 (1992)).

Blanket representation

Corporate counsel's assertion of blanket representation of the corporation and all its corporate employees is bluster. It is inappropriate. First, a unilateral declaration by a corporation's counsel that he or she represents all current and former employees does not make it so. Second, such blanket representation of a

corporation and all its current and former employees would in many instances be fraught with impermissible conflicts of interest for the corporate lawyer.

The Board's view is that a lawyer representing a corporation may not prohibit contact with all employees by asserting blanket representation of the corporation and all its current and former employees. A similar view is expressed by the ABA, Committee on Ethics and Professional Responsibility: "[A] lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization." ABA, Formal Op. 95-396 (1995).

[For this Board's view as to blanket instructions to government employees see Opinion 92-7 advising that "[a] government department or agency or its counsel should not give blanket instructions to all its employees not to communicate with counsel representing an adverse party unless the government attorney is present.") Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 92-7 (1992).]

Yet, some current employees of a corporation are off limits—they are protected by DR 7-104(A)(1) from contact by opposing counsel without corporate counsel's consent. The Board has provided guidance in Opinions 90-20 (1990) and Opinion 96-1 (1996) as which employees are protected by the rule. This advice is reviewed below.

#### Current employees

Certain current employees of a corporation are considered represented by corporate counsel and are shielded by the anti-contact rule from contact by opposing counsel without consent of corporate counsel. Defining the group of protected employees helps attorneys to comply with DR 7-104.

In Opinion 90-20 the Board advised 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 acts or omission in connection with the controversy may be imputed to, or an admission of, the corporation." Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 90-20 (1990).

In Formal Opinion 95-396, the ABA, Committee on Ethics and Professional Responsibility advised that "[w]hen a corporation or other organization is known to be represented with respect to a particular matter, the bar applies only to communications with those employees who have managerial responsibility, those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question." ABA, Formal Op. 95-396 (1995).

More recently, a 2002 amendment to the comment to ABA Model Rule 4.2 (the anti contact rule) provides further clarity as to off limits employees.

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA, Model Rule 4.2, comment 7.

The Board finds the language of comment 7 to Model Rule 4.2 to illuminate which employees are protected by the anti-contact rule. Thus, while the past language of Opinion 90-20 has served well, the language of the Model Rule 4.2 comment 7 may provide more clarity to Ohio attorneys. Thus, the Board modifies Opinion 90-20 by now advising that when a corporation is known to be represented with respect to a particular matter DR 7-104(A)(1) prohibits communications with an employee of the corporation who supervises, directs or regularly consults with the corporation's lawyer concerning the matter, or has authority to obligate the corporation with respect to the matter, or whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability.

Former employees

Former employees, who have not obtained counsel in a matter, may be interviewed without consent of the corporation's counsel.

In Opinion 96-1 (1996), this Board advised:

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.

See also ABA, Formal Op. 91-359 (1991) advising that “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.”

## Conclusion

Counsel representing an interest adverse to a corporation may communicate without the consent of a corporation’s lawyer with certain current employees and former employees of the corporation, even when corporate counsel asserts blanket representation of the corporation and all its current and former employees.

As to communication with current employees of a corporation, these guidelines apply. When a corporation is known to be represented with respect to a particular matter, DR 7-104(A)(1) prohibits communications without the consent of corporate counsel with an employee of the corporation who supervises, directs or regularly consults with the corporation’s lawyer concerning the matter, or has authority to obligate the corporation with respect to the matter, or whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability. This modifies Opinion 90-20.

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**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.**

