LEGAL ETHICS OPINION 1409

COMMUNICATION WITH WITNESS — DEFENSE ATTORNEY ENGAGING IN *EX PARTE* COMMUNICATION WITH PLAINTIFF'S WIFE.

You have indicated that Attorney represents a Defendant governmental agency which has been named by a former employee in a Title VII suit alleging illegal reprisal and race discrimination. Plaintiff seeks a remedy based, in part, upon his inability to work due to the emotional distress/disability suffered as a result of the alleged discrimination. You further advise that, although there is no active divorce action pending, Plaintiff has been separated from his wife for approximately 17 years, but the separation was not continuous and they periodically lived together for undetermined periods of time.

You indicate that, although Defendant's Attorney would not inquire into the content of any privileged communication, he seeks to engage in *ex parte* communication with Plaintiff's wife. You have requested that the committee opine as to the propriety of such communication which would be made in order to determine if Plaintiff has any history of mental illness or factors which would predispose him to mental illness.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:7-103(A)(2) which requires that, in the course of his representation of a client, a lawyer shall not 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; and DR:7-103(B) which mandates that, 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 and shall make reasonable efforts to correct any misunderstanding the person may have as to the lawyer's role in the matter.

The Committee has consistently opined that it is not per se improper for a defense attorney to make *ex parte* contact with plaintiff's fact witnesses without plaintiff's or plaintiff's counsel's knowledge or permission. In the case of a plaintiff's treating physician, where the defense counsel sought to obtain factual information as to the patient's treatment, physical condition, and anticipated future damages, the committee suggested that common courtesy would indicate that the defendant's counsel contact the plaintiff's counsel before interviewing the physician. (See LE Op. 1042, LE Op. 1058.) In addition, the Committee reiterated the admonitions against an attorney advising the plaintiff's treating physician, whose interests may be adverse to defense counsel's client, or indicating to the physician that he is obligated to disclose such information when in fact he may be or is not under any such obligation. See LE Op. 1235. Conversely, the Committee has earlier opined that when an individual has been party to a concurrent or prior action to the action in question, and has or had prior representation at that time, it would be improper for an attorney to communicate with that individual on the subject of that litigation without either the consent of the prior attorney or authorization by law. (See LE Op. 1281, LE Op. 1389.)

Under the facts you have provided, Plaintiff's estranged wife was not a party to any prior or simultaneous action and thus was not represented by counsel who should be contacted for consent. Thus, the Committee is of the opinion that, although Plaintiff's estranged wife may be an indirect beneficiary of any remedies awarded to Plaintiff, she does not enjoy status as “party” to the action, as the term is used in DR:7-103. (See also *Banks v. Rockwell International North American Aircraft Operations*, 666 F. Supp. 1053, 1058 (S.D. Ohio 1987).)

Therefore, under the facts you have provided, the Committee is of the opinion that it would not be improper for Defendant's Attorney to engage in *ex parte* communication with Plaintiff's [estranged] wife.

Committee Opinion
March 12, 1991

Legal Ethics Committee Notes. – This opinion is overruled by Va. Code § 8.01-399 (D) and LEO 1639.