

COMMUNICATION WITH ADVERSE PARTY: ATTORNEY/CORPORATE SHAREHOLDER COMMUNICATING WITH OFFICERS, DIRECTORS, AND EMPLOYEES OF CORPORATION AFTER HE HAS FILED SUIT AGAINST CORPORATION.

You have presented a hypothetical situation in which an attorney is a shareholder in a corporation and has filed suit in his own name against the corporation which is represented by counsel. The attorney/shareholder is concerned that the directors of the corporation are not receiving accurate information about the nature of his claim.

You have asked the committee to opine whether, under the facts of the inquiry, it is proper for the attorney, who has filed suit in his own name against a corporation in which he is a shareholder, to communicate directly with officers, directors, and employees of the defendant corporation. Specifically, you have asked the committee to consider whether the attorney/shareholder may transmit his offer to sell his stock directly to the directors and shareholders of the corporation rather than through the corporation's attorney, where the terms of the shareholder's agreement require the secretary to transmit notice of an offer to sell stock to other shareholders. In addition, you have asked the committee to consider the propriety of the attorney discussing the pending litigation in a request that the matter regarding his offer to sell stock be placed on the Agenda for a shareholders meeting.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:7-103(A)(1), which states that a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. [emphasis added]

The committee believes that the answer to your question requires a step-by-step analysis of the elements contained in DR:7-103(A)(1) and their impact on the facts you have provided:

First, the committee is of the opinion that if the attorney/shareholder contacts the corporation as to the pending suit he has filed against the corporation, that communication is on the "subject of the representation" under DR:7-103(A)(1). The committee assumes that the offer to sell stock is related to the pending suit and any communication thereupon is also on the subject of the representation.

Second, the committee has consistently opined that an attorney may not contact employees of an adverse corporate entity within the "control group", i.e., officers, directors and key employees, because those persons are recognized to be "parties" under the Disciplinary Rule. Thus, the committee opines that it is not permissible for the attorney/shareholder to contact officers, directors, or employees who occupy a position within the corporation such that he, or she could commit the organization or corporation to specific courses of action. *Upjohn Co. v. U.S.*, 101 S.Ct. 677 (1981). See LE Op. 795, LE Op. 801, LE Op. 1076; see also LE Op. 347, LE Op. 530, LE Op. 533; cf. LE Op. 905.

Third, the committee has previously opined that consent must be obtained from the lawyer representing the parties; consent directly from the client would not satisfy the requirements of DR:7-103(A)(1). See LE Op. 1507.

Finally, the question of whether the attorney/shareholder is authorized by law, e.g., under the statutes governing Virginia corporations, to make such contact raises a legal issue the determination of which is beyond the purview of the committee.

Additionally, the committee is of the opinion that neither the fact that the attorney/shareholder is representing himself nor the claim that the corporation's directors are not receiving accurate information about the nature of the attorney/shareholder's claim would constitute an exception to DR:7-103(A)(1). See LE Op. 521, LE Op. 523, LE Op. 1323.

Thus, the committee opines that, without the consent of counsel representing the corporation, the attorney/shareholder may not contact the officers, directors, or "control group" employees about the suit he has filed, in his own name, against the corporation, about his offer to sell stock, or about his request to have the matter added to the agenda for the shareholders' meeting.

Committee Opinion  
May 11, 1993