

You have presented a hypothetical situation in which an attorney represents a disabled child and his/her parents in a special education matter. Following the attorney's request for a due process hearing, the attorney would like to talk with the teachers and school professionals who have conducted evaluations as well as with the members of the team which develops the Individualized Education Program (IEP). At the meeting convened to develop the IEP, one school representative is designated with authority to commit the school to providing services and one employee, generally the same person, is designated as the school board's representative in the due process hearing.

You further indicate that there is no formal discovery in a due process hearing, although exhibits must be exchanged five days prior to the hearing. The parents can request all the child's educational records prior to the initiation of the hearing and the school board can also request the child's records which may be relevant to the issues presented at the hearing.

Finally, you indicate that counsel for the local school board prohibits contact with any school employees, which prohibition may extend to school board counsel denying consent to interviews or insisting on being present at any such interviews, effectively preventing parents' counsel from receiving interpretation of reports and other information.

You have asked the committee to opine whether, under the facts of the inquiry, it is proper for counsel for the child and parents to communicate with witnesses, such as teachers and evaluators who are employed by the school board, without the presence or prior approval of the lawyer who represents the school board.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:7-103(A)(1) which, in pertinent part, prohibits a lawyer from communicating 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; DR:7-103(A)(2) which precludes a lawyer from giving 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 [the lawyer's] client; and DR:7-103(B) which requires 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. Additional guidance is available through EC:5-18 [EC:5-18], the pertinent parts of which exhort that

[a] lawyer employed or retained by a corporation *or similar entity* owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. . . . Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present. (emphasis added)

The committee has consistently opined that it is not impermissible for an attorney to directly contact and communicate with employees of an adverse party provided that the

employees are not members of the corporation's "control group" and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego. *See, e.g.*, LE Op. 347, LE Op. 530, LE Op. 795, LE Op. 801, LE Op. 905; *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). The committee has also found that it is not improper for an attorney to contact an opposing party's fact or expert witnesses, although it would not be appropriate under DR:7-103(A)(2) and (B) for the attorney to offer advice to those witnesses. *See* LE Op. 1042, LE Op. 1158, LE Op. 1235.

With respect to actions involving governmental agencies, the committee has previously opined that the disciplinary rule proscribing communications with adverse parties is not applicable in a case where persons are petitioning a legislative body [LE Op. 529]; and that, where an attorney is involved in litigation against a county board of supervisors, it would not be improper for the attorney to contact other county employees if they are fact witnesses not charged with the responsibility of executing board policy [LE Op. 777]. Furthermore, the committee has also opined that, where information is generally available to the public under the Freedom of Information Act, the status of litigant or litigant's counsel does not disenfranchise one from obtaining such information. *See* LE Op. 1504. *Frey v. Department of Health and Human Services*, 106 F.R.D. 32 (E.D. N.Y. 1985).

Thus, in the facts you present, the committee believes that it would not be improper or violative of DR:7-103(A)(1) for the lawyer representing the child and parents to directly contact school board employees who are not in a position to bind the school board to a course of action. The committee is of the opinion that the rule prohibiting an attorney's communication with adverse parties should be narrowly construed in the context of litigation with the government in order to permit reasonable access to witnesses for the purpose of uncovering evidence, particularly where no formal discovery processes exist. Opinion 332 (9/88), Ethics Committee of the Kentucky Bar Ass'n, ABA/BNA Law. Man. on Prof. Conduct 901:3905.

Committee Opinion
June 22, 1993