

EX PARTE COMMUNICATION WITH
OPPOSING PARTY'S TREATING
PHYSICIAN TO ADVISE OF
REPRESENTATION AND
FORTHCOMING SUBPOENA.

You have presented a hypothetical situation in which defense counsel, or a legal assistant at defense counsel's direction, during the course of a pending personal injury action, contacts *ex parte* (by phone or in writing) the plaintiff's treating physician, without the consent of the plaintiff/patient, to advise the treating physician that:

- a. the attorney represents the patient's adversary in the lawsuit to which the physician's patient is a party;
- b. the physician will soon be served with a subpoena *duces tecum* for the patient's medical records;
- c. the subpoena (which has not yet been issued) will request the physician to produce the records at the defense attorney's office at a specific date and time;
- d. if the doctor has any questions, *please do not hesitate to contact the lawyer or his paralegal at the given number.*

Under the facts you have presented, you have asked the committee to opine as to the propriety of the defense counsel's unauthorized *ex parte* communication with his adversary's treating physician, in advance of the physician's receipt of the subpoena, to the extent that such contacts might foster or encourage *ex parte* contact between the physician and attorney in violation of Virginia Code § 8.01-399, as amended and effective July 1, 1993. You are also concerned that such communication might cause the physician to produce the patient's records before the return date on the subpoena and before the patient's attorney can file or be heard on a motion to quash the subpoena, or move the court to require that the records be returned to the Clerk's Office, pursuant to Va. S. Ct. Rule 4:9(c), so that the patient's attorney may withdraw them for copying.

The pertinent statutory provision is Va. Code § 8.01-399(D) which states:

“Neither a lawyer, nor anyone acting on the lawyer's behalf, shall obtain, in connection with pending or threatened litigation, information from a practitioner of any branch of the healing arts without the consent of the patient except through discovery pursuant to the Rules of the Court as herein provided.”

The appropriate and controlling disciplinary rule relative to your inquiry DR:7-105(C)(5) prohibiting an attorney from intentionally or habitually violating any established rule of procedure or evidence, where such conduct is disruptive of the proceedings.

The committee has previously opined in LE Op. 204, LE Op. 1042, LE Op. 1158 and LE Op. 1235 that the *ex parte* communication by defense counsel with the plaintiff's treating physician in order to obtain factual information as to the patient's treatment, physical condition, and anticipated future damages is not improper, *provided such communication does not violate the Rules of Court or trial court rulings regarding discovery.* These prior opinions were issued well before the 1993 amendment to Va. Code § 8.01-399 which now prohibits an attorney from obtaining nonconsensual *ex parte* informal discovery of information from an adversary's treating physician. It is the opinion

of the committee that LE Op. 204, LE Op. 1042, LE Op. 1158 and LE Op. 1235 are overruled by this material change in the law regarding discovery.

Given the cited statute, it is the opinion of the committee that it would be improper for an attorney to *obtain* information from an adverse party's treating physician in violation of § 8.01-399(D). Such conduct would violate the cited disciplinary rule. *See, e.g.*, ABA Formal Opinion 93-78 (November 8, 1993) (lawyers must abide by statutes prohibiting unauthorized *ex parte* communications with a party's treating physician); *Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993) (lawyer sanctioned for violating Arkansas law prohibiting unauthorized *ex parte* communications between defense counsel and a non-party treating physician).

The Committee would observe that under the facts presented it appears that the *ex parte* contacts with the plaintiff's physician initiated by defense counsel or his/her legal assistant were intended to provide information and as a courtesy rather than to obtain information from the physician. It is also not clear that defense counsel has obtained any information as a result of these letters. Whether the communications which are the subject of this request or any similar contacts between a lawyer (or his staff) and a practitioner of any branch of the healing arts constitute a violation of § 8.01-399 is a question of law beyond the purview of the committee.

Committee Opinion
April 24, 1995