

Committee Opinion
May 17, 1988

LEGAL ETHICS OPINION 1076

CORPORATIONS – COMMUNICATING
WITH EMPLOYEE OF ADVERSE
PARTY ATTORNEY – EXPERT
WITNESSES SOLICITATION.

You pose several unrelated questions. The Committee will respond to these questions in the order presented in your letter.

Your first question involves communicating with employees of a corporation with which you are engaged in litigation. You state that you have always believed that the control group was a corporation for the purpose of communication and that you would be out of line to talk to the control group without consulting the counsel on other side of the case, but that you would be free to walk into a certain department store and talk to sales clerks and people of that sort who are not directly involved in the litigation.

You wish to know whether there is any prohibition against this kind of communication. The Committee refers you to LE Op. 905 and LE Op. 801, which are dispositive of this inquiry.

Your second question is whether or not you may communicate with an adverse party's expert witnesses. There is nothing within the Code of Professional Responsibility which would prohibit you from communicating with an adverse party's expert witnesses; however, the Committee believes that common courtesy would dictate that you advise the opposing attorney prior to doing so.

Your third question relates to the listing of expert witnesses. You advise that in pretrial motions, you routinely list the experts you intend to call and sometimes include other possible experts whom you may or may not have talked with already so that if you should talk to them and decide to call them as an expert at trial, you cannot be cited for failure to have identified these witnesses. You wish to know whether it is improper for you to list as an expert witness, someone whom you have not actually retained as an expert. The Committee believes it is not improper to list experts which you have a reasonable belief may be retained.

Your fourth question is what your duty would be in a situation where some unknown third party sends you selected items from your opponent's file. You wish to know whether or not it is permissible for you to read, retain and use the materials. You also wish to know whether you are under any ethical obligation to return these materials to your opponent. While there is nothing within the Code of Professional Responsibility which would obligate you to return the materials to the opposing attorney or which would prohibit you from reading the material or using it to your client's benefit, the Committee believes that out of professional courtesy you should inform the opposing counsel that you have received these materials.

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Your final question is regarding letters of solicitation. You wish to know whether or not you may write directly to injured parties, asking them to permit you to represent them in a personal injury action. You also wish to know whether you may write to a group of people who are unrepresented by counsel, asking them to let you represent them or in the alternative, invite these individuals to a seminar discussing the situation. The Committee refers you to LE Op. 904 and LE Op. 862, which the Committee believes are dispositive of your inquiry.

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[See also, LEOs 1527 and 1702.]