

Committee Opinion
October 26, 1988

LEGAL ETHICS OPINION 1158

COMMUNICATION WITH WITNESS:
DEFENSE COUNSEL'S *EX PARTE*
COMMUNICATION WITH PLAINTIFF'S
FACT WITNESS.

You have advised that you represent the plaintiff in a dental malpractice case for which you have obtained numerous dentists to testify on her behalf as experts from outside the jurisdiction of the pending litigation. In addition, the plaintiff has disclosed that a local dentist will be testifying as a fact witness on the violation of the standard of care by the defendant. Recently, you learned that defense counsel made a direct telephonic contact with one of the plaintiff's local treating dentists to discuss her treatment and the anticipated future damages which may result from her condition. Although records from that dentist had been disclosed by the plaintiff earlier through discovery proceedings and defense counsel had independently obtained all of the dentist's records via subpoena duces tecum, defense counsel had not obtained authorization or consent from the plaintiff or her attorney prior to communicating with the fact witness. When you questioned defense counsel about the propriety of his *ex parte* contact with plaintiff's treating dentist, defense counsel cited § 8.01-399, Code of Virginia, which allows an attorney to make such contact without the prior consent of the plaintiff or her counsel since the physical condition of the patient is at issue.

You wish to know whether it is ethically permissible for defense counsel to have direct, *ex parte* contact with plaintiff's treating physician, who is testifying, not as an expert, but as a fact witness, without prior consent from the plaintiff, her counsel or a court order authorizing such contact.

The Committee believes that contact by opposing counsel of plaintiff's treating physician/fact witness in order to obtain factual information as to patient's treatment, physical condition, and the anticipated future damages is ethically permissible under the facts as you have presented them in your inquiry. Obviously, in the course of the communication with the treating physician, opposing counsel should not be privy to information which is protected by the physician/patient relationship.

The Committee would direct your attention to LE Op. 1042, which in the view of the Committee is dispositive of your inquiry.

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Legal Ethics Committee Notes. – This opinion is overruled by Va. Code § 8.01-399(D) and L E Op. No. 1639.

Editor's Note. – L E Op. No. 1158 was overruled by § 8.01-399(D) of the Code of Virginia as amended by the 1993 session of the Virginia General Assembly, the Virginia State Bar Standing Committee on Legal Ethics has determined. The subsection precludes

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a lawyer or anyone acting on the lawyer's behalf from obtaining, 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.