

Committee Opinion  
January 4, 1989

LEGAL ETHICS OPINION 1190

COMMUNICATING WITH ONE OF  
ADVERSE INTEREST:  
COMMUNICATING WITH  
UNREPRESENTED PARTY TO  
ESTABLISH VALID CLAIM.

You have advised that Attorney A has been informed by his client, Company Y, of a possible infringement on a patent or illegal use of the trademark issued to Company Y by a potential adversary, Company X. Thereafter, Attorney A instructs his paralegal to call Company X and inquire as to whether or not they are in fact manufacturing a certain product or using a certain trademark.

You have asked several questions regarding Attorney A's and his paralegal's method of inquiry of a possible claim. The Committee will remind you that paralegals are also bound by the Code of Professional Responsibility when assisting their attorneys with client matters. The Committee will address your questions in the order in which they were presented in your inquiry.

I. Has Attorney A and/or his paralegal violated any rules or ethical considerations under the Code of Professional Responsibility? If so, what precautions could either the attorney or the paralegal have taken to avoid any violation of the Code?

The Committee believes that such investigation of the merits of a claim by either the attorney or his paralegal is required and proper in compliance with § 8.01-271.1 of the Code of Virginia, in order to avoid sanctions for filing a frivolous lawsuit. Disciplinary Rule 7-103(A) [DR:7-103] provides:

Except for the advice to secure counsel, an attorney shall not communicate or cause another to communicate on the subject of the representation with one he knows to be represented by counsel in that matter, without the prior consent of opposing counsel or proper legal authority.

Hence, the presumption that contemplated communication regarding the subject of the litigation shall not be made to a named adversary party to the litigation. However, this is not the case in the hypothetical scenario you have presented in your inquiry. No lawsuit has been filed and the paralegal is making an investigative rather than accusatory inquiry. The Committee opined in LE Op. 550 that an attorney's investigator may interview the adversary party or witnesses in a personal injury matter, unless the attorney has reason to know that said party is represented by counsel. Furthermore, such communication is required by statute and does not constitute an ethical violation until such time as the attorney determines that a warranted claim may be brought under existing law.

II. Must the paralegal ask the employees she contacts whether they are represented by counsel, and should she disclose her potential adversarial role and identify herself prior to obtaining any information?

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Under DR:7-103(B) an attorney should not state or imply that he is disinterested when he or she should reasonably know that the unrepresented person may misunderstand the attorney's role in the matter. The Committee believes that the attorney or his paralegal should properly identify himself or herself and state the purpose for making the inquiry, which may later place the attorney or paralegal in an adversarial role. (See LE Op. 482 and LE Op. 905) The Committee believes further that the paralegal or attorney should limit his investigation to the facts regarding Company X's product or trademark to determine whether any infringement of Company Y's patent or trademark rights has occurred; however, at this stage, it is not incumbent to inquire whether the potential adversary party is represented by counsel. Once the investigation shows that there is a meritorious claim, any subsequent contact should be made in accordance with the terms of DR:7-103 only.

III. If the paralegal or attorney had requested pamphlets or other literature that is available to the public about Company X's products, would this have constituted a violation of the Code of Professional Responsibility?

No. Obviously, information that is available to the public is not considered confidential and would not be protected by the attorney-client relationship, nor would an attorney or paralegal be ethically prohibited from obtaining the same for the purpose of conducting the investigation of a claim. Given the potential adversarial status of Company X, the attorney has a legal duty to investigate the matter before filing a lawsuit for infringement of a patent or trademark right.

IV. Would requesting pamphlets or other literature available to the public affect the foregoing questions raised regarding communication with a potential adversary party?

No. The Committee is of the view that communication to a potential adversary, whether it is written or verbal, for the purpose of inquiry or investigating a potential claim is proper, if not imperative, before one may file a lawsuit. An attorney has a professional as well as a legal responsibility to ascertain that a claim has not been made for the purpose of harassment or malicious injury, but rather has been formed after reasonable inquiry, and is well grounded in fact and is warranted by, existing law or a good faith argument for the extension, modification, or reversal of existing law, pursuant to DR:2-107 and § 8.01-271.1 of the Code of Virginia.

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