

LEGAL ETHICS OPINION 1504

COMMUNICATION WITH ADVERSE
PARTY: ATTORNEY'S PARALEGAL
CONTACTING OPPOSING PARTY FOR
INFORMATION AVAILABLE UNDER
VIRGINIA FREEDOM OF
INFORMATION ACT.

You have indicated that private parties, represented by a private law firm, are involved in either litigation or an administrative proceeding with a state agency which is represented by the Attorney General. A paralegal for the private law firm, at the direction of an attorney, contacts an employee of the state agency to determine if certain information exists, which information is relevant to the proceeding. The paralegal then follows up the conversation with a written request under the Virginia Freedom of Information Act [Act]. The agency employee in question, acting within his authority, responds to the request, providing the information. Neither the agency head nor the Office of the Attorney General is made aware of either the request or the response.

You have asked the Committee to opine whether, under the facts of the inquiry, the conduct in question is in any way inconsistent with the ethical obligations set out in the Code of Professional Responsibility.

The appropriate and controlling Disciplinary Rule relative to your inquiry is DR:7-103(A)(1) which mandates that

During the course of his representation of a client, a lawyer shall not communicate or cause another to communicate 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*. [emphasis added]

The Committee has previously opined that it is not improper for an attorney or his paralegal to contact a potential adverse party for the purpose of securing pamphlets, other literature or product information that is available to the public. The Committee opined that 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 preliminary to filing an action. LE Op. 1190. *Cf.* LE Op. 482, LE Op. 1281.

Furthermore, 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. 905; *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

Committee Opinion
December 14, 1992

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]. *Cf.* LE Op. 964 (2) (plaintiff's counsel in an action against the Division of Child Support Enforcement shall not communicate or cause another to communicate on the subject of the representation with the party in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so).

The Committee is of the opinion that the role of the governmental agency in accommodating the need of the public at large or the opposing party in particular for information in the possession of the agency has been addressed by the Act. The Committee believes that it is thus not improper for opposing counsel or his paralegal to avail themselves of information available under that Act. In the Committee's view, the status of litigant or litigant's counsel does not disenfranchise one from obtaining information otherwise available to the public. *See 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 where contact with a governmental agency is authorized through statutory provisions, such as the Freedom of Information Act, communication carried out by an employee of an attorney opposing the agency in litigation is neither improper nor violative of DR:7-103(A)(1).