

Committee Opinion
April 11, 1994

LEGAL ETHICS OPINION 1589

COMMUNICATION WITH ADVERSE
PARTIES: ATTORNEY CONTACTING
FORMER EMPLOYEE OF ADVERSE
CORPORATE PARTY WHEN
CORPORATE ATTORNEY CLAIMS TO
REPRESENT FORMER EMPLOYEE
INDIVIDUALLY.

You have presented a hypothetical situation in which A sues B, a corporation, for medical negligence and fraud. You indicate that A's attorney contacts and attempts to interview B's former employee, X, who has information relevant to A's claims against B. However, X states that B's attorney has already contacted her and advised her not to speak with A's attorney. Also, B's attorney has told X that he represents X individually as well as B.

You have asked the committee to opine whether, under the facts of the inquiry, it is ethical for B's attorney to contact former employees of B, advise them that he represents them individually, and instruct them not to speak with A's attorney.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:7-103(A)(1), which provides that 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.

The committee has previously opined that an attorney may communicate directly with former employees of an adverse party, unless the attorney is aware that any of the former employees is represented by counsel. See LE Op. 533, LE Op. 905.

The question, then, is whether B's former employees are represented by counsel? It is well-established that a corporation's attorney represents, and owes his allegiance to, the corporation and not individual corporate employees. See EC:5-18.

As former employees, X and others have a right to choose their own counsel. The facts do not indicate that the former employees have freely chosen counsel. Instead, the facts indicate that B's attorney contacted X, advised her not to speak with A's attorney, and advised her that he represents her as well as B. Since X did not choose B's attorney as counsel, B's attorney cannot claim to represent her absent her agreement. B's attorney cannot claim to represent any of the former employees if they did not engage him to do so.

Since the facts do not indicate that X agreed to representation by B's attorney, the committee is of the view that B's attorney cannot advise X that he represents her individually nor may he instruct X not to speak with A's attorney. See LE Op. 1235, LE Op. 1281, LE Op. 1426. As to X, or any other unrepresented former employee, B's

Committee Opinion
April 11, 1994

attorney may only advise that person to secure counsel, since that person's interests may be in conflict with the interests of his client, B. See DR:7-103(A)(2).

Committee Opinion
April 11, 1994

Legal Ethics Committee Notes. – Rule 3.4(g) allows a lawyer to request that former employees of a corporate client “refrain from voluntarily giving relevant information to another part” under certain circumstances.