Committee Opinion
March 29, 2001

LEGAL ETHICS OPINION 1749

PROPRIETY OF ATTORNEY ASKING QUESTIONS ABOUT ADVICE PROVIDED BY CORPORATE COUNSEL WHEN QUESTIONING FORMER EMPLOYEE OF OPPOSING PARTY.

You have presented a hypothetical situation in which a plaintiff sues a corporation in a personal injury action. The counsel for the corporation, in the course of investigation, interviews an employee who has knowledge of matters relevant to the litigation. The employee is not within the corporate control group. The interviews all occur on the corporation's premises during the employee's normal work hours. The employee is acting within the course and scope of employment in participating in the interviews. The communications are confidential in nature and no factors exist which would constitute a waiver of the attorney-client privilege as to these communications.

Thereafter, and while the litigation remains pending, the employee terminates her employment with the corporation. Upon learning this, the plaintiff's counsel initiates *ex parte* contact with the employee and inquires not only regarding the facts known to the employee, but also regarding the substance of the communications with counsel.

Under the facts you have presented, you have asked the committee to opine as to whether it is a violation of the Rules of Professional Conduct for counsel to:

1. Inquire into matters known or reasonably apprehended to be confidential communications when interviewing, *ex parte*, a former employee of a corporate adversary in pending litigation.

2. Induce a former employee of a corporate adversary in pending litigation to disclose matters known or reasonably apprehended to be confidential communications in an *ex parte* interview where: a) such disclosure might subject the employee to civil liability; b) the employee is unrepresented by counsel; or c) the communications fall within the attorney-client privilege and pertain directly to the matters in litigation.

The appropriate and controlling rules relative to your inquiry are Rule 1.6, 1.13(a), 4.2, and 4.4. Those rules state in pertinent part as follows:

RULE 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

> **RULE 1.13 Organization as Client**
> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> **RULE 4.2 Communication With Persons Represented By Counsel**
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
>
> **RULE 4.4 Respect For Rights Of Third Persons**
> In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

In considering whether the attorney in this inquiry may participate in the described conversation with the former employee, two distinct questions need resolution. The initial threshold question is whether the attorney may contact the former employee of the opposing corporate party. If that threshold question is answered in the affirmative, then a second question becomes whether the content of that contact is restricted or unlimited.

With regard to the threshold question of whether an attorney may contact the former employee of an opposing party, this Committee previously opined that such contact is permissible so long as that former employee is not represented by his own counsel. *See*, LEOs 533 [LE Op. 533], 905 [LE Op. 905], 1589 [LE Op. 1589], 1670 [LE Op. 1670]. Those opinions all interpret former DR:7-103(A)(1). Current Rule 4.2 is substantially the same as the previous rule; the only change is the replacement of “party” with “person.” That change has no pertinent impact on the analysis in those prior opinions. Moreover, Comment 4 to Rule 4.2 expressly clarifies that the contact prohibition of that rule does not apply to contact with former employees. While the Committee is aware that some other states have found such contact generally impermissible under Rule 4.2, the Committee finds the conclusions of those states unpersuasive as only the Virginia rules contain the pertinent language found in Comment 4. Accordingly, the Committee opines that the lawyer in this scenario may contact the former employee of the opposing party regarding the litigation.

In allowing the contact generally, the Committee notes that under Rule 3.4(f), the employer's counsel can request that the former employee not communicate with opposing counsel. To allow contact from the opposing counsel would merely provide a level playing field where both attorneys in a dispute, neither of which represent the former employee, may contact that potential witness.

The question remains what restrictions, if any, apply to the content of the contact between the attorney and the former employee. Specifically, this request asks whether the attorney may ask questions that seek information from confidential communications with the corporation's attorney. This Committee has previously addressed that protection of

client confidences and secrets is a “bedrock principle” of legal ethics. *See*, LEOs 1643 [LE Op. 1643], 1702 [LE Op. 1702]. Accordingly, this Committee does not want to erode that principle unnecessarily. For the attorney-client relationship to develop in a way that facilitates delivery of quality legal services, both the attorney and the client need to depend on the protection of their confidential communications. Without such assurance, open discourse is hampered.

To maintain protection of client confidences and secrets, some states have opted to prohibit all contact with former employees that have communicated with former counsel. See generally, *Restatement (Third) of the Law Governing Lawyers* § 162 (Proposed Official Draft 1998); Susan J. Becker, *Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints*, 51 Md. L. Rev. 239. As discussed above, the Comments to Virginia’s Rule 4.2 preclude that option. Moreover, the Committee opines that such a sweeping prohibition is broader than needed for the goal of confidentiality protection. Many former employees will have had little or no contact with the former employer’s counsel. Such employees may have valuable information having to do with the facts of a case and not with the counsel's legal advice. Such nonlegal information can be critical in opposing counsel’s determination of whether a potential case has merit or would be frivolous. This Committee opines that a more limited prohibition can serve the confidentiality protection.

The Committee believes that the only needed prohibition on contact with former employees is one of content restriction. The Rules of Professional Conduct already limit the content of an attorney’s communication with unrepresented parties; Rule 4.3 requires that the attorney identify his role in the matter and that the attorney provide no legal advice other than to obtain independent counsel. Thus, attorneys are directed by Rule 4.3 to curb their contact with unrepresented parties to prevent overreaching. Similarly, confidentiality protection can survive contact with former employees with a prohibition on seeking any information that may reasonably be foreseen as stemming from attorney-client communications.

In determining the parameters of this content prohibition, consideration must be given to the complexity presented by an entity client. Virginia's Rules of Professional Conduct address that complexity in Rule 1.13(a), which notes that an attorney represents an entity client through its “constituents,” defined as “officers, directors, employees, shareholders, and other constituents.” *See*, Rule 1.13, Comment 1. Thus, the former employee in this inquiry was a constituent of the corporation at the time of his communications with the corporation's attorney. Comment 2 to Rule 1.13 establishes that the confidentiality protections afforded all clients under Rule 1.6 attach to constituent/attorney communications in order to preserve the client's (*i.e.*, the entity’s) right to confidentiality. Thus, under that provision, the communications between the former employee, during the tenure of his employment, with the corporation's attorney must receive the confidentiality protection of Rule 1.6.

In considering whether the attorney in the inquiry may ask this former employee about those confidential communications, Rule 4.4 is pertinent. Rule 4.4 prohibits an attorney

from obtaining evidence in a manner that violates the rights of a third party. As established above, the corporation has a right to confidentiality for the constituent/attorney communications involving this former employee. The attorney would violate that right and, therefore, Rule 4.4 if he were to ask the former employee to disclose the content of those constituent/attorney discussions.

The committee opines that the attorney in this request's scenario may contact the former employee but that such contact must be limited as described in this opinion. As the answer to the first question of this request prohibits inquiry into confidential communications in all instances, the answer to the remaining three questions is, of course, that such inquiries are prohibited.