Ethics Opinion No. 85-2

Ex Parte Communication with Experts Retained by Opposing Counsel.

The Committee has received several requests for reconsideration of Ethics Opinion 84-8, which holds that nondeceptive ex parte attorney communications with expert witnesses or consultants retained by an adverse party are not prohibited by the Code of Professional Responsibility. These requests point out that the Committee has not considered the provisions of Alaska Civil Rule 26(b)(4), which sets forth the method for formal discovery of facts known and opinions held by experts, acquired or developed in anticipation of litigation or for trial. Actually, the Committee did consider Alaska Civil Rule 26(b)(4) in its issuance of Ethics Opinion 84-8.

Ethics Opinion 84-8 was intended to deal only with the initial ex parte contact, and not with the requirements of formal discovery. The procedure envisioned was that the initial ex parte contact could be made. At that point the expert could either consent to or decline to talk to opposing counsel. The attorney hiring the expert could protect against disclosure of information by directing the expert not to discuss the case with other persons.

Subsequent to the issuance of Ethics Opinion 84-8, certain things have taken place which have convinced the Committee that the procedure approved in Ethics Opinion 84-8 has serious inherent problems. Three developments have taken place since the issuance of Ethics Opinion 84-8, which militate against the procedure approved in that opinion, as follows:

- (1) The Ninth Circuit Court of Appeal in *American Protection Insurance Co. v. MGM Grand Hotel Las Vegas, Inc.*, No. 83-2674, 83-2728 (December 3, 1984), stated that a law firm could be disqualified from representing its client because of ex parte contacts made with a confidential employee and expert witness of the opposing party. The court recognized that ex parte contacts may result in the disclosure of confidential information to the opposing parties. The party seeking disqualification must show only a possibility or the appearance of the possibility of obtaining confidential information in order to obtain disqualification. (*Trone v. Smith*, 621 F.2d 994, 1001 (9th Cir. 1980)) The Second Circuit, in fact, has held that disqualification is required where an attorney is only potentially in a position to use privileged information. (*Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)) In *American Protection Ins. Co.*, the Ninth Circuit stated that the District Court should resolve doubts in favor of disqualification not only to protect the parties involved, but also the integrity of the courts and the public perception of the legal profession. (see endnote 1)
- (2) On June 13, 1985, the Alaska Bar Association circulated a memorandum to all members pointing out that the Disciplinary Board had recently privately reprimanded an attorney for using a subpoena as a discovery device to obtain

materials from a nonparty. The subpoena was not accompanied by a notice of deposition, and no notice was provided to the parties to the case. The Disciplinary Board found that the attorney had intentionally circumvented the Civil Rules to obtain possession of documents to which he might otherwise have been denied access, had the Civil Rules been followed. The Board found that the attorney's conduct violated Disciplinary Rule 1-102(A)(5), which prohibits conduct that is prejudicial to the administration of justice, and Disciplinary Rule 7-106(C)(7), in that he intentionally violated an established rule of procedure. The purpose of the memorandum was to notify all attorneys that subpoena without notice, as a discovery device, was improper.

Since Civil Rule 26(b)(4) provides the approved method of obtaining formal discovery from expert witnesses, it would appear that operating outside of that rule may also violate the rationale of the June 13, 1985, memorandum.

(3) Ethics Opinion 84-8 has apparently been used to justify approaches to expert witnesses which were never intended to be permitted. One of the requests for reconsideration pointed out a situation where the opposing counsel had contacted several of the attorney's retained experts and repeatedly asserted to them that they were "required" to discuss their testimony with him. The experts were dismayed, confused, and in one case outraged, by being contacted. Most experts refused to discuss the case. However, one expert, not as sophisticated or experienced as the others, apparently sent the opposing counsel a copy of his expert report and underlying factual data before these had even been seen by the attorney who retained the expert.

Accordingly, upon reconsideration in light of subsequent events, Ethics Opinion 84-8 is vacated. Ex parte contacts should not be made with expert witnesses retained by an opposing counsel or party. Discovery from expert witnesses to whom Alaska Civil Rule 26 (b)(4). applies shall be done only in a manner agreed upon in advance with opposing counsel or in the manner set forth in Alaska Civil Rule 26(b)(4).

Adopted by the Alaska Bar Association Ethics Committee on August 8, 1985.

Approved by the Board of Governors on August 23, 1985.

Endnotes

#1. The opinion in *American Protection Co. v. MGM Grand Hotel Las Vegas, Inc.* was originally reported at 748 F.2d 1293. The opinion itself was subsequently vacated by the Ninth Circuit, and the appeal dismissed. However, the rationale of the opinion, and the fact that ex parte contacts should result in disqualification if there is only a possibility or the appearance of the possibility of obtaining confidential information, militates strongly against allowing ex parte contacts with retained experts. In *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1979), the court did not consider

whether ex parte contacts with an expert would be permissible, but the rationale of the opinion appears to prohibit them. Finally, in *Campbell Industries v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980), the Ninth Circuit upheld the District Court's finding that an attorney's ex parte contact with an opposing party's expert was a flagrant violation of the provisions of Federal Rule of Civil Procedure 26, deserving strong sanction.