

ALASKA BAR ASSOCIATION

Ethics Opinion No. 88-3

RE: Communication with Former Employees of Corporations Represented by Counsel

The committee has been asked whether it is a violation of the disciplinary rules for an attorney to speak with the former employees of a corporate opponent party. The committee is advised that the attorney wishes to question these former employees regarding the subject matter of the pending litigation since the former employees dealt closely with the transaction which gives rise to the existing law suit against their prior corporate employer.

It is the opinion of this committee that an attorney representing an opposing party in a law suit against a corporation may contact former employees of the corporation, including former members of the corporation's control group, who dealt with the subject matter of the litigation without permission of corporate counsel. It should be noted that counsel may still be prohibited from direct communication with a former employee if that person is individually represented with regard to the pending matter. Further, the questioning attorney may not inquire into privileged attorney-client communications. The interrogating attorney may not listen while the former employee tries to reveal privileged communications voluntarily. The existence of any privileged matter among the former employee and the corporate employer's counsel can only be waived by the corporation who possess this privilege.

A lawyer may communicate with a former employee of an adverse party if the former employee is not represented by counsel. If the lawyer must directly communicate with an unrepresented person, the lawyer should not provide advice, though he may suggest that the third party seek a lawyer. *See*, Committee on Ethics of the Maryland State Bar Assoc., Opinion No. 86-13 (08/30/85), citing: DR7-104(A)(1); EC7-18. An important element of whether the employee is equivalent to a "party," and thereby prohibiting inquiring counsel from questioning without opposing counsel present, is whether the employee has the power to commit the corporate employer. The scope of the rule allows interviews with all employees concerning their knowledge of factual matters outside the scope of their employment and interviews of former employees since they are no longer part of the corporate entity. *See*, Committee on Professional Ethics of the Assoc. of the Bar of the City of New York, Opinion No. 80-46 (undated), citing: DR1-102(A)(2)(4), 7-104(A)(1), EC7-17, EC7-20, ABA Informal Opinion 1410.

Most authorities have restricted their scope of protection for corporate parties to those managerial or other employees whose actions and statements can bind or be imputed to the corporation. *See*, Alaska Bar Assoc. Ethics Opinion No. 84-11 (11/09/84), citing: DR7-104(A)(1); Canon 9; ABA Rule 3.4(f) and 4.2. This same reasoning would exclude former employees from the scope of the rule's protection, even if those employees were formerly part of the corporate control group. Direct communication with former "control" employees does not deprive the corporation of legal counsel, since former employees no longer can act or speak on behalf of the corporation. *See*, Illinois State Bar Assoc. Cmte. on Professional Responsibility, Opinion No. 85-12 (04/04/86). The distinction between a mere bystander witness and a managerial employee who is the later ego of the corporation rest on their authority to commit the organization to a position concerning the scope of their

employment. The difference between bystander and non-bystander witnesses does not apply to an organization's former employees. After leaving the organization's employment, a former employee cannot bind the organization under the law. Therefore, an attorney does not violate DR7-104(A)(1) by communication directly with the organization's former employees about the substantive dispute without the prior consent of the organization's counsel. See, Colorado Bar Assoc. Cmte., Opinion No. 69 Rev. (06/20/87).

In summary, direct communication with former control group or managerial employees may result in eliciting information adverse to the corporation. However, this no more deprives the corporation of the benefit of counsel than does direct communication with any potential bystander witness. Former officers or employees have no authority to commit the organization since such prior employees can no longer be the alter ego of the corporation.

Adopted by the Alaska Bar Association Ethics Committee on May 18, 1988.

Approved by the Board of Governors on June 7, 1988.

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