ALASKA BAR ASSOCIATION ETHICS OPINION NO. 91-1

Communication with Former Employees of Corporation Represented by Counsel (Reconsideration of Ethics Opinion No. 88-3)

The Committee has been asked to re-evaluate Opinion No. 88-3 regarding communications with former employees of a corporation represented by counsel. The Committee expressed the view in that opinion that "an attorney representing an opposing party in a lawsuit 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." The opinion was qualified to the extent that counsel could not contact the former employee if that person was individually represented with regard to the pending matter, and further, the questioning attorney could not inquire into privileged attorney-client communications with the former employee. Otherwise, the attorney was free to "communicate with a former employee of an adverse party if the former employee is not represented by counsel."

The opinion of the Committee, as expressed in Opinion No. 88-3, is hereby reaffirmed. Nevertheless, because there are some isolated court opinions supporting a contrary conclusion, the Committee believes it appropriate to discuss the rationale behind its opinion and underlying rule, and distinguish its conclusion from that reached by others considering the issue.

DR 7-104(A)(1) prohibits a lawyer from communicating on the subject of his representation with "a party" he knows to be represented by another attorney, without that attorney's consent, or unless authorized by law. The purpose of that rule is to prevent lawyers from deliberately dodging adversary counsel to reach - and exploit - that party, thereby obviating the effectiveness of retained counsel. By doing so, the rule minimizes the likelihood that clients will make improvident settlements, ill-advised disclosures and unwarranted concessions against which counsel would advise. Niesig v. Team I, 559 N.Y.S.2d 493 (1990).

The issue is whether former employees of a corporate party are also to be considered as "parties" under this rule. Since corporate parties act only through natural persons, it is obvious that some of the current employees must be classified as parties, or the corporation would be deprived of any protection under the rule. Consistent with that reasoning, certain categories of employees, whether described as the

"control group," or those employees whose acts or omissions are binding on the corporation, are considered to be "parties" to litigation involving the corporation.

Frequently confusion occurs in the application of DR 7-104(A)(1) because the attorney-client privilege is injected into the analysis. This tends to expand the application of the prohibition because the confidential nature of a communication is not lost by termination of the representation or resolution of the matter for which representation was sought. Rather, the privilege continues and the confidence may not be breached without consent of the client unless otherwise required by law. But the privilege does not immunize the underlying factual information, it only protects the communication between the attorney and client. Opinion No. 88-3 recognizes the continuing nature of that privilege.

Once it is recognized that the attorney-client privilege does not require extension of the "party" definition to include former employees, the question is whether the rationale for the attorney-client privilege would otherwise present a basis for extending the prohibition of DR 7-104(A)(1) to former employees. The Committee does not find any compelling reason for that extension.

That is not to say that a former employee could not provide information that would be damaging to the corporation. Such information would be prejudicial, however, whether it is disclosed informally or only after more expensive and perhaps formal procedures are utilized by the party seeking such information. We do not believe that artificial barriers to the informal development of such information would promote any policy or objective that would outweigh the expeditious and less expensive resolution of disputes that may result from use

of the informal discovery. Because the corporation has unique access to the information available from its documents and employees, and the best opportunity to gather information from its employees, the Committee does not believe any burden is imposed on corporate parties by its interpretation of the rule.

The Committee is aware of cases which interpret Rule 4.2 of the Model Rules of Professional Conduct to prohibit ex parte contacts with former managerial employees of an organization. See Sperber v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., No. 82 CIV 7428 (S.D.N.Y. Nov. 21, 1983) (vacated and withdrawn); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 FRD 36 (D. Mass. 1987). See also, Miller & Calfo, "Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?" 42 Bus. Law. 1053 (August 1987); Comment, "Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest" 82 Nw. U.L.Rev. 1274.

Rule 4.2¹ is the counterpart to DR 7-104(A)(1). The Comment to the Rule states, <u>inter alia</u>, the following language:

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¹ The Board of Governors for the Alaska Bar Association have approved a version of the Model Rules of Professional Conduct, and they are presently pending before the Alaska Supreme Court for adoption. The version adopted by the Board has retained the language of Rule 4.2, as well as the comment interpreted by the Sperber court.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(Emphasis added.)

In <u>Sperber</u>, <u>supra</u>, the court interpreted the language in the comment to include former employees:

The phrase preceding the second category of the Comment, "any other person," is plainly broad enough to cover certain former employees, and there is nothing explicitly limiting the Comment's application to current employees. Also, in this case [the former employees] were the individuals who made and carried out the decision to discharge Sperber. It is their actions and motives as officers of the organization at the time which are the subject of plaintiff's claims of discrimination and which plaintiff will seek to impute to the defendant organization in order to hold it civilly liable to plaintiff. It would appear, therefore, that the conversations with [the former employees] fall into the protection of Rule 4.2 (as interpreted by the second paragraph of the Comment.)

A majority of the Committee does not agree with the reasoning of the <u>Sperber</u> court, and it should be noted that the opinion has been vacated and withdrawn, though for reasons which may be unrelated to the court's analysis of this policy, objectives of the rule are not advanced by preventing an attorney from discussing <u>factual</u> issues with a former employee even if those facts may impute liability to the organization. Presumably those facts will not vary depending on whether the organization's counsel does or does not consent to the interview. There is no indication that DR 7-104(A)(1) was intended to protect organizations from the efficient and unimpaired development of facts relating to the matter in dispute, and the Committee declines to stretch the rule's premise in order to reach that result.

Approved by the Alaska Bar Association Ethics Committee on January 3, 1991. Adopted by the Board of Governors on January 18, 1991.

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