ADVISORY ETHICS OPINION 96-07

SYNOPSIS:

An attorney representing a client in a matter in which an adverse party is a corporation represented by counsel may communicate with a former employee of the corporation about the matter without the consent of the corporation's counsel.

FACTS:

The requesting attorney represents the plaintiff in a contract action against a corporation which is represented by counsel in the matter. The requesting attorney wishes to question a former employee of the corporation regarding the issues raised in the complaint without the consent of the corporation's counsel. The former employee is the individual who, during her employment with the corporation, signed the contract at issue on behalf of the corporation and managed the corporation's performance thereunder. The former employee is not represented by counsel with respect to the matter.

QUESTION:

The requesting attorney seeks the opinion of this Committee as to whether the proposed *ex parte* communication with the defendant corporation's former employee would violate DR 7-104(A)(1).

DISCUSSION:

The question presented is not unfamiliar to the Vermont legal community and our lack of guidance in the area has been the subject of some concern.[1] In this Article we are urged, "[to] adopt the majority position and [to] allow unrestricted ex parte contact with former employees."[2] For the reasons outlined below, the Committee is of the opinion that DR 7-104(A)(1) does permit an attorney to have contact with former employees of a business organization with an adverse interest in the matter which is the subject of the contact without obtaining the consent of the counsel for the business organization. This opinion would also apply if Vermont adopts Rule 4.2 of the Model Rules of Professional Conduct as currently amended.

The relevant disciplinary rule of the Code is DR 7-104 which provides as follows:

> DR 7-104 Communicating With One of Adverse Interest.
> (A) During the course of his representation of a client a lawyer shall not:
> (1) 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.
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

The operative prohibition of DR 7-104(A)(1) is ex parte communication with an adverse "party" regarding a matter for which the "party" is represented. The ultimate question here is whether (and if so, to what extent) an adverse "party" which is a business organization also includes the organization's former employees.

The term "party" as used in this rule has been broadly construed by the Vermont Supreme Court. "It suffices for parties to be adverse that '[t]he issue must be proffered by one and controverted by the other. They must be arrayed on opposite sides of the issue....'" (citations omitted).[3] In In re Vincent Illuzzi, Esq.,[4] it was held that the rule, "applies to all transactions for which lawyers are hired and cannot be construed to imply that its application is limited to cases where suit is filed."[5] Likewise, this Committee has held that the term extends to "any person represented by counsel in matters closely related to the subject matter of the client's representation."[6] See also the companion ethical consideration, EC 7-18, which uses the term "person" rather

[1] See Catherine L. Schaefer, *A Suggested Interpretation of Vermont's DR 7-104(A)(1): The Employment Attorney's Perspective on Contacting Employees of an Adverse Business Organization*, (The Jonathon B. Chase Paper) 18 Vt. Law Rev. 95, 99 (1993).
[2] Id. at 112.
[3] In re C.I., Juvenile, 155 Vt. 52, 56-57 (1990).
[4] In re Vincent Illuzzi, Esq., 159 Vt. 155 (1992).
[5] Id. at 159-160.
[6] Opinion 94-3.

than "party." Unfortunately, however, none of the Vermont authority cited serves well to answer the ultimate question in this case. Furthermore, cases and opinions in other jurisdictions which do address the question are not consistent. But see State Bar of Wisconsin Ethics Opinion E-82-10 (1982) (Question 1), which appears to be on point and concludes that contact is permitted with a former employee of an adverse organization even though the former employee was the managing agent of the organization during the time period relevant to the case.

Rule 4.2 of the Model Rules of Professional Conduct contains a nearly identical proscription (set forth here as amended in 1995 without the confusing term "party"):

> Rule 4.2 Communication with Person 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.

This Rule as it relates to the ultimate question in this case is the subject of ABA Standing Committee on Ethics and Professional Responsibility (ABA Committee) Formal Opinion 91-359 (1991). After discussing the rationale and policy supporting the Rule and acknowledging that "persuasive policy arguments" have been made for a less bright-line, more analytical and fact-dependent approach, the ABA Committee concluded as follows:

> [A] lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

Id. at ABA/BNA Lawyers' Manual on Professional Conduct 1001:104. (The Rule at the time contained the term "party" rather than "person.") In so concluding, the ABA Committee relied upon the plain, clear text of the Rule and its Comments and expressly declined, "to expand its coverage to former employees by means of liberal interpretation."[7] Also, in rendering its Opinion, the ABA Committee found the corresponding Code provision (DR 7-104(A)(1)) to be "substantially identical."[8] The Vermont Supreme Court has twice noted that the text of the Code provision is clear.[9]

In 1995, the ABA Committee addressed at length the various issues which arise under the Model Rule when a current, rather than former, employee is involved.[10] We do not address those issues in this Opinion since we are not here confronted with a current employee. However, it should be noted that the 1995 Opinion does expressly reaffirm the bright-line interpretation of the 1991 Opinion relating to former employees:

> It should be noted that Rule 4.2 does not prohibit contacts with *former* officers or employees of a represented corporation, even if they were in one of the categories with which communication was prohibited while they were employed. (emphasis in original)[11]

As noted above, the clear text of our anti-contact rule extends only to those "parties" or "persons" who are adversely positioned in the matter. Where the one adverse is a business organization, we find nothing in our law or rules which creates a direct, current nexus between a business organization and its former employees.[12] Such employees would, in our view, stand in the same shoes as a potential witness, or, at most a "party" in his or her own right. Current counsel in the matter for the organization would not, by virtue thereof, be counsel for the former employee. Therefore, in our opinion, our anti-contact rule, as currently framed, does not extend to former employees of an adverse business organization. This is so, whether or not the former employee was a manager of the organization. Like the ABA Committee, we decline to extend or modify the Rule through interpretation or analysis, no matter how persuasive or compelling. This is especially so where, as here, there is clear and unequivocal direction on the issue which has existed, unchanged, for five years. The answer to the question presented is, No.[13]

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[7] Id.
[8] Id. at 1001:101.
[9] In re Vincent Illuzzi, Esq., *supra*, at 159 (which refers to "the absence of ambiguity in the rule"); In re C.I., Juvenile, *supra*, at 56 (which states that "[t]he disciplinary rule is clear....").
[10] See Formal Opinion 95-396 (1995).
[11] ABA/BNA Lawyers' Manual on Professional Conduct 1001:290 at 1001:301, ftn. 47.
[12] For example, admissions against the organization under V.R.E. 801(d)(2)(D) are limited to statements by agents or servants "made during the existence of the relationship."
[13] This Opinion should not be viewed as a call for change in the Rule. That function of this Committee is separate and distinct and is performed only after proper analysis and consultation with the Bar, a process which is ongoing in light of this State's apparent move toward adoption of the Model Rules.

Notwithstanding this Opinion, the Requesting Attorney is required to adhere to the proscriptions contained in DR 7-104(A)(2) relating to unrepresented persons.

In the State Bar of Wisconsin Ethics Opinion E-82-10 (1982), *supra*, a duty of the attorney contacting an unrepresented former employee of an adverse organization was stated as follows:

> [T]he attorney should first apprise the former employee that he or she may have a continuing duty to the corporation not to reveal any confidential information which he or she may have acquired during the course of his or her employment by the corporation.

In the ABA Committee Formal Opinion 91-359 (1991), *supra*, duties to the unrepresented former employee under the Model Rules include the following:

> [The] attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer's counsel are protected by the privilege....
>
> [The lawyer should] make clear the nature of the lawyer's role in the matter giving occasion for the contact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party.

CONCLUSION:

These directions appear to come from Model Rules 4.4 ("burden a third person") and 4.3, respectively, which have no substantially equivalent counterpart under our Code. However, this Committee views any compliance with these Rules to be well within the recognized qualifications upon a lawyer's duty to represent a client zealously, and therefore would be permissible. DR 7-101(A)(1) (last sentence). [14]

[14] For Vermont's statutory lawyer-corporate client privilege see 12 V.S.A. §1613.