

# ADVISORY ETHICS OPINION 95-17

## SYNOPSIS:

A lawyer may not interview administrative officers of a client's local governmental employer concerning their knowledge of facts concerning the client's injury while on the employer's property without the consent of the attorney for the employer's workers compensation insurer, where the lawyer has brought suit against individual co-employees and other but does not seek to hold the employer liable for the client's injuries. The lawyer is not required to obtain the consent of the attorneys for the co-employee defendants in the lawsuit.

## FACTS:

The attorney for the plaintiff in a personal injury action wishes to interview certain top administrative officers of the plaintiff's employer concerning their knowledge of facts which relate to the cause of the plaintiff's injuries. The plaintiff was injured in one of the employer's facilities while completing her work for the day. She has alleged that she was injured as a result of the negligence of two co-employee managers and other parties not affiliated with her employer. She has not sued her employer. She has made a claim for workers compensation, in which coverage is not contested, and has brought the personal injury case as a so-called "third party" action. The employer's workers compensation insurance company, under Vermont law, would have a right to reimbursement of compensation paid to the plaintiff out of any recovery obtained as a result of the third-party action. The named defendants all have separate counsel. The requesting attorney states that counsel for the co-employee defendants have been retained by the employer's liability insurer because Vermont law would require indemnification of such employees if they were to be held personally liable for their negligence.

## QUESTION:

The requesting attorney wishes to communicate directly with certain top administrative officers of the client's employer concerning their knowledge of the facts leading to the injury and notes that the employer is not an adverse party in the personal injury action because the exclusive remedy against the employer is through a worker's compensation claim. We are asked to give an opinion as to whether the attorney must notify and obtain permission from any of the parties' lawyers in the personal injury action or the lawyer for the workers compensation insurer before proceeding to talk with the administrative officers.

## ANALYSIS:

Disciplinary Rule 7-104(A)(1) states:

"(A) During the course of representation of a client a lawyer shall not:

- (1) communicate or cause to communicate on the subject of the representation with a party [s/he] knows to be represented by a lawyer in that matter unless [s/he] has the prior consent of the lawyer representing such party or is authorized by law to do so" (Emphasis added).

EC 7-18 also states:

"The legal system in its broadest sense functions in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of [the] client with a person [the lawyer] knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless [the lawyer] has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal with the unrepresented person; in such instance, a lawyer would not undertake to give advice to the person who is attempting to represent [him or herself], except that [the lawyer] may advise [the person] to obtain a lawyer.

The American Bar Association, in Formal Opinion 95-396, recently affirmed the trend to apply the Rule to preclude communication not only with formal parties, but also with any person known to be represented with respect to the matter to be discussed. This Committee has embraced this approach in interpreting DR 7-104(A)(1) to prohibit communication with persons having managerial responsibility on behalf of a defendant organization and with any other person whose act or omission may be imputed to the defendant, or whose statements may constitute an admission on the part of the defendant.<sup>1</sup>

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<sup>1</sup> Cf. Opinion No. 93-9 (In action against the State, plaintiff's counsel, without consent of the State's counsel, may communicate with employees of departments who are not targets of the litigation, unless such employees have the power to commit the state; affirms policy of supporting broad access to government employees).

In the factual situation presented to us, the application of Disciplinary Rule 7-104(A)(1) is a close decision, and counsel may be well advised to notify other counsel in the litigation of the intent to interview or depose the administrative officers with respect to their factual knowledge relating to the third-party claim. However, we do not believe the requesting attorney would run afoul of DR 7-104(A)(1) by communicating without the consent of other counsel in the personal injury case.”

We reach a different opinion with respect to notification of and permission from the attorney retained by the workers compensation insurer. It is true that the individuals to be contacted are not named as individual parties in the personal injury action nor is the employer named, inasmuch as the plaintiff has an exclusive remedy against the employer provided by the workers compensation claim, in which coverage is not contested and negligence is not an issue. At first blush, therefore, it would appear that there are no interests of the employer in the personal injury action that could be exploited by the communication with the administrators. However, because of the pending workers compensation claim based upon the same facts, in which the employer is represented by counsel retained by its insurer, we regard a lawyer-client relationship as existing between the administrative officers and such counsel. Further, because the two legal proceedings are so closely related as to the material facts leading to the plaintiff's injuries, and the administrative officers may be in a position to affect their employer's interests in the outcome of the action, we regard the employer, and its top administrative officers, as being “represented by a lawyer” in a “matter” covered by the consent requirements of DR 7-104(A)(1).