
**E-91-1 Communications with opposing party's
agents or employees**

Facts

Attorney A has brought suit against Company XYZ based upon the employees' negligent acts. The employees are not named parties to the action. In fact, attorney A does not know which specific employees were negligent but knows of three specific employees who were involved in the task. Additionally, 10 other employees may have had peripheral involvement in the matter or observed the three specific employees performing their tasks.

Finally, another 20 employees would have been involved in formal or informal discussions with a variety of company personnel after A wishes to investigate the matter, but attorney B has indicated that he does not give authority to speak with any employees of Company XYZ. However, the lawsuit names the company only, and attorney B has appeared only on behalf of the company and its insurer.

Questions

What, if any, prohibitions are there on attorney A speaking with the following groups of people:

- 1) the three employees who were actively involved in the matter, each of whom may have acted negligently;
- 2) the 10 employees who viewed the three employees' actions but who at any point will not likely be alleged to be negligent; and
- 3) the 20 other employees who overheard conversations regarding the incident or who were present at company meetings during which the events were discussed?

Opinion

Question 1: Employees involved in the matter. Attorney A may only communicate with employees believed to have been negligent with the consent

of Company XYZ's attorney or through formal discovery. SCR 20:4.2. "In the case of an organization, [SCR 20:4.2] prohibits communications by a lawyer for one party concerning the matter in representation . . . 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." SCR 20:4.2, Comment.

Question 2: Employees who were only witnesses. Attorney A may communicate with unrepresented employees who were only known to be witnesses regarding the representation provided that: a) no negligence is alleged on their part; and b) the attorney first explains his or her role in the matter and then exercises reasonable care to refrain from seeking privileged information. *See, e.g., Bobele v. Superior Court*, 199 Cal. App. 3d 708, 245 Cal. Rptr. 144 (1988); *Curley v. Cumberland Farms Inc.*, Civ. No. 86-5057 (DC NJ 1/28/91). *But see, Public Services Electric & Gas Co. v. Associated Electric & Gas Insurance Services Ltd.*, 745 F. Supp. 1037 (1990). "Generally an attorney may communicate with one not represented by counsel and may properly interview witnesses or prospective witnesses for opposing sides in any civil or criminal action without prior consent of opposing counsel unless such person is a party." Committee on Professional Ethics Formal Opinion E-82-10, citing American Bar Association Committee on Ethics and Professional Responsibility Informal Opinion 1377. *See also*, SCR 20:4.2; SCR 20:4.3.

Question 3: Employees who were not involved in the matter but who have overheard conversations regarding it. If the statements of these employees cannot constitute admissions on the part of the organization, attorney A may communicate with these employees regarding the representation. Before doing so, however, attorney A first must explain his or her role in the matter and then exercise reasonable care to refrain from seeking privileged information. SCR 20:4.2; SCR 20:4.3. *See also, Bobele, supra.*

Directions to employees not to communicate. Regarding attorney B's "not giv(ing) authority to speak to any employees of Company XYZ," we would point out that attorney B may "request" employees of Company XYZ not to communicate with attorney A or his or her agents subject to SCR 20:3.4(f).