
E-82-10 Communications with a party's former employees

Question 1

In a pending action, may counsel for an adversary party contact a former managing agent of the corporation, who was an employee of that corporation at the time when certain material acts were taken which may form a partial basis for liability?

Opinion

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. (ABA Informal Opinion 1377.)

Since a corporation, although a party, acts only through its officers, directors, managers, employee and the like, it would, in the committee's opinion, be improper to interview any officer or employee who had the authority to commit the corporation, since, under such circumstances, those persons are alter egos of the corporation and are parties for the purposes of SCR 20.38(1).

ABA Informal Opinion 1410 states in part:

The right of the corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the corporation. Where an officer or an employee can commit the corporation, opposing counsel must view the officer or employee as an integral component of the corporation itself and therefore within the concept of a single "party" for the purposes of the Code.

However, if the former managing officer has severed all relationship with the corporation in question, and has no longer any capacity whatsoever to commit the corporation, so that such former employee would not be a party by implication, then contact may be made for the purpose of interviewing such person as a witness or prospective witness in the pending action.

In doing so, the 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.

Question 2

May the corporation's counsel properly inform the former employee that counsel represents that employee by virtue of his representation of the corporation and proceed to represent both the former employee and the corporation without the request of the employee but with the former employee's acquiescence?

Opinion

Section 757.295(1) states: "Except as provided under Section 757.296, no person may solicit legal matters or a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services."

Section 757.296 authorizes advertisement of legal services therein provided.

SCR 20.06 states: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

SCR 20.06(2)(b) states in part: "A lawyer should not contact a non-client directly or indirectly, for the purpose of being retained to represent the client for compensation." However, SCR 20.06(2)(c) permits a lawyer to volunteer advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment) and regular clients.

A former employee of the corporation is not a former client of that corporation's counsel by virtue of the corporate employment, since corporate counsel represents the corporate entity, and not individual employees. SCR 20.23(3)(e). However, the same section states that if the lawyer for the entity is requested by an employee to represent him or her in an individual capacity, the lawyer may do so only if the lawyer is convinced that differing interests are not present.

Therefore, it is the committee's opinion that the corporation's counsel may not initiate contact with the former employee for the purpose of proceeding to represent both the corporate client and the former employee unless: (1) the

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former employee requests such representation; (2) no conflict of interest arises between the duty to the corporation and the former employee; and (3) consent of the corporate client is obtained for such representation.