
**E-83-13 Contact with opposing party's expert
witness (modified by E-91-4)**

Question

May an attorney contact an opposing party's expert witness, including treating medical doctors without the permission of the opposing counsel?

Answer

Yes.

Opinion

The general rule with regard to an opponent's witnesses is that attorneys for one party in a pending cause of action are free to interview the intended witnesses of the other party without the consent or presence of opposing counsel. *Annot. Code of Prof. Responsibility*, p. 335, citing *Devlin v. Rosman*, 205 So. 2d 346 (Fla. Dist. Ct. App. 1967), and *Reilley v. Keswani*, 137 N.J. Super. 553, 350 A. 2d 74, 76 (1975). This general rule was followed by the State Bar Professional Ethics Committee in Memo Opinion 2/77 wherein the committee held that it was ethically proper for an attorney witness to contact an opposing party's expert witness. Wis. Bar Bulletin, June 1979 Supp., p. 92.

The opinions of the American Bar Association's Committee on Ethics and Professional Responsibility support the view taken in Memo Opinion 2/77. In Formal Opinion 127 (March 15, 1935), the ABA committee held that it was proper for an attorney representing a widow to contact the physician who attended the widow's husband, although the physician had been subpoenaed as a witness by the opposing party. *See also* ABA Informal Opinion 892 (Oct. 11, 1965); Opinion 73, 13 Me. Bar Bulletin 67 (1979).

Wisconsin Supreme Court Rules 20.34(3)(i) and 20.43(2) and (3) address the propriety of an attorney contacting witnesses. Those rules prohibit an attorney from advising or causing a person to secrete himself or herself or to leave a tribunal's jurisdiction for the purpose of making the person unavailable as a witness before that tribunal. Furthermore, an attorney is proscribed from

paying, offering to pay, or acquiescing in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. Neither rule prohibits an attorney from expressing an opinion concerning the necessity of the witness's testimony.

In light of the above, it is clearly permissible for an attorney to contact an opposing party's expert witness.