

**ALASKA BAR ASSOCIATION
ETHICS OPINION 90-1**

**Attorney Representing Dissenting
Shareholders/Directors Communicating with Board
of Directors without Consent of Corporation's Attorney**

The Committee has been requested to give an opinion as to whether it is improper for an attorney who represents two corporate directors, in their individual capacity, in a shareholder derivative action to discuss matters relating to the pending litigation with other board members when the corporation is represented by both corporate counsel and retained litigation counsel who have not consented to the communication. It is the opinion of the Committee that the communication is in violation of Disciplinary Rule 7-104(a)(1) of the Code of Professional Responsibility.

Disciplinary Rule 7-104(A)(1) provides as follows:

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 prior consent of the lawyer representing such party or is authorized by law to do so.

Attorney originally represented three dissenting shareholders who sued a corporation, three board members, and a corporate employee, on their own behalf and in the form of a shareholder's derivative suit, to set aside a corporate transaction. Two of the plaintiffs and the daughter of a third plaintiff were subsequently elected to the board of directors, along with other directors who shared their view. At the time in question, the board was deeply and approximately evenly divided on the propriety of the corporate transaction. The lawsuit was active. The corporation had a corporate attorney, and had also retained a separate litigation attorney to represent the corporation in the lawsuit. The board had also created a special litigation committee to determine what the corporation's position should be on the transaction in question. The committee's membership consisted of all available disinterested directors.

At a point when the litigation was very active, and important decisions needed to be made quickly, the attorney met with seven of the thirteen corporate directors. The attorney received a request to so meet from his client, who was one of the corporate directors and a plaintiff in the derivative lawsuit. This plaintiff/director was present at the meeting. The other six directors present at the meeting consisted of the director/corporate president who was the daughter of a plaintiff, an additional client/plaintiff/director, and four disinterested directors who were eligible for and subsequently appointed to the litigation committee. The attorney did not seek the consent of the corporate counsel or the litigation counsel prior to the meeting, nor did the attorney notify either one that the meeting would take place.¹ The specific issue presented by this opinion request is the extent to which corporate directors are parties in litigation involving the corporation. A related question is how the ethical conduct of the attorney is affected by the principle that factions of a corporate board, such as dissenting directors or minority shareholders, have the right to obtain legal counsel of their own choosing to advise them or to represent their own interests.²

The corporation was an opposing party in the litigation. Therefore, so were its officers and directors, except those who chose to be plaintiffs.

ABA Informal Opinion 1410 (2/14/78) states:

If the officers and employees that you propose to interview could commit the corporation because of their authority as corporate officers or employees or for some other reason the law cloaks them with authority, then they, as alter egos's of the corporation, are parties for the purpose of DR 7-104(A)(1)...It accordingly, is the

¹The Ethics Committee normally does not issue opinions with respect to past conduct. An exception is being made here at the specific request of the Board of Governors.

²In the situation under discussion, it is clear that the communication was on the subject of the representation. Additionally, there is no dispute regarding the attorney's knowledge that the corporation was represented by both a corporate and a litigation attorney, and that no prior consent was obtained or notice given to either with respect to the meeting.

opinion of this committee that no communication with an officer or employee of a corporation with the power to commit the corporation may be made by opposing counsel unless he has the prior consent of the designated counsel of the corporation, or unless he is authorized by law to do so.

The comment to Model Rule 4.2, which is essentially the same as DR 7-104(A)(1), states that the rule applies to communications with persons having a

managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization.

The Committee has previously addressed inquiries raising somewhat similar issues. In Alaska Bar Association Ethics Opinion No. 71-1, the Committee advises that:

[A]ttorneys may ethically communicate with employees of a governmental entity, so long as that communication is not made with employees of the entity who may reasonably be thought of as representing the entity in matters relating to the matter in controversy, and as long as the lawyer reveals to the employee his identity and representation and the connection between the representation and the communication.

Alaska Bar Association Ethics Opinion No. 72-2 involved interviews conducted by a member of the legal staff of the Alaska Department of Law with members of the governing body of an Alaska community to determine whether Alaska Legal Services had the authority to bring suits on the community's behalf. That opinion concludes that there was no justification for the contact. The opinion makes no distinction because members were contacted individually rather than as a body.

In Opinion No. 78-4, the Alaska Bar Association Ethics Committee interpreted DR 7-104(A)(1) to prohibit communication between a plaintiff's attorney and a claims representative of a defendant's insurer. Finally, in Ethics Opinion 84-11 the committee referred to Ethics Opinion 71-1 and the comment to Rule 4.2 of the American Bar Association Model Rules of Professional Conduct to determine that, under the factual circumstances presented, an attorney could communicate with the Juneau Teleconference Manager for the State of Alaska, without consent of State attorneys, because that employee was not a person having a managerial responsibility; that acts or omissions of that employee would not be imputed to the state agency or named defendants for purposes of civil liability;

and the employee's statements would not constitute an admission on the part of the organization.

A three-factor test was developed by the Los Angeles County Bar Association in their Opinion 369 (11-13-77), to guide its members in the determination of whether an "employee" is a "party" under Disciplinary Rule 7-104(a)(1). The test adopted in that opinion is as follows:

- 1) whether the person has authority to negotiate or otherwise control corporate decisions regarding the litigation; 2) whether the person's position is such that an admission by him concerning the subject of the interview would be binding on the corporation; and 3) whether the person has access to confidential corporate information relevant to the subject of the interview. If these factors indicate the person is closely identified with management, the opposing attorney must have the

prior consent of the corporation's counsel to conduct the interview.

Similarly, the Illinois Bar Committee, quoting from a 1984 Illinois appeals case said:

. . . a corporate party constitutes only those top management persons who have the responsibility of making final decisions and those employees whose advisory role is to top management, are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis of any final decision.

Illinois State Bar Association committee on professional responsibility, Opinion 85.12 (4/4/86).

One of the most thorough and most recent discussions regarding the interpretation of DR 7-104(A)(1) is found in Wright by Wright vs. Group Health Hosp., 103 Wash 2d 192, 691 P.2d 564 (1964). That case involved a motion by Plaintiff's attorney in a personal injury case for a protective order declaring that he had the legal and ethical right to interview ex parte both current and former employees of the defendant so long as they were not management employees. In granting the protective order the court noted the distinction between the attorney-client privilege which would protect attorney communications with lower level employees from the ethical

rule prohibiting an attorney from communicating ex parte with another represented party. The purpose for the latter rule is "to prevent situations in which a represented party may be taken advantage of by adverse counsel." The court also noted the policy conflict raised by DR 7-104(A)(1) where "[o]n the one hand there is the need of the adverse attorney for information which may be in the exclusive possession of the corporation and may be too expensive or impractical to collect through formal discovery and on the other hand, the corporation's need to protect itself for the traditional reasons justifying the rule."

Following a discussion of the various cases and opinions dealing with the rule, the court held as follows:

We hold the best interpretations of "party" in litigation involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, ie: those employees who have speaking authority for the corporation. This interpretation is consistent with the declared purpose of the rule to protect represented parties from the dangers of dealing with adverse counsel.

Id at 569. That language was included by the District Court for the State of Alaska in the complaint of Korea Shipping Corp., 621 F.Supp. 164 and 167 (D. Alaska 1985).

The rule grows out of a recognition that there is an 'imbalance in knowledge and skill' between lawyer and

layman...(cites omitted). A related purpose of the rule is to "preserve the proper functioning of the legal profession" by insuring that in making decisions relating to a dispute, a client has the benefit of the advice of the legal experts he has employed to assist him.

Discipline Rule 7-104(A)(1) is designed to preserve the integrity of the client-lawyer relationship by protecting the represented party from the skill and knowledge of the opposing lawyer. United States v. Jamil, 546 F. Supp. 646 (E.D.N.Y. 1982); Powell v. Alabama, 287 U.S. 45 (1932); In re Mussman, 111 N.H. 402, 286 A.2d 614 (1971). The rule is to prohibit lawyers from taking advantage of persons who are represented by counsel. A layperson with retained counsel is entitled at all times to the advice and guidance of that person. In re Atwell,

115 S.W.2d 527 (p/ 1938). The rule "shields the opposing party not only from an attorney's approaches which are well intended but misguided." Abeles v. State Bar. 510 P.2d 719, 108 Cal. Rptr. 359 (Calif. 1973).

The definition of a "party represented by counsel" is defined broadly for the purpose of DR 7-104(A)(1) in conformity with the purpose of the rule. United States v. Jamil, 546 F. Supp. 646 (E.D.N.Y. 1982), United States v. Batchelor, 484 F. Supp. 812 (E.D. Pa. 1980). Where the opposing party is a corporation, an officer or employee with authority to commit the corporation is considered a party.

It is not relevant that the contact was not initiated by the attorney. United States v. Jamil, 546 F. Supp. 646, 658 (E.D.N.Y. 1982), offers the following explanation why, under DR 7-104 (A)(1), it is irrelevant who initiates the contact:

. . . DR 7-104(A)(1). . . is not directed solely at protecting the defendant's rights. The ethical rule is also intended to enhance an entire profession's ability to perform its essential functions effectively through the protective screen it places around the client and the attorney-client relationship. This relationship may arise at any time; its existence does not depend upon the state of the investigation or adversarial proceedings. Once it is established, the attorney has assumed the duty to zealously and competently represent the client and he may be held accountable for faithful performance. See ABA Canons of Professional Ethics Nos. 6, 7 and 9. to assign him such broad responsibilities implies that he will have some measure of control over developments concerning his client, whether in the nature of investigation, discovery, settlement or otherwise. No attorney can insure that his client will not imprudently sign a release, for example, or divulge privileged information whether by reason of ignorance or susceptibility to undue pressure. The Code supplies the necessary restraint in order to make the attorney's duty tenable by controlling the conduct of the adversary's counsel.

Thus the communication prohibition
remains operative even where a represented

party requests or agrees to communicate in the
absence of his own attorney with opposing counsel.
[citation omitted] [Emphasis added.]

It is clear that the duty of adhering to the Code of Professional Responsibility falls squarely upon attorneys, and not upon their clients who would have little or no understanding of the disciplinary rules or the rationale behind them. To say that an attorney is excused from this strict rule of non-communication when the adverse party approaches him only serves to circumvent the purpose of the rule.

In Abeles v. State Bar, 9 Cal.3d 603, 510 P.2d 719, (Cal. 1973) an attorney received a public reprimand for a violation of a parallel California discipline provision. In that case, Stein was named as a plaintiff in his capacity as a business partner. At the defendant's request, Stein met with Abeles, the defendant's attorney. Stein told Abeles that he was not represented by the attorney of record and, at Abeles' request, signed an Affidavit denying he had authorized the filing of the action. Supra at 721. Stein later testified that he thought he was not personally represented in the lawsuit. Abeles testified that, because of previous work he had done, he thought Stein was his own client and that the plaintiffs' attorneys had filed an action without Stein's consent. The court found that:

A "party represented by counsel" includes a party who has counsel of record whether or not that counsel was in fact authorized to act for the party. If the quoted words were interpreted to include counsel of record only if such counsel was in fact authorized to act for the party, harm could result to the attorney-client relationship and to the administration of justice. Under the latter interpretation an opposing attorney could deal directly with a party who was known to the attorney to have counsel of record, upon a subject of controversy with impunity in some cases, even though the counsel of record had actual authority to act for the party, since it might be impossible to show that the opposing attorney had knowledge of that authority and willfully violated rule 12. [Supra at 723]

The Committee recognizes the principle that a "faction" on a board of directors has every right to obtain legal counsel of its own choosing to represent that faction's own interests. (See Evans v. Artek Systems Corp., 715 P.2d 788, 792-94 (2nd Cir. 1983); Yablonski v. United Mine Workers of America, 448 F.2d 1175, 1181 (D.C. Cir. 1971); Financial General Bank Shares, Inc. v. Metzger, 523 F. Supp. 744, 764-67 (D.D.C. 1981). In certain circumstances, persons affiliated with the corporation will have interests which are adverse to those of the corporation itself, and will need legal advice and representation from an attorney sympathetic to their cause and whom they trust, rather than from attorneys

aligned with and loyal to the corporation or a different faction on the board. The fact that this principle exists, however, does not govern in this case. At the time of the meeting, four of the directors were supposedly "disinterested" directors who were subsequently appointed to the litigation committee.

Additionally, even if a non-client director desired to talk to the attorney, the ethical obligation is on the attorney to refuse to discuss the case with the non-client director.

In a situation such as present here, where a majority of the board apparently wanted to meet with the attorney, the attorney should not have met with the board. The board should have been advised to discuss the matter with its attorneys and reached an appropriate resolution as to how the matter should be handled. Such an approach fulfills the purpose of Disciplinary Rule 7-104(A)(1) in that it requires the board to seek the advice and guidance of its counsel, and protects the board from being taken advantage of, either in an intentionally improper or well-intended but misguided manner.

Approved by the Alaska Bar Association Ethics Committee on October 25, 1989.

Adopted by the Board of Governors on January 19, 1990.

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