

AO 1984-85/4

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1984-85/4
Taking Statements From An Opposing Party
November 13, 1984

RULE REFERENCES:

SUBJECTS:

- * Witnesses
- * Communications With Parties

CODE REFERENCES:

- *DR 1-102
- *DR 7-101(A)(1)
- *DR 7-104
- *DR 7-104(A) (1)
- *DR 7-104(A)(2)
- *EC 7-1

ANNOTATIONS:

During the course of representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party that he/she knows is represented by a lawyer in that matter, unless he/she has the prior consent of the lawyer representing that party, or is otherwise authorized by law to communicate with that party.

FACTS AND QUESTIONS:

A lawyer representing one party in a lawsuit wishes to interview or take the statement of an opposing party. The lawyer has posed three queries:

- a) Whether it is proper to take the statement of the opposing party before suit is filed and that party has obtained counsel; and

b) Whether it is proper to take the statement of a former agent or employee of the opposing party after suit has been filed and counsel has been retained (assuming that the former agent or employee whose statement is sought was an agent or employee of the opposing party at the time of the incident giving rise to the suit); and

c) Whether it is proper to take the statement of a present agent or employee of the opposing party either (i) before suit has been filed, or (ii) after suit has been filed. For purposes of this question, the Committee is to assume that the agent or employee from whom a statement is sought, was an agent or employee of the opposing party at the time of the incident giving rise to the lawsuit, and continues in that relationship at the time the statement is sought, but the agent or employee is not the named defendant in the lawsuit.

RESPONSE:

With regard to the first inquiry, DR 7-104(A)(1) directly addresses the subject of communications by an attorney with a party, whether or not that party's interests are adverse, in stating that:

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

Accordingly, if the party is not represented "in that matter", there would be no ethical bar to either the taking of a statement or other communication by a lawyer with the adverse party, regardless of whether suit has or has not been filed, so long as the constraints set forth in DR 7-104(A) (2) are observed. A lawyer is duty bound to represent his or her clients zealously within the bounds of the law. EC 7-1; DR 7-101(A) (1). This duty includes a duty to investigate thoroughly facts related to the subject matter in litigation. In carrying out this duty, an attorney should avoid conduct that may tend to mislead a party not represented by counsel and should identify himself or herself and whom he or she represents. DR 1-102.

With regard to the second and third inquiries, DR 7-104 prohibits a lawyer from communicating with a party, adverse or otherwise, whom he or she knows is represented by counsel in the matter, in the absence of that counsel's consent. Assuming proper resolution of the knowledge requirements of DR 7-104, the key question is whether the former or present agent or employee is to be considered the equivalent of the "party" for purposes of DR 7-104. Resolution of that question will be heavily dependent upon the facts and circumstances of each case. The Committee is unable to resolve it in this particular case, because the information provided is not sufficiently detailed.

SUMMARY:

If a lawyer has knowledge that a party involved in the lawyer's subject of representation is represented by counsel, he/she may not communicate with or cause another to communicate with that party without the prior consent of that party's attorney, unless otherwise authorized by law to do so. Former or present agents or employees of a party may be the equivalent of a "party", for purposes of the Disciplinary Rules, depending on the facts and circumstances of each case.