



### **OPINION 1983-1**

Without the consent of the association attorney, it would be improper to contact an officer, director, or managing agent of the association or to contact an association member whose statements, relating to the matters in dispute, may be binding on the association. It would also be improper to contact an association member or employee, if the subject of discussion is any act or omission of such person which is legally binding on, or otherwise may form the basis of the claim or claims against the association.

#### **QUESTION:**

If an incorporated trade association has retained counsel to represent it in a lawsuit, may opposing counsel contact one of the association's directors without the consent of the association's counsel? In addition, which, if any association members or employees may opposing counsel contact without such consent?

#### **CONCLUSION:**

Without the consent of the association attorney:

1. It would be improper to contact an officer, director, or managing agent of the association;
2. It would be improper to contact an association member whose statements, relating to the matters in dispute, may be binding on the association;
3. It would be improper to contact an association member or employee, if the subject of discussion is any act or omission of such person which is legally binding on, or otherwise may form the basis of the claim or claims against the association.

#### **FACTS:**

Client (a corporation) has brought an antitrust and defamation suit against a livestock breeders' association, of which it is a member. The association is a California not-for-profit corporation, comprising a number of profit-making corporations. The other defendants are the association's current president, the plaintiff corporation's chief competitor, and several unnamed co-conspirators. The complaint alleges that the competitor, the association's current administration and others have conspired to suspend the plaintiff's membership for violations of the association's code of ethics. The association is represented by counsel. Plaintiff has asked the following questions:

1. Without the consent of the association's counsel may plaintiff's counsel interview the past president, who is also a current director, about his competitor's attempts to suspend plaintiff from the association.
2. Without the consent of the association's counsel may plaintiff's counsel interview association members or employees who are not officers, directors, or managing agents about their knowledge of matters at issue in the lawsuit?

#### **RULE INVOLVED:**

Rule 7-103. Communicating With An Adverse Party Represented By Counsel.

"A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body."

#### **DISCUSSION:**

It is clear that no contact with a party about the matters in controversy is permissible without the consent of the party's counsel. There is no doubt that the interviews at issue will involve discussion of the matters in controversy. The question is, who falls within the term "party" when the party is a corporation.

Ethical Consideration 5-18 of the ABA Code of Professional Responsibility states that "a lawyer employed or retained by corporation owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."

Since a corporate entity can only act through individuals, the issue presented is which of such individuals is the "entity" for purposes of rule 7-103.

At a minimum, it is this Committee's view that opposing counsel is barred from contacting those officials - officers, [1] directors, and managing agents - who have express or implied authority to commit the corporation to a course of action. Because of their rank, such individuals act on behalf of the corporation, are responsible for running it, and are so closely identified with it that they must be deemed to be parties for purposes of rule 7-103 when the corporation is a party.

This conclusion is supported by ABA Informal Opinion 1377 (June 2, 1977). In that opinion, a municipal corporation had been sued for defective construction of a sewer system. The question was whether it was proper for opposing counsel to meet with the building marshall for the municipal corporation, without the knowledge and consent of counsel for the corporation. The building marshall, who was an officer of the corporation and was in charge of enforcing the corporation's building code, would be questioned about his conclusions as to the cause of the structural failure in the sewer system.

The Committee found such contact to be improper under ABA DR 7-104, the ABA analog of California rule 7-103 [2]. The Committee noted that counsel may interview a witness or prospective witness unless the person is a party. Thus, the question was whether the building marshall must be deemed a party when the actual party was the municipal corporation for which he worked. The Committee said yes:

"If the Building Marshall in the hypothetical case presented would be in a position to commit the municipal corporation in the particular situation because of his authority as a corporate officer or because for some other reason the law cloaks him with authority then he, as the alter ego of the corporation, is a party for purposes of DR 7-104(A)(1). The right of the municipal corporation to representation by counsel must prevail over opposing counsel's unrestricted access to officers and employees of the municipal corporation. Where an officer or employee can commit the corporation, opposing counsel must view the officer or employee as an integral component of the municipal corporation itself and therefore within the concept of a 'party' for the purposes of the Code."

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Footnotes:

1. The Committee recognizes that certain "officers" may have no significant duties or responsibilities and that in a given case an "Officer" may not be a "party" within the meaning of the rule.
2. DR 7-104 does not contain an express exception to the prohibition on communication when public agencies are involved. Such an express exception is contained in rule 7-103.

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