NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion –577 — 10/29/86 (19-86)

Topic: Interviewing expert witness of adversary

Digest: Not improper to communicate with expert witness retained by adversary without knowledge or consent of opposing counsel.

Code: DR 1-102(A)(5); DR 7-104(A)(1)

QUESTION

May an attorney communicate with an expert witness retained by an adversary without the knowledge, permission, or consent of opposing counsel?

OPINION

The starting place for this inquiry is DR 7-104(A)(1) of the Code of Professional Responsibility, which provides as follows:

"A. During the course of his representation of a client a lawyers 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."

This provision is designed to insulate parties represented by counsel from direct communication with an opposing attorney. "In the interests of fair play and expeditious resolution of disputes, the legal system functions best when communications between represented adversaries are controlled by their counsel." ABA Inf. 1496 (1983).

The resolution of the question now presented depends upon whether an expert witness retained by a party in an adversarial context is "a party . . . represented by a lawyer" within the meaning of DR 7-104(A)(1). The American Bar Association ethics committee has stated that "[g]enerally a lawyer may properly interview witnesses or prospective witnesses for opposing sides in any civil or criminal action without the prior consent of opposing counsel—unless such person is a party." ABA Inf. 1410 (1978). This Committee also has expressed the view that communication with non-party adverse witnesses without the consent of opposing counsel is ethically permissible under the Code of Professional Responsibility. N.Y. State 245 (1972).

This brings us to the principal focus of the inquiry: whether a retained expert witness is distinguishable from an ordinary witness under DR 7-104? We are unaware of any ethical rule or policy which would justify a different interpretation of DR 7-104(A)(1) for non-party, retained expert witnesses. We, therefore, are of the opinion that communication with such individuals is ethically permissible. *Accord*, Alaska Op. 84-8 (1984) (lawyer may communicate *ex parte* with expert witness or consultant retained by adverse party); Wisconsin Op. 83-13 (general rule permitting lawyer to communicate with intended witnesses of other party without consent of opposing counsel encompasses expert witnesses).

We add, however, that, while *ex parte* communication by a lawyer with the adversary's retained expert is permissible, it would unethical for the lawyer to attempt to discover through such communication matters protected by an evidentiary or work product privilege. See, DR 1-102(A)(5).

It should be noted that New York State's Civil Practice Law and Rules § 3101(d)(1) and Federal Rule of Civil Procedure 26(b)(4) set forth procedures for and govern the scope of discovery of expert witnesses. Because matters of law are beyond the authority of this Committee, we express no opinion on the application of these statutes and rules to *ex parte* communications with an adverse party's expert witness, or whether such conduct might violate court rules or policies relating to discovery and disclosure. *See, Campbell Industries v. M/V Gemini*, 619 F.2d, 27 (9th Cir. 1980) (counsel's *ex parte* communications with expert witness retained by adversary voilated Rule 26(b)(4) of the Federal Rules of Civil Procedure).

For the reasons stated, the question posed is answered in the affirmative.

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NYSBA ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion — 578 — 12/4/86 (24-86)

Overrules N.Y. State 93

Modified by N.Y. State 629

Topic: Lawyer as union member; conflict of interest; lawyer union member representing State in disciplinary proceedings against other State union employee members.

Digest: Lawyer employed by State may be a member of union with non-lawyer members as long as lawyer violates no Disciplinary Rule; lawyer union member may not represent State in disciplinary proceedings against other State employees under the same collective bargaining agreement to which lawyer is subject.

Code: Canons 5 and 9; DR 5-105(A), 5-105(C), 6-101(A)(3), 7-101(A)(2), 7-101(A)(3); EC 5-13

QUESTION

1. May a lawyer join a labor union composed of both lawyers and non-lawyers?

2. May a lawyer employed by a State department or agency who is covered by a collective bargaining agreement represent the State in disciplinary proceedings brought against other State employees under a collective bargaining agreement?

OPINION

Certain lawyers employed by the State of New York are covered by a collective bargaining agreement that provides that they shall pay agency shop dues. Some of these lawyers have joined the union, which includes non-lawyers as members. As part of their duties, the lawyers may be required to represent the State in disciplinary proceedings brought against other State employees under a collective bargaining agreement. These other employees may be either full or agency shop members of the same union or they may be members of another union which represents State employees.

In response to question 1, the Code of Professional Responsibility does not specifically prohibit membership by lawyers in unions. This is true even where the union has members who are non-lawyers. Consequently, lawyers may be union members provided they violate no Disciplinary Rule. *See* ABA Inf. 1325 (1975) (lawyers are not forbidden *per se* to belong to unions, whether or not the union membership is limited to lawyers). N.Y. State 93 (1968), decided prior to the adoption of the Code, is to the contrary and is hereby overruled.

Ethical guidance on the proper conduct of lawyers who are union members is found in Canon 5 which requires that an attorney exercise independent professional judgment on behalf of his or her client and in EC 5-13 which provides:

> A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

As ABA Inf. 1325 noted with respect to EC 5-13:

> It is apparent . . . . that concern is expressed that a lawyer belonging to an association of employees or a union is not unlikely to be confronted

> with a choice between acquiescing or assisting in certain union activities and violating certain Disciplinary Rules such as DR 6-101(A)(3), proscribing neglect of a legal matter entrusted to a lawyer, DR 7-101(A)(2), forbidding a lawyer to intentionally fail to carry out a contract for employment with a client, and DR 7-101(A)(3), prohibiting a lawyer to intentionally prejudice or damage his client during the course of the professional relationship.

See also N.Y. City 82-75 (ethical obligations of attorneys employed by Legal Aid Society when their union calls a strike).

We now reach the same conclusion as ABA Inf. 1325. While lawyers are not prohibited from union membership, they remain first and foremost lawyers. Consequently, "(l)awyers who are union members are required, the same as all other lawyers, to comply with all Disciplinary Rules at all times; and lawyers who are union members should not permit the organization to prescribe, direct or suggest how to fulfill one's professional obligations, but should be vigilant at all times to safeguard one's fidelity to employer free from outside influences." ABA Inf. 1325. If a conflict arises between union membership and a lawyer's ethical obligations under the Code, the lawyer must withdraw from the union or from the representation, or, if it is obvious that he or she can adequately represent the client (see DR 5-105(C)), must obtain the informed consent of the client to continue the representation. N.Y. City 79-55 (1980) (if at any time membership of a lawyer in a union affects or reasonably may affect his or her professional judgment, the lawyer must choose between continuing the union membership and continuing to represent the client affected, unless the informed consent of the client is obtained); D.C. Op. 112 (1982), ABA/BNA Lawyer's Manual on Professional Conduct 801:2306 (agency attorneys who join a union may not continue to work for the agency if union membership creates a financial or personal interest which will or may affect the attorneys' professional judgment). Thus, if a conflict arises between union membership and a lawyer's ethical obligations under the Code, the lawyer must disclose the conflict to his or her client and, if the client is not a public body and if it is obvious that he or she can adequately represent the interests of the client, obtain the client's informed consent to continue the representation. If the lawyer's continued membership in the union will interfere with his or her ability to serve the client independently, the lawyer must also withdraw from the union before continuing his or her representation in the matter.

Because a public body may not give its consent to a conflict, N.Y. State 450 (1976), the lawyer is left with no alternative in such a situation. He or she must either decline the representation or resign from the union.

The answer to the second question is dependent upon whether or not the lawyer representing the State is a union member subject to the same collective bargaining agreement as the State employee. A lawyer union member may not represent the State in disciplinary proceedings against other State employees brought under a collective bargaining agreement to which the lawyer is also subject. In such a situation there is a real danger that the union may attempt to prescribe, direct or suggest the course of the lawyer's conduct. See DR 5-105(A). At the very least such a situation would create the appearance of impropriety in violation of Canon 9.

If, however, the lawyer is simply an agency shop member, or if the collective bargaining agreement involved is not one to which the lawyer is subject, these concerns are not present to the same degree. Therefore, such a lawyer is not specifically prohibited from representing the State in a disciplinary proceeding brought under a collective bargaining agreement, except where the lawyer finds that he or she is unable to exercise independent professional judgment.

CONCLUSION

For the reasons stated, and subject to the qualifications set forth above, a lawyer may be a member of a union that has non-lawyer members. However, a lawyer union member may not represent the State in disciplinary proceedings against other State employees brought under the same collective bargaining agreement to which the lawyer is subject. A lawyer who is an agency shop member or who is not subject to the same collective bargaining agreement as the State employee may represent the State in such proceedings provided his or her independent professional judgment is not affected.