

MINUTES

COMMITTEE: Ethics Committee

DATE: September 4, 2003

7. CHAPTER 8, RULE 12.1: WHETHER LAWYER FOR DEFENDANT CAN CONTACT PLAINTIFF TO DISCUSS ANOTHER PLAINTIFF'S EVIDENCE

Lawyer B and Lawyer N asked the Committee whether it is proper for the lawyer for a defendant at the suit of two plaintiffs to contact one of the plaintiffs to discuss the other plaintiff's situation, when both plaintiffs are represented by counsel. It is understood that the situation of the plaintiff who is to be contacted would not be discussed.

The question arises out of an actual situation where Lawyer N represented two plaintiffs in a single action, P and her daughter, S, who claim damages arising out of a motor vehicle accident. The guardian *ad litem* of S is K, her father and the husband of P.

Lawyer B telephoned K to discuss P's case. In that contact she emphasized that her questions would be directed to P's case, and not the case for which K acted as guardian *ad litem* for his daughter. It is common ground that Lawyer B did not fulfill the requirements of Chapter 8, Rule 12.1. Lawyer B argues that the steps required by that Rule were unnecessary in the circumstances of this case.

The Committee noted that Chapter 8, Rule 12.1(b) of the *Professional Conduct Handbook* enjoins a lawyer from contacting a witness who is a party to a proceeding and represented by counsel except through or with the consent of the party's lawyer. The argument that Rule 12.1 does not apply in these circumstances requires that the "proceeding" in which Lawyer B contacted K be interpreted as being restricted to the action commenced by his wife and not include the action involving his daughter, in which he acts as guardian *ad litem*. According to this argument, a defendant's lawyer would be entitled to contact any represented co-plaintiff in an action provided the lawyer discussed with the contacted person only the claims of other co-plaintiffs.

In the Committee's view, the litigation in which Lawyer B is acting arises from a single set of facts and both P's claim and that of her daughter (in which K acts as guardian *ad litem*) are contained in a single action which is the "proceeding." This is the interpretation which is most consistent with the major policy objectives underlying the rule. It follows from this reasoning that a lawyer must comply with Rule 12.1 in order to contact a co-plaintiff in these circumstances.