

MINUTES

COMMITTEE: Ethics Committee

DATE: September 7, 2000

10. CHAPTER 4, RULE 1.1: WHETHER EMPLOYEE IS WITNESS OR PARTY

Lawyer A represents a plaintiff who is suing the provincial government. He has asked whether he is prohibited by Chapter 4, Rule 1.1 from contacting a government employee concerning matters at issue in the litigation. The Committee also considered a submission by the government's lawyer in the matter, Lawyer B.

The plaintiff's claim against the government is for failure to properly supervise the work of a counsellor of a funded agency in providing alcohol and drug treatment, and failure to deal adequately with psychological trauma resulting from inadequate supervision. Lawyer A wants to contact and interview an area manager brought in from another area to conduct an internal review of the conduct giving rise to the claim. The area manager's initial report on the matter was prepared in November 1993 and revised in January 1994.

The area manager was a member of the management team that investigated and dealt with the matters giving rise to the litigation. At the time of her involvement, the government had been contacted by a lawyer on behalf of the plaintiffs, and had itself sought legal advice. The area manager was in contact with the government's counsel at that time, in respect to matters that included her investigation.

The Committee noted and approved of the following reasoning of Wolfram in *Modern Legal Ethics*, 1986, at p. 613 regarding whether an employee of a corporate litigant is a party to litigation and approachable only through the lawyer for the entity, or is merely a witness:

Application of the anticontact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anticontact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. Thus, in the case of corporate and similar entities, the anticontact rule should prohibit contact with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in the representation. And generally the anticontact rules should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter."

Applying this reasoning to this case, the Committee was of the view that the area manager's authority in the matter fell short of the authority that she would be required to exercise in order to find that she was a party to the litigation. The materials do not disclose that she has the power to bind the government in the matter or that direct contact with her by Lawyer A would undermine the lawyer-client relationship between Lawyer B and Lawyer B's client, nor are the area

manager's own interests at stake in the litigation. For these reasons, the Committee concluded that, subject to any rulings by the court, it is proper for Lawyer A to contact the area manager in accordance with the provisions regarding contacting witnesses set out in Chapter 8 of the *Professional Conduct Handbook*.

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