KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-65
Issued: May 1973

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at http://www.kybar.org), before relying on this opinion.

Question: May an attorney contact an opposing party to obtain information relating to a pending controversy, without the consent of opposing counsel?

Answer: No.

References: Canon 9, 22; DR 7-104

OPINION

Defendant's attorney gave notice to take depositions of three plaintiffs. On the day of the scheduled deposition, the plaintiff's attorney, upon being advised of an illness to one of the plaintiffs by the wife of such plaintiff, who was also a party to the action, notified the chief counsel for the defendants approximately two hours before the scheduled depositions. The chief counsel preferred to take all three plaintiffs' depositions at the same time, so he agreed to postpone the depositions and to notify his co-counsel of such a decision.

In reliance upon the agreement with the defendant's chief counsel, the plaintiffs' attorney did not appear for the depositions, nor did either of the plaintiffs. The defendant's co-counsel had been advised at least one hour before the scheduled depositions that they would not be taken.

Defendant's co-counsel, with one of the defendants, then searched out the plaintiffs and inquired of the nature of the illness and attempted to determine whether or not in fact the plaintiff was ill or was tending to other business. No leave of court was obtained and no effort was made to contact the plaintiffs' attorney prior to contacting the plaintiff.

The defendant's co-counsel interrogated the plaintiff concerning the advice he had received from the plaintiff's attorney about attending the deposition and communications between them about the deposition. Defendant's co-counsel later testified as a witness in support of his motion to dismiss the case and for an affirmative award of counsel fees and expenses for attending the deposition.

The issue arises as to whether or not it was proper to communicate with an adverse party pending litigation without the consent of his counsel.

Canon 9 of the Canons of Professional Ethics holds:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel, but should deal only with his counsel.

And, DR 7-104 states:

> (a) During the course of the representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of 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.

Through the years, the ABA has dealt with Canon 9 in numerous situations. In ABA Formal Opinion 187 (1938), the Committee held:

> It is clear from the earlier opinions of this Committee that Canon 9 is to be construed literally and does not allow a communication with an opposing party, without the consent of his counsel, though his purpose be merely to investigate the facts.

It is evident from reading the earlier opinions and later ones that this is the clear intent of the Canon. ABA Informal Decision C-426, issued March 16, 1961, held that the materiality or the immateriality of the information which the attorney might obtain from the adverse party in a statement would have no bearing on the question of ethics involved. And, later in ABA Informal Decision C-517, issued February 15, 1962, the Committee again held for its strict application and listed but two exceptions to such application: (1) If the attorney for the other party consents to the contact, then contact will be proper, and (2) If information vital to the settlement of the case is not communicated by the other attorney to his client.

Despite the increased liberality of the Civil Rules and forms of discovery, the rules do not contemplate discovery of privileged information between attorney and client. While it is the duty of an attorney to represent his client zealously, it is also his duty to represent him within the bounds of the law.

It is also proper to note that Canon 22 provides that the conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness. Clearly this includes trust in one's opposing counsel and acceptance in good faith of what he conveys to you. The results of gross mistrust in the legal profession are immeasurable.

The reasons for the prohibition upon communications are clear and convincing. They arise out of the nature of the relation of attorney and client and are imperative to the rights and interests of the adverse party and his attorney. To preserve the proper functioning of the legal system, as well as to shield an adverse party from improper approaches, the Canons and Disciplinary Rules are to be strictly applied.

———

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.