

November 2005
A Monthly Publication

Tom Enneking, Editor

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Good Morning, Mr. Parker, This is the Plaintiff's Lawyer Calling ...

William B, Leahy, Esq. and Amy Scheurman
Buckingham, Doolittle & Burroughs, LLP.
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As veteran trial lawyers know, most corporate clients find the courtroom a strange and perilous place. The prospect that the opposing lawyer might call the corporate client's employees or former employees to seek an interview during the litigation heightens the discomfort. Under the rules established by the Ohio courts, that prospect is not an unlikely one.

There are ethical rules that define the circumstances under which a lawyer can communicate with an opposing corporation's employees or former employees during litigation. This may be puzzling to clients because, generally, a business person can contact anyone he wants in transacting his business. A lawyer, however, must abide by the rules that govern his profession. The groundrules are different if a lawyer proposes to contact his

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CCH Newsletters Available via Remote Access

David Whelan, Law Librarian

Many Law Library Association members now have a new remote access resource, thanks to a pilot program implemented between the Cincinnati Law Library Association and CCH, Inc. (formerly Commerce Clearing House, and now a subsidiary of Wolters Kluwer). The new program enables members of the Association to access CCH current awareness content remotely, around the clock. These 80+ newsletters on business, human resources, and tax issues, enable professionals to stay on top of the latest legal developments. The newsletters cite to other CCH products, which are not available remotely but can be accessed by contacting a

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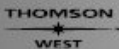
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opponent's former employees, as opposed to its current employees. Under Disciplinary Rule 7-104(A)(1), a lawyer may not communicate with the following current employees of an opposing corporation: (1) an employee who supervises, directs or regularly consults with the corporation's attorney concerning the matter at issue; (2) an employee who has the authority to obligate the corporation with respect to the matter at issue; and (3) an employee whose act or omission in connection with the matter at issue may be imputed to the corporation for purposes of civil or criminal liability.

DR 7-104(A)(1) allows communication with former employees without notification to or consent of the corporation's attorney so long as: (1) the former employee is not represented by his or her own counsel in the matter at issue; (2) the former employee has not asked the corporation's counsel to provide representation in the matter at issue; (3) the opposing attorney obtains the former employee's consent to be interviewed; (4) the opposing attorney informs the former employee not to divulge any communications that the former employee may have had with corporate or other counsel; (5) the opposing attorney fully explains that he is representing a client adverse to the corporation's interests; and (6) the opposing attorney does not provide an unrepresented former employee with any advice other than to seek counsel in the matter. See Opinion 2005-3 (Feb. 4, 2005), Opinion 96-1 (Feb. 2, 1996) and Opinion 90-20 (Aug. 17, 1990), Board of Commissioners on Grievance and Discipline, Supreme Court of Ohio.

A corporate attorney cannot assert blanket representation of all current and former employees in order to frustrate otherwise-permitted communications. If a lawyer is prohibited from engaging in a communication with an employee or former employee of an opponent corporation, he may not circumvent that prohibition by asking his client or anyone

else to engage in the prohibited communication. DR 7-104(A)(1) applies to employees of government agencies in the same manner as it applies to employees of corporations. See Opinion 92-7, Board of Commissioners on Grievances and Discipline, Supreme Court of Ohio (Apr. 10, 1992); Johnson v. Ohio Dept. of Youth Servs., 231 F. Supp. 2d 690 (N.D. Ohio 2002).

Ohio courts have proven reluctant to grant relief for alleged violations of these ethical rules. In Smith v. Cleveland Clinic Found., 151 Ohio App.3d 373 (Ohio Ct. App. 2003), plaintiff filed a wrongful termination lawsuit against the corporate employer. The plaintiff's attorney contacted and interviewed the opposing corporation's employees involved in the decision not to renew the plaintiff's contract. The plaintiff's attorney did not notify the defendant of these communications. The defendant sought disqualification of the plaintiff's attorney for violating DR 7-104(A)(1). The trial court granted the defendant's motion for disqualification but, on appeal, the appellate court reversed, holding that disqualification was an improper remedy because the defendant had failed to show that it was prejudiced.

In Davis v. Washington Co. Open Door, Home, 2000 U.S. Dist. LEXIS 20007 (S.D. Ohio 2000), the Court held that an attorney was permitted to contact and interview an opposing corporation's former employee without notifying the corporation's attorney. In United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257 (N.D. Ohio 1997), the Court denied a corporate defendant's motion for a protective order that would have required the plaintiff's attorney to notify and obtain consent from the defendant's attorney before engaging in *ex parte* communications

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with any former employees, to maintain a list of all former employees contacted with notes related to such interviews and to make the list available to the corporation. In Huther v. Mac Tools, 1993 U.S. Dist. LEXIS 21234 (S.D. Ohio 1993), as in Beiersdorf-Jobst, the Court denied a motion for a protective order to prevent *ex parte* communications with an opposing corporation's former employees. In Summers v. Rockwell International Corp., Inc., 1993 U.S. Dist. LEXIS 21173 (S.D. Ohio 1993), the Court refused to impose a "brightline" test that would prohibit all contact with an opposing corporation's former employees.

Under the ethical rules as promulgated by the Supreme Court of Ohio, any current employee who was neither a regular contact with outside counsel, a corporate decision maker or a "point person" on a particular dispute may be a prospect for communication from an opposing attorney. In my experience as a trial lawyer, it is unusual for an opposing attorney to attempt to contact a corporate client's current employees. If it does occur, however, and if the contacted employee fails to report the communication, the case may proceed without any knowledge on the part of corporate counsel that employees were contacted. This is perhaps the most troublesome prospect because without knowing if an employee has been contacted there is no way for corporate counsel to assess whether his opponent has engaged in unethical conduct.

It is far more commonplace for an opponent's attorney to contact former employees. An opposing attorney's wide-ranging ability to interview former employees is a concern, particularly in circumstances in which an employee may have left the company under unpleasant circumstances, affording him incentive to shade the truth and damage his former employer. It is even more likely that a

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reference librarian (reference@cms.hamilton-co.org or 946-5303).

The CCH newsletter pilot is only available to solos and members in firms with a firm membership and with 15 or fewer lawyers during this first year. Just as the Cincinnati Law Library is taking its first steps into remote access, CCH is concerned about making too much content available and hurting its market. This pilot program will give CCH insight into how lawyers use this type of service and how something similar might be made available for other county law libraries around the nation.

The newsletters are accessed from the Law Library's Web site at <http://www.hamilton-co.org/cinlawlib/intra/cchlogin.asp>. Members can access the content using their borrower number and last name. If you do not know your borrower number, please call us (946-5300).

The Law Library has subscribed to CCH print publications for many years, and has added an extensive collection of electronic databases in the last year. The CCH business, human resources, and tax databases are extensive and enable the Law Library to provide access to resources that it could not possibly maintain in the print collection because of upkeep costs and the amount of shelf space they require. Topical areas range from OSHA/Safety to State Tax (part of CCH's Omnifax database) to Transportation. These databases are accessible only from the Law Library.

The Law Library will continue to seek out opportunities to provide its members with remote access to legal research content to supplement the extensive collection housed in the Courthouse. If you have any questions about this resource or the other remote or internal resources available to Law Library Association members, please contact me (dwhelan@cms.hamilton-co.org, 945-5263).

Tech Tip: Printing in Westlaw

Printing in Westlaw...? When printing in Westlaw do not use the Internet Explorer's printing features because the webpage's is set up in frames. This gives you an individual page for each frame on the screen. Use Westlaw's printing options located in the top right corner of the screen.



Did You Know Our Members Receive:

- ❖ Free Westlaw Access in the Library
- ❖ Free Internet Access in the Library
- ❖ Free Access to CD-ROM law libraries and forms
- ❖ Free Reference Assistance, in person, by phone, or via e-mail
- ❖ Extensive Ohio and Federal primary law collection in print and electronic formats
- ❖ Practice materials, including:
 - handbooks
 - rules
 - treatises
 - jury verdicts
- ❖ Borrowing privileges to nearly all materials in the Library's collection, including CLE materials.

New Titles at the Law Library

- Steven V. O'Neal and Aaron R. Gruber. *Engineering Evidence*. Eagan, MN: Thomson/West, 2005.
- Robert L. Dunn. *Recovery of Damages for Lost Profits*. Westport, CT: Lawpress Corp., 2005.
- Mark Flipp. *Covenants Not to Compete*. New York, NY: Aspen, 2005.
- Barth H. Goldberg. *Valuation of Divorce Assets*. Eagan, MN: Thomson/West, 2005.
- Fred Steingold. *The Employer's Legal Handbook*. Berkeley, CA: Nolo, 2005.
- Anthony Mancuso. *The Corporate Records Handbook: Meetings, Minutes and Resolutions*. Berkeley, CA: Nolo, 2005.
- Christopher M. Ernst. *Tort Law*. Cleveland, OH: Thomson/West, 2005.

Elections and Equity: The Ohio Elections Commission

Tom Enneking

As the autumn air become crisper and the outdoor temperatures cooler, Election Day is almost upon us. Citizens of Cincinnati will choose a new mayor and new members of city council; citizens in the municipalities will face similar decisions. On the state level, there are a number of issues for voters to decide including redistricting, campaign finance reform, and early voting. To ensure fairness and equity, the Ohio Elections Commission (<http://elc.ohio.gov/>) oversees campaigns within the state of Ohio.

According to its website, the OEC enforces those sections of the Ohio Revised Code that cover elections and it issues Advisory Opinions from those sections within its jurisdiction. The OEC also responds to concerns and complaints from interested citizens, especially those on campaign finance and fair campaign practices. Finally, the Commission executes all functions of the Ohio Elections Commission in a timely and efficient manner and in accordance with all other requirements of the Ohio Revised Code.

What types of information can a researcher discover on the Ohio Elections Commission's webpage? You can expect to find:

- Advisory Opinions, which are available from 1987 – 2002. You may also search opinions topically with the drop-down menu. Opinions are available as PDFs and may be downloaded for free.
- Information on meetings and agendas, which at this time is a bit out-of-date. You may need to call

the Commission at (614) 466-3205 for current information.

- Links to the Ohio Administrative Code and Ohio Revised Code that deal with elections.
- Directions on how to file a complaint with the OEC. Anyone may file a complaint, but the burden of proof rests with complainant.
- Links to Ohio's Secretary of State, to the Ohio Ethics Commission, Federal Elections Commission, and links to Ohio's County Boards of Elections.

The OEC was born out of perhaps the best known example of campaign dishonesty – Watergate. That incident created a need for a body to enforce the state's campaign finance and fair campaign practices laws. The Commission was also instrumental in the Ohio's campaign finance reform movement in the mid-1990s; this movement introduced a number of limits into Ohio's political culture. The OEC will continue to play an important role in Ohio's political landscape, even as political campaigns move into the digital age.

Election 2005

As you all know, 2005 is an election year, and in the City of Cincinnati, the race for mayor is drawing much attention. For more information on the upcoming election and its issues, please consult the following websites:

Hamilton County Board of Elections:
<http://www.hamilton-co.org/boe/>

Cincinnati League of Women Voters:
<http://www.lwvcincinnati.org/>

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former employee will not report an attempted interview than it is that a current employee will fail to do so. For this reason, the prospect for unpleasant surprise in litigation increases. Although it is most advisable for corporate counsel to attempt to interview his corporate client's former employee before his opponent has the opportunity to do so (assuming he learns about the former employee first), there is no guarantee that the former employee will agree to an interview. Moreover, it is unethical for corporate counsel to instruct the former employee to decline an interview from opposing counsel. He must leave it to the discretion of the former employee to determine whether he will speak with opposing counsel.

Turning to "the other side of the coin," corporate counsel may interview an opposing corporation's current or former employees so long as his conduct comports with the above-described ethical rules. It is unwise, however, to "push the envelope." Indeed, a determination not to interview an opposing corporation's current employees at all is generally the wisest course. If corporate counsel attempts an interview that even arguably violates ethical rules, it can prove highly damaging not only to the corporate counsel's professional standing but also to the corporation's prospects in the lawsuit. If there is any possibility that corporate counsel may be deemed to have engaged in unethical behavior, it can prejudice his client's standing with the court severely. For these reasons, supporting ethical behavior by corporate counsel is not only the right thing to do but the practical thing to do.

Although the Ohio courts are more expansive than those in many states in allowing these communications, for the most part Ohio lawyers seem unwilling to risk an ethical violation by engaging in an arguably prohibited communication. Nonetheless, the

prospect that an opponent may seek to communicate with a corporate client's present or former employees should be sufficiently troublesome to warrant remedial steps. First, a corporation should leave no stone unturned in disclosing to its attorney the names and addresses of all current and former employees who may have relevant information. To the extent possible and economical, the corporation should authorize its attorney to interview such persons, particularly including critical former employees, promptly. Second, the corporation's personnel should be aware of the ethical groundrules and report any attempted communication by opposing counsel. Third, corporate counsel should respond to any arguably improper communication by an opponent decisively. A decisive response may take the form of a motion filed with the Court or a complaint to an opponent's local bar association. Before corporate counsel files a motion or makes a complaint, however, he should have a high level of confidence that he is on firm ground. Although Ohio courts seem reluctant to sanction offending lawyers, responding decisively to ethical violations should deter an opponent from further questionable conduct.

NOTE: This article is intended to inform and should not be construed as legal advice. The author would like to add that since this article was originally published, the courts may have rendered new ethics decisions. He suggests that interested parties search past decisions and monitor future decisions that may amend this work.



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ADDRESS CORRECTION REQUESTED

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NOVEMBER 2005 LIBRARY NEWSLETTER
