ANSWER TO QUESTION NO. 5

The answers to these questions primarily involve MRPC 4.2, which provides that:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The three individuals that plaintiff's counsel wishes to interview are not parties to the action and are not represented by counsel in the matter. The defendant company's attorney is not the attorney for these witnesses. For this reason, it would appear that, even though the subject matter of the proposed interview is the subject matter of the litigation, the rule is inapplicable. However, in the case of an organizational party, the analysis is more complex. The Comment to Rule 4.2 states:

"In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

The Comment requires an analysis of whether the witnesses are persons with managerial responsibility or are persons whose acts or omissions might be imputed to the organization for purposes of liability or whose statements constitute an organizational admission.

1. The currently employed janitor is not a manager. Therefore, unless there is reason to believe that an act or omission by the janitor could be imputed to the corporation or that the janitor's statement may constitute an admission on the part of the corporation, there is no ethical prohibition against the investigator attempting to interview the janitor.

Neither Michigan case law nor any decision by the Michigan Attorney Discipline Board considers the application of the rule in the circumstances presented. One formal Michigan ethics opinion,

R-2 (1989), concluded that once a lawsuit has been filed, plaintiff's counsel may not seek to interview current employees but may attempt to interview former employees so long as counsel complies with Rule 4.3. That opinion involved nurses who had cared for the plaintiff in an alleged malpractice case where their acts or omissions could be imputed to the organization, or whose statements could constitute an admission against the organization. As a result, the Commissioners concluded that plaintiff's counsel could not ethically communicate with those nurses without the consent of the hospital's counsel. The facts presented in this question involving a currently employed janitor indicate that he or she might have knowledge about a fact issue, that is, whether certain plastic parts had been thrown out in the normal course of business. In the absence of any facts indicating that the janitor is anything other than a mere fact witness, the facts of this case differ qualitatively from those present in R-2 and do not implicate the no-contact provision of Rule 4.2.

Moreover, because the janitor is not represented by the corporation's attorney, an interview with the janitor would not undermine the primary policy considerations underlying Rule 4.2 -- protecting a represented person against overreaching by adverse counsel and safeguarding the lawyer-client relationship from interference.

On the other hand, once litigation has been initiated, any attempt to interview a corporate defendant's employee is governed by the rules regulating discovery in civil cases. Plaintiff's response to this argument is that (1) the rules regarding discovery are meant to supplement, not supplant, other permissible investigative tools, (2) requiring plaintiff's counsel to go through defense counsel before attempting to interview a janitor and other similarly situated witnesses would unreasonably increase the cost of litigation, (3) increasing the cost of litigation exacerbates what is already an uneven playing field, given the imbalance of resources between most plaintiffs and most corporate defendants and (4) if the rules of civil discovery were intended to supplant other investigative tools, there would be no need for Rule 3.4(f) to permit a corporation's attorney to ask company employees not to agree to be interviewed by plaintiff's counsel, since such a request by plaintiff's counsel would violate the rules of the tribunal and, therefore, be unethical pursuant to Rule 3.4(c).

Further, because Rule 3.4(f) permits a company's lawyer to ask a company employee not to agree to be interviewed by opposing counsel, plaintiff's counsel must, at least, give notice to defense counsel that she intends to seek an interview with the employee in order to provide defense counsel with an opportunity to give the

advice permitted by Rule 3.4(f). Plaintiff's response to this argument is that (1) the rule merely permits defense counsel to make such a request but does not also require plaintiff's counsel to give notice to defense counsel before attempting to interview an employee, (2) if the rule were designed to advance require notice to defense counsel, it would have so stated and (3) defense counsel remains free to ask company employees not to speak with plaintiff's counsel at any time, including when first learning that suit has been filed or might be filed.

This is a fact-sensitive issue without much case law guidance. Applicants can score points with either a "yes" or "no" answer with proper analysis.

2. With respect to the formerly employed janitor, the answer is "yes". Once the janitor is no longer employed by the defendant company, the janitor is no longer the company's agent, so there is even less reason for prohibiting the proposed contact. *Valassi v Samelson,* 143 FRD 118 (ED Mi 1992), and *Smith v Kalamazoo Ophthalmology,* 322 F Supp 2d 883 (WD Mi 1992).

In conducting such an interview, however, counsel must remain careful not to seek disclosure of any attorney work-product or any communications between the janitor and company counsel that occurred while the janitor was employed by the company, as those communications remain privileged regardless of the fact that the janitor is no longer employed by the defendant company. Counsel must also be mindful of Rule 4.3, which requires her to avoid stating or implying that she is disinterested in the matter.

3. With respect to a current division manager, a request for an interview would be improper. As a key decision-maker, there is a substantial likelihood that the division manager's statements may be treated as admissions by an agent or otherwise binding on the company. Moreover, the division manager is much more likely to have participated in or otherwise be privy to confidential communications between defense counsel and other key company decision-makers; for this reason, there is also a significantly greater danger that an interview of the division manager would intrude on either or both the attorney-client privilege or the work product privilege.