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## CONTACT WITH INSURANCE ADJUSTER

Adopted May 17, 1986.

### *Syllabus*

Once a lawyer who represents a claimant or plaintiff knows an insurance company has retained counsel to represent its insured in the specific matter, that lawyer may not communicate or cause another to communicate with the insurance adjuster regarding that matter unless the claimant's or plaintiff's lawyer has obtained the prior consent of the lawyer representing the insured.

### *Facts*

This opinion addresses the question of whether plaintiff's lawyer may communicate with the insurance company or its adjuster without the prior consent of defendant's lawyer, even if the adjuster initiates the communication. This opinion does not address the conduct of non-lawyers nor does it attempt to deal with the broad spectrum of investigative and adjustment practices within the insurance industry. References herein to plaintiff's or defendant's lawyer include all persons or entities of adverse interest and not merely litigants.

### *Opinion*

The Code of Professional Responsibility, DR 7-104(A)(1), provides as follows:

#### *Communicating With One of Adverse Interest*

(A) During the course of his representation of a client a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation with the party he knows to be represented by a lawyer in that matter unless he has the prior consent of a lawyer representing such other party or is authorized by law to do so.

It is the opinion of the Colorado Bar Association Ethics Committee that DR 7-104(A)(1) prohibits communication by plaintiff's lawyer with the adjuster for the defendant's insurance company, once plaintiff's lawyer knows<sup>1</sup> that the defendant is represented by counsel, without the prior consent of the lawyer who is known to represent the defendant.

The policy underlying the rule and Ethical Consideration 7-18 is intended to preserve the proper function of the attorney-client relationship and to shield the adverse party from improper inquiry. Indeed, CBA Ethics Committee Formal Opinion 69,<sup>2</sup> adopted May 18, 1985, concludes that

[t]he purpose of DR 7-104(A)(1) is to prevent the deprivation, undermining or bypassing of a client's right to the advice of counsel. . . . In other words, the purpose of DR 7-104(A)(1) is to prevent opposing counsel from impeding an attorney's performance.

It is the unanimous view of the other state bar associations which have addressed the same question that if plaintiff's lawyer knows that defendant is represented by counsel, plaintiff's lawyer must receive the prior consent of defendant's counsel before communicating with defendant's insurance adjuster. Arizona Ethics Opinion 162 (1964); Florida Opinions 65-62 (1965); Kansas 54-13, Opinion 42 (1968); Kentucky Opinions, E-67 (1973); Missouri Opinion 98; North Carolina State Bar II-176, Opinion 631 (1968); Oklahoma B.A.L.E.C. Supp. 55, Opinion 240 (1966); Virginia Ethics Opinion 550 (1983); Washington State Bar 150, Opinion 137 (1968).

The ABA Committee on Ethics and Professional Responsibility adopted a more stringent approach in its Informal Opinion 1190 (August 27, 1971) which, on similar facts, declared:

If counsel for the insurance carrier representing the Defendant in litigation consents and authorizes negotiations between Plaintiff's counsel and the adjuster for the insurance carrier and if such negotiations are carried on under the supervision of the counsel for the insurance company, we believe that then it is proper for Plaintiff's counsel to carry on such negotiations with the insurance adjuster.

The ABA Committee even suggested that defense counsel's consent should be obtained in writing before plaintiff's lawyer begins communication with the adjuster.

Courts agree with the unanimous opinion of the bar associations. Two cases are found dealing with the fact situation presented. In *Waller v. Kotzen*,<sup>3</sup> the court relied on the Pennsylvania Code of Professional Responsibility, DR 7-104, which is identical to the Colorado provision, in holding that plaintiff's lawyer should not have discussed settlement with the insurance company without first having obtained the consent of defense counsel retained by the insurance company to represent its insured. Similarly, in *Estate of Vafiades v. Sheppard Bus Service, Inc.*,<sup>4</sup> the court found that the plaintiff's attorney violated DR 7-104(A)(1) by conducting settlement negotiations directly with the insurance company for the defendants, where there was no evidence that consent was ever requested from or granted by the defendant's lawyer.

### **Conclusion**

When a plaintiff's lawyer knows that the defendant is represented in the matter, that lawyer should obtain the prior consent of the defendant's lawyer before participating in any communication with the defendant's insurance adjuster regarding that matter.

## **NOTES**

1. "Knows" means information of representation received by direct verbal or written communication or by constructive notice from the pleadings. CBA Ethics Comm., Formal Op. 69, 14 *The Colorado Lawyer* 1225 (July 1985) at 1226, *Colorado Ethics Opinions Handbook*, p. 203.

2. *Id.*

3. 567 F.Supp. 424 (E.D. Pa. 1983).

4. 192 N.J. Super. 301, 469 A.2d 971 (1983).