Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-07

Approved August 7, 1998

Issue: May the lawyer for the plaintiff in a personal-injury case directly contact the adjuster for defendant's insurer without first obtaining the consent of the defendant's attorney?

Opinion: Such a contact is improper if the lawyer for the plaintiff knows or reasonably should know that the insurer is represented by counsel in the case, either when the insurer has separate counsel or when it is represented by the same counsel as defendant. If defendant's attorney does not also represent the insurer, plaintiff's attorney need not obtain the consent of defendant's attorney to contact the insurer or its attorney.

Analysis: Rule 4.2 of the Utah Rules of Professional Conduct prohibits a lawyer, in representing a client, from communicating "about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

In connection with the typical insurance claim, the adjuster has been hired by the insurance company and acts as its agent. The contract between the insurance company and the insured provides for counsel for the insured, paid under the insurance contract. If there are no conflicts between the insurance company and the insured, counsel for the insured may act on behalf of both the insured and the insurance company. If there are conflicts, the insurance company will retain separate counsel if it wishes representation. The insured may also retain counsel outside of the insurance contract.

The question posed to the Committee involves one of two different situations: (a) the injured person has contacted a lawyer and is pursuing settlement of a claim on an informal basis; (b) the injured person and the insurance company have not been able to achieve a satisfactory resolution of the complaint, and the matter seems headed to litigation.

(a) In the first situation, the injured person has contacted a lawyer and is pursuing settlement of a claim on an informal basis. At this stage of informal dispute resolution, the plaintiff's lawyer may wish to contact the insurance adjuster to achieve efficient claim resolution. Most typically in this situation, although the defendant's contract of insurance provides for legal representation, a lawyer for defendant will not yet be involved. At this early stage, it is reasonable for the lawyer for the plaintiff to believe that neither defendant nor the insurance company is a "represented party" for purposes of Rule 4.2, (fn1) unless the lawyer has been informed by the adjuster or otherwise. So long as the attorney complies with the other Rules of Professional Conduct -for example, does not pretend to be a neutral party when he is representing the injured person (fn2) - the direct contact with the adjuster is proper.

(b) In a second situation, the injured person and the insurance company have not been able to achieve a satisfactory resolution of the claim, and the matter is either in or likely to proceed to litigation. The insured's contract provides for defense from the insurance company, and pursuant to that contract, the company has provided the insured with counsel. Such insurance-provided counsel clearly represents the interests of the insured. (fn3) The question raised in the inquiry is, then, whether the insurance company should now be considered to be a "represented party" in the "matter."

In the Committee's view, the insurance company now has a direct interest in the results of any litigation or settlement and is a "party in the matter." (fn4) Absent any indication to the contrary, therefore, the lawyer for the plaintiff reasonably should expect that the insurance company may be represented by counsel in this situation. (fn5) The Committee concludes that, at this stage, contact with the adjuster about the merits of the case would be improper unless plaintiff's lawyer has affirmatively determined that the insurer does not consider itself represented by counsel in the matter. This conclusion is also reached in an ABA informal opinion, (fn6) and in ethics decisions from New Jersey, (fn7) Pennsylvania (fn8) and Vermont. (fn9)

In the absence of contrary information about the insurer's internal decision-making process or hierarchy, plaintiff's lawyer may verify the status of the insurer's representation by counsel from the insurer's adjuster. Contact of the insurance company's general counsel or other person known to represent the company in such matters is another way to make the determination.

If plaintiff's counsel determines that the insurance company is not represented in the matter, he may proceed to deal directly with the adjuster. If he has any reason to believe that the insurance company is likely to be represented, he

must determine whether defendant's counsel also represents the insurance company or whether anything has arisen that has caused the insurance company to retain separate counsel.

Finally, at any stage in these processes, the lawyer for the plaintiff may pursue settlement negotiations with the insurance adjuster after obtaining consent of the relevant attorney pursuant to Rule 4.2. In so doing, the lawyer for the plaintiff must comply with other applicable Rules of Professional Conduct, such as Rule 4.3.

Conclusion. Because the insurance carrier for a personal-injury defendant is a separate "party in the matter" for purposes of Rule 4.2, plaintiff's attorney is responsible to determine whether the carrier is represented by counsel in the matter at hand. If plaintiff's lawyer determines or reasonably should have determined that the insurance company is represented-either by the same attorney who represents defendant or by separate counsel-he may not contact the insurer's adjuster directly without the consent of the carrier's attorney. Ordinarily, plaintiff's attorney may rely on the representations of the insurance company's adjuster (as its agent) as to whether it is represented by counsel in the matter for purposes of Rule 4.2.

Footnotes

1.*See* Utah State Bar Ethics Advisory Op. 95-05, slip op. at 6-8, 1996 WL 73351, for interpretation of the meaning of "party to a matter" under Rule 4.2. In particular, "The 'matter' need not be a formal proceeding, but may be any matter for which a person has sought legal representation." *Id.* at 6. *See also In re Illuzzi*, 616 A.2d 233 (Vt. 1992).

2. *See* Rule 4.3, Dealing with Unrepresented Person.

3. *See, e.g.*, Rule 1.8(f):

A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-attorney relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.

4. *See* note 1, *supra;see also In re Illuzzi*, 616 A.2d 233 (Vt. 1992).

5. Some plaintiffs' attorneys have contended that these are situations in which the insurance carrier is not a "party" to the matter under Rule 4.2 and, accordingly, plaintiff's counsel could contact the insurer's adjuster without consent. A representative from the Insurance Law Section of the Utah State Bar appeared before the Committee and related the views of some of the members of that section.

6. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1149 (1970).

7. *Heffner v. Jacobson*, 469 A.2d 970 (N.J. Super. 1983).

8. *Waller v. Kotzen*, 567 F. Supp. 424 (E.D. Pa. 1983).

9. *In re Illuzzi*, 616 A.2d 233 (Vt. 1992).

Rule Cited:

4.2