

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

create a better relation between the profession and the general public." (Drinker, page 256). See A.B.A. Informal Decision No. 631.

2. Distribution of such pamphlets by way of a rack or table in the lawyer's reception room where they are made available to lay people coming into his office is permissible so long as the lawyer's name does not appear in or on the pamphlet itself. A.B.A. Informal Opinion No. 846.

The New York State Bar Association accompanies the pamphlets with the following notice which governs their distribution:

- " 1. Pamphlets may be made available, through a distribution rack in a lawyer's office to clients and other visitors to the office.
2. Lawyers may distribute them to active, personal clients.
3. Lawyers MAY NOT make wholesale distribution of the pamphlets by mail.
4. Lawyers MAY NOT attach a business card to nor type or imprint their own name or the name of their firm on the pamphlets."

Opinion #47 - 1/26/67 (10-66) Topic: Communications with Opposing Party.

Digest: Lawyer may not communicate with opposing party without permission of opposing counsel, even where lawyer suspects violation of a canon of ethics, until case is settled.

Canon: Former Canon 9

QUESTION

A lawyer represents the plaintiff in a suit against a defendant who is defended by an insurance company. During the course of the litigation he deals not only with the defense counsel but also with the local office of the insurance company. He has reason to believe that in settlement discussions deception is being practiced on his client by the defense counsel, the local office of the insurance company or both. He asks to what extent he is prevented by the Canons of Ethics from complaining, before or after settlement of the case, to (1) the local office of the insurance company or (11) the home office of the insurance company, when requested not to do so by the defense counsel or the local office.

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OPINION

Canon 9 forbids a lawyer to communicate directly with an opposing party who is represented by counsel without the consent of such counsel. In this case the insurance company is a real party in interest and the plaintiff's attorney should not deal with the insurance company unless defense counsel expressly or by implication authorizes him to do so. (See Informal Opinions No. 570 and 523 of the A.B.A.) Consent for one case does not constitute consent for others and consent once given may be withdrawn.

Where defense counsel has authorized the plaintiff's counsel to deal directly with the local office of the insurance company he may do so and continue to do so until such time as the consent is withdrawn by the defense counsel. He may not communicate, however, with the home office of the insurance company when requested not to do so by the defense counsel. The right of defense counsel to refuse plaintiff's counsel the right to communicate with the defendant also includes the right to limit the scope of the communication. The plaintiff's counsel may also not communicate with the home office of the insurance company when requested not to do so by the local office unless and until he communicates again with defense counsel, informs defense counsel of the local office's position and receives defense counsel's permission to speak directly with the home office.

If the plaintiff's attorney believes that his client is being defrauded in the settlement negotiations it is his duty to protect his client against such fraud by keeping the client informed and advising against a settlement the attorney believes to be unfair. However, without the consent of counsel for the insurance company he has no right to deal with the insurance company while the case is pending irrespective of his suspicion of fraud. Violation of a canon of ethics by one counsel does not justify violation of another canon by his adversary. (See Opinion No. 235 of N.Y. County Lawyers Assn.)

After the case is settled, the prohibitions of Canon 9 against dealing with opposing counsel's client no longer apply and the plaintiff's counsel is free from the standpoint of professional ethics to register such complaint or protest as he deems proper with the grievance committee of the appropriate bar association and with the insurance company. (Opinion No. 93 of the N.Y.Co. Lawyers Association, and Informal Opinion No. 927 of A.B.A.)