New York State Bar Association

Committee on Professional Ethics

Opinion 785 – 2/1/05

Topic: Communications with represented parties; insurance company

Digest: An attorney representing a plaintiff in a personal injury action may engage in settlement discussions with a non-lawyer insurance company claims adjuster over the objection of the attorney assigned by the insurance company to represent the defendant-policyholder with respect to the claim, *provided* that (i) the insurer is not represented by separate counsel with respect to the matter; and (ii) the plaintiff's attorney does not deliberately elicit information protected from disclosure.

Code: DR 7-104(A)(1)

FACTS

An individual injured in an automobile accident (the "Plaintiff") filed a personal injury action against the driver of the vehicle alleged to be at fault (the "Defendant"). In response, the Defendant's insurer assigned counsel to defend against the action. Before the suit was commenced, the Plaintiff's attorney engaged in unsuccessful settlement negotiations with the insurance company's non-lawyer claims adjuster. Subsequent to his assignment, the Defendant's attorney learned that Plaintiff's attorney was persisting in communicating with the adjuster in further settlement attempts. Defendant's attorney thereupon instructed the Plaintiff's attorney to cease all such communications.

QUESTION

May the Plaintiff's attorney engage in direct settlement negotiations with the adjuster over the objection of the attorney assigned by the insurance company to represent the Defendant?

OPINION

DR 7-104(A)(1) of the Code of Professional Responsibility (the "Code"), commonly referred to as the "no contact" rule, provides that, in the course of a representation, a lawyer shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows *to be represented* by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so."[1]

Is the adjuster a represented party for purposes of the "no contact" rule? Or to restate the question, is the adjuster represented by the same counsel assigned to represent the Defendant? We believe not. 40 years ago in N.Y. State 4 (1964), we stated that: "[W]e see nothing improper in an attorney for a claimant entering into negotiations with the adjuster, even where the negotiations include discussion of the legal aspects of liability." We adhere to this conclusion, which is consistent with our many subsequent opinions on the ethically complex tripartite relationship that exists among an insurance company, assigned counsel and a policyholder[2], in holding that contact with the adjuster is not contact with the policyholder.

However, the "no contact" rule will bar unconsented communication with the adjuster if the insurance company is known to be separately represented by counsel with respect to the matter.[3] In addition, an attorney may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product from an unrepresented person, such as the insurance company (for whom the adjuster is an agent).[4] Here, a sizeable portion of the insurance

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[1] Emphasis added.

[2] For example, we have stated, "Despite the fact that an insurance company has retained the lawyer pursuant to its contractual duty to defend the policyholder, the client is the policyholder, not the insurance company." N.Y. State 721 (1999) (citing N.Y. State 716 [1999]); *see also* ABA Inf. Op. 1476 (1981) ("When a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client"); *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (Sup. Ct. 1954) ("When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance"). We also reject the notion that the policyholder and the insurance company can be co-clients of the policyholder's assigned counsel. *See* N.Y. State 721 ("Some U.S. jurisdictions have held that an insurance carrier and an insured are 'co-clients' who have joint rights in the information concerning the representation. New York is not one of them.") (citation omitted); N.Y. State 716 (1999), n. 2 ("[A]t least in New York, the policyholder's agreement to be represented by a lawyer who is compensated by the insurer does not itself make 'co-clients' of the policyholder and the insurer for purposes of the Code of Professional Responsibility. Rather, . . . the policyholder alone is the client").

[3] Under certain circumstances, claimant's attorney may have a duty to inquire before concluding that the insurance company is not so represented. *See* N.Y. State 728 (2000).

[4] *See* N.Y. State 735 (2001) (independent accountant); N.Y. State 700 (1997) (former employee).

company's file is likely to be protected as work product.[5] Therefore, in discussing settlement with the insurance adjuster, the Plaintiff's attorney must not deliberately elicit such protected information.

CONCLUSION

An attorney representing a plaintiff injured in an automobile accident may engage in direct settlement discussions with a non-lawyer insurance company claims adjuster over the objection of the attorney assigned by the insurance company to represent the defendant-policyholder with respect to the claim, provided that: (i) the insurer is not represented by separate counsel with respect to the matter, and (ii) the plaintiff's attorney does not deliberately elicit information protected from disclosure in the action.

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[5] *See* Mc Kinney's Cons Laws of N.Y., CPLR 3101(d)(2) (2005) (discussing protections for materials prepared in anticipation of litigation); *Kandell v. Tocher*, 22 A.D.2d 513, 256 N.Y.S.2d 898 (1st Dept. 1965) (applying CPLR 3101(d) to accident report information policyholder gave to his insurance carrier); *Finegold v. Lewis*, 22 A.D.2d 447, 256 N.Y.S.2d 358 (2d Dept. 1965) (same); *see generally* Connors, Practice Commentaries C3101:31 and C3101:32, McKinney's Cons. Laws of NY, CPLR 3101 (2004).