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One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 846 (10/27/10)

Topic: Contacts by non-lawyer insurance company representatives with workers' compensation claimants represented by counsel

Digest: A lawyer for an insurance carrier may not, without prior consent of claimant's counsel, send forms directly to a specific claimant where the lawyer knows the claimant is represented by counsel with respect to the claim, but if the lawyer gives reasonable advance notice to claimant's counsel, the lawyer may cause the insurance carrier's employees to send the forms. The fact that a lawyer designed, or assisted in designing, forms to be sent by non-lawyer employees of the carrier to claimants as a class does not trigger the requirements of Rule 4.2, even though the lawyer knows that some of the claimants are represented by counsel.

Rules: 4.2.

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

FACTS

1. An insurance carrier provides workers' compensation insurance for employers in New York State. The insurance company employs (or contracts with) personnel to act as claims adjusters, examiners, investigators or third-party administrators to investigate and manage workers' compensation claims. (Although the personnel have varying titles, we will refer to all of them in this opinion by the generic term "claims adjusters.")

The claims adjusters are not lawyers (or at least are not acting as lawyers in the claims adjuster jobs). In the course of investigating and managing claims, the claims adjusters regularly communicate with claimants.

2. The facts presented to us indicate that every claimant with whom the claims adjusters communicate is a party to an ongoing Workers' Compensation Board proceeding, and some of the claimants are represented by legal counsel regarding their claims. The carrier knows which claimants are represented by counsel because 12 NYCRR § 300.17 requires attorneys or licensed representatives representing claimants to file a "notice of retainer" with the Workers' Compensation Board "immediately upon being retained" and to transmit a copy of this form to the insurance carrier "at the time of filing." Whether claimants are represented by counsel or not, the carrier sends forms to claimants that seek information on their work status or entitlement to benefits. The insurers may later use the information on these forms against the claimants (*e.g.,* to seek a change in benefits due to a claimant's status, or to disqualify a claimant from receiving benefits if the representations on a form prove false).

3. When an insurance carrier sends a form to a claimant in the above circumstances, is an attorney for the insurance carrier violating the New York Rules of Professional Conduct (the "Rules") if:

(a) the form is sent by an attorney to a specific claimant? or

(b) the form is sent by a non-attorney to a specific claimant at the direction of an attorney? or

(c) the form is sent by a non-attorney *not* acting under an attorney's direction, but an attorney designed or assisted in designing the form and will use the information from the form? or

(d) the form is sent on a regular basis via computerized process without human intervention, but an attorney designed or assisted in designing the form or will use the information from the form? or

(e) the attorney provides reasonable advance notice to the claimant's counsel?

(f) If the answer to question (e) is yes, what constitutes "reasonable advance notice" in the case of written and oral communications?

OPINION

4. The most relevant provision of the Rules of Professional Conduct for this inquiry is Rule 4.2, which has two subparagraphs. Rule 4.2(a) prohibits lawyers from communicating or causing another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, without the prior consent of the other lawyer. Rule 4.2(b), however, permits a lawyer to "cause a client" to communicate with a represented person, and counsel the client with respect to those communications, *provided* the lawyer gives "reasonable

advance notice" to the represented person's counsel that such communications will be taking place.[1]

5. We note at the outset that the restrictions of Rule 4.2 do not apply if a lawyer "is authorized ... by law" to communicate or cause another to communicate with a represented party. Thus, if the Workers' Compensation Board has validly authorized insurance carrier attorneys to contact claimants, or to cause claims adjusters to contact claimants directly, with respect to matters before the Board, then Rule 4.2 would not restrict such contacts.[2]

Question (a)

6. Assuming that the restrictions of Rule 4.2 apply to sending the forms in question, it is clear that Rule 4.2(a) would prohibit the insurance carrier's attorneys from sending

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[1] Rule 4.2 provides:

> (a) In representing a client, a lawyer shall not communicate or cause another to communicate 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 prior consent of the other lawyer or is authorized to do so by law.
>
> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Because the facts presented to us indicate that every claimant in question is at all relevant times a party to an ongoing Workers' Compensation Board proceeding, we need not address here whether Rule 4.2 restricts contact with a represented person who is not a "party" to a relevant proceeding. *Compare Grievance Comm. for Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (criminal defense lawyer did not violate DR 7-104(A)(1) by interviewing witness represented in related matter) *with* N.Y. State 735 (2001) (in noncriminal cases, the term "party" in DR 7-104(A)(1) should be read broadly to cover represented witnesses) *and* N.Y. State 785 (2005) ("[T]he 'no contact' rule will bar unconsented communication with [a nonparty insurance] adjuster if the insurance company is known to be separately represented by counsel with respect to the matter.").

[2] The Board's regulations provide that a licensed representative for an insurance carrier should "communicate with an adverse party who is represented by an attorney or licensed representative only through such attorney or representative," see 12 NYCRR § 302-2.6, but some Board opinions state that this regulatory limitation on communications with an adverse party "applies only to licensed representatives, whom the Board regulates, and attorneys for the parties, who are regulated by the Appellate Division and by the Code of Professional Responsibility, in their professional dealings with the adverse parties in litigated matters, and does not apply to claimants, employers and carriers themselves." *Matter of Nick Tahou's Inc.*, 2008 NY Wrk. Comp. 70210028, 2008 NY Wrk. Comp. LEXIS 9427. *See also Fink Baking Co.*, 2007 NY Wrk. Comp. 34566, 2007 NY Wrk. Comp. LEXIS 10305 (carrier did not err in asking its investigator to obtain represented claimant's written statement regarding work activity because "a carrier has an absolute right ... to have direct contact with claimants on behalf of its insured"); *NYS Dept of Corrections*, 2001 NY Wrk. Comp. 59800320, 2001 NY Wrk. Comp. LEXIS 97590 (restriction in § 302-2.6 "applies to the representatives of claimants, employers and carriers, not to the claimants, employers and carriers themselves"). We express no view on whether the Board's regulations permit communications with claimants when those communications would be prohibited by Rule 4.2, or whether the Board's decisions supersede the restrictions of Rule 4.2. Those are questions of law beyond our jurisdiction.

the forms themselves, absent prior consent of the claimant's counsel, if the lawyer knows that the claimant is represented by counsel.

Questions (b) and (e)

7. Where the lawyer directs the insurance company's non-lawyer agents to send a form to a specific claimant, Rule 4.2(b) applies and the lawyer may ordinarily "cause a client to communicate with a represented person." In that case, the lawyer may proceed without the "prior consent" of the claimant's counsel as long as the lawyer gives "reasonable advance notice" to the claimant's counsel.

Question (f)

8. Rule 4.2 does not further define what constitutes "reasonable advance notice." We believe the term must be interpreted in light of the purpose of the requirement, which is to permit the represented party's lawyer to counsel his or her client on what to do when the client is contacted by the insurance company. The notice thus must be provided in a manner and with enough time so that the receiving lawyer has a reasonable amount of time, under all the circumstances, to contact his or her client regarding the planned communication. This is consistent with the sound guidance contained in former EC 7-18 of the New York Code of Professional Responsibility, which stated, in relevant part:

> "Reasonable advance notice" means notice provided sufficiently in advance of the direct client-to-client communications, and of sufficient content, so that the represented person's lawyer has an opportunity to advise his or her own client with respect to the client-to-client communications before they take place.

Questions (c) and (d)

9. The more difficult questions concern the level of attorney involvement in the design of the forms, and the procedures for sending the forms, that will constitute "causing" the client to communicate with the claimant for purposes of Rule 4.2. We considered a related question in N.Y. State 828 (2009). In that opinion, a New York State agency maintained a staff of non-lawyer investigators who would conduct investigations of agency licensees "without any supervision of the investigators by staff counsel." When misconduct by a licensee was discovered, a report would be prepared by one of the investigators for review by counsel and possible prosecution by counsel. We opined that the non-lawyer investigator's conduct in contacting represented licensees would not be imputed to the agency's staff attorneys unless the attorneys were charged with "supervision or control" of the investigators, which was not the case. We observed:

> Where, for example, the agency requires its investigators to be instructed by staff attorneys concerning the procedures to be followed before undertaking an investigation, the conduct of the investigators will generally be imputed to the attorneys.... Where, on the other hand, there is no

> requirement or expectation that the agency's investigators will operate under the guidance of the staff attorneys, then . . . the conduct of the investigators will not ordinarily be imputed to the staff attorneys.

10. We did not specifically address in N.Y. State 828 the extent to which a lawyer's involvement in setting up or designing a general program of contacts with counterparties, some of whom may be represented by counsel, would constitute "supervision or control." With respect to the present inquiries, we conclude that the fact that an attorney designed or assisted in designing a form to be sent to claimants generally – some of whom may be represented by counsel – does not, for the purposes of Rule 4.2, constitute "causing" the carrier to communicate with those claimants who are represented. In other words, designing a form to be sent by non-lawyers does not by itself amount to supervision and control over the non-lawyers.[3]

11. This conclusion is based on sound policies. A client such as the insurance carrier here should be able to consult with its lawyers on generalized or mass communications with claimants or other counterparties. If an attorney's design or advice about mass communications triggered Rule 4.2 based merely on the statistical probability (or even certainty) that some of the counterparties would be represented by counsel, then insurance carriers and similar clients might be chilled in seeking such advice—a perverse result that was not the intent of Rule 4.2.[4] Rather, we believe Rule 4.2 is triggered by an attorney's involvement in sending a communication to a specific claimant (or set of claimants) only when the attorney knows that the specific claimant (or set of claimants) is represented in the matter in question. Thus, we answer questions (c) and (d) in the negative.

CONCLUSION

12. In answer to question (a), an attorney for the insurance company may not, without obtaining consent of the claimant's counsel under Rule 4.2(a), send a form directly to a specific claimant where the lawyer knows that the claimant is represented by counsel with respect to the workers' compensation claim.

13. In answer to questions (b) and (e), the attorney for the insurance carrier may direct a non-lawyer employee of the carrier to communicate with a represented claimant after the attorney gives "reasonable advance notice" to the claimant's counsel within the meaning of Rule 4.2(b).

14. In answer to question (f), such a communication must be provided in a manner and with enough time so that the receiving lawyer has a reasonable amount of time,

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[3] Another rule about causing another to violate the Rules of Professional Conduct is Rule 8.4(a), which provides that a "lawyer or law firm shall not violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." A lawyer who complies with Rule 4.2(b) by causing another person (a client) to communicate with the opposing party upon reasonable advance notice to opposing counsel is not violating Rule 4.2(a). Thus, a lawyer who complies with Rule 4.2(b) also is not violating Rule 8.4(a).

[4] A lawyer should not, of course, design the form so as to seek privileged information or to discourage represented claimants from consulting with their counsel. *See* Rule 4.2, Cmt. 1 (Rule 4.2 protects represented parties against "uncounseled disclosure of information relating to the representation") and Rule 4.2, Cmt. 11 (lawyer "may not advise the client to seek privileged information").

under all the circumstances, to contact his or her client and advise the client what to do when contacted by the insurance company.

15. In answer to questions (c) and (d), where non-lawyer claims adjusters send forms to claimants who are represented by counsel, or where a computerized process sends such forms without human intervention to represented and unrepresented claimants, Rule 4.2 does not apply simply because a lawyer designed or assisted in designing the forms unless the attorney knows that a specific claimant is represented by counsel in the matter.

(24-10)