

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1993/94-15
Communication With Person Represented By Counsel:
Communication With Insurance Representative Without Consent Of Defense Counsel
July 21, 1993

RULE REFERENCES:

- *Rule 4.2
- *Supreme Court Rule 170

SUBJECTS:

- *Attorney-Client Relationship
- *Client Communications
- *Conduct Toward Opposition
- *Consent
- *Insurance

ANNOTATION:

Rule 4.2 does not prohibit direct communication by counsel with an insurance company representative where insurance defense counsel is retained to represent the insured and does not represent the insurance company; such practice, however, is not recommended. (Rule 4.2)

QUESTION:

Does Rule 4.2 prohibit opposing counsel from direct communication with an insurance representative in the course of litigation when the insured is represented by defense counsel retained by the insurance company?

FACTS:

This inquiry raises the question of the propriety of direct communication with an insurance representative during litigation by opposing counsel when the insured defendant is represented by defense counsel retained by the insurance carrier.

In this inquiry, defense counsel was retained by the insurance carrier to represent its insured in a matter in litigation. In the course of litigation, the Superior Court ordered the parties to participate in Superior Court Rule 170 mediation. Rule 170 requires the presence of the insurance representative at the mediation hearing.¹

The mediation session was lengthy and involved active participation by the insurance representative in the settlement negotiations. Under the insurance policy, the carrier has sole discretion with respect to settlement. No settlement was reached, but the parties were "close."

Several days later, plaintiff's counsel called the insurance representative directly without the knowledge or consent of defense counsel and attempted to negotiate a settlement.

RESPONSE:

Rule 4.2 of the Rules of Professional Conduct concerns lawyer communications with persons represented by counsel and states specifically:

In representing a client, a lawyer shall not 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 consent of the other lawyer or is authorized by law to do so.

The general purposes behind this “anticontract” rule are (1) to prevent lawyers from taking advantage of lay persons in the absence of their counsel, (see United States v. Batchelor, 484 F.Supp. 812 (E.D. Pa. 1980)); and (2) to preserve the proper functioning of the attorney-client relationship. See id.; see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 83-1498 (1983) (cited in Annotated Model Rules of Professional Conduct, at 424 (2nd Ed. 1992)).

A resolution of the inquiry presented here necessarily entails an analysis of the language of the rule. The reach of Rule 4.2 is limited in several respects. First, the subject matter of the communication between the opposing lawyer and the opposing party must be “about the subject of the representation.” In this case, the contact with the insurance representative for the purpose of negotiating a settlement is clearly about the subject of the representation.

Second, the person or entity with whom the opposing counsel is communicating must be a “party.” The rule does not limit “party” to those who are named in litigation. Rather, a party is one who is “represented . . . in the matter.” Rule 4.2.

In In Re Illuzzi, 616 A.2d 233 (Vt. 1992), the Vermont Supreme Court held that because the “insurance companies had interests opposed to those of respondents clients,” the insurance companies were parties in the matter. Id. at 236. Illuzzi involved a disciplinary proceeding under DR 7-104(A)(1), a provision nearly identical to Rule 4.2. The Court in Illuzzi prohibited contact between opposing counsel and the insurance company where defense counsel was retained to defend personal injury claims and prior consent was not obtained. Id. at 235-36.

While the insurance company in this case may qualify as a party for purposes of Rule 4.2, the next -- and most important -- question is whether the company is “represented by another lawyer in the matter.”

The issue of whether insurance defense counsel in New Hampshire represents the insured, the insurance company, or both, has previously been decided by the Federal District Court and this Committee. In Gibbs v. Lappies, No. 92-159-M, Slip Op. at 2 (Aug. 10, 1993), the District Court stated that “[w]hen an attorney is retained by an insurance company to provide a defense under a liability policy, the attorney's client is the insured, not the insurer.” The Committee also recently adhered to this rule in the context of third party payor arrangements; see, Practical Ethics Article, Control of Settlement by Third Party Paying Lawyer's Fees (Dec. 8, 1993). In light of this rule, the Committee is bound to conclude that the insurance company, while arguably a party, is not a represented party under the circumstances of this inquiry since defense counsel represents the insured and not the company. Accordingly, direct communication with the insurance representative under the circumstances presented here is not violative of Rule 4. 2.

This conclusion is reached, however, despite the existence of contrary authority found in case law and ethics opinions in other jurisdictions. While these opinions are pertinent, and the practitioner

would be well advised to review them, the opinions do not set forth a clear discussion or resolution of the question of whether the insurance company is a represented party. While those decisions implicitly find the insurance company a represented party, there is no discussion or clear suggestion that the issue was considered.

The two most commonly referenced cases on this issue are Waller v. Katzen, 567 F.Supp. 424 (1983) and Estate of Vafiades v. Sheppard Bus Service, 469 A.2d 971 (N.J. Super. L. 1983). In Waller v. Katzen, the insurance company retained counsel for the insured in an automobile claim that was in litigation. The case went into compulsory arbitration pursuant to local rules and a \$4,000 award was made. Plaintiff's counsel then bypassed defense counsel and contacted the insurance company, who was unaware of the award, and settled the case for the previously offered sum of \$15,000. While the Waller court set aside the settlement on grounds different than the ethical concern, after quoting DR 7-04 the court stated:

In this matter, [the insurer] selected and retained defense counsel to represent the defendant Kotzen who was insured by [the insurer]. It appears to the Court that [DR] 7-104 makes it clear that counsel for the plaintiff . . . should not have discussed settlement with [the insurer] without having first obtained the consent of defense counsel.

567 F.Supp. at 426-27.

In Estate of Vafiades v. Sheppard Bus Service, 469 A.2d 971 (N.J. Super. L. 1983), the claimants hired plaintiff's counsel from Florida to represent them in their action in New Jersey arising from an automobile-bus collision. Even though plaintiff's counsel was denied admission pro hac vice, and even though the insurance carrier had retained defense counsel for the insured, plaintiff's counsel conducted settlement negotiations directly with the insurance carrier without defense counsel's consent. The court, however, did not engage in a detailed analysis of DR 7-104. Instead, after quoting the rule, it stated simply: "There is no evidence that [prior consent] was ever granted by defendant's attorney. [Plaintiff's counsel] were obviously in violation of the several Disciplinary Rules enumerated." Id. at 978.

In addition to the foregoing case law, the overwhelming majority of other state bar associations have held that a plaintiff's lawyer must obtain the prior consent of defense counsel retained to defend an insured before communicating with the insurance company. Arizona Ethics Opinion 162 (1964); Colorado Ethics Opinion 73 (1895); 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).

However, as noted, the foregoing authority does not address the question of whether the insurance company is a represented party, and the committee declines to follow their holdings in light of our previous opinions and the opinion of our Federal Court. While we view the better practice as obtaining the consent of defense counsel before contacting the insurance carrier, such conduct is not prohibited by Rule 4.2.

¹ Rule 170(g)(2) regarding mediation states that "all parties and counsel and . . . an insurance representative, shall be present and . . . have authority to authorize settlement."