

## Lawyer May Not Talk To Insurance Adjuster

In Formal Opinion 200504 (April 2005), the Association of the Bar of the City of New York considered whether a plaintiff's lawyer may properly communicate with a nonlawyer claims adjuster employed by an insurance company with which the lawyer's client is in litigation or arbitration..

The Opinion asked two questions:

1. Does DR 7104(A)(1) apply when the nonlawyer is a sophisticated adjuster who initiates the contact and the purpose of the communication is to achieve a fast and efficient settlement?; and
2. Does plaintiff's lawyer need to obtain the actual consent of the carrier's counsel, or may he rely on the adjuster's assurances or circumstantial evidence of consent?

The questions arose in the context of a claim by a provider of medical services against an insurance company over unpaid medical bills. In this type of claim, the defendant insurer retains an attorney, but, frequently, the first contact with plaintiff's attorney is by the claims adjuster, who may or may not have the express consent of the insurer's lawyer.

### No Contact Rule

The Opinion assumed: (1) direct contact between the claims adjuster and plaintiff's attorney are commonplace in these claims; (2) the adjuster is a sophisticated business person employed by a sophisticated insurance company; (3) the purpose of the adjuster's direct approach is to facilitate settlement at low cost; and (4) if asked, the adjuster would advise that the carrier's lawyer is aware of, and consents to, the direct contact.

DR 7104(A)(1), the so called "no contact" or "anticontract" rule provides as follows:

A. During the course of the representation of a client a lawyer shall not:

1. Communicate 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.

The purpose of this Rule is to protect a represented client against overreaching by adverse counsel, to preserve the attorney/client relationship, and to safeguard against improvident settlements and "ill advised disclosures and unwarranted concessions." Under the facts as presented, the Opinion stated, there is no question that the Rule applies:

“...the discussions with the adjuster take place during the representation of a client regarding the subject matter of the representation,” and “the adjuster is the representative of a party that has retained counsel in the matter.”

The fact that the contact is initiated by the adjuster is not relevant.

‘Even if the represented party initiates the conversation or agrees to the communication, DR 7-104(A)(1) prohibits a lawyer from engaging in any discussion with the represented party without first obtaining a lawyer’s consent..’ (Roy Simon, *Simon’s New York Code of Professional Responsibility Annotated*.)

Also, the fact that adjuster lawyer contact is commonplace in the industry “does not excuse a New York lawyer from compliance with Disciplinary Rules or deprive the insurance company counsel of the right to expect such compliance.”

The Opinion concludes that “‘prior consent’ of adversary counsel is necessary before communication with an adjuster for the defendant insurer can occur.” Moreover, counsel’s consent should not be implied. “...the safest course is to obtain that consent orally or in writing from counsel.”

[Editor’s Note: In a footnote, the City Bar’s Opinion commented on NYSBA Opinion 785 (2/1/05) (See, NYPRR, March 2004, p. 8). That opinion said that a plaintiff’s lawyer in a personal injury action may communicate with a nonlawyer claims adjuster for the insurer without the prior consent of the insured’s lawyer. Although the City Bar Opinion did not address the earlier opinion of the State Bar, it took care to cite several decisions and opinions in other states which had held that plaintiff’s attorney may not contact the insurer’s adjuster because the insurer itself is an adverse party. Typical of these opinions was Utah State Bar Opinion 0005, which said that direct contact with an insurance adjuster is improper unless plaintiff’s counsel has affirmatively determined that the insurer does not consider itself represented by counsel in the matter.