

Plaintiff's Lawyer May Talk To Insurance Adjuster

BY LAZAR EMANUEL

A long line of cases and a series of Ethics Opinions have established that although the lawyer representing the defendant-insured in a personal injury matter may be retained and paid by the insurer, the client is nevertheless the insured, not the insurer. N.Y. State 721 (1999); N.Y. State 716 (1999); *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954). Indeed, New York has rejected the position of other jurisdictions which treat the insured and the insurer as co-clients.

However, many subtle issues can surface within the general principle that the insured is the client. One of these was recently tackled by the NYSBA's Committee on Professional Ethics in Opinion 785 (2/1/05). The issue was: Is plaintiff's attorney permitted to negotiate a settlement with the carrier's adjuster over the objections of the lawyer retained by the carrier to represent the defendant-insured?

The question brings into play DR 7-104(A)(1) of the New York Code, usually referred to as the "no-contact" rule:

- 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."

Is the adjuster for the carrier a represented party who may not be contacted by plaintiff's attorney? In other words, does the lawyer assigned by the insurer to represent the policy holder represent the adjuster?

The Committee answered this question "No." The Committee said:

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, in holding that contact with the adjuster is not contact with the policyholder.

However, if the carrier retains separate counsel in the same matter, then the adjuster is off-limits to plaintiff's counsel. If the carrier is not separately represented, the plaintiff's lawyer may not deliberately

elicit information protected by the attorney/client privilege or attorney work product from the adjuster in their settlement discussions because the adjuster is the agent of the carrier.

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