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ETHICS ADVISORY PANEL
OPINION #93-33, REQUEST #367
Issued August 25, 1993

The inquiring attorney represents the plaintiff in a tort claim arising out of a motor vehicle accident. The defendant driver is insured. The inquiring attorney attempted to negotiate a settlement of the client's claim with the insurance company's adjustor. That effort proved unsuccessful. A lawsuit was initiated and the insurer appointed legal counsel to represent the defendant driver. After the appointment of counsel on behalf of the defendant driver, the inquiring attorney continued efforts to settle the matter via direct communication with the insurance adjustor. Defense counsel objected, instructing the inquiring attorney to have no further contact with the insurance company or its agents. At no time did the inquiring attorney contact or attempt to contact the defendant driver.

The inquiring attorney desires direct communication with the insurance adjustor, and has expressed to the Panel his/her opinion that the plaintiff's offers of settlement have not been relayed by defense counsel to the defendant driver or the insurance company. This opinion is not based on any concrete evidence. The inquiring attorney has relayed to the Panel his/her belief that defense counsel may have a conflict of interest as a result of the plaintiff's offer to settle within the policy limits. Such a settlement, while obviously costly to the insurance company, would relieve the defendant driver from the possibility of personal liability for that portion of any judgment in excess of the policy limits.

As an initial matter, the Panel will not comment or opine on the ethical conduct of defense counsel. See, Ethics Advisory Panel Rule 2(a) (the Panel may decline to render an advisory opinion regarding the conduct of a lawyer other than the inquirer). With respect to the inquiring attorney's desire to communicate directly with the insurance adjustor, this issue involves the prospective conduct of the inquiring attorney and is properly before the Panel. Id.

Rhode Island Rule of Professional Conduct 4.2, entitled "Communication with Person Represented by Counsel," governs the inquiring attorney's ethical responsibilities in this situation. The Rule states that:

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.

As stated in the comment to Rule 4.2, the prohibition against direct contact, "covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in

question." The Panel believes that Rule 4.2, along with the elucidation provided in the comment thereto, prohibits the inquiring attorney from direct communication with the insurance adjustor absent the consent of opposing counsel. The insurance company is represented by counsel (as is the defendant driver), and the representation concerns the matter of the automobile accident. By the plain language of the Rule, therefore, the desired communication is prohibited.

The inquiring attorney contends that in Massachusetts, direct contact with an insurance company is not prohibited "since the attorney provided by the insurer represents the insured and not the company." Although unfamiliar with the practice in Massachusetts, the Panel disagrees with the premise of this argument. While there can be no question that opposing counsel represents the insured, it is the Panel's opinion that an attorney/client relationship exists between the insurance company and opposing counsel as well. Since the company is "represented" in this matter, all contact must occur through opposing counsel.

The inquiring attorney also contends that in many cases, including the case in question, an insurance company's failure to settle within the policy limits may subject the insurance company to an action by its insured for bad faith settlement practices. Although this may or may not be the case, the Panel sees no reason for this to undermine the clear language of Rule 4.2

It has also been argued that direct contact between plaintiff's attorneys and insurance adjustors promotes judicial economy and the public interest by resolving contested matters quickly and efficiently. However, this argument can be made with respect to direct contact with any adverse party, since it conveniently eliminates the "obstacle" of adverse counsel. Finally, it has been argued that direct contact is necessary in order to prepare and prove bad faith claims against insurance companies. This argument weighs against direct contact, not in favor of it. It makes clear that the insurance company and the plaintiff's counsel are adverse in every sense.

A number of courts have held that Rule 4.2's predecessor, DR 7-104, precludes a plaintiff's attorney from communicating directly with an insurance company without the consent of defense counsel. In re Illuzzi, 616 A.2d 233 (Vt. 1992); Waller v. Kotzen, 567 F. Supp. 42, 426-27 (E.D. PA. 1983); Estate of Vafiades v. Sheppard Bus Service, 192 N.J. Super. 301, 314, 469 A.2d 971, 978 (Law Div. 1983).

For the reasons stated above, the Panel opines that the inquiring attorney may not communicate directly with an adverse insurance company represented by counsel without the prior consent of adverse counsel.