

LEGAL ETHICS OPINION 1326

COMMUNICATION WITH ONE OF
ADVERSE INTEREST – MULTIPLE
REPRESENTATION – PERSONAL
INJURY PRACTICE: PLAINTIFF'S
ATTORNEY IN A PERSONAL INJURY
ACTION COMMUNICATING WITH
DEFENDANT WHO IS REPRESENTED
BY UNINSURED MOTORIST
CARRIER'S ATTORNEY.

You have advised that you represent the plaintiff in a personal injury action arising out of an automobile collision in which the defendant is uninsured, although his identity is known, and suit has been filed in accordance with Virginia Code § 38.2-2206. You further indicate that an attorney representing the uninsured motorist carrier has filed an answer in the name of the carrier only. That attorney asserts that it would be ethically improper for you, as plaintiff's attorney, to communicate directly with the named defendant and, further, that he intends to identify himself at trial as representing or appearing on behalf of the named defendant.

You have requested that the Committee opine as to the propriety of plaintiff's counsel communicating directly with the defendant, assuming that the defendant agrees to such communication. Secondly, you have inquired if the uninsured motorist carrier's attorney may properly identify himself to the jury as representing the interest of or appearing on behalf of the named defendant when the attorney has filed responsive pleadings only in the name of the uninsured motorist carrier.

The Committee is cognizant of the provisions of § 38.2-2206(F) which permit the uninsured motorist carrier (insurer) to "file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured ... motor vehicle or in its own name." (emphasis added) The same subsection indicates that the owner or operator of the uninsured motor vehicle is not precluded "from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding." The Committee is of the view that the issue of whether or not an attorney-client relationship exists between the attorney representing the uninsured motorist carrier/defendant and the (identified) uninsured motorist/defendant, in the circumstances you describe, requires a legal and factual determination which is beyond the purview of the Committee.

In the event that it is determined that an attorney/client relationship does exist, the appropriate and controlling rule of the situation is DR: 7-103(A)(1) which prohibits a lawyer, during the course of his representation of a client, from communicating on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The Committee has previously opined that where the defendant in personal injury litigation is represented by counsel, it is improper for the plaintiff's attorney to contact the

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defendant's insurer without consent of counsel for the defendant and his insurer. (See LE Op. 687) Similarly, the Committee opined that communication with a party's attorney or authorization by law, even where the individuals are parties in different but related matters. (See LE Op. 1281; see also ABA Informal Decision 570 (August 23, 1962)) Thus, if a factual determination is made that the attorney representing the uninsured motorist carrier also enjoys an attorney/client relationship with the uninsured motorist/defendant, the Committee is of the opinion that it would be improper for plaintiff's counsel to communicate directly with the (individual) defendant absent consent from the attorney and despite any agreement by the defendant. The plain language of DR:7-103(A)(1) requires the "prior consent of the lawyer representing such other party" and makes no provision for any agreement of the defendant to override such prerogative of the lawyer.

Conversely, in the event that a determination is made that no attorney/client relationship exists, the appropriate and controlling rules are DR:7-103(A)(2) and DR:7-103(B). The former mandates that, in the course of his representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client. The latter rule requires that a lawyer dealing on behalf of a client with an unrepresented person shall not state or imply that the lawyer is disinterested. Further guidance is available in Ethical Consideration 7-15 [EC:7-15] which provides, in pertinent part, that "[i]f one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer."

Prior LE Op. 550 permits a personal injury plaintiff's attorney's investigator to interview the adversary driver or witnesses without the consent of counsel for such parties or witnesses unless the attorney or his investigator knows or has reason to know that the party is represented by counsel. (emphasis added) It remains the opinion of the Committee that it would not be improper for the plaintiff's attorney to communicate with the uninsured motorists, provided that (1) no advice is given, (2) the lawyer does not state or imply that he is disinterested, and (3) the plaintiff's attorney does not know or have reason to know that the uninsured motorist is represented by counsel. (See also LE Op. 1019, LE Op. 1112, and LE Op. 1156)

With regard to the question you have raised regarding the identification of the attorney representing the uninsured motorist carrier also identifying himself as representing the interest of or appearing on behalf of the named defendant, even though pleadings have been filed only in the name of the carrier, the appropriate and controlling rules are DR:7-105(B)(1) which requires that a lawyer shall disclose to a tribunal that he appears in a representative capacity, and DR:7-102(A)(5) which requires that in representing a client, a lawyer shall not knowingly make a false statement of law or fact.

As noted above, the determination of whether the carrier's attorney also enjoys an attorney/client relationship with the uninsured motorist requires a legal and factual

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conclusion under § 38.2-2206(F) which is beyond the purview of this Committee. Should it be determined that such a relationship does not exist, the Committee opines that it would be improper for the carrier's attorney to identify himself as appearing on behalf of the named defendant. (See LE Op. 743 and LE Op. 768) Conversely, should it be determined that an attorney/client relationship does exist, he would be required to inform the court of his representation of the uninsured motorist.

Finally, in the event that it is determined that an attorney/client relationship does exist, the Committee cautions that the fact situation you have described would raise other ethical concerns regarding the propriety of such multiple representation.

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