

Committee Opinion
March 29, 2001

LEGAL ETHICS OPINION 1752

CONTACT WITH REPRESENTED PARTY .

You have presented a hypothetical situation in which the defendant/company in a personal injury case has limited insurance coverage. Recent settlements and verdicts in similar cases indicate the possibility of an excess verdict which would exceed defendant's insurance coverage, exposing defendants' personal assets. Defendants (company owner and driver) are represented by the same attorney, who was retained by the insurance company. Defense counsel refuses to acknowledge Plaintiff's inquiry as to whether the defendants have been advised of their right to separate counsel and objects to Plaintiff's counsel advising the defendants in this regard.

Under the facts you have presented, you have asked the committee to opine as to whether Plaintiff's counsel can advise the defendants by mail or at depositions of their right to separate counsel.

The appropriate and controlling rule relative to your inquiry is [Rule 4.2](#), which states: In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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. Interpreting Rule 4.2's predecessor [former Discipline Rule 7-103(A)(1), [DR:7-103\(A\)\(1\)](#)], this committee opined that even where the opposing counsel is wrongfully withholding information from his client, an attorney may not directly contact that opposing party. LEO 521 [[LE Op. 521](#)]. Similarly, despite his concerns that the opposing counsel may have a conflict of interest, the attorney in the present inquiry is prohibited from contacting the opposing party without consent of the opposing counsel. The basic prohibition of [Rule 4.2](#) contains no exception other than when the contact is "authorized by law." The attorney in the present context is not within that narrow exception.

The committee notes that the inquiry asks about contact via mail and in person at depositions. Clearly, the contact by mail is of the sort prohibited by [Rule 4.2](#). Moreover, the committee opines that giving advice to a party in the presence of his lawyer, with no advance consent, is also prohibited. Such a "surprise" contact would not afford the opposing counsel the opportunity to decline the communication, but only to comment upon it afterward. Rule 4.2 requires consent of opposing counsel, not merely his presence. Therefore, the committee opines that the attorney in this inquiry may communicate with the opposing client neither through mail nor at the deposition unless opposing counsel has consented.

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