

LEGAL ETHICS OPINION 1863 MAY A LAWYER COMMUNICATE WITH AN
INSURANCE ADJUSTER WHEN THE INSURED IS
REPRESENTED BY A LAWYER PROVIDED BY THE
INSURER?

In this hypothetical, a defendant/insured in a personal injury case is represented by a lawyer provided by his liability insurer. The plaintiff is also represented by a lawyer. The defendant/insured's lawyer has not indicated to the plaintiff's lawyer whether he represents the insurer or only the insured. The plaintiff's lawyer asks whether he may communicate directly with the insurance adjuster, an employee of the insurer, without consent from the defendant/insured's lawyer.

QUESTION PRESENTED

In a pending personal injury case where the defendant is represented by counsel provided by his insurance carrier, may the plaintiff's lawyer contact the insurance carrier without the consent of the defendant/insured's lawyer?

APPLICABLE RULES AND OPINIONS

The applicable Rule of Professional Conduct is Rule 4.2¹, and the applicable legal ethics opinions are 550, 687, 1169, 1524, and 1723.

ANALYSIS

The Supreme Court of Virginia has never directly answered the question of whether the insurer is also a client of the defendant/insured's lawyer when that lawyer is provided to the defendant/insured pursuant to his contract of insurance with the insurer. The leading authority on the duties of the lawyer for the insured, *Norman v. Insurance Company*, 218 Va. 718, 239 S.E.2d 902 (1978), emphasizes that the lawyer for the defendant/insured owes the same duty to his client as if he were privately retained by the insured – thereby strongly suggesting that the defendant/insured is the only client of the lawyer. Unauthorized Practice of Law Opinion 60 (Approved by the Supreme Court of Virginia, March 8, 1985) and Legal Ethics Opinion 1723 (Approved by the Supreme Court of Virginia, September 29, 1999) also suggest the same conclusion.

Although the question of whether an attorney-client relationship exists in a specific case is a question of law and fact, the Committee believes that, based on these authorities, it is not accurate to say that the defendant/insured's lawyer should be presumed to represent the insurer as well. On the other hand, in the absence of a particular conflict, it would be permissible for a single lawyer to represent both the insured and the insurer. If the lawyer is jointly representing both the insured and the insurer, then Rule 4.2 would apply to require the lawyer's consent to any communications between the plaintiff's lawyer and the insurer. Conversely, if the lawyer is not representing the insurer, then Rule 4.2 does not apply and the plaintiff's lawyer is free to communicate with the insurer without the defendant/insured's lawyer's consent/involvement.²

Accordingly, unless the plaintiff's lawyer is aware that the defendant/insured's lawyer also represents the insurer, the plaintiff's lawyer may communicate with the insurance adjuster or

¹ Rule 4.2 Communication With Persons Represented By Counsel

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.

² The duties that arise out of the contractual relationships that exist between the insurer, the insured, and the defendant/insured's lawyer are not addressed in this opinion.

other employees of the insurer without consent from the defendant/insured's lawyer. LEOs 550, 687, 1169, and 1524 are overruled to the extent that they state or imply that the lawyer for the defendant/insured always represents the insurer as well, thereby requiring plaintiff's lawyer to seek the insured's lawyer's consent before communicating with the insurance adjuster.

This opinion is advisory only and is not binding on any court or tribunal.

Committee Opinion
September 26, 2012