

**ALASKA BAR ASSOCIATION
ETHICS OPINION No. 98-1**

Contact With Defendant's Insurer

The Committee has been asked to revisit Ethics Opinion No. 78-4 concerning the propriety of direct contact with an insured's insurer by an attorney representing the plaintiff when the plaintiff's attorney knows that the insured is represented by counsel. In Ethics Opinion No. 78-4, the Committee concluded that the plaintiff's attorney in personal injury litigation is not entitled to either contact or continue discussion with a claims representative of the defendant's liability insurer without the consent of the insured's attorney. In the Committee's view, the bar of Opinion No. 78-4 is no longer valid. Unless the plaintiff's attorney has actual knowledge that the insurer is represented by counsel in the matter at issue, an attorney representing the plaintiff in personal injury litigation does not violate Rule 4.2 by contacting or communicating with a claims representative or other agent of the defendant's insurer concerning the matter.

DISCUSSION

Rule 4.2 of the Alaska Rules of Professional Conduct ("ARPC") provides the focus for the Committee's analysis:

In representing a client, a lawyer shall not communicate about the subject matter of the representation **with a party or person the lawyer knows to be represented by another lawyer**, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

ARPC 4.2 (emphasis added). In light of Rule 4.2, the specific issue is whether the plaintiff's attorney, having knowledge of the insured's representation, is barred from communicating with the insurer on the premise that "knowledge" that an insured is represented by counsel constitutes the "knowledge" that the insurer¹ is also represented by that same lawyer.

¹ The insurer is not the same "person or party" as the insured. To establish this, we need only point out that Alaska is not a direct action jurisdiction. A claim, suit, or judgment against an insured is separate from a claim, suit, or judgment against the insurer. *Meyers v. Robertson*, 891 P.2d 199 (Alaska 1995). Therefore, the insured and insurer cannot be considered to be the same "person or party" within Rule 4.2. Absent

The word “knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from the circumstances.” ARPC 9.1(f). Thus to violate Rule 4.2, the plaintiff’s lawyer must have actual knowledge that the insurer is represented by insured’s counsel.

While multiple representation by the insured’s attorney is often allowable, there is clearly no rule of law in Alaska which requires² the insured’s lawyer to represent the insurer. See AS 21.89.100 (separate counsel for insured, paid for by the insurer, is authorized in certain circumstances); *Chi of Alaska v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1118 n.10 (Alaska 1993); Ethics Opinion 90-2 (attorneys hired by an insurance company to represent the insured must honor insured’s objection to the insurer’s direction to send an offer of judgment, even if the insured’s objection might breach insurance contract). Consequently, absent a requirement in all cases that an insured’s lawyer must also represent the insurer, knowledge of the insured being represented by a lawyer does not constitute knowledge that the same (or a different) lawyer represents the insurer.³

Additionally, the plaintiff’s attorney is authorized by law to communicate with the insurer and the insurer is under an affirmative duty to communicate with the plaintiff or, if represented, the plaintiff’s attorney, including specifically identifying the agent of the insurer who is handling the claim. AS

such a requirement, it would be inaccurate to presume knowledge of such a relationship by plaintiff’s counsel.

² A determination that the insured’s counsel may represent an insurer is far different than determining that the insured’s counsel must represent the insurer.

³ The Committee acknowledges that Opinion No. 78-4 states in part:

In typical personal injury litigation, the defendant is insured. A portion of the contract of insurance entitles the defendant’s insurer to control the litigation, and designate the counsel for defense of that litigation.

Alaska Bar Association Ethics Op. 78-4. Thus, where a defendant in litigation is insured, in many instances, the insurer will have a direct interest in the subject matters of the litigation consistent with that of the insured and, in some cases, a contractual right to control the litigation. This does not necessarily mean that the insured’s attorney represents the insurer.

21.36.125(2); 3 AAC 26.040(b)(1). The plaintiff's attorney is therefore authorized by law to contact the insurer until notice is received identifying the insurer's lawyer as such.

On the other hand, if the plaintiff's attorney has actual knowledge that the insurer is represented by counsel, whether it be the insured's attorney or a separate attorney, then the communication is clearly prohibited (without consent).⁴ In such a case, communication with the insurer is accomplished through its counsel.

In summary, ARPC 4.2 prohibits a lawyer from communicating with an insurer who the lawyer *knows* to be represented by counsel. While knowledge may be inferred from certain circumstances, knowledge of attorney representation of the insured is not by itself sufficient to establish that the same lawyer represents the insurer.

Approved by the Alaska Bar Association Ethics Committee on November 6, 1997.

Adopted by the Board of Governors on January 16, 1998.

G:\ADS\COMMAEC&OPS\OPINIONS\98-1.DOC

⁴ The Alaska Rule extends to any person or organization and is not limited to matters in litigation. Thus, if plaintiff's attorney knows the insurer is represented by counsel with respect to the pending matter, the plaintiff's attorney may not contact the insurer without the consent of counsel. ARPC 4.2.