

# LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

**Formal Opinion No. 508**

**February 25, 2002**

**INSURANCE COVERAGE — CONTACTING A DEFENDANT'S INSURER**

## **SUMMARY**

An Attorney does not violate his ethical duties by contacting a defendant's Insurer directly, so long as the Attorney does not actually know that the Insurer is represented by counsel in the matter.

## **AUTHORITIES CITED**

California Rules of Professional Conduct, Rule 2-100(A).

Utah State Bar Ethics Advisory Committee, Opinion No. 98-07

Cal. State Bar Formal Opn. No. 1996-145

Cal. State Bar Formal Opn. No. 1993-131.

Gregory v. Gregory (1949) 92 Cal.App.2d 343

In re Inuz (Vt. 1992) 616 A.2d 233

San Diego Navy Fed. Credit Union v. Cumis Ins. Soc. (1984) 162 Cal.App.3d 358

State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co. (1999) 72 Cal.App.4th 1422

Truitt v. Superior Court (1997) 59 Cal.App.4th 1183

Waller v. Kotzen (1983 C.D. Pa.) 527 F.Supp. 424

## **FACTS AND ISSUES PRESENTED**

Attorney represents Plaintiff in suing Defendant. Attorney learns that Defendant has an insurance policy that might provide coverage for Plaintiff's claim, but Defendant has advised Attorney that it will not submit the matter to its Insurer. Attorney believes that the involvement of Insurer will facilitate a beneficial resolution of the matter for Plaintiff.

## **QUESTION PRESENTED**

May Attorney contact Insurer without violating any ethical duties?

## **DISCUSSION**

Rule 2-100(A) of the California Rules of Professional Conduct restricts the ability of lawyers to make contact with other persons with an interest in a matter. This Rule provides:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

Under the Rule, the critical inquiry is whether the member knows that the other party is represented by another lawyer in the matter. The lawyer often would be Defendant's counsel, who typically is deemed to be representing the Insurer who assigned him to defend its Insured.

On the facts presented there is no indication that Insurer is represented by a lawyer in the matter. To the contrary, Defendant has advised Attorney that Defendant has not submitted — and does not intend to submit — the matter to Insurer. Under these facts, Attorney does not know that Insurer is represented by a lawyer in the matter. Accordingly, Rule 2-100 imposes no limitation on the propriety of Attorney contacting Insurer to advise

Insurer of the action against Defendant. Prudence may, nonetheless, dictate that the attorney begin any communication with the insurer by confirming that Insurer is not represented by counsel in the matter.

Nothing in this opinion pertains to the more common situation in which an insurer has accepted the defense of a party to an action and is involved in the litigation. In such circumstances, the attorney representing Defendant is generally representing the insurer and the insured. Accordingly, Rule 2-100(A) would make it improper for the attorney to contact the insurer directly. Of course, in such a situation the concerns presented in this inquiry would not arise — the insurer would already be represented by counsel and plaintiff's counsel could communicate with the insurer through the insurer's counsel. (Different issues, not addressed here, may arise where an insurer defends under a reservation of rights, and the insured has separate counsel. )

The same distinction drawn here was seen by the Utah State Bar Ethics Advisory Committee in a 1998 opinion. The Utah Committee was asked whether a lawyer for a plaintiff could ethically contact the adjuster for a defendant's insurer without obtaining permission from the defendant's lawyer. The committee advised that if the matter is in an informal pre-litigation stage, it is reasonable for the lawyer to believe (absent being informed to the contrary) that the insurer is not a represented party and make contact. If, however, the matter is in or likely to proceed to litigation, the committee concluded that the insurer would have a direct interest in the matter and be considered a party to the matter, and that could properly contact the adjuster about the matter only upon confirmation that the insurer is not represented by counsel in the matter.

Here, where the facts show that counsel for Defendant does not currently represent Insurer, and Attorney does not know that Insurer is represented in the matter by other counsel, Attorney is not precluded by the Rules of Professional Conduct from making direct contact with Insurer.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinions are based only on such facts as are set forth in the questions submitted.

- 1 Rules of Professional Conduct, Rule 2-100(A) (emphasis added); see also Discussion to Rule 2-100 ("As used in paragraph (A), 'the subject of the representation,' 'matter,'; and 'party' are not limited to the litigation context.").
- 2 Truitt v. Superior Court (1997) 59 Cal.App.4th 1183, 1188 (Rule 2-100 "does not apply where the attorney does not actually 'know' but merely 'should have known' that the opposing party was represented"). In so holding, Truitt displaced prior ethics opinions to the contrary. See Cal. State Bar Formal Opn. Op. 1996-145; Cal. State Bar Formal Opn. No. 1993-131).
- 3 State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co. (1999) 72 Cal.App.4th 1422, 1428-29.
- 4 See generally Gregory v. Gregory (1949) 92 Cal.App.2d 343 (discussing obligations of lawyer communicating with unrepresented party).
- 5 See Cal. State Bar Formal Opn. No. 1996-145 (recommending that attorney ask party if it is represented in context of contract dispute where attorney knew party had been represented by counsel in entering contract).
- 6 See State Farm, supra, 72 Cal.App.4th 1422, 1428-29.
- 7 ; See Waller v. Kotzen (M.D. Pa. 1983) 567 F.Supp. 424, 426-27 (plaintiff's counsel violates Pennsylvania disciplinary rule by directly contacting insurer after insurer provides defense counsel to defendant); In re Inuz (Vt. 1992) 616 A.2d 233 (ethical rule violated by direct contact to insurers providing defense to defendant).
- 8 See generally San Diego Navy Fed. Credit Union v. Cumis Ins. Soc. (1984) 162 Cal.App.3d 358.
- 9 Utah State Bar Ethics Advisory Committee, Opinion No. 98-07 (interpreting Rule 4.2 of the Utah Rules of Professional Conduct, which prohibits a lawyer, in representing a client, from communicating "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").