

**ETHICS OPINION NUMBER 141  
OF THE MISSISSIPPI BAR  
ADOPTED MARCH 11, 1988**

**COMMUNICATION WITH UNREPRESENTED ADVERSE PARTY** - In representing a personal injury claimant, a lawyer may ethically communicate with an unrepresented adverse party concerning the facts of the claim and any applicable liability insurance coverage provided the lawyer complies with the requirements of Rules 4.1, 4.3, and 4.4, including, but not limited to, that he not knowingly make a false statement of material fact or law, that he take reasonable steps to correct any misunderstanding by the adverse party of his role, and that he not give advice to the unrepresented person other than to obtain counsel.

The Ethics Committee of the Mississippi State Bar has been asked to render its opinion as to whether a lawyer who represents an injured person may, prior to filing a lawsuit against the alleged tortfeasor, directly contact the tortfeasor to discuss the claim and to urge the tortfeasor to discuss with his liability insurance carrier the facts of the case and the possibility of settlement. By separate request, the Ethics Committee has been asked to render its opinion on the following similar situation:

May an attorney who represents a client concerning a personal injury claim call or personally contact the alleged tortfeasor to attempt to discuss the details of the subject accident and/or the status of the alleged tortfeasor's potential insurance coverage when he intends to file a lawsuit, and he knows or has reason to believe that the alleged tortfeasor has liability insurance and knows or is reasonably sure that the liability insurance carrier will hire an attorney to represent the alleged tortfeasor.

Would it make any difference if the attorney was unsure as to whether or not he was going to file a lawsuit against the alleged tortfeasor, if he still knew the alleged tortfeasor had liability insurance and would be represented by an attorney if the lawsuit was filed?

The Rule 4.2 series of the Mississippi Rules of Professional Conduct govern a lawyer's transactions with persons other than clients and, therefore, govern these requests. Rule 4.2 governs communication with a person represented by counsel and states in full:

In representing a client, a lawyer shall not communicate 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. (emphasis added).

In pertinent part, the comment to Rule 4.2 notes that it covers "any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." Therefore, the Committee concludes that the actual filing of a lawsuit or intent to file a lawsuit is irrelevant to the question of whether the lawyer may communicate with the adverse party.

On these facts, there can be no doubt that the lawyer's communication with the adverse party will be about the subject of the representation in the matter. The operative question is whether the lawyer knows that the adverse party is represented by another lawyer in that particular matter. If lawyer has such knowledge, then the lawyer is prohibited from communicating with that adverse party about the subject of the representation unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

On the facts before the Committee, the lawyer for the claimant apparently has no knowledge that the adverse person is represented by a lawyer in the matter. While it is true that the insurance carrier will hire a lawyer to represent its insured if and when a lawsuit is filed, on these facts it has not actually done so, and the attorney for the claimant cannot know that a lawyer is representing the adverse person in the particular matter. Therefore, the Committee concludes that Rule 4.2 is inapplicable to this request because the adverse party is not actually represented by a lawyer in the matter. Accordingly, the claimant's lawyer is not prohibited by Rule 4.2 from communicating with the adverse tortfeasor concerning the incident and his insurance coverage.

Even though the lawyer for the claimant may communicate with the unrepresented adverse party, the Mississippi Rules of Professional Conduct do contain significant restrictions on such communications. First, Rule 4.1 requires that the lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to the third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. Further, Rule 4.3 specifically regulates a lawyer's dealing with unrepresented persons and states in full:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply

that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The comment to Rule 4.3 goes on to specifically note that "[d]uring the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel." (emphasis added). Thus, in communications with the unrepresented adverse party, particularly concerning liability insurance coverage and settlement, the lawyer must refrain from giving legal advice to the insured other than the advice to obtain counsel. See ABA Informal Opinion No. 1034 (May 30, 1968) (holding that letter from claimant's lawyer sent prior to suit to unrepresented insured tortfeasor violated the similar prohibition in Canon 9 of the ABA Canons of Professional Ethics where the letter advised the insured of his personal liability for damages exceeding his insurance coverage, advised him of his conflict of interest with his insurer if the insurer failed to settle the claim for the coverage limits if the demand exceeded the coverage, and advised insured as to proper course of conduct).

Finally, Rule 4.4 directs that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." The comment notes that these rights of a third person include legal restrictions on methods of obtaining evidence from third persons.

Based upon these provisions, the Committee concludes that on these facts the lawyer for the claimant may directly communicate with the unrepresented adverse party concerning the particular incident and any applicable liability insurance coverage, but that the lawyer must not knowingly make a false statement of material fact or law, not state or imply that he is disinterested, and not give advice to that unrepresented person other than the advice to obtain counsel. Further, if the lawyer knows or reasonably should know that the adverse party misperceives the lawyer's role, the lawyer must make reasonable efforts to correct that misunderstanding.

The Committee notes that this result is supported by ABA Informal Opinion No. 83-1502 (October 30, 1983), which addressed the propriety of a lawyer's writing letters to the commissioners of a town threatening them with a personal civil suit if they repealed a zoning ordinance to the detriment of the lawyer's landowner client. The lawyer wrote each commissioner (all of whom were non-lawyers) advising them of the client's position with respect to the proposed action, indicating that a civil suit would

be commenced against the commissioners individually if the zoning ordinance were repealed, stating the lawyer's opinion previously given to the client that the commissioners would not be immune from personal liability to the client, stating the lawyer's calculation of the amount of the claim and advising the commissioners to consult counsel. The ABA Committee on Ethics and Professional Responsibility reviewed the request under both the prior Code of Professional Responsibility and the then proposed Model Rules of Professional Conduct and concluded that the lawyer's letter was ethically proper where the lawyer did not knowingly make false statements of law or fact and did not offer advice to those persons even though the lawyer stated his opinion on legal issues in support of his client's position.