

# Advisory Opinion 1988-2

An attorney has requested an advisory opinion on the following question:

It is an ethical violation for a plaintiff's lawyer to communicate directly with Risk Management Division to explain or negotiate settlement of a case, without defense counsels consent?

Risk Management Division is a division of the General Services Department of the State of New Mexico. its principal function is to administer the insurance risks of the State and State agencies. See N.M. Stat. Ann. § 15-7-1 *et seq.* (1986 Repl.). Among its other duties, Risk management Division retains private law firms to defend claims against public employees and public entities in situations where a defense is not provided by a private insurance carrier. N.M. Stat. Ann. § 41-4-4(B) (1986 Repl.). Risk Management Division also has authority to "compromise, adjust, settle and pay claims." N.M. Stat. Ann. § 15-7-3(A)(4) (1986 Repl.). In these capacities, the role of Risk Management Division is similar to that of a private insurance company.

The relevant ethical consideration is New Mexico Rule of Professional Conduct 16-402:

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. Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel.

The first sentence of the above rule is identical to ABA Model Rule of Professional Conduct 4.2.

When a private insurance company acts on behalf of its insured in the conduct of litigation and settlement of claims, it assumes a fiduciary relationship with the insured. *Chavez v. Chenoweth*, 89 N.M. 423, 430, 553 P.2d 703, 710 (Ct. App. 1976). in such situations, the insurance company is the real party in interest, *Grammar v. Kohlhaas Tank & Equipment Co.*, 93 N.M. 685, 692, 604 P.2d 823, 830 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980), and the relationship is one of agent and principal. 44 Am. Jur. 2d, *Insurance* § 1422 (1982); *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957).

A.B.A. Informal opinion 1190 (August 27, 1971) states that "[even though the insurance carrier is not a named party to the litigation, in most cases it stands in the shoes of the individual defendant in asserting the defense in the litigation and in protecting its insured, who is the named defendant." The opinion holds that an insurance company may authorize a lay adjuster to negotiate directly with plaintiff's counsel with the express consent of defense counsel, so long as the activity does not constitute the unauthorized practice of law. A.B.A. Informal Opinion 570 (August 23, 1962) suggests that defense counsel represents both the insurance company and the insured until such time as the insured should elect to retain separate counsel.

Although the interpretation does not appear to be uniform, state bar opinions from other jurisdictions have considered it improper for plaintiff's counsel to communicate directly with insurance companies. Virginia State Bar opinion 687 (May 29, 1985); Colorado Bar Association opinion 73 (May 17, 1986). *But see* Maine Professional Ethics Commission, Board of overseers of the Bar, Opinion 63 (January 7, 1986).

In such situations, therefore, a private insurance company acts as an agent for its insured, in a fiduciary relationship. Unless and until a conflict develops, its interests are allied with those of the insured. Under these circumstances, it is the Committee's opinion that it is improper for plaintiff's counsel to initiate direct communication with the insurer without the consent of defense counsel.

The Committee does not express a formal opinion on whether the insurance company may authorize or initiate direct communication with plaintiff's counsel. The rule against direct communication with a represented party is designed for the protection of the represented party. A.B.A. Formal Opinion 108 (March 10, 1934). There may be circumstances, therefore, in which the insurance company could waive its right to this protection. The Committee believes, however, that the safer course of action for plaintiff's counsel is not to engage in substantive discussions with the insurance company or its agents, even when the communication is initiated by the company or agent.

We must next consider whether this opinion is changed by the fact that Risk Management Division is not a private insurer, but a governmental entity. Rule 16-402 contains an exception to the general rule prohibiting direct communication if the communication is "authorized by law." The official comment to A.B.A. Model Rule 4.2 states that "communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." Despite the broad nature of this language, however, the restriction against direct communication has to date been applied to government agencies and boards in the same manner as it has been applied to corporate parties. *A.B.A./B.N.A. Lawyers' Manual on Professional Conduct*, 71:317 (1987). Instances where the "authorized by law" exception (or its predecessors) have been invoked appear to be limited to instances where specific statutes or court rules require or permit direct communication with an adverse party. See, *A.B.A./B.N.A. Lawyers' Manual on Professional Conduct* 71:307-308 (1987). The general rule appears to be the same as for private corporations, and that management level employees of a governmental agency may not be contacted directly in such circumstances. *A.B.A./B.N.A. Lawyers' Manual on Professional Conduct* 71:318-319 (1987).

It is, therefore, the Committee's opinion that Risk Management Division's status as a public entity does not change the general rule, in the absence of a specific statute or rule permitting direct communication; and that it is, therefore, improper for plaintiff's counsel to initiate communication with Risk management Division concerning matters for which Risk management Division has retained counsel to provide a defense for a public employee or entity, without the consent of defense counsel.