

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-67
Issued: May 1973

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May an attorney negotiate directly with a layman representing the insurer during pending litigation?

Answer: No.

References: Canon 9; DR 7-104

OPINION

An inquiry has been received concerning the propriety of an attorney's representing a claimant in an automobile accident case and negotiating directly with a lay adjuster representing the insurance company where the insurance company is represented by local counsel. The inquirer asks for a clarification of KBA E-28 in light of the "statement of principles on respective rights and duties of lawyers and laymen in the business of adjusting insurance claims," which was adopted January 8, 1939, by the Conference Committee on Adjusters, composed of representatives of the American Bar Association and the insurance industry. In particular the following passage is cited:

- (3) In the second class (a claim of a third person in tort against the holder of a policy of liability insurance), under a policy by which the company insures the liability of the policyholder, it is recognized that the company has a direct financial interest in the claim represented against the policyholder, and in a suit in which the name of the company may not appear as a party litigant, but which the company is obliged to defend in the name of the policyholder. Therefore, the company has a right
 - (a) To discuss with the policyholder or the claimant the merit of the claim, and to settle it.

To consider this problem we look first to Canon 9 of the Canons of Professional Ethics.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

This Canon has been strictly construed throughout all the Opinions handed down from the American Bar Association.

The newer Code of Professional Responsibility, adopted by both the American Bar Association and the Kentucky Bar Association, states in DR 7-104:

- (A) During the course of his representation of a client a lawyer shall not
 - (I) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The principles and rules as stated are clear and evident No exception is mentioned except with consent of the lawyer representing such other party or when authorized by law. No mention is made of the “Statement of Principles.”

Indeed, the American Bar Association has dealt with this problem frequently. In Informal Decision Number 523, issued May 31, 1962, approximately twenty-three years after the adoption of the “Statement of Principles,” it held:

In Opinion 124 this Committee specifically held that it is contrary to the principles of professional propriety as enunciated in Canon 9 for a lawyer to negotiate a settlement with an adverse party without the knowledge of the lawyer for the adverse party. Lay adjusters, while only employees of the insurance company, shall be treated the same as an adverse party since they are clearly representing the insurance company. It is, therefore, our opinion that the plaintiff’s attorney would be in violation of the specific provisions of Canon 9 in dealing with lay adjusters, without the specific consent and approval of the insurance company’s counsel.

ABA Informal Opinion 523, *supra*, further provides:

Although the adjuster may negotiate settlements, there are definite limitations; if the attorney permits his professional discretion to be delegated to the layman, or authorizes the layman to make final settlement without reporting to and obtaining the approval of the attorney, such conduct would be improper.

No exception for the “Statement of Principles” was noted.

KBA E-28, which the inquiring member feels may be in conflict with the “Statement of Principles,” was issued in November, 1965. Its question was identical to the one at hand. It held:

It is our opinion that it would be unethical conduct for an attorney to discuss the case pending in court with the representative of the insurance carrier when the parties are represented by counsel.

As a result of the proceeding, KBA E-28 is upheld. ABA rules and decisions make no difference to the “Statement of Principles” and neither will the Committee. It is therefore improper to negotiate directly with the laymen representing the insurer without the consent of the insurer’s counsel.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.