Are Lawyers Who Represent Claimants Exempt from the rules of Professional Conduct?

By Douglas L. Drayton

An informal hearing was held on a claimant's request for medical treatment. After researching the internet, the claimant asked the treating physician to refer her for a relatively new and controversial form of therapy. Having reached an endpoint with this patient, the physician gladly wrote a report recommending this therapy and referring her to any specialist she could find for same.

Over the respondent attorney's vigorous objection, the commissioner suggested a one-time authorization to determine the course of such treatment and expected result.

The insurer is a local company that is "paperless" so all communication goes to their Tennessee data entry address. The respondent attorney's hearing report was duly entered and preceded into cyberspace.

Five days after this hearing, someone from the claimant's attorney's office called the adjuster demanding the authorization "ordered" by the commissioner at the hearing. When the adjuster called her attorney for details and explained that she had already spoken with someone rom opposing counsel's office, the attorney became very upset. He immediately called the claimant's attorney and demanded to know why the adjuster was contacted without his consent. The attorney, who could not understand the anger level his direct contact with the adjuster produced, suggested that it was customary and reasonable to do so. The respondent attorney replied by reminding claimant's counsel that this was a serious situation and could result in a possible grievance. These statements were met with incredulity by the claimant's attorney.

This scenario implicates the Rules of Professional Conduct. Rule 4.2 of the Rules of Professional Conduct, which is entitled

"Communication With Person Represented by Counsel," states as follows:

> "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 consent of the other lawyer or is authorized by law to do so."

This language has been interpreted to mean that "absent the consent of the other lawyer, the rule bars a direct approach to that lawyer's client." CBA, Informal Opinion 93-10, March 26, 1993. Informal Opinion 93-10 clearly states that there is no ambiguity in Rule 4.2. It also cites and relies upon Formal Opinion No. 92-362, July 6, 1992 from the ABA Standing Committee on ethics and professional responsibility. The question presented in that case was whether or not an attorney could contact a party represented by counsel to discuss an outstanding settlement offer. The ABA framed the question and the answer to that question in the following manner: "Under what circumstances, if any, may offeror's attorney contact the offeree directly, without permission of defense counsel, to inform the party of the settlement offer? The answer is none, under Rule 4.2, absent consent of the other lawyer or authorization by law." Id. Other jurisdictions have also examined whether or not it is appropriate for a claimant's counsel to contact an insurance adjuster and have similarly concluded that, absent consent, such contact is inappropriate. See Colorado Bar Association, Formal Opinion 73, May 17, 1986; Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2005-04 (April 2005).

While Rule 4.2 is clear and unambiguous, attorneys often seek to claim exemptions that simply do not exist. For example, the attorney previously dealt with the claims person before the respondent secured counsel, or the adjuster initiated the call, even though it was after an appearance was filed. These are not exceptions to the rule and only if respondent's counsel consents to such communication is there no violation.

Although many innocuous and trivial administrative issues are better served by such communications, they cannot take place without the consent of counsel. The concern is that they will turn to issues not so meaningless and trivial. As the Connecticut Supreme Court pointed out in Pinsky v. Statewide Grievance Committee, 216 Conn. 228, 236 (1990), "[t]he purpose of this restriction is to preserve the integrity of the lawyer-client relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer". The rule is designed to prevent situations in which a represented party may be taken advantage of by opposing counsel. See ABA/BNA Lawyer's Manuel on Professional Conduct (1989) 71:303.

There are some situations that defy explanation but bring into question the proper action by counsel. Contact by a claims person while the hearing process is underway puts claimant's counsel in an awkward position. Obtaining permission from the respondent's counsel to conduct negotiations or discussions with an adjuster is the obvious answer. However, what if the council is in-house, doesn't file any appearance form, and the claims adjuster announces that "they work for me and you deal with me!? Obviously, the claimant's counsel does not want a sour relationship with the keeper of the checkbook, so diplomacy is required. Conferencing the respondent attorney on the call is one suggestion to avoid this problem.

Is there an obligation to obtain consent? In order to protect oneself from complaints of ethical violations, certainly something must be done. Written confirmation from respondent's counsel of approval to communicate or written accord from the adjuster to both counsel expressing the intent to communicate would seem to solve any such ethical dilemma. If efforts to obtain permission are met without response, claimant's counsel should enlist the help of the commissioner. The relationship of respondents' counsel may suffer and justifiably so under these circumstances.

Apparently, some practitioners have argued there is a dichotomy as to the employer and insurer that allows some flexibility with respect to Rule 4.2. C.G.S. § 31-340 essentially makes the employer and insurer one for purposes of the Act. If there is a

conflict, there are separate appearance forms filed by counsel. If there are employment issues outside of the Workers' Compensation Act, then certainly those may be addressed to the employer. However, if the issues stem from the claim, even if they are labor issues, such as providing selected or light duty work, counsel in the workers' compensation case must give permission for client communication.

There are no reported decisions on this issue as to workers' compensation cases in Connecticut. However, those reported decisions dealing with litigation make it quite clear that communications with a party without their counsel's permission is in violation of Rule 4.2.

Counsel should understand that no communications are permitted without approval. In most instances, I would suggest confirmation by e-mail (which can be printed and put in the file) or in writing. It should also be understood that permission for one communication, such as finding out if a report is available, is not permission to communicate on any other issues. This practice area of Connecticut law has always been congenial and somewhat informal, but do not be caught in a grievance situation by treating Rule 4.2 casually.