

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 613**

December 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer, who has been retained by an insurance company to represent an insured person in a case that is settled based on the insurance company's transfer of funds to the lawyer for the other party, provide, without the consent of the other party's lawyer, written notice to the other party of the settlement payment as strongly encouraged by the Texas Department of Insurance?

STATEMENT OF FACTS

A lawyer is retained by an insurance company as defense counsel in a matter in which the claimant is represented by another lawyer. The terms of the settlement of the matter require that the insurance company issue a check for the settlement amount to the claimant's lawyer. As strongly encouraged by a bulletin issued by the Texas Department of Insurance, the lawyer retained by the insurance company proposes to provide written notice of the payment directly to the claimant at the same time the settlement check is sent to the claimant's lawyer.

DISCUSSION

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented in the matter by another lawyer unless the first lawyer has the consent of the other lawyer or is authorized by law to do so:

“In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

As noted in Comment 1 to Rule 4.02, this rule is intended to prevent lawyers from circumventing the lawyer-client relationship of other persons represented by counsel in a matter.

Under the facts presented, the proposed notice of settlement payment is a communication “about the subject of the representation” with the claimant who is known to be represented by another lawyer. Consequently, in the absence of consent from the lawyer representing the claimant, the proposed communication is permitted under Rule 4.02(a) only if the lawyer's

communication is “authorized by law.” In the circumstances here considered, the insurance company and lawyer are responding to a bulletin from the Texas Department of Insurance that strongly encourages, but does not require, the notification. Accordingly it is not possible to say that the proposed communication as proposed by the lawyer is authorized by law within the meaning of Rule 4.02(a). In these circumstances, Texas lawyers remain subject to the requirements of Rule 4.02(a) and are not permitted to send, or participate in the sending of, a notice as encouraged by the Texas Department of Insurance.

Although insurance companies are not themselves subject to the Texas Disciplinary Rules of Professional Conduct and are thus not limited by Rule 4.02(a) in their own communications to other persons, Rule 4.02(a) prohibits a Texas lawyer from causing or encouraging other persons acting for the insurance company to carry out a communication to another party that would be prohibited if the communication were directly from the lawyer. However, so long as the lawyer does not cause or encourage such a communication, the lawyer is not required to affirmatively discourage a communication by the insurance company in which the lawyer is not involved. See Comment 2 to Rule 4.02.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer, who has been retained by an insurance company to represent an insured person in a case that is settled based on the insurance company’s transfer of funds to the lawyer for the other party, is prohibited from providing written notice of the settlement payment to the other party without the consent of the other party’s lawyer even if such communications are strongly encouraged by the Texas Department of Insurance.