

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-54
Issued: September 1971

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 for a claimant's insurance carrier contact an uninsured motorist who takes no action to employ counsel for his cooperation in the litigation if he notifies him he should seek counsel of his own choice and where the tortfeasor has "uninsured motorist" coverage in his automobile insurance policy?

Answer: Yes.

OPINION

With the advent of the "uninsured motorist" coverage provisions of automobile insurance policies now in effect throughout Kentucky, as well as in many other states, certain ethical problems have arisen in our profession.

The most troublesome problem, from the standpoint of ethics of our profession, arises when a policyholder files suit for damages against another motorist who is uninsured, and the insurance carrier for the person seeking damages employs counsel to defend the action on behalf of the uninsured motorist. The problem becomes even more vexing when the uninsured motorist is served with a summons, and chooses to do nothing himself in the way of employing counsel of his own choosing. Thus, the attorney for the claimant's insurance carrier is faced with the dilemma of deciding whether or not he should contact the uninsured motorist and actively seek his cooperation in defending the litigation, thus running the risk of being accused of solicitation of business and establishing an attorney-client relationship between himself and the uninsured motorist who did not seek his advice and counsel. Obviously, in order to properly defend the action, the cooperation of the uninsured motorist is essential, but the "real party in interest" in this kind of situation is the insurance carrier for the claimant.

This problem has recently been presented to the Kentucky State Bar Association, and has likewise been called to the attention of the Organized Bar in other states. Precedent decisions by Committees on professional ethics of the State Bar Associations of Tennessee and Georgia have been considered in attempting to resolve this problem.

Both the Canons of Professional Ethics of the American Bar Association and the newer Code of Professional Responsibility of the American Bar Association, which has been adopted by the Kentucky State Bar Association as a guideline, would seem to

recognize the obligation of the attorney caught in such a dilemma to intervene on behalf of the insurance carrier as the real party in interest, making full disclosure to the court and all parties concerned of the exact nature of his employment. At the same time, it likewise appears that, notwithstanding the difficulties encountered in adequately defending litigation of this nature, an attorney who actively solicited the representation of the uninsured motorist would be acting improperly and in violation of the spirit of, if not the actual letter of, the professional guidelines set forth above. It would not appear to be improper for the attorney to notify the uninsured motorist that he was representing the insurance carrier for the claimant in defending the litigation, and invite and actively solicit the cooperation of the uninsured motorist in the defense of the claim, making it abundantly clear to the uninsured motorist that the attorney was not undertaking to represent him personally. Such a contact with the uninsured motorist should also include the advice that the uninsured motorist should consult counsel of his own choosing for any further advice he might desire in the pending litigation.

Even more complicated is the situation wherein the litigation results in a judgment for the plaintiff under the uninsured provisions of the policy, and the insurance carrier thereafter seeks to employ the same attorney who defended the original action to bring suit against the uninsured motorist personally to recover the judgment paid by the insurance company.

Under the professional guidelines above quoted, it is unprofessional and a violation of the ethics of our profession to represent conflicting interest, except by expressed consent of all concerned, given after a full disclosure of all of the facts. Here it becomes the duty of the attorney, if he accepts such employment, to contend for that which the same duty required him to oppose in the original litigation. See In re Boone, 83 F 944, 952-953 (1897):

The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interest of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection.

It would appear that whether or not an attorney should accept representation of an insurance carrier in these circumstances would depend upon whether or not the uninsured motorist cooperated in the defense or furnished any information which would be useful to the attorney, to say the least, in a subsequent action on behalf of the insurance carrier against the uninsured motorist personally. On the other hand, if the uninsured motorist chose to do nothing in his own behalf, or secured other counsel, it would not appear to the Committee to be improper for the attorney to subsequently prosecute litigation against the uninsured motorist.

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.