

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2008-2**

**Where A Lawyer Represents An Insured Party Whose Claim Is Subrogated
To A Third Party Insurer, Does The Insurer Become A “Client” Of The
Insured’s Lawyer Under Alaska’s Rules Of Professional Conduct?**

Conclusion

The subrogated insurer’s right to receive proceeds from the insured plaintiff’s recovery in a lawsuit does not make the insurer a “client” of the lawyer under the ethics rules.

Background

It is not uncommon for a lawyer to represent a plaintiff who has been injured by a third party, but has had some portion of his or her losses (such as medical expenses) paid by their own insurer. In such cases, the insurer may be entitled under the insurance policy, or by law, to “subrogation” of the claim, that is, the right to either (1) step into the plaintiff’s shoes to sue the third party defendant directly as a means of recovering of its own payments to plaintiff or (2) let plaintiff bring suit against the third party and receive repayment from the proceeds of any recovery by plaintiff. The Alaska Supreme Court has recognized the right of the insurance company to take either course, at its option. In Ruggles v. Grow, 984 P.2d 509 (Alaska 1999), the Court stated:

When an insurer pays expenses on behalf of an insured it is subrogated to the insured’s claim. The insurer effectively receives an assignment of its expenditure by operation of law and contract. If the insurer does not object, the insured may include the subrogated claim in its claim against a third-party tortfeasor. Any proceeds recovered must be paid to the insurer, less pro rata costs and fees incurred by the insured in prosecuting and collecting the claim. But the subrogated claim belongs to the insurer. The insurer may pursue a direct action against the tortfeasor, discount and settle its claim, or determine that the claim should not be pursued.

Id. At 512 (emphasis added).

The question presented here is whether an attorney pursuing an insurer's subrogated claim at the request of the insured may also be said to "represent" the insurer for purposes of the Alaska Rules of Professional Conduct, at least in the absence of an express disclaimer of such representation by the insurer itself.¹

The question is significant. For example, if the insurer were automatically deemed a "client" in this context, a lawyer for the defendant would be prohibited, without the consent of the lawyer, from directly contacting the insurer to discuss settlement or other matters. ARPC 4.2. Likewise, the lawyer for the insured plaintiff would, with regard to the insurer, be subject to all of the ethical responsibilities owed to other clients, including obligations regarding fees and fee agreements (ARPC 1.5), communication (ARPC 1.4) and conflicts of interest (ARCP 1.7; ARCP 1.8; ARCP 1.9). Obviously, such questions can affect the way the underlying legal matter is handled on both sides.

Discussion

The Alaska Rules of Professional Conduct define a "client" as:

[A] person, public officer, or corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

ARPC 9.1(b) (emphasis added). This is not a circumstance in which "consultation" creates the lawyer-client relationship. Ruggles does not mandate any communication at all between the insured plaintiff's lawyer and the subrogated insurer about the third party lawsuit, either before or after it is

¹ The Court, in Ruggles, held that plaintiff was not permitted to proceed with the subrogated claim "against the insurer's wishes." Id. at 512. Accordingly, the Court found that "[w]hen [insurer] instructed [insured] not to pursue its subrogation claim, [insured] lacked authority to pursue it." Id. (emphasis added). Such an instruction by an insurer has come to be known as a "Ruggles letter," and would constitute clear proof that an attorney-client relationship is lacking. See Alaska Bar Association Ethics Op. 98-1 (plaintiff's counsel may, without violating ARPC 4.2, contact the claims representative or other agent of defendant's insurer absent "actual knowledge" that defendant's counsel also represents the insurer). A "Ruggles letter" may also impose other ethical obligations on the insured's attorney, including an obligation under ARCP 4.1 (truthfulness to third parties) and ARCP 3.4. (fairness to opposing party and counsel) not to falsely state or imply that such authority continues to exist.

filed. Indeed, as a practical matter, communications with the insurer about the case may occur late in the case, or not at all.

Nor can a lawyer be said to be “rendering professional legal services” to the insurer merely by virtue of the fact that a successful outcome in the lawsuit will benefit the insurer financially. Were this the case, any third party creditor with a lien against judgment proceeds could potentially be considered a “client.” Courts in numerous jurisdictions have refused to recognize a lawyer-client relationship between insurance companies and lawyers for the insured based upon foreseeable economic impact alone. See e.g., Continental Casualty Company v. Pullman Comley, Bradley & Reeves, 929 F.2d 103,108 (2nd Cir. 1991)(excess insurer was not “client” of law firm hired by primary insurer to represent insured in medical malpractice action and could not maintain a malpractice action against the law firm on that basis); Great American Insurance Co. v. Dover, Dixon Horne, P.L.L.C., 456 F.3d 909, 912 (8th Cir. 2006) (secondary excess liability carrier lacked standing to bring malpractice claim against insured’s counsel); Zenith Insurance Company v. Cozen O’Connor, 148 Cal. App. 4th 998, 55 Cal. Rptr. 3d 911 (Cal. App. 2007) (reinsurer was not “client” of primary insurer’s counsel, despite knowledge by all parties that reinsurer faced 100% of the liability for unsuccessful outcome of case).

The Ruggles decision itself makes no suggestion that the Court intended that the subrogated insurer would become the “client” of the insured’s attorney for ethical purposes. The Alaska Supreme Court recently rejected such arguments in a case involving analogous facts. In Alaska Native Tribal Health Consortium v. Settlement Funds Held For Or To Be Paid on Behalf of E.R., 84 P.3d 418 (Alaska 2004) the Court found that a portion of the proceeds received by an injured plaintiff in a personal injury suit were required to be paid to the Tribal Health Consortium to settle hospital liens for medical services provided by the Consortium. As in Ruggles, the Court concluded that any such recovery by the Consortium must be reduced by its pro rata share of attorneys fees expended to obtain the judgment. Id. at 431. The Court rejected an argument by the Consortium that plaintiff’s attorney, by alleging that the Consortium must bear its pro rata share of fees related to the recovery, was in essence, “claiming to be attorney for the Consortium,” thus triggering various alleged ethical violations. Id. at 435. The Court found no ethical violations, noting that the attorney had met his ethical duty by complying with Alaska Bar Association Ethics Opinion 92-3. Id. That ethics opinion deals with “the obligation of an attorney to hold funds when a dispute arises concerning the rights of third parties to client funds in the possession of attorney.” Id. (emphasis added).

The Alaska Supreme Court, in Alaska Native Tribal Health Consortium, also expressly declined to impose upon plaintiff or plaintiff's attorney any obligation, as a prerequisite to the fee-sharing obligation, to inform the Consortium of its intent to seek a fee from proceeds recovered, or even to inform the Consortium of the pendency of the lawsuit. Id. at 434. Had the Court intended for lienholders, or subrogees, to personal injury claims to be deemed the "clients" of plaintiff's lawyer for ethical purposes, this ruling would be inconsistent with ARCP 1.5, which generally requires a lawyer to execute a written fee agreement with a client "before or within a reasonable time after" commencing the representation.

While Alaska Native Tribal Health Consortium dealt with statutory hospital liens rather than contractual subrogation, there is no reason to believe that the court would not apply similar reasoning in the Ruggles context.

Based on the foregoing, we conclude that the pursuit of an insurer's subrogated claim under the authority of Ruggles v. Grow, standing alone, does not create an attorney-client relationship between a subrogated insurer and counsel for the insured.²

Approved by the Alaska Bar Association Ethics Committee on September 4, 2008.

Adopted by the Board of Governors on September 11, 2008.

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² The Committee does not mean to suggest by this opinion that an express or implied contract could not be established in an appropriate case by independent evidence of an attorney-client relationship. See Zenith, 148 Cal. App. 4th at 950 ("it is the intent and conduct of the parties that controls the question as to whether an attorney-client relationship has been created"). Moreover, it should be noted that, even in the absence of an attorney-client relationship, insured's attorney may owe ethical duties to the insurer as an interested third party. See, e.g. ARPC 1.15 (safekeeping of funds in which a third party claims an interest); Alaska Bar Association Ethics Op. 92-3 (ethical responsibility of attorney re disputed funds).