

RO-1989-31 - Use of investigator to obtain evidence against adverse party

QUESTION:

"The plaintiff in a workmen's compensation case has filed a lawsuit in which he claims permanent and total disability as a result of a back injury. After the complaint was filed, an individual who knows the plaintiff made an unsolicited call to the workmen's compensation carrier to report that the plaintiff is presently operating a grocery store and also has a piece of machinery for sale. When prospective purchasers come to look at the machine, the plaintiff engages in physical activity while showing the machine that is inconsistent with his complaint. These activities include climbing on the machine and also carrying a heavy battery to the machine and hooking the battery to the machine in order to give it power. The workmen's compensation carrier had previously assigned the defense of this case to me and after receiving this unsolicited telephone call, the carrier called me to report this information. I took the individual's name and telephone number and gave the information to an investigator who called the individual and confirmed the information. The investigator then suggested that he contact a third person who would go to the plaintiff's business and pose as a prospective buyer for the machine owned by the plaintiff and the investigator would remain in a nearby vehicle where he would film and/or photograph the plaintiff when the plaintiff showed the machine to the person posing as a prospective buyer."

ANSWER:

Disciplinary Rule 7-104(A)(1) states as follows:

"(A) During the course of his representation of a client a lawyer shall not:

- (1) 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."

We do not feel that using an investigator to obtain information directly related to an apparent fraud or misrepresentation by an opposing party, when there is no contemplation of a communication between the investigator and the claimant on the subject matter of the litigation, is impermissible. An attorney has an affirmative ethical obligation to his client to develop admissible and applicable evidence and, within ethical guidelines, to pursue evidentiary leads. Accordingly, we deem the proposed course of conduct, as outlined herein, to be permissible.

3/30/89