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A CONTROVERSIAL SETTLEMENT APPROACH: THE ALPERT LETTER

CINDY J. JACKSON

I. THE ALPERT LETTER

A HEATED CONTROVERSY¹ among lawyers and insurance underwriters specializing in aircrash litigation centers around an approach to claims settlement that was introduced by United States Aviation Underwriters, Inc. (USAU) in 1977.² Shortly after an aircrash, insurance underwriters following the "Tenerife Approach" or "Alpert Approach", as the practice is sometimes called, send letters to potential claimants offering early settlement and discouraging them from hiring lawyers to pursue their claims on a contingent fee arrangement.³ USAU has used the Tenerife Approach and Alpert Letter in every major aircrash involving its insureds since 1977.⁴ The debate over the propriety of this practice has been renewed recently as a result of USAU's use of the Tenerife Approach to handle claims resulting from the crash of a Pan American 727 aircraft after takeoff from New Orleans International Airport on July 9, 1982.⁵

According to Robert L. Alpert, Jr., the senior vice president of USAU and the author of the Alpert Letter, the Ten-

¹ The Alpert Letter has been a controversial topic among those in the aviation industry since it was first used in 1977. Wermeil, *Pan Am's Insurer Stirs Controversy By Urging Families to Avoid Suing*, Wall St. J., July 14, 1982, at 31, col. 4.

² Craft, *Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation*, 46 J. AIR L. & COM. 895 (1981).

³ Kreindler, *The Letter Should Not Be Sent*, THE BRIEF 5 (Nov. 1982).

⁴ Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983).

⁵ Wermeil, *supra* note 1.

erife Approach was formulated in an effort to reverse the then-prevalent situation in which less than fifty percent of the money paid out by the insurer after an air crash was received by victims or their families.⁶ The remaining money was consumed by court fees, defense attorneys' fees, and plaintiffs' attorneys' fees.⁷ According to Alpert, USAU determined that its clients, the airlines, gained nothing when litigation with an air crash victim or his family was extended over a long period of time.⁸ Since compensation virtually was guaranteed the victims or their families,⁹ Alpert says, USAU determined that it should attempt to settle with claimants as soon as pos-

⁶ Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983).

⁷ *Id.*

⁸ *Id.* Alpert noted that defendants in air crash litigation may harm their position severely with respect to claimants by denying liability for the accident and "creating a fiction of contingency" of recovery for the plaintiff. Although USAU did not handle the claims arising out of the crash of a Turkish Airlines DC-10 in Paris, France in 1974, Alpert conceded that the litigation arising out of that crash demonstrated the harm that could befall defendants by treating plaintiffs' claims as if recovery were contingent. *Id.* The claims arising out of the Turkish Airlines crash were escalated because the defendants, each blaming the other for the accident, resisted settlement with claimants. The result was that many of the claimants hired plaintiffs' lawyers on contingency fees and "what may have been a twenty million dollar accident grew full flower into . . . a one hundred million dollar accident." Address by Lee S. Kreindler, plaintiff's attorney, American Bar Ass'n, Annual Meeting (Aug. 10, 1981, New Orleans) (debating the propriety of the Alpert Letter with defense attorney, Randal R. Craft, Jr.) [hereinafter cited as Address by Lee S. Kreindler]. Kreindler speculated that the Tenerife Approach originated as a result of the Turkish Airlines crash. Kreindler said:

[T]he London insurance market and the American companies learned a bitter lesson. And I think they decided that they'd better keep their own houses in order and not fight each other, and work together, and stop denying liability in these major airline tragedies and rush out and get rid of the cases before they graduated into big cases . . .

Id.

⁹ Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983). Alpert observed that compensation after an air crash is guaranteed the victims or their families. The only remaining question, Alpert said, was from whom they would be compensated. As a matter of policy, the insurer determined that it would be in the best interest of the airlines, USAU's clients, to offer to compensate the victims soon after an accident because their compensation did not depend upon which defendant or defendants ultimately were found liable for the accident. The airline's readiness to pay damages to victims or their families as soon as possible after an accident, Alpert said, stemmed from the airline's responsibility to its passengers because they paid the airline for the flight. *Id.*

sible, thereby lessening the accumulation of large legal bills.¹⁰ The party defendants could later litigate among themselves the issue of ultimate liability.¹¹

USAU put these concepts to the test for the first time following the collision of a KLM 747 and a Pan American 747 on a runway at Tenerife in the Canary Islands on March 27, 1977.¹² Under the Tenerife Approach, the airline's insurer organizes a claims team that is ready to fly to the scene of an accident.¹³ There the team assists the airline and the victims or their survivors.¹⁴ The team helps the survivors identify bodies, make funeral arrangements, and secure hotel accommodations.¹⁵ It also offers to advance funds to them to meet immediate economic needs.¹⁶

The claims team also begins gathering information on which to base settlement offers.¹⁷ It obtains basic personal information about the victims by making personal contact with their survivors.¹⁸ The team then tries to determine what laws will be applicable to the potential claims and how claimants' damages will be measured under those laws.¹⁹ It

¹⁰ *Id.*

¹¹ *Id.* Alpert emphasized his position that the insurer's offer to settle with victims or their families did not constitute an admission of liability for the accident on behalf of the airline. According to Alpert, the airline retained the right to sue other defendants in actions for contribution or indemnity. *Id.*

¹² *Id.*

¹³ Kreindler, *supra* note 3, at 9. *See generally*, Craft, *supra* note 2, at 896-900 (describing the benefits of the Tenerife Approach from the perspective of a defense attorney hired by an airline's underwriter).

¹⁴ Craft, *supra* note 2, at 898.

¹⁵ Kreindler, *supra* note 3, at 9. While Craft says that the insurer's assistance is given in response to inquiries it receives from passengers and next of kin, it has been observed that USAU was not particularly concerned about the financial or personal problems of aircrash victims or their survivors before it adopted the Tenerife Approach to claims settlement. *See generally*, Address by Lee S. Kreindler, *supra* note 8 (in which Kreindler criticizes the Tenerife Approach as a self-serving attempt by USAU to reduce its claims costs).

¹⁶ Kreindler, *supra* note 3, at 9.

¹⁷ Craft, *supra* note 2, at 898.

¹⁸ *Id.*

¹⁹ *Id.* In researching the law applicable to actions arising out of an aircrash, it is likely that an insurer will consider conflict of laws questions, whether the injured party's domicile provides for prejudgment interest, whether punitive damages are recoverable, and whether any international conventions are applicable to the accident. *See* Craft, *supra* note 2, at 898; Craft, *The Letter Should Be Sent*, *The Brief* 5 (Nov. 1982)

also attempts to determine whether international conventions apply to the accident or to potential claims.²⁰

Within a few days after the crash,²¹ the underwriter sends a letter to potential claimants.²² In the "Alpert Letter", Robert L. Alpert, Jr.,²³ of USAU begins by expressing his condolences.²⁴ He then discusses the identification process and provides the telephone numbers of claims personnel for the family to contact if they have questions. Alpert offers to pay all costs of funeral arrangements and to advance funds to the families.²⁵ He also informs the potential claimants that claims personnel will be contacting them within two weeks to obtain information so that they may evaluate claims and

[hereinafter cited as Craft, *The Letter Should Be Sent*]. See generally, *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 633, 637-41 (7th Cir.1981) (holding that under Illinois law, prejudgment interest is not a separate element of damages in a wrongful death case); *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594 (7th Cir. 1981) (discussing various state statutes regarding the allowance of punitive damages in wrongful death actions); Dubuc and Doctor, *Legislative Developments Affecting the Aviation Industry 1981-82*, 48 J. Air L. & Com. 263, 268-275 (1983) (discussing problems air carriers face with respect to the Warsaw Convention limitations on liability); Note, *Conflict of Laws*, 47 J. Air Law & Com. 339 (1982) (discussing conflict of laws issues arising out of air-crash cases).

²⁰ Craft, *supra* note 2, at 898. The Warsaw Convention limits recovery in wrongful death actions in international flights to \$75,000 per passenger, which may be extended only by proof of wilful and wanton misconduct on the part of the airlines. See generally, Haskell, *The Warsaw System And The U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483 (1973).

²¹ Kreindler, *supra* note 3, at 9. In the New Orleans crash, the letter was mailed four days after the aircrash. *Id.*

²² In his article, *The Letter Should Be Sent*, Randal R. Craft, Jr. says that the letter is mailed because of a pre-existing relationship between the airline and its passengers. Craft writes:

The letter describing the settlement approach is unquestionably based on the airline's duties and obligations to passengers and other injured parties. The accident cemented an already existing relationship between the airline and any injured parties on the ground. This should be distinguished from a situation in which a plaintiff attorney with no previous relationship with a claimant contacts him after an accident and tries to create . . . a new relationship from which the attorney will profit.

Craft, *The Letter Should Be Sent*, *supra* note 19, at 6.

²³ Alpert, the senior vice president and director of claims of USAU, is also an attorney. The letters are written on USAU's letterhead and are signed by Alpert in his position as senior vice president and director of claims. *Id.* at 8, n.3.

²⁴ Letter from Robert L. Alpert, Jr. of USAU to potential claimants in the July 9, 1982, Pan American 727 crash in Kenner, Louisiana (July 14, 1982), reprinted in *The Letter: Should It Be Sent?* THE BRIEF 5, 7 (Nov. 1982) [hereinafter cited as *Alpert Letter*].

²⁵ *Id.*

make settlement offers.²⁶

While there are undoubtedly some who would criticize the letter if it contained no more than the remarks described above, these portions of the letter have received little attention in the debate over the letter's propriety. The last four paragraphs of the letter, on the other hand, have sparked a great deal of controversy in the legal and insurance fields.²⁷ The letter states:

Money damages can never compensate for the loss of a loved one but this is the medium recognized by the law for compensating victims and the families of victims in air disasters It is our intention to see that you receive fair compensation for the loss which you have sustained. It is also our hope that you will retain as much of the compensation as is properly due you without unnecessary diversion of large amounts to legal expenses.²⁸

Alpert then discourages claimants from hiring lawyers to represent them on a contingency fee arrangement. Alpert writes:

You may find yourselves under pressure to sign a contingent fee retainer with an attorney whereby his fee is a percentage of the final award. The rationale for such a percentage fee is that the lawyer risks getting no fee if there is no recovery. There is no such contingency in this case. There is also nothing to be gained by a precipitous lawsuit. We do suggest that it would be in your best interest to evaluate the offers which will be made to you and obtain the help of your attorney based upon a fee for the work involved rather than a percentage of the settlement award.²⁹

Alpert also attempts to dissuade claimants from filing suit immediately. The letter continues:

Immediate legal action is unnecessary to avoid permitting applicable time periods (i.e., statutes of limitations, etc.) to ex-

²⁶ *Id.*

²⁷ The letter has been the subject of at least two public debates, was discussed at length on the public television show, "Nightline", and has been discussed in numerous articles. See generally, *The Letter: Should It Be Sent?* THE BRIEF 5 (Nov. 1982) (discussing the pros and cons of the Alpert Letter and the Tenerife Approach).

²⁸ Alpert Letter, *supra* note 24.

²⁹ *Id.*

pire. Should discussions not ultimately result in an amicable resolution of any claims that might exist, we provide a reasonable extension of any applicable time limitation based upon the facts and circumstances of the individual case in order that you will have ample time to take any path you choose as to counsel you retain, the basis upon which he is paid or whether you wish to institute a lawsuit. Please do not be rushed into limiting your alternatives or committing yourselves needlessly to an inordinate legal expense.³⁰

A few weeks after the letter is sent, USAU mails a second letter to potential claimants.³¹ This letter includes a copy of an article written by United States District Judge John F. Grady.³² In the article, Judge Grady criticizes the contingency fee system and argues that contingency fees often bear no relation to the value of services performed.³³ Judge Grady asserts that contingency fees are unconscionable when awards are high because there often is no real contingency in personal injury cases.³⁴

Once a claimant retains counsel, USAU and their defense counsel direct all further communication to the claimant's attorney³⁵ and obtain from the attorney the information necessary to formulate a settlement offer.³⁶ When it has evaluated

³⁰ *Id.*

³¹ Kreindler, *supra* note 3, at 11.

³² Grady, *Some Ethical Questions About Percentage Fees*, LITIGATION J. 20 (Summer 1976). Grady is a federal district judge for the Northern District of Illinois.

³³ *Id.* at 23.

³⁴ *Id.* at 24.

³⁵ Craft, *supra* note 2, at 901. Disciplinary Rule 7-104(A) of the Code of Professional Responsibility provides that 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.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (A)(1)(1979).

³⁶ Craft, *supra* note 2 at 901. Six days after the 1979 crash of an American Airlines DC-10 at Chicago's O'Hare International Airport, Mr. Alpert wrote to two lawyers representing the family of one of the victims. Alpert wrote:

In our opinion the precipitous commencement of this lawsuit is unfortunate. Frequently such lawsuits are filed only to highlight the identity in the media of the attorneys of record for the plaintiff and do not take into consideration the orderly and reasonable presentation of damage infor-

the damages information,³⁷ USAU makes a settlement offer.³⁸ Though the offer purports to be final,³⁹ USAU often makes higher settlement offers when it is faced with the prospect of trial.⁴⁰

II. THE CONTROVERSY

The debate over the Tenerife approach began six years ago when it was introduced by USAU after the crash at Tenerife.⁴¹ Personal injury plaintiffs' attorneys generally complain that the letter is a self-serving attempt by underwriters to re-

mation to the potentially responsible parties in anticipation of an amicable settlement. Such a settlement can be accomplished without an unnecessary diversion of large amounts to contingent legal fees and litigation expenses.

Letter from Robert L. Alpert, Jr. of USAU to lawyers representing claimants in the 1979 American Airlines DC-10 crash in Chicago (May 31, 1979), *reprinted in* Kreindler, *supra* note 3, at 38.

³⁷ *Letter Should Be Sent*, *supra* note 19, at 5. Craft says that the initial settlement offers are based on assessments of the amount the claimant would likely be awarded at the trial of damage issues alone, applying the law of the injured party's domicile. *Id.* Craft, *supra* note 2, at 899. According to Craft, the offers are not discounted because they are extended soon after the accident, nor are they affected by the fact that the injured party is represented by an attorney working for a contingent fee. Craft, *The Letter Should Be Sent*, *supra* note 19, at 5.

³⁸ Craft, *supra* note 2, at 899. Lee Kreindler contends that the underwriter determines the amount of the initial settlement by assuming a "real value" of the case by subtracting a substantial amount for the plaintiff's attorneys fees, an additional amount for defense costs, and another small amount. The result is that the amount of the offer is approximately sixty five percent of the "real value" of the case. Address by Lee S. Kreindler, *supra* note 8.

³⁹ *Id.* In an attempt to settle claims arising out of the DC-10 crash at Chicago's O'Hare International Airport on May 25, 1979, Alpert wrote to plaintiffs' attorneys informing them that the underwriter's offer was final. Alpert wrote:

[W]e do not intend to make an increase in [the] offer now or in the future. The case will simply have to be tried to determine whose evaluation was more accurate Recovery will be sought against you and your client(s) for any and all cost, incurred in responding to this unnecessary liability 'fishing expedition'. . . .

Letter from Robert L. Alpert, Jr. of USAU to lawyers representing claimants in the 1979 American Airlines DC-10 crash in Chicago (May 31, 1979), *reprinted in* Kreindler, *supra* note 3, at 38.

⁴⁰ *Id.* at 11. Kreindler claims that in one case he handled in connection with the DC-10 crash in Chicago in 1979, the underwriter's initial offer was \$800,000. The underwriter paid \$1,750,000 as trial was about to begin. Kreindler does not mention how much of the final award was paid to the plaintiff's attorney as a contingency fee. *Id.*

⁴¹ Wermeil, *supra* note 1.

duce their claims costs by paying claimants less and reducing the legal fees of both plaintiff and defense attorneys.⁴² Plaintiffs' attorneys say that the letter exploits families at a time when they are vulnerable and induces them to settle with the airline for less money than they might obtain otherwise.⁴³ It has also been argued that although underwriters using the Tenerife Approach purport to strive for an early settlement,⁴⁴ their actual intent is to delay settlement in order to earn interest on their money for as long as possible.⁴⁵ Under this theory, USAU places itself in a no-lose situation in which it makes extremely low initial settlement offers as a sham, expecting that the offers will not be accepted.⁴⁶ If the offer is not accepted, USAU retains the offered sum, earning interest on it until the claim is resolved. If the low initial offer is accepted, on the other hand, USAU is benefitted by obtaining an extremely advantageous settlement of the claim.⁴⁷

Underwriters and defense attorneys, on the other hand, say that the letter leads to reasonable settlement, provides for early disbursement of money to claimants, and avoids excessive legal fees.⁴⁸ They contend that under the Tenerife Approach, claimants need not wait for reasonable compensation, and compensation need not be diminished significantly by contingent fees.⁴⁹ In addition, defense attorneys argue that the Tenerife Approach is designed in such a way that, even if claimants later might receive higher awards

⁴² Kreindler, *supra* note 3, at 9. Kreindler says that the Alpert Approach is "anti-lawyer and tends to drive a wedge between claimants and the experienced lawyer Moreover, in its aggressive approach to grief-stricken families within hours or days of utter human tragedy, it is heartless and inhumane. It gives both lawyers and insurers a bad name." *Id.* at 38.

⁴³ Wermeil, *supra* note 1.

⁴⁴ Craft, *supra* note 2, at 897. Wermeil, *supra* note 1.

⁴⁵ Kreindler, *Settlement*, N.Y.L.J., April 17, 1981, at 1, col. 1. Kreindler calls the Tenerife Approach a "no settlement approach" reasoning that in major aircrash litigation, where passenger claims may amount to hundreds of millions of dollars, the underwriter has a large incentive to hold onto its money as long as possible. Kreindler notes that even though some jurisdictions allow prejudgment interest to run on a damages award from the date suit is filed, that interest rate is far lower than the market rate. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Craft, *supra* note 2, at 897.

⁴⁹ *Id.*

or offers, they will probably net more by settling early.⁵⁰

Some plaintiffs' and defense attorneys concede that the Tenerife Approach has produced both positive and negative results.⁵¹ In his article, *The Letter Should Be Sent*,⁵² Randal R. Craft, Jr. concedes that some people may be offended by the Alpert Letter.⁵³ Lee Kreindler, a plaintiffs' attorney who vigorously opposes the letter, concedes that the letter has benefited the public because contingency fees in major airline cases have dropped to an average of 17.5 percent compared to the 33.33 percent that prevails in most negligence cases.⁵⁴ Kreindler further concedes that the letter has led to the development of a variety of fee arrangements between plaintiffs and their attorneys.⁵⁵ For example, in some cases plaintiffs' attorneys fees now are based on the difference between the amount the plaintiff was offered by the insurer before the plaintiff retained counsel and the amount the plaintiff ultimately received.⁵⁶ The Tenerife Approach also has reduced

⁵⁰ *Id.*

⁵¹ See generally, Kreindler, *supra* note 3, at 38 (discussing the positive and negative effects of the letter); Craft, *The Letter Should Be Sent*, *supra* note 19, at 6 (in which Craft, a defense attorney, concedes that the letter may be offensive to some people).

⁵² Craft, *The Letter Should Be Sent*, *supra* note 19.

⁵³ *Id.* at 6.

⁵⁴ Kreindler, *supra* note 3, at 38.

⁵⁵ *Id.* Kreindler writes:

[I]n some cases the plaintiff attorney's fee is based on the excess over what the defendant offers. In a situation where the claimant has been offered \$800,000 he may be reluctant to retain a lawyer for litigation without something close to a guarantee that he will at least net \$800,000. This has led to a variety of fee arrangements.

Id.

⁵⁶ Lee Kreindler concedes that the Alpert Approach has resulted in a variety of fee structures and refers to the three payment options available to his clients as an example. First, the client may pay a contingency fee calculated as a percentage of the amount ultimately received by the plaintiff at trial or by settlement. These fees are calculated on a sliding scale so that the percent charged declines as the firm is retained by additional clients from the same accident. For example, if the firm is representing only one client, he is charged a 25% contingency fee. If it represents two clients, they are each charged 24%. If the firm is retained by nine clients or more, each is charged 17.5%, which is the firm's lowest rate. Under the second option, the firm charges a client five percent of the defendant's offer as a fee for evaluating the value of the client's case. Thus, if the defendant offered \$500,000 and the firm's evaluation determined that the client's claim was worth no more than \$500,000, the firm would charge the client \$25,000 for the evaluation, and, presumably, would advise the client to accept the settlement offer. Using the same example, the third option would arise when

fees paid to defense lawyers by shifting responsibility for much of the negotiations and settlement work from defense attorneys to insurance claims personnel.⁵⁷

Because of the large sums of money involved in air crash litigation, plaintiffs' and defense attorneys as well as insurance underwriters have a financial stake in the debate over the Alpert Letter.⁵⁸ For this reason the debate over the letter is a heated one and is likely to continue.⁵⁹ USAU has not indicated that it intends to alter or abandon the approach. In fact, Robert L. Alpert, Jr. has stated that USAU plans to continue developing the Tenerife Approach.⁶⁰

Those opposing the Tenerife Approach have urged the bar, the courts, and state legislatures to prohibit the letter's use.⁶¹ To date, however, these bodies have not censured the letter or directed that it not be sent.⁶² Interestingly, the California

the firm determined that the case was worth more than \$500,000. In that event, Kreindler would charge the client five percent of the original offer (\$25,000) plus twenty-five percent of the excess over the original offer ultimately obtained with the help of counsel. According to Kreindler most of his clients choose the first option. Address by Lee S. Kreindler, *supra* note 8.

⁵⁷ Kreindler, *supra* note 3, at 38.

⁵⁸ Kreindler, *Chicago Post-Mortem—Shameful Behavior*, N.Y.L.J. June 15, 1979, at 1, col. 1.

⁵⁹ Wermeil, *supra* note 1.

⁶⁰ Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983). Alpert indicated that USAU intends to use in some future crashes a modified version of the letter sent out following the 1982 Pan American Airlines crash in Kenner, Louisiana. Alpert also suggested that USAU's development of the Tenerife Approach was not limited to modification of the letter. *Id.*

⁶¹ Kreindler, *supra* note 3, at 9.

⁶² Craft, *supra* note 2, at 899. In litigation arising out of the 1979 American Airlines DC-10 crash in Chicago, Ill., the Judicial Panel On Multidistrict Litigation denied a plaintiff's motion to issue notice of the pendency of proceedings before the Panel to the families of all victims regardless of whether or not they had brought suit. The Panel noted without comment plaintiff's contention that the proposed notice was crucial because USAU had communicated directly with the families of victims in an attempt to dissuade them from initiating litigation. The Panel held that regardless of the merits of giving such notice to non-litigants, the Panel lacked the power to require it. *In re Air Crash Disaster Near Chicago, Ill.*, 476 F. Supp. 445, 450 n.7 (J.P.M.D.L. 1979).

The propriety of the Alpert Letter also was put in issue in litigation arising out of the 1982 Pan American 727 crash in Kenner, Louisiana. There, Judge Duplantier of the United States District Court for the Eastern District of Louisiana entered a contempt judgment against Robert L. Alpert, Jr. for allegedly violating a court order prohibiting USAU from contacting claimants represented by counsel. Judge Duplantier later set aside the contempt order. According to Alpert, an independent adjusting company in

Bar Association cleared the original Alpert Letter before it was mailed following the Tenerife disaster.⁶³

III. THE CODE PROVISIONS

Some critics of the Alpert Letter contend that its use is unethical.⁶⁴ This criticism is based upon a disciplinary rule of the American Bar Association (ABA) Code of Professional Responsibility⁶⁵ that provides that during the course of representation of a client, a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."⁶⁶ The ABA's newly adopted⁶⁷ "Model

New Orleans rather than USAU sent the letter made the basis of the contempt order. Alpert said Judge Duplantier vacated the contempt order because of a 1976 Fifth Circuit Court of Appeals case, *Lewis v. S.S. Baune*, 534 F.2d 1115 (5th Cir. 1976), which held that a federal court judge could not enjoin a party defendant from directly contacting victims or heirs for the purpose of settling the case, even if the victims or heirs were represented by counsel. Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983). In *Lewis*, the court reasoned that since any settlement gained by overbearing conduct, duress, coercion, fraud or overreaching could be set aside, the equitable remedy of injunction was not justified. 534 F.2d at 1123. It is important to note, however, that *Lewis* was an admiralty case involving injuries to seamen. The court observed that since a seaman is a ward of the admiralty, a settlement agreement executed by a seaman would be subject to careful scrutiny by the courts. *Id.* See also, *Cook v. Moran Atlantic Towing Corp.*, 76 F.R.D. 481 (S.D.N.Y. 1977) (holding that a claimant has the right to discharge his attorneys prior to settlement of the case).

⁶³ THE FUTURE OF AVIATION TORT LAW (1978) (transcript of Proceedings of the Association of Trial Lawyers of America), Monaco (Feb. 8, 1978)).

⁶⁴ Kreindler, *supra* note 3, at 9-11; Wermeil, *supra* note 1. In *Bode v. U. S. Aviation Underwriters, Inc.*, No. 82-3121 H (E.D. La. filed July 29, 1982) two families whose homes were destroyed by the Pan American Airlines crash in Kenner, Louisiana in July, 1982, filed suit against U.S. Aviation Underwriters, Inc. asserting claims for damages resulting from use of the Alpert Letter. The petition alleged that use of the letter constituted an invasion of privacy and an interference with the attorney-client relationship. In particular, the petition alleged that by sending the letter, Alpert rendered unethical legal advice. *Id.*

⁶⁵ The Code of Professional Responsibility was adopted by the House of Delegates of the ABA on August 12, 1969. COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOC. INFORMAL ETHICS OPINIONS 1 (1975).

⁶⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(2) (1979). Prior to the ABA's adoption of the Model Code of Professional Responsibility in 1969, the Canons of Professional Ethics were in effect. Communications between an attorney and an unrepresented adverse party were governed by Canon 9 which provided in part: "It is incumbent upon the lawyer most particularly to avoid everything that may

Rules of Professional Conduct"⁶⁸ contain substantially equivalent language in the comment⁶⁹ to Rule 4.3.⁷⁰ The comment provides, "[d]uring the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."⁷¹

What constitutes improper "advice" within the meaning of these provisions is unclear.⁷² It is clear, however, that the disciplinary rule is not intended as an absolute ban on all direct communication between an attorney and an unrepresented adverse party.⁷³ Ethics committee opinions interpreting the rule indicate that there are two recognizable limitations on an attorney's communication with an unrepresented adverse party. The attorney must avoid everything that may tend to

tend to mislead a party not represented by counsel and he should not undertake to advise him as to the law." CANONS OF PROFESSIONAL ETHICS, Canon 9 (1908), *reprinted in* AMERICAN BAR ASSOCIATION, OPINIONS ON PROFESSIONAL ETHICS 43 (1967).

⁶⁷ The members of the ABA adopted the Model Rules of Professional Conduct at their annual meeting in August, 1983, in Atlanta, Georgia.

⁶⁸ MODEL RULES OF PROFESSIONAL CONDUCT, *reprinted in* 52 U.S.L.W. 1 (Aug. 16, 1983).

⁶⁹ The preamble to the new Model Rules provides that the comments do not add obligations to the Rules but provide guidelines for practicing in compliance with the Rules. The preamble also states that use of the term "should" in a rule indicates that the rule is permissive and that the lawyer has professional discretion. The preamble further states that no disciplinary action should be taken when a lawyer chooses not to act or acts within the bounds of his or her discretion. MODEL RULES OF PROFESSIONAL CONDUCT, Preamble, *reprinted in* 52 U.S.L.W. 1 (Aug. 16, 1983).

⁷⁰ *Id.* Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id., Rule 4.3.

⁷¹ *Id.*, comment to Rule 4.3.

⁷² AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 340 (1979).

⁷³ *See* ABA Comm. on Professional Ethics, Informal Op. 908 (1966) (an attorney may interview a potentially adverse party and take his statement); ABA Comm. on Professional Ethics and Grievances, Informal Op. 670 (1963) (an attorney may inquire about the policy limits of a prospective defendant's liability insurance); ABA Comm. on Professional Ethics, Formal Op. 102 (1933) (an attorney representing an employer may draft settlement papers for workmen's compensation claims when the employee is not represented by counsel).

mislead an adverse party unrepresented by counsel,⁷⁴ and should not undertake to advise him "as to the law."⁷⁵

In Informal Opinion 908,⁷⁶ the ABA Committee on Professional Ethics and Grievances concluded that it was not unethical for an attorney representing a potential plaintiff to interview a potential defendant and take his statement.⁷⁷ The committee warned, however, that the attorney should advise the potential defendant that he was conducting an interview and was attempting to take the statement in his position as counsel for the potential plaintiff.⁷⁸ The committee based its conclusion on an earlier ABA opinion⁷⁹ that stated that it was not improper for a plaintiff's attorney who had not yet filed suit to inquire about the policy limits of a prospective defendant's liability insurance, as long as the lawyer did nothing that would tend to mislead the prospective defendant.⁸⁰

In ABA Formal Opinion 102,⁸¹ the ABA ethics committee concluded that it was not improper for an attorney representing an employer to draft settlement papers for workman's compensation settlements when the employee was not represented by counsel.⁸² The committee reasoned that many state statutes provided that compensation for an employee's injury be made in a lump settlement on the joint petition of the employer and employee and approved by a court of competent jurisdiction.⁸³ The committee concluded that when an

⁷⁴ M. PIRSIG, PROFESSIONAL RESPONSIBILITY 285 (1970); ABA Comm. on Professional Ethics, Informal Op. 670 (1963). *See also*, Lyons v. Paul, 321 S.W.2d 944 (Tex. Civ. App. - Waco 1959, writ ref'd n.r.e.) (holding that a lawyer who files suit and is contacted in any manner by one of the parties who has been sued, owes a duty to the party to advise him immediately that he is on the other side of the litigation and cannot render any service whatsoever to the opposing party making inquiry of him).

⁷⁵ M. PIRSIG, PROFESSIONAL RESPONSIBILITY 285 (1970); ABA Comm. on Professional Ethics, Formal Op. 102 (1933).

⁷⁶ ABA Comm. on Professional Ethics, Informal Op. 908 (1966).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ ABA Comm. on Professional Ethics, Informal Op. 680 (1963).

⁸⁰ *Id.*

⁸¹ ABA Comm. on Professional Ethics, Formal Op. 102 (1933).

⁸² *Id.*

⁸³ *Id.*

employee was not represented by counsel, the employer's attorney properly could prepare the settlement papers as long as the attorney refrained from advising the employee about the law and avoided misleading the employee about the law or facts.⁸⁴ Additionally, the attorney was required to advise the court that he prepared the settlement papers and that the employee was not represented by counsel.⁸⁵

The parameters of the Code's prohibition against "misleading" an adverse party unrepresented by counsel or giving him "advice as to the law" are difficult to discern. "Misleading" is a broad term and appears to include any situation in which an attorney, by representation or omission, induces or tends to induce an unrepresented adverse party to take a position that is adverse to the party's interests.⁸⁶ For example, in Informal Opinion 734,⁸⁷ the ABA Committee on Professional Ethics and Grievances said that it was improper for an attorney to send collection letters that described in legal terms collections suits that may have been filed and threatened to bring additional proceedings when such suits and proceedings had no direct connection with the action to collect the debts.⁸⁸ The committee decided that the collection letters were meant to coerce and frighten the alleged debtor and were improper.⁸⁹ Similarly, in Formal Opinion 178,⁹⁰ the ABA committee decided that it was improper for a creditor's attorney to send papers to debtors which, unless carefully read, created the false impression that suit had been instituted against the debtor, when, in fact, the papers constituted a demand for payment.⁹¹ The Committee found the

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See generally, ABA Comm. on Professional Ethics, Informal Op. 734 (1964) (deciding that an attorney representing a client in an action to collect a debt could not threaten additional suits that were not connected directly to the action in an effort to coerce or frighten the party into paying the debt); ABA Comm. on Professional Ethics, Formal Op. 178 (1938) (deciding that a creditor's attorney could not send papers to debtors that created the false impression that suit had been filed).

⁸⁷ ABA Comm. on Professional Ethics, Informal Op. 734 (1964).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ ABA Comm. on Professional Ethics, Formal Op. 178 (1938).

⁹¹ *Id.*

papers "palpably misleading" and improper.⁹²

An approximate definition of the term "advice as to the law" can be formulated by analyzing various ethics committee opinions that discuss improper advice.⁹³ These opinions indicate that the term "advice as to the law" encompasses any statement regarding a party's legal rights or the legal consequences of his acts or omissions.⁹⁴ The New York Bar Association ethics committee, for example, decided that it was improper for an attorney representing a personal injury plaintiff to send a copy of a letter to an unrepresented potential defendant advising him that failure to settle within the defendant's insurance policy limits would be considered bad faith and would expose the defendant to judgment in excess of his policy limits.⁹⁵ The ethics committee reasoned that such a letter rendered legal advice to the potential defendant in violation of DR7-104(A)(2).⁹⁶ In a similar opinion,⁹⁷ the ABA Committee on Professional Ethics and Grievances decided that a lawyer may not write to a debtor unrepresented by counsel to tell him that a judgment against him will injure his credit or reflect on his moral standing.⁹⁸

⁹² *Id.*

⁹³ N.Y. St. B. Ass'n Comm. on Professional Ethics, Opinion 358 (1974), *reprinted in* 46 N.Y. St. B.J. 625 (1974); ABA Comm. on Professional Ethics, Informal Op. 1034 (1968); ABA Comm. on Professional Ethics, Formal Op. 58 (1931).

⁹⁴ *See generally* N.Y. St. B. Ass'n Comm. on Professional Ethics, Opinion 358 (1974), *reprinted in* 46 N.Y. St. B.J. 625 (1974) (deciding that it was improper for a plaintiff's attorney to advise an unrepresented defendant that failure to settle within the defendant's insurance policy limits would be considered bad faith and would expose him to judgment in excess of his policy limits); ABA Comm. on Professional Ethics Informal Op. 303 (unpublished), *reprinted in* AMERICAN BAR ASSOCIATION, OPINIONS ON PROFESSIONAL ETHICS 45 (1967) (deciding that a creditor's lawyer could not tell an unrepresented debtor that a judgment against him would injure his credit or reflect on his moral standing); ABA Comm. on Professional Ethics, Informal Op. 1034 (1968) (stating that a plaintiff's lawyer could not advise an unrepresented defendant that if his insurance company refused to settle the case when the amount sued for exceeded the amount of the defendant's coverage, a conflict of interest would exist between the defendant and his insurance company).

⁹⁵ N.Y. St. B. Ass'n Comm. on Professional Ethics, Opinion 358 (1974), *reprinted in* 46 N.Y. St. B.J. 625 (1974).

⁹⁶ *Id.*

⁹⁷ ABA Comm. on Professional Ethics, Informal Op. 303 (unpublished) *reprinted in* AMERICAN BAR ASSOCIATION, OPINIONS ON PROFESSIONAL ETHICS 45 (1967).

⁹⁸ *Id.*

In Informal Opinion 1034,⁹⁹ the ABA ethics committee considered a letter sent by a plaintiff's attorney to an insured potential defendant prior to the institution of suit. The letter informed the potential defendant, who was unrepresented by counsel, that suit would be filed and offered to settle with him for the lesser of his insurance coverage or an amount stated in the letter.¹⁰⁰ The letter warned the insured that if the amount of his coverage were less than the amount sued for and the insurance company subsequently refused to accept the offer, a conflict of interest would then exist between the defendant and his insurance company.¹⁰¹ The committee concluded that this letter violated the disciplinary rule because it attempted to advise an unrepresented defendant as to the law.¹⁰²

In Formal Opinion 58,¹⁰³ the ABA ethics committee concluded that it would be unethical for a lawyer, consulted by a client who wished to procure a divorce, to confer with the unrepresented spouse in an attempt to persuade her to agree to a divorce.¹⁰⁴ Reasoning that such a situation might lead the attorney to give advice to the spouse,¹⁰⁵ the committee concluded that the attorney should limit his communication to a statement of the proposed action and a recommendation

⁹⁹ ABA Comm. on Professional Ethics, Informal Op. 1034 (1968).

¹⁰⁰ *Id.*

¹⁰¹ The letter stated:

You undoubtedly bought insurance not only for your own financial protection, but also for the humane purpose of adequately compensating those to whom you might become legally liable for injuries sustained. The law does not permit — to sue your liability insurer directly, but upon a final judgment against you awarding money damages to — your insurer is then compelled to pay the award up to the amount of your insurance coverage. We have no way of finding out the amount of your insurance coverage. However, if the award exceeds the limits of your coverage, then under the law, you are personally liable for the excess out of your own pocket. — does not want this to happen to you. It is the object of this letter to set your mind at ease and assure you that it need not happen.

Id.

¹⁰² *Id.*

¹⁰³ ABA Comm. on Professional Ethics, Formal Op. 58 (1931).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

that the spouse seek independent counsel.¹⁰⁶

In Informal Opinion 1140,¹⁰⁷ the ABA ethics committee considered whether it would be improper for the attorney representing the plaintiff in a domestic relations case to obtain a waiver of certain rights from the defendant who was unrepresented by counsel.¹⁰⁸ The waiver form in question waived the issuance of and service of summons, the right to contest the jurisdiction or venue of the court, and notice to take depositions.¹⁰⁹ The committee quoted from its Formal Opinion 58¹¹⁰ in which it decided that in a similar situation "[t]he proper procedure [was] to limit the communication as nearly as possible to a statement of the proposed action, and a recommendation that the adverse party should consult independent counsel."¹¹¹ The committee concluded that if such a waiver were obtained from an unrepresented defendant it would be a violation of proper ethical conduct.¹¹²

The ABA Committee on Professional Ethics and Grievances reaffirmed this position in Informal Opinion 1255¹¹³ in 1972. There, it was called upon to decide whether it would be improper for an attorney to send a copy of a form of "Appearance and Responsive Pleading of Respondent" prescribed by a state supreme court to an unrepresented defendant in a "no fault" divorce action.¹¹⁴ The committee decided that under these circumstances the attorney would be improperly advising both parties within DR7-

¹⁰⁶ *Id.*

¹⁰⁷ ABA Comm. on Professional Ethics and Professional Responsibility, Informal Op. 1140 (1970).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* The waiver form further provided that the case be submitted to the court during its term or in vacation and without further notice to the defendant. The form also provided that depositions could be taken at any time, without notice, and without formality. *Id.*

¹¹⁰ ABA Comm. on Professional Ethics, Formal Op. 58 (1931).

¹¹¹ *Id.*

¹¹² ABA Comm. on Professional Ethics and Professional Responsibility, Informal Op. 1140 (1970).

¹¹³ ABA Comm. on Professional Ethics and Professional Responsibility, Informal Op. 1255 (1972).

¹¹⁴ *Id.*

104(A)(2)'s¹¹⁵ prohibition against representing both parties when there was a reasonable possibility of conflict of interests.¹¹⁶

IV. IS THE LETTER ETHICAL?

It is clear that an attorney, during the course of representation of his client, may communicate to a limited extent with a potentially adverse party who is unrepresented by counsel.¹¹⁷ Thus, an underwriter, who is also an attorney, does not violate the Code by the mere act of mailing a letter to a victim or the family of a victim of an aircrash. Nor does he violate the Code by advising the victim to secure counsel.¹¹⁸ As previously discussed, an attorney does not violate the Code by communicating with an unrepresented adverse party if he avoids everything that may tend to mislead the party, and he does not undertake to advise him as to the law.¹¹⁹ The question, then, is whether an underwriter tends to mislead an unrepresented potentially adverse party or undertakes to advise him as to the law when he sends the party a letter explaining the rationale for contingency fees, saying that no contingency exists in the case and stating that there is nothing to be gained by a precipitous lawsuit.¹²⁰ The Alpert Letter states:

You may find yourself under pressure to sign a contingent fee retainer with an attorney whereby his fee is the percentage of the final award. The rationale for such a percentage fee is that the lawyer risks getting no fee if there is no recovery. There is no such contingency in this case. There is nothing to be gained by a precipitous lawsuit. We do suggest that it would be in your best interest to evaluate the offers which will

¹¹⁵ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(2) (1979).

¹¹⁶ ABA Comm. on Professional Ethics and Professional Responsibility, Informal Op. 1255 (1972).

¹¹⁷ ABA Comm. on Professional Ethics, Informal Op. 908 (1966); ABA Comm. on Professional Ethics, Informal Op. 670 (1963); ABA Comm. on Professional Ethics, Formal Op. 102 (1933). *See supra* note 73 and accompanying text (discussing the extent to which an attorney ethically may communicate with an unrepresented adverse party).

¹¹⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-104(A)(2) (1979).

¹¹⁹ M. PIRSIC, PROFESSIONAL RESPONSIBILITY 285 (1970). *See supra* notes 74-75 and accompanying text.

¹²⁰ *Alpert Letter*, *supra* note 24.

be made to you and obtain the help of your attorney based upon a fee for the work involved rather than a percentage of the settlement award.¹²¹

The statement, "[t]here is no such contingency in this case," may mislead the letter's recipient if he construed it to mean that "there is no contingency as to the amount of recovery."¹²² The amount of recovery in a given case depends upon many variables including the nature and extent of the loss suffered, conflicts of laws questions, the availability of prejudgment interest, and the applicability of international conventions.¹²³ A claimant could be misled to his detriment if he decided to forego retaining counsel in the mistaken belief that there was no possibility of increasing the amount of his recovery. While the possibility of this interpretation and result probably was not anticipated or intended by the insurer,¹²⁴ the Code prohibition against misleading an adverse party is objective and may be violated when a lawyer makes a statement which merely "tends to mislead" an adverse

• ¹²¹ *Id.* The letter continues:

Immediate legal action is unnecessary to avoid permitting applicable time periods (i.e., statutes of limitations, etc.) to expire. Should discussion not ultimately result in an amicable resolution of any claims that might exist, we provide a reasonable extension of any applicable time limitation based upon the facts and circumstances of the individual case in order that you will have ample time to take any path you choose as to counsel you retain, the basis upon which he is paid or whether you wish to institute a lawsuit. Please do not be rushed into limiting your alternatives or committing yourselves needlessly to an inordinate legal expense.

Id.

¹²² Lee Kreindler apparently adheres to this construction of the statement. Kreindler argues that the statement gives erroneous legal advice because claims may exist for punitive damages in air crash cases. Kreindler, *Chicago Post-Mortem—Shameful Behavior*, N.Y.L.J., June 15, 1979, at p.1, col. 1.

¹²³ See *supra*, notes 19-20 and accompanying text.

¹²⁴ See Craft, *The Letter Should Be Sent*, *supra* note 19, at 6. Craft implies that the insurer's intent in making this statement is to "draw attention to the fact that recovery is not contingent in that [upon] receipt of necessary damage information a settlement offer will be promptly made." *Id.* Robert L. Alpert, Jr. suggested that the statement was intended to inform claimants that "recovery [was] guaranteed" because the insurer was prepared to pay compensatory damages on behalf of the airlines regardless of who was found ultimately to be liable for the accident. Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims for USAU (Oct. 6, 1983). See *supra* notes 9-10 and accompanying text.

party who is unrepresented by counsel.¹²⁵

Even if the reader understands the statement to convey its intended meaning, that recovery itself is not contingent, the statement may be misleading when it is made before the airline has stipulated liability for compensatory damages. When the letter was mailed after the Chicago DC-10 crash in 1979, American Airlines, the underwriter's insured, had not admitted its liability for compensatory damages.¹²⁶ Since liability was still in issue, the letter's statement that there was no contingency as to recovery was erroneous.¹²⁷

The next question is whether the letter's statement renders "advice as to the law" within the Code's prohibition.¹²⁸ As previously discussed, the Code forbids rendering advice to an unrepresented adverse party regarding his legal rights or the legal consequences of his acts or omissions.¹²⁹ While the statement says nothing about the consequences of the readers' acts or omissions, it may be argued that it informs them of their legal right to compensation. On the other hand, it may also be argued that the statement is a promise to pay.¹³⁰ If that is the intended meaning and the meaning conveyed to the reader, the statement does not violate the Code.

¹²⁵ ABA Comm. on Professional Ethics, Informal Op. 734 (1964); ABA Comm. on Professional Ethics, Formal Op. (1938). See *supra* notes 86-92 and accompanying text.

¹²⁶ Kreindler, *Chicago Post-Mortem—Shameful Behavior*, N.Y.L.J. June 15, 1979 at p. 1, col. 1.

¹²⁷ See Kreindler, *supra* note 3, at 10, in which Lee Kreindler opines that the statement is erroneous legal advice. In the litigation arising out of the crash of the American Airlines DC-10 in Chicago in 1979, the plaintiffs moved for summary judgment on the grounds that the letter's statement that there was no contingency constituted an admission of liability. USAU argued, and the court agreed, that the letter itself did not remove the issue of liability but was merely an offer to settle. USAU argued that when the letter was mailed a few days after the aircrash neither the insurer nor the parties had conducted enough discovery to determine which party was liable. The insurer, in offering to pay compensatory damages on behalf of the airline, retained the right to litigate the issue of liability with the other defendants. Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983). See *supra*, note 11 and accompanying text.

¹²⁸ M. PIRSIG, PROFESSIONAL RESPONSIBILITY 285 (1970). See *supra*, note 75 and accompanying text.

¹²⁹ See *supra*, notes 93-99 and accompanying text.

¹³⁰ According to Robert L. Alpert, Jr., the statement is an offer to settle. Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983).

The letter next informs the reader that the "rationale" underlying the contingency fee is that the lawyer risks getting no fee if there is no recovery.¹³¹ This statement has been criticized for failing to mention that contingency fees provide a means of hiring competent legal talent in circumstances where plaintiffs may be unable to afford hourly fees.¹³² Regardless of whether it is the best explanation of the rationale underlying the contingency fee, the letter's definition does not violate the Code's prohibition against misleading unrepresented adverse parties because it does not induce or tend to induce the party to take a position adverse to his own best interests.¹³³ Similarly, the definition does not render advice as to the legal rights of the reader or the legal consequences of his acts or omissions.¹³⁴ Thus, it does not violate the Code's prohibition against rendering advice "as to the law."

More significant arguments may be raised against the letter's statement, "There is nothing to be gained by a precipitous lawsuit."¹³⁵ First, many jurisdictions allow prejudgment interest.¹³⁶ Thus, in those jurisdictions, the earlier a claimant files suit, the larger the interest component of his final recovery will be. Second, a plaintiff may be benefitted by filing suit quickly in a jurisdiction that has favorable choice of law rules or standards of damages¹³⁷ because most actions arising out of an air crash that are filed in federal district courts are consolidated by the Judicial Panel on Multidistrict Litigation and transferred to a single district for discovery and other

¹³¹ *Alpert Letter*, *supra* note 24.

¹³² Kreindler, *Chicago Post-Mortem—Shameful Behavior*, N.Y.L.J., June 15, 1979, at p.1, col. 1.

¹³³ See *supra*, notes 86-92 and accompanying text.

¹³⁴ See *supra* notes 94-95 and accompanying text.

¹³⁵ See generally, Kreindler, *supra* note 3, at 10 (discussing several reasons why claimants should file their lawsuits quickly).

¹³⁶ Louisiana, for example, provides that twelve percent interest will be added on compensatory damages awarded in a suit, calculated from the day suit was filed. Kreindler, *supra* note 3, at 10. See also *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 633, 637-41 (7th Cir. 1981) (discussing the availability of prejudgment interest under Illinois law).

¹³⁷ In choosing where to file their lawsuits, plaintiffs are likely to consider whether prejudgment interest is recoverable in a particular jurisdiction and whether punitive damages are recoverable in wrongful death suits. See *supra*, note 19.

pre-trial proceedings.¹³⁸ The Panel, in making its determination regarding the venue for multidistrict litigation, may take into consideration the number of cases that are filed in a particular district.¹³⁹ Thus, by filing his lawsuit before the Panel makes this determination, a plaintiff increases the chances that his lawsuit may be maintained in his preferred jurisdiction.¹⁴⁰

The letter fails to mention the advantages that a claimant may forego by heeding its advice to not file a precipitous lawsuit.¹⁴¹ In fact, Robert L. Alpert, Jr. questions whether these alleged "advantages" exist.¹⁴² Alpert asserts that USAU includes prejudgment interest in its settlement offers in jurisdictions that provide for it.¹⁴³ Alpert further points out that cases subject to multidistrict litigation are consolidated only for liability and discovery issues.¹⁴⁴ Most of the cases are removed to the jurisdiction in which they were originally filed for the trial of damage issues.¹⁴⁵ Thus, in air crash cases where liability is stipulated and the amount of damages is the only issue, the claimant's trial will take place in the jurisdiction filed, regardless of where the multidistrict litigation took place.¹⁴⁶

But for the letter, the underwriter is certainly not under a duty to inform a claimant of the potential advantages, if any, of filing suit quickly. In fact, such information would be considered a violation of the Code's prohibition against rendering "advice as to the law" to an unrepresented adverse

¹³⁸ Such consolidation is done pursuant to 28 U.S.C. § 1407 (1976).

¹³⁹ Kreindler, *Chicago Post-Mortem—Shameful Behavior*, N.Y.L.J., June 15, 1979, at 1, col. 1.

¹⁴⁰ *Id.* Kreindler writes that in litigation arising out of the 1979 American Airlines DC-10 crash in Chicago, there was a "mad rush" by defendants to move all of the cases to Chicago. According to Kreindler, the defendants feared the choice of law rules in California which were very favorable to plaintiffs. *Id.*

¹⁴¹ *Alpert Letter*, *supra* note 24.

¹⁴² Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

party.¹⁴⁷ By making the statement at all, the underwriter places itself in a precarious position in which the ethics of its statement may depend finally upon the reader's understanding of the word "precipitous."¹⁴⁸ One may agree that there is nothing to be gained by a "precipitous" lawsuit if one understands the term to mean "rash" or "marked with unwise haste."¹⁴⁹ Yet, there may be advantages to filing suit quickly. Thus, if the reader, defining "precipitous" as "quick", understands the statement to mean that there is nothing that can be gained by filing suit quickly, he may be induced not to do so. If the "advantages" to filing suit quickly exist and the reader, in reliance upon the letter's advice, decides not to do so, the letter has misled him to his detriment, in violation of the Code.¹⁵⁰

V. CONCLUSION

Plaintiffs' attorneys, outraged by the Alpert Letter's aggressive approach and, undoubtedly, equally incensed by the dramatic effect it has had on the size of their fees,¹⁵¹ insist that its use be stopped.¹⁵² Their most convincing argument is that the letter violates the provision of the Code of Professional Responsibility that prohibits an attorney from giving advice to a party, unrepresented by counsel, whose interests are adverse to those of the attorney's client.¹⁵³ The question, then, is whether the ABA, state bar associations, courts, or legislatures should take action to prohibit further use of the letter. The propriety of the Alpert Letter should be analyzed by considering not only whether it violates the Code, but also whether it frustrates the policies underlying the Code. Such analysis should include an additional consideration - whether

¹⁴⁷ *Id.* See *supra* notes 94-95 and accompanying text.

¹⁴⁸ *Alpert Letter*, *supra* note 24.

¹⁴⁹ "Precipitous" means marked by great rapidity, haste, or lack of caution. WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1784 (1964).

¹⁵⁰ See *supra* notes 86-92 and accompanying text.

¹⁵¹ Plaintiffs' attorneys' contingency fees have been diminished substantially as a result of the Tenerife Approach. Kreindler, *supra* note 3, at 38.

¹⁵² Kreindler, *supra* note 3, at 9; Wermeil, *supra* note 1.

¹⁵³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(2)(1979).

there are other factors involved in the aftermath of a major disaster which trigger other policy considerations outweighing those underlying the disciplinary rule.

The Model Code of Professional Responsibility contains only one explanation of the policy underlying the disciplinary rule.¹⁵⁴ EC7-18,¹⁵⁵ which accompanies the rule, states, "The legal system functions . . . best when persons in need of legal advice or assistance are represented by their own counsel."¹⁵⁶ ABA ethics committee opinions indicate that the purpose of the disciplinary rule is to preserve the proper functioning of the attorney-client relationship and to shield an unrepresented party from improper approaches.¹⁵⁷

Part of the rationale underlying the rule undoubtedly is based on the imbalance in legal knowledge and skill between a lawyer and a layman.¹⁵⁸ A layman ordinarily does not have the requisite knowledge of the law to be able to evaluate skillfully his position and options.¹⁵⁹ Additionally, a layman unwittingly may reveal matters during a discussion with opposing counsel that he legitimately might choose not to reveal upon proper advice from his own counsel.¹⁶⁰ Because of

¹⁵⁴ *Id.* EC 7-18 (1979).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* The ABA's recently adopted MODEL RULES OF PROFESSIONAL CONDUCT forbid a lawyer, in dealing on behalf of a client with a person who is not represented by counsel, from stating or implying that he is disinterested. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.3 (1983), *reprinted in* 52 U.S.L.W. 1 (Aug. 16, 1983). *See supra*, note 70 and accompanying text. The comment to rule 4.3 explains, "An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client." *Id.*

¹⁵⁷ ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934); ABA Comm. on Professional Ethics and Grievances, Informal Op. 1140 (1970).

¹⁵⁸ Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136 (1977). Although Kurlantzik's article primarily addresses itself to the ban on communication between a lawyer and an adverse party who is represented by counsel, it is arguable that much of his analysis applies equally to the ban on communication between a lawyer and an unrepresented party. *Id.*

¹⁵⁹ *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 95 (1933) (noting that even intelligent and educated laymen know little of legal procedure).

¹⁶⁰ Kurlantzik, *supra* note 158, at 145. Kurlantzik observed that in communicating directly with opposing counsel, an unrepresented person might reveal matters that otherwise would be protected from disclosure by the marital privilege, the privilege against self-incrimination or some other privilege. *Id.*

the inherent unfair advantage a lawyer has with respect to an unrepresented layman, the ABA has set forth the prohibition on communication to protect laymen's rights¹⁶¹ and to preserve the integrity of the legal system.¹⁶²

The Alpert Letter contains at least three statements that arguably violate the Code either by tending to mislead an unrepresented adverse party or by giving the party "advice as to the law". The statements include an explanation of the rationale underlying the contingency fee,¹⁶³ advice that there is no contingency in the particular case involved,¹⁶⁴ and advice that there is nothing the reader can gain from a "precipitous" lawsuit.¹⁶⁵ Whether the letter's explanation of the rationale underlying the contingency fee is incomplete or inaccurate,¹⁶⁶ the explanation does not constitute prohibited communication because it does not mislead or tend to mislead the reader or give him "advice as to the law".¹⁶⁷

The letter's statement, "[t]here is no such contingency in this case", is misleading if it is taken to mean that there is nothing contingent whatever in the lawsuit¹⁶⁸ because in wrongful death cases arising out of a major aircrash, there are many variables which may affect the amount of the claimant's recovery.¹⁶⁹ It should be apparent to the reader, how-

¹⁶¹ One source indicates that another rationale underlying the disciplinary rule is the prevention of client solicitation. 7 C.J.S. *Attorney & Client* § 47 (1980). C.J.S. states:

A disciplinary rule relating to giving unsolicited advice to laymen by an attorney does not prohibit communicating information to lay persons concerning their legal rights or recommending to them that they obtain counsel, but merely prohibits an attorney from using information as a bait with which to obtain an agreement to represent them for a fee.

Id.

¹⁶² Kurlantzik, *supra* note 158, at 144. Kurlantzik reasons that the rule is justified by the ABA's desire to avoid not only improper behavior, but also the appearance of impropriety. According to Kurlantzik, even the appearance of impropriety among lawyers fosters public mistrust of the legal system. *Id.*

¹⁶³ *Alpert Letter*, *supra* note 24.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ For a discussion of the possible inaccuracies of the letter's explanation of the rationale underlying contingency fees, see *supra*, notes 132-135 and accompanying text.

¹⁶⁷ See *supra*, notes 86-92 and accompanying text.

¹⁶⁸ For a discussion regarding this interpretation of the passage, see *supra*, notes 122-128 and accompanying text.

¹⁶⁹ The amount of recovery may depend on conflicts of laws questions, whether pre-

ever, that the words "no such contingency" refer to the contingency, assumed in other personal injury cases, that there will be no recovery. To eliminate the possibility that the letter's recipients would construe it to mean that there are no contingencies in the law suit, the letter's drafters should clarify the language of the sentence to leave no doubt about what is or is not contingent in the case.

The letter's statement, "[t]here is nothing to be gained by a precipitous lawsuit",¹⁷⁰ may not withstand the scrutiny of a conscientious bar ethics committee. There may be much to be gained by filing a lawsuit quickly in a jurisdiction advantageous to the plaintiff.¹⁷¹ If there are advantages to filing suit quickly, the letter's statement that there is nothing to be gained is misleading under the Code's standard¹⁷² because it attempts to persuade the potential claimant to delay filing suit, which may be against the claimant's best interests.

The statement implicitly, at least, advises the reader "as to the law." The underwriter and, more importantly, the underwriter's attorney are aware of the legal rights of the victim of an air crash or his survivors. The purpose of the letter appears to be to inform the reader of aspects of the aftermath of an air crash of which he may be unaware. In its paternalistic tone, the letter implies that the underwriter is experienced in these matters. By telling the reader that there is nothing to be gained by a precipitous lawsuit, the letter implies that, because of the underwriter's experience with such legal matters, it knows that there is nothing to be gained.

The drafters of the Alpert Letter should edit and revise it before they use it again. Certainly USAU is justified in writing victims or their families to express its condolences and inform them of its plans to compensate them for the loss they

judgment interest and punitive damages are recoverable, and whether any international conventions apply. See *supra*, notes 19-20 and accompanying text.

¹⁷⁰ *Alpert Letter*, *supra* note 24.

¹⁷¹ By filing suit quickly in his preferred jurisdiction, a plaintiff may net a larger recovery because prejudgment interest is allowed, and his claim may be subject to favorable choice of law rules and standards of damages. For a discussion of the alleged advantages to filing suit quickly, see *supra*, notes 136-41 and accompanying text.

¹⁷² See *supra*, note 86 and accompanying text.

have suffered.¹⁷³ It does not have the right, however, to use the letter to advise them about legal issues. Obviously, one of USAU's main objectives in sending the letter is to persuade potential claimants to resist plaintiffs attorneys' pressures to retain them on a contingency fee.¹⁷⁴ This objective may be achieved without violating the Code by informing potential claimants of USAU's intentions regarding settlement rather than making conclusory statements that constitute or approach impermissible "advice as to the law."

According to Robert L. Alpert, Jr., USAU's intention in making the statement, "[t]here is no such contingency in this case", is to inform potential claimants that USAU is prepared to compensate them for their loss on behalf of the insured airline, regardless of whether or not the airline ultimately is found liable for the accident.¹⁷⁵ Alpert says that USAU is justified in making the statement, "[t]here is nothing to be gained by a precipitous lawsuit," because USAU intends to include prejudgment interest in its calculations of settlement offers in jurisdictions where it is allowed.¹⁷⁶ USAU should inform potential claimants of these intentions and allow them to draw their own conclusions about whether hiring a lawyer on a contingency fee is warranted under the circumstances. This portion of the letter might read as follows:

¹⁷³ As previously mentioned, the Code does not establish an absolute ban on communication between an attorney and a potentially adverse party who is unrepresented by counsel. See *supra*, note 73, and accompanying text.

¹⁷⁴ Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983). Alpert suggested that the Tenerife Approach was formulated in an effort to combat the extremely large legal fees associated with aircraft litigation. See *supra*, notes 6-11, *infra*, note 183 and accompanying text for a discussion of the rationale underlying the introduction of the Tenerife Approach.

¹⁷⁵ Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983).

¹⁷⁶ *Id.* Alpert further discredits the argument that because of multi-district litigation plaintiffs are benefitted when they file suit quickly because they thereby increase the possibility that the multi-district litigation will take place in their preferred jurisdiction. According to Alpert, the situs of the multi-district litigation is irrelevant because the cases are sent back to the jurisdiction in which they were originally filed for trial on the issue of damages. For a discussion of this issue, see *supra* notes 142-147 and accompanying text.

The management at United States Aviation Underwriters, Inc. and the management of the airline have determined that it is our duty to compensate you for the loss you have suffered with as little delay as possible. Instead of delaying payment to you until after it has been determined which of the potential defendants in the case (the airline, the manufacturer or the government, for example) ultimately is liable for the accident, we will pay you money damages to compensate you for your loss as quickly as possible. You may consider this letter a promise by USAU that your recovery in the case is guaranteed. The amount we will offer you will be reasonable, it will include prejudgment interest in jurisdictions where it is allowed, and it will not depend upon your filing suit or hiring a lawyer. You may find yourself under pressure to sign a contingency fee retainer with an attorney whereby his fee is a percentage of the final award. In deciding whether or not to retain an attorney on this type of arrangement, please remember our promise that your recovery in this case is guaranteed.

The letter then should advise the claimant to obtain the help of an attorney retained on something other than a contingency fee to evaluate USAU's settlement offers.

By couching these remarks in terms of promises, the letter would not violate the Code and it would notify the reader that large contingent fees may not be warranted in light of the insurer's promise to pay. Assuming that USAU's professed intentions are sincere, the letter's language would not induce or tend to induce an unrepresented adverse party to take a position adverse to his own best interests.¹⁷⁷ Nor would it render advice as to the legal rights of the reader or the legal consequences of his acts or omissions.¹⁷⁸ Though the proposed passage would inform the reader that it is not necessary to file suit or retain an attorney in order to recover damages, the passage would not render advice as to the legal consequences of not filing suit. Instead, it would promise that no ill consequences would befall him by not filing suit.

¹⁷⁷ For discussion of the Code's prohibition against misleading an unrepresented adverse party, see *supra*, notes 86-92 and accompanying text.

¹⁷⁸ For a discussion of the Code's prohibition against rendering "advice as to the law" to an unrepresented adverse party, see *supra*, notes 93-116 and accompanying text.

While the language of the Alpert Letter is in need of some revising, there are a number of reasons why the letter itself should not be banned. First, the Alpert Letter is not inconsistent with the policies underlying the Code's prohibition on communication.¹⁷⁹ The letter encourages claimants to retain their own counsel to advise them throughout the settlement process,¹⁸⁰ and once such counsel has been retained, USAU directs all further communication to him.¹⁸¹ Moreover, the letter's purpose clearly is not to gain an unfair advantage over claimants by using the underwriter's superior knowledge and legal expertise.¹⁸² Rather, the letter's main purpose appears to be to combat the exorbitant cost to the insurer resulting from plaintiffs' attorneys' contingency fees.¹⁸³ To fully understand why, as a matter of policy, bar associations should not prohibit the use of an edited version of the Alpert Letter, it is necessary to consider the circumstances under which the letter is sent.

After a major aircrash, the victims or their families are caught in the midst of a chaotic situation in which plaintiffs' attorneys vie for the chance to represent them in litigation, and the airline and its underwriters attempt to convince them that there is no need to file suit.¹⁸⁴ With hundreds of millions of dollars on the line, many plaintiff and defense attorneys and underwriters overlook the family's grief. In the midst of all this confusion, victims' families receive the Alpert Letter.

¹⁷⁹ See *supra*, notes 156-163 and accompanying text (discussing the various policies underlying the disciplinary rule).

¹⁸⁰ *Alpert Letter*, *supra* note 24.

¹⁸¹ Craft, *supra* note 2, at 901.

¹⁸² John Brennan, president of U.S. Aviation Underwriters, Inc. stated that the purpose of the Alpert Letter was:

. . . to address some of the practices of certain members of the plaintiff's bar, where the contingent fee was exorbitant This isn't an attempt at all by the insurance community to come up with a reduced settlement. We got into this with the idea that families should receive damages earlier and not have to give away a large portion of it in attorneys fees.

Wermeil, *supra* note 1. For a discussion of purposes underlying the genesis of the Alpert Letter, see *supra*, notes 6-11, 176 and accompanying text.

¹⁸³ See *supra*, notes 6-11, 176, and accompanying text.

¹⁸⁴ See generally, *The Letter: Should It Be Sent?*, THE BRIEF 5 (Nov. 1982) (discussing the pros and cons of the Tenerife Approach).

Undoubtedly the underwriter's motivating purpose in sending the letter is a selfish one, to reduce claims costs.¹⁸⁵ Yet, the letter has done more than help the underwriter. It has benefited the public by forcing plaintiffs' attorneys to reduce drastically the size of their contingency fees in aircrash cases.¹⁸⁶

Contingency fees of a large percentage of the final judgment are abusive in litigation arising out of a major airline crash for two reasons: (i) the plaintiffs' attorneys assume no significant contingency in these cases,¹⁸⁷ and (ii) the fees are excessive in relation to the value of work performed in presenting the claims.¹⁸⁸ At least part of the justification of the contingency fee in other contexts is that the lawyer assumes the risk of receiving no compensation if no damages are awarded or no settlement is made.¹⁸⁹ In litigation arising out of a major airline crash, however, the contingency disappears when the airline stipulates its liability or when it promises potential claimants that recovery is guaranteed.

For these reasons, ordinary contingency fee arrangements are unconscionable in aircrash cases.¹⁹⁰ Because the Alpert

¹⁸⁵ Contingency fees increase the underwriter's costs because claimants, who have hired a lawyer to represent them on a contingency fee, may be unwilling to accept settlement offers for amounts that otherwise would have been satisfactory if they were not obliged to pay a large percentage of the settlement as a contingency fee. Craft, *The Letter Should Be Sent*, *supra* note 19, at 6. Lawyers working on a contingency fee basis may cause further expense to the underwriter by purposefully dragging out the litigation of a claim in order to justify the amount of their fees. Craft, *supra* note 2, at 918.

¹⁸⁶ In his article, *The Letter Should Not Be Sent*, Lee Kreindler contends that contingency fees have dropped to an average of 17.5 percent in major airline cases from the average of 33.33 percent that prevails in most negligence cases. Kreindler, *supra* note 3, at 38. Randal Craft confirms that contingency fees charged in major aircrash cases now range from 15 to 25 percent. Craft, *The Letter Should Be Sent*, *supra* note 19, at 8.

¹⁸⁷ Craft, *The Letter Should Be Sent*, *supra* note 19, at 8.

¹⁸⁸ Telephone interview with Robert L. Alpert, Jr., Senior Vice President and Director of Claims of USAU (Oct. 6, 1983). Alpert said that in litigation arising out of the 1979 American Airlines DC-10 crash in Chicago, it was reported that at least one plaintiffs' attorney had charged such a high percentage fee in relation to the amount of work done on the case that his time, if billed by the hour, would have been charged at approximately \$10,000 per hour. *Id.*

¹⁸⁹ *Id.* See *supra*, notes 132-135 and accompanying text for a discussion of the rationale underlying the contingency fee.

¹⁹⁰ Craft, *The Letter Should Be Sent*, *supra* note 19, at 8. Craft suggests that contingent fees should apply only to the amount above the total of the underwriter's original offer plus interest that the money offered would have earned if it had been invested during

Letter has brought about significant reduction in the amount of plaintiffs' attorneys' contingency fees, bar associations should not prohibit the letter's continued use. Instead, they should recommend that it be modified to exclude or delete those passages which are suspect under the Code of Professional Responsibility.

the period commencing with the making of the offer and ending at the time of the ultimate verdict or settlement. *Id.*

