

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1981 - 1

The Committee has been asked by a member of the Delaware Bar for its opinion as to whether his appearance in a lawsuit in opposition to a party whom he represents in a separate, but closely related, law suit constitutes a conflict of interest under the Delaware Lawyer's Code of Professional Responsibility (hereinafter "Code").

The inquiring lawyer has been retained by an automobile insurance company to defend a personal injury claim brought against one of its insureds. The claim arose out of an automobile collision which occurred while the insured was driving his employer's vehicle. Both the insured and his employer were named as defendants.

The insured's personal insurance company, which had issued a policy covering the insured's privately owned vehicle, undertook his defense pursuant to two reservation of rights letters, the first based on the theory that the insured had forfeited his right to coverage by failing to give the company timely notice of the claim, and the second asserting that the auto accident was not within the coverage of the policy. The defense of the insured's employer was provided by its insurance carrier. The employer's insurance company asserted that its policy did not cover the collision, because the collision occurred after business hours when the employee was not authorized to use his employer's automobile.

During the pendency of the personal injury action, the employer's insurance company filed a declaratory judgment action against the insured and his personal insurance company to determine which, if either, of the insurance policies covered the personal injury claim. The inquiring lawyer entered an appearance in the declaratory judgment action solely on behalf of the insured's personal insurance company and not on

behalf of the insured. He filed an answer in which he asserted a crossclaim against the insured, alleging that the accident was not within the coverage of the policy for the reasons set forth in the reservation of rights letters. The insured was advised that he should retain an attorney to represent him in the declaratory judgment action.

To summarize, the inquiring lawyer has been retained by an insurer to defend its insured in a personal injury action. At the same time, the inquiring lawyer has been retained by the insurer in a separate action to assert against the insured a crossclaim seeking a declaratory judgment that the personal injury claim is not covered by the insured's policy.

#### OPINION

Under the circumstances of this case, the inquiring lawyer has a conflict of interests within the contemplation of D.R. 5-105(A) and (B). If the lawyer cannot adequately represent the conflicting interests of both clients or if either of his clients does not give fully informed consent to the multiple representation, then under D.R. 5-105(C), he must withdraw his appearance on behalf of the insurance company. In the event that the dual representation is later challenged, the lawyer will have the burden to prove that the consent obtained was fully informed and freely given and that it was reasonable to anticipate that the dual representation was adequate with regard to each client.

#### DISCUSSION

The resolution of this inquiry is found in the principles contained in Canon 5 of the Code and its underlying Ethical Considerations and Disciplinary Rules.<sup>1</sup> Canon 4<sup>2</sup>

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<sup>1</sup> In adopting the Delaware Lawyers Code of Professional Responsibility, the Supreme Court stated that: "The ethical considerations and notes contained in [the ABA Code of Professional Responsibility] are hereby approved in principle as interpretive guidelines, where appropriate, in the application of the Canons and (continued)

and Canon 9<sup>3</sup> are also implicated.

Canon 5 establishes the principle that "a lawyer should exercise independent professional judgment on behalf of a client." Disciplinary Rule 5-105 applies that principle to the conflict of interest situation. It states:

"(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

"(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

"(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

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Disciplinary Rules hereby promulgated." In a footnote, the Supreme Court observed that:

"The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

"The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action . . ."

Order Of The Supreme Court Of The State Of Delaware, dated March 22, 1971, adopting the Delaware Lawyers Code of Professional Responsibility. See Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 268 n.5 (D. Del. 1979).

2 Canon 4 states "A lawyer should preserve the confidences and secrets of a client."

3 Canon 9 states "A lawyer should avoid even the appearance of professional impropriety."

The standard by which a conflict of interest is measured under D.R. 5-105 is whether the ability of the lawyer to exercise "his independent professional judgment in behalf of a client will be, or is likely to be, adversely affected." In Pennwalt Corp. v. Plough, Inc., 85 F.R.D., 264, 271 (D. Del., 1979), Judge Schwartz stated "undivided and undiluted loyalty are the lawyers' talismans under Canon 5."

Analysis of the question at hand begins with the observation that the mere fact that an attorney is retained by an insurance company which is responsible for paying his fees does not, standing alone, call into question the ability of the attorney to exercise his independent judgment on behalf of his client, the insured. The ABA Standing Committee on Professional Ethics has approved this practice saying "the essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity as required by Canon 6."<sup>4</sup>

In the instant case, the insured's personal insurance company undertook to defend the insured pursuant to a reservation of rights letter. In so doing, the company created a conflict between its interests and those of the insured. In Fulton v. Woodford, Ariz. App., 545 P.2d 979, 982 (1976) the court stated:

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<sup>4</sup> Former ABA Canon 6 reads, in pertinent part, as follows:

"6. Adverse Influences and Conflicting Interests

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

"Obviously the insurance company or an attorney employed by an insurance company who undertakes to represent an insured under a reservation of the right to subsequently seek reimbursement from that insured for any losses arising out of that representation has a 'conflict of interest' with that insured. Equally obvious is the principle that the insured being fully informed of that conflict of interest may consent to that representation under those circumstances."

Though it is not expressly stated, it appears from the inquiring lawyer's letter that the insured has consented to representation by the lawyer retained by his insurance company, even though the insurance company is providing the defense subject to a reservation of rights. It should, however, be emphasized that the fact that the insurance company has reserved its right to deny coverage under the policy does not alter the fact that the lawyer's client is the insured, and it is to the insured that the lawyer owes his obligation of undivided fidelity. The ABA Standing Committee on Professional Ethics approved the representation of an insured by an attorney retained by an insurance company, notwithstanding a reservation of rights, stating:

"In such a case, although you are employed by the insurance company and were paid by them, your client was the insured. This is true regardless of the fact that the original defense was being conducted under a reservation of rights. Regardless of the fact that both parties at that time recognized that there would be a dispute as to coverage to be solved at some future time, both parties proceeded in concert for a determination of the damage claim against the insured. You were the lawyer for the insured."

Informal Decision No. C728 (1963).

In view of his obligation to further the interests of the insured, the attorney retained by the insurance company may not advise the company concerning its liability to the insured under the policy. In Parsons v. Continental National American Group, Ariz. Supr., (in banc), 550 P.2d 94 (1976) the court stated:

"The attorney representing [the insured] in the personal injury suit . . . had to be sure at all times that the fact he was compensated by the insurance company did not 'adversely affect his judgment on behalf of or dilute his loyalty to [his]

client, [the insured].' Ethical Consideration 5-14. Where an attorney is representing the insured in a personal injury suit, and, at the same time advising the insurer on the question of liability under the policy, it is difficult to see how the attorney could give individual loyalty to the insured client. 'The standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated.' "

550 P.2d at 98.

It follows, a fortiori, that the attorney who defends the insured in the defense of the primary action may not represent the company in the event that it desires to contest the coverage of the policy. In Treiber v. Hopson, N.Y. App. Div., 277 N.Y.S. 2d 241 (1967) the court, on facts closely analogous to those presented in the instant inquiry, held that an attorney may not represent an insured in the defense of an action for personal injury resulting from an automobile collision and at the same time represent the insurance company in a declaratory judgment action in which the insurer seeks to avoid its liability under the policy on the ground that the insured had failed to cooperate in the defense of the case. The court stated:

"When an insurance carrier provides for the defense of its insured, counsel assigned owes a duty of paramount allegiance to the insured, and if there is a conflict of interest between the carrier and the insured, as in this case, he cannot represent both."

The same conclusion was reached in Storm Drilling Co. v. Atlantic Richfield Corporation, 386 F. Supp. 830 (E.D. La 1974) where the court stated: "The same attorney may not represent both the insured and the insurer where the insurer denies coverage or reserves its right to do so subsequently." 386 F. Supp., at 832.

These cases are consistent with the position taken by the ABA Standing Committee on Professional Ethics in its Informal Opinion Number 873 (1965). That Opinion concerned an attorney who had been retained by an insurance company to defend the insured subject to a reservation by the company of its right to deny coverage under

the policy. After the attorney had filed an answer on behalf of the defendant, he filed a separate suit on behalf of the insurance company against the insured and the plaintiff seeking a declaratory judgment as to the rights of the parties with respect to the insurance policy. The ABA Standing Committee noted that while the primary suit involved questions of liability and damage and the declaratory judgment action merely involved a question of law as to the rights of the parties to the contract of insurance, the attorney nonetheless had a conflict of interest. Relying upon Informal Opinion No. 728, the Committee concluded that in the absence of full disclosure and full consent on the part of the insured, the attorney's actions violated Former ABA Canon 6.<sup>5</sup>

The principles articulated in Informal Opinion Number 873 apply under the existing Canons of the Delaware Lawyers Code. Accordingly, the Committee is of the opinion that the inquiring lawyer has a conflict of interest within the contemplation of D.R. 5-105(A) and (B).

Having determined that a conflict exists, it remains to be decided whether it can be resolved. D.R. 5-105(C) states that a lawyer may represent multiple clients where (1) "it is obvious that he can adequately represent the interests of each" and (2) "each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Both of these elements must be satisfied.

Of course, the fully informed consent of both clients is key to continuation of the multiple representation by the inquiring attorney. Without it, he must withdraw from his representation of the insurance company in the declaratory judgment action. However, consent alone is not enough. It must also be shown that the lawyer can

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<sup>5</sup> See footnote 4, supra.

adequately represent the interests of both clients. The Committee does not have before it sufficient facts to opine on this issue; nonetheless, it has grave concern whether the inquiring attorney can adequately represent the conflicting interests of his two clients.

There are several factors which should be considered in deciding whether the attorney can represent both clients. The Standing Committee On Professional Ethics, in its Informal Decision No. 822 stated that where an attorney undertakes multiple representation with the consent of the insured and the insurer he owes a fiduciary duty to both clients. Accordingly, the Committee concluded that the attorney owed a duty to convey information to the insurance company of facts and circumstances which arise during the course of the defense which might bear on the question of non-coverage under the policy. The Committee stated:

"The lawyer is the attorney for both the insured and the insurer. He, of course, should make the same disclosure to the insured, for his right to represent both persons in this case depends on consent and full knowledge as defined in Canon 6."

The duty to reveal to the insurance company matters which may affect the insured's rights under the policy stands in conflict with the attorney's duty under Canon 4 to preserve the confidences and secrets of the insured, his client. The ABA Committee on Ethics and Professional Responsibility stated in Informal Opinion No. 949 that a law firm which undertakes to defend an insured at the request of the insurance company is barred from revealing to that insurance company any information which the firm may receive in the course of its representation of the insured which might be used by the insurer in its subsequent attempt to avoid liability under the policy. The Committee stated:

"If the firm does represent the insured in the personal injury action, to subsequently reveal to the insurer any information received from the insured for possible use by the insurer in defense of a garnishment proceeding by the injured person,



would be a clear violation of both Canon 6 and Canon 37 regarding confidences of a client."<sup>6</sup>

Thus, the attorney's obligation to the insured would prevent him from disclosing to the insurance company information which may be useful to the insurance company in connection with its position in the declaratory judgment action.

D.R. 4-101(B) provides:

- "(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
- "(1) Reveal a confidence or secret of his client.
  - "(2) Use a confidence or secret of his client to the disadvantage of the client.
  - "(3) Use of confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

The exception permitted by D.R. 4-101(C) allows a lawyer to reveal confidences or secrets "with the consent of the client or clients affected, but only after a full disclosure to them."

Consent in this case causes us special concern. The insured is an assigned risk. This and other circumstances make it extremely important that consent, if given, be freely given on full information. Among other things, the insured must be aware that

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<sup>6</sup> Former ABA Canon 37 states, in pertinent part:

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available surces of such information. A lawyer should not continue employment when he discovers that his obligation prevents the performance of his full duty to his former or to his new client."

his lawyer will be obligated to convey to the insurance company any information, including confidences and secrets, which might be useful to the insurance company in supporting its position against the insured in the declaratory judgment action. The Committee is concerned this might well inhibit the insured from being totally candid with his attorney and that such inhibition may affect the free and candid interchange between attorney and client that is necessary to adequate representation.

The Committee is of the opinion that the inquiring attorney must withdraw his appearance on behalf of the insurance company in the declaratory judgment action, if it is not "obvious that he can adequately represent the interests of each" of his clients, or if either of his clients refuses to consent to the multiple representation. Further, since the lawyer acts in a fiduciary capacity for his clients, in any later challenge to the dual representation the lawyer will have the burden to prove that the representation under the circumstances was adequate and that consent was freely given with informed consent.

Dated: February 19, 1981