DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1981-6

In Opinion 1981-1, this Committee advised a Delaware lawyer for an insurance carrier that, unless he received fully informed consent from the carrier and its insured and unless the representation of both was adequate, the lawyer could not simultaneously (a) defend the insured in a tort action and (b) prosecute a declaratory judgment action which contested the insured's insurance coverage for the tort. If questioned, the lawyer was advised that he would have the burden of proof both as to the adequacy of the representation and the satisfactory quality of the consent.

Now, a second Delaware lawyer has asked us whether it would be proper in a similar situation for the carrier's attorney, while prosecuting a declaratory judgment action on coverage, to appear for the insured in the tort action as "co-counsel" in association with an attorney selected by the insured.

OPINION

If the insured gives consent to this procedure, after independent advice from a personal attorney, it is

ethical for the inquiring lawyer to appear as co-counsel; if the insured does not so consent the representation is not ethical.

DISCUSSION

Opinion 1981-1, citing DR 5-105(C), set out two substantial criteria for dual representation in situations such as the present one. The first requirement was adequate representation of each client; the second was free consent of each client after full disclosure. Both substantial criteria had to be satisfied and, in addition, if questioned, the inquiring lawyer was informed that he probably would have to prove the satisfaction of each one. Both substantial criteria apply to the present case as well. Opinion 1981-1 dealt with a client who had no independent counsel. Here, the insured is individually represented and it seems appropriate to us to leave to the client after full consultation with the personal attorney, the judgments as to adequate representation and whether or not to consent to the arrangement. If consent is granted by the insured after advice by the personal attorney, the proposed procedure would appear to us to be ethical and the inquiring attorney would not appear to us to be obliged to prove the satisfaction of the controlling criteria.

On the other hand, if after consultation with the personal attorney, consent is not given by the insured, the inquiring attorney could no more serve as "co-counsel" than as sole counsel.

We would leave to the insured's personal attorney the decision as to what factors are deemed appropriate to inform the insured before consent is sought. For the personal attorney's assistance, however, we would suggest that the factors contained in ABA Informal Opinion No. 583, DR 5-105 and our Opinion 1981-1 all appear relevant to the questions presented.

Such factors relate primarily to such matters as the risk of the breach of attorney-client privilege and the danger that client confidences may be broken and in some cases might even be used against the client. Whether these risks are overbalanced by the factors favoring dual representation seem to us to be better left to the judgment of the client and the personal legal adviser.

We suggest that before entering into the dual representation the inquiring lawyer would be well advised to obtain written consent from the insured or the personal attorney on behalf of the insured reciting the receipt of independent legal advice. We suggest that the inquiring

lawyer, if he wishes to follow this course, will want to convey our views to the personal lawyer for the insured.

Dated: June 12, 1981