

OPINION 1988-1

A member of the Delaware Bar has requested the Committee's Opinion as to how his firm should respond to the demands of a difficult client.

The inquiring attorney's firm (the "Firm") has been retained by an insurance company to defend a church in an action brought by its pastor to recover damages for personal injuries sustained by the pastor when he fell off a scaffold while assisting in construction work on the church. The church is organized as a membership corporation and is governed by a board of Elders (the "Elders").

The Elders speak and act on behalf of the corporation in connection with the litigation. Therefore, it is with them that the Firm must coordinate the defense. The first complication arises from the fact that the plaintiff is one of the Elders. Although he has not participated in conversations concerning the corporation's defense, the other Elders appear to be advising him of the Firm's defense strategy.¹

The second complication arises from the fact that the Elders have refused to sign answers to interrogatories setting forth as affirmative defenses the plaintiff's

¹To add to the confusion, the plaintiff is represented by the attorney who successfully defended the church in a declaratory judgment action brought by the insurance company in which the insurance company sought to avoid the corporation's coverage for the plaintiff's claim.

contributory negligence and assumption of the risk. Unable to get the Elders' approval of the defenses, the Firm tried a different approach. It took the depositions of the two most knowledgeable Elders in an attempt to evoke the facts from them under oath. That too failed, because both Elders refused to answer questions concerning the affirmative defenses -- one on a dubious invocation of the Fifth Amendment privilege and the other on the ground that the information was protected by the privilege of confidentiality accorded to communications between a clergyman and members of his congregation.

The Firm feels that the Elders are interfering with its defense of the corporation. As a consequence the Firm is also concerned that the Elders may be jeopardizing the corporation's insurance coverage.² On account of this concern, the Firm has delayed in transmitting copies of the transcripts of the two Elders' depositions to the insurance carrier.

The Firm has requested the Committee's Opinion as to how it should proceed in its representation of the corporation. In particular, the Firm seeks the Committee's advice as to whether it should send the deposition transcripts to the insurance carrier.

²Although not explicitly stated in the inquiring attorney's letter, it appears that the policy of insurance includes the usual provisions which allows an insurance carrier to deny coverage when the insured fails to cooperate in its defense.

In the opinion of the Committee, the Firm should attempt to resolve its inability to work with the Elders, but if it is unable to do so, it may consider moving to withdraw from the case. Additionally, it is the Committee's opinion that the Firm should seek the approval of the Elders before it sends the deposition transcripts to the carrier. If the Elders do not give their approval, the Firm may consider moving to withdraw from the case. The Committee's reasons are as follows:

The Firm has been retained by the insurance company to defend the corporation.³ Therefore, it is to the corporation that the Firm owes its duty.⁴ The problem is how the Firm should discharge that duty when the individuals who act on behalf of the corporation do not appear to be acting in its best interest. That problem is addressed by Rule 1.13(b)⁵ which provides, in pertinent part, that:

³In accordance with customary practice, it is reasonable to assume that the defense firm's fees are paid by the insurance carrier. This practice is perfectly acceptable under Rule 1.8(f) so long as the client is aware that the attorney's fees are paid by the carrier and consents to the arrangement.

⁴When an attorney is retained by an insurance company to defend an insured, the attorney's client is the insured, not the company. Thus, the attorney must avoid any conflict of interest between the insured (his client) and the insurance company. See Rule 1.7 and Delaware State Bar Association Committee on Professional Ethics Opinion 1981-1.

⁵The Delaware Lawyers' Rules of Professional Conduct adopted by the Delaware Supreme Court effective October 1, 1985, are cited in this Opinion as "Rule."

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Based upon the facts provided by the inquiring attorney, it appears that the Elders' conduct places this case well within the scope of this rule. In particular, if the Elders have advised the plaintiff of confidential information relevant to the corporation's defense or if they have intentionally rejected the advice of the corporation's defense counsel out of a misguided sense of loyalty to the plaintiff⁶ (who remains their pastor and one of their colleagues), they would appear to have violated their fiduciary duty to the corporation and at the same time to have imperiled its insurance coverage.⁷ Thus, in the words of the Rule, the Elders appear to be conducting themselves in

⁶The Elders owe their fiduciary duties to the corporation, not the pastor who (in the context of the litigation) is adverse to the corporation.

⁷Of course, the Ethics Committee is not in a position to opine as to matters of a director's fiduciary duty or a corporation's insurance coverage, nor is it the role of the Committee to make findings of fact relevant to these questions. Rather, the Committee merely notes that these issues exist for purposes of its analysis of the attorney's obligation to his corporate client.

a manner which is "likely to result in substantial injury to the [corporation]."

Under these circumstances, Rule 1.13 provides that the Firm is obligated to take such steps as it believes may be required to secure the best interests of the corporation. The Rule suggests that the Firm should consider such things as:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organizations; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

Rule 1.13(b).

Addressing these points in reverse order, it is apparent that the last is of no use. Quite simply, there is no higher authority in the organization to which the Firm can turn. The Elders (whose actions have created the problem) are in charge of the corporation, and the pastor (who presumably holds some power) has an obvious conflict of interest which prevents him from acting in this matter.

The two remaining points provide the possibility of a solution. First, the Firm should consider suggesting to the Elders that they retain separate legal counsel to advise

them with respect to their fiduciary duties.⁸ The Firm should then ask the Elders to reconsider the matter in light of the advice received from their independent counsel.

In the event the Elders refuse to retain independent counsel or in the event the Firm finds that it remains in conflict with the Elders after they have reconsidered the matter, it is authorized by Rule 1.13(c)⁹ to move to withdraw as counsel to the corporation. Under these circumstances, withdrawal is permissive, not mandatory. Rule 1.16(b)(3).

The more immediate question facing the Firm is whether it should continue to withhold from the insurance carrier transcripts of the Elders' depositions. It appears

⁸This is advice which the Firm should not provide. It represents the corporation, not the Elders. Although a lawyer may represent both a corporation and its directors, he may not do so when the interests of the corporation conflict with those of the directors. Rules 1.7 and 1.13(e). Here, the conduct of the Elders places their interests in this matter in conflict with those of the corporation. To the extent their failure to cooperate constitutes a breach of fiduciary duty which results in the corporation's loss of insurance coverage, the Elders face the possibility of personal liability in the event the pastor obtains a judgment against the corporation. Plainly, the Elders should seek separate counsel.

⁹Rule 1.13(c) provides:

If, despite the lawyer's efforts in accordance with Paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

that those transcripts set forth facts from which the carrier might conclude that the corporation should be denied coverage on account of its failure to cooperate in its defense.

Analysis of this question begins with the relationship among an insurance defense lawyer, his client and the insurance carrier. The carrier has a special relationship to both the attorney and his client, because the carrier creates the attorney client relationship when it retains the attorney to defend the insured pursuant to the carrier's contractual obligation under the insurance policy. The carrier bears the cost of the defense and the financial exposure in the event the insured is held liable. Moreover, the carrier plays a significant role in any proposal to settle the case, and under certain circumstances, may have an obligation to settle the case within policy limits.

By the same token, the insured has certain obligations to the carrier. These include a duty to cooperate in the defense of his case which, in turn, includes a duty to keep the carrier informed. As a practical matter, the insured discharges this duty through his agent, the attorney, who routinely and regularly consults with the carrier. Thus, it is critical to the carrier and the client alike that the attorney be able to communicate freely with both parties concerning the client's case.

Rule 1.6(a) provides that an attorney shall not reveal information relating to the representation of a client

unless the client consents or the disclosure is impliedly authorized in order to carry out the representation. Because of the necessity of free communication between the attorney and the insurance carrier, such communications are "impliedly authorized" within the meaning of the Rule.¹⁰ However, the notion of implicit authorization evaporates when such a disclosure would be contrary to the client's interest.¹¹

Here, the disclosure of the transcripts is likely to alert the carrier to facts which the Firm reasonably believes could lead the carrier to deny the client coverage. Thus, disclosure could be contrary to the client's interest. On the other hand, the transcripts relate directly to the defense of the client's case and therefore should be sent to the carrier as part of the client's duty to cooperate in the defense of his case. In that sense, disclosure of the transcript would be in the corporation's interest.

¹⁰The inquiring attorney's letter does not disclose the terms of the insurance policy under which the defense is being provided. That policy may include a provision by which the insured authorizes the attorney to communicate freely with the insurance carrier. If the policy contains such a provision and if the Firm is satisfied that it constitutes a fully informed waiver of the client's right of confidentiality, the Firm may rely upon the waiver as authority for communications with the carrier. In that event, the analysis which follows concerning implied authorization would be unnecessary.

¹¹The comment to Rule 1.6 states that the Rule "does not pertain to or limit communications between an insurance carrier and the lawyer employed by that carrier to represent an insured of that carrier, so long as no communication conflicts with the interest of the insured in the reasonable opinion of the lawyer."

Thus, the client has imposed conflicting demands on the Firm. Its interest in concealing the actions of the Elders prevents the transcript from being sent, and at the same time its interest in cooperating in its defense requires that it be sent. In this circumstance, the Firm should request that the Elders determine whether they desire the transcript to be sent to the carrier. If they authorize the Firm to do so, the ethical problem disappears, because Rule 1.6 allows an attorney to disclose even harmful information when the client has given its consent. On the other hand, if the Elders refuse, the problem becomes more acute.

The transcripts either have been, or soon will be, filed with the Court where they will be a matter of public record.¹² Thus, if the Elders refused to authorize disclosure of the transcripts, the attorney will be required to conceal these public documents from the carrier.¹³ This creates a difficult problem because the carrier, unless advised to the contrary, expects to be fully informed as to the status of the client's case. In order to avoid

¹²The Committee assumes that the court in this case has not entered an order placing the record under seal.

¹³Under the present Rules of Professional Conduct, a lawyers' duty not to keep information confidential is no longer limited to his client's confidences and secrets. Under the present Rule, he must not reveal any information relating to representation of his client except as allowed by Rules.

misleading the carrier,¹⁴ the Firm would have to inform the carrier that facts exist which its client has forbidden it to disclose. Thus, such a course of action would exacerbate the corporation's apparent failure to cooperate with the carrier in its defense. Once again, the Firm should suggest that the Elders retain independent counsel. In the event they refuse to do so, or in the event they refuse to authorize disclosure of the transcripts, the Committee believes that the Firm would be authorized to move to withdraw.

¹⁴In this circumstance, the attorneys' willful concealment of the transcripts may implicate a form of fraud. In Lock v. Schreppler, 426 A.2d 856 (Del. Super. 1981), the Court held that a person who has a duty to speak is guilty of fraud when he fails to disclose material information and is aware that the non-disclosure will create a false impression. That result is avoided by informing the carrier that the Firm is unable to disclose all facts. Rule 4.1 prohibits an attorney from failing to disclose material facts when such disclosure is necessary to prevent the client from participating in a fraud, unless, as here, the attorney's silence is required by Rule 1.6.