



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2, 1.4, 1.6, 1.7, 1.16, 4.1, and 5.4. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 98-08
May, 1999

Topic: Conflict of interest; insurance defense; multiple representation.

Digest: A lawyer designated by an insurance company to defend an insured party represents and has the same professional obligations that would exist had the lawyer been personally retained by the insured. Disagreement between the lawyer and the insured as to defense strategy may require the lawyer to withdraw.

Ref: Illinois Rules of Professional Conduct, Rules 1.2, 1.4, 1.6, 1.7, 1.16, 4.1 and 5.4.
ISBA Opinion No. 89-17 (1990) and No. 92-02 (1992).
Rogers v. Robson, Masters, Ryan, Brumund and Belom, 74 Ill. App. 2d 467, 392 N.E. 2d 1365 (3d Dist. 1979), affirmed, 81 Ill.2d 201, 407 N.E. 2d 47 (1980).
Nandorf, Inc. v. CNA Insurance Companies, 134 Ill.App. 3d 134, 497 N.E. 2d 988 (1st Dist. 1985).
Illinois Municipal League Risk Management Association v. Seibert, 223 Ill.App.3d 864, 585 N.E.2d 1130 (4th Dist. 1992).
ABA Formal Opinion 96-403 (1996).
California State Bar Formal Opinion No. 1995-139 (1995).

Arizona Bar Association Opinion No. 94-03 (3/1/94).
Colorado Bar Association Formal Opinion No. 91 (1/16/93).
Restatement of the Law Governing Lawyers, § 215, Proposed Final Draft No. 2 (4/6/98).
D.R. Richmond, "Lost in the Eternal Triangle of Insurance Defense Ethics," 9 Geo. J. Legal Ethics 475 (1996).
R.E. O'Malley, "Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed," 66 Tul. L. Rev. 511 (1991).

FACTS

The inquirer has submitted the following fact situation. An action was filed against a municipality and two of its police officers in which the plaintiff alleged that his civil rights were violated when the officers used excessive force in arresting him. The complaint sought compensatory and punitive damages. The insurance carrier for the municipality provided one lawyer for the municipality, another lawyer for one of the officers, and a third lawyer for the other officer. One officer accepted the lawyer provided by the insurance carrier. The other objected to being represented by a lawyer provided by the insurance carrier. This officer asserted that the lawyer would have a conflict of interest and would not be in a position to fully and properly represent the officer's interests. The lawyer assigned by the insurance carrier responded to the suggestion of a conflict of interest by taking the position that there was no conflict of interest and stating the intention to aggressively and competently represent this particular officer and do all things necessary to clear the officer's name.

While the case was pending, the lawyer-client relationship between the officer and the lawyer was poor; however, the lawyer refused to withdraw even when the officer expressed a lack of confidence in the lawyer. As the case progressed, the officer learned the lawyer had not conducted any independent investigation, but had only reviewed the work done by the other lawyers in the case. When the officer asked the lawyer to disclose communications between the lawyer and the insurance carrier, the lawyer refused. The lawyer did not inform the officer of the officer's right to be represented by a lawyer of his own choice who would be paid by the insurance carrier. (The facts submitted do not state whether the insurance carrier had issued a reservation of rights or otherwise questioned coverage with respect to the officer.)

QUESTIONS

In view of the fact situation stated above, the inquiring lawyer poses the following questions:

1. If a lawyer-client relationship deteriorates to the point at which the client does not want the lawyer's representation and the client has no confidence in the lawyer, does the lawyer have a duty to withdraw from the representation?
2. If a lawyer appointed by and paid by an insurance company to represent an insured refuses on request to disclose to the insured communications between the lawyer and the insurance carrier, does that refusal constitute a breach of the lawyer's fiduciary duty to the insured?
3. Is a lawyer appointed by and paid by an insurance company to represent an insured limited to providing only those legal services for which the insurance company will pay?

4. If a lawyer appointed by and paid by an insurance company to represent an insured believes the insurance company is acting in its own best interests and contrary to the best interests of the insured, what duty of disclosure does that lawyer have to the insured?

OPINION

The present inquiry raises significant issues arising out of the so-called "tripartite" relationship, also known as the "eternal triangle", created when an insurance company designates a lawyer to represent a policyholder or other insured party in a claim for which the insurer has a duty to defend. Liability insurers typically owe their insureds duties of defense and indemnity under the insurance contract. The duty to defend is usually held to be broader than the duty to indemnify and extends to claims that are only potentially within the scope of the policy. An insurer may also be required to defend an entire action although the action alleges claims outside the policy's coverage. See National Union Fire Insurance Co. v. Glenview Park District, 158 Ill.2d 116, 632 N.E.2d 1039, 1042 (1994).

As a part of their duty to defend, liability insurers generally have the right under the policy to control the defense of their insureds. However, the Illinois courts have recognized two exceptions to this general rule in situations where the interests of the insurer conflict with those of the policyholder or other insured. These are: (1) where it appears that the insurer may not vigorously defend a claim against its insured; and (2) when proof of certain facts would shift liability from the insurer to the insured. See Illinois Municipal League Risk Management Association v. Seibert, 223 Ill. App. 3d 864, 872, 585 N.E.2d 1130 (4th Dist. 1992). Unless one or both of these exceptions apply, the insurer may continue to control the defense of the insured, including the designation of defense counsel.

The Committee believes that the determination of whether an insured, in any particular situation, may be entitled to assume control of the defense of an action and retain separate counsel due to a conflict with the insurer is a matter governed by the substantive insurance law rather than the Rules of Professional Conduct. For that reason, the Committee will assume for purposes of responding to this inquiry that representation of the insured by defense counsel appointed by the insurer was appropriate at the time of the appointment.

In that context, the initial inquiry in defining the triangular relationship is the identity of the lawyer's client or clients. In its Opinion No. 89-17 (May 25, 1990), the Committee stated: "Where an insurance company hires an attorney to represent an insured, the attorney's client is the insured, not the company. The representation is limited by the terms of the policy, but the attorney's client is still the insured, not the company." In Opinion No. 92-02 (July 17, 1992), the Committee further observed that a lawyer designated by an insurer "has the same obligation in his representation of the insured as if he had been personally retained by the insured."

The principle that counsel appointed by an insurer to defend an insured represents only the insured and not the insurer is the rule in many jurisdictions. California State Bar Formal Opinion No. 1995-139 (1995); Arizona Bar Association Opinion No. 94-03 (March 1, 1994); Colorado Bar Association Formal Opinion No. 91 (January 16, 1993). This is also the position advocated

by several commentators on the “eternal triangle.” See, e.g., D. R. Richmond, “Lost in the Eternal Triangle of Insurance Defense Ethics,” 9 Geo. J. Legal Ethics 475, 535 (1996); R. E. O’Malley, “Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed,” 66 Tul. L. Rev. 511, 520 (1991). There are other opinions and commentators that advocate a dual-client approach, particularly in the typical insurance defense situation where the insurance carrier has not raised a coverage issue and the claim appears to be within policy limits. See C. Silver and K. Syverud, “The Professional Responsibilities of Insurance Defense Lawyers,” 45 Duke L.J. 255 (1995).

The Committee need not attempt to resolve that debate for purposes of this opinion. As stated in the comment to § 215 of the most recent draft of the Restatement of the Law Governing Lawyers, it is “clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured.” Restatement of the Law Governing Lawyers, § 215, Comment *f*, Proposed Final Draft No. 2 (April 6, 1998).

In such situations, the Illinois Appellate Court has stated that the lawyer appointed by an insurance company to defend an action against an insured has the “same professional obligations that would exist had the attorney been personally retained by the insured.” Rogers v. Robson, Masters, Ryan, Brumund and Belom, 74 Ill. App. 3d 467, 472, 392 N.E.2d 1365 (3d Dist. 1979), affirmed, 81 Ill.2d 201, 407 N.E.2d 47 (1980). In a subsequent opinion, however, the court stated the insurance defense lawyer “owes fiduciary duties to two clients: the insurer and the insured.” Nandorf, Inc. v. CNA Insurance Companies, 134 Ill. App. 3d 134, 137, 479 N.E.2d 988 (1st Dist. 1985). Citing Rogers, the Nandorf opinion repeats the principle that the lawyer designated by the insurer owes the same professional obligations to the insured that would exist had the lawyer been personally retained by the insured. As to the putative second client, the insurer, the opinion recognizes the “reality” that insurance defense lawyers may have closer ties to the insurance company and thus may also have a “more compelling interest in protecting the insurer’s position, whether or not it coincides with what is best for the insured. ... This reality frequently gives rise to conflicts of interest between the insurer and insured.” Having expressed this observation, the Nandorf opinion does not, however, identify or otherwise describe the fiduciary duties owed to the insurer.

Whatever the duties owed by defense counsel to the insurer, the relevant Illinois cases, the Restatement, and this Committee’s prior opinions make clear that assigned counsel owes the insured the same professional obligations as if the lawyer had been personally retained by the insured. From this basic principle, it appears that the insured is, at a minimum, the defense lawyer’s primary client. As the lawyer’s primary client, entitled to the same professional obligations as a client that had personally retained the lawyer, the insured should have priority over the insurer whenever the interests of the insured and the insurer are inconsistent. Thus, the lawyer’s duty under the Rules of Professional Conduct is to protect the interests of the insured while fulfilling the insured’s contractual obligations to the insurer in a situation where the insurer has control of the defense and a direct economic interest in the outcome.

The specific Rules of Professional Conduct relevant to the “eternal triangle” include Rules 1.2,

1.4, 1.6, 1.7, 1.16, 4.1 and 5.4. Rule 1.2(a) provides that a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. Rule 1.4(a) requires a lawyer to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and Rule 1.4(b) directs a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Rule 1.6(a) provides that a lawyer shall not use or reveal a confidence or secret of a client unless the client consents after disclosure. The term "disclosure" under the Rules denotes communication of information reasonably sufficient to permit the client to appreciate the matter in question. Under Rule 1.6(c), a lawyer may use or reveal the intention of a client to "commit a crime."

Rule 1.7(a) prohibits representation of a client that will be directly adverse to another client unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after disclosure. Rule 1.7(b) prohibits representation that may be materially limited by the lawyer's own interests or obligations to another client or to a third party, unless the lawyer reasonably believes the representation will not be adversely affected and the affected client consents after disclosure.

Rule 1.16(a), which governs mandatory withdrawal from representation, provides that a lawyer shall withdraw, among other reasons, if the lawyer knows or reasonably should know that continued employment would result in a violation of the Rules, or if the lawyer is discharged by the client. Rule 1.16(b), governing permissive withdrawal, provides that a lawyer may withdraw, among other reasons, if the client seeks to pursue and/or insists that the lawyer pursue a course of conduct that is illegal or contrary to the Rules, if the client renders it unreasonably difficult to carry out the representation effectively, if the client insists that the lawyer engage in conduct contrary to the lawyer's advice or judgment, or if the client consents to the lawyer's withdrawal after disclosure.

Rule 4.1, which concerns the lawyer's obligations of truthfulness in statements to third parties, provides that a lawyer shall not: (a) make a statement of material fact or law that the lawyer knows or reasonably should know is false; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Finally, Rule 5.4(c) provides that a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering those services.

With that background, the Committee will respond to each of the questions submitted by the inquiring lawyer.

(1) The first questions put in the present inquiry is whether appointed counsel has a duty to withdraw where the insured has lost confidence in the lawyer and does not want the lawyer's continued representation. As noted above, the insurer's right to control the insured's defense

usually includes the ability to appoint defense counsel. Unless one of the exceptions noted in Seibert are shown to exist, the right to designate counsel remains with the insurer. (An insured may choose to retain additional or substitute counsel. Whether the insured or the insurer will be responsible for paying separate counsel will depend upon the particular circumstances of each matter.)

Under the circumstances given, grounds for mandatory withdrawal under Rule 1.16(a) do not appear present, so the lawyer does not have an affirmative duty to seek to withdraw. (Rule 1.16(c) provides that a lawyer shall obtain permission to withdraw where the rules of the court require.) However, if the lawyer concludes that the insured's discontent renders it unreasonably difficult for the lawyer to effectively conduct the insured's defense, grounds for permissive withdrawal exist under Rule 1.16(b)(1)(D); and the lawyer should seek leave to withdraw if the lawyer cannot effectively represent the insured.

(2) The second question posed is whether it is a breach of the lawyer's duty to the insured to refuse to disclose communications between the insurer and defense counsel. Assuming that the communications in question involve information actually relevant and material to the insured's defense, the Committee believes that defense counsel has a duty to disclose such information to the insured. As the lawyer's primary client, the insured is owed the lawyer's primary loyalty. Rule 1.4 requires the lawyer to provide the client relevant information to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In Formal Opinion 96-403 (August 2, 1996), the ABA concluded that a lawyer hired to defend an insured must communicate any limitations on the lawyer's representation of the insured authorized by the insurance policy, such as the right of the insurer to control the defense and to settle within policy limits, to the insured early in the representation. (Even if the insured and the insurer are considered to be co-equal clients, the usual rules of joint representation do not permit a lawyer to keep confidences from joint clients.) If the defense lawyer were unwilling to comply with the insured's request for material relevant information regarding the representation, due either to a "more compelling interest in protecting the insurer's position" or the express direction of the insurer, the Committee believes that such unwillingness would constitute a material limitation on the lawyer's representation of the insured, contrary to Rule 1.7(b). Unless the insured is willing to consent to this limitation after disclosure, the continued employment would result in a violation of the Rules of Professional Conduct, and grounds for mandatory withdrawal would exist under Rule 1.16(a)(2).

(3) The third question is whether the services of a lawyer appointed by an insurer to represent an insured are limited to providing only those for which the insurer is willing to pay. The Committee notes that the issue of whether certain "cost control" measures by an insurer violate the insurer's contractual duty to defend is beyond the scope of this opinion. As stated above, Rule 5.4(c) directs that a lawyer "shall not permit" the insurer to direct or regulate the lawyer's professional judgment. Section 215(2) of the Restatement of the Law Governing Lawyers, Proposed Final Draft No. 2 (April 6, 1998), provides generally that a lawyer's professional conduct on behalf of a client may be directed by someone other than the client when: (a) the

direction is reasonable in scope and character; and (b) the client consents after consultation. As explained in Comment *d* to § 215:

d. Third-person direction of representation. The principle that a lawyer must exercise independent professional judgment on behalf of the client generally requires that no third person control or direct a lawyer's professional judgment on behalf of a client, as the lawyer codes require.

* * *

Just as there are limits to client consent in § 202, there are limits to the restrictions on scope of the representation permitted under this Section.

The Committee agrees with the Restatement's conclusion that any restrictions on the lawyer's scope of representation should have the insured's informed consent. Thus, if an insurer's proposed restrictions on the scope of the activity necessary for the defense of a claim compromises the lawyer's professional judgment, continuing the representation would be contrary to Rule 5.4(c). Under those circumstances, grounds for mandatory withdrawal would exist under Rule 1.16(a)(2).

(4) The fourth and final question raised by this inquiry is the "duty of disclosure" an appointed defense lawyer may have if the lawyer believes that the insurer is acting in its own best interests contrary to the best interests of the insured. The Committee is unable to respond to this question in its original form because it implies an improper motive on the part of the insurer. The fact that an insurer and insured may have inconsistent views on the defense of a matter should not necessarily impute improper motives to either party. As explained above, if the lawyer designated by an insurer to represent an insured is unable to meet the lawyer's professional obligations to the insured as the primary client of the lawyer, then the lawyer should withdraw.

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