

Utah Ethics Opinions

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72. USB EAOC Opinion No. 72

Utah State Bar

Ethics Advisory Opinion No. 72

Approved November 16, 1979

Summary: An attorney employed by an insurance company to represent both insurer and insured in a matter must fully disclose to both of all relevant circumstances and potential conflicts of interest and after obtaining consent of both may proceed and negotiate with the company on behalf of the insured for compromise and settlements.

Facts: The question presented herein arises where an attorney is acting as legal counsel for both an insurance company and the insured in a claim or action. The company, by its policy terms and statute, is entitled to full subrogation for any sum received prior to payment to the insured of any excess. Attorneys, acting in such situations, often urge the insurance company to comprise their subrogation claim in favor of the insured. The Committee is asked to determine if an attorney in this situation is involved in an unethical conflict of interest.

Opinions: Formal Opinion 282 (1950) of the ABA provided early guidance for situations of this sort, which guide has been basically adhered to in all later opinions. This opinion held that an attorney would be retained by an insurance company to represent both the company and the insured within the limits of the policy. The attorney may also simultaneously represent the insured in a claim for the amount not recoverable under the insurance policy if the insured requests such services and separately retains the attorney for the same.

However, such dual representation of both insurance company and the insured may preclude subsequent or simultaneous representation of either or both. The applicable disciplinary rule is contained in Canon 5, DR 5-105(A), (B) and the caveat of (C) as follows:

(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, or if it would be likely to involve him in representing differing interests, 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, or if it should be likely to involve him in representing differing interests, except to the extent permitted under DR 5-103(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.

In Informal Decision C-728 (1963), an attorney was retained by an insurance company to defend the insured in a case where there was a question of policy coverage. The defense was conducted under a reservation of right executed by the insured, allowing the company to subsequently deny coverage. The attorney appeared as counsel of record for the insured. After termination of that action, the insurer sought to employ the same attorney to represent it against the insured in denying coverage. The facts raised both a question of conflict of interest and the duty of an attorney to preserve confidences and secrets of his client under Canon 4. The committee noted that although the attorney was hired by and paid for by the insurer in the first instance, his client was the insured, to whom he owed a duty on "undivided fidelity." Therefore, he was precluded from representing the insurer on the issue of policy coverage without full disclosure to the insured, and obtaining his consent as provided in DR 5-105(C). Similarly, in Informal Opinion 977 (1967), the ABA Committee on Ethics held that an insurer's attorney was precluded from representing a policy holder having uninsured motorist coverage in a suit by another involved in a collision, and simultaneously acting as counsel for the insurer in arbitration proceedings requested by the insured. The Committee found that a "community of interest" was lacking in the dual representation to an extent to which was irreconcilable and could not be cured even by consent of both parties.

A later opinion pointed out that the differing interest in such insurance cases presented a potential conflict of interest in such insurance cases because of the possible differing attitude regarding settlement. Informal Opinion 1065 (1969).

Informal Opinion 1153 (1970) addressed itself in part, to the actions required of an attorney in such a situation, to overcome the conflict problem. The facts presented there were that both automobiles involved in the collision were insured by the same company. Passengers in one automobile brought suit. The incident was investigated in

full by representatives of the insurance company. It was recognized that the company had an interest adverse to that of at least one of the insured (because of the possibility that liability may exceed policy limits) and that the two insured had opposing interests. The company sought to hire two different attorneys to represent the two insured. The Committee then outlined the circumstances under which the lawyers hired by the company could proceed. First, each attorney should have full knowledge of all relevant facts known by the company and should inform the proposed client, one of the insured, of those facts. The client should further be advised that both vehicles were insured by the same company, that the company had hired both attorneys, and that the insured had the right to obtain additional counsel to participate in the matter. Reference was made to EC 7-8 and EC 7-9 concerning the obligation of counsel to fully advise a client of all moral, as well as legal implications. Once such full disclosure has been made and consent obtained, the attorney may proceed to represent the insured. The lawyer has an additional duty of disclosure to the company, which should be advised of the consequences of refusing to permit insured to select their own counsel if they wish to and of the obligation to fully inform the insured. The Committee concluded that if the insured would not consent to representation by the company lawyer and the company persists in its intention to hire the lawyer to "represent it in performing its contractual obligations to the insured, either against the wishes of the insured or without notifying him of the full facts it is in our view that the representation should not be undertaken by the lawyer in question."

In Informal Opinion 1402 (1977), the facts were that the insurance company employed full time, salaried staff attorneys who were available to defend insured in claims filed under professional liability policies. The attorney in such representation is bound by the same rules as if directly employed by the insured. The Committee also emphasized that the lawyer's relationship to the insurer should be disclosed to the insured and the lawyer must be continually sensitive to any divergence of interests of the two. The rule of Canon 5, DR 5-107(B) was also emphasized, which states as follows:

"A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

The Committee stated that "the essential point of ethics is that the lawyer so employed shall represent the insured as his client with undivided fidelity."

The above opinions have established the following principles applicable to attorneys acting as counsel for an insurance company and another with an interest in policy

coverage:

1. An attorney may represent both the insurer and the insured in claims under the applicable policy.
2. The same attorney may represent the insured in claims which exceed policy coverage if there is specific retention by the insured for such representation.
3. The attorney may not subsequently or simultaneously represent either the insurer or the insured, in a related matter involving the same incident, where the interest of the two are then divergent, absent full disclosure in obtaining of consent.
4. In some instances, the divergence of interest may be so marked as to disallow dual representation even with consent.
5. Differing interests regarding settlement may present a conflict of interest situation.
6. Disclosure of all relevant facts and considerations to both insurer and insured is required as well as the obtaining of consent after such full disclosure. Without both, the attorney may not proceed.
7. An attorney hired by the insurer to represent the insured owes a full fiduciary duty to the insured as his client.

The Committee in applying these principles to the instant fact situation holds that the attorney representing the insured should disclose of his relationship to the insurer and should advise both of the possibility of conflict in regard to settlement, compromise or any other relevant matters. If both consent, the attorney must then represent the insured fully and competently. Attempts to persuade the insurer to compromise its subrogation rights will then be consistent with the duty owed to the primary client, the insured, and will have the requisite consent of the insurer initially, without coercion or attempts to control the lawyer by the insurer.

Rule Cited:

Canon 4 & 5