

New York State Bar Association
Committee on Professional Ethics

Opinion 1154 (6/5/18)

Topic: Third-Party Payor: Duty to communicate with client of insurance-assigned counsel

Digest: An attorney assigned by insurance carrier to represent an insured owes a duty of loyalty to the insured, and may not restrict or limit communications to the insured concerning the representation, notwithstanding attorney's concerns that insured may use such information adversely to financial interests of insurance carrier.

Rules: 1.2(a), 1.4; 1.6; 1.7(a)(2); Rule 1.7(b), Rule 1.8(f).

FACTS

1. The inquirer is a New York attorney whom an insurance carrier chose to defend an indemnification counterclaim stemming from a fatal car collision.
2. The automobile accident killed the driver husband and passenger wife. The Surrogate's Court appointed one of the couple's children as Executor of the Husband's Estate and the Wife's Estate. The Executor retained both an Estate Counsel and a Litigation Counsel. The Litigation Counsel commenced a wrongful death action on behalf of the Executor, acting for the Estates, as well as the Executor and the couple's other children in their individual capacities and as Beneficiaries of the Estates. Defendants in the wrongful death action are the owner and driver of the other vehicle involved in the collision. The wrongful death action seeks compensatory damages on behalf of the Beneficiaries, comprising lost monetary support, and survival damages on behalf of the Estates, consisting of physical and emotional pain and suffering of the decedents prior to death. The Beneficiaries of both Estates are the same.
3. In answer to the wrongful death complaint, defendants have asserted an affirmative defense of comparative fault that the husband's negligence in operating the vehicle was the sole, or at least a contributing, cause of the accident. Defendants have also asserted a counterclaim solely against the Husband's Estate for indemnification. Neither the affirmative defense nor the counterclaim would reduce the recoveries by the other plaintiffs in the wrongful death action, but a successful affirmative defense could reduce any damages awarded to the Husband's Estate and a successful indemnification claim could result in the Husband's Estate reducing the exposure of defendants to damages awarded plaintiffs. Litigation Counsel represents the Executor of each Estate and the Beneficiaries in opposing the comparative fault affirmative defense. The Wife's Estate and the Beneficiaries have interposed no direct claim against the Husband's Estate.
4. The inquirer is the attorney assigned by the husband's insurance carrier to defend the Husband's Estate against the indemnification counterclaim. The inquirer believes that the insurance coverage may not be adequate to satisfy an award entered on the counterclaim. Although limiting the husband's culpability for the accident is in the interest of all plaintiffs in the wrongful death action, the inquirer believes that tension exists between the interests of the Husband's Estate, on the one hand, and the Wife's Estate and the Beneficiaries, on the other hand, with respect to the wrongful death damages each allegedly sustained. On the inquirer's view, the Executor, acting on behalf of the Husband's Estate in defense of the counterclaim, should seek to minimize the wrongful death damages to reduce the exposure of the Husband's Estate to indemnify defendants, but, acting on behalf of the Wife's Estate and the Beneficiaries, the Executor should seek to maximize the wrongful death damages allegedly due them.
5. The Executor has directed the inquirer to communicate solely with Estate Counsel about the

defense of the indemnification counterclaim. The inquirer is concerned, however, that confidential information received by the Estate Counsel from the inquirer will be shared by the Estate Counsel or by the Executor with Litigation Counsel. That confidential information would ordinarily concern, among other things, the inquirer's strategy for addressing the husband's allegedly culpable conduct and the compensatory wrongful death damages sustained by the Wife's Estate and the survival damages sustained by the Beneficiaries. For this reason, the inquirer wishes to circumscribe the communications to the Estate Counsel, because the inquirer believes that unrestricted communications may adversely affect the insurance company's exposure on the indemnification counterclaim.

QUESTION

6. May an insurer-assigned counsel for an insured limit communications to the counsel's client based on a belief that the client may use the communications to the financial detriment of the insurance company?

OPINION

7. The answer is no. Our opinions address solely the ethics issues that an inquirer poses about the inquirer's own prospective conduct; we do not opine on the conduct of others. Thus, we offer no opinion here on whether Litigation Counsel has a conflict of interest in representing all plaintiffs in the wrongful death action. Our focus is confined to the inquirer's duties to the inquirer's client, the Executor of the Husband's Estate, under the New York Rules of Professional Conduct (the "Rules"). The Rules make clear that the inquirer's obligations are to serve the interests of the Executor as the Executor defines them.

8. Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

9. Rule 1.8(f) makes clear that, no matter the source of the lawyer's compensation for representing a client, the lawyer's duty is to the client, not to the one paying the lawyer's fees.

10. Comment 11 to Rule 1.8(f) elaborates:

Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company).... Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client.

Rule 1.8, Cmt. [11]; *see Feliberty v. Damon*, 72 N.Y.2d 112, 120 (1988) ("[T]he paramount interest independent counsel represents is that of the insured, not the insurer."); N.Y. State 1102, ¶ 3 (2016) ("When the insurance company designates counsel for the assured, whether the designated counsel is inside or outside counsel, the lawyer's client is the insured and not the insurance company."); N.Y. State 716 (1999) (the lawyer's primary allegiance is to the client, the insured); N.Y. State 73 (1968) (attorney employed by carrier has superior duty to assured, the client) .

11. An insurer-compensated lawyer thus owes the same duties to a client as if the client were paying the lawyer's fees. Rule 1.2(a) provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

12. Rule 1.4 imposes obligations on attorneys, among other things, promptly to inform the client of material developments in the matter, Rule 1.4(a)(1)(iii); reasonably to consult about the means by which the client's objectives are to be achieved, Rule 1.4(a)(2); to keep the client reasonably informed about the matter, Rule 1.4(a)(3); promptly to comply with the client's reasonable requests for information, Rule 1.4(a)(4); and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, Rule 1.4(b).

13. It may be that the inquirer's counterclaim defense litigation strategy, if freely reviewed and discussed with the Executor or Estate Counsel in conformance with inquirer's obligations under Rules 1.2(a) and 1.4, and subsequently disclosed to Litigation Counsel, might harm the interests of the insurance carrier, but consideration of the insurer's interests in discharging the lawyer's obligations under Rules 1.2(a) and 1.4 would constitute interference with the inquirer's attorney-client relationship with the client Executor that Rule 1.8(f) forbids. *See Feliberty*, 72 N.Y.2d at 120 ("[t]he insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client") (citations omitted). Any strategy for opposing and defeating the comparative fault affirmative defense and the indemnification counterclaim is just one element of the larger picture that the Executor must consider, a picture which also presumably takes account of the limited coverage that the insurance carrier provides for the counterclaim. Accordingly, the inquirer's communications with the Executor, or with the Estate Counsel at the direction of the Executor, should be free and unrestricted, guided by the requirements of Rules 1.2(a) and 1.4. The use to which the Executor or Estate Counsel choose to make of those communications, in what they determine to be the overall best interests of the Estates and the Beneficiaries, is for the Executor or Estate Counsel to decide, not the inquirer.

14. The inquirer should take one other consideration into account, an issue we raise owing solely to the inquirer's desire to limit communications to the inquirer's client based on the inquirer's concern about the Husband's Estate's insurer.

15. The inquirer may rely on repeat business from the insurance carrier, whether through a longstanding business relationship between the carrier and the inquirer's law firm, personal relationships with claims agents or other carrier employees, or otherwise. We are mindful, for example, that insurance companies often maintain lists of approved counsel to represent their insureds in particular types of matters. Being so listed is obviously in the financial and business interests of the law firm. We recognize, too, that the interests of the insurer and the insured are not always perfectly aligned. Although each has an interest in minimizing a claimant's recovery, an insured may have other interests in seeking a resolution of a matter that the insurer regards as excessive in light of the insurer's more narrow interests – a situation that this inquiry potentially poses.

16. If a lawyer depends on an insurance carrier for a regular flow of business, and the lawyer believes that the lawyer's insured client is pursuing a course of action that the lawyer considers potentially injurious to the insurance carrier, then the lawyer must determine whether, under Rule 1.7(a), a reasonable lawyer would conclude that a "significant risk" exists "that the lawyer's professional judgment on behalf" of the insured client "will be adversely affected by the lawyer's own financial, business, property or other personal interests." If the lawyer determines that such a "significant risk" is present, then, consistent with Rule 1.7(b), the lawyer must assess whether the lawyer nevertheless reasonably believes that the lawyer "will be able to provide competent and

diligent representation” to the insured client and obtain the insured client’s informed consent, confirmed in writing, to continuing the representation. In that circumstance, the inquirer should disclose the inquirer’s relationship with the insurer and, if able to provide the requisite representation, obtain the Executor’s consent to continuing the representation.

CONCLUSION

17. An insurer-assigned lawyer may not limit or restrict communications to the lawyer’s client even if the possibility exists that the client may share the communications with others whose interests may be in conflict with those of the insurer.

(5-18)