

New York County Lawyers Association

Committee on Professional Ethics

Formal Opinion 751

TOPIC: Tripartite Conflicts for Insurance Defense Counsel

DIGEST: A lawyer who is one of an insurance carrier's panel counsel, and is selected by the insurer to defend one of its insureds, must maintain insured's confidential information pursuant to RPC 1.6 and 5.4, and may not disclose to the insurance carrier confidential information furnished by the insured (the lawyer's client) regarding a misrepresentation in the original insurance application that may negatively affect coverage. The lawyer may not counsel the client regarding whether to disclose the past misrepresentation absent written consent after making full disclosure of the facts, and even then only if the lawyer reasonably believes he or she can provide competent representation to the client. The lawyer may seek to withdraw consistent with his or her obligations under RPC 1.16.

RULES OF PROFESSIONAL CONDUCT: 1.2(d), 1.6, 1.7, 1.8(f)(2), 1.16(c & d), 5.4(c), 8.4(c)

OPINION

1. A law firm is panel counsel for an insurance carrier. Representation of the insurance carrier's insureds is a significant portion of the firm's business. Panel counsel was selected by the insurance carrier to defend the insured, who is a licensed professional, against a claim of professional negligence.
2. In the course of defending the insured (or "the client"), the lawyer becomes aware that the client made a misrepresentation in its insurance application, falsely informing the carrier that the client was fully licensed in the profession pertinent to the insurance coverage and in all relevant jurisdictions when the initial application had been completed. In fact, the client was not licensed at the time of the application, although the client had become duly licensed prior to rendering the services underlying the claim. Panel counsel is retained solely to defend the client in a civil claim filed against the client, and not to advise the client or the insurance carrier as to coverage.
3. The tripartite relationship between insurance carrier, insured and defense counsel representing the insured at the carrier's expense has been the subject of many ethics opinions, all of which agree that the lawyer's primary duty is to its client, the insured. *See, e.g.*, ABA Formal Op. 01-43 (2001) (exploring a lawyer's duties in the tripartite relationship among the lawyer, the insured, and the insurer); N.Y. State 716 (1999) (lawyer in tripartite relationship with insured and insurer can only disclose information to third party auditor upon client consent after full disclosure, and even then the disclosure of confidential information should be minimized); N.Y. County 669 (1989) (addressing issues similar to those in this opinion); and N.Y. State 731 (1968)

(in tripartite relationship, lawyer must advise insurance carrier that "his undivided allegiance and fidelity is to the [insured]").

4. The duties of insurance panel counsel or other lawyers who are compensated for representing a client by a third party are explained in New York's Rules of Professional Conduct ("RPC") 1.8 and 5.4. According to RPC 1.8 (f);

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the 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.

A lawyer's duty is further explained in RPC 5.4 (c), which provides that:

Unless authorized by law, a lawyer shall not permit a person who recommends, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

RPC 5.4(c).

5. Under the hypothetical facts presented, the lawyer has learned information that might be detrimental to the client if it is revealed because it could jeopardize the client's insurance coverage. If the lawyer reveals the information to the insurance carrier, the carrier may benefit but the client may be harmed by losing coverage.

6. The first issue is whether the coverage information is considered confidential within the meaning of RPC 1.6. That rule provides that, "A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client for the advantage of the lawyer or third person," absent informed consent or one of the exceptions in RPC 1.6(b). Under RPC 1.6, confidential information is defined as "Information gained during and relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." RPC 1.6(a)(3). Here, the lawyer learned about the false information on the insurance application from the client, and the disclosure of the information could be detrimental to the client, so it *prima facie* qualifies as confidential information under RPC 1.6.

7. This Committee addressed an analogous fact pattern 28 years ago. In NYCLA Formal Opinion 669, we considered the ethical duties of defense counsel selected by an insurance carrier to represent the interests of an insured. In Opinion 669, the subject attorney learned, in the course of representing the client, confidential information that might be used by the carrier to disclaim coverage. We wrote that the lawyer should advise the client to make full disclosure to the insurer, barring which the lawyer should resign from the representation without disclosing the potentially compromising confidential information. As we wrote in NYCLA Ethics Opinion 669, “When the lawyer withdraws from the representation, he may not inform the insurance company of the reasons for the withdrawal.” We suggested that the lawyer could state, as reasons for withdrawal, that “professional considerations required termination of the representation . . .”

8. Here, we agree that the disclosure by the lawyer of confidential client information to the insurance company would likely result in a disclaimer of coverage, and therefore would be detrimental to the client. Accordingly, we believe the lawyer ethically is prohibited from revealing the misrepresentation in the client’s insurance application to the insurance carrier under RPC 1.6(a) and RPC 5.4(c).¹

9. We reconsider here that aspect of the Opinion 669 which counsels the lawyer to advise the client “to make full disclosure to the insurer” or else withdraw from the representation. RPC 1.7(a) provides that a lawyer shall not represent a client if a reasonable lawyer would conclude that:

- (1) The representation will involve the lawyer in representing differing interests or;
- (2) There is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

RPC 1.7(a).

10. We understand that the lawyer has a longstanding and lucrative business relationship with the insurance carrier. Upon discovery that the client’s coverage may have been fraudulently obtained, the lawyer understands that the insurer, once made aware of the past misrepresentation, may seek to deny coverage. In addition, the insurer may cease to have the lawyer represent its insureds if it discovers that the lawyer knew of the misrepresentation but did not disclose it. Thus, the lawyer is conflicted in advising the client regarding the misrepresentation in the insurance application because disclosure could jeopardize the lawyer’s financial interest in protecting the business relationship with the insurer.

11. The lawyer's conflicting financial interest, inability to disclose the misrepresentation to the insurance carrier, and inability to continue the representation if fees will be covered by the insurance carrier and the insured does not disclose the misrepresentation creates the critical

¹ RPC 1.6(b)(2) provides an exception that permits the lawyer to disclose confidential information to prevent the client from committing a crime. Whether the client’s conduct would constitute a crime is an issue of law beyond the scope of this Committee. We note, however, that the revelation of confidential information must be reasonably necessary “to prevent the client from committing a crime.” RPC 1.6(b)(2).

conflict dilemma for the lawyer in this scenario. RPC 1.7(b) provides that a lawyer may represent a client despite a concurrent conflict if

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Therefore, the lawyer can only advise the insured about whether to disclose the past misrepresentation after making full disclosure of his or her financial interest in the insurance carrier to the client and obtaining the client's written consent to waiving the conflict. The lawyer cannot seek consent, however, unless the lawyer reasonably believes that he or she can provide competent representation to the client despite the conflicting financial interest.

12. We believe that the interests of the lawyer in protecting the business relationship with the insurer and the client's interest in not disclosing a misrepresentation that could cause the termination of the insured's coverage is very likely to adversely affect the lawyer's professional judgment on behalf of the client, which would render the lawyer not competent to advise the client on disclosure. Further, we believe that it is likely that the lawyer's conflict could not be cured by disclosure and consent. Accordingly, the lawyer should advise the client to consult with an independent attorney about whether to make a disclosure to the insurance company.

13. We modify and amend Opinion 669 consistent with the discussion herein insofar as Opinion 669 suggests that the lawyer should advise the car owner to make full disclosure to the insurer.

14. In the scenario presented, it is possible that the insured's representation in the original insurance application that he or she was duly licensed was false but innocent, due perhaps to the insured's lack of understanding as to when the process for obtaining the license was completed. In such a scenario, it is possible that the insured – independently or on the advice of other counsel – may choose to disclose the error and argue the innocent mistake as the reason that coverage should not be cancelled. If, however, the client does not reveal the misrepresentation to the insurance carrier, the lawyer may withdraw from the representation under RPC 1.16(c)(2, 3) (permitting withdrawal if the client persists in a course of action involving the lawyer's services that the lawyer believes is criminal or fraudulent or has used the lawyer's services to perpetrate a crime or fraud), and should seek permission for withdrawal from the tribunal handling the underlying professional negligence claim if required by the rules of the tribunal. *See* RPC 1.16(d).

CONCLUSION

15. For the foregoing reasons, we conclude that selected panel counsel who, in the course of representing an insured, learns of confidential information that may be detrimental to the insured if disclosed, must maintain the confidentiality of that information and not disclose it to the insurance carrier. The lawyer cannot advise the client regarding disclosing the misrepresentation absent written consent by the client after full disclosure of the conflict, and even then only if the lawyer is not disabled from rendering competent representation by the lawyer's conflicting financial interest. If the client does not disclose the information to the insurance carrier, the lawyer may withdraw from the representation if the client persists in a course of action involving the lawyer's services that the lawyer believes is criminal or fraudulent or has used the lawyer's services to perpetrate a crime or fraud, and should seek permission for withdrawal from the tribunal handling the underlying professional negligence claim if required by the rules of that tribunal.