

NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion

Opinion #73 - 3/1/68 (36-67) *Topic:* CONFLICT OF INTERESTS,
DISCLOSURE
Digest: ATTORNEY EMPLOYED BY CARRIER
HAS SUPERIOR DUTY TO ASSURED,
HIS CLIENT
Canon: Former Canons 6, 15

QUESTION

A lawyer has been retained by an insurance company to defend its insured under the terms of a Homeowner's policy in an action commenced against the assured which alleges two separate and alternative causes of action, one for an intentional assault committed by the assured and the second for negligence assuming that the physical contact was accidental. The policy in question covers the assured for general liability but expressly excludes coverage for an assault.

The insurance company's investigation file contains factual evidence indicating an intentional assault and there exists a possible conflict of interest since the assured will undoubtedly claim any harm was accidental and, of course, the attorney is duty-bound to protect the interests of the assured alone. On the other hand, the attorney asserts that the carrier's rights are no less entitled to equal justice and if, in fact, an assault was involved, the facts indicating such should be developed.

The attorney asks what, if any, protection his firm may have against a charge by the assured that the attorney's loyalty was not to him but to his carrier.

OPINION

Canon 6 of the Canons of Professional Ethics states that, "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose..."

There is no question but that the assured is the client of the retained attorney and that the attorney is obligated to represent him with undivided fidelity regardless of the fact that his fee for legal services is being paid by another. The insurance company is not a party to the suit and it has a contractual obligation not to take any action that would prejudice the assured's defense to the negligence claim. The attorney supplied by it, in addition, has the duty to defend the suit in its entirety.

It is the opinion of the committee that the attorney is obligated under Canon 6 to disclose to the carrier and to the assured, the

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apparent conflict of interest with a full disclosure of the facts and to advise the carrier that even though his legal services are being paid by it, his undivided allegiance and fidelity is to the assured and that it will be necessary for him to defend the assured in an effort to defeat recovery on any grounds asserted in the complaint and probably to contend directly against the interest of the carrier to promote the interest of the assured.

Canon 15 also applies, and the carrier and assured should be advised that, "In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client."

Questions of law may arise as to whether the lawyer's fee should be apportioned between the assured and the insurance company (see Prashker vs. United States Guaranty Co., 1 NY 2d 584 (1956); Hoffman vs. Allstate Insurance Company, 188 NYS 2d 408, Sup. Ct., Nassau County, (1959); O'Morrow vs. Borad, 27 Cal 2d 794, 167 P 2d 483 (1946)), but from an ethical standpoint there is no doubt as to the lawyer's duty to the assured as his client.

It is further the opinion of the committee, that if the attorney feels that the apparent conflict is such that he cannot act as indicated above, then the assured should be advised to retain counsel of his own choosing and the question of the responsibility for the fees of his selected counsel will then be decided between the carrier and the assured or by the Court.

Opinion #74 - 3/28/68 (32-67)

Topic: CONFLICT OF INTEREST
Digest: REPRESENTATION OF INJURED
CHILD IN ACTION AGAINST
INSURED PARENTS. ATTORNEY
RETAINED BY PARENTS.
Canon: Former Canon 6

QUESTION

While husband and wife were riding with their infant child in the wife's car, with the husband driving, an accident occurred resulting in serious injury to the child and damage to the automobile. The parents retained an attorney to recover for the personal injuries to the child and for the property damage to the wife's automobile. Following investigation by the attorney, it became apparent that the accident may have been caused either by the negligence of the manufacturer of a tire that blew out or by the negligence of the driver. The question thus arose as to whether or not, in addition to bringing the action against the tire manufacturer, an action should be brought directly against the parents, who carried liability insurance.