



Committee on Professional Ethics

Opinion #247 - 4/28/72 (25-72) Topic: Conflict of Interests

Digest: Improper for an attorney to accept retainer from an insurance carrier to defend a municipality while at the same time he maintains negligence actions against the municipality.

Code*: EC 5-1; EC 5-14; DR 5-105(A);
DR 5-105(C).

QUESTION

May a law firm be retained by an insurance carrier as counsel for a municipality, and at the same time maintain negligence actions against a municipality.

OPINION

EC 5-1 provides:

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client".

EC 5-14 provides:

"Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant".

It is clear that without the consent of the municipality and of all clients for whom the attorney is litigating against the municipality, the attorney may not accept a retainer to defend the municipality, even though he is being paid by the insurance carrier, while at the same time he is litigating for clients against the municipality. DR 5-105(A) provides:

"A lawyer shall decline proffered employment if the exercise

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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, except to the extent permitted under DR 5-105(C)".

DR 5-105(C) provides:

"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".

See also, ABA 112 (1934); N.Y. County 350 (1939); N.Y. County 450 (1957); N.Y. County 549 (1967); Drinker, Legal Ethics 111, 112 (1953).

As the public interest is involved, the municipality is unable to give consent, and so we need not consider whether the attorney could properly accept the retainer with the consent of the municipality and of the clients for whom he is suing the municipality. N.Y. State 213 (1971); N.Y. State 218 (1971); Drinker, Legal Ethics, 120 (1953).

In New York State 218 (1971) we again noted that a municipality cannot give consent.

Accordingly, an attorney may not be retained by an insurance carrier to defend a municipality and at the same time maintain negligence actions against the same municipality.
