NEW YORK STATE BAR ASSOCIATION

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 826 – 9/12/08

Topic: Conflicts of interest; multiple representation

Digest: No *per se* rule prohibits a lawyer from representing plaintiffs in declaratory judgment actions against an insurance carrier and simultaneously defending that carrier against other insureds in other declaratory judgment actions, or from obtaining advance waivers of the conflict. Where the actions involve related issues of law, however, whether the clients can validly consent depends on, among other things, potential "positional conflicts," the possibility that the lawyer may need to cross-examine employees of a client, and the possibility that confidential information derived from one representation may be of use in another.

Code: DR 4-101(B)(2); DR 5-101(A); DR 5-105(A) and (C); EC 5-15

QUESTION

1. May a lawyer agree to defend an insurance company in coverage disputes arising out of construction accidents while simultaneously representing other insureds in other coverage cases against that insurance company arising out of unrelated construction accidents?

OPINION

2. The inquirer is a member of a law firm that regularly represents property owners and construction managers who are defendants in construction accident cases and who were denied insurance coverage. The firm represents these clients, as plaintiffs, in actions filed against the insurance carriers for declaratory relief

invalidating the coverage disclaimers and enjoining the carriers to defend and indemnify them, on grounds that the plaintiffs are "additional insureds" in subcontractor liability policies. The firm has been approached by one of the defendant insurance companies to represent it as a defendant in other, unrelated declaratory judgment and injunction actions brought by other insureds. The inquirer asks whether the firm may take on these engagements.

3. A lawyer may not take on or continue the concurrent representation of multiple clients if the representation would "involve the lawyer in representing differing interests" or if "the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected," unless the lawyer obtains the informed consent of each client affected by the conflict "after full disclosure of the implications of the simultaneous representation and the advantages and risks involved" and "a disinterested lawyer would believe that the lawyer can competently represent the interest of each."[1] "Differing interests" are defined broadly by the Code to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest."[2]

4. Here, there clearly is a conflict with respect to the matters involving the carrier that the lawyer or law firm proposes to defend. If the lawyer or law firm takes on those matters, the lawyer or firm will be representing in the existing actions one client – the insurance company – adverse to another client – the insureds – and can proceed only if the conflict is consentable and all clients involved provide informed consent.[3] In considering whether the conflict is consentable and the nature of the disclosure required in obtaining consent, the situation in this inquiry presents particular issues.

5. First, because of the standardized nature of many insurance policies, there is a significant probability that a lawyer or law firm representing the carrier may be called upon to take the opposite side of an issue that the lawyer is simultaneously litigating on behalf of a declaratory judgment plaintiff in another case – for example, the outer time limit for timely notice of claim, the required specificity for a valid notice of disclaimer, or the scope of coverage afforded by a particular clause. This type of "positional" or "issue conflict" does not present an automatic bar to the multiple representation. EC 5-15 states, "[A] lawyer may generally represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts."[4]

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1 DR 5-105(A) and(C).

2 Code Definitions.

3 Under the Code, individual lawyers have the conflict, but pursuant to DR 5-105(D) their conflict is imputed to every lawyer in their firm.

4 *See also* Model Rule 1.7 cmt. 24 ("The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client

6. Even where there is a risk of creating an adverse precedent, such conflicts are generally subject to consent if the client is adequately informed of the issues involved.[5] There may be circumstances, however, in which the lawyer's effectiveness on behalf of one client may be impaired by the representation of the other client, as for example, where the lawyer's own advocacy of the contrary position may be used against the lawyer in the representation of one of the clients, or where the lawyer will feel constrained by the position he or she has taken in one case from arguing vigorously for the contrary position. In such cases, it will generally not be possible to meet the requirement of DR 5-105(C) that "a disinterested lawyer would believe that the lawyer can competently represent the interest of each."

7. A second consideration is whether the lawyer may need to cross-examine an employee of the carrier client in the representation of an insured. There is nothing in the abstract that prevents an adequately advised client from consenting to be sued by the client's lawyer in unrelated matters, particularly if the client is a sophisticated consumer of legal services, as are most insurance companies. But depending on such questions as the seniority of the employee, the importance of the testimony, and the nature of the cross-examination, it may be impossible to meet the disinterested-lawyer test where such a suit would require cross-examination of an insurance carrier employee. Similar considerations would be presented if the lawyer were required to cross-examine an expert that the lawyer might have used or be using in a case for the other side.

8. Third, the firm that seeks to represent both the carriers and the declaratory judgment plaintiffs in coverage disputes should be mindful of DR 5-101(A), which

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represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."); ABA 93-377 ("[I]f the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128(f) (2000) ("A lawyer ordinarily may take inconsistent legal positions in different courts at different times. . . . However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. . . . If a conflict of interest exists, absent informed consent of the affected clients . . . , the lawyer must withdraw from one or both of the matters.").

[5] *See*, *e.g.*, Model Rule 1.7 cmt. 24 ("If there is significant risk of material limitation, *then absent informed consent of the affected clients*, the lawyer must refuse one of the representations or withdraw from one or both matters.") (emphasis added); sources cited in the preceding footnote.

concerns conflicts arising from a "lawyer's own financial, business, property or personal interests." To the extent there may be a significant disparity in the fees likely to be generated by the owners and construction managers on the one hand, and the carrier on the other hand, there may be an "inclination . . . to 'soft peddle' or de-emphasize certain arguments or issues – which otherwise would be vigorously pursued – so as to avoid impacting the other case."[6]

9. In addition, a lawyer may not use for the benefit of the insureds any confidential information that the lawyer has learned in the course of representing the carrier.[7] If in a particular case for an insured, for example, the practices of the carrier or of individual employees of the carrier with respect to a certain issue may be called into question, it may well not be possible for the lawyer to avoid using confidential information derived from a prior representation of the carrier regarding those practices.[8] In such cases, again, the lawyer might not be able to satisfy the "disinterested lawyer" test.

10. To the extent that the lawyer concludes that a conflict is consentable, the lawyer should advise the clients of these considerations in obtaining that consent. The lawyer's disclosure should address, as necessary in a particular case and depending on the sophistication of the client, questions such as the possibility that advocating a favorable legal position in one client's case may be prejudicial to a client in another case, the possibility that the lawyer or a lawyer in the firm may need to cross-examine an employee of the carrier, and any other considerations that may reasonably be thought to affect the lawyer's independent professional judgment or the vigor of the lawyer's representation of the clients.

11. A further consideration is whether the lawyer or law firm seeking to represent a carrier in a series of actions while continuing to bring actions by insureds against that carrier may seek an advance waiver of conflicts with respect to future cases the lawyer or law firm may take on. If the conflicts are otherwise consentable, there is sufficient disclosure of the nature of the conflicting representations that may arise and the client is capable of understanding the waiver, a lawyer or law firm generally may ethically request and rely upon the advance waiver of a future multiple-representation conflict.[9] The extent of the disclosure necessary, and potentially the scope of the advance waiver, may depend on, among other things, the sophistication of the client.[10] For example, where a client is relatively unsophisticated in legal

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6 ABA 93-377.

7 DR 4-101(B)(2) bars a lawyer from knowingly using "a confidence or secret of a client to the disadvantage of the client."

8 *See* N.Y. City 2005-2 ("There are situations, however, where information that the lawyer has in his or her mind from the first representation is so material to the second representation that the lawyer cannot avoid using the information.").

9 *See* N.Y. City 2006-1.

10 *See id.* at 5.

matters, an advance waiver is more likely to be enforceable if it is limited to lawsuits on behalf of the carrier of the same general kind as the lawyer or law firm is then prosecuting, as opposed to a more open-ended waiver.

12. The lawyer should review the validity of such an advance waiver both when the waiver is given and when it is triggered. For example, the lawyer would not be able to rely on an advance waiver by an insured broadly permitting the lawyer or firm to represent the carrier defendant in other construction-accident suits against other insureds if the lawyer or firm thereafter wishes to take on a lawsuit on behalf of the carrier that would require the lawyer or firm to argue for a position that would limit the lawyer's effectiveness in arguing for the insured.

CONCLUSION

13. There is no per se rule that would disqualify a lawyer from representing certain declaratory judgment plaintiffs against the insurance carrier and simultaneously defending the carrier against other declaratory judgment plaintiffs in coverage disputes. The possibility of positional conflicts, however, will require careful consideration in each case of the nature of the issues presented and the effect on the representation of other clients of the positions taken on behalf of one. In some cases, considerations such as the identity of the likely witnesses and whether the lawyer has confidential information derived from representation of the carrier that may be of use in the representation of the insured may also limit the lawyer's ability to obtain informed consent to the conflict. For these reasons, the burden of satisfying the "disinterested lawyer" test in these cases will often be a high one.

(17-07)