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 allegience 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 chicane. 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.

The attorney retained by the parents advised that although an unemancipated child has been held, in New York, to have no cause of action against his parents for negligence, there was a remote possibility of recovery in this case; that the insurance carrier would defend in their behalf, but that they would be personally liable for any recovery over the limits of the policy. The parents gave the attorney permission to commence the action against themselves and the tire manufacturer. The attorney had a relative of the child appointed guardian ad litem, and instituted the action. Subsequently, the attorney became concerned that despite his disclosure and the parents' express consent, there were conflicting interests among the parties, and he advised the parents to obtain a substitution of attorneys. The parents informed him that they do not want a substitution, and have asked him to continue in the case. The attorney inquires if he may proceed with the matter.

OPINION

It would be improper for the attorney, who was retained by the parents to bring an action against the tire manufacturer to recover for property damage to the wife's automobile, to represent the interests of the child in an action against the parents for personal injury. Neither the parents' consent, nor the attorney's withdrawal as counsel of record in the wife's suit against the tire manufacturer, would justify the attorney's handling the child's claim against the parents.

Canon 6 reads in part as follows:

> "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."

As stated in Drinker's "Legal Ethics", at page 120, Canon 6 "does not sanction representation of conflicting interests in every case where such consent is given, but merely forbids it <u>except</u> in such cases" (emphasis in original). He further points out that there are "certain cases in which such representation is improper or at least unwise even with consent".

In this case, the potential conflicts are so serious that it would be impossible for the attorney to discharge his duty to both sides. For example, it may become his duty to press for a recovery against the parents exceeding the limits of their insurance coverage. Other possibilities of conflict creating problems of divided loyalty exist in connection with such matters as discovery proceedings, settlement negotiations, litigation strategy and appeals.

In the absence of insurance, the parents would not consent to the proposed transfer of allegiance. The situation should be no different, merely because the parents are covered by insurance. It is immaterial, so far as Canon 6 is concerned, that an attorney for the insurance company probably will defend the case, for "interests which are essentially adverse remain so regardless of any contract of indemnity a party may have." (N.Y.City 223, 711).

It would, of course, not be improper for an attorney who does not represent a child's parents to be retained by a guardian ad litem to institute action against the parents, even though the guardian ad litem was appointed upon application of the parents, so long as there is no collusion or conspiracy to mulct the insurance company. This is distinguishable from a case where an attorney is retained at the instance of an insured car owner to represent an injured party in an action against the insured, which has been disapproved as in violation of the Canons of Ethics. (N.Y.City 603).

In the circumstances described in the inquiry, the attorney should inform the parents that inasmuch as he was originally retained by them, he cannot represent their child in an action against them. If they refuse to agree to a substitution, he should apply to the Court to be relieved of the case.

Opinion #75 - 4/3/68 (1-68)

Topic: SOLICITATION.
Digest: MAY LEGAL AID SOCIETIES SEND LETTERS INFORMING INDIGENT CLIENTS THAT THERE IS PENDING AN EVICTION PROCEEDING AGAINST THEM.
Canon: *Former Canon 27*

QUESTION

The Legal Aid Society of Albany, Inc., has instituted a program involing Tenant Notification of Eviction Proceedings. Procedures were set up whereby the name and address of each respondent in a Summary Dispossess Proceeding filed in court are obtained together with "certain other information." Then, a form letter is sent to each tenant respondent "Notifying them that an eviction proceeding has been commenced; that there may be a good defense; suggesting that if the tenant wishes to defend, he consult an attorney; and if he cannot afford an attorney that he contact the Legal Aid Society of Albany."

The Committee is asked if the above procedures followed by the Legal Aid Society are consistent with the Canons of Ethics. An additional inquiry is made as to whether the Committee's answer would "differ if the address of respondents were screened to exclude those outside of the low income areas of the city."

OPINION

It is the opinion of the Committee that it would not be improper for the Legal Aid Society to send an appropriate form letter intended to achieve the purpose mentioned in the inquiry. It is, however, the opinion of the Committee that any reference to the fact that "there may be a good defense" should be deleted from the letter.

This inquiry involves an interpretation of Canon 27 concerning solicitation. It has been held in the past that Bar Associations may issue publications advising the layman of the importance of seeking legal advice (ABA 121, 179, Jacksonville Bar Association v. Wilson, 102 So. (2) 292, Fla. 1958). The main purpose of the anti-solicitation statute is to prevent commercialization of the legal profession. The practice