NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #519 - 3/21/80 (10-80)

Topic: Conflict of interests; insurance company; staff counsel.

Digest: Insurance company's staff counsel may not represent assured when company disclaims coverage.

Code: EC 5-14, 5-15, 5-17; DR 5-105(A) and (C)

QUESTION

An automobile was involved in an accident while driven by an acquaintance of its owner. Both owner and driver were sued. The company insuring the automobile disclaimed coverage of the driver on grounds that he lacked the owner's consent to drive the vehicle. Thereafter, the company discovered that it had insured the driver under a separate policy. Since the amount of coverage provided by the owner's policy is substantially greater than that of the driver, the company has persisted in disclaiming coverage for the driver under the owner's policy. The company has assigned one of its staff lawyers to represent the driver in the pending litigation.

In such circumstances, may the insurance company's staff lawyer accept the assignment and undertake to represent the driver in a declaratory judgment action to be brought against the company for the purpose of determining the issue of his coverage under the owner's policy?

OPINION

There is no doubt that an insurance company's staff lawyer may ethically represent an insured in the usual case of defending against the claims of third parties. See, e.g., N.Y. State 109 (1969) and ABA 282 (1950). In such cases, the common interests of both clients clearly preponderate. See, EC 5-17.

Even where there is some basis upon which the company might seek to disclaim, we believe that it is still possible for staff

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counsel to proceed with the defense of third party claims, provided the company abandons its right to disclaim.

If the company persists in disclaiming coverage, however, we believe that neither the third party action nor the declaratory judgment proceeding should be handled by staff counsel. See, EC 5-14, EC 5-15 and DR 5-105(A).

The primary allegiance of counsel employed to defend against third party claims clearly belongs to the assured, notwithstanding the fact that counsel is retained and compensated by the carrier. Thus, we explained in N.Y. State 73 (1968) where it appeared that the carrier might disclaim coverage, counsel's "undivided allegiance and fidelity is to the assured"; and, if the carrier disclaimed, counsel would be expected "to contend directly against the interest of the carrier to promote the interest of the assured." We concluded by observing:

> "[I]f 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."

While theoretically a staff lawyer might be so isolated from his employer's affairs as to provide the assured with counsel capable of contending against the carrier, we are convinced that, in actual practice, the difficulties of preserving client confidences and exercising independent professional judgment would prove insurmountable. Accordingly, we believe that a per se rule of disqualification is fully warranted.

In this determination, we are supported by ethics opinions from other states. See, e.g., La. Op. 338 (1974) (where insurer either denies coverage or reserves its rights to do so subsequently, the same attorney may not properly represent both the assured and the insurer) and Ore. Op. 254 (1973) (attorney may not represent assured and advise the insurer on matters relating to coverage), respectively indexed at 8580 and 9815, O. Maru, Digest of Bar Association Ethics Opinions (1975 Supp.).

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Under the circumstances, there would seem to be no alternative to the retention of outside counsel. Even after full disclosure of the conflict and with the driver's consent, we find the situation so fraught with risk to the lawyer's professional responsibilities that the representation should not be permitted. See, DR 5-105(C). The assured cannot by his consent nullify the lawyer's ethical obligations. Cf., Matter of Kelley, 23 N.Y. 2d 368 (1968).

For the reasons stated, the question posed is answered in the negative.
