NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion 596 - 12/5/88 (16-88)

Topic: Insurance Company, Disclosure of Plaintiff's File to Defense Attorney.

Digest: Where the same insurance company insures plaintiff and defendant in a lawsuit, defense counsel hired by insurance company may not obtain plaintiff's insurance file from company in avoidance of rules of discovery.

Code: Canon 9
DR 1-102(A)(4), 5-107(B), 7-102(A)(7), 7-102(A)(8)
EC 5-23, 7-25, 9-2

QUESTION

In a personal injury lawsuit in which the plaintiff and defendant are insured by the same insurance carrier, may the defense attorney hired by the carrier utilize information contained in the plaintiff's insurance file, forwarded to the attorney by the carrier?

OPINION

While it is not the function of this Committee to resolve questions of law, the question posed requires us to note that in the great majority of cases, information given by an insured to the insurer would be considered privileged as information given solely in preparation for litigation. *Hollien v. Kaye*, 194 Misc. 2d 821, 87 N.Y.S.2d 782 (Sup. Ct. Sullivan Co. 1949); *Kandel v. Tocher*, 22 A.D.2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965); *Finegold v. Lewis*, 22 A.D.2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965); *Harris v. Processed Wood Inc.*, 89 A.D.2d 220, 455 N.Y.S.2d 411 (4th Dep't 1982); 3A Weinstein, Korn and Miller, *New York Civil Practice*, ¶3101.60. (*But see, Vandenburgh v. Columbia Memorial Hospital*, 91 A.D.2d 710, 457 N.Y.S.2d

591 (3d Dep't 1982), for a contrary rule of the Third Department.) The prevailing view of the New York courts appears to be that the privilege arises as an incident of the insurer-insured relationship, regardless of the stage of the litigation in which communication is made.[1]

To the extent that communications between the insured and the carrier are protected against disclosure as a matter of law, the defense counsel may not advise or participate in any breach of the carrier's duty to protect that privilege. DR 7-102(A)(7); DR 7-102(A)(8); N.Y. State 126 (1970); N.Y. State 545 (1982). A lawyer may not participate in illegal conduct by using information obtained in violation of law.[2]

In a first party situation, however, where medical records are sent to a no-fault insurer, it may be argued that the insured has no legitimate expectation that the carrier in that situation is acting as an agent pursuant to its obligation to defend and that, therefore, no privilege arises.[3] Even where it is uncertain whether disclosure of such information would be illegal, however, we believe as an ethical matter the defense counsel should not participate in the avoidance of the rules of discovery. EC 7-25. In *Juskowitz v. Hahn*, 56 Misc.2d 647, 289 N.Y.S. 2d 870 (Sup. Ct. Nassau Co. 1968), plaintiffs sought an order suppressing statements made by them to their insurance carrier in connection with its medical payments obligation. The Court relied upon Canon 9 in granting a motion to suppress the statements:

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1. In *Kandel v. Tocher*, 22 A.D.2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965) the court stated:

> The policy requires the insurer to represent and defend the insured in the event an action is brought against him. In consequence, once an accident has arisen, there is little or nothing that the insurer or its employees do with respect to an accident report except in contemplation and in preparation for eventual litigation, or for a settlement which may avoid the necessity of litigation. In this connection, therefore, it is immaterial whether attorneys have actually been assigned or employed by the insurer to represent the insured in the settlement or defense of the claim. For parallel reasons, it is immaterial whether the action based on the claim has been begun or not. On this view, automobile liability insurance is simply litigation insurance.

2. In this regard, use of information obtained even through inadvertent disclosure by an adversary's attorney has been suppressed (*Manufacturers and Traders Trust Company v. Sevotronics Inc.*, 132 A.D.2d 392, 522 N.Y.S 2d 999 (4th Dep't 1987), and in extreme cases, where disclosure has been purposefully obtained improperly resulting in substantial prejudice to a party, disqualification has been ordered. *Matter of Weinberg*, 133 Misc.2d 950 (Surr. Ct. N.Y. Co. 1986), *modified sub nom. Matter of Beiny v. Wynyard*, 129 A.D 2d 126, 517 N.Y.S 2d 474 (1st Dep't 1987) Even where unprivileged materials have been improperly obtained, judicial criticism of "deceptive practice" and "covert discovery" has been emphatic. *Estate of Kochovos*, - A.D 2d -, 528 N.Y.S.2d 37 (1st Dep't 1988)

3. There is lower court authority holding that no-fault reports are discoverable, as they are not considered to be prepared solely for litigation *Hinrichs v. Tonnssen*, 128 Misc 2d 196, 489 N.Y.S.2d 663 (Sup. Ct. Nassau Co. 1985)

> . . .to permit an attorney employed by an insurance carrier to hide behind the fact that he also represents the insured and to disown the taking of a statement from plaintiffs after the action was commenced and the insurer was charged with notice that plaintiffs were represented by counsel would be to condone a clear violation of Canon 9 . . . (The Court means) most forcefully to bring to the attention of insurers generally and the defendants' bar that the carrier will not be permitted to use its medical payments obligation as a means of clandestine discovery, and that, therefore, when a matter is in suit, the carrier's representative has an obligation to deal with an adverse litigant only through his attorney, even though the subject be medical payments and nothing more.

If the plaintiff's file is obtained by the defense attorney from the insurer absent the consent of the plaintiff for use against that party, the attorney has engaged in "back-door" discovery, which raises at least the appearance of impropriety. EC 7-25, EC 9-2.

Use of information disclosed in this manner also contains an element of deceit which we believe brings it within the proscription of DR 1-102(A)(4). An insured, even though he or she may anticipate that the carrier would use no-fault information to protect its own interests on a first-party claim, has no reasonable expectation that the same information would be used against the insured by some other party. If the insured did have reason to expect such use of the information, he or she would likely have obtained representation before disclosing it. Thus, we believe there is an element of deception which, while perhaps not rising to the level of illegality, should be considered unethical. N.Y. State 328 (1973); N.Y. State 293 (1973). DR 1-102(A)(4) has been interpreted to impose a duty of fairness, fair dealing and candor upon attorneys. N.Y. State 275 (1972); N.Y. State 328 (1974); N.Y. State 463 (1976); N.Y. State 535 (1981). Use of information given to the carrier in the reasonable belief that it would not be used against that party, which only becomes available to the defense attorney by the fortuitous event of the coincidental coverage, does not meet the standards of fairness and forthrightness which are required of attorneys.

We are also of the opinion that the particular character of defense counsel's representation of an insurance company must be recognized. It is well established that particular care must be taken when the lawyer's fee is paid by a third party, to avoid any appearance of a dividend loyalty which may compromise the representation of the client. DR 5-107(B); EC 5-23; N.Y.

State 73 (1968). We do not believe a lawyer should condone the disclosure of information when to do so raises the appearance of collusion with the insurance carrier for the carrier's own interests. EC 9-2. Canon 9 has been applied in analogous situations where, despite the absence of an actual conflict of interest, a particular type of representation, such as that of a district attorney, requires that care be taken to avoid an appearance of impropriety. N.Y. State 130 (1970); N.Y. State 152 (1970); N.Y. State 171 (1970). If information given in confidence by an insured to the insurance carrier may be disclosed to an attorney who represents the carrier to be used against the insured in litigation, then an insured required contractually to cooperate with an insurance company is placed in an untenable situation. Absent a judicial determination that the information is discoverable in a given case, a lawyer should not use the relationship with a carrier to reach such a result.

Accordingly, we answer the question presented in the negative.