

# New York State Bar Association

## Committee on Professional Ethics

Opinion 778 – 8/30/04

Topic: Conflicts of interest; representing multiple defendants.

Overrules (in part):  
N.Y. State 555 (1984)

Digest: Lawyer engaged by insurance company may not represent two defendants, one of whom has a potential indemnification claim against the other, unless a disinterested lawyer would believe the lawyer can competently represent the interests of each, the one defendant waives the right to assert indemnification as cross-claim, and both defendants otherwise consent after full disclosure.

Code: DR 5-105(A), (B), (C); DR 5-108 (A); EC 5-15, 5-16, 5-17

### QUESTION

May a lawyer engaged by an insurance carrier represent two co-defendants who are named insureds when the amount of the plaintiff's claim exceeds the policy limits and one co-defendant has an indemnification claim against the other?

### OPINION

The owner of a building hired a general contractor who agreed to procure a liability insurance policy naming both the general contractor and the owner as insured, and also agreed to defend and indemnify the owner with regard to any claims arising from the construction. A subcontractor's employee was injured and sued both the contractor and the owner for an amount in excess of the policy limits. The insurance carrier seeks to engage one lawyer to defend both the general contractor and the owner.

Under DR 5-105(A) and (B) of the Code of Professional Responsibility (the “Code”), a lawyer must decline to represent multiple clients if the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer’s representation of the other client, or if it would be likely to involve the lawyer in representing differing interests. DR 5-105(C) nevertheless permits a lawyer to represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. See EC 5-15, 5-16, 5-17.

Under the Code, the “differing interests” 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.” Code Definitions. In the facts at issue, differing interests arise from the owner’s contractual rights to indemnification from the contractor with respect to the amount of the claim exceeding the policy limits.<sup>1</sup>

Consequently, the lawyer must first determine if a disinterested lawyer would believe that the lawyer can competently represent the interest of both the owner and the contractor. For example, a disinterested lawyer may determine that he or she could not competently represent the interests of both if the lawyer believes that the owner should assert the indemnification rights as a cross-claim or if the complaint alleges an independent claim of negligence against the owner so that the trial will necessarily involve determining the apportionment of liability between the two defendants.<sup>2</sup> Assuming that a disinterested lawyer would believe that the lawyer can competently represent the interest of both the owner and the contractor, the lawyer may do so only if each consents to the representation after full disclosure of the implications of the joint representation and the advantages and risks involved.

Such disclosure should explain the potential advantage to both clients of presenting a unified defense to the plaintiff employee’s action and the offsetting disadvantage to the owner of the owner’s consequent inability to assert indemnification rights as a cross-claim in the same action. Although the owner could defer asserting the indemnification claim until such time (if ever) as the plaintiff obtains a judgment, the owner would face the risks of (1) necessary witnesses becoming unavailable, (2) a judgment being enforced by the plaintiff against the owner before the indemnification claim has been fully litigated, and (3) the possi-

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<sup>1</sup> If the claim did not exceed the policy limits, the indemnification right becomes irrelevant if the carrier is not disclaiming liability as to any claim against the owner.

<sup>2</sup> If the trial will necessarily involve an apportionment of liability between two defendants, a subsequent action by one seeking indemnification from the other may be precluded by the doctrine of collateral estoppel. *Schwartz v. Public Adm’r of County of Bronx*, 24 N.Y.2d 65 (1969).

bility of the general contractor becoming judgment proof. On one hand, both parties would likewise endure the expense and inconvenience of two trials rather than one.<sup>3</sup> On the other hand, if the original litigation were to result in a verdict or settlement for less than the policy limit, joint representation would have, in retrospect, greatly simplified the litigation with no risk to the owner.

In seeking consent to a joint representation the lawyer should explain to both clients any other potential consequences, including (1) the lawyer's obligation, absent each client's agreement to other arrangements, to disclose to one client any confidences and secrets communicated to the lawyer by the other client, N.Y. State 761 (2003),<sup>4</sup> (2) circumstances which may require the lawyer to withdraw from the representation entirely or, with appropriate consent, to continue to represent only one of the clients, N.Y. State 674 (1995), and (3) possible consequences at trial, such as the number of peremptory challenges granted to the defendants.

Because the claim here exceeds the policy limits, both defendants should be advised of their right to have separate counsel with respect to the excess claim. The lawyer contacted by the insurance company may find it advisable to recommend to the owner that he or she seek separate counsel to advise both as to the excess claim and as to the advisability of asserting a cross-claim in the present litigation.

If the owner ultimately determines that the advantages of a unified defense outweigh the disadvantages of deferring the indemnification claim, and the parties otherwise consent, the lawyer may represent both parties. In that event, the lawyer would be precluded from representing either party in a subsequent action to enforce the indemnification rights without obtaining the separate consent of the other client after full disclosure. DR 5-108(A).

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<sup>3</sup> Issues regarding the obligation of the carrier to provide a defense to its insured, the extent to which that obligation may include bringing or defending a cross-claim for an excess amount, and how the responsibility to pay lawyer fees should be divided between the insured and the carrier with respect to the cross-claim are considerations which may be relevant in the insured's determination as to consenting to the joint representation, but are matters of law and of contract on which this Committee does not opine. However, we note that New York courts have generally held that an insured defendant is entitled to defense by a lawyer of his or her own choosing at the insurer's expense when the insurer's interest in defending the lawsuit is in conflict with the defendant's interest. See, e.g., *Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981); *Bryan v. State-Wide Ins. Co.*, 144 A.D.2d 325 (1988); cf. *Nat. City Bank v. N.Y. Cent. Mut. Fire Ins. Co.*, 6 A.D.3d 1116 (2004)(if carrier provided defense, hiring separate counsel to pursue cross-claims was responsibility of insured); *Goldberg v. American Home Assurance Co.*, 80 A.D.2d 409 (1981)(no conflict so no entitlement to separate counsel). Regardless of the extent to which lawyer fees may be paid by the carrier, the insured is the client of the lawyer engaged by the carrier, and the lawyer is obligated to represent the insured with undivided fidelity. N.Y. State 73 (1967).

<sup>4</sup> To the extent that N.Y. State 555 (1984) suggests that full disclosure to both clients is not required even absent an agreement to that effect "where disclosure to the other joint client would obviously be detrimental to the communicating client," it is overruled.

The conclusion of this opinion is in harmony with prior opinions of this Committee. N.Y. State 560 (1984) involved two defendants in a medical malpractice action, one of whom as a passive tortfeasor had a potential claim against the other as an active tortfeasor. Because one of the defendants did not consent to a joint representation, the Committee concluded that the lawyer could not represent them both. In N.Y. State 191 (1971) the issue was whether a lawyer could represent both the driver of one car and his adult daughter-passenger against the driver of the other car if the daughter, fully informed, chose to waive any cause of action against her father. Because that opinion involved plaintiffs and did not involve the possibility of a subsequent indemnification action, the opinion discussed only a cross-claim and joint representation and concluded that the lawyer could not represent both the father and the daughter unless the daughter confirmed that in no event would she want to sue her father, no matter how good a cause of action she might have against him. *See also* N.Y. State 349 (1974)(absent special circumstances, lawyer may not represent driver-husband and wife-passenger as plaintiffs if defendant may assert proportionate liability against one plaintiff to reduce damages sought by the other plaintiff).

On the facts of this opinion, it does not appear that it is necessary for the owner to waive any indemnification cause of action against the builder as long as the owner agrees not to assert that cause of action as a cross-claim and otherwise consents.

## **CONCLUSION**

A lawyer engaged by an insurance company to represent two defendants, one of whom has a potential indemnification claim against the other, may not do so unless the lawyer determines a disinterested lawyer would believe the lawyer can competently represent the interests of each defendant, the defendant with the indemnification claim waives the right to assert it as a cross-claim, and both defendants otherwise consent after full disclosure.

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