



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1102 (7/15/2016)

Topic: Insurance counsel; sharing office space with nonlawyers

Digest: The lawyers in an insurance company's in-house department who provide legal services to the insurance company's policy holders must take reasonable steps to protect client confidential information of the insureds and to avoid conflicts of interest, and must comply with other applicable Rules.

Rules: Rule 1.0(h), 1.1, 1.6(a) & (c), 1.8(f), 5.3

FACTS

1. The inquirer is a salaried employee of an insurance company. The inquirer's practice is limited to the defense of the insurance company's policy holders. The lawyers in the inquirer's department are setting up an office within the building that houses the insurance company and have asked if there are any ethical requirements regarding the layout and function of the office.

QUESTION

2. What ethical rules govern the office of an insurance company's in-house department that provides legal services to the insurance company's policy holders?

OPINION

3. This Committee has long held that a lawyer may be retained or employed as "house counsel" to an insurance company to defend the insurance company's assureds. *See* N.Y. State 519 (1980); N.Y. State 109 (1969) (citing ABA Opinion 282). N.Y. State 109 notes that the contract of insurance gives the insurance company control over the defense of any action brought against the assured. Opinion 109 also notes that, since the interests of the insurance company and the assured are usually the same (*i.e.*, to defeat claims that the insurance company might be required to pay), an insurance company's in-house lawyer's representation of an insured normally does not present a conflict of interest.¹ *But see* N.Y. State 519 (1980) (insurance company's staff counsel may not represent assured when company disclaims coverage). When the insurance company designates counsel for the assured, whether the designated counsel is

¹ In N.Y. State 109, the inquirer also asked whether such an arrangement would constitute the unauthorized practice of law by the insurance company. We declined to answer that question, on the grounds that identifying the unauthorized practice of law is a question of law, and thus is outside the jurisdiction of this Committee. *See generally* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *Fordham L. Rev.* 2581 (1999), available at: <http://ir.lawnet.fordham.edu/flr/vol67/iss5/32>.

inside or outside counsel, the lawyer's client is the insured and not the insurance company. *See* N.Y. State 716 (1999) (the lawyer's primary allegiance is to the client, the insured); N.Y. State 73 (1968) (attorney employed by carrier has superior duty to assured, the client); *American Employers Insurance Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S.2d 393 (1954) (although the insurance company has retained the lawyer under its contractual duty to defend the policyholder, the client is the policyholder, not the insurance company). *Cf.* Rule 1.8(f) (lawyer shall not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship).

4. In N.Y. State 726 (2000), we held that a group of lawyers who are salaried employees of an insurance company and whose practice is exclusively to defend the company's policyholders may hold themselves out as a law firm, as long as (i) they undertake to act consistently with the professional responsibilities of a law firm and (ii) they disclose to insureds and others they are employees of the insurance company. We noted there that these responsibilities include compliance with the rules on confidentiality and conflicts of interest. However, all of the New York Rules of Professional Conduct (the "Rules") would apply to the lawyers in the legal department, since the department constitutes a "law firm" under the Rules, whether or not the lawyers in the department hold themselves out as such. *See* Rule 1.0(h) (the term "firm" or "law firm" includes the legal department of a corporation or other organization).

5. Regarding the design of the office space of the in-house department (the "Department"), the requirement to safeguard the confidentiality of client information informs that issue. Rule 1.6(a) provides: "A lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" unless the client gives informed consent. Rule 1.6(c) provides: "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, *and others* whose services are utilized by the lawyer from disclosing or using confidential information of a client" (Emphasis added.) Here, the "others" include employees of the insurance company outside the Department, including the management of the insurance company and the insurance company's claims investigators. *See* N.Y. State 987 (2013) (absent consent from the insured, staff counsel may not permit review of the confidential information in the client's file by non-attorney employees of the insurance company); N.Y. State 716 (1999) (lawyer representing insured may not submit legal bills to an independent audit company employed by the insurance carrier without the consent of the insured after full disclosure because legal bills may contain confidential information of the client).

6. We have previously opined on the requirement of confidentiality where a lawyer shares office space with non-lawyers or lawyers not in the lawyer's own firm. *See* N.Y. State 643 (1993) (where a bar association provides volunteer lawyers to a legal service organization, client files may be kept at the offices of the bar association as long as client confidential information is protected from unauthorized disclosure and the files are stored in a secure location available only to (i) the client, (ii) the client's present or former lawyer, or (iii) another person for whom the client has given informed consent); N.Y. State 939 (2012) (independent lawyers who share office

space must take reasonable measures to ensure the confidentiality of client confidential information).

7. We believe the requirement of confidentiality mandates that the work space of the lawyers who represent assureds must be separated from the work space of other insurance company managers and employees, so that conversations about clients of the Department may not be overheard by persons outside the Department. In addition, client papers should be secured so that persons outside the Department cannot access them absent the client's informed consent.

8. The inquirer must determine whether use of the insurance company's computer system would adequately safeguard confidential information of the assureds. For example, in N.Y. State 939 (2012), we discussed lawyers who shared office space as well as a single computer. Each of the lawyers had a separate administrative password to the computer that was not known to the other. We said:

The fact that the lawyers have separate computer passwords is certainly an appropriate precaution. Whether it is sufficient would depend on further factors. Some password systems may be more resistant to unauthorized access than others. Protection of the password is also important; for example, a password kept on a piece of paper stuck to the computer and readily visible to any user does not provide much protection. On the other hand, if a robust password system provides a degree of protection similar to that of locked file cabinets, then its proper and consistent use may well constitute reasonable care.

See also Rule 1.1, Cmt. [8] (a lawyer should "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients").

9. Here, if the insurance company's technical administrators have access to the Department's client files and are not prohibited from sharing them with persons outside the Department, the lawyers in the Department will be violating their duty to preserve the confidentiality of client information.

10. Finally, the lawyers in the Department have an obligation under Rule 1.6(c) and Rule 5.3 to supervise the work of nonlawyers in the Department to ensure that it is consistent with the lawyers' responsibilities under Rule 1.6. *See* Rule 5.3, Cmt. [2] (law firm must ensure that assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client.)

CONCLUSION

11. The lawyers in an insurance company's in-house department who provide legal services to the insurance company's policy holders must take reasonable steps to protect client confidential information of the insureds and to avoid conflicts of interest, and must comply with other applicable Rules.

(19-16)