

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-378
Issued: March 1995

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rules 1.2 and 1.7, which were substantially amended. Lawyers should consult the current version of the rules and comments, SCR 3.130, (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a lawyer paid by insurer to defend an insured in a personal injury action in which claims are also made against the insurer under the UCSPA represent both the insured and the insurer?

Answer: No.

References: RPC 1.2, RPC 1.6, RPC 1.7, RPC 1.8, KBA E-331, KBA E-340, KBA E-368.

OPINION

We begin with a restatement of the firm view we have expressed numerous times in the past that defense counsel represents the insured, not the insurer; that defense counsel's duty to the insured arises from the attorney-client relationship and is governed by the Rules of Professional Conduct, not the contract of insurance.

Rule 1.2 provides,

A lawyer shall abide by a client's decision concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

The lawyer's duty to abide by the client's decisions regarding settlement places the lawyer on the horns of a dilemma in the fact pattern set out above. The carrier has a strong interest in securing a dismissal of the UCSPA claims and the tort claims. The insured has a strong interest in dismissal of the tort claims alone, but may not be able to do so if the carrier insists upon dismissal of the UCSPA claims as a condition of dismissal of the underlying tort. If that cannot be accomplished, the handling of the defense by the lawyer may become pertinent to the liability of the company. It also is obvious that the lawyer would face conflicting duties by

representing both the insured and the insurer if facts bearing upon coverage were revealed by the insured. If the insured is the lawyer's only client, this information would be considered confidential. See RPC 1.7 Comment #9. Loyalty is an essential element in the lawyer's relationship with the client. RPC 1.7 Comment #1. We have previously held that the insured is entitled to competent and zealous representation that is not adversely affected by prohibited conflicts of interest. KBA E-331.

While directly adverse interests may not be presented by every case, and in fact, in many cases the UCSPA claims are bifurcated out and held in abeyance until conclusion of the underlying tort action, nevertheless, counsel will in each case be required to determine whether the representation of either the insured or the insurer may be materially affected by the lawyer's responsibilities to the other. Even if the lawyer reasonably believes that the representation will not be materially affected, the client must have the benefit of an explanation of the implications of the common representations and the advantages and risks involved before consent can be obtained.

If the lawyer seeks the insured's consent to an arrangement whereby the lawyer would be paid by the insurer to represent the insurer on the UCSPA claims and also paid by the insurer to represent the insured on the underlying tort action, it seems that the act of advising the insured, whether to consent or not, would be materially affected by the lawyer's responsibilities to the insurer (who would presumably be in favor of dual representation) or the lawyer's own interests. The mere act of urging the insured to consent, as part of the representation of the insured, would be affected by the desires of the insurer to cut down on defense costs by using one lawyer. RPC 1.7(b). It is easy to see where dual representation would be to the insurer's advantage, but difficult to see where such an arrangement would be recommended to the insured as being in the insured's best interest.

Furthermore, conflicting interests may arise in the conduct of the litigation. The lawyer may find himself/herself acquiescing the insurer's position regarding settlement in order to justify their prior conduct as opposed to recommending settlement while acting as an advocate for the insured. These problems of dual representation interfere with the lawyer's independence of professional judgment and may undermine the lawyer-client relationship with the insured.

It is the Committee's position that defense counsel should be free to abide by the insured's decisions concerning the objectives of the litigation and settlement, should be not subjected to competing loyalties that may compromise the lawyer's ethical obligation to hold inviolate confidential information of the client, and should not be required by an insurer to seek the consent of the insured to dual representation.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.