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DUTY TO INSURED

Adopted December 13, 1969.

Addendum issued 1995.

Syllabus

A lawyer, employed by a liability insurance carrier to defend a claim against the company's insured, must represent the *insured* with undivided fidelity and cannot ethically take any position which is potentially disadvantageous to the insured even though that position may be advantageous to the carrier.

Facts

An attorney is employed by an insurance company to represent the insured defendant in a personal injury action. Upon undertaking the defense, the attorney learns that the defendant is also involved in a Workers' Compensation action arising out of the same incident. The claimant in both proceedings is the same person. The insurance company has no exposure with reference to the Workers' Compensation action, it is obviously to the insurance company's interest to abate the personal injury action as long as possible and to assert that the Workers' Compensation proceeding constitutes a bar to any recovery under the insurance policy. On the other hand, the defendant insured will benefit from an immediate trial of the personal injury action and he directs the attorney to proceed to trial immediately. The insurance company opposes this course of action.

Opinion

The essential point of ethics involved is that a lawyer must represent his client with undivided loyalty.

Canon 6 of the Canons of Professional Ethics makes unequivocal reference to "the obligation to represent the client with undivided fidelity. . . ." Canons 5 and 9 of the new Code of Professional Responsibility are also apposite. They require that a lawyer exercise independent professional judgment on behalf of the client and that he avoid even the appearance of professional impropriety.

The requirement of undivided loyalty is predicated upon the fact that maintenance of public confidence in the Bar and preservation of respect for each lawyer's integrity require that no lawyer can appear both for and against the same party in the same controversy. Drinker, *Legal Ethics*, at page 115; ABA Informal Opinion No. C-728; and Ethical Consideration 9-1, Code of Professional Responsibility.

The principle of undivided loyalty is further articulated in the first Ethical Consideration to Canon 5 of the Code of Professional Responsibility as follows:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

The client in the instant situation is the defendant insured and not the insurance company. The problem is analogous to conflict of interest situations involving uninsured motorist coverage and other similar cases where the interests of the insured and his insurance carrier are divergent. Universally, these situations have resulted in opinions which recognize that the lawyer employed by the insurance company must be loyal to the insured who is, in fact, the client. ABA Informal Opinions Nos. C-728, 853, 949, and 977.

The courts have likewise recognized that the insured, and not the insurance company, is the client. *Allstate Insurance Company v. Keller*, 17 Ill. App.2d 44, 149 N.E.2d 482 (1958); *Fidelity and Casualty Co. of N.Y. v. McConaughy*, 228 Md. 1, 179 A.2d 177 (1962).

Although the contract of insurance may give the insurance company the right to select the lawyer who will control the incidents of litigation, the insured has not contracted away the right to the undivided loyalty of his attorney. ABA Formal Opinion No. 282 and ABA Informal Opinion 977.

A lawyer who knowingly permits considerations advantageous to the insurance carrier to influence his conduct to the disadvantage of the insured is guilty of unethical conduct.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

The Ethics Committee directs attorneys to Opinion 91 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 91 which should be reviewed in conjunction with the Rules.