

ADVISORY ETHICS OPINION 95-21

SYNOPSIS:

An attorney who is insured and is currently being defended in litigation by an insurance carrier may pursue an unrelated claim against that same insurance carrier for a client only if the client consents after full disclosure of the relationship and the potential for conflict.

FACTS:

The inquiring attorney has a liability policy issued by an insurance carrier. The attorney has been named as a defendant in a lawsuit, and the insurance carrier has retained counsel to defend against that claim. This attorney is also handling an unrelated worker's compensation claim for a client which is adverse to the same insurance carrier.

We are asked whether the attorney can continue the representation in the worker's compensation matter and, if so, whether the attorney must disclose to the client that the insurance carrier in the worker's compensation matter also insures the attorney for professional liability and is currently defending him against a claim.

ANALYSIS:

The only ethical issue presented arises pursuant to DR 5-101(A), which states:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.

CONCLUSION:

We conclude that on the facts presented, the attorney may not continue to represent the client in pursuing the worker's compensation claim without first obtaining the consent of this client after full disclosure.

The mere fact that an attorney is personally insured by the insurance carrier he is pursuing creates at least the appearance of a conflict of interest. An insurance carrier's rates are a function of its claims experience; the less paid out on claims, the lower the rates charged to policyholders. As an insured, the attorney is interested in keeping his rates as low as possible, but as counsel on the worker's compensation claim he wants to maximize the amount paid by the carrier. To the extent that larger amounts paid out on claims will increase rates, there is a small, but real, conflict between the attorney's business interests and the interests of his client. The problem is increased to the extent that the attorney may even have a legal ownership in the carrier as one of its policyholders as, for instance, in the case of a mutual insurance company. Here where the attorney is being defended by the carrier in litigation, the potential for problems expands. A variety of circumstances can arise where the business interests of the attorney, as an insured, could appear to affect his pursuit of a claim against the carrier. Coverage issues can arise between the carrier and the insured attorney; demands can exceed policy limits; and certain policies contain provisions requiring that the policyholder consent to any settlement. All of these can lead to situations where the attorney may be bargaining with the insurance carrier on his own behalf and for his own interest at the same time that he is attempting to maximize his client's recovery on the unrelated claim.

While the conflict is less direct than others we have considered,¹ it is still sufficient to require that the attorney make full disclosure of the potential for conflict to the client, and that the client consent to the representation.

¹ Cf. Opinion No. 77-15 (attorney may not represent suspect charged with murdering her husband and at the same time serve as administrator of husband's estate).