ADVISORY ETHICS OPINION 79-27

SYNOPSIS:

An attorney should not represent both the employer or its insurance carrier and the employee or his representative, given potential for impairment of independent judgment of attorney in context of settlement negotiations.

FACTS:

Under the Vermont Worker's Compensation statute, by virtue of 21 V.S.A. §24, if a person has incurred a compensable injury under circumstances creating a legal liability in some person other than the employer to pay damages, the injured employee or his personal representative is authorized to enforce the liability of the third party for damages. In the event the injured employee or his personal representative fails to commence an action within one year after occurrence of the personal injury, the employer or its insurance carrier may enforce the liability of the third party in the name of the injured employee or his personal representative. Under the statute, any party in interest has a right to join in the suit, but direction and control of the suit is with the injured plaintiff. Prior to entry of judgment, either the employer or his insurance carrier, or the employer or his personal representative may settle their claims as their interests may appear, but depending upon the amount of the settlement, the consent of the employer or the insured may be required. The statutes further provide that settlement and release by the employee does not bar further proceedings by the employer against the third party, and that in the event the employee or his representatives settle their claim, any monies recovered, after deduction of expenses of recovery, go first to reimburse the employer or its insurance carrier for amounts that were paid or payable under the statutes, with the balance going to the employee, his dependents, or personal representative.

This Committee has been asked whether an attorney who has been engaged by the employer or by the employer's insurance carrier to bring suit pursuant to the provisions of 21 V.S.A. §624 may properly represent the injured employee or his personal representative in proceedings against a third person having a legal liability to pay damages in respect of the injury. As posed, the question called upon the Committee to consider three hypothetical situations which might arise in the context of settlement negotiations and their potential effect upon the attorney's role in recommending that one or both clients consider settlement negotiations: (Although actual dollar figures are used in the hypothetical, they have been selected for the purpose of clarifying the more abstract issues raised by the situations themselves).

1. Assume that the attorney has evaluated the prospects for recovery in the case to be good, and that he believes that there is a reasonable likelihood of recovering $30,000.00. Further assume that after negotiations a final bona fide offer of $20,000.00 is tendered for settlement, and the carrier is entitled to reimbursement in the amount of $15,000.00.

2. Assume that under the same circumstances, the attorney's assessment as to the possibility of recovering $30,000.00 is only fair, with chances of a recovery being approximately 50/50, and that an offer of $15,000.00 is made.

3. Assume the potential for damages in the same amount and under the same general circumstances, but with an assessment by Plaintiff's attorney that the chances of recovery are small, with a $10,000.00 offer being made to settle the claim.

OPINION:

The provisions of the Code of Professional Responsibility which are relevant to the above situation appear in Canon 5 of the Code of Professional Responsibility, as set forth in 12 V.S.A., App. IX. The relevant disciplinary rules are as follows:

DR 5-106 Settling Similar Claims of Clients.

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

In addition to the disciplinary rules mentioned above, certain ethical considerations of Canon 5 provide guidance in this situation.

Interests of Multiple Clients.

EC 5-14. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interest be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15. <u>If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests</u>. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC 5-17. <u>Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent</u> co-defendants in a criminal case, co-plaintiffs in a personal injury case, <u>an insured and his insurer</u>, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

[Emphasis supplied]

In each of the hypothetical negotiation situations referred to above, it is the belief of the Committee that the attorney's independent judgment on behalf of one or the other of his clients will be or is likely to be adversely affected by his representation of the other client. Under the first hypothetical situation, the insurer or employer would obviously prefer to settle, and the attorney is confronted with an obvious conflict situation. Similar difficulties arise under the other hypothetical situations and because it is by no means "obvious" that he can "adequately represent the interests of each." (DR 5-105(c)) the Committee is of the opinion that the only responsible course of action for the attorney ultimately finding himself in such a situation would be to discontinue the multiple employment.

Furthermore, having in mind Ethical Consideration 5-15, requiring the attorney to "weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment" and its caveat that all doubts should be resolved "against the propriety of representation," it is the further opinion of this Committee that the likelihood of conflict situations along the lines set forth above is so great in most, if not all, cases arising under 21 V.S.A. §624, that an attorney asked to represent both the employee or his personal representative and the employer or its carrier in such actions should decline to do so.