Connecticut Bar Association

30 Bank Street
PO Box 350
New Britain, CT 06050-0350
06051 for 30 Bank Street
(860)223-4400
fax (860)223-4488

June 17, 2009

Informal Opinion 09-03

Issues of Common Representation and Conflicts in Workers' Compensation Practice

A lawyer who practices in Workers' Compensation matters raises several questions arising out of the common practice of concurrent representation of employer and insurer by one lawyer retained and paid by the insurer. The inquiry raises concerns that concurrent representation can lead to "an untenable conflict situation," particularly when the employer is a small "mom and pop" entity and the claimant is a member of the "mom and pop" family or is the "mom" or the "pop" employer. Several questions are posed.

First, may a lawyer represent both an employer and the employer's insurance carrier when both are parties to a worker's compensation matter? If so, how should the lawyer respond when the lawyer identifies a conflict between the interests of the employer and the insurer?

In the Connecticut Workers' Compensation Commission, both employer and insurer are parties to a proceeding.[1] It is common practice for the lawyer retained by the insurer to appear for both the employer and the insurer. In most situations, the interests of the insured and the insurer in defeating a claim are identical, and because insurance coverage is statutory and has no dollar limits the opportunity for conflict is small. Every workers' compensation insurance contract is statutorily deemed to be a contract for the benefit of the injured employee,[2] is conclusively presumed to cover the entire liability of the insured employer,[3] and defenses based upon breach of warranty, coverage, or misrepresentation may not be raised as defenses to the employee's claim.[4]

The Connecticut Rules of Professional Conduct permit representation of multiple clients in the same matter. In a concurrent representation, the duties of the lawyer to each client are generally equal unless altered by consent, contract, or substantive law. If a conflict arises, the lawyer must determine whether the conflict is likely to materially

[1] C.G.S.A. 31-341.
[2] C.G.S.A. 31-340.
[3] C.G.S.A. 31-343.
[4] Id.

limit the lawyer's ability to represent either of the clients.[5] If not, the waiver is not necessary and the representation may continue. If so, the lawyer must determine whether the conflict can be waived pursuant to Rule 1.7(b).[6] A waiver, if permissible, must be voluntary, based on informed consent, and confirmed in writing.[7] If the conflict cannot be waived, or if any affected client elects not to waive after being fully informed, the lawyer is required by Rule 1.16 (a)(1) to withdraw from the representation. Withdrawal will generally have to be for all parties. After withdrawal, the lawyer has a continuing obligation to protect the former clients' confidences and to decline representation adverse to the former clients in the same or substantially related matters. The lawyer may not use or reveal the confidences of a former client.[8]

Although the interests of employer and insurer are generally aligned in defending a workers' compensation claim, conflict may arise if the goals of one differ substantially from those of the other. In the "mom and pop" or family employer context conflict is possible if the employer desires recovery, or maximized recovery, by the employee, but the insurer is skeptical of or opposes recovery. Since a lawyer must consult with and abide by the decisions of the client as to the objectives of the representation,[9] it is not permissible to continue a concurrent representation if the employer-client directs the lawyer to seek objectives that conflict with the objectives of the insurer-client, or vice versa. The employer-client should be advised, however, that its decision to pursue conflicting objectives may breach contractual obligations under the insurance policy, creating coverage or indemnity risks; and to consult another lawyer as to those risks. The lawyer representing both parties may not give advice as to the obligations of either to

---

[5] **Rule 1.7. Conflict of Interest: Current Clients**

(a) Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or by a personal interest of the lawyer.

[6] **Rule 1.7. Conflict of Interest: Current Clients**

(b) Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and

(4) each affected client gives informed consent confirmed in writing.

[7] **Rule 1.0 Terminology ....**

(f) ''Informed consent'' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(Note that informed consent in the insurance defense context is sometimes implied in the Rules. See Rules 1.8(f)(1) and 1.8(g).)

[8] Rule 1.9 (a) and (c).

[9] See Rules 1.2(a) and 1.4.

the other. Whether the insurer has an obligation to provide another lawyer to represent the employer after withdrawal depends upon the contract and the substantive law of insurance.

Second, how should the lawyer respond when the lawyer gains information about the employer or the facts of the claim that would compromise or limit insurance coverage or create other exposure for the employer?

Resolution of this issue depends upon several factors in addition to the Rules of Professional Conduct. Such factors include the rights and obligations arising out of the insurance contract, the scope of the joint representation undertaken, the law of insurance, and the understandings and expectations of the insurer and employer concerning confidentiality. In the Workers' Compensation Commission, issues of insurance coverage are generally not relevant in defending an employee's claim. Policies are statutorily required to cover the entire liability of the employer, do not have dollar limits, and questions of breach of warranty, coverage, or misrepresentation are not relevant.[10] The compensation policy obligates the insurer to "defend any claim" against the employer and gives the insurer the right to choose the lawyer, control the defense, and settle claims. Rule 1.2 provides that a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[11] The Commentary to Rule 1.2 acknowledges that an insurer-provided defense may be limited in scope.[12]

Rule 1.6(a) establishes a mandatory duty of confidentiality concerning information related to the representation of a client. Disclosure of information is prohibited unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required or permissive under one or more of the circumstances described in Rule 1.6(b), (c) or (d). "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."[13] When one lawyer represents multiple clients, however, there should be, in the absence of an agreement or other legal doctrine limiting disclosures, no expectation of confidentiality between the clients as to facts bearing on the representation. Rule 1.4 requires prompt and regular communication with both clients. Rule 1.7, discussed above, addresses the obligations of the lawyer when representing common clients. A Commentary to Rule 1.7, added to the Rules in 2007, provides guidance[14] in this area.[15]

---

[10] C.G.S.A 31-340 through 31-343.

[11] Rule 1.2(c) specifically negates the need for informed consent in limiting the scope of the representation where the lawyer is retained to represent a client by an insurer, and the client cannot be located.

[12] *Agreements Limiting Scope of Representation.* The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage.

[13] See Commentary to Rule 1.6.

[14] The Commentaries to the Rules "do not add obligations", but are intended as "guides to interpretation", to explain and illustrate the meaning and purpose of each Rule and to "provide guidance for practicing in compliance with the Rules". See Preamble to the Rules.

The relationship between an insurer, its insured and insurer-appointed defense counsel, and the boundaries of the ethical duties of insurance defense counsel representing an insured entity, have engendered a great deal of debate.[16] Answers depend upon the application of multiple legal principles within and outside the area of professional conduct. They do not readily lend themselves to categories based upon whether the lawyer represents one or both parties in an insurance defense situation nor to simple rules not based upon specific fact situations.[17] In the liability insurance situation Connecticut law is clear that the lawyer hired by an insurer owes primary and unwavering loyalty to the insured - to the detriment of the insurer when conflicts arise. *Metropolitan Life Ins. v. Aetna Casualty & Surety*, 249 Conn. 36, 61; *Novella v. Hartford Accident & Indemnity Co.* 163 Conn. 552 (1972); CBA Informal Opinions 97-37, 92-07, 87-13, 83-5. Although this conclusion is partly based upon the assumption that the insured is the only client in the liability defense situation, this concept has become generally accepted by insurers and insurance defense lawyers in Connecticut. Insurers generally understand that an insurance defense lawyer's primary duty is to the insured when the lawyer has been instructed to appear on behalf of the insured, whether the insurer is considered a concurrent client or not, and that adverse facts learned about the insured during the representation may not be disclosed to the insurer. This understanding is consistent with ABA Formal Op. 96-403 at 2, 3 (1996) that, in the insurance context, "nothing

---

[15] *Special Considerations in Common Representation.* ... the lawyer has an equal duty of loyalty to each client, and the lawyer should inform each client that each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. To that end, the lawyer must, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared.... and that the lawyer will have to withdraw if one client decides prior to disclosure that some matter material to the representation should be disclosed to the lawyer but be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[16] *See Symposium: Liability Insurance Conflicts and Professional Responsibility*, 4 Conn. Ins. Law Journal, 1997-1998; *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke Law Journal, 1995; Hazard and Hodes "The Law of Lawyering", Third Edition (2000), at Sections 12.13 to 12.15; and *ALI Restatement Third of the Law of Lawyering* (2000) at Section 134.

[17] In the Comments to Section 134 of the Restatement of The Law Governing Lawyers, setting out the rules for Compensation or Direction of a Lawyer by a third person, the reporters note: "While discussion in the following Comments (see Comment *f*) will consider issues of the law governing a lawyer representing an insured person, the relationship between the insured person and the insurer or indemnitor will be controlled by other law, such as the law of insurance or of contract....Issues relating to all such other relationships are beyond the scope of the Restatement."

Comment *f* provides: *Representing an insured.* A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment *a*, beyond the scope of the Restatement. Certain practices of designated insurance-defense counsel have become customary, and in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus, a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics.

fundamental turns on whether the lawyer represents the insured alone or both the insurer and the insured." ABA Formal Op. 96-403 at 2, 3 (1996).

In the absence of the employer-client's informed consent to disclosure, the compensation defense lawyer who becomes aware of facts that would likely compromise or limit the employer's coverage, or create other exposure for the employer, may not disclose them to the insurer. The "fundamental principle" of client confidentiality prohibits disclosure without consent. Although the 2007 change to the Commentary to Rule 1.7 states that the lawyer entering a concurrent representation of multiple clients must obtain informed consent to full disclosure to all concurrent clients, it acknowledges that there may be circumstances where limited disclosure is appropriate. It is difficult to conclude that the insurer-appointed lawyer could adequately provide unbiased and complete information to the employer-client sufficient to obtain informed consent to the disclosure of adverse facts to the insurer-client. It is difficult to visualize a circumstance where a fully informed employer would give such consent. It is possible, however, that the lawyer may have the consent of the insurer not to disclose to it any adverse facts as to coverage that might arise during the defense of the employee's claim, or that the law of insurance would prohibit such disclosure. The lawyer may continue to represent the employer and the insurer in defending the claim, without disclosing the adverse facts, if the lawyer determines that failure to disclose to the insurer does not violate the lawyer's duty to the insurer and that the lawyer's representation of each client will not be "materially limited" by the lawyer's duties to the other.[18]

If there is no consent from the insurer limiting disclosure and the law of insurance or the insurance contract does not provide a similar limitation on disclosure, the lawyer cannot fully satisfy the lawyer's obligations to both clients. If the lawyer does not disclose to the insurer the lawyer is ignoring a duty of loyalty and full disclosure to the insurer; but if the lawyer does disclose the lawyer is violating the duty of confidentiality to the employer-client. Although the Commentary to Rule 1.7 guides to full disclosure to all concurrent clients, it also presumes the informed consent of all concurrent clients to full disclosure before the facts are discovered. In the absence of such prior consent, if such consent is possible in these circumstances, the "fundamental principle" of confidentiality imposed by Rule 1.6(a) must govern. Without informed consent the lawyer may not make the disclosure. The appropriate course in that event is a withdrawal without disclosure to the insurer, unless the lawyer believes that disclosure is likely to prevent the employer client from committing a fraudulent act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another, in which case disclosure by the lawyer is permissive under Rule 1.6(c)(1).

Third, under what circumstances may counsel for the injured employee communicate with a corporation whose owner, and sole employee, is one person, or with a sole proprietorship, where the injured employee is a family member of the owner, or is the owner.

When a lawyer represents a client, the lawyer is required by Rules 1.1, 1.2, 1.4, 1.5, and 2.1 to communicate with the client in order to render competent advice and

[18] Rule 1.7(a).

representation. In the context of worker's compensation claims, the lawyer representing the employee can be expected to gather information about the nature of the claimant's employment, the circumstances causing the injury, the employee's medical condition, and related matters. If the employer is not represented, the only limitations on communication with the employer by the lawyer representing the employee are those set out in Rules 4.1, 4.3, and 4.4. If the employer is also represented, direct communication is limited by the considerations stated in Rule 4.2.[19] A lawyer may generally communicate with a represented person or legal entity on the subject of the representation if the communication is authorized by law and only to the extent that the communication is so authorized. *See* CBA Informal Op. 01-18 (2001). Otherwise, a lawyer may not communicate with a represented person or entity on the topic of the representation without the consent of the represented party's lawyer, regardless of the legal form through which the represented party conducts its business. The unique circumstances of this inquiry arise because the statutes permit one person to function as a *de facto* or *de jure* employer and also be an employee, pursuing a worker's compensation claim against, in essence, himself, herself, or a family proprietorship or incorporated entity as the employer.

The lawyer representing the employer must communicate with the employer to render competent advice, although many times the employment-related facts necessary to a competent defense have already been gathered by the insurer before the representation begins. Out of necessity, communication with both lawyers must occur. Each lawyer may discharge the lawyer's duties without violating Rule 4.2, while remaining within the bounds of necessary inquiry. Because this inquiry is put in general terms, we do not consider the propriety of any particular communication, except to say that the lawyer for one party may not inquire as to any substantive communications made by the person in the person's capacity as an opposing party to or from the lawyer representing the person in that capacity, or to the employer's insurer in the capacity of employer.

We note also that when a lawyer is representing an injured employee who is prosecuting a workers' compensation claim against an employer, and the lawyer also represents that employer in other matters or contexts, the rules governing current conflicts of interest come into play. Such a situation would often arise in the "mom and pop" or "family" owned business situation. Rule 1.7(a)(1) provides that the representation of one client directly adverse to another client creates "a concurrent conflict of interest." Representing a workers' compensation claimant pursuing a claim against an employer who is also a current client creates such a conflict, even though the lawyer may not appear for the employer-client in the workers' compensation matter. How such concurrent conflicts should be addressed, and whether they can be waived, is

---

ee Commentary to Rule 1.6.

[19] Rule 4.2. Communication with Person Represented by Counsel
In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

addressed by Rule 1.7. A waiver, if permissible, would require the informed consent of both, confirmed in writing.

THE COMMITTEE ON PROFESSIONAL ETHICS

By Wick R. Chambers

Wick R. Chambers, Chair