The Insurance Company, the Insured, and the Attorney—A Professional Responsibility

Insurance companies frequently retain counsel to defend their policyholders in tort actions brought by injured third parties. The ABA Committee on Professional Ethics expressly sustained the propriety of such simultaneous representation¹ since there is usually little chance that the attorney’s judgment would be affected by the potential conflicts of interest that may develop between the insurance company and the insured. The attorney should, however, always consider his professional obligations to both parties, and he should be prepared to deal with actual conflicts of interest that may arise.²

Trieb v. Hopson presents such an actual conflict.³ Subsequent to the filing of a negligence action by a third party against the insurance company’s policyholder, the company commenced a declaratory judgment proceeding to determine whether the insured had breached the “cooperation clause” in the insurance contract. Prior to taking that action, the company did not disclaim liability in the negligence action and did not refuse to defend the insured.

¹ ABA Committee on Professional Ethics, Formal Opinions, No. 282 (1950) [hereinafter cited as ABA Opinions]. See also H. DRINKER, LEGAL ETHICS 114-115 (1953) [hereinafter cited as DRINKER].

The ABA Formal and Informal Opinions cited in this comment are based upon interpretations of the Canons of Professional Ethics rather than the more current ABA Code of Professional Responsibility. But, “[b]ecause the ABA Code was premised on the notion that the Code would not create any new rules, and all prior ABA Committee Opinions were to be considered and restated, it is relevant to consider prior interpretations of all ethical mandates.” Cohen, The Fundamentals of Legal Ethics in Alabama, 36 Alabama Lawyer 160, 162 (1975) [hereinafter cited as Cohen, Fundamentals of Legal Ethics].

² The circumstances confronting an attorney retained by an insurance company to represent its insured, have been called an “archetypical conflict of interest situation.” “The attorney’s loyalty, as one retained by the insurance company, is to the company. His policy should be to contest coverage or, if that is not possible, to deny liability and gamble for a jury verdict in defendant’s favor, thereby limiting the sum the company must pay out. As attorney for the insured, however, the attorney’s loyalty should be to the insured. As such, his goal should be to successfully protect the insured from a judgment, and, if possible, settling the suit within the insured’s policy limits.” Corboy, Defending Insurance Companies and the Insured—Can Two Masters Be Served?, 55 Chicago Bar Record 102 (December 1973).

The attorney retained to defend the policyholder initiated the declaratory judgment action for the insurance company and also filed a motion on behalf of the policyholder to stay the negligence action pending the outcome of the declaratory judgment proceeding. He made the latter motion without the knowledge or consent of the insured and supported it with his own affidavit. At no time did the attorney make application to withdraw as the insured's attorney.  

The court stated that declaratory relief is generally available to an insurance carrier to determine the company's obligations under the insurance policy; but in the case presented, the attorney's motion to stay the negligence action was not in the insured's best interest and contravened the ABA Canons of Professional Ethics. More specifically the attorney had failed to adequately weigh the dictates of Canons 6 and 37 dealing with conflicts of interest and confidential communications.  

Canon 6 made clear that it was un-

4. *Id.*, 277 N.Y.S.2d at 243.

5. See ABA Canons of Professional Ethics No. 6 which reads as follows:

   It is the duty of the lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel. It is unprofessional to represent conflicting interest except by express consent of all concerned given after full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interest when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Canon 37 states: "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . . [and he should not] accept employment which involves or may involve the disclosure or use of those confidences." ABA Code, Canon 37.

Note: The ABA Code of Professional Responsibility was adopted in 1969 to replace the Canons of Professional Ethics. Although many of the cases cited in this comment were decided prior to the enactment of the ABA Code, the questions presented will be discussed with reference to the more recent standards. The Code contains Disciplinary Rules (DR) and Ethical Considerations (EC). "In theory, Ethical Considerations are guidelines to conduct and Disciplinary Rules are binding 'black letter' rules of conduct. In practice, the Ethical Considerations often state black letter rules which are sometimes more clearly stated than the binding Disciplinary Rules, and one gets the idea that the Ethical Considerations are in-
professional for the attorney to represent conflicting interest without the consent of both the insured and the insurer, given after full disclosure of the facts relevant to the conflict. By filing the declaratory judgment action for the insurance company and subsequently filing a motion to stay the negligence action, the attorney had taken action in behalf of the company that he was bound to oppose as the attorney for the insured. There is no double standard of representation. Regardless of whether the attorney was retained privately by the client or was paid by the insurance company, his primary duty is to his client, the insured. Since a favorable ruling for the insurance company in the declaratory judgment action would have been contrary to the insured’s best interest, the court refused to condone the attorney’s conduct and the motion to stay the negligence action was denied.

Since in most situations a community of interest exists between the insurance company and the insured, an attorney retained by the company to defend its policyholders will usually not face conflicting interest. As *Trieb v. Hopson* illustrates, however, there are circumstances in which an attorney’s judgment may be adversely affected by divided loyalties. This note will focus on the conflicts of interest that may confront the attorney, the effect of confidential communications between the attorney and the insured, and the nature of the attorney’s ethical duty to both the insurance company and the insured.

**Conflicts of Interest**

Consider whether an attorney who has fully investigated the question of policy coverage for an insurance company should undertake the defense of the insured on the merits. The ABA *Code of Professional Responsibility* advises the attorney to weigh carefully the effect that a potential conflict of interest may have on his profes-

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ional judgment, and to resolve all doubts against representation. Disciplinary Rule (DR) 5-107 further directs the attorney not to allow one who pays him to render legal services to another to direct or regulate his professional judgment. If he is convinced that the policy will not cover the insured's claim, the attorney should carefully consider his loyalty to his employer, the insurance company, and should probably not represent the insured in the matter.

Similarly, an attorney who has defended the insured on the merits should not subsequently represent the insurance company in a declaratory judgment action to establish that the policy does not cover the insured's claim. Since the attorney's close connection with the case on behalf of the insured would no doubt result in the development of confidences, he should decline to represent the insurer in a case so intimately tied to the original litigation. But even in the absence of actual conflicts of interest or confidential communications, maintenance of public confidence in the legal profession requires a lawyer not to appear both for and against the same party in the same controversy. The conflicts of interest that can develop in such a situation were extensively discussed by the court in Trieber.

The attorney's duty to devote himself to the best interest of the insured is equally important when he participates in settlement negotiations. Where settlement could be reached only near or in excess of the insured's policy coverage, the insurance company may

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10. ABA Code, Disciplinary Rule 5-107 [hereinafter cited as DR].
12. Drinker, supra note 1, at 115. See also ABA Code, Canon 5. See generally ABA Code, Canon 9. Canon 5 operates independently of Canon 4 (Preserving the Confidences and Secrets of a Client), and an attorney may be disqualified even if no confidences or secrets have been confided. See Drinker, supra note 1, at 109.
13. Contra, Brasseaux v. Girouard, 214 So. 2d 401, 407-408 (La. Ct. App. 1968). The Louisiana court after discussing the foregoing principles, cited Opinion 249 of the Louisiana Bar Association, asserting that the insurance company's counsel would not be barred from subsequent representation of the company adverse to the insured, even though the attorney may have received some information from the insured. The committee's rationale was that any conflict of interest in the subsequent (not simultaneous) adverse representation was obviated by the insured's consent in advance through the policy clause requiring the insurance company to represent the insured. Louisiana Bar Association, Opinion 249, 13 La. B.J. 1953 (1965).
be willing to litigate rather than settle the case. In such circumstances, full communication between the attorney, the insurance company, and the insured, is essential if conflicts are to be avoided. Counsel should fully inform the insured as to the relation between the policy limits and the plaintiff’s claim, and of his right to retain at his own expense independent counsel to advise him. If he is exposed to liability in excess of the policy limits, the insured should also be advised of his right to participate in all settlement negotiations. The attorney should advise the insurance company that unless its policyholder fully consents to the attorney’s representation, the company may be exposed to additional liability. If the insured refuses to accept the attorney appointed by the insurance company and the company retains the attorney against the insured’s wishes, or without notifying the insured of the potential conflicts of interest involved, the attorney in question should refuse to undertake the representation.

*Lysick v. Walcom* was an action by an insured against both his insurance carrier and the attorney retained by the company to defend him in a negligence suit. After discovering that a conflict of interest existed between the insured and the company in regard to settlement negotiations, the attorney continued to represent both parties without disclosing to the insured either the nature of the conflict or his right to obtain independent counsel. The court deter-

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14. In *Yeomans v. All State Ins. Co.*, the New Jersey court stated a definite standard applicable to insurance companies in conducting settlement negotiations: “When it is probable that an adverse verdict will exceed the policy limit, the propriety of an insurer’s refusal to accept a settlement offer which is within the coverage requires a resolution of conflicting interests. In our judgment, in view of the duty of the insurer to act in good faith, the resolution can lead to but one fair result: both interests can be served justly only if the insurer treats any settlement offer as if it had full coverage for whatever verdict might be recovered, regardless of policy limits and makes its decision to go to trial on that basis.” 121 N.J. Super. 96, 296 A.2d 96, 98 (Morris County Ct. 1972).

While the attorney retained by the insurer to represent the insured must effect the court’s standard on behalf of the insurance company, his duty is more extensive as the *Code of Professional Responsibility* must be considered as well.

15. In case of a serious conflict of interest between the insurer and the insured, the company can generally fulfill its duty to represent the insured by retaining independent counsel to protect the insured’s interest. *Yeomans v. Allstate Ins. Co.* 130 N.J. Super. 48, 324 A.2d 906, 909 (1974). If the insured desires counsel of his own choosing, he may retain an attorney at his own expense.


mined that an attorney must inform the insured of all facts necessary to enable him to make an intelligent decision regarding representation of his interests. Since he had failed to do so, the attorney was liable to the client for any loss caused him by such failure.

As a general rule, if an attorney simultaneously represents two clients whose interests become adverse, he may be either disqualified from the case or allowed to withdraw voluntarily. In Schwartz v. Sar Corporation, the court granted the insured’s motion to disqualify the attorney retained by the insurance company to defend him. The attorney’s primary loyalty was apparently to the insurance company, which he had represented in numerous cases over the years. The attorney had fully investigated the merits of the case and he was convinced that the insured was perpetrating a fraud upon the company. The court expressed doubt that an attorney with such divided loyalties could expend his best efforts to protect the interests of the insured.

Confidential Communications

In those cases involving conflicts of interest, the confidentiality of the insured’s communications with the attorney should also be considered. Some cases holding that an attorney was not disqualified despite a conflict of interest have specifically mentioned the absence of any breach of confidence by the attorney.

If during consultations in preparation for trial, the insured furnishes the attorney with information indicating that the insurance policy does not cover the insured’s claim, what should the attorney do? In view of the actual conflict of interest, the attorney probably should not continue to defend the insured; and he clearly should not represent the insurance company in a later action on policy coverage since the attorney cannot ethically use information acquired by him in the course of representation of a client to the disadvantage of that client.

20. Id., 195 N.Y.S.2d at 503.
22. EC 4-1 of the ABA Code provides: “Both the fiduciary relationship exist-
Such a situation was presented in Allstate Insurance Co. v. Keller. The insured disclosed information to the attorney showing that the policy probably would not cover his claim. Rather than voluntarily withdrawing from the case, the attorney took the insured's deposition and later testified against the insured in a declaratory judgment action on policy coverage. The attorney admitted that he had been retained and paid by the insurance company, that at the time he took the insured's deposition he anticipated the company's challenge to policy coverage, and that the purpose of the deposition was to strengthen the company's position. These facts were not disclosed to the insured. The court found it incumbent upon the attorney to terminate his relationship with the insured as soon as the conflict of interest developed. Since he failed to do so without explaining the nature of the conflict to the insured, the court refused to allow the insurance company to disclaim policy coverage.24

Suppose in the Allstate case, the attorney involved had withdrawn as counsel for the insured when the conflict of interest became apparent; may he now disclose the information he has already received to the insurance company or testify at a subsequent action on policy coverage?

An attorney does owe an ethical duty to preserve the secrets and confidences of his client,25 and where the insured has entrusted the


24. Id., 149 N.E.2d at 486. See also State Farm Mutual Auto. Ins. Co. v. Walker, 382 F.2d 548, 552 (7th Cir. 1968). The insured admitted to the attorney retained by the insurance company to defend him that the version of the accident he gave the company was not true. The attorney proceeded to take the insured's deposition and also took an ex parte sworn statement; both were used to support the company's allegation that the insured had breached the cooperation clause in the policy. The court held that the attorney's conduct raised a question of fact as to whether the insurance company had waived the insured's breach of the cooperation clause. Id.

25. ABA Code, DR 4-101 (B).
attorney with damaging information, the attorney is precluded from actively representing the insurance company in any later action adverse to the insured. But does the Code of Professional Responsibility impose an absolute prohibition against the use of such information? The ABA Committee on Professional Ethics has rendered an informal opinion stating that since the attorney acts for both the insured and the insurance company, he should inform the company of any information he obtains relative to policy coverage.26 The opinion presupposes full disclosure to the insured of all facts relative to the simultaneous representation, including the attorney’s obligation to disclose all information to the insurance company. The initial representation is dependent on such knowledge by the insured and on his express consent. The attorney’s disclosure to the insurer of the confidences or secrets of the insured could therefore be justified by the insured’s express consent.27 Without the insured’s consent, the attorney’s conduct would contravene both Canon 4 and Canon 5 of the ABA Code.

Apparently, the attorney’s testimony on the issue of policy coverage would be admissible in a later action brought by the insurance company. While an attorney should never continue to represent the insured in order to procure additional information favorable to the insurer, the insured’s communications to the attorney are generally not within the scope of the attorney-client privilege. The privilege does not protect the insured’s communications where the issue to which they relate is directly in controversy between the insured and the insurance company since the attorney, with the knowledge of

26. The insurance company in question fully investigated the accident that was the basis of its insured’s claim, and determined that the liability policy did not cover the claim. The company forwarded the case file to an attorney regularly retained by the company and advised him that although the company had determined that there was no coverage, the defense of the insured was to be undertaken with reservation of the right to deny coverage. The Committee stated that with full disclosure of these facts to the insured, and with his consent, the attorney could ethically represent the insured in the matter. Furthermore, if in the course of handling the case, the attorney ascertained additional information relating to non-coverage, he should communicate the information to the insurer. ABA INFORMAL OPINIONS, No. 822 (1965).

27. The information would appear to be a cliental secret within the bounds of DR 4-101 (A), and without the client’s consent as provided in DR 4-101 (C)(1) of the ABA Code there would be no justification in allowing any disclosure of the information, even to the insurance company. See ABA Code, DR 4-101 (B); ABA Code, DR 4-101 (C)(1).
the insured, is acting for both. The insured's statements may therefore be used to support a disclaimer by the insurance company of its obligation to indemnify and the attorney may testify in a later proceeding for that purpose.

Conclusion

In assessing the responsibilities of an attorney confronted with a situation such as that presented in Trieber v. Hopson, the question generally is not whether he may undertake the representation at all, but under what conditions he may do so and what steps he should take to fulfill his responsibilities to both the insurer and the insured.

The attorney must represent the insured with undivided loyalty. Although he is employed by the insurance company, his client is the insured and he must represent the insured's best interest even if both parties recognize that there is a dispute as to policy coverage to be resolved in the future. The attorney must disclose to both the insurance company and the insured any circumstances that might cause one of the parties to question his loyalty. DR 5-105(B) and (C) direct that the attorney should not continue multiple employment if the exercise of his professional judgment in behalf of the insured will be, or is likely to be, adversely affected by his representation of the insurance company; and DR 4-101(B) provides that he

29. Colbert v. Home Indemnity Co., 45 Misc. 2d 49, 259 N.Y.S.2d 36 (1965); Liberty Mutual Ins. Co. v. Engels, 41 Misc. 2d 49, 244 N.Y.S.2d 983 (1963); Shafer v. Utica Mut. Ins. Co., 248 App. Div. 279, 289 N.Y.S. 577 (1936). In an action by the insured against his insurer for the company's failure to settle within the policy limits, the court granted the insured's motion to require the attorney who was appointed by the insurer to represent the insured, to produce documents in his files containing communications between the company and the attorney pertaining to the case in question. See Finn v. Morgan, 362 N.Y.S.2d 292 (1974); Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 1968). Contra, State v. Krich, 123 N.J.L. 519, 9 A.2d 803, 805 (1939) (a criminal prosecution for conspiracy by the insured and others to defraud the insurance company in which it was held error to admit fraudulent statements made by the insured to the insurance company's attorney during his preparation for trial of the initial cases: "The evidence was not admissible in any suit. The privilege belongs to the client and may be waived by him only."). But see Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37 (E.D.S.C. 1964) (court distinguished Krich and refused to apply the case beyond its particular facts).
30. ABA OPINIONS. No. 282; cases cited note 6 supra.
31. ABA CODE, EC 5-16.
may not use the insured's confidences or secrets to his disadvantage. Only if he can adequately represent the interests of both the insurance company and the insured, and if each client consents after full disclosure of the potential conflicts of interest, should the attorney continue the relationship.\textsuperscript{32}

The \textit{Code of Professional Responsibility} emphasizes the attorney's duty to fully communicate with the parties involved at all stages of the representation. He should insure that the client's decisions are made only after the client has been informed of all relevant considerations. Furthermore, the lawyer should initiate the decision-making process if the client fails to do so.\textsuperscript{33}

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\textsuperscript{32} ABA Code, DR 5-105 (B) and (C), DR 4-101 (C)(1).
\textsuperscript{33} ABA Code, EC 7-8.