THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
OPINION 2010-9
(FEBRUARY 2011)

The inquirer obtains litigation assignments from an insurance company. The insurance company is contemplating the centralization of many functions normally performed by those outside attorneys, like the inquirer, who are assigned to handle cases and defend insureds. The functions at issue include: (1) preparation of responsive pleadings; (2) preparation of and answers to interrogatories; (3) preparation for depositions as well as deposition reviews and summaries; (4) review and summarization of medications; (5) ordering of expert reports (IME, Reconstruction, Economic, etc.); (6) preparation of pretrial motions (motions in limine, etc.); (7) preparation of trial motions (summary judgments, motions to compel); (8) negotiation of the case; (9) subpoenaing of records; and (10) preparation of arbitration or pretrial statements.

The inquirer advises that these functions would all be centralized out of state at the insurance carrier's corporate headquarters, and presumably the enumerated tasks would be handled by both paralegals and attorneys not admitted in Pennsylvania.

The arrangement contemplates that the work would be reviewed by the inquirer who would sign off on it and submit it under his own name. The inquirer understands that he would retain responsibility for reviewing all of the work performed by the employees of the carrier and could make changes if he deemed it necessary. All court appearances would be by the inquirer.

The inquirer has concerns about the proposed arrangement, and is particularly concerned with issues of confidentiality as well as his aiding and abetting the unauthorized practice of law by the insurance carrier through its attorneys and paralegals, or by the attorneys and paralegals individually.

Various provisions under the Pennsylvania Rules of Professional Conduct (the “Rules”) are raised by the proposed arrangements.

Rule 1.0. Terminology, provides in part that:

(e) ‘‘Informed consent’’ denotes the consent 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.

Rule 1.3. Diligence, provides that:

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication, provides in part that:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;…

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6. Confidentiality of Information, provides in part that:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules, provides in part that:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Rule 2.3. Evaluation for Use by Third Persons, provides in part that:

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

Rule 5.1. Responsibilities of Partners, Managers and Supervisory Lawyers.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts

to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment:

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish **internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct.** Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and **ensure that inexperienced lawyers are properly supervised** [emphasis added].

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated

senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. **Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension** [emphasis added].

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice Of Law, provides in part that:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, **or assist another in doing so** [emphasis added].

…

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who **actively participates in the matter** [emphasis added];

The Committee has concluded that the proposed arrangement violates several provisions of the Rules and to participate in it would be unethical.

The Committee's analysis starts with the requirements under Rule 1.8(f) when a third party is paying an attorney's fee for providing representation to a client. It is clear from that Rule that the independence and protection of the client through the attorney-client relationship cannot be impeded by the involvement of the third party payer.

While some ministerial work could be done from a centralized location at an insurance company, the Committee finds that most of the enumerated tasks in the inquiry constitute the practice of law and must be done by an attorney who is directly handling the case or supervising an attorney doing the work. The attorney in the supervisory role must have the experience and authority within the firm to ensure not only compliance with the Rules of Professional Conduct, but also to ensure that the work is being done competently. This duty directly relates not only to the professional independence of the attorney under Rule 1.8(f) but also to the attorney's supervisory responsibilities under Rule 5.1. The long distance relationship as well as the importance of many of these functions makes proper supervision by the inquirer under the scenario impossible.

Other concerns are also raised under Rules 1.0(e) and 2.3(b) defining and providing for informed consent. Normally, even though an insured does not pay for his or her defense, a representation agreement is executed between the attorney and the client outlining the responsibilities and scope of representation by the attorney hired by the insurance carrier. Information communicated by the client to the attorney is confidential under Rule 1.6, with the exception of information that the client has agreed, based on informed consent, to have released to the carrier because of the client's duty of cooperation under the policy of insurance, and the reporting by the attorney to the carrier as regards issues and progress in the case.[1] An attorney who learns of

[1] In a similar vein, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Opinion on Inquiry 97-06 (January 13, 1997) discusses the need, pursuant to RPC 1.4, for adequate information to be conveyed from the attorney to the insured concerning the relationship between counsel and the insurance company:

> in sufficiently clear terms so that the insured will understand that relationship at the outset of the representation and be in a position to take appropriate action, including posing whatever questions may be necessary to satisfy the insured's comfort level as to the independence and loyalty of such counsel, and also to determine whether to engage separate counsel to protect its interests.

(continued…)

information which might impact the insured's right to coverage or even the provision of a defense to the insured is confidential and must not be reported to the carrier.[2]

Under the scenario provided, there would be no way of preventing disclosure of such harmful information to the carrier, who could use it to deny coverage. The inquirer could not adequately represent a client with such information already disclosed, nor could the inquirer do so when a defense is being provided under a reservation of rights. Consider that in the first situation, the inquirer may not learn of the existence of the information imperiling coverage until that information has already been used as a basis to deny coverage. Additionally, the insurance company attorneys would not be subject to the disciplinary jurisdiction of the Pennsylvania courts, yet ironically, the inquirer might be subject to discipline for failure to adequately supervise under Rule 5.1 and possible failure to provide diligent representation as required by Rule 1.3. The attorney forced to participate in the defense of the client in such a way as described is in fact being placed in simply too tenuous a position.[3]

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(continued...)

Id. The requirement of an adequate disclosure pursuant to RPC 1.4 is heightened in the scenario presented by the inquirer because the arrangement presents a greater risk to the insured and a concomitant need for more expansive disclosures, which will, in practicality, be impossible to provide. This risk is further exacerbated by the informed consent disclosure requirement found under Rule 2.3(b).

[2] This Committee has taken this position for over twenty years, articulating it in Formal Opinion 90-14. Also, see Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Opinion 2004-038 (May 17, 2004) (prohibiting the disclosure of information which could defeat insurance coverage by counsel hired by an insurance company to represent the interests of its insured). This position is consistent with that taken in ABA Formal Opinion 01-121 as well. See also Pa. Bar. Association Formal Opinion 96-196.

[3] In the reservation of rights situation, the insurance carrier is placing itself in a compromised position in being as involved in the case as it is, because the reservation immediately places its actions on behalf of the insured in question.

With the limited contact between the attorney and the client, and such contact being made directly only at the end of the representation process (i.e. prior to and at trial), the attorney's ability to provide competent and diligent representation under Rule 1.3 is brought into question. The assigned attorney would not necessarily be privy to information learned by staff counsel and paralegals before the supervising attorney has any contact with the insured. In addition to placing the inquirer at a disadvantage that amounts to an inability to adequately represent this client, the situation also creates an unacceptable risk that the insurer will learn, and not disclose to the assigned attorney, information concerning a policy exclusion, which can then be used to the detriment of the insured/client. The possibility also exists that the inquirer would not be privy to important information leading to an adequate defense to the underlying case, because of lack of contact with the client, and lack of knowledge of Pennsylvania law by either the in-house attorney or the paralegal.

While the inquirer has a duty of loyalty to the client/insured and is subject to the disciplinary jurisdiction of the Pennsylvania courts, the paralegals and in-house counsel at the insurance carrier have undivided loyalty to their employer and would not be subject to discipline in the jurisdiction where the litigation progresses.

The inquirer also runs the risk of aiding and abetting the unauthorized practice of law in Pennsylvania. While in Pa. Bar Association Opinion 96-196 it was held that attorneys in captive law firms could represent insured clients (with the appropriate disclosures and consent), that is not the situation described in this inquiry. First, attorneys in captive law firms are admitted to the state in which they are providing representation to clients. Here, many of the functions of supervision and representation have been removed from the realm of the work to be done by the inquirer. The involvement of an in-house attorney for the carrier, with the attorney not being admitted to Pennsylvania, could very well be in violation of Rule 5.5(a) since the inquirer could not necessarily be said to be handling the matter in affiliation with a Pennsylvania attorney, nor could he be said to necessarily be actively participating in the matter, thus at least opening the door to the issue of aiding and abetting the unauthorized practice of law, whether it be by the individuals working at the carrier's headquarters or by the carrier itself.

This last point is in fact just one more problem with the proposed arrangement. The Committee's conclusion that participation in the scenario by the inquirer would be unethical draws primarily from the Committee's recognition that the arrangement not only would subject the client to a situation where the individuals working on the file are subject to undue pressure to identify coverage issues, but also is one where a true attorney-client relationship, with all of the attendant protections of the Rules, does not exist between the inquirer and the client because the division of duties is such ***that formation of a true attorney-client relationship is not possible.***

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