Ethics Opinion
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QUESTION PRESENTED: May a law firm represent both defendants and plaintiffs whose claims, though unrelated to each other, and involving different insurance companies, are nevertheless simultaneously in the hands of an insurance adjusting company?

ANSWER: Yes, with the valid consent of both parties.

ANALYSIS: It is assumed, because the claims of the defendant and the plaintiff each represented by the law firm are not adverse to one another and are in fact unrelated, that there is no likelihood of a violation of Rule 1.6 of the Rules of Professional Conduct prohibiting disclosure of client confidences. There would appear to be no reason or any practical likelihood that the law firm would disclose to the insurance adjusting company any confidential information obtained from its plaintiff client simply because the insurance adjusting company is adjusting that plaintiff's claim and has, in an unrelated case, referred to the law firm the defense of the law firm's defendant client.

The issues appear to be governed almost entirely by Rule 1.7 of the Rules of Professional Conduct which provides as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

In analyzing this rule, commentators have observed:

Subsection (a) of Rule 1.7 governs conflict of interest of interest situations involving simultaneous and direct adversity, whereas subsection (b) governs the myriad of situations in which the conflict is muted or indirect. Not surprisingly, Rule 1.7(a) imposes something akin to a per se ban on continued representation. Rule 1.7(b), by contrast, requires a subtle calculus to

determine whether the quality of the lawyer's representation is likely to be affected. The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, Hazard and Hodes, Volume 1, page 129 (hereinafter referred to as Hazard and Hodes).

Rule 1.7(a) would appear to have no application to these facts because there is no direct adversity between the clients and the law firm. Only if the insurance adjusting company is deemed to be a client of the law firm would Rule 1.7(a) appear to apply. Although, because its referral and oversight of defense claims may make the relationship of the insurance adjusting company to the law firm somewhat extraordinary, it is unlikely that the relationship can be characterized as that of attorney and client. While the insurance company for which the insurance adjusting company adjusts claims may be a client of the law firm in cases referred by the insurance adjusting company to the law firm for defense, it does not appear that the insurance adjusting company is so closely aligned with the insurance company that it should also be considered the client of the law firm.

Accordingly, it appears more appropriate to consider this case under the limitations of Rule 1.7(b) which addressed conflicts arising out of a lawyer's responsibilities to third persons or the lawyer's own interests. Under the facts presented, it appears that the law firm would be sensitive to any conduct on its part which might in any way discourage or inhibit the insurance adjusting company from further referral of defense claims to the firm from the various insurance carriers employing the insurance adjusting company. The vigorous representation of a plaintiff by the law firm against an insured whose claim is adjusted by the insurance adjusting company might well put the adjusting company in a bad light with the carrier involved, even to the point of jeopardizing its future employment by that insurance carrier. Moreover, particular adjusters within the adjusting company might be alienated by aggressive representation of a plaintiff by the law firm even though the outcome of the case or claim was not such as would adversely affect the adjusting company's relationship with its employing insurer. The prospect that vigorous representation of plaintiff's case involving the adjusting company may inhibit future defense referrals, could cause the law firm to "pull its punches" or at least be less vigorous in its representation of claimants where the adjusting company is involved. Thus . . . " the representation of that client [plaintiff] may be materially limited . . . by the lawyer's own interests, . . ." under Rule 1.7(b) requiring then, that the law firm satisfy the qualifications of that rule with respect to: (1) its own belief that the representation will not be adversely affected, and (2) the consent of the client after consultation.

Can the law firm in the case presented safely conclude that its representation of a claimant on a claim the adjusting company is trying to settle "cheap" will not be adversely affected by the fact that the adjusting company is a company with which the firm works closely in defense cases? The answer may depend entirely upon the breadth of authority granted to the adjusting company by the various insurance companies involved. If the oversight of the litigation in defense cases by the adjusting company is relatively passive and lacking in control or decision making authority, then the impact of that working relationship will be reduced and be less likely to impact the law firm's handling of the plaintiff's claim. It seems likely that the law firm's relationship with the adjusting company may be such that the law firm may reasonably believe that the representation of a plaintiff or claimant whose claim is assigned to the adjusting company for adjusting services may not adversely affect the law firm's representation.

However, Rule 1.7(b) also requires that the plaintiff/client consent to the arrangement after consultation. The client may be unwilling to consent after learning that the insurance adjusters with whom the law firm works so closely and to whom the law firm looks for referral of business in defense cases may play a significant role in determining the outcome of the plaintiff's claim. See *Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979) where the court held on appeal that it was per se fundamentally unfair for a prosecutor and a criminal defendant to share a lawyer. The court went on to acknowledge that the joint representation would have been proper if the accused had knowingly and intelligently waived a conflict of interest. In that case, a lawyer representing a defendant in a criminal case also represented the criminal prosecutor in an unrelated civil case.

The case under consideration is certainly not on all fours with the *Zuck* example, but there is a strong parallel in the analysis in the sense that the adverse party in a criminal prosecution is the state and not the prosecuting attorney. And we have concluded that the insurance adjusting company is not the client of the law firm and accordingly, not to be compared closely with the prosecutor represented by the criminal defense lawyer in a separate civil action.

However, the allegiance of the prosecutor to the state and the adjusting company to the insurance company is similar enough to be instructive. The client's willingness to consent may depend on the claimant's experience and sophistication - how trusting will the claimant be and will the law firm be able to objectively obtain an informed consent to the representation in light of the firm's working relationship with the adjusting company in other cases.

It seems far less likely that the law firm's clients in defense cases (both the insurance carrier and the insured) would withhold consent to representation by the law firm of the claimants in unrelated cases just because the adjusting company is involved in both matters. Nevertheless, prudence would suggest under Rule 1.7(b) that the consent of all clients be obtained in cases where the adjusting company is a common denominator.

In cases where the adjusting company has substantial control of defense litigation and plays a very persuasive role with the insurance company involved, the distinction between the insurance company which is a client and the adjusting company which is not a client can be very illusive. In such a case, the adjusting company may realistically have to be considered a client for purposes of the conflict analysis. The conflict is then one of simultaneous representation governed by Rule 1.7(a). Then the subtle difference between the rules becomes pivotal. Under Rule 1.7(a) it is a question of whether the representation of adverse clients, even on unrelated matters, will adversely affect the client relationship. This involves the subjective reactions of the client. Rule 1.7(b) asks whether the representation itself will be adversely affected - a test calling for the attorney's evaluation of his or her representation (i.e. performance) in the case which arguably may be addressed more objectively under the rule than when evaluating the client's reaction and the effect on the relationship. If Rule 1.7(a) governs the decision because the adjusting company's role requires that it be treated as a client, then the per se ban on the representation suggested by Hazard and Hodes, supra, may control. See generally the analysis of Rule 1.7 in Hazard and Hodes at pp. 128-154. See also the brief discussion of "who is the client" at pp. 53-62.

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