Committee Opinion
November 16, 1990

LEGAL ETHICS OPINION 1310

CONFIDENTIALITY – MULTIPLE REPRESENTATION – PERSONAL INJURY: ATTORNEY REPRESENTING INSURANCE CARRIER IN PERSONAL INJURY CLAIM FILED BY EMPLOYEE/DRIVER UNDER EMPLOYER'S UNINSURED MOTORIST PROVISION WHEN ATTORNEY EARLIER REPRESENTED EMPLOYER/INSURED IN LIABILITY MATTER.

You advised that you were retained by insurance company to represent their named insured, defendant, who had been sued for damages to plaintiff as a result of an automobile accident involving defendant's employee and phantom driver, John Doe (defendant/insured was the owner of the vehicle but his employee was the driver of the vehicle). You advised that while you did not represent employee in this action as he was not a party, he was the key witness on the issue of liability along with a state trooper who testified as to the length of the skid marks and damage. You indicate that your defense in the instant matter was that employee was not negligent. Employee testified that he had done nothing wrong but had been approached by a phantom vehicle (John Doe) who forced him out of the roadway. The general district court judge, however, concluded that the amount of the damages, the length of the skid marks and the surrounding circumstances led to a finding that employee was negligent, regardless of whether John Doe was partially negligent also. A judgment was obtained against defendant/insured based upon imputed negligence.

Approximately two years later, employee/driver brought an action for personal injuries against phantom driver, John Doe, and insurance company employed your services to defend the uninsured motorist case. You indicate that your defense in the second action was that employee was barred based upon res judicata and/or collateral estoppel. You have alleged that you did not gain anything from the previous representation of defendant/insured that would have been privileged since insurance company was privy to all information and would have passed that information to counsel in the second case.

The second matter has not been resolved and you wish to know whether under the facts you have presented there is a potential conflict of interest that would preclude you from continuing to represent the insurance company in the uninsured motorist case.

The appropriate and controlling rules relative to your inquiry are DR:4-101 and DR:5-105(D) respectively regarding preservation of clients' confidences and secrets and representation in collateral matters which are substantially related. In particular, DR:4-101(B) provides that a lawyer shall not knowingly reveal a confidence or secret of his client or use the same to the disadvantage of the client, or use the same to his own advantage or that of a third person. Disciplinary Rule 5-105(D) also provides that a lawyer shall not represent a person in a matter that is the same or substantially related to a

former representation if the interests of the former client and the current client are adverse in any material respect, unless the former client consents after full disclosure.

The Committee directs your attention to LE Op. 1142 in which the Committee opined that it was not improper for defendant/driver 1's attorney to also represent his client's insurance carrier (which may be liable for any "excess" judgment under the insured's uninsured motorist provision) where the plaintiff, passenger in vehicle operated by driver 1, took a voluntary nonsuit in the personal injury action against driver 1. The Committee cautioned that first the attorney must obtain the informed consent of his former client and should be diligent not to reveal any confidences or secrets obtained in the former representation, unless the former client explicitly consents thereto. (See DR:4-101(C)(1))

The determination of whether an attorney-client relationship existed between counsel and a key witness is a legal determination which is beyond the purview of this Committee. Under the facts as you have presented them in your inquiry, the Committee would opine that the continued representation of insurance company in the uninsured motorist case is ethically permissible assuming that no attorney-client relationship was created with the plaintiff-employee in the previous action against former client-defendant/insured. Thus, no confidential information could have been obtained that could now be used against the former client in derogation of DR:4-101(B). Furthermore, assuming that no attorney-client relationship was established with plaintiff-employee in the prior representation of defendant/insured, proscriptions in DR:5-105 would not apply in the instant matter since the interests of the former client-insured/defendant and the present client-insurance company presumably are not potentially adverse.