

LEGAL ETHICS OPINION 1592

CONFLICT OF INTEREST — MULTIPLE
CLIENTS — ZEALOUS
REPRESENTATION —
COMMUNICATION WITH ADVERSE
PARTIES — MISCONDUCT:
INSURANCE CARRIER AND
UNINSURED MOTORIST.

You have presented a hypothetical situation in which Attorney A has been retained by an uninsured motorist insurance carrier to defend the carrier in an action in which the uninsured motorist (“Defendant Motorist”) has appeared *pro se*. Although Attorney A has not entered an appearance on behalf of Defendant Motorist, Defendant Motorist has consulted with Attorney A, and Attorney A has assisted Defendant Motorist and/or given Defendant Motorist advice in the following ways:

(1) Attorney A, during the deposition of Defendant Motorist, raised objections of privilege on behalf of Defendant Motorist and advised Defendant Motorist not to answer certain deposition questions propounded by the plaintiff.

(2) Attorney A instructed Defendant Motorist not to produce certain physical evidence which was requested by plaintiff, and which during his deposition Defendant Motorist had agreed to produce. Following Attorney A's advice, Defendant Motorist subsequently informed the plaintiff that the physical evidence would be available for inspection at Attorney A's office following a criminal hearing which is based on the same accident giving rise to the uninsured motorist claim. Defendant Motorist is represented by separate criminal defense counsel in the criminal matter.

(3) Plaintiff filed a motion to compel discovery responses from Defendant Motorist. Attorney A opposed the motion on the basis that Defendant Motorist should not be compelled to produce the information requested. Defendant Motorist presented no *pro se* opposition to the motion, and the motion was granted.

(4) Attorney A assisted Defendant Motorist in responding to plaintiff's interrogatories, requests for production, and requests for admissions, as evidenced by the fact that the responses were typed on Attorney A's lined pleading paper in Attorney A's office; interrogatories were notarized by Attorney A's employee; and discovery responses were served by mail in an envelope with Attorney A's name and return address label on it.

You have asked the committee to assume that the uninsured motorist carrier has a potential future subrogation claim against Defendant Motorist, but that Attorney A and the uninsured motorist carrier have not informed Defendant Motorist of the possibility that the carrier may later assert such a subrogation claim against Defendant Motorist and have not provided Defendant Motorist with a written waiver of any future subrogation claims.

You have asked the committee to opine, under the facts of the inquiry:

Committee Opinion
September 14, 1994

(1) whether there is an attorney-client relationship between Attorney A and Defendant Motorist;

(2) whether, regardless of the answer to question 1, it is improper for Attorney A to give legal counsel and guidance to Defendant Motorist when the insurance carrier may later assert a subrogation claim against Defendant Motorist;

(3) whether the response to question 2 would differ if Defendant Motorist was provided a written waiver of the carrier's potential future subrogation claim, assuming the carrier consented to such a waiver;

(4) whether it is proper for Attorney A to permit Defendant Motorist to continue to represent to the court that he is appearing *pro se*, if in fact, Attorney A is providing him legal counsel and a defense; and

(5) whether, if the answer to question 1 is yes, it is improper for Attorney A to continue to represent either the insurance carrier or Defendant Motorist if the insurance carrier has not waived the right to pursue any potential future subrogation claim against the Defendant Motorist.

The appropriate and controlling Disciplinary Rules related to your inquiry are:

DR:1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law;

DR:5-105(B) which provides that a lawyer shall not continue multiple employment if the exercise of his independent professional judgment will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR:5-105(C);

DR:5-105(C) which states that a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each;

DR:7-102(A)(3) which requires that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal;

DR:7-103(A)(2) which prohibits a lawyer from giving advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client;

Committee Opinion
September 14, 1994

DR:7-103(B) which states that, in dealing with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested and that he shall make reasonable efforts to correct any misunderstanding of the lawyer's role in the matter; and

DR:7-105(A) which provides that a lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

The committee responds to your inquiries relative to the facts presented as follows:

1. Once the attorney has advised the uninsured motorist, the committee is of the opinion that an attorney-client relationship has been established between Attorney A and Defendant Motorist. As defined in Part Six, Section I(B) of the Rules of Court, the relation of attorney and client exists whenever one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill; and specifically, whenever one "undertakes with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business". Thus, the committee believes that by providing the advice and assistance to Defendant Motorist as described, Attorney A has established an attorney-client relationship. *See* LE Op. 1127 and LE Op. 452.

2. The committee is of the view that if there are no other conflicts between the carrier and the defendant motorist, it is not improper for Attorney A to give legal counsel and guidance to defendant motorist even though the insurance carrier may later assert a subrogation claim against defendant motorist. The interest of both is in defeating the claim of the plaintiff.

3. The committee believes that Defendant Motorist and the insurance carrier would no longer have conflicting interests if the insurance carrier were to give a written waiver of its subrogation rights. Thus, under those circumstances, it would not be improper or violative of DR:7-103(A)(2), for Attorney A to give advice to Defendant Motorist. Attorney A, however, would still have to comply with the requirements of DR:7-103(B); i.e., Attorney A could not state or imply that he is disinterested in the matter.

4. The committee believes that it would be improper for Attorney A to permit Defendant Motorist to continue to represent to the court that he is appearing *pro se* if Attorney A has advised Defendant Motorist about the issues in the case or matters which will be presented to the court.

Under DR:7-105(A), and indications from the courts that attorneys who draft pleadings for *pro se* clients would be deemed by the court to be counsel of record for the *pro se* client, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that Disciplinary Rule. Such failure to disclose would also be violative of DR:7-102(A)(3). Further, such failure

Committee Opinion
September 14, 1994

to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR:1-102(A)(4). The committee cautions that Attorney A may wish to obtain Defendant Motorist's assurance that he will disclose A's assistance to the court and adverse counsel. *See* LE Op. 1127; Association of the Bar of the City of New York Opinion 1987-2 (3/23/87), ABA/BNA Law. Man. on Prof. Conduct, 901:6404.

5. For the same reason set forth in #2 above, it is not improper for Attorney A to represent the carrier and the defendant.