

The Virginia State Bar's Standing Committee on the Unauthorized Practice of Law has proposed its Opinion 60. The Virginia State Bar's Standing Committee on Legal Ethics has been asked to render its opinion on the applicability of the Virginia Code of Professional Responsibility to the facts upon which the proposed UPL Opinion 60 is based. The opinion of the Standing Committee on Legal Ethics is the following:

1. There is no provision of the Virginia Code of Professional Responsibility that expressly prohibits representation of an insured by a staff attorney for a liability insurance carrier.
2. However, there are provisions of the Code of Professional Responsibility which provide guidance in the conduct of that relationship, namely DR:4-101((C)(1), DR:5-101(A) and DR:6-101(D).
3. Canon 5 states “A lawyer shall exercise independent professional judgment on behalf of a client.”

DR:5-101(A) states

Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) A lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property or personal interest, except with the consent of his client after full and adequate disclosure under the circumstances.

DR:5-106 states, in pertinent part,
Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full and adequate disclosure under the circumstances, a lawyer shall not:

- (1) accept compensation for his legal services from one other than his client.
- (2)

(B) A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

Accordingly, it is imperative under the Virginia Code of Professional Responsibility that a liability insurer's staff attorney representing an insured must inform the insured of his employment and obtain the insured's consent “after full and adequate disclosure under the circumstances.”

The Legal Ethics Committee of the American Bar Association stated the principle well in its Informal Opinion 282 (5/27/50) in concluding that “An attorney, employed by an

insurance company exclusively, upon a salary basis [may ethically] defend lawsuits against assureds on behalf of the insurance company” and added

The essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity

The expressed, affirmative prohibitions of parts (A)(1) and (B) of DR:5-106(quoted above) amplify the essence of Canon 5 and the more specific statement in DR:5-101(A). See also EC:5-21, EC:5-22 and, particularly, EC:5-23.

4. Canon 4 states “A Lawyer Should Preserve the Confidences and Secrets of a Client.”

DR:4-101(B) prohibits the revelation of a confidence or secret (as defined in 4-101(A)), or the use of a confidence or a secret to the disadvantage of the client, or the use of a confidence or a secret of the client for the advantage of the attorney or a third person.

The client of an insurance carrier's employee attorney is the insured, not the insurance carrier. Accordingly, except with the consent of the client, the insurance carrier's employee attorney is barred from disclosing or using confidences and secrets as set out in 4-101(B) including, for example, any defense to policy coverage gained through the attorney/client relationship with the attorney's insurance carrier's insured. Informal Opinions 949 (8/8/66) and 1476 (8/11/81) of the ABA Legal Ethics Committee are in accord. See also EC:4-1, EC:4-2 and EC:4-5.

5. DR:6-101(D) states “A Lawyer Shall Inform His Client of Facts Pertinent to the Matter and of Communications from Another Party That May Significantly Affect Settlement or Resolution of the Matter.” Accordingly, the insurance carrier's employee attorney is required to keep his client advised of settlement and such information.

6. Canon 6 requires that “A Lawyer Should Represent a Client Competently” and Canon 7 states that “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.” We believe that it is implicit in those canons and related disciplinary rules that an insurance carrier's employee attorney make full and adequate disclosure to his client insured of any limitation of the scope of the representation.

In summary, then, it is the opinion of the Legal Ethics Committee of the Virginia State Bar that it is not improper for an attorney who is an employee of an insurance carrier to represent a client who is insured by his employer. We point out the provisions of DR:4-101(B), DR:5-101(A), DR:5-106(A)(1) and (B), and DR:6-101(D) and Canons 6 and 7 as guidance to an attorney in the maintenance of such a relationship.

Approved by the Supreme Court of Virginia
March 8, 1985
Effective June 1, 1985

Justices Stephenson and Russell would disapprove the opinion.