ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct . This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 92-2
July 17, 1992

Topic: Conflict of Interest; Multiple representation; Confidences and Secrets.

Digest: The attorney retained by an insurance company to defend its insured owes a duty to the insured not to disclose facts to the insurer which might prejudice the insured's rights in a potential coverage dispute with the insurer; the insured may thus require that counsel's reports be edited to delete such information. Disagreement between the insured and retained counsel regarding the contents of such reports may ultimately require withdrawal.

Ref.: Rogers v. Robson, Masters, Ryan, Brumund and Belon, 74 Ill.App.3d 467, 392 N.E.2d 1365, 1371 (3rd Dist. 1979)
Trovillian v. U.S. Fidelity and Guar, Co., 130 Ill.App.3d 694, 474 N.E.2d 953 (5th Dist. 1985)
Thornton v. Paul, 74 Ill.2d 132, 384 N.E.2d 335, 343 (1978)
Illinois Municipal League Risk Management Assn. v. Terry Seibert, 223 Ill.App.3d 864, 585 N.E.2d 1130 (4th Dist. 1992)
M.F.A. Mutual Ins. Co. v. Cheek (1977) 66 Ill.2d 492, 496
Allstate Ins. Co. v. Keller, 17 Ill.App.2d 44, 149 N.E.2d 482 (1958)
Waste Management v. International Surplus Lines, 144 Ill.2d 178, 579 N.E.2d 322 (1991)
ISBA Opinions on Professional Conduct, Nos. 216 and 89-17

1990 Illinois Rules of Professional Conduct, Rules 1.16(b)(D) and 5.4

FACTS

The inquiry deals with the professional responsibilities of an attorney retained by an insurance company to represent the interests of its insured in pending litigation.

The insured/defendant is a corporation. Its general counsel has advised the attorney employed by the insurance company that the insurer is defending under a reservation of rights. The attorney is given no other information regarding the reservation of rights.

He is advised by general counsel for the insured that he is to send all documents and correspondence to the general counsel's office for his review prior to their being sent to the insurance company so that he (general counsel) may delete any material that may be used by the insurance company to ultimately deny coverage under the policy. The inquiring attorney states that his reports will deal only with factual matters developed during pre-trial discovery and will contain no advice or opinion with respect to the coverage issues. However, he fears that permitting general counsel of the insured to censor and to edit his reports to the company may constitute a breach of the "cooperation clause" of the policy. The question is whether the attorney must comply with the insured's demand to review and edit his reports.

The inquirer also states that the general counsel has advised him not to tell the insurance company of the demand by general counsel that he be permitted to edit documents before being sent to the insurance company. He inquires as to whether this is appropriate.

OPINION

It is difficult to make a definitive analysis of the problems presented by the inquiry without knowing the reasons for the reservation of rights by the insurer. A reservation of rights may be based upon late notice or other action prejudicing the insurer's defense, or it may relate to coverage for the claim in question. The precise reasons for the insurer's reservation of rights will have a direct bearing upon the assessment by retained counsel of an actual or potential conflict of interest. The Committee can, however, make some general observations which may be of guidance.

Where an insurance company employs an attorney to defend an action against its insured, the attorney represents both the insured, as well as the insurance company, in furthering the interests of each. In the usual case, those interests are compatible, or at least not antagonistic. Both the insurer and the insured expect to benefit from a successful defense of the suit. Under ordinary circumstances, therefore, there is nothing professionally improper in the attorney's representation of both interests. Rogers v. Robson, Masters, Ryan, Brumund and Belon, 74 Ill.App.3d 467, 392 N.E.2d 1365, 1371 (3rd Dist. 1979); ISBA Opinion No. 216 (11/13/62).

Where, however, a question exists as to whether the insurance policy affords coverage for the allegations in the suit against the insured, the insurer must either defend the action under a reservation of rights or it must seek a declaratory judgment regarding its obligations to the insured. Trovillian v. U.S. Fidelity and Guaranty Co., 130 Ill.App.3d 694, 474 N.E.2d 953 (5th Dist. 1985). It may do both. If it defends the suit under a reservation of rights and simultaneously files a declaratory judgment action on the coverage question, separate counsel will be required, one to

defend the insured in the underlying suit and one to prosecute the declaratory judgment action on behalf of the insurer. Thus, divided loyalties are avoided.

Finally, Where the interests of the insurance company and its insured are in direct conflict, such that a finding of facts indicative of a lack of coverage will benefit the insurer to the detriment of the insured, the insurer will not be permitted to control, or even to participate in, the defense. In such a case, the insured is entitled to representation by counsel of his own choosing, and the insurer's duty to defend is satisfied by reimbursement of the insured for the costs of the defense. Thornton v. Paul, 74 Ill.2d 132, 384 N.E.2d 335, 343 (1978). Illinois Municipal League Risk Management Assn. v. Terry Seibert, 223 Ill.App.3d 864, 585 N.E.2d 1130 (4th Dist. 1992). In that event, general counsel would certainly be entitled to edit whatever reports might be sent to the insurer as a matter of information.

With respect to the feared breach of the "cooperation clause", such a clause is ordinarily designed to protect the insurer's interests and to prevent collusion between the insured and the injured party. (M.F.A. Mutual Ins. Co. v. Cheek (1977) 66 Ill.2d 492, 496). While the provisions of the particular clause in question are not detailed in the inquiry, the usual cooperation clause imposes upon the insured the duty to assist the insurer in the conduct of suits against the insured and to give such information and assistance as the insurer may reasonably require in that connection.

However, the Committee does not believe that the insured has the duty under the "cooperation clause" to reveal adverse information concerning possible late notice, misrepresentation, or other matters which may prejudice the insured's coverage under the policy. To the extent that the reports to the insurer may involve any such disclosures, it is the Committee's opinion that the insured's general counsel has a right to insist that they be deleted, since the insured's duty to cooperate with the insurer in the conduct of the litigation does not extend to incriminating itself with respect to possible policy defenses of the insurer. In such circumstances, the retained attorney must refrain from disclosing any such facts, since he has the same obligation in his representation of the insured as if he had been personally retained by the insured. (Allstate Ins. Co. v. Keller, 17 Ill.App.2d 44, 149 N.E.2d 482)

If the retained counsel and general counsel cannot agree on the content of reports with regard to the "cooperation clause" question, counsel retained by the insurer should advise general counsel that the particular deletions or omissions may expose the insured to a claim of breach of cooperation by the insurer. If the conflict becomes irreconcilable, retained counsel should move for leave to withdraw pursuant to Rule 1.16(b)(D) so as not to jeopardize the attorney-client relationship with either the insurer or the insured.

The Committee also cautions that any claim of "privilege" by general counsel with respect to the attorney's reports to the insurer should be examined in light of the principles recited in Waste Management v. International Surplus Lines, 144 Ill.2d 178, 579 N.E.2d 322 (1991). In that case, the Illinois Supreme Court stressed the considerations of public policy which require encouragement of full disclosure by an insured to its insurer. The court pointed out that the "common interest doctrine" recognizes that, where an attorney acts for two different parties having a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties. This is especially true, the court stated, where an

insured and its insurer initially have a common interest in defending an action against the insured. The court held that the insurer was entitled to production of defense files, based upon the contractual obligations under the policy and the "common interest doctrine", and that neither the attorney-client nor the "work product" exceptions to discovery (Supreme Court Rule 201(b)(2)) were applicable.

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