STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 9
(*originally issued on 4/21/88, conclusion amended 9/24/07)*

QUESTIONS - 1. Is an attorney required to disclose to the insurance company which hires him to defend a personal injury lawsuit arising from a vehicle accident information communicated by the insured client as to potential fraud of the client in obtaining vehicle liability insurance?
2. Does the client's communication of information as to potential fraud in obtaining vehicle liability insurance create a conflict of interest which requires or suggests a) the attorney withdraw his representation from client or b) terminate his employment by the insurance company?
3. Does the client's disclosure create a conflict of interest which precludes the attorney from accepting compensation from the insurance company for representing the client?

ANSWERS
1. Information communicated by an insured client to his attorney as to potential fraud in obtaining vehicle liability insurance is confidential. Unless the client consents to disclosure, it would be a violation of Nevada Supreme Court Rule 156 (hereinafter SCR) for attorney to reveal such information to the insurance company which hired him because a) disclosure is not impliedly authorized to carry out attorney's representation, b) there is no threatened criminal act likely to result in death or bodily harm, c) the attorney's services have not been used in the commission of the fraud, and d) disclosure is not necessary for the attorney's self-defense.

2. Information of the potential fraud communicated by client to the attorney does not create a conflict of interest within the meaning of SCR 157 to require that attorney withdraw his representation from the client or terminate his employment by the insurance company provided that a) the attorney believes his representation of client will not be adversely affected and b) the client consents to continuing representation. Nor does the communication suggest the attorney should consider withdrawal under SCR 166 because a) continuing representation does not violate the Nevada Rules of Professional Conduct or other law, b) the client has not used the attorney's services to perpetrate the fraud and c) the fraud does not involve continuing use of the attorney's services.

3. Client's communication of potential fraud in obtaining vehicle insurance does not create a conflict of interest under SCR 158 to require the attorney decline compensation from the insurance company provided a) the client consents after consultation, b) there is no interference with the attorney's independence of professional judgment or the client-lawyer relationship and c) information relating to representation of the client is protected as required by SCR 156.

AUTHORITIES RELIED ON

Nevada Rules of Professional Conduct (Supreme Court Rules) 152, 154, 156, 157, 158, 166, 167, 172 and 181.
Nevada Revised Statutes, Sections 49.035 through 49.115 (1971).

DISCUSSION

The questions presented arise from a hypothetical fact situation submitted to the Ethics Committee wherein attorney is hired by client's insurance company to defend client regarding a complaint filed against client alleging client, as owner of a vehicle, negligently entrusted the vehicle to client's brother's friend. Client's brother's friend then became involved in an accident injuring plaintiff. Client is, in fact, the title owner and registered owner of the vehicle involved in the accident. Prior to the accident, client's

brother had been cited on numerous occasions for driving while under the influence and was unable to obtain automobile insurance because of his poor driving record.

Significant discovery has taken place in litigation over the accident, although no trial has been set. Recently, client advised attorney that the vehicle involved in the accident was for client's brother to use and that the only reason client was the title owner and registered owner was so that he could obtain insurance for the vehicle. It is likely that if such information had been known to client's insurance company, the policy would have been written so as to exclude client's brother from coverage or not written at all. It is further likely that such information could provide client's insurance company with ground to deny coverage.

The attorney submitting the hypothetical fact situation requests the Committee advise the best method for the attorney involved to handle the situation and the reasons for the Committee's opinion.

It is assumed by the Committee that the attorney has been hired solely to represent the client in defense of the vehicle accident and not for the purpose of advising the insurance company on questions of coverage. It is further assumed, without deciding, and for purpose of this opinion only, that client's conduct in obtaining insurance constituted a "fraudulent act" within the meaning of SCR 156. Whether the client actually committed fraud is a question of law beyond the scope or jurisdiction of this Committee. It is suggested the attorney advise client that fraud may have been committed, and if discovered independently by the insurance company, this may be grounds for denial of coverage and possible criminal prosecution. Accordingly, client should be advised of his right to consult with other counsel as to these matters.

An attorney hired by an insurance company to represent an insured owes that person the same unswerving allegiance and fidelity that would be owed if the attorney were retained and paid personally by the insured. Glacier Gen. Assurance Co. v. Superior Court, 95 Cal. App. 3d 836, 157 Cal. Rptr. 435, 436 (1979) ("overall", ...the attorney's primary duty is to the insured"), Mead Corp. v. Liberty Mut. Ins. Co., 107 Ga. App.167, 129 S.E. 2d 162, 165 (1962) (Attorneys, whether or not paid by insurance companies, owe their primary obligation to the insured they are employed to defend"); Apex Mut. Ins. Co. v. Christner, 99 Ill. App. 2d 153, 240 N.E. 2d 742, 753 (1968) (counsel provided by insurer represents only the insured); Jackson v. Trapier, 42 Misc. 2d 139, 247 N.Y.S. 2d 315, 316 (Sup. Ct. 1964) (counsel provided by insurer represents solely interest of the insured); American Employers Ins. Co. v. Goble Aircraft Specialities, Inc., 205 Misc. 1066, 131 N.Y.S. 2d 393, 401 (Sup. Ct. 1954) (counsel provided by insurer has "paramount" duty to insured).

The attorney should consult with client to confirm the confidential nature of the information and the attorney's duty to maintain the confidence unless the client otherwise consents to disclosure. This is in conformity with the general rule of attorney-client privilege (Nev. Rev. Stat. Sec. 49.095) pertaining to confidential communications. Such information is not to be released unless authorized by the client.

"A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Nev. Rev. Stat. Sec. 49.055.

The general rule of confidentiality under the Nevada Rules of Professional Conduct, SCR 156, is that all information conveyed by the client, unless subject to stated exceptions, is confidential. The exceptions include disclosures that are "impliedly authorized" to carry out representation and disclosures required or permitted under subsections 2 and 3 of the rule

SCR 156(2) mandates disclosure where the attorney "reasonably believes" disclosure is necessary to prevent the client from committing a criminal act that the attorney believes is likely to result in "imminent death or substantial bodily harm." This exception is not applicable under the facts submitted.

SCR 156 (3) (a) allows discretionary disclosure to the extent the attorney "reasonably believes" necessary:

"(a) To prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used, but the lawyer shall, where praticable, first make reasonable effort to persuade the client to take corrective action.. . ."

Disclosure is further allowed under SCR 156(3) (b) to establish a claim or defense in behalf of the attorney in a controversy between the attorney and client, to establish defense to a criminal charge or civil claim against the attorney based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the attorney's representation of the client. This is commonly known as the "self-defense" exception.

Neither of the exceptions to discretionary disclosure applies in this case to overcome the general rule of confidentiality. First, the client's fraudulent conduct in obtaining vehicle insurance for his brother occurred before attorney's representation and not in the course of representation. Discovery of the fraudulent conduct was "incidental" to the attorney's representation. The attorney's conduct was not "instrumental" in the commission of the fraud. Secondly, the fraud has already occurred and cannot be prevented by the attorney's disclosure. In accord, see Sloan v. State Bar, 102 Nev. Adv. Opn. 97, 726 P.2d 330 (1986).

SCR 156 (formerly SCR 179), is derived from the Model Rules of Professional Conduct adopted by the American Bar Association with amendments approved by the Nevada Supreme Court based upon analysis of the confidentiality problem and proposal for solution by Professor Geoffrey C. Hazard, Jr., reporter for the Model Rules, in his article entitled "Rectification of Client Fraud: Death and Revival of Professional Norm", 33 EMORY LAW JOURNAL 271 (1985). SCR 156(3) (a) embodies the language suggested by Professor Hazard. Id., 308. As noted by Professor Hazard, the rule requires a connection between attorney services and the fraud before the attorney has discretion to reveal the information. It draws the line between not being an "instrument of fraud", on the one hand, and not being a "policeman" on the other. It prevents disclosure of fraud that the lawyer discovers "incidental" to representation as opposed to that which is committed in the course of representation. The rule also includes both prevention rectification of fraud and requires warning and effort to persuade the client to take corrective action. Id., 308-309.

The second issue to be considered is conflict of interest with respect to continued representation. The general rule concerning conflict of interest is embodied in SCR 157. Subsection 2 of the rule states:
"2. 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 interest, unless:
a) The lawyer reasonably believes the representation will not be adversely affected; and
b) The client consents, preferably in writing, after consultation."

Since the insured is the client, not the insurance company (third party), the attorney must use his skill to present the best defense he can for the client. The Committee has previously stated this opinion is rendered on the assumption that the attorney is hired solely to represent the insured in defense of the negligence lawsuit. Were it otherwise, the attorney would have to determine if his representation of the insured would be "adversely affected" by his responsibilities to the insurance company on questions of coverage and would further be required to obtain the client's consent to dual representation. In such case, it is likely the attorney would find himself in a position of conflict of interest.

The conflict of interest problem where disclosure of confidential information occurs is demonstrated in Parsons v. Continental National American Group, 113 Arizona 223, 550 P.26, 94 (1976). In Parsons, the attorney obtained information from the insured client indicating the client had intentionally injured plaintiffs. The attorney felt compelled to convey the information to the company resulting in refusal to settle and pay judgment. The attorney continued to represent the insured and insurance company, and was further retained by the insurance company in defense of a subsequent garnishment proceeding to

collect on the judgment. The Arizona Supreme Court, in its analysis of the conflict of interest created by the disclosure and continued representation, determined that the attorney should have notified the company that he could no longer represent it when he obtained information that could be detrimental to the client's interest in policy coverage. Relying on Parsons the Arizona State Bar Ethics Committee in Opinion No. 79-16, June 7, 1979, determined that an attorney involved in a similar fact situation must withdraw as counsel for the insurance company to avoid a conflict.

The problem with attorney withdrawal, either from representation of the client or the employment relationship with the insurance company is that the mere announcement or act of withdrawal, even without disclosure, is likely to place the insurance company on notice there is a problem which may result in defeat of coverage or other adverse consequences for the client. See comment in HAZARD, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (1985), P. 430.1 ("an announcement of withdrawal usually signifies much more than the 'mere fact' of withdrawal.").

The client's "paramount" interest is obviously better served by the attorney continuing his employment relationship with the insurance company and his representation of the client where it is clear that his responsibility is to provide for the insured's defense and not to advise the insurance company on questions of coverage. This avoids the conflict of interest problem. It also avoids having to consider withdrawal under SCR 157 or SCR 166 for the reasons previously stated in the Committee's answer to question two.

The third issue is whether the attorney has a conflict of interest which ethically prohibits his accepting compensation from the insurance company under SCR 158(6), which states:

"6. A lawyer shall not accept compensation for representing a client from one other than the client unless:
a) The client consents after consultation;
b) There is no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship; and
c) Information relating to representation of client is protected as required by Rule 156".

The requirement of SCR 158(6) (c) is satisfied since the information conveyed by the client is confidential and protected by SCR 156. It is thus incumbent upon the attorney to see that the requirements of SCR 156 (6) (a) and (b) are met. Presumably, the client will consent to the attorney's compensation by the company unless the client wishes to pay the attorney himself. It is further presumed acceptance of compensation from the company will not interfere with the attorney's independence of professional judgment or client-lawyer relationship since the attorney should know whether or not his employment relationship with the insurance company requires that he render advise on questions of coverage.

CONCLUSION

The information communicated by client to attorney should be considered a confidential communication subject to SCR 156 which prohibits the attorney from disclosing to the insurance company the potential fraud of client in obtaining vehicle insurance for his brother. The attorney does not have a conflict of interest under SCR 157 provided he has been retained by the insurance company for the purpose of defending client in the negligence lawsuit and not for the purpose of advising the insurance company on questions of coverage. Attorney is not prohibited under SCR 158 from accepting compensation from the insurance company provided the client consents and there is no interference with attorney's independence of professional judgment or with the attorney-client relationship. Although not specifically required under the Nevada Rules of Professional Conduct, it is recommended that the attorney counsel with the client to refrain from future conduct of a fraudulent nature, including obtaining future vehicle insurance coverage for client's brother. This is consistent with the provision in SCR 156 (3) (a) to rectify client fraud and to avoid any appearance of impropriety in condoning fraudulent conduct.

NOTE: The Nevada Supreme Court has expressly held that when an insurer retains a lawyer to represent an insured, the lawyer represents both the insured and the insurer. *Nevada Yellow Cab Corp. v. Eighth Judicial District Court*, 123 Nev. Adv. Op. No. 6 (March 8, 2007). Although the insured remains the lawyer's "primary" client, the retention also establishes an attorney-client relationship between the lawyer and the insurer, absent a conflict of interest. *Id.* While statements to the contrary in this opinion are thereby superseded, the Court's holding does not otherwise overrule or alter this opinion or its conclusions.