

**STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

Formal Opinion No. 26

OPINION 26- originally issued 3/20/01, conclusion amended 9/24/07

QUESTION

Can an insurance company demand information from the law firm it hires to represent the insured, relating to the case, when that information might be used by the insurance company to deny benefits to the named insured?

ANSWER

No.

AUTHORITIES RELIED UPON

NRS 49.095

Nevada Supreme Court Rules 151, 156(1), 169(1), 182

Model Rule of Professional Conduct 5.4(c)

Ballard v. Eighth Judicial Dist. Court, 106, Nev. 83, 787 P2d. 406 (1990)

Cronin v. Eighth Judicial Dist. Court ex rel. County of Clark, 105 Nev. 635, 781 P.2d 1150 (1989)

Ricketts v. Farmers Group, Inc, BC 165961 (Superior Court of Los Angeles)

INTRODUCTION

Law firms are hired by insurance companies to defend policy-holders. The question posed involves a Law Firm retained by an Insurance Company to act as defense counsel on behalf of Client, a subcontractor, involved in complex construction defect litigation. The basis of the claims against Client is that Client is responsible for the existence of construction defects at a construction project.

It is the Insurance Company's position that, pursuant to the terms of its insurance contract with the Client, damages to the Client's own work are not covered losses. However, damages caused by the Client to the work or property of other parties (i.e., "resultant damages") are covered losses under the policy. During the litigation, Insurance Company requested that Law Firm identify those items of damages claimed by the Plaintiff which were "resultant damages." Therefore, by omission, the Law Firm would provide the Insurance Company with its opinion as to which damages were not resultant damages, and thus were not covered under the insurance policy.

The Law Firm's concern was whether the request for information posed a conflict of interest. Specifically, the Law Firm was concerned that it was being asked to render an opinion that could be used by the Insurance Company to deny coverage to the Client. The Insurance Company took the position that there was no conflict of interest.

DISCUSSION

The question of potential conflict of interest does not appear to be an ethical issue per se. Rather, the appropriate first issue is the identification of the client. The Law Firm was retained by the Insurance Company to act as insurance defense counsel on behalf of Client. Accordingly, the "Client" of the "Insurance Company" is actually the client of the Law Firm, as to the claims defended by the Law Firm. There is no attorney/client relationship between the Insurance Company and the Law Firm on those claims. If coverage of a claim is the issue, the Insurance Company should hire its own counsel.

The agreement by which the Insurance Company hired the Law Firm is a third-party-beneficiary contract intended for the benefit of Client; the Insurance Company's obligation to hire the law firm is an outgrowth of its contract of insurance with Client. Release of information by the Law Firm to the Insurance Company would apparently constitute breach of that third-party-beneficiary contract.

Model Rule 5.4(c) states that "A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." This rule would appear to apply to Insurance Company's employment of Law Firm. It could be argued that requiring information from the Law Firm does not itself constitute "directing" or "regulating" the Law Firm's professional judgment.

There could be no other purpose for the request for the information, however, except to allow the Insurance Company to decide what position it would take regarding whether to cover losses suffered by the Client, including whether it would pay the Law Firm to do so. The position taken by the Insurance Company would, or at least could, result in expanding or restricting the scope of the Law Firm's defense of the Client, and thus would amount to "directing or regulating" the Law Firm's "judgment in rendering legal services." Where furnishing the requested information would likely lead to the Insurance Company informing the Law Firm that it would not pay for the defense of some portion of the claims against the Client, the Law Firm would be precluded from supplying the information directly.

The applicable statutory and case law apparently point counsel toward not disclosing to the Insurance Company any potentially damaging admissions made by the Client to the Law Firm. In the context of disclosure to the opposing party in litigation, the attorney-client privilege (see NRS 49.095) has been held to apply to statements made by an insured to an insurer, when that statement was taken at the express direction of counsel. *Ballard v. Eight Judicial Dist. Court*, 106 Nev. 83, 787 P.2d 406 (1990). It obviously would apply to a statement made directly by the Client to the Law Firm.

Even if the Insurance Company could be considered another "client" of the Law Firm, the normal conflict rules would prohibit the Law Firm from simply providing adverse information from or about the Client to the Insurance Company:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except disclosures that the law impliedly authorizes to carry out the representation

SCR 156(1). If the lawyer believed that the information would be utilized by the Insurance Company to the detriment of the Client, it would not be able to disclose the information to the Insurance Company as an independent Client, even as a matter of the Law Firm's "evaluation" of the information for the use of the Insurance Company, without the Client's consent:

A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(b) the client consents after consultation.

SCR 169(1).

While not directly addressing the question posed here, a series of decisions and initiatives in the parallel area of insurance company authority to manage litigation is illustrative. In at least one recent decision, one basis of a court's award of punitive damages against an insurance company was its instructions to an English/Spanish translator to report privileged information to the company for the purpose of voiding the insured's coverage. *Ricketts v. Farmers Group, Inc*, BC 165961 (Superior Court of Los Angeles). Presumably, it would have been just as prohibited for the insurance company to obtain the information from the attorney directly as it was to obtain it from the translator.

The economic interdependence of defense counsel and insurance companies has caused some third party entities to recommend "middle ground" when counsel is asked for information. The Defense Research Institute issued "case handling guidelines" in April, 2000, that sought to comply with Rule 5.4(c) of the Model Rules of Professional Conduct by providing that insurance companies have the right to review counsel's files in most circumstances, "but only in a manner that will not compromise attorney-client or work product protection" and only if the material reviewed is "not privileged or intended by the insured to be confidential," in which case consent of the insured would be required for the attorney to make a disclosure. Michael M. Bowden, *Seeking Common Ground; Insurance Industry Works with DRI to Avert Crisis*, in *Lawyers Weekly USA*, May 29, 2000, at B12.

It thus appears that, at least if the Law Firm knows that the information it has developed or accumulated would be used by the Insurance Company to the detriment of the Client, the Law Firm is not permitted to disclose that information to the Insurance Company upon the latter's request.

The Insurance Company may have a separate right to demand such information from the Client, however, under a "duty to cooperate" or similar clause in the contract of insurance between the Insurance Company and the Client. The Insurance Company may, therefore, be allowed to compel the Client to direct the Law Firm to release the information.

Further, the Law Firm probably has a duty to at least ask the Client if the requested disclosure should be made when the Insurance Company requests it. As soon as it begins representation of the Client, the Law Firm becomes the only legitimate means by which information can be requested of the Client by the parties in litigation. SCR 182; *Cronin v. Eighth Judicial Dist. Court ex rel. County of Clark*, 105 Nev. 635, 781 P.2d 1150 (1989).

Therefore, the Law Firm has a duty to pass along to the Client such requests for information, and to inform the Client of the ramifications for disclosure and non-disclosure, under the general duty of competence. SCR 151. If the underlying contract of insurance contains a clause that would penalize the Client for not revealing information indicating that there is no insurance coverage, the Law Firm would have to inform the Client of the potential damages for the non-disclosure.

CONCLUSION

It is improper for the Law Firm to provide information relevant to "resultant damages" to the Insurance Company except with the consent of the Client.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunal charged with regulatory responsibilities, or any member of the State Bar.

1 The question posed was not precise as to whether the information sought by the Insurance Company is what the Plaintiffs to the claims have identified as resultant damages, or what the Law Firm has concluded are resultant damages. Presumably, the question posed goes to the Law Firm's conclusions, since there appears to be no ethical issue in truthfully reporting to the Insurance Company what claims have been asserted that the Law Firm is being asked to defend.

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.