

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

Opinion No. 96-07

COPY

May 31, 1996

The Committee has received a request for an opinion from an attorney concerning the following hypothetical fact situation:

Decedent is struck by an automobile driven by Insured. The heirs and survivors of the Decedent request no-fault insurance benefits from Insurer alleging that the Decedent was a pedestrian at the time of the accident. The Insurer denies the benefits on the basis that at the time of the accident the Decedent was attempting to commit suicide and therefore is excluded from receiving PIP benefits. The heirs and survivors of Decedent then bring a bad faith action against the Insurer seeking damages. One attorney has been retained by the Insurer to represent the driver of the auto. The same attorney is also retained by the Insurer to represent the Insurer in the bad faith action. May the same attorney undertake representation of the Insured in the wrongful death action and also undertake representation of the Insurer in the bad faith action?

DISCUSSION

A. Ethics Rules

Rule 1.7 of the North Dakota Rules of Professional Conduct provides in part as follows:

- (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest.

- (c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:
 - 1. The lawyer reasonably believes the representation will not be adversely affected; and
 - 2. The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
- (d) Except as required or permitted by Rule 1.6, a lawyer shall not use information relating to representation of

a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation.

As noted in the comment to the rule the potential for a conflict does not always prohibit multiple representation:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, the likelihood of the conflict, will interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

B. Who is the Client?

Many years ago the ABA attempted to answer the question of who is the client in the insurance defense situation, the insurer or the insured?

1. A lawyer may ethically undertake the dual representation of the insurer and the insured in the defense of a third-party action against the insured; and
2. The lawyer so employed "shall represent the insured as his client with undivided fidelity." ABA Formal Opinion 282 (1950).

However, problems can arise when a course of action would be beneficial to the insurer, but detrimental to the client insured. Where a conflict arises between an insured and the insurer, the lawyer may not continue with the dual representation unless both consent after full disclosure. ABA/BNA Lawyers Manual on Professional Conduct 51:309 (1993) (hereinafter "ABA/BNA").

C. Client Consent.

As noted above, it does appear at least possible that in the situation presented here, that the attorney could continue to represent both the Insurer and the Insured if both consent after consultation. However, it is important to emphasize that circumstances under which this can be done are limited.

Nevertheless, the rules and law are clear that a lawyer may [represent two or more different clients in the same case] only under very limited circumstances, namely, where the lawyer reasonably believes the multiple representation will not adversely affect any one of the clients, and all of the clients consent after full disclosure of the implications of the multiple representation. ABA/BNA at 51: 301.

One state ethics opinion recently approved such a dual representation:

A lawyer who reviewed an insurance policy and advised an insurer regarding coverage may defend both the insurer and the insured against a complaint filed by a third party against the insured so long as full disclosure is made and consent obtained from both the insurer and the insured, including the fact of the lawyer's previous representation of the insurer in review and advisement. Oregon Opinion 1991-77 (1991), ABA/BNA at 1001:7110.

Thus, the rules do not absolutely prohibit the lawyer from representing both an Insured and Insurer, but the situation must be carefully scrutinized.

D. Insurance Coverage

Generally speaking, it would appear that both the Insurer and its Insured have an interest in proving that the Decedent was attempting to commit suicide. If suicide is proven, this might eliminate or reduce the risk of recovery against the Insured and may create a situation where no-fault benefits cannot be collected by the Decedent from the Insurer as a matter of law. State Farm Mutual Automobile Insurance Company vs Estate of Gabel, 539 N.W.2d 290 (N.D. 1995).

However, if the Insured was negligent in operation of the automobile, the fact that the Decedent attempted to commit suicide may not be an absolute defense and may require a comparison of fault to be resolved by the trier of fact. Champagne vs United States, 513 N.W.2d 75, 79 (N.D. 1994). In this situation, there might be a conflict of interest if the claims of the Decedent exceed available coverage under the liability policy. The Insured may feel it is in his best interest if there was coverage available under the no-fault policy. North Dakota Century Code § 26.1-41-08 provides that the insured ("secured party") is exempt from liability to pay damages to the extent no-fault benefits are paid to the injured party.

The Committee can find no ethics opinion from any other jurisdiction which deals directly with this issue.

CONCLUSION

The question presented here is a close one. In many respects the interests of the Insured and the Insurer are identical, in that proving suicide will in most situations protect both. This appears to be a question of "how much" coverage. If the claims are within policy limits then there would not appear to be an absolute conflict. There is also the option of the attorney discussing this matter with both the Insurer and the Insured and obtaining the

consent of both to proceed at least until a conflict over coverage arises.

Generally speaking, there is a potential for a conflict or appearance of impropriety when the same attorney represents an insurance company on a coverage issue and a defendant on a liability issue. As a result, this Committee is of the opinion that the attorney should not represent the Insured in the wrongful death action and also the Insurer in the bad faith action unless both clients consent in writing after full disclosure of the implications.

This opinion is provided pursuant to Rule 1.2(B), N.D.R. Lawyer Discipline, which states:

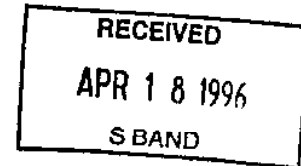
A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the Association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the Conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Brian R. Bjella and was unanimously approved by the Committee on May 30, 1996.


ALICE R. SENECHAL, Chair

[REDACTED]

April 17, 1996



Ms. Sandi Tabor, Executive Director
State Bar Association of North Dakota
P.O. Box 2136
Bismarck, ND 58502

RE: Request for Ethics Committee Opinion

Dear Ms. Tabor:

I am requesting the Ethics Committee to consider the following scenario and issue its opinion.

Specifically, I am seeking the Committee's opinion and guidance as to whether or not an attorney may represent the insureds in a wrongful death action and simultaneously represent the insurer in a bad faith action arising out of the nonpayment of PIP benefits for the underlying accident giving rise to the wrongful death action.

Hypothetical facts would include the following:

Decedent is struck by an automobile driven by Insured. The heirs and survivors of the Decedent request no-fault insurance benefits from Insurer alleging that the Decedent was a pedestrian at the time of the accident. The Insurer denies the benefits on the basis that at the time of the accident the Decedent was attempting to commit suicide and therefore is excluded from receiving PIP benefits. The heirs and survivors of Decedent then bring a bad faith action against the Insurer seeking damages. One attorney has been retained by the Insurer to represent the driver of the auto. The same attorney is also retained by the Insurer to represent the Insurer in the bad faith action. **May the same attorney undertake representation of the Insured in the wrongful death action and also undertake representation of the Insurer in the bad faith action?**

I trust that this factual outline is sufficient for the Committee to determine whether there are real conflicts of interest existing so as to preclude the representation of both parties by the attorney. Should you require any additional information, please advise.

Ms. Sandi Tabor
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In reviewing this matter as well as the appropriate rules, I do not believe that there is an actual conflict of interest but rather a purely theoretical and potential conflict of interest between the Defendant Insured and the Defendant Insurer that would not preclude the representation of the parties in the separate suits.

I appreciate the cooperation and assistance of the Committee and yourself. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

[REDACTED]
[REDACTED]
[REDACTED]