

ALASKA BAR ASSOCIATION
ETHICS OPINION 89-3

RE: Ethical Obligations of the Attorney Hired by an Insurance Company to Defend its Insured to the Insured When Insured Objects to the Attorney

AGREED STATEMENT OF FACTS

Attorney was hired by insurance company to represent the insured in a slip and fall case. The insured objected to the insurance company's retention of Attorney on several grounds.

QUESTION PRESENTED

What are the ethical obligations of an attorney retained by the insurance company when the insured objects to the retention of such attorney?

DISCUSSION

Whether the insurance company is obligated to select different counsel because of objections by the insured is not before this committee. Similarly this committee will not address the insurance company's obligations pursuant to the insurance contract. We rather only examine the ethical obligations of the attorney retained by the insurance company to carry out the insurance company's defense obligations to its insured.

In ABA formal Opinion No. 282 it was determined that under the Canons of Professional Ethics which were in effect at the time of the opinion, i.e., May 27, 1950, that an attorney could accept employment from an insurance company to represent the company's insured within the limits of the policy without either the request or preapproval of the insured. The opinion stated in pertinent part:

Whenever the insured is served with the court process as a defendant, the contract of insurance expressly requires him/her to forward such process to the company so that the company may provide the means of defense. It is elemental that this includes retaining and compensating the lawyer at the company's expense.

Under certain circumstances a person may by contract clothe another with power to retain a lawyer to conduct a defense. Especially may this be done when, as here, the power is coupled with an interest resulting from covenants of insurance . . . The essential point of ethics is that the lawyers so employed shall represent the insured as his client with undivided fidelity as required by Canon six.

Thus it is clear that the initial selection of Attorney by the insurance company without preapproval by the insured is appropriate. Thus Attorney did not breach any ethical obligations to the insured by not first seeking approval from the insured before he began his defense.

However, after the defense was begun the insured placed Attorney on notice that he objected to Attorney's continued representation. It is the opinion of this committee that once an attorney is placed on notice that his client, in this case, the insured, desires a dissolution of the representative relationship, the attorney is ethically obligated to accommodate his client's wishes. Attorney is consequently ethically obligated to withdraw from representing the insured.

The committee bases this conclusion upon DR 2-110(B)(4). DR 2-110(B) sets forth the circumstances under which withdrawal as counsel is mandatory:

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if: . . .

(4) He is discharged by his client.

Whenever an attorney withdraws from representation there are certain precautions which must be taken to protect the interests of his client. DR 2-110(A)(2) sets forth the responsibilities of an attorney when he withdraws from employment. DR 2-110(a)(2) states in pertinent part:

. . . a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client

It is the opinion of this committee that this requirement establishes an ethical obligation on the part of Attorney to recommend that the insured seek the advice of separate counsel with regard to the possible ramifications of discharging the attorney selected by the insurance company.

CONCLUSION

When the attorney retained by the insurance company to represent an insured is informed by the insured that the insured does not want the attorney to represent him, the attorney has an ethical obligation to withdraw from such

representation. The attorney also has a concurrent obligation to recommend that the insured seek legal counsel with regard to whether the insured's discharge decision may have ramifications under the insurance policy.

Approved by the Alaska Bar Association Ethics Committee on July 13, 1989.

Adopted by the Board of Governors on October 27, 1989.

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