

**ALASKA BAR ASSOCIATION
ETHICS OPINION 90-2**

**Ethical Obligations of the Attorney Hired by an
Insurance Company to Defend its Insured to the Insured
When Company Directs an Offer of Judgment**

QUESTION PRESENTED

What are the ethical obligations of an attorney retained by an insurance company to represent its insured when the insurance company directs him to make an offer of judgment?

CONCLUSION

When an attorney is hired by an insurance company to represent the insured, the attorney initially meets his ethical obligations by keeping the insured apprised with regard to his activity in the case. Such appraisal should give sufficient notice to the insured so that the insured has reasonable opportunity to inform the attorney of any objection. If the insured makes no objection the attorney can assume tacit consent. However, if the insured instructs the attorney to not make an offer of judgment, the attorney is ethically obligated to honor those instructions.

AGREED STATEMENT OF FACTS

Attorney was hired by insurance company to represent its insured in a slip and fall case. The contract of insurance provided that the insurance company would control the insured's defense. At the direction of the insurance company, attorney made an offer of judgment. Attorney did not obtain the consent of the insured before making the offer.

DISCUSSION

A.B.A. Formal Opinion No. 282, decided in May of 1950 discussed the relationship among the insurance company the insured and the attorney hired by the insurance company to represent 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 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 a 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....

There is express consent by the insured in the insurance contract to allow the insurance company to control his defense. Therefore, the attorney may reasonably assume when he is retained by the insurance company to represent its insured that the insured consents to the insurance company's handling of the litigation. Nonetheless, the insured is the attorney's client, and as such the attorney's fiduciary obligations lie with the insured. The attorney has a continuing obligation to keep his client, the insured, informed of activities in the case and the implications to the insured. The attorney may properly assume that the insured has given tacit consent to all indicated courses of action of which the insured has been given reasonable notice and to which the insured does not object. It is implicit that the attorney must inform the insured of his intended course of action sufficiently prior to his carrying out of the plan of action so that the insured has a reasonable time to inform the attorney of any objection.

In the question presented here the insurance company directed the attorney to make an offer of judgment. The attorney was then ethically obligated to inform the insured of his intent to make an offer of judgment. The insured thereby would have been on notice that if he did not wish an offer of judgment to be made that he should make his dissatisfaction immediately known.

If the insured informs the attorney that he does not wish the attorney to make the offer of judgment the attorney is ethically obligated to follow the insured's wishes. DR 5-107. The attorney is also obligated to inform the insured of the possible ramifications of this position, including the impact on coverage under the insurance policy. The attorney must inform the insurance company of the insured's desires and indicate to the company that the attorney cannot proceed on a course contrary to the desires of his client, the insured.

Approved by the Alaska Bar Association Ethics Committee on January 11, 1990.

Adopted by the Board of Governors on January 19, 1990.

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