

NEW HAMPSHIRE BAR ASSOCIATION

Ethics Committee Advisory Opinion #2018-19/2

Insurance Opinion

ABSTRACT

The Ethics Committee previously issued two opinions addressing the relationship between an insurance company and the lawyer hired by the company to represent its insured. These opinions, which turned on a preliminary question of insurance law that remains unsettled in New Hampshire, are inconsistent with one another. Because it is not within the Committee's purview to decide this question of insurance law, after review the Committee withdraws one of the opinions and modifies the reasoning of the other. Lawyers are further advised that until this question is resolved by the New Hampshire Supreme Court, they should be clear whom they represent in their engagement letters and in communications with the insurance company.

ANNOTATIONS

There are three schools of thought on the relationship between an insurance company and the lawyer hired by the company to represent its insured: 1. The lawyer always represents the insured alone, while the company is only a third party payor (the "single-client" model); 2. The lawyer always represents both the insured and the company (the "dual-client" model); or 3. The lawyer always represents the insured and may represent the insurance company as well, in appropriate situation, based on agreement of the parties (the Restatement approach).

Ethics Committee Formal Opinion #1993/94-15 (Communication with Insurance Representative Without Consent of Defense Counsel) (N.H. 1993), which concluded that plaintiff's counsel may contact an insurance adjustor without the approval of defense counsel, is incorrect and is withdrawn.

N.H. Bar Ethics Committee Advisory Opinion #2001-01/05 (Release of Billing Statements to Third Party Auditors), (N.H. 2000), which concluded that it was unethical for a lawyer hired to defend an insured to release billing information to third-party auditors hired by the insurance company, is correct, but its reasoning must be modified.

The general rule is that, in the tripartite relationship between an insurance company, its insured, and the lawyer the company hires to defend the insured, the insured is always the lawyer's client.

New Hampshire law is unsettled as to whether, in the tripartite relationship between an insurance company, its insured, and the lawyer that the company hires to defend the insured, the insurance company is also the lawyer's client.

It is not within the purview of the Ethics Committee to determine the nature of the tripartite relationship between an insurance company, its insured, and the lawyer that the company hires to defend the insured.

Until the nature of the tripartite relationship between an insurance company, its insured, and the lawyer that the company hires to defend the insured is resolved by our Supreme Court, lawyers should be clear whom they represent in their engagement letters and in communication with the insurance company.

If an insurance company insists that it must have an attorney-client relationship with the lawyer it hires to defend its insured, then potential conflicts under NH RPC Rule 1.7 may require the lawyer to withdraw in some situations.

Role of Insurance Defense Lawyer

The Committee has been asked to clarify two inconsistent ethics opinions addressing the role of insurance defense counsel. The opinions, described below, although addressing different factual questions, turn on the relationship between the insurance company and the lawyer hired by the company to represent its insured. Courts and Ethics Committees across the country have grappled with this issue, and it continues to generate much controversy and commentary. *See e.g., Restatement (Third) of the Law Governing Lawyers, § 134, cmt. f.*

Three schools of thought have emerged on the question: 1. The lawyer always represents the insured alone, while the company is only a third party payor ("single-client" model); 2. The lawyer always represents both the insured and the company ("dual-client" model); or 3. The lawyer always represents the insured and may represent the insurance company as well, in appropriate situation, based on agreement of the parties (the Restatement approach). *Id.*

1993 Opinion

In a 1993 opinion, *Ethics Committee Formal Opinion #1993/94-15 (Communication with Insurance Representative Without Consent of Defense Counsel)* (N.H. 1993), we concluded that plaintiff's counsel may contact an insurance adjustor without the approval of defense counsel. We believe this opinion is incorrect and withdraw the opinion, for the reasons discussed below.

In the 1993 opinion, the Committee stated that a lawyer for a plaintiff is permitted to contact an insurance adjustor directly without violating the no-contact rule for represented clients (NHRPC 4.2). This conclusion was based on a decision of the Federal District Court for the District of New Hampshire finding that the lawyer retained by an insurance company to provide a defense under a liability policy represents only the insured, and not the insurer. *See Gibbs v. Lappies*, 828 F.Supp. 6, 7 (D.NH 1993). Based on this case, the Committee concluded that New Hampshire was a single-client state.

2000 Opinion

In the second opinion, *N.H. Bar Ethics Committee Advisory Opinion #2001-01/05 (Release of Billing Statements to Third Party Auditors)*, (N.H. 2000) we found it unethical for a lawyer hired to defend an insured to release billing information to third-party auditors hired by the insurance company. After reviewing that opinion, we believe that conclusion still to be correct. We find it necessary, however, to modify our reasoning as discussed below.

In the 2000 opinion, the Committee stated that a lawyer retained by an insurance company to defend its insured generally could not disclose detailed billing statements to third-party auditors hired by the insurer without the insured's informed consent. This conclusion was based on *Dumas v. State Farm Automobile Insurance*, 111 N.H. 43, 49 (1971). In the ethics opinion, we stated that the *Dumas* holding was "consistent with the traditional view that the tripartite relationship between insurer, insurance defense counsel and insured involves dual representation of 'co-clients.'" In other words, the Committee concluded that New Hampshire was a dual-client state.

Analysis

These opinions are inconsistent. The ethical issue in each case turns on a preliminary question of insurance law that remains largely unsettled in New Hampshire: Whether an attorney hired by an insurance company to represent an insured represents only the insured or represents both the company and the insured. We believe that in the 1993 ethics opinion, we may have relied too strongly on the dicta in the *Gibbs* case. Similarly,

upon further review, we believe we may have overstated the reach of the holding in the *Dumas* matter in the 2000 opinion.

In *Gibbs*, the issue was whether a law firm could withdraw from its representation of the insured when the hiring insurance company stopped paying for the lawyer's services, due to insolvency. The Court ruled that the primary client in insurance defense is the insured and declined to allow the withdrawal. This is certainly consistent with the general rule that the insured is *always* the client in such situations. See *Restatement (Third) of the Law Governing Lawyers*, § 134, cmt. f ("[A] lawyer designated to defend the insured has a client-lawyer relationship with the insured"); *Gibbs*, 828 F.Supp. at 7.

In so ruling, however, the *Gibbs* Court also remarked that the insurer was not the attorney's client, an observation that was not essential to the district court's holding (and therefore dicta). We believe that the Committee in its 1993 opinion relied too heavily on this dicta to decide that the governing rule in New Hampshire was the single-client rule and thus that the insurance company could never be a client. Were such a broad ruling to be made in a diversity case such as this, the Court would have needed to address the Supreme Court's *Dumas* decision, which it did not.

We note, however, that where the defense lawyer and company agree that the lawyer will represent only the insured, the conclusion of the 1993 opinion that the plaintiff's lawyer may contact the adjuster without permission of defense counsel is correct. However, we withdraw the opinion since the broad reasoning on which that opinion is premised is incorrect.

Upon reconsideration, we also believe this Committee in the 2000 opinion may have read the *Dumas* decision in an overly broad manner. *Dumas* dealt with whether, in a subsequent action between the insured and the insurance company over the failure to settle, the file of the defense lawyer was privileged. The Supreme Court found, as a factual matter, that the lawyer represented both the company and the insured. *Dumas*, 111 N.H. at 49; see also *Baker v. CNA Ins. Co.*, 123 F.R.D. 322, 325 (1988) (finding that the defense lawyer had confidential discussions with both the company and the insured and relying on these conversations in finding dual representation). Despite this, the Court allowed the discovery because of the rule that there is no privilege between co-clients in a subsequent action between the two parties. In its 2000 opinion, the Ethics Committee read *Dumas* to have "adopted the 'dual-client' model." In reviewing the 2000 opinion, we believe the Committee may have overreached.

Based on *Dumas*, we believe that the seemingly contradictory conclusion in our 2000 opinion stating that there is "no definitive answer to the nature of the tripartite relationship" is correct and that we should not have proceeded to predict the insurance relationship rule that the New Hampshire Supreme Court would adopt. We also note

that *Dumas*, which permitted the insured and insurer to both be clients of the defense lawyer, seems to eliminate the possibility that New Hampshire is a mandatory single-client state. Despite this modification, we believe the rule of the 2000 opinion to be sound since the confidentiality duty on which the opinion was based is the duty to the insured, who will under any test always be a client.

After careful review of the court decisions and committee opinions, we are unable to determine if the New Hampshire Supreme Court, when confronted with the question in the future, would adopt the dual client rule or would follow the Restatement. The Restatement quite sensibly, we think, concludes that in an insurance situation "...a lawyer designated to defend the insured has a client-lawyer relationship with the insured." *Restatement (Third) of the Law Governing Lawyers*, § 134, cmt. f. The comment goes on to conclude that the lawyer can also create a client-lawyer relationship with the company, unless a potential conflict situation is presented. *Id.* Of course the lawyer for the insured even if not representing the company, must remain mindful of the contractual obligation of the insured to cooperate with the insurance company. It is not within our purview, however, to decide this question of insurance law.

Conflict Between Clients – Insured and Insurer

While neither of the opinions in question addressed the following factual issue, we believe it might make this opinion more useful if we highlight the context in which this dilemma most commonly arises and the conflict of interest it can cause. In our experience, this controversy most often presents itself when the insured, often just before a mediation or deposition, reveals to the lawyer facts that would render the insured ineligible for insurance coverage, such as that the defendant engaged in intentional conduct. Whether the lawyer may or must reveal this information to the company, and whether the lawyer must withdraw from the matter depend on the resolution of the relational issue.

If the single-client rule were to be followed in the above factual situation, the lawyer would be barred from disclosing the harmful facts to the insurance company and, unless faced with perjury or other similar ethical issue, could continue defending the insured. However, if New Hampshire were a dual-client state, the lawyer in the example would have duties of communication to the company. Since those duties would conflict with his or her duty of confidentiality to the insured, the lawyer would, at least, need to withdraw from the case since there would be two clients with differing interests. If the state were to adopt the Restatement position, the resolution would depend on what the parties had agreed to.

The Committee wishes it could resolve this issue to provide certainty for the Bar. In light of the holding in *Dumas*, however, we can only suggest that, until this issue is resolved by our Supreme Court, lawyers be clear whom they represent in their engagement letters and in communication with the insurance company. If they want to have a relationship only with the insured, something that will avoid possible future conflicts if the insured provides information such as in the above example, they should make this clear to the insurance company.

The insurance company might not be willing to decline the representation (which would avoid this potential conflicts for the lawyer) since the insurance company also then might not have a malpractice claim if the lawyer makes significant mistakes in the defense or have a claim of privilege for the normal, periodic communications with the insurance company necessary to satisfy the insured's duty to cooperate.

The *Restatement* recognizes these important issues and suggests that even if the lawyer has avoided a relationship with the company, the company should be allowed to sue for malpractice since it is the real party at interest and that all communication in the normal course of the representation should be privileged. *Restatement (Third) of the Law Governing Lawyers*, § 134, cmt. f. There is certainly no settled law supporting this reasonable resolution. See e.g., *Pine Island Farmer's Coop v. Erstad and Reimer*, 649 N.W.2d 444 (Minn. 2002). In light of this, the Committee notes that one way to protect the privilege in single-party representation might be to execute a joint defense agreement with the insurance company.

If the insurance company insists that it also have an attorney client relationship with the lawyer for privilege, malpractice, and communication purposes, then the potential conflicts under NH RPC Rule 1.7 described above may require the lawyer to withdraw in some situation. Such withdrawal could prove costly to the company, especially if the conflict arises late in the litigation, as the company will have to hire a new lawyer for the insured and, to protect its non-coverage claims, one for itself as well.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 1.7

Rule 4.2

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

Ethics Committee Formal Opinion #1993/94-15 (Communication with Insurance Representative Without Consent of Defense Counsel) (N.H. 1993)

N.H. Bar Ethics Committee Advisory Opinion #2001-01/05 (Release of Billing Statements to Third Party Auditors) (N.H. 2000)

SUBJECTS:

Conflicts of Interest

Contact with Represented Parties

By the NHBA Ethics Committee

This opinion was submitted for publication to the NHBA Board of Governors at its May 6, 2019 Meeting.