

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2008-02 Request No. 952
Issued July 10, 2008

Facts:

The inquiring attorney has been retained by Jane Doe's insurance carrier to represent her interest in a personal injury claim brought by her husband, John Doe. At the time of the injury, the two individuals were not married. John and Jane Doe had been drinking before deciding to drive to John Doe's parent's home. According to Jane Doe, she was driving and John Doe was a passenger in the front seat of her vehicle when she lost control of the vehicle and struck a telephone pole. She has further stated that John Doe got out of the vehicle to view the damage to the car which was smoking. John Doe was attempting to move the car to his parents' home which was less than a block away when police arrived and took John Doe into custody for driving under the influence. John Doe subsequently pled guilty to the DUI charge. The inquiring attorney states that Jane Doe's version of the events is not consistent with a police report, or with statements of unbiased witnesses which state that John Doe was driving, and Jane Doe was in the passenger seat. Jane Doe stated these facts in interrogatories, and the inquiring attorney believes she will testify likewise at a deposition and at a trial.

Issue Presented:

The inquiring attorney asks whether the Rules of Professional Conduct require him/her to withdraw from the representation, and whether the insurance carrier needs to retain counsel.

Opinion:

Rule 1.16(a) requires withdrawal from representation if the inquiring attorney knows that Jane Doe is lying in furtherance of a fraudulent claim. If on the basis of contradictory evidence, the inquiring attorney surmises or concludes that Jane Doe is lying, the inquiring attorney may withdraw pursuant to Rule 1.16(b), provided withdrawal can be accomplished without material adverse effect on the client's interest. Withdrawal is subject to the court's approval.

Reasoning:

Rule 1.16(a) entitled "Declining or terminating representation" sets out the circumstances for both mandatory and permissive withdrawal from a lawyer's representation of a client.

The Rule states:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Applicable to this inquiry also, is Rule 1.2(d) which states:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The inquiring attorney does not state that his/her client, Jane Doe, has told the inquiring attorney, that in fact, John Doe was driving when the accident occurred. The inquiring attorney also does not state whether the DUI charge against John Doe and his eventual guilty plea related to the first leg of this scenario, *i.e.* the road trip between the initial point and the impact with the telephone pole; or the second leg *i.e.* the trip from the accident scene to John Doe's parents' home; or both. Without these facts, the Panel is not in the position to definitively advise the inquiring attorney. Suffice it to say that if the inquiring attorney knows that Jane Doe is lying, the inquiring attorney has an obligation to withdraw under Rule 1.16(a), subject to the court's approval, because Rule 1.2(a) prohibits lawyers from assisting a client in conduct that the lawyer knows is criminal or fraudulent. A lawyer may and should discuss the legal consequences of such conduct with a client, including the legal consequences of lying under oath. See Rule 1.2(d).

Aside from any actual knowledge that Jane Doe is lying, there exists evidence that contradicts Jane Doe's statement that she was the driver of the vehicle, namely, unbiased witness statements, a police report, and John Doe's drunk-driving plea. If on the basis of contradictory evidence, and after a full investigation of the facts, the inquiring attorney surmises or concludes that Jane Doe is lying, then Rule 1.16(b) permits the inquiring attorney to withdraw from the representation if withdrawal can be accomplished without material adverse effect on the interests of the client, and if the court approves.

In deciding whether withdrawal is appropriate under the Rules, the inquiring attorney, who has been retained by the insurance carrier, must exercise his/her independent professional judgment mandated by Rule 5.4(c). The Panel will not comment on the insurer's obligations under the Rules of Professional Conduct or under its agreement with Jane Doe.