

Final

Rhode Island Supreme Court
Ethics Advisory Panel
Opinion No. 99-18, Request No. 763(B)
Issued October 27, 1999

Facts:

The inquiring attorney and his/her law firm have been retained by an insurance company to represent its insureds. The insurer requires the attorney to abide by "litigation management guidelines" established by the insurance company which delineate the financial relationship between the insured and the law firm, and which set parameters and approval prerequisites for the legal services to be provided. The inquiring attorney has submitted a copy of the insurer's litigation management guidelines to the Panel.

Issue Presented:

The inquiring attorney asks whether it is a violation of the Rules of Professional Conduct to agree to abide by the insurer's "litigation management guidelines?"

Opinion:

The litigation management guidelines submitted to the Panel in this inquiry contain provisions which in the opinion of the Panel interfere with the independent professional judgment of defense counsel and ultimately with the quality of legal services provided to the insureds. As such, the inquiring attorney and his/her law firm may not ethically agree to abide by these guidelines in their entirety.

Reasoning:

A lawyer hired by an insurance company to represent its insured must represent the insured as his/her client with undivided loyalty. R.I. Sup. Ct. Ethics Advisory Panel Op. 98-10 (1998). The Rules of Professional Conduct define the ethical responsibilities of a lawyer to his/her client. *Id.* Several Rhode Island Rules of Professional Conduct govern a lawyer's ethical obligations within the context of the tripartite relationship between and among a lawyer, a client-insured, and an insurance company. Foremost among an attorney's ethical obligations is the duty to exercise his/her independent professional judgment on behalf of a client. Rule 2.1 of the Rules of Professional Conduct sets forth this obligation in absolute terms:

Rule 2.1. Advisor. - In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Rule 1.8(f) and Rule 5.4(c) prohibit an attorney from permitting one who is not his/her client from interfering with the attorney's independent professional judgment. Both rules are particularly applicable to the situation where an insurer retains counsel to represent its insured. Rule 1.8(f) provides:

Rule 1.8. Conflict of Interest: Prohibited Transactions . -

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

Rule 5.4(c) states:

Rule 5.4. Professional Independence of a Lawyer. -

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The Comment to Rule 1.5, entitled "Fees," specifically addresses impermissible limits placed on the legal services to be provided:

"An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest."

In addition, because the tripartite relationship between and among defense counsel, a client-insured, and an insurer exposes the attorney to the risks of serving two masters, a conflict of interest can arise under Rule 1.7, which states:

Rule 1.7. Conflict of Interest: General Rule. -

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, 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.

The Panel has examined the litigation management guidelines submitted by the inquiring attorney. It is reasonably apparent to this Panel that certain of the guidelines under consideration, even though intended to achieve cost efficiency, infringe upon the independent judgment of counsel and induce violations of our Rules. See Indiana Bar Assoc. Op. 3 (1998).

Overall, the guidelines establish the financial relationship between the insurer and defense counsel. Noncompliance with the guidelines results in nonpayment. Certain guidelines identify reimbursable expenses, hourly rate schedules for counsel and for support staff, permitted legal services for which compensation will be made, and activities for which compensation will not be made. Billing statements must be detailed and must adequately describe the services provided. See RI Sup.Ct. Ethics Advisory Panel 99-17 (1999) (discussing insurer's billing requirements and submission of bills to

insurer's outside billing auditors.) To the extent that these provisions merely define the financial relationship between the insurer and defense counsel, they do not present ethical concerns under the Rules. See Indiana Bar Assoc. Op. 3 (1998).

Other provisions of the guidelines purport to coordinate the roles of defense counsel and various employees of the insurer assigned to the claim. Such provisions also do not raise ethical concerns under the Rules.

However, certain other provisions, specifically those that require the insurer's pre-approval for specified legal services, extend beyond the financial and working relationship between the insurer and defense counsel, and infringe upon the attorney-client relationship between the insured and the inquiring attorney. For example, the insurer's prior approval is required before defense counsel engages in the following: conducting legal research in excess of three hours; filing counterclaims, cross-claims or third-party actions; visiting the accident scene; preparing substantive dispositive motions or briefs; customizing interrogatories or document requests; and scheduling depositions. The insurer's prior approval is also required before counsel incurs expenses related to any of the following: retaining expert witnesses; scheduling independent medical examinations or peer reviews; instituting surveillance; and conducting additional investigations. To the extent that the insurer reserves unto itself the right to withhold approval for reasonable and necessary legal services to be provided to an insured, these provisions of the guidelines impermissibly interfere with the independent professional judgment of the inquiring attorney. By agreeing to abide by the preauthorization provisions, an attorney impermissibly abdicates the obligations imposed by Rule 2.1 and Rule 5.4(c). Therefore, the inquiring attorney may not agree to them. Furthermore, such provisions result in a material disincentive to provide legal services that are reasonable and necessary to the defense of the insured. See Indiana Bar Assoc. Op. 3 (1998). A material disincentive creates a conflict of interest pursuant to Rule 1.7.

Under the litigation management guidelines submitted to the Panel, counsel who is unsuccessful in obtaining the insurer's approval for legal services which in his/her judgment are reasonable and necessary would have two options. Either he/she must withdraw from the representation pursuant to Rule 1.8(f), or he/she may choose to provide the unauthorized services without compensation. Neither of these alternatives responsibly addresses the threshold question of whether an attorney may agree in advance to subordinate his/her professional judgment on behalf of a client to the judgment of another person or entity. For this reason, the Panel does not believe that defense counsel must be without guidance from this Panel until he/she is faced with the choice of either withdrawing from the representation of an insured or providing legal services for free.

In the Panel's opinion, when confronted with proposed guidelines, such as those submitted in this inquiry, which have the effect of directing and regulating counsel's independent professional judgment in the representation of an insured, counsel may not ethically agree to

them. The better course is for counsel to seek an acceptable modification that comports with the obligations imposed by the Rules. If counsel is unable to obtain a modification, he/she should decline the representation pursuant to Rule 1.8(f).

The Panel does not address today whether the litigation management guidelines of other insurers violate the Rules of Professional Conduct. An attorney may agree to abide by an insurer's litigation management guidelines provided that the guidelines do not direct or regulate the attorney's independent professional judgment in the representation of an insured. The level of control given to the insurer in the guidelines submitted in this inquiry extends too far.

The Panel has noted that the guidelines under consideration contain precatory language relating to counsel's responsibilities to the insured. The guidelines provide:

The following billing requirements have been compiled and adopted by the [insurer] office of claims in order to provide guidelines for billing purposes only. These guidelines should never interfere with any duties, obligations, or responsibilities owed to a client nor should they diminish the quality of the defense [insurer's] outside counsel will provide the [insurer's] insured.

The guidelines also state:

If the firm believes that any part of these billing requirements is inappropriate or would not be in the best interest of [insurer] or its insured(s) or customer(s), such issues must be discussed with [insurer], or [insurer's] designee.

These recitals conflict directly with the preauthorization provisions of the guidelines, and in the opinion of the Panel, do not adequately safeguard the independent professional judgment of defense counsel.

The Panel concludes that the specific litigation management guidelines submitted by the inquiring attorney in this inquiry contain provisions which interfere with the independent professional judgment of defense counsel and ultimately with the quality of legal services provided to the insureds. As such, the inquiring attorney and his/her law firm may not ethically agree to abide by the litigation management guidelines in their entirety. Counsel and his/her law firm are advised to seek a modification consistent with the Rules of Professional Conduct. If they are unable to obtain a modification, they are advised to decline the representation.