

**LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY
AND ETHICS COMMITTEE**

**Opinion No. 528
April 2017**

SUMMARY

When an attorney engaged by an insurance carrier to defend the interests of an insured obtains information that could provide a basis for the insurance carrier to deny coverage, the attorney is ethically prohibited from disclosing that information to the insurance carrier. In such a situation, the attorney must withdraw from the representation.

AUTHORITIES CITED

Rules of Professional Conduct:

California Rules of Professional Conduct, Rules 3-100, 3-500 and RPC 3-700.

Statutes:

Bus. & Prof. C. § 6068(e)
Bus. & Prof. C. § 6068(m)

Cases:

Bank of America, N.A. v. Superior Court of Orange County, 212 Cal.App.4th 1076 (2013)
Flatt v. Superior Court, 9 Cal.4th 275 (1994)
In re Johnson, 4 Cal. State Bar Ct.Rptr. 179 (Rev.Dept. 2000)
Lysick v. Walcom, 258 Cal.App.2d 136 (1968)
State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co., 72 Cal.App.4th 1422 (1999)

Ethics Opinions:

Cal. State Bar Op. 1995-139
L.A. County Bar Ops. 386, 436 and 456

STATEMENT OF FACTS

Insurance Carrier assigns Panel Defense Counsel (“PDC”) to defend Insured Client. Included in the documents received by PDC from the Insurance Carrier are the complaint and a reservation of rights letter. The reservation of rights letter suggests the possibility that Insured Client had knowledge of the claim before it applied for the policy

issued by Insurance Carrier and failed to disclose that knowledge on its application of insurance.

PDC files an answer on behalf of Insured Client. Plaintiff then serves PDC with requests for admissions. One request seeks to have Insured Client authenticate a *mea culpa* letter; another seeks to have Insured Client admit the date of its transmission to Plaintiff. The *mea culpa* letter is dated prior to the date of the insurance application. The letter may establish a statute of limitations defense by establishing the date on which Plaintiff was aware of the facts supporting the claim, but it may also invalidate coverage by establishing that Insured Client had knowledge of the potential claim at the time it submitted its application for insurance and failed to disclose it to Insurance Carrier.

ISSUE

May PDC reveal the existence of the *mea culpa* letter to Insurance Carrier?

DISCUSSION

It is well-established in California that “[w]hen an insurer retains counsel to defend its insured, a tripartite attorney-client relationship arises among the insurer, insured, and counsel.” *Bank of America, N.A. v. Superior Court of Orange County*, 212 Cal.App.4th 1076, 1083 (2013). In essence, insurance retained defense counsel have two clients, the insurer and the insured to whom equal and potentially competing duties are owed. *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, 72 Cal.App.4th 1422, 1429 (1999).

It is the obligation of any attorney “to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.” Bus. & Prof. C. § 6068(m); see also California Rule of Professional Conduct (“RPC”) 3-500. For insurance defense counsel to discharge this duty and meet the expectations of the two clients, the lawyer must disclose all facts and circumstances necessary to enable each of the clients to make free and intelligent decisions regarding the subject matter of the representation. *Lysick v. Walcom*, 258 Cal.App.2d 136, 151 (1968).

The attorney also has a duty “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Bus. & Prof. C. § 6068(e); see also RPC 3-100. The duty of confidentiality can conflict with the duty to communicate in certain situations: for example, when in the course of the representation of an insured defendant an insurance defense counsel obtains, through confidential communication with the insured defendant, information which if revealed to the insurer could have an adverse impact on coverage. Cal. State Bar Op. 1995-139.

In its formal opinion 1995-139, the State Bar Committee on Professional Responsibility and Conduct (“COPRAC”) considered a situation similar to that presented by the hypothetical presented in this opinion, but that differs in one key respect. There,

COPRAC assumed that the information that could potentially affect coverage was communicated by Insured Client to PDC under conditions that a reasonable client would assume constituted a confidential communication (an attorney-client interview). COPRAC concluded that under those circumstances, PDC had a duty to maintain the confidentiality of Insured Client's communication. In addition, COPRAC concluded that if PDC were to determine that an attorney representing Insurance Carrier only would be obligated to disclose this information to Insurance Carrier, PDC had an irreconcilable conflict so that withdrawal was mandatory.

The key difference between the COPRAC fact pattern and the one presented here is that while in the COPRAC opinion PDC obtained the problematic information from a confidential communication with Insured Client, here PDC obtained the information from a third party (opposing counsel). The Committee believes that this is a distinction without a difference. As clearly stated in section 6068(e), an attorney has a duty not only to maintain inviolate a client's confidences, but also to preserve the client's secrets. The duty of confidentiality is not limited to information obtained in confidence from a client, but extends to information obtained from a public source that the client may not want disclosed. *In re Johnson*, 4 Cal. State Bar Ct.Rptr. 179, 189 (Rev.Dept. 2000) (client felony conviction). It also extends to "other information gained in the professional relationship . . . the disclosure of which . . . would likely to be detrimental to the client." L.A. County Bar Ops. 386, 436 and 456.

The information contained in the *mea culpa* letter would likely be detrimental to Insured Client because it could provide Insurance Carrier with evidence that could enable Insurance Carrier to defeat coverage, leaving Insured Client with no insurance for the claims asserted. But it is also information that an attorney representing Insurance Carrier would be obligated to communicate. Accordingly, the Committee concludes that PDC is faced with an irreconcilable conflict of interest between the duty to keep Insurance Carrier reasonably informed and the duty to preserve the secrets of Insured Client. A conflict of interest is best defined as a situation when the lawyer's duty toward one client requires the lawyer "to contend for that which duty to another client requires [the lawyer] to oppose." *Flatt v. Superior Court*, 9 Cal.4th 275, 282 fn. 2 (1994). The only option when faced with this conflict is a mandatory withdrawal by PDC. RPC 3-700(B)(2).

PDC's withdrawal will be governed by RPC 3-700. This Rule requires PDC to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of Insured Client "including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." See RPC 3-700(A)(2). This will include notifying both Insurance Carrier and Insured Client that a conflict of interest has arisen requiring PDC's withdrawal, without revealing the nature of the conflict. PDC should make this notification so that Insurance Carrier and Insured Client can select and, if possible, agree on new defense counsel. PDC should seek to obtain a substitution of attorney from Insured Client but if that is not forthcoming, PDC should move to withdraw, again without revealing the nature of the conflict. PDC should remain cognizant of his or her duty to continue representing

Insured Client until relieved by the rules of the tribunal before which the matter is pending. RPC 3-700(A)(1); Cal. State Bar Op. 1994-134.

This Opinion is advisory only. The Committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.