

OPINION NO. 424
(January 16, 1984)

DUTY OF LOYALTY-CONFLICT OF INTEREST-INSURED AND INSURANCE COMPANY. Where an insurance company asserts that a portion of a claim against the insured is not covered by the insurance policy, it is improper for a single attorney representing both the insurance company and the insured to apportion costs and fees between the issues where coverage is conceded and the issues where coverage is disputed.

AUTHORITIES CITED:

Rule 5-102

American Mutual Liability Insurance Co. v. Superior Court, 38 Cal.App.3d 579 (3d Dist. 1974).

Employer's Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973)

INA v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980)

Lysick v. Walcom, 258 Cal.App.2d 136 (1st Dist. 1968)

Parsons v. Continental National American Group, 113 Ariz. 223, 550 P.2d 94 (1976)

ABA Formal Opinion No. 282

ABA Informal Opinion No. 949

ABA Informal Opinion No. 1476

J. Blakslee, "Notes on Professional Ethics," 55 A.B.A.J. 262 (1969)

An insured has been sued on several claims. The insurer has divided the claims into the following categories: (1) claims as to which it concedes coverage; (2) claims as to which it is providing a defense under reservation of

right; (3) claims as to which it denies any responsibility and any obligation to defend. The insurer has asked the attorney to exercise his own judgment in apportioning the fees and expenses between those claims for which it is providing a defense and those for which it denies the obligation to defend. The attorney representing the insurer and insured has refused to make the allocation without the written consent of the insured, which has been denied. The insured contends that all claims are inextricably intertwined, and that coverage extends to all of them. The Committee has been asked its opinion as to whether the position taken by the attorney is correct.

An attorney hired by an insurer to represent its insured owes duties of loyalty and fidelity to both the insurer and the insured under Rule 5-102. See American Mutual Liability Insurance Co. v. Superior Court, 38 Cal.App. 3d 579 (3d Dist. 1974); Lysick v. Walcom, 258 Cal.App.2d 136 (1st Dist. 1968); INA v. Forty-Eight Insulations, 633 F.2d 1212, 1225n.25 (6th Cir. 1980); Parsons v. Continental National American Group, 113 Ariz. 223, 550 P.2d 94 (1976); Employer's Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973); ABA Formal Opinion No. 282 (interpreting ABA Canon 6). His duties to the insured prohibit him from disclosing any information to the insurer that is detrimental to the insured. Parsons, supra; ABA Informal Opinion No. 1476

(attorney is prohibited from disclosing to insurer information learned from a witness that tends to show lack of coverage); ABA Informal Opinion No. 949; J. Blakslee, "Notes on Professional Ethics," 55 A.B.A.J. 262, 262-263 (1969). As Blakslee puts it in his article, "If insurance companies need further protection from their insureds, it must come from sources other than those attorneys who represent their insureds." 55 A.B.A.J., at 263.

In requesting the attorney to exercise his own judgment in allocating his fees and costs between the claims as to which the insurer is providing a defense and the claims as to which it denies the duty to defend, the insurer is asking the attorney to create the facts and build a record that it can use against the insured. If the attorney were to accede to this request, he would be acting directly contrary to the express interests and desires of the insured. Such conduct by the attorney would breach his duty of loyalty to the insured, in violation of Rule 5-102. Although the insured has agreed to the dual representation, he has not agreed that his attorney may assist the insurance company in creating records that may be used against him.

For the foregoing reasons, this Committee is of the opinion that the attorney has acted properly in refusing to allocate his fees and costs as requested, without the consent of the insured.

This opinion is advisory only. The Committee responds to specific questions submitted ex parte, and its opinion is based on such facts only as are set forth in the questions submitted.