

L.E.I. 94-02
DUTIES OF A LAWYER RETAINED
PURSUANT TO UNINSURED MOTORIST COVERAGE

An issue which arose in litigation prompted counsel for two parties to seek guidance from the Committee on Legal Ethics concerning the ethical responsibilities of an attorney retained under an insurance policy providing uninsured motorist coverage. Rather than addressing the specific facts presented, the Committee deems it appropriate to set forth general guidelines for such situations.

W. Va. Code, 33-6-31(d) states:

Any insured intending to rely on the coverage required by subsection (b) of this section [providing for uninsured and underinsured motorist coverage] shall, if any action be instituted against the owner or operator of an uninsured or underinsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy, in the manner prescribed by law, as though such insurance company were a named party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name.

Nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceeding.

Typically, the insurance company which has been served with a complaint by its insured when the defendants have no insurance coverage will elect to appear in the litigation in the name of one of the defendants instead of its own name. The attorney hired by the insurance company will then file pleadings as counsel for the defendant. The statute gives an insurance company the right to file pleadings in the name of a defendant, because of potential jury bias against an insurance company.

The questions arises as to who is the attorney's client and what duties are owed to the defendant in whose name pleadings are filed.

The uninsured motorist issue differs from the more common insurance defense representation. An attorney hired by an insurance company to represent its insured who has been named as a defendant unquestionably has an attorney-client relationship with the defendant arising out of a contractual agreement.¹ The right of an insurance company to appear in litigation between the insured and the alleged tortfeasor is statutory.

The statute makes clear that the purpose of the insurance company appearing in the litigation is to protect its own financial interests. The uninsured motorist, as noted in the statute, still has a right to retain counsel to protect his or her own interests.

The Supreme Court of Appeals recognized that when a lawyer appears "as counsel" for a defendant who is underinsured (and who is already represented by counsel), the lawyer is in fact representing an insurance company's interest concerning its own potential liability. State ex rel. Allstate Insurance Co. v. Karl, ___ W. Va. ___, 437 S.E.2d 749 (1993). The issue in that case was which insurance company had the right to assume primary control of the defense.²

¹ This L.E.I. does not address potential conflicts or tensions an attorney may experience between the insured and the insurance company during such representation.

² A similar issue might arise if an insurance company appears in a case pursuant to its uninsured motorist coverage and the defendant, who has no insurance, nevertheless retains his or her own attorney. This is a question for the courts.


The attorney who appears ostensibly on behalf of an uninsured motorist cannot ethically represent the motorist's interests. W. Va. Code, 33-6-31(f) gives the insurance company a right to collect from the motorist any amount it pays to the insured.

The attorney therefore owes no duty of loyalty to the defendant. The defendant should be treated as an unrepresented co-defendant. The attorney may notice any party, including the defendant, for a deposition to explore coverage issues.

The American Bar Association's Informal Opinion 1065 (1969) states that under a comparable Tennessee statute, the attorney hired by the insurance carrier could not serve in a dual capacity as counsel for the carrier and the uninsured motorist.

Since the attorney represents the interests of the insurance company while purporting to be the uninsured motorist's counsel, Rule 4.3 of the Rules of Professional Conduct³ requires the attorney to explain in writing to the uninsured motorist that he or she does not actually represent the defendant. The defendant needs to know that the attorney-client privilege does not apply and that the defendant has the right to hire counsel.

APPROVED this 5th day of MAY, 1994.



Stephen G. Jory, Chairman
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³ Rule 4.3 provides, in part, that "when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."