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Open Questions on the Duty to Advise of the Right to Select Independent Counsel

Barry R. Temkin, *New York Law School*

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BY BARRY R. TEMKIN *

Much has been written about the tripartite relationship among insurance carriers, their policyholders, and insurance defense counsel appointed to represent the former's insureds. Most reported decisions on the topic, particularly in New York, arise in the context of coverage disputes between carriers and their policyholders. This article is not about, and does not purport to address, coverage disputes.

Rather, this discussion addresses the emerging issues presented to carriers and defense counsel on whether there is a duty to advise the policyholder client of the right to independent counsel, and given the current state of the law, what steps counsel can take to best protect their clients and themselves.

Goldfarb Conflicts

As a matter of substantive law, a conflict may arise between an insurer and a policyholder when some of the claims in a case are covered by the policy, while others are not, and strategic decisions made by defense counsel may affect the insured's interests. In *Public Service Mut. Ins. Co. v. Goldfarb*,[1] a dentist was simultaneously accused of negligent malfeasance, which was covered by the insurance policy, and intentional sexual assault, which was not. The court wrote that:

> [I]nasmuch as the insurer's interest in defending the lawsuit is in conflict with the defendant's interest – the insurer being liable only upon some of the grounds for recovery asserted and not upon others – defendant Goldfarb is entitled to defense by an attorney of his own choosing, whose reasonable fee is to be paid by the insurer.[2]

Over the thirty years since it was decided, *Goldfarb* has begotten numerous progeny, not all of which are consistent. Still unsettled at this time is the issue of whether an insurance carrier is obligated to notify a policyholder of the latter's right to select conflict counsel at the carrier's expense.

In other words, must a carrier affirmatively give an insured the civil equivalent of a *Miranda* warning notifying the policyholder of its right to select independent counsel in the event of a conflict? *Compare Elacqua v. Physicians' Reciprocal Insurers*[3] (carrier must affirmatively and accurately notify insured of right to select *Goldfarb* counsel at carrier's expense), *with Sumo Container Station, Inc. v. Evans, Orr, Facelli, Norton & Laffan*[4] (neither carrier nor appointed counsel has an affirmative duty to inform insured of its right to select its own counsel at the carrier's expense), *and Coregis Ins. Co. v. Lewis, Johs, Avallone, Aviles and Kaufman*[5] ("Defendants' position that Coregis was obligated to designate separate counsel once it realized that a coverage issue may exist is simply unsupported by New York law.").

Ethical Duties Under Rules of Professional Conduct

There is little authority specifically addressing the duties of insurance defense counsel under the 2009 Rules of Professional Conduct. RPC 5.4(c) provides: "Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6."[6] RPC 1.8(f)(2) similarly proscribes "interference with the lawyer's independent professional judgment" when someone other than the client is paying the fees.

What are a lawyer's duties when presented with a Goldfarb conflict? Should a lawyer retained and paid by the carrier be placed in a position to give the client advice which may be inimical to the interests of the carrier? Under some circumstances, the lawyer may have a longstanding and mutually dependent relationship with the carrier. And in the process of giving a so-called *"Goldfarb Miranda"* warning, a lawyer may, in effect, be advising the client of its right to fire existing counsel, i.e., the lawyer herself.

Thus, the lawyer may, in some circumstances, be conflicted from advising the client about choice of counsel because of a real and substantial conflict with the lawyer's own interests. RPC 1.7(a)(2) prohibits a lawyer, absent waiver, from representing a client where "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."[7]

But all is not lost. RPC 1.7(b) provides that, notwithstanding a concurrent conflict of interest, a lawyer may still represent a client if all four of the following factors are met:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing.[8]

The New York City Bar, in an interesting and helpful ethics opinion, instructs that, under some circumstances, a law firm may limit the scope of its representation of a new client in order to avoid a conflict with an existing client.[9] By extension, a law firm with a direct financial stake in the outcome of a client's decision might be able to advise the client (in writing) to seek advice from another firm as to the existence, significance and waivability of the lawyer's conflict.

New York lawyers may take further guidance from California's experience in resolving what it refers to as *Cumis* conflicts, named after the landmark and legislatively-modified decision in *San Diego Navy Fed. Credit U. v. Cumis Ins. Co.*[10] The California Civil Code, while providing for choice of counsel by the insured in some instances, specifically gives clients the option of waiving that choice and opting for panel counsel selected by the carrier. In so doing, the California legislature has actually prescribed the language necessary to constitute such a waiver: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time."[11] While the California language is useful, it does not resolve the question of under what circumstances a lawyer may ethically advise the client whether or not to waive its right to select independent counsel.

Of course, yet another option for defense counsel is to avoid giving any advice at all to the client. Many insurance defense counsel have traditionally interpreted their role as simply to defend the claim, and not venture into questions of coverage under any circumstances.

However, this approach worked out to the disadvantage of assigned defense counsel in *Shaya B. Pacific, LLC v. Wilson Elser Moskowitz Edelman & Dicker, LLP*,[12] which upheld the sufficiency of a legal malpractice complaint against a law firm for failing to investigate the existence of excess insurance or give notice to the client's excess carrier. The Appellate Division held that whether a retained insurance defense lawyer has a duty to ascertain excess coverage is a fact-specific determination, which "would turn primarily on the scope of the agreed representation – a question of fact . . .."[13] *Shaya B.* served as a wake-up call to the practitioners of the insurance defense bar, many of whom had assumed that their role was simply to defend – not to advise.

Conclusion

Public policy behind the ethical rules and case law, in many respects, appears designed to protect policyholders. Moreover, until the many open questions examined in this discussion are resolved, counsel retained by insurance carriers to represent policyholders should keep in mind that their primary ethical duty is to their clients, even if somebody else is paying the lawyer's fees. Moreover, lawyers are

ethically obligated under RPC 1.4 to regularly consult with and inform their clients of the status of the representation. Under some circumstances, counsel may ethically seek to obtain informed consent and waiver for continued representation in a conflict situation, consistent with the Rules of Professional Conduct. Moreover, counsel should ensure that they are not conflicted even from giving advice about conflicts with the carrier.

* Barry R. Temkin is Counsel to Mound Cotton Wollan & Greengrass, an adjunct professor at Fordhamn University School of Law and Chair of the New York County Lawyers' Association Professional Ethics Committee. The views exprissed are solely those of its author.

1 53 N.Y.2d 392 (1981).
2 *Id.* at 401 (citations omitted).
3 52 A.D.3d 886 (3d Dep't. 2008).
4 278 A.D.2d 169 (1st Dep't. 2000).
5 No. 01 CV 3844 (SJ), 2006 WL 2135782 (E.D.N.Y. July 28, 2006).
6 RPC 5.4(c) (22 NYCRR § 1200 *et seq.*).
7 RPC 1.7 (a) (2), 22 NYCRR Section 1200.0 et seq.
8 RPC 1.7 (b).
9 N.Y.C. Bar Op. 2001-3 (2001).
10 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1985).
11 Cal. Civ. Code 2860.
12 38 A.D.3d 34 (2d Dept. 2006).
13 *Shaya B. Pacific*, 38 A.D.3d at 41.