

## ABA CLARIFIES CONFIDENTIALITY RULES FOR LAWYERS REPRESENTING EMPLOYER AND EMPLOYEE IN LITIGATION

JUNE 23, 2009

In one of its most recent Formal Opinions, the American Bar Association addressed the conflict of interest that a lawyer may face when representing multiple clients in the same or related matters. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-450, "Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters" (April 9, 2008) (hereinafter "Opinion"). This problem arises when a lawyer's duty under Rule 1.6 of the Model Rules of Professional Conduct to protect the confidential information relating to one client conflicts with his or her duty under Rule 1.4(b) to provide another client with information necessary to make informed decisions. See Opinion at 2. The Opinion attempts to navigate the tension between these rules. In the event that a lawyer cannot fulfill both duties, the Opinion concludes that the lawyer would be required to withdraw from representing one or both clients. Id. at 4-5. This Advisory summarizes the Opinion.

The Opinion frames the issue by way of a hypothetical: a lawyer is retained by an insurance company to defend both an insured employer and its employee whose conduct is at issue. Id. at 3. Thus, the lawyer could have as many as three separate clients in the matter: the insurance company (depending on whether state law deems the insurer to be a client<sup>1</sup>), the employer, and the employee. The lawyer learns while

<sup>1</sup> The Opinion notes that in some jurisdictions both the insurer and the insured are deemed to be clients, but the lawyer's primary duty is to the insured. See Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Court, 152 P.3d 737, 741 (Nev. 2007). The New Hampshire Ethics Committee has concluded, based on an unreported Federal District Court case, that the insurance company is not a client. See Formal Opinion #1993/94-15 (July 21, 1993) ("The issue of whether insurance defense counsel in New Hampshire represents the insured, the insurance company, or both, has previously been decided by the Federal District Court. In Gibbs v. Lappies, No. 92-159-M, Slip Op. at 2 (Aug. 10, 1993), the District Court stated that "[w]hen an attorney is retained by an insurance company to provide a defense under a liability policy, the attorney's client is the insured, not the insurer . . .").

This Advisory will focus on the portion of the ABA's Opinion that addresses the conflict between the employer and employee, and put aside the discussion of any duty to the insurance company

### Attorney Conduct & Liability Practice Group

**Peter Beeson, Co-Chair**  
603.410-1712  
pbeeson@devinemillimet.com

**Mitch Simon, Of Counsel  
and Co-Chair**  
603.228.1541  
msimon@devinemillimet.com

**Andy Dunn**  
603.695.8503  
adunn@devinemillimet.com

**Bob Dewhirst**  
603.695.8646  
rdewhirst@devinemillimet.com

**Shelagh C.N. Michaud**  
603.695.8703  
smichaud@devinemillimet.com

**Anne E. Trevethick**  
603.695.8725  
atrevethick@devinemillimet.com

DEVINEMILLIMET.COM

interviewing the employee that he or she may have acted outside the scope of his or her employment when the conduct at issue occurred. Id. Accordingly, the insurance company may be able to contractually deny coverage, and the employer may be able to avoid vicarious liability altogether. Id.<sup>2</sup> Absent an express agreement that permits and anticipates free exchange of information between the two clients, must the lawyer share this information with the employer client in the matter, so as to allow it to make informed decisions, or must he keep the information confidential, as it is potentially damaging to his or her other client, the employee?

The answer, according to the Opinion, requires a balancing of the lawyer's conflicting duties under the Model Rules of Professional Conduct. Id. at 4. On one hand, Rule 1.6<sup>3</sup> prohibits a lawyer from revealing information relating to the representation of a client, regardless of whether that information is protected by attorney-client privilege, unless the client gives informed consent, the disclosure is impliedly authorized, or the disclosure is permitted under a specified exception in Rule 1.6(b). Id. at 5. Since no specified exceptions apply in the hypothetical, and the employee is unlikely to give informed consent, the only question becomes whether the disclosure is impliedly authorized to carry out the representation of the employee. Id. The Opinion answers this question in the negative, reasoning that implied authority does not exist where the disclosure would be adverse to the client's interest. Id. at 6. In the hypothetical, the employee's interest in having the employer be held vicariously liable is at odds with the employer's interest to avoid liability.

---

<sup>2</sup> For the reasons stated in footnote 1, this Advisory will focus on the portion of the Opinion that addresses the conflict between the employer and employee, rather than any potential obligation to the insurance company.

<sup>3</sup> New Hampshire's Rule 1.6 differs from the ABA rule on which the Opinion is based, but in ways that are not relevant to the analysis of the issue at hand. New Hampshire's Rule 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or
  - (2) to secure legal advice about the lawyer's compliance with these Rules; or
  - (3) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  - (4) to comply with other law or a court order.

## Office Locations:

111 Amherst Street  
Manchester, NH 03101  
T 603.669.1000  
F 603.669.8547

300 Brickstone Square  
Andover, MA 01810  
T 978.475.9100  
F 978.470.0618

43 North Main Street  
Concord, NH 03301  
T 603.226.1000  
F 603.226.1001

On the other hand, there is the question of whether withholding information from the employer would cause the lawyer to violate Rule 1.4(b), which requires a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Id. at 6. The lawyer does have a duty to provide reasonably necessary information to the employer under Rule 1.4. Thus, there is a conflict of interest vis-à-vis the employee. Id. Accordingly, the lawyer’s continued representation of both clients would violate Rule 1.7, since the clients’ interests would be adverse to each other. Id. The lawyer would be required to withdraw from representing one or both, in accordance with Rule 1.16(a)(1), which requires withdrawal when continued representation would cause the lawyer to violate a Model Rule of Professional Conduct. Id.

The Opinion notes the possibility that the employer and the insurer might be willing to forego the scope-of-employment defenses and stand with the employee in defending the case. Id. at 7. The problem with that approach is that the employee would need to consent to the disclosure of any confidential information beforehand; otherwise the lawyer would be barred from making the disclosure. Id. Should the lawyer suggest disclosure, he runs the risk of committing malpractice. Id. (noting that “that issue is beyond the scope of this opinion”).<sup>4</sup>

Finally, the ABA Opinion notes that it is always advisable to clarify information sharing expectations at the outset when representing multiple clients in the same or related matter. Id. at 8 n. 21. A lawyer can inform each client that information will be shared and that if a client decides that certain information should be kept confidential, the lawyer may be required to withdraw. Id. Taking this step may make it easier for the lawyer to continue representing one of the clients once problems arise rather than withdrawing from the case entirely. Id.

**The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct & Liability Practice Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at [AC&LPG@devinemillimet.com](mailto:AC&LPG@devinemillimet.com).**

---

<sup>4</sup> In the opinion of the authors, the risk of a valid malpractice claim should not be significant if the employee is fully advised of the risks as well as the advantages of disclosure, the employee provides informed consent and there are legitimate potential benefits for the employee if disclosure is made to his/her employer.