

ETHICS OPINION

RO-94-08

For Rule 1.7 purposes, lawyer retained by insurance company to defend action against insured represents the insured as well as the insurance company

QUESTION:

"The purpose of this letter is to request an opinion from the Alabama State Bar concerning whether our firm has a conflict of interest in representing a defendant, A & B Trucking Company, in a lawsuit filed against it by the XYZ Insurance Company.

A & B Trucking Company is a regular client of our firm for which we have handled numerous legal matters. Our firm also represents insured's of XYZ in some litigation. Our firm does not have any cases where we represent XYZ directly. All of the current files we have are where we represent an insured of XYZ in some type of litigation and XYZ is providing the defense and indemnity for any judgment.

The suit filed by XYZ against A & B is a claim for fraud arising out of worker's compensation insurance issued by XYZ to a company named Acme Driver Leasing, Inc. A & B's involvement in the case arises out of the fact that it leased truck drivers from Acme Driver Leasing. The allegation by XYZ is that Acme Driver Leasing, A & B, and the insurance broker conspired to defraud XYZ by misrepresenting the nature of the Acme Driver Leasing operation and the relationship of that company to A & B. XYZ alleges that it is entitled to additional worker's compensation insurance premiums for a 3 1/2 year period because of those misrepresentations. A & B, Acme Driver Leasing, and the insurance broker are all defendants in the lawsuit filed by XYZ.

Our firm has never been involved in any litigation similar to the lawsuit filed by XYZ. By virtue of our representation of XYZ's insureds in the past and at present, our firm has never been privy to or had access to any information which would have any bearing on the issues in the XYZ lawsuit. All of these facts have been disclosed to A & B and A & B wishes for our firm to defend them in the XYZ lawsuit."

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ANSWER:

Your situation is covered by the application of Rule 1.7. Rule 1.7(a) states that you cannot undertake legal representation that will be directly adverse to another existing client. This is so even if the two matters are totally unrelated.

Is XYZ an existing client? If so, would your defense of A & B be "directly adverse" to XYZ? The Comment to Rule 1.8 "Person Paying for Lawyer's Services" makes it clear that when a lawyer is retained to defend an insured, the lawyer has two clients in the absence of a coverage dispute. The insurance company is not a "third party".

In Mitchum v. Hudgens, 533 So.2d 194 (Ala. 1988), the Alabama Supreme Court implied the same thing stating: "When an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interests of each." Id. at 198.

Since you are currently representing some of XYZ's insureds, XYZ is an existing client of your firm. XYZ is seeking monetary damages from A & B so their interests are directly adverse.

Therefore, you are not able to defend A & B in the suit brought by XYZ if XYZ objects to it.

MLM/vf

7/27/94