Enduring Ethics Opinions: Opinion #63 (Concurrent Multiple Representation)
by Rita M. Farry, Esq., Professional Ethics Commission

On November 5, 1985, the Professional Ethics Commission addressed the ethics of concurrent multiple representation in the context of an attorney assigned by an insurance company to represent multiple insureds named as Defendants in a lawsuit. The insurance company notified each insured that the company would provide a defense at the company’s expense, but under a “reservation of rights.” The claims in the lawsuit included ones both within and outside the scope of the policy, and damages sought exceeded the coverage of the policy. The Commission was asked:

1. Who is the attorney’s client?
2. May the attorney represent multiple defendants?
3. May the attorney provide advice to the insured or the company in a dispute over coverage?
4. May the attorney provide representation on claims outside the scope of the policy?

The Commission analyzed these questions under then applicable Maine Bar Rule 3.4\(^1\) An analysis of these questions under M. R. Prof. Conduct 1.7 reveals that while the provisions of the new rule are not identical to abrogated Rule 3.4, Opinion 63 remains relevant and worthy of review.

In answer to the first question posed in Opinion 63, the Commission clarified that the insured is the client, regardless of the fact that the insurance company is paying the bill and referenced now abrogated Rule 3.6(h), which provided that the person who pays a lawyer to render legal services to another person shall not regulate or direct the legal services thus provided.\(^2\) In response to Question 2, the Commission noted that in the case of representation of multiple insureds, as in all cases, multiple employment is permitted only if (1) it is “obvious” the lawyer can adequately represent both interests and (2) all clients consent after full disclosure. Relative to Question 3, the Commission found that the attorney could not provide advice to the

\(^1\) The Maine Supreme Judicial Court adopted the Maine Rules of Professional Conduct with an effective date of August 1, 2009. On the same date Maine Bar Rule 2-A (Aspirational Goals for Lawyer Professionalism), Maine Bar Rule 3 (Code of Professional Responsibility) and Maine Bar Rule 8 (Contingent Fees) were abrogated, as they were replaced by the Maine Rules of Professional Conduct.

\(^2\) See M. R. Prof. Conduct 1.8(f).
company that could adversely affect his client, the insured, and could not represent the insurance company on coverage issues, referencing Rule 3.4(d). As a result, even if both parties were to consent, it was not “obvious” that the lawyer could adequately represent the interests of either party in that circumstance and the company must be referred to separate counsel. Further answering this question, the Commission found that Rule 3.4(f) did not automatically bar the lawyer from representing the insured/client on coverage issues provided the lawyer fully disclosed to the insured the lawyer’s relationship to the insurance company. If the client provides written consent after such disclosure, the Commission found that the lawyer may represent him or her on coverage issues that are adverse to the company, although the full disclosure should include the possible inhibiting effect the relationship with the insurance company could have on the lawyer’s representation of the insured. The Commission found that Question 4 was also subject to analysis under Rule 3.4(f) and would require full disclosure and written consent before providing representation of the insureds on claims outside the scope of the policy.

The results under today’s Maine Rules of Professional Conduct would likely be the same as those under abrogated Maine Bar Rule 3.4. M. R. Prof. Conduct Rule 1.7 provides that “[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict-of-interest.” The new rule, which is significantly more concise than former Bar Rule 3.4, defines a concurrent conflict-of-interest and allows representation notwithstanding the conflict if the “the lawyer reasonably believes that the lawyer would be able to provide competent and diligent representation to each affected client; and each affected client gives informed consent, confirmed in writing.” Comments [18-22] to M. R. Prof. Conduct Rule 1.7 provide insight into the nature and extent of the informed consent that is required. While a signed, informed consent is only required if a concurrent conflict-of-interest is identified, the better practice may be to obtain the signed consent even if the conflict is not clear.

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3 M. R. Prof. Conduct Rule 1.7 provides “[a] concurrent conflict-of-interest exists if: (1) the representation of one client would be directly adverse to another client, even if representation would not occur in the same matter or in substantially related matters; or (2) there is a significant risk that the representation of one or more clients would be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”