

NEW HAMPSHIRE BAR ASSOCIATION

Counsel for an Insured: Possible Conflicts

Ethics Committee Advisory Opinion #1982-3/19

February 22, 1983

Reviewed by Board of Governors March 17, 1983

Question:

Is there a conflict of interest presented counsel for an insurance company who litigates and settles an uninsured motorist claim by the passenger insured, when insurance counsel thereafter obtains an assignment of the passenger insured's rights to sue the uninsured driver and then proceeds under this assignment to sue the uninsured driver in the name of the insured passenger for the benefit of the insurance company for the amount paid the insured passenger?

Response:

Assignment of rights by the passenger for suit in his name does not necessarily make the passenger the client of the insurance company counsel. If the assignment by the passenger insured is a complete assignment of all the passenger insured's rights against the driver, there is no conflict since the insurance company counsel has and will always represent only the interests of the client insurance company. However, the inquiry fails to submit the exact terms of the passenger's assignment which may include handling the passengers further claims against the driver along with the company's subrogation rights thereby making both parties clients of insurance counsel. Such situations carry a potential conflict of interest and should be avoided, EC 5-15, but are permissible if it is obvious that counsel can adequately represent the interest of each client and if each client consents to the representation after full disclosure of the possible effect of such representation on the exercise of counsel's independent professional judgement on behalf of each client. DR 5-105(c). Counsel should give the passenger an opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires, EC 5-16, but whether counsel can fairly and adequately protect the interests of such multiple clients in such situations depends upon an analysis of each case. EC 5-17. In no event could insurance counsel settle the case against the driver without both clients' consent after advising both clients of the existence and nature of all claims involved in the proposed settlement, of the total amount of the settlement and of the participation of each person in the settlement. DR 5-106.