
**E-92-1 Conflicts, representation of plaintiff and
subrogated insurance carrier**

Facts

In pursuing a personal injury case for a plaintiff, an attorney is asked by the plaintiff's medical and hospitalization insurance carrier also to pursue a subrogation claim against the responsible tortfeasor. There are both liability and contributory negligence issues. Initial review indicates that adequate insurance coverage for the other party is not a problem.

Question

Under what circumstances, if any, may the attorney represent both the plaintiff and the subrogated insurance carrier without violating the Rules of Professional Conduct?

Opinion

Any analysis of representing multiple clients in a single transaction begins with reference to the basic conflict of interest rule, SCR 20:1.7.

Thus, a lawyer considering the possibility of representing two clients in the same matter must initially determine whether there is a conflict between the interests of the two and, if so, whether the lawyer may represent each without adversely affecting the relationship with the other client. Assuming that conclusion is affirmative, the lawyer also must consider whether representing one client may materially limit the representation of the other and must decline the representation unless the lawyer believes the representation will not be adversely affected. In each instance, the affected clients must consent to the dual representation in writing after consultation with the lawyer. That consultation must include an explanation of the risks of common representation as well as the advantages.

There may be cost-saving advantages to the common representation of a claimant and the subrogated insurer in the same action. There also are clear potential conflicts of interest. There are two separate and discrete areas of

representation where the potential for conflict exists. First, in representing both the plaintiff and the subrogated insurance carrier against a common defendant or defendants, there is the potential for conflict inherent in any multiple party representation where the interests of the parties may not be identical. Second, in determining how much of a settlement each party is to receive, there is by necessity a conflict of interest. In the event of a judgment, the appellate process also may create conflicts of interest between the subrogated insurer and the plaintiff if, for example, one party wishes to appeal and the other does not.

Representing an injured person followed by an agreement to represent a subrogated insurance carrier that paid health-care expenses for its insured, the injured party, creates the potential for a conflict of interest. At trial the injured client and the subrogated insurance carrier would have essentially the same objective: recovering from the responsible tortfeasor. However, a lawyer, when asked to represent both plaintiffs, must anticipate that there may be efforts to settle the litigation, or may be a dispute with respect to the propriety or amount of the various claims asserted by the two claimants which could create conflicts.

Lawyers should anticipate and must deal with several possibilities, not uncommon in situations where a subrogated carrier is involved. A tortfeasor who is a defendant or potential defendant may offer a lump sum to settle the claim, with or without designating how much will go to the injured party and how much to the subrogated insurer. The defense may suggest that the injured party should take less than 100 percent of his or her damages either to avoid litigation, because of liability problems or contributory negligence problems, or the subrogated carrier may insist that it should be made whole.

If it is determined at any point that there may be inadequate insurance coverage and/or an uncollectible tortfeasor, a conflict of interest exists. In situations involving insufficient collectible funds to make both the injured party and the subrogated carrier whole, an irreconcilable conflict exists and joint representation would violate the Rules of Professional Conduct (for example, SCR 20:1.7). In a case with the potential for multiple tortfeasors, disagreement may arise between the injured party and the subrogated carrier as to whether a *Pieringer* release should be issued. In each of these instances, there is either an actual or potential conflict of interest for the attorney representing both the injured party and the subrogated insurer.

In Wisconsin, the situation is further complicated by *Rimes v. State Farm Mutual Automobile Insurance Company*, 106 Wis. 2d 263, 316 N.W.2d 348 (1982). In Wisconsin, an insurance carrier with a subrogation claim is not entitled to any payment until the insured person has been “made whole.” This can present an extra layer of potential conflict if the case is governed by Wisconsin law, because an attorney could argue that the insured client has not been made whole and that, therefore, the subrogated carrier should receive nothing from a settlement or judgment.

Applying other laws also could cause the interests of the parties to diverge, and may make it difficult or impossible for the lawyer to obtain informed consent to the mutual representation. For example, the result reached under federal ERISA law is exactly the opposite of that reached under *Rimes*; that is, the *payor* must be made whole before the claimant receives proceeds from any recovery. ERISA typically applies to an employer who is self-insured, for example, an employer who provides healthcare coverage for its employees directly rather than purchasing insurance coverage through a traditional insurance carrier. Since these programs normally are administered by a health insurance company, the lawyer may not know until well into the litigation whether ERISA may apply.

Absent delimiting circumstances such as these, joint representation may be possible if adequate precautions are taken. Because the injured plaintiff and subrogated carrier would not necessarily be adverse parties at trial, both seeking to obtain the maximum recovery against a third party, representation of both is not automatically disqualifying. ABA Formal Opinion 282 (1950). However, because the conflict of interest in determining how much of a judgment or settlement would belong to each party would always have an impact on trial strategy or the consideration of any settlement, it is critical that there be a clear written agreement between the injured plaintiff and the subrogated carrier allocating the proceeds of any judgment or settlement and fixing the arrangements with regard to the fee *before* joint representation against a third party is undertaken. This is consistent with the opinion of those courts that have addressed the issue; however, there appear to be no Wisconsin cases on point. *See, e.g., Frantz Tractor Co. Inc. v. Providence Washington Ins. Co.*, 119 A.2d 495 (Pa. 1956); *Traveler's Indemn. Co. v. Ingebretsen*, 38 Cal. App. 3d 358, 113 Cal. Rptr. 679 (1974); Ronald Mallen, Jeffrey Smith, 2 *Legal Malpractice* § 23.22 (3d Ed. 1989); Thomas S. Brown, M. Jane Goode, *Conflicts of Interest in Subrogation Actions*, Tort & Ins. L. J., Fall 1986, at 16. These agreements should

specify which client would be responsible for conducting the case and making settlement decisions and otherwise make clear who would be responsible for making other decisions that could arise.

In terms of representing one or both of the parties in attempting to reach an agreement beforehand with regard to eventual allocation of any proceeds, the lawyer should make clear in a written engagement letter on whose behalf the lawyer is acting. SCR 20:1.2 and SCR 20:1.4.

If the lawyer concluded under SCR 20:2.2 that the lawyer may represent both parties in reaching that agreement as well, it must be made clear that if a dispute were to arise between the claimant and the subrogated carrier at a later date about the scope or fairness of the allocation, *the lawyer would be precluded from representing either party* and discussions between the lawyer and each party as to the allocation agreement would not be subject to a claim of attorney-client privilege in that dispute. Finally, if the lawyer were to receive information during the joint representation under SCR 20:2.2 that was adverse to the interests of the other client (for example, information suggesting that there was not insurance coverage or that the claimed losses to be made whole were in whole or in part fraudulent), the lawyer also would be required to withdraw from representing either party and could not continue representing either or both clients against the third party. SCR 20:1.16(a)(1).

A lawyer entering into this type of multiple representation must obtain the written consent of each client after consultation and also should be concerned with obtaining a clear understanding with regard to the lawyer's fee (which must be in writing if it involves a contingent fee) and which should include a clear understanding on the subject of sharing legal expenses beyond attorney fees. SCR 20:1.7(b)(2) and SCR 20:1.5(c). The written consent letters also should address what will happen in the event that an unanticipated conflict develops prior to trial. Ordinarily, this will require the lawyer to cease representing at least one and probably both of the clients. SCR 20:1.7(a) and SCR 20:1.16(a)(1).