

Lawyer Need Not Disclose Insurance In Settlement Talks

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In Opinion 731 (9/01/03), the Committee on Professional Ethics of the New York County Lawyers' Association considered whether an inquiring lawyer in settlement negotiations has a duty to reveal that her client has insurance coverage for the adversary's claim. The Opinion concluded that the lawyer did not have a duty to disclose the existence of insurance coverage unless disclosure was required under applicable substantive law or a specific court rule. The Committee also concluded that the inquiring lawyer had no obligation to correct the adversary's impression that her client was on the verge of insolvency, so long as that impression was neither conveyed nor confirmed by the lawyer, her client or someone acting under their instructions.

The lawyer's inquiry concerned settlement negotiations during a commercial arbitration between the lawyer's corporate client and a claimant against the corporation. During the negotiations, the claimant's attorney received information from an independent source indicating that the corporate client was on the verge of insolvency. As a consequence, claimant's attorney offered to settle for fifteen cents on the dollar. The inquiring lawyer knew that there was an outstanding insurance policy which would cover the claim.

The Committee found no provision in either the New York Code of Professional Responsibility or the ABA Model Rules which controls or even discusses the obligation of disclosure during settlement negotiations. But DR 1-102(A)(4) and DR 7-102 are both relevant guides. DR 1-102(A)(4) defines as lawyer misconduct engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 7-102(A)(5) directs a lawyer not to "knowingly make a false statement of law or fact."

The Committee recognized that settlement negotiations raise unique ethical issues.

While lawyers generally aspire to high standards of decency and professionalism, by convention a good negotiator will not disclose such information as her client's bottom line or willingness to bear the uncertainties of litigation or verdict. It is customary and appropriate for negotiators to conceal how far their clients are prepared to go to resolve disputes amicably, but the ethical line is drawn short of making material misrepresentations or knowingly offering false statements to others.

In some circumstances, a lawyer will be required to disclose the existence of insurance coverage. In a federal law suit, for example, disclosure of insurance coverage is required without a request for discovery. Fed. R. Civ. P. 26(a)(D). Under the New York rules, however, disclosure is not mandatory but is subject to formal demand during discovery. CPLR 3101(f). The Committee noted that some administrative agencies and some arbitration forums have no provision for such discovery.

Of course, a lawyer may not make an affirmative misrepresentation about the existence or the extent of insurance coverage. DR 7-102. If he does, he may be held civilly liable. The Committee cited the case of *Slotkin v. Citizens Casualty Company*, 614 F.2d 301 (2d Cir. 1979). In that case, both the lawyer and the insurance adjuster affirmatively denied the existence of excess coverage. As a result, an infant's malpractice claim was settled within the limits of the primary policy. A lawyer who negligently misrepresented the absence of excess coverage in *Slotkin* was later suspended.

The Committee distinguished those cases which hold that an attorney in settlement negotiations should disclose the death of his client before accepting a settlement offer. The death of a client terminates or modifies the lawyer's authority to act in behalf of the client and a failure to disclose the death is tantamount to making a false statement of material fact. ABA Formal Op. 95-397.

In the opinion of the Committee, the death of a client is different from the decision whether to disclose or withhold insurance information. A death is a matter of public record. The existence or non-existence of insurance coverage may under some circumstances be considered a client secret or confidence. A client may wish to conceal the existence of an insurance policy. A corporate client may not wish to disclose the existence of coverage to the general public and, in particular, to the plaintiffs' bar, out of a concern that disclosure will encourage frivolous law suits.

The Committee concluded: A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule...Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources.