

Multiple Representation When The Recovery Fund Is Limited

BY LAZAR EMANUEL

The recent decision by Nassau County Supreme Court Judge F. Dana Winslow in *Gentile v. Hart Limousine and Entertainment* provides interesting instruction on the conflicts of interest inherent in the representation of multiple plaintiffs when there is a limited recovery fund.

Twelve passengers of Hart Limousine (Hart) were injured in an accident involving their vehicle. The firm of David Horowitz P.C. (Horowitz) agreed to represent three of the passengers, including passenger Baker. The firm investigated the accident and commenced an action against Hart in 1996. During its investigation, Horowitz learned that Hart's liability coverage was limited to one million dollars, that there was no excess coverage, and that Hart was bankrupt.

In 1997, Baker discharged Horowitz and retained the firm of Del Gadio and Tomao (Del Gadio). Baker cited Horowitz' inherent conflict in attempting to represent multiple clients who would be forced to divide a limited fund. Following the discharge, the two firms stipulated as follows: 1) Horowitz would surrender its files in exchange for a forwarding lien; 2) the amount of the lien would be determined when Baker recovered; and 3) all fees would be held in escrow until the Horowitz lien was fixed. The court then entered an order allocating the recovery fund among all the passengers and their spouses as they might agree, and, in the absence of agreement, as the jury would decide.

Subsequently, Del Gadio moved to vacate the Horowitz lien on the ground that Baker had discharged Horowitz for cause. Del Gadio argued that Horowitz had violated DR 5-105 by undertaking to represent multiple clients in a case with a limited recovery fund and in failing to advise Baker of the inherent conflict.

[Editor 's Note: DR 5-105(B) instructs a lawyer not to continue a multiple representation if his professional judgment in behalf of one client is likely to be adversely affected by his representation of another client, except as provided in DR 5-105(C). DR 5-105(C) enables the lawyer to continue the representation if a disinterested lawyer would believe that the lawyer can competently represent the interests of each client, and if each consents to the representation after full disclosure of the risks involved.]

Horowitz replied that the real dispute was between it and Del Gadio; that it had given up its common law retaining lien in exchange for the contractual lien provided by its stipulation with Del Gadio; and that there was no conflict of interest in its representation of Baker in any event.

Fees Forfeited On Discharge For Cause

In deciding Del Gadio's motion, Judge Winslow reminded the parties that a client may discharge a lawyer at any time, with or without cause. If the discharge is for cause, the lawyer is not entitled to be paid for improper services. If he is not entitled to be paid, he is not entitled to a common law retaining lien or to a charging lien under Judiciary Law §475.

[Editor's Note: At common law, a lawyer had two kinds of liens. The first was a retaining lien which attached to any papers, securities or funds of the client in the lawyer's possession. The retaining lien secured all fees owing to the lawyer but was conditioned on possession. The second lien was called a charging lien. This lien attached to the judgment or monetary award secured through the lawyer's services and was not dependent upon possession. Some early cases suggested that the charging lien did not attach until a judgment was secured. Judiciary Law §475 was designed to extend the lawyer's lien to the client's "cause of action, claim or counterclaim" and to any recovery in the client's favor.]

Applying these general principles to these facts, Judge Winslow concluded that if Horowitz was discharged for cause, it had no lien on Baker's recovery and therefore no right to a contractual lien under the lawyers' stipulation. It had no lien "to confirm by contract or to relinquish as consideration for a contractual lien." The Court was left to decide whether Horowitz had violated DR 5-105 so as to enable Baker to discharge the firm for cause.

Judge Winslow inquired first whether Horowitz had an obligation to advise Baker of the potential conflict at the out-set of the representation. The court acknowledged that representation of multiple plaintiffs in an action to recover for personal injuries in a common accident is not improper per se. But is there an obligation to tell all the clients that their interests may diverge or become incompatible?

ECs Distinguished From DRs

In answering this question, Judge Winslow analyzed the difference between an Ethical Consideration (EC) and a Disciplinary Rule (DR). An EC, the Court said, is only "aspirational in character"; it represents a guiding principle for attorney conduct, but it is not mandatory. A DR, on the other hand, is mandatory. Violation of a DR can subject a lawyer to disciplinary action or civil penalty. Thus, although EC 5-16 advises that a lawyer representing two or more clients with differing interests should explain to each client the implications of the common representation and should accept employment only if each client consents (preferably in writing), Horowitz was not guilty of actionable misconduct in not advising Baker of the potential conflict at the outset, because its initial conduct did not "rise to the level of misconduct that would justify the imposition of a penalty."

[Judge Winslow warned, however, that the ECs may not be ignored if we are to "maintain the highest professional standards and...avoid the allusion of misconduct." "Conduct that does not violate the express terms of a Disciplinary Rule may nonetheless be sanctionable if it violates the general principles set forth in the Disciplinary Rules, and the Ethical Considerations may provide 'interpretive guidance' as to when such principles have been violated."]

Knowledge of Conflicting Interests

However, when Horowitz learned of the limited amount of insurance coverage, it knew or should have known that the aggregate damages of all the plaintiffs might exceed the fund available, especially because their injuries were serious. Even if it assumed that there was excess coverage or that Hart's assets could be reached, it should have realized that it was involved "in representing different interests" which would be competing for the money. At one point, it even told Baker that she might have to "take less" because of the competing claims of the other plaintiffs.

From the moment it would have appeared to a "reasonable attorney" that Horowitz had a conflict between competing interests, it had a duty to withdraw, or to advise Baker and the other clients that it had a conflict and obtain their written consents to the continued representation.

However, Horowitz' right to compensation is not defeated unless Baker can show that the firm's conduct had an adverse effect on her claims against Hart. Before it was discharged, Horowitz was engaged in investigation of Baker's claims, filing no-fault claims, commencing litigation and initiating discovery. Unless Baker can show that its activities were relatively inimical to her interests and favorable to the other plaintiffs, Horowitz may be entitled to be paid for its services. An act prejudicial to Baker would occur, for example, if Horowitz made a preferential demand on behalf of one of the other plaintiffs.

EC's Define Highest Standards

"To avoid violating the Disciplinary Rules, a lawyer who undertakes multiple representation must adhere to the highest ethical standards." A lawyer who follows the principles of the ECs will inform the clients of the potential conflict inherent in any representation of more than one client. The ideal way to do this is to evidence the disclosure by the client's written consent to the representation. Thereafter, any circumstance which seems to suggest a conflict greater than an inherent conflict should be reported immediately to all the clients. The moment the inherent conflict ripens into an actual conflict, any further activity by the lawyer in the matter without the informed written consent of all the clients may constitute a violation of DR 105.

Court Orders Limited Hearing

Judge Winslow found that he could not tell from the record whether Horowitz was discharged before or after it learned that the interests of the plaintiffs were irreconcilable or whether or not it conducted any activities after learning of its clients' different interests. If it did conduct such activities, it violated DR 5-105 and would not be entitled to share in the legal fees. If it did not engage in such activities, then its discharge was without cause and it would be entitled to compensation. The Court therefore ordered a limited issue hearing to decide, in part, whether Horowitz had engaged in any activity in violation of DR 5-105.

The hearing will also determine the aggregate amount of fees and the pro-rata share, if any, owing to Horowitz. In a fee dispute between outgoing and incoming lawyers, the outgoing lawyer has a choice of receiving immediate payment in quantum meruit or of waiting to share in the contingent fee at the end of the case. In the absence of agreement at the time of discharge, the presumption is that the outgoing lawyer prefers the contingent fee. In this case, Horowitz wanted to share in the contingent fee, but Del Gadio refused. If the Court finds that Horowitz was not discharged for cause, its fee will be a prorated percentage of the aggregate fees of all attorneys in the action, based upon the proportionate share of the total work performed by Horowitz.

Lazar Emanuel is the publisher of the New York Professional Responsibility Report.

© Copyright 2008 –The New York Professional Responsibility Report (NYPRR)