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# Addendum to Formal Ethics Opinion 91: Ethical Duties of Attorney Selected by Insurer to Represent Its Insured

## Addendum Merely Updates Terminology

by Andrew LaFontaine

Many insurance policies provide that the insurer will hire a lawyer to represent the insured in the event of a lawsuit. This can be a great bargain for insureds, because it allows them to defray the expense of litigation through their monthly premiums. It also benefits insurers by helping to prevent costly judgments against their insureds. However, this type of arrangement—one in which the person being sued is not the person paying the bills—can raise some potentially thorny ethical questions for the lawyer:

- Who is the client—the insurer or the insured?
- Can the insurer require the insured to settle (or go to trial) against his or her will?
- Can the insured require the insurer to pay for high-priced expert witnesses?
- What happens if there's a dispute regarding coverage?

### Informed Consent Versus Consent After Consultation

To answer these types of questions, the CBA Ethics Committee[1] issued Formal Opinion 91 (FO91),[2] which covers the "tripar-

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## Addendum Increases the Potential for Conflict

by Casey Quillen

My reading of the Addendum to Formal Ethics Opinion 91[1] (FO91) is that it is impractical as it would apply to the majority of clients defended under an insurance contract. In the tripartite relationship, the attorney's ethical duty is to ensure that the interests of the insured are protected, while simultaneously fulfilling the insured's contractual obligations to the carrier. This is accomplished by keeping the insured informed of the developments in the case and allowing the carrier to effectively control the result, as long as differing interests do not arise. Ambiguity created by the Addendum makes this less practical and increases the risk of a conflict arising during the defense of the insured client.

Andrew LaFontaine, my colleague in this point/counterpoint discussion, opines that the Addendum should be read simply as an attempt to update the old terminology of FO91 to reflect the new language of the Colorado Rules of Professional Conduct (Rules). I respectfully observe that had the CBA Ethics Committee (Committee) merely wanted to update FO91 in this manner, it could have replaced the phrase "consent after consultation" in the old opinion with the term "informed consent."

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tite relationship" between the lawyer, the insurer, and the insured. Central to FO91 is the idea that the insured should have adequate information concerning the defense being mounted on his or her behalf, coupled with the ability to meaningfully participate in this defense. Nowadays, this goal is achieved through the mechanism of informed consent. However, when FO91 was written, the version of the Colorado Rules of Professional Conduct (Rules) in effect used a slightly different term: consent after consultation. FO91 employed the consent after consultation standard rather than informed consent standard to describe what was required of lawyers when they performed certain activities.[3]

In 2008, Colorado repealed and reenacted the Rules to better align them with the Model Rules promulgated by the American Bar Association (ABA) Ethics 2000 Committee. Under the reenacted Rules, the term "consent after consultation" was replaced with "informed consent." Although the ABA did not intend for this to be a substantive change, there are differences between the two standards that warrant consideration. On the one hand, "consultation" had merely required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." The new standard, on the other hand, requires an attorney to provide "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[4] In practice, this change expands the amount of information the lawyer needs to give the client, particularly as it relates to risks and alternatives. Despite this modification, however, the client still must consent to the proposed course of action before the lawyer goes ahead with it.

## Addendum Updates Language of the Standard

In 2013, the Ethics Committee issued an Addendum to FO91. The purpose of the Addendum was to address the fact that the phrase "consent after consultation" was now obsolete, and that lawyers instead should comply with the new informed consent standard when representing clients under a tripartite relationship.[5]

I interpret the Addendum simply as an attempt to update the old terminology of FO91 to reflect the language of the new Rules. However, some practitioners are concerned that the Addendum imposes new duties on them—duties they may not always be able to meet. My counterpart, Casey Quillen, specifically notes that informed consent may be impossible to obtain in situations where the client cannot be located, which may in turn infringe on the insurer's right to control the defense under the terms of the policy.

I believe these concerns are unfounded. The Addendum does state: "In circumstances where the Rules require informed consent, the mere communication of information by the lawyer is not sufficient; the client must actually give the required informed consent." However, this is nothing new. Neither the Addendum, nor the amended Rule, creates a new consent requirement where one did not previously exist. Indeed, as noted above, the old consent after consultation standard still required approval from the client. Further, the Addendum tempers its stance by acknowledging: "[T]he crux of informed consent is that the lawyer must make *reasonable efforts* to ensure that the client or other person possesses information reasonably adequate to make an informed decision." (Emphasis added.)

Quillen fears that if the client is unavailable, the lawyer will be unable to obtain the consent necessary to accept fees from the insurance company (Rule 1.8(f)) or to disclose client information to the insurance company (Rule 1.6(a)). In my view, these fears are illusory. Most policies give insurers the right and duty to defend the insured, and require that the insured cooperate in the provision of such defense. As such, the client has effectively consented to the lawyer's retention simply by purchasing the policy. Furthermore, if the client cannot be located, what protected attorney–client communications is the lawyer in danger of disclosing?

It is important to recall that the Rules provide several avenues through which consent may be inferred from the surrounding circumstances. Pursuant to Rule 1.2(a), for example, "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." Because an insurance policy spells out certain particulars of the representation, the lawyer is invested with the authority conferred by the policy terms. In addition, Rule 1.0, comment 7 states:

> In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.

In the insurance defense context, it would seem that an insurer readily meets the definition of an "other person" with "reasonably adequate information about the matter." The lawyer must be careful not to stretch the concept of inferred consent too far, but in the early stages of a case, it can provide some breathing room while the client is located.

## Conclusion

Lawyers owe their clients duties of competence (Rule 1.1), diligence (Rule 1.3), and loyalty (Rule 1.7). Consequently, it should be ethically permissible for a lawyer to undertake certain limited actions necessary to protect the client's interest, even if the client is not immediately available.[6] These actions could include contesting service of process, filing documents to prevent entry of default, interposing legal defenses such as the statute of limitations that would otherwise be waived, and moving to quash subpoenas.

As a final rejoinder to the concern that the Addendum to FO91 imposes new and unmanageable limitations on attorneys, I must note that these formal ethics opinions do not carry the force of law. Rather, they are merely resources that can help attorneys navigate the sometimes complex ethical landscape. To quote an experienced colleague of mine: "The Rules of Professional Conduct are tools, not traps." Similarly, the ethics opinions exist to provide attorneys guidance and advice in particular situations. For this reason, I believe the Addendum to FO91 will make the lives of insurance defense lawyers easier, not harder.

### Notes

1. I am currently a member of the CBA Ethics Committee; however, I had no role in drafting any of the documents discussed herein.

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# Addendum Increases the Potential for Conflict

## Addendum Requires Insured Response for All Decisions

As I read it, the Addendum seems to backpedal on FO91's tacit understanding that the carrier controls the purse-string decisions. The extended discussion of informed consent implies that the Committee views the new Rules as heightening the duties owed by insurance defense counsel. The Addendum does not simply note that informed consent is the new standard; it goes so far as to suggest that informed consent requires an actual response from the insured—even for purse-strings decisions.

FO91 states:

> The attorney's ethical duty is to assure that the interest of the insured are protected, while at the same time fulfilling the insured's contractual obligations to the carrier against a backdrop where the insurance company, by virtue of financing the defense, may effectively control the result and may have its own interests at stake.

FO91 also recognizes that, although the attorney should fully advise the insured of settlement negotiations and their ramifications, the insured may be precluded by the insurance contract from interfering with settlement negotiations. This is consistent with CRS § 42-7-414(2)(b), which provides that "the insurance carrier shall have the right to settle any claim covered by the policy."

In contrast, the Addendum makes no exception for the insurer's contractual right to control purse-string decisions by requiring actual consent from the insured client. In requiring an actual response from the insured client, the Addendum is broader than the Rules and potentially inconsistent with the insured client's contractual obligations to his or her carrier.[2]

## Potential Conflict of Interest

I agree that the client should be informed of settlement negotiations and decisions; however, requiring informed consent actually may create a conflict of interest and cause the client to be in breach of the insurance agreement. For example, if a settlement can be obtained for a reasonable amount within policy limits, and the insurer desires to settle but the client does not give consent (and there is no consent to settle clause in the policy), the client would be in breach of the contract and the attorney would be in a conflict position.

Although it may be possible to obtain informed consent from most insured clients, insurance defense counsel can relate tales of at least a handful of insured clients who never responded to correspondence, did not provide (or have) a valid phone number, and even failed to appear at depositions or in court after being served. In this circumstance, if the insurer desired to settle the case to protect the interest of the insured client, the Addendum literally requires actual consent:

> In circumstances where the Rules require informed consent, the mere communication of information by the lawyer is not sufficient; the client must actually give the required informed consent.

With the increasing reliance on CRS § 42-7-414(3)(a) for service of process, I anticipate this will become more of a problem for independent defense counsel.[3] How on earth would counsel obtain informed consent from an insured that plaintiff and the insurer cannot locate?

## Scope of Informed Consent

LaFontaine suggests that a lawyer may be able to infer limited informed consent from the existence of the insurance contract itself. I think that is contrary to the express language quoted above. Moreover, if that were the Committee's intent, why does the Addendum expressly mention that "the lawyer must obtain the client's informed consent in order to accept fees from the insurance company" and "to disclose client information to the insurance company"? Wouldn't these be the two most obvious implications under a contract of insurance?

Inferred consent is even more attenuated in the defense of a permissive user. I am currently litigating a case where my client is not the insured, though he is being defended by an insurance company. According to the plaintiff, he was properly served the Complaint in another state; try as I might, however, I cannot find him, much less get him to respond and give actual informed consent. In light of the Addendum, the implication of proceeding—accepting fees from the insurance company, disclosing client information, negotiating settlement—without the client's consent (much less without the benefit of the client actually having purchased the insurance policy) gives me heartburn.

The Committee should specifically address whether the existence of the insurance contract does imply limited informed consent, as well as the scope of the informed consent. If the insurance contract does create an inference of informed consent, the statement that "the client must actually give the required informed consent" should be modified accordingly.

## Conclusion

My fealty runs to the client; however, the reality is that the insurance carrier is footing the cost of the litigation. Generally, policies contain some type of clause wherein the carrier reserves the right to direct the course of the defense, make decisions regarding settlement, and receive information regarding the defense. The literal application of the Addendum ignores the contractual agreement between the insured client and the insurer, and requires the client to respond and weigh in on decisions contractually retained by the insurer. This creates more "moments" during the litigation where the insured client and insurer may have conflicting desires as to the control and result of litigation.

LaFontaine points out that the Rules should be viewed as tools, not traps, and that the formal ethics opinions are resources to assist attorneys in "navigating the ethical landscape." Although I don't disagree with the intent of these resources, my concern is that the Addendum's ambiguity muddies the waters rather than providing clarity.

## Notes

1. CBA Formal Ethics Comm. Op. 91 (Jan. 16, 1993) (FO91), available at www.cobar.org/index.cfm/ID/22347/CETH/Formal-Ethics-

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2. CBA Formal Ethics Comm. Op. 91 (Jan. 16, 1993) (FO91), available at www.cobar.org/index.cfm/ID/22347/CETH/Formal-Ethics-Opinions. *See also* Addendum to Formal Comm. Op. 91 (Feb. 23, 2013), 42 *The Colorado Lawyer* 26 (May 2013), available at www.cobar.org/tcl/tcl_articles.cfm?articleid=8062.

3. Examples given by FO91 include taking on clients when the insurer was paying their fees, dealing with waivable conflicts of interest, revealing privileged communications, and undertaking to provide limited representation.

4. Colo. RPC 1.0(e).

5. Although not necessarily relevant here, the Addendum also notes certain instances where lawyers may disclose confidential information to combat fraud.

6. *See* State Bar of California Formal Op. No. 1989-111:

> An attorney was retained to represent the defendant in a personal injury action. A complaint was filed and served but no answer was filed on behalf of the defendant. The answer is now due and the attorney cannot locate the client . . . . The Committee opines that the attorney may file an answer to the complaint to avoid reasonably foreseeable prejudice to the client. ■

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Opinions. *See also* Addendum to Formal Comm. Op. 91 (Feb. 23, 2013), 42 *The Colorado Lawyer* 26 (May 2013), available at www.cobar.org/tcl/tcl_articles.cfm?articleid=8062.

2. Comment [6] to Colo. RPC 1.0 indicates it would be sufficient for the lawyer to make "reasonable efforts" to ensure the client possesses information adequate to make an informed decision. The Addendum, in contrast, states that the mere communication of information is not sufficient.

3. CRS § 42-7-414(3)(a) requires that the policy include language whereby the insured agrees that a civil action may be commenced against him or her by service of process on the insurance carrier. ■