

http://www.theholidayspot.com/thanksgiving/turkey_song.htm#video3



Insurance Mediation

Happy Thanksgiving!!!

What is Andy Dershowitz's ethical response?

a) You know I can't do that, Rock. It's getting close to the end of the year and my billing is way down. This has to be a full day for me.



No can do, bud. You know I have to think of the best interests of Phil and Dillary. I may not have voted for 'em, but I have to give them my best efforts today -- whether they're covered or not.

c) How about we split the difference and conclude after lunch. I heard the deli is running a special today on hot wings.

d) I'll have to call the Florida Bar Ethics Hotline at (800) 235-8619 and get back to you on that.

Rule 4-1.7: Conflict of Interest; Current Client

(e) Representation of Insureds:

Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing **both the insurer and the insured** as clients, or only the insured, **and to inform both** the insured and the insurer regarding the scope of the representation.

Comment [16] The unique tripartite relationship of insured, insurer, and lawyer can lead to **ambiguity** as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, [or] both as dual clients. Establishing clarity as to the role of the lawyer at the inception of the representation avoids **misunderstanding** [or] confusion and **inconsistent expectations** that may arise.

"What is Andy Dershowitz's ethically correct response?"

a) "Of course not. I'm ethically obligated to serve your best interests. Besides, who are you going to get that's better than me?"



"Yes."

c) "Hillary, you and Phil are both lawyers. You don't need me to answer that question."

d) I'll have to call the Florida Bar Ethics Hotline at (800) 235-8619 and get back to you on that.

Rule 4-1.7 Conflict of Interest: General Rule

1. If an attorney represents multiple clients in one proceeding he/she must advise all clients of the advantages and risks of one attorney representing multiple clients.
2. If an attorney is hired by the insurance company the attorney has an obligation to:
 - a. Ascertain from the insurance company if he/she is representing both the insurance company and the insured, or if the attorney only represents the insured.
 - b. The attorney needs to inform both the insurance company and the insured of the scope of his/her representation.
 - c. All other Florida Bar rules regarding conflicts of interest apply to this relationship.

Rule 4-1.2 Scope of Representation

3. A lawyer shall abide by the clients decisions concerning the objectives of the representation. A lawyer shall consult with the client regarding which means will be used to achieve the clients objectives. A lawyer shall abide by a client's decision whether to make or accept a settlement offer.

What should Andy do?



Tell his clients that they may choose to settle the case if they are willing to contribute \$50k to meet the Plaintiff's demand.

- b) Tell the mediator and his clients that the parties are too far apart and pack up to go home.
- c) Tell Atticus Finch, the mediator, to work on Rochelle some more.
- d) Hold a press conference to announce that this case is all about whether the First Lady should receive a salary.
- e) I'll have to call the Florida Bar Ethics Hotline at (800) 235-8619 and get back to you on that.

Rule 4-1.4 Communication

(a) Informing Client of Status of Representation

A lawyer is required to keep each client reasonably informed and to promptly comply with each client's reasonable requests for information.

(b) Duty to Explain Matters to Client

A lawyer is also required to explain matters to the extent necessary for a client to make informed decisions.

Rule 4-1.7 Conflict of Interest: General rule

(f) Compensation by Third Party.

If an attorney is accepting compensation from anyone other than the client, he or she must:

- (1) Inform client and get consent;
- (2) Ensure that continued independent professional judgment and attorney-client relationship remains; and
- (3) Abide by rule 4-1.6 as it relates to protection of information relating to representation of a client.

Comment [9] present an example: "**[W]hen an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence.**"

Is there a problem here?

- a) Not really. Phil and Dillary are employing ethical tactics of persuasion to get Andy to tell the insurance company to pony up more money to settle the case.



Yes. AllSafe's dec action, which seeks to rid the insurer of any obligation in the case, creates a conflict of interest between AllSafe and the Defendants.

- c) Yes, Phil is not telling the truth. He tripped Rochelle on purpose.

- d) Yes. Dillary is not telling the truth. She threw a gravy boat at Phil and Rochelle.

- e) I'll have to call the Florida Bar Ethics Hotline at (800) 235-8619 and get back to you on that.

Rule 4-3.2 Expediting Litigation

A lawyer is required to reasonably expedite litigation as is consistent with the interests of his or her client.

Rule 4-1.4 (b) Communication

The attorney must also reasonably inform the client so as to allow him or her to make informed decisions about representation.

Rule 4-1.6 (a) Confidentiality of Information

An attorney is required to keep information acquired as part of representation confidential, even if a third party is compensating the attorney.

Is Defense Counsel accurate that because the pending claims reasonably exceed the policy limits, that the The Allsafe Insurance Company does not have an obligation to investigate Ms. Hareless' claim or invite Ms. Hareless to the Global Mediation Conference?

(a) Yes.



No.

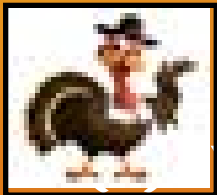
(c) Maybe.

(d) He should have called the Florida Bar Ethics Hotline before giving that advise.

Based on the *Farinas v. Florida Farm Bureau*
and *Gen'l Nat'l Sec v. Marsh* cases---

● Allsafe has a duty to its insured to fully
● investigate all claims and invite all potential
● claimants to a Global Mediation. Defense
counsel has an obligation to counsel
Allsafe on the “bad faith” ramifications of
not completely investigating and
● attempting to settle all claims.

Given the Mediator's statements to Albert as they were walking to caucus, does the mediator have any obligations to withdraw from serving as mediator in this case?



Yes.

- (b) No. He got the case settled for \$500,000 for each Albert and Charlie so there was clearly no bias or impartiality.
- (c) Only if Charlie finds out about his conversation with Albert.
- (d) I think the mediator better call the Florida Ethics Hotline.

The Florida Rules for Certified and Court Appointed Mediators

Rule 10.330 Impartiality

(a) Generally. A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual.

(b) Withdrawal for Partiality. A mediator shall withdraw from mediation if the mediator is no longer impartial.

During the mediation, a mediator shall maintain impartiality even while raising questions regarding the reality, fairness, equity, durability and feasibility of proposed options for settlement. In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw.

Is Defense Counsel in violation of the Rules of Professional Conduct by representing both the Allsafe and Wanafry?

- (a) No, because The Rules of Professional Conduct allow Defense Counsel to represent both an insured and an insurer



Yes, because Defense Counsel has a conflict under the Rules of Professional Conduct and therefore cannot represent both parties

- (c) Defense Counsel better call the Florida Ethics Hotline

- While it is true that Rule 4-1.7(e) would allow Defense Counsel to represent both Allsafe and Mr. Wanafry, in this particular case it appears clear that Defense Counsel has a conflict. Defense Counsel now knows that Hareless has a potential claim for at least \$200,000.

- By trying to settle the matter at the policy limit with Charlie and Albert only, Defense Counsel could leave Mr. Wanafry exposed to a claim by Hareless. While Allsafe has an interest in "being done" with the action, Wanafry has an interest in protecting himself from later claims by Hareless as well as from the claims by Albert and Charlie.

- The positions of the Allsafe and Wanafry are therefore in conflict and Rule 4-1.7(a) states:

"[A] lawyer shall not represent a client if (1) the representation of a client will be directly adverse to another client, or (2) there is a substantial risk that that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

And – in case you are wondering about Rule 4-1.7(e), here it is.....

Rule 4-1.7(e) states: “Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating the Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.”

Under these circumstances, does Defense Counsel have an obligation to advise Wanastry that:

- (a) A probability exists that the value of the claimants' claims will exceed the policy limits.
- (b) He has the opportunity and right to retain and consult with a personal attorney.



Both (a) and (b).

- (d) That he called the Florida Bar Ethics Hotline and they never got back to him.

In this case, we have already determined that a conflict of interest exists between Defense Counsel and Wanafry under Rule 4-1.7(e). Further, Defense counsel and Wanafry “just met,” and thus there has been no opportunity for Wanafry to provide “informed consent” to the representation under Rule 4-1.7(b)(4). Additionally, since they just met, Defense Counsel has not provided Wanafry with a copy of the “Statement of Insured’s Client’s Rights”. Defense Counsel therefore needs to advise Wanafry of his “rights” including:

8. ***Your Risk.*** If you lose the case, there might be a judgment entered against you for more than the amount of your insurance, and you might have to pay it. **Your lawyer has a duty to advise you about this risk and other reasonably foreseeable adverse results.**



9. Hiring Your Own Lawyer. The lawyer provided by the insurance company is representing you only to defend the lawsuit. If you desire to pursue a claim against the other side, or desire legal services not directly related to the defense of the lawsuit against you, you will need to make your own arrangements with this or another lawyer. **You also may hire another lawyer, at your own expense, to monitor the defense being provided by the insurance company. If there is a reasonable risk that the claim made against you exceeds the amount of coverage under your policy, you should consider consulting another lawyer.**

* We have complete copies of "Statement of Insured's Client's Right's" if anyone would like a copy.

A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation is _____ limited by the lawyer's own interests:

- (1) in any way;
- (2) completely;
- (3) slightly; **OR**



Materially

Unless.....????

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding;
- (4) the client gives informed consent; OR
All of the above.



Explanation: Florida Rule of Professional Conduct 4-1.7(b) provides that a lawyer should not represent a client if the representation of that client is directly adverse to the lawyer or another client. Comment to Rule 4-1.7 states that: "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." Likewise, "[t]he lawyer's own interests should not be permitted to have adverse effect on representation of a client." Fla. Rules of Prof'l Conduct R. 4-1.7 cmt. (2012).

True/False:

Attorney Teaparty and Attorney Radical are prohibited from signing the Confidential Settlement Agreement since they will not be parties to the divorce lawsuit?

False

Explanation: There is nothing in the Rules of Professional Conduct which specifically prohibits an attorney from executing a settlement agreement. However there are restrictions on a lawyer participating in any agreement in which a restriction of the lawyer's right to practice is part of the settlement of a client controversy.

Authority: Rule 4-5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Caveat: In a personal injury context, the Professional Ethics Committee of the Florida Bar in 2005 advised that a lawyer may participate in a settlement agreement in which the insurance company deposits directly into a client's financial account only the portion of the settlement proceeds owed to the client, but may not participate in a settlement if the funds deposited directly into the client's financial account include attorney's fees, costs and funds to which a third party may have a claim. RPC: 5-1.1(e)

OPINIONS: 00-2, 02. See Ethics Opinion 00-2 Reconsidered January 21, 2005.

Is the \$500k penalty clause proposed by
Rightwing for breach of the confidentiality
agreement enforceable?

No

Explanation: Florida law provides that although generally liquidates damages clauses are enforceable, they will be held invalid where their purpose is to deter or punish. Goldblatt v. C.P. Motion, 77 So.3d 798 (3rd DCA 2011). “[a] Liquidated damages provision operating as a penalty are improper and not enforceable by courts.” See National Service Industries, Inc., 395 So.2d 1280 (Fla. 2d DCA 1981).

*What is the key to a good
Thanksgiving dinner?*



The Tur-KEY!!!



