

## He Who Pays The Piper May Not Get To Call The Tune

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A lawyer is prohibited from allowing a person "who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Minnesota Rules of Professional Conduct (MRPC), Rule 5.4(c). For the lawyer who is retained by an insurance company to represent its insured, this prohibition is of more than academic interest. Lawyers whose practice can be described as "insurance defense work" often feel the tension between the insurer's desire to control litigation costs and the lawyer's desire to zealously represent the client. A recent opinion by the Tennessee Supreme Court's ethics panel reminds us of the ethical constraints on lawyers in accepting such representations.

The Tennessee panel's opinion held that a lawyer has an obligation to refuse to comply with certain insurance company directives that compromise the lawyer's duty to the client. The facts presented to the Tennessee panel involved an insurance company that required the attorneys it retained to appeal all adverse trial court judgments, demand a jury in every trial, and to refuse to participate in mediation. The insurance company demanded that the attorneys representing their insureds follow these directives even if the attorney believed that one of the prohibited options might be the best means by which to represent the client.

The Tennessee ethics panel held that an attorney may not accept employment by an insurer on behalf of an insured with conditions limiting or directing the scope and extent of his or her representation of the insured in any manner, unless the client had expressly agreed with the conditions and that agreement was confirmed in writing. The panel further advised Tennessee attorneys that counsel receiving a retention purporting to require undeviating compliance should inform the insurer that such compliance cannot be assured, but that the lawyer would comply to the extent permitted by the lawyer's duty to the insured. In reaching its decision, the Tennessee panel looked to an earlier Tennessee opinion holding that "the insured, not the insurer, is the attorney's client." The panel also considered DR-5-107(B) of the Tennessee Code of Professional Responsibility that provides that "a lawyer shall not permit a person who recommends, employs, or pays him [sic] to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

While the Tennessee opinion is obviously not controlling in Minnesota, it is relevant nonetheless. Most states, including Minnesota, hold that the lawyer hired by an insurer to represent its insured is the insured's lawyer. "The attorneys hired by [the insurer] to represent them owe their allegiance to their clients, the insureds, to best represent their interests." *Miller v. Shugart*, 316 N.W.2d 729, 733 (Minn. 1982). As in Tennessee, a Minnesota lawyer who is retained by an insurer to represent its insured is in most cases the insured's lawyer.[Ftn 1](#)

Further, the Minnesota Rules of Professional Conduct prohibit a lawyer from accepting compensation from someone other than the client unless certain conditions are met. A lawyer may not accept compensation for

representing a client from one other than the client unless: 1) the client consents after consultation or acceptance is authorized by the nature of the representation; 2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and 3) information relating to the representation of a client is protected as required by Rule 1.6. (Rule 1.8(f), MRPC).

Like the Tennessee opinion, Rule 1.8(f) addresses a third party's ability to control the lawyer's professional judgment. Conditions such as those required by the Tennessee insurer that the attorneys retained appeal all adverse trial court judgments, or that they refuse to participate in mediation, would be problematic for Minnesota lawyers as well. A lawyer cannot know at the representation's outset that eliminating a particular option will be in the client's best interest. That decision can only be made as the facts of the case develop, the lawyer considers the client's objectives and the lawyer applies his or her professional judgment.

Therefore, to agree to such conditions without the client's knowledge and consent presents serious potential ethical problems for the lawyer.

The Tennessee opinion reminds us that even though the insurer may be paying the piper, its ability to call the tune is limited. The Rules of Professional Conduct prohibit the lawyer from permitting another to interfere with the lawyer's independence and professional judgment.

<sup>1</sup> There are situations, such as some workers' compensation matters, where the insurer is also a party to the litigation and the lawyer represents both insurer and insured.