

THE PHILADELPHIA BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE  
Opinion 2013-5  
(June 2013)

The inquirer represents husband and wife who were injured in a motor vehicle accident. It was a rear end accident and the defendant was cited for DUI. At the time husband and wife told the police that wife was driving. In addition, prior to retaining the inquirer, husband and wife filed an application for PIP benefits, which again stated that wife was driving and husband was passenger. After being hired, the inquirer forwarded additional PIP applications to the clients. The clients filled them out and signed them, again representing that wife was driving and husband was the passenger. Thereafter, the inquirer forwarded the PIP Applications to the clients' insurance carrier (which happens to be the same as defendant's liability carrier. Since then PIP medical benefits have been exhausted. While husband has recovered, wife has not, having sustained a serious neck injury which required neck surgery. PIP wage loss benefits were exhausted with reference to husband but not wife. She has an outstanding claim for the balance of her wage loss, but no action has been taken in that regard as the inquirer was waiting to add that to the UIM claim, if any.

The inquirer filed a complaint just short of two years from the date of the accident, on behalf of husband and wife. The complaint was verified by the inquirer, and it was his intention to substitute his verifications with those obtained from the clients. While the clients have provided him with those verifications, he has as yet not substituted them.

Within weeks of filing the Complaint, the husband advised the inquirer that from the start, husband and wife had lied, and that in fact husband was driving and not the wife. The husband stated they had lied because the husband was not carrying his driver's license, and the couple wanted to avoid any problems with the police. The husband indicated that the couple had decided to disclose the truth to the inquirer because, since litigation had started, they did not want the inquirer to be blindsided during a deposition or other proceeding in the litigation process.

The inquirer asks the following questions:

- 1) Can or must he withdraw as counsel;
- 2) Does the Complaint need to be withdrawn;
- 3) Can the existing Complaint be amended to reflect the facts as the inquirer now knows them to be;
- 4) What disclosures are necessary to the Court and the insurance carrier who is handling the clients' PIP benefits as well as the third party liability claim (which carrier happens to be the same for both);
- 5) What may the inquirer disclose without violating any applicable privilege even if the potential ramifications include criminal charges against either or both clients;

6) Would it be permissible (of course with the client's consent and authorization) to discontinue the action & walk away without the need to notify anyone of anything, including the PIP carrier? In other words does the requirement of candor to the tribunal extend to correcting a pleading even if the action is discontinued?

Several of the Pennsylvania Rules of Professional Conduct (the "Rules") apply to this situation.

Rule 1.0 **Terminology** provides in part that,

(e) "Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.6 **Confidentiality of Information**, provides in part that,

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

...

(3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used;

Rule 1.16 **Declining or Terminating Representation** provides in part that,

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

...

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

...

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

...

**Rule 3.3 Candor Toward the Tribunal**, provides in part that,

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

...

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

**Rule 4.1 Truthfulness in Statements to Others**, provides in part that,

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;

or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Committee is of the opinion that the falsity in this case, specifically, the identification by the clients of the wife as driver and husband as passenger is in fact material to the liability claim and the complaint filed therein. The wife's neck injuries, and whatever other injuries suffered by either husband or wife could very well be impacted by where each was sitting in the car when it was struck. As regards the PIP application, the inquirer was involved in forwarding completed PIP documents to the PIP carrier. In Pennsylvania, any PIP application includes a certification that must be signed by the applicant(s) that any intentional misrepresentation in said application constitutes insurance fraud. Clearly the PIP applications for both husband and wife contain intentional misrepresentations and thus are fraudulent.

It is against this background that the inquirer's questions must be considered. In addition, in discussing the various courses of action with the clients, it is the inquirer's responsibility to insure that the clients are making their decision(s) about what to do based on "informed consent" (as defined in Rule 1.0(e)) to such actions being given to the inquirer. As such, prior to taking any action, the inquirer must advise of the full range of possible solutions and actions as well as the consequences of each and should refer the clients to a criminal attorney so that they can understand the impact in that arena of the decisions that they eventually make.

The central problem here is posed by Rule 3.3. That rule states that, " a lawyer shall not knowingly make a false statement of material fact or law or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Unfortunately, due to circumstances beyond his control the lawyer has made a false statement to the court, and it must be corrected.

As to the inquirer's first question, if the client allows the lawyer to rectify the falsity, then no rule would require the lawyer's withdrawal.

However, if the client refuses to rectify the situation, then the inquirer must withdraw. That is so because, as seen below, the lawyer must himself disclose the falsity here and if he were to do so over the clients' objection (which he may have to do), then it would give rise to a conflict of interest under Rule 1.7 (a)(2)

Simply withdrawing without doing anything more, would in the Committee's opinion violate both Rules 3.3 and 4.1. However, the inquirer, should he take the appropriate action can avoid violations of these Rules, and as such not be required to withdraw.

Whether the inquirer may withdraw from representation is governed by both Rules 1.16b 2 and 3. Clearly, if the clients refuse to take any corrective action regarding their misrepresentation and fraud, then the inquirer has grounds for permissive withdrawal under both of these Rules. However, the Committee cautions that while there may be grounds for permissive withdrawal, again, this does not address what the inquirer is required to do under the Rules as regards the clients' misrepresentations and fraud.

The Committee will address the inquirer's second and third questions together. Withdrawal of the complaint in and of itself will not address the inquirer's duties under Rule 3.3a1 to correct the fundamental material misrepresentation made to the Court in the pleading verified (even if by information and belief) by the inquirer, or by the clients, were the inquirer move to substitute their verifications. However, because the inquirer knows that the clients are lying about a material fact, he cannot go ahead and substitute his verifications with theirs knowing that they are false. He must take corrective action as required by Rule 3.3a1.

Merely withdrawing the case without prejudice allows the clients to move forward with their claim again, and does nothing to correct the fraud committed upon the court. However, withdrawing the claim with prejudice in fact ends any claims that the clients are able to make against the defendant and thus permanently concludes any matters before the court on a third party liability claim, thus effectively rectifying the clients' misrepresentation to the court.

The Committee hastens to point out that this is not the only way to accomplish such rectification. Amending the complaint to accurately reflect who the driver was and who the passenger was cures the material misrepresentation and in addition, provides adequate notice to the defendant through his counsel, as well as to the defendant's liability and PIP carrier (being one and the same) of the clients' misrepresentation. This one action will in fact address the issues facing the inquirer and his duties under Rules 3.3 as well as 4.1.

As a practical matter, the balance of the inquirer's questions would apply should the clients refuse to cooperate in rectifying the fraud upon the court (and thus upon their PIP carrier) as well and will be answered as one. The inquirer would at that point, prior to withdrawing (for which the inquirer has both mandatory as well as permissible grounds), be required to notify the PIP carrier of the clients' fraud because of the interaction between Rules 4.1 and the exceptions to confidentiality as contained in Rules 1.6c3. It is clear that Rule 4.1 requires disclosure of material fraud providing it is not prohibited by Rule 1.6. Given that the facts of this inquiry fall into an exception to confidentiality results in the inquirer being required to make a disclosure to the insurance carrier or its representative regarding the clients' misrepresentation. The inquirer should not characterize it as fraud or a crime, but rather simply make the disclosure as to who was the actual driver and who was the actual passenger and allow the carrier to investigate. The Committee acknowledges that this could have devastating impact to the clients. However, the situation requires the disclosure, and does not allow the clients to be protected by confidentiality under Rule 1.6.

The inquirer will clearly be disclosing confidential information in making any disclosure required or taking the action necessary to amend the complaint. Should the clients refuse to allow the inquirer to rectify their fraud both with the tribunal (Rule 3.3) and the carrier (Rule 4.1), then the inquirer is required to make the disclosures necessary as noted above as regards Rule 4.1. Refusal to cooperate in the rectification of the fraud,

either by amending the complaint or withdrawing it with prejudice would result in the inquirer's violation of Rule 3.3. Not only would the inquirer then be required to withdraw from the case, he would have to disclose to the court in some fashion as to the reason for it when withdrawing. The inquirer should request an *in camera, ex parte* meeting with the court to make that disclosure in a fashion that is the least prejudicial to the clients. However, should the court deny such a request, the disclosure must be made under the circumstances which the court directs. Again, what is required to be disclosed is simply that the husband was driving and not the wife.

Should the clients fire the inquirer and choose to go to new counsel, the inquirer clearly should make disclosure to the new attorney of the clients' untruth. However, in the Committee's view this does not necessarily meet the inquirer's obligations under Rule 3.3b. If the complaint is not amended by the new attorney, the inquirer is required under the Rule to report the lie to the court, and as previously stated to the insurance carrier as well.

In closing the Committee notes that had the inquirer not been involved in the transmission of completed PIP forms to the carrier, that disclosure to the PIP carrier would not be required. However, as a practical matter since the defendant's and the clients' carrier is the same, disclosure to the third party liability division by amending the complaint would obviously suffice as disclosure to the PIP division. However, withdrawal of the matter with prejudice while addressing the inquirer's obligation under Rule 3.3b would not suffice to cure the problem of the fraud with the PIP carrier, which would still require disclosure that the husband and not the wife was driving.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.