

## ETHICAL ISSUES FOR LAWYERS IN D&O REPRESENTATIONS

By Thomas B. Mason

Securing insurance coverage for your representation of an officer or director client under a D&O policy is an important step. However, a lawyer engaged in such a representation could confront several significant ethical issues. It is, therefore, important to keep a few issues in mind when representing your client.

First, the obligation to keep client matters confidential is frequently in tension with an insurer's requirement to be fully informed about a matter. Billing statements and status reports to the insurer typically contain confidential information covered by ethics rules.

As an example, ABA Model Rule 1.6 prohibits a lawyer from revealing "information relating to the representation," a term that includes nonprivileged information. (*See* Comment [3] to ABA Model Rule 1.6. ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.")) In order to reveal information—even from sources other than the client—to a third party such as a D&O carrier, the lawyer must have either the client's explicit consent or be able to demonstrate that the client "impliedly authorized" the disclosure. (Model Rule 1.6 (a).) Although many jurisdictions have adapted and then adopted the ABA Model Rules, given the differences among various states, it is important to consult the applicable rules regarding these issues.

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Prudent lawyers should not rely on "implied authorization" by the client and should instead discuss with the client the extent and nature of the disclosures in advance and should obtain the client's explicit consent. Such discussion should include the potential impact of the disclosures on the attorney-client privilege.

Moreover, many ethics codes require a lawyer to get the client's explicit consent before a lawyer can accept fee payments from a third party, such as an insurer. ABA Model Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from a third party absent informed consent from the client. "Informed consent" requires that the lawyer provide "adequate information and explanation" about the "material risks" and "reasonably available alternatives." As the Model Rules make clear, one of those "material risks" to be discussed is that the fee payor will attempt to interfere with the "lawyer's independence," "professional judgment," or the "client lawyer relationship." (*Id.* *See also* Model Rule 5.4(c) (prohibiting a third-party fee payor from "direct[ing] or regulat[ing]" the lawyer's professional judgment.)) A lawyer must review the various guidelines and policies provided by the carrier with care before agreeing to any term or condition that could compromise the lawyer's independence.

Further, to the extent that the lawyer does agree to be governed by certain conditions or policies of the insurer, the lawyer should review them in advance with the client and obtain the client's consent before agreeing to abide by them. A client cannot consent and a lawyer cannot agree to any condition that compromises the lawyer's professional judgment or independence. At the end of the day, the attorney's obligation is to the client, and entering into an arrangement that compromises a lawyer's ability to fulfill that obligation could create serious problems down the road.