

## COMMITTEE ON PROFESSIONAL ETHICS

Opinion 2009-01	Topic:	Conflicts of Interest
	Digest:	When there is insufficient liability insurance coverage or other recoverable assets to fully compensate an injured party and his or her medical insurance carrier, it is unethical for an attorney who represents the injured party in a negligence action against the tortfeasor to also represent the medical insurance carrier to enforce its subrogation rights.
	Code:	DR 5-106 [22 NYCRR §1200.25] DR 5-105 [22 NYCRR §1200.241]

### QUESTION

1. May a lawyer, in the same action in which the lawyer seeks damages for an injured plaintiff, also represent the plaintiff's medical insurance carrier to assert its subrogation rights, when there is insufficient insurance coverage or other recoverable assets to fully compensate both the injured party and the medical insurance carrier?

### DISCUSSION

2. When there is insufficient insurance coverage or other recoverable assets to fully compensate the injured party and the medical insurance carrier, any payment to a medical insurance carrier, pursuant to the medical insurance carrier's right of subrogation, would, of necessity, reduce the sums available to the plaintiff as a result of plaintiff's personal injury.
3. DR 5-106 [22 NYCRR §1200.25] provides: A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against the clients, unless each client has consented after full disclosure of the implications of the aggregate settlement and the advantages and the risks involved, including the existence and nature of all claims involved and the participation of each person in the settlement.
4. DR 5-105 [22 NYCRR §1200.24] provides, in part, as follows:
  - (A) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would

be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

5. Since it is the obligation of a lawyer for an injured plaintiff to secure the maximum amount for a personal injury plaintiff, and since any payment to a medical insurance carrier, pursuant to the subrogation rights of a medical insurance carrier under the circumstances set forth in paragraph 2 above, would reduce the payment to a personal injury plaintiff, representation of both the plaintiff and a medical insurance carrier's subrogation rights presents a conflict of interest.
6. Under the circumstances set forth in paragraph 2 above, it is our opinion that a disinterested lawyer would not believe that a lawyer can competently represent the interests of a personal injury plaintiff and a medical insurance carrier seeking to enforce the medical insurance carrier's subrogation rights. Thus, representation of a personal injury plaintiff and a medical insurance carrier asserting subrogation rights presents a non-waiveable conflict of interest and is unethical.

#### CONCLUSION

7. When there is insufficient coverage or other recoverable assets to fully compensate an injured party and a medical insurance carrier, representation of a personal injury plaintiff and a medical insurance carrier seeking to enforce the subrogation rights of such medical insurance carrier presents a conflict of interest, and a lawyer cannot represent a personal injury plaintiff and a medical insurance provider seeking to enforce subrogation rights in the same proceeding.