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PROFESSIONAL CONDUCT

When the Company Pays the Fees: N.J. Puts Some 'Meat on the Bones'

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Special to the Legal

One of the trends that we see developing in the new decade is a significant rise in corporate investigations by government agencies. We've previously written about how Pennsylvania's Rules of Professional Conduct govern a company's efforts to both defend itself and permit it to pay for and provide appropriate counsel for its employees and other witnesses. (See our article headlined "When Three Isn't a Crowd: It's OK to Take Payment from a Third Party" published in *The Legal* July 6, 2007.)

In New Jersey, however, the propriety of third-party payment was subject to question. See *In re Abrams*, which says: "It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct. For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony."

Recently, the New Jersey Supreme Court dramatically changed the landscape of the law in that state and also provided interesting guidance for this side of the river. In our view, this is an important change for the better.

In *IMO State Grand Jury Investigation*, a company under grand jury investigation decided to provide separate counsel of its



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choosing, free of charge, for three employees identified as possible additional targets, as well as any other "non-target current and former employees of [the company]" The retainer letter/agreement for each employee provided that: the company was responsible for all legal fees, that such payment was not dependent upon the attorney's cooperation with the company and that the company had the right to stop paying the attorney at any time; the attorney's sole professional obligation was to the employee; the attorney was not required to disclose any legal strategy to the company; no professional relationship

would arise between the attorney and the company; and the company would receive only summary, non-detailed invoices from the attorney. In addition, the company sent a letter to each employee advising them that they were free to hire and pay for their own attorneys.

The state moved to disqualify counsel for the employees on the basis that their payment arrangement with the company created an impermissible conflict of interest for the lawyers involved. In response, the employees provided certifications to the court stating that they could not afford to retain counsel on their own and that they were happy with their current representation. The trial court denied the state's motion to disqualify counsel, concluding that the employees gave informed consent to the payment arrangement, that the attorneys involved were "competent, knowledgeable, respected attorneys" and that the attorneys adequately maintained client confidentiality in accordance with RPC 1.6.

However, the trial court imposed two additional requirements on the company and counsel: First, going forward the attorneys would be required to redact all of their bills so that no specific information would be detailed therein, and second, that prior to ceasing payment in connection with the representations, the company would first have to obtain leave from the court.

The state sought leave to appeal in the Supreme Court of New Jersey. The court noted the long-standing jurisprudence prohibiting third-party payment but held that it had been abrogated by the adoption of the Rules of Professional Conduct in 1984 and that Rules 1.8, 1.7 and 5.4

governed the issue. Rule 1.8 permits third-party payment if “the client gives informed consent”; the lawyer’s independence is not compromised and the requirement to keep client communications confidential is not breached; RPC 1.7(a) forbids a lawyer from representing a client “if the representation involves a concurrent conflict of interest”; RPC 5.4(c) provides that a “lawyer shall not permit 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.” Applying these rules, the court affirmed the trial court’s decision denying the state’s motion to disqualify.

In its opinion, the court enumerated six requirements of conflict-free representation when a third-party employer foots the bill:

- A third-party payer is prohibited from limiting the employee’s choice of counsel. If the company decides to pay its employees’ counsel fees, it must also permit the employees to independently select their counsel within reasonable fee and expense limits. According to the court, this independent choice is a necessary component of informed consent.

- The attorney must have absolute independence and the retention letters “should clearly and conspicuously note that nothing in the representation shall limit the lawyer’s responsibilities to the client,” and that the third-party payer shall not, in any way, interfere with the lawyer’s professional independence.

- “There cannot be any current attorney-client relationship between the lawyer and the third-party payer” and of course, all other conflicts under the rules must be resolved. (This requirement may need some further judicial refinement as it appears to forbid a company lawyer from ever representing a company employee; this is a result the court probably did not intend.)

- Client confidentiality must be maintained, including “careful and conscientious redaction of all detail from any billings submitted to the third-party payer.” This

does not preclude the company’s lawyers from entering into a joint defense agreement with the employees’ lawyers, as long as all the parties agree, and payment of the employees’ lawyers is not conditioned on participation in the agreement.

- The third-party payer shall pay the attorney’s invoices as promptly as it pays its own invoices.

- In for a penny, in for a pound, or as the court said, “once a third-party payer commits to pay for the representation of another, the third-party payer shall not be relieved of its continuing obligations to pay without leave of court brought on prior written notice to the lawyer and the client.” Relief from such payment cannot be predicated on the payer’s disagreement with the strategy that the attorney has chosen for his client.

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The court concluded that, in the case before it, the company had acted in good faith, the retained counsel were both “diligent” and “competent,” the trial court had properly exercised its supervisory authority and the six requirements listed above had been met.

Larry Lustberg, chairman of the criminal defense department at the Gibbons firm in Newark, N.J., argued the case for

the employees’ attorneys. In an e-mail, he described this case as “an important decision for the entire system of justice. A contrary decision would have had the effect of depriving many employees of the assistance of counsel, or at the very least would have dramatically shifted defense costs from employers to employees — with both constitutional and public policy ramifications. The court put some meat on the bones of the applicable rules and supplied guidance to practitioners who can now proceed with assurance that they are not acting unethically.”

We agree that this is both a salutary and significant change in the law that will benefit the entire system. As we gear up for a decade of more stringent regulation and corporate oversight, we are happy to see the courts ensuring an even playing field.

Kristen E. Polovoy contributed to the research and drafting of this article. •