

Law Firm and Three Attorneys Entitled to Independent Counsel of Their Own Choosing in Legal Malpractice Case

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In an unreported decision, a New York state trial court has held that a law firm and three of its attorneys insured under a duty-to-defend legal malpractice policy were entitled to independent counsel in an underlying action for legal malpractice because of potential conflicts among them. *Rosenberg & Estis, P.C., et al. v. Chicago Ins. Co.*, 2003 WL 21665680 (N.Y. Sup. Ct. July 11, 2003). The court also held that, because of disputed coverage issues, the attorneys were entitled to choose their own counsel.

The insurer issued a duty-to-defend legal malpractice policy to a law firm. The policy provided that "[u]pon the Insured becoming aware of any negligent act, error, omission or Personal Injury in the rendering of or failure to render Professional Services which could reasonably be expected to be the basis of a Claim covered hereby, written notice shall be given by the Insured, or its representative to the Company together with the fullest information obtainable as soon as practicable."

In October 2000, the law firm provided notice to the insurer of a potential claim arising out of alleged misconduct by one of its attorneys of which it had just become aware. In March 2001, after that matter had been resolved, the law firm notified the insurer that it had uncovered further acts of misconduct by the same attorney from 1997 and 1998 that could give rise to a claim. In December 2001, the law firm and three of its attorneys were sued as a result of the purported misconduct. The insurer denied coverage, contending that the law firm had not provided timely notice of the potential claim because (1) the attorney whose misconduct was at issue had knowledge of the misconduct in 1997 and that knowledge could be imputed to the entire firm, and (2) in any event, the law firm should have uncovered the misconduct by timely reviewing the attorney's files after receiving notification in October 2000 of the first potential claim. Coverage litigation ensued.

The trial court held that both arguments raised by the insurer involved issues of fact that precluded summary judgment. The court explained that the attorney's knowledge of his misconduct could not necessarily be imputed to the entire firm, reasoning that "[i]t can be assumed that a 'bad actor' does not advise his partners or employers of his bad acts, until they are otherwise uncovered." In particular, the court noted that the law firm appeared to be "large" and to have "many" attorneys, and reasoned that "[t]he matter would be different

if it related to a single practitioner or possibly to a very small and well integrated firm." The court also held that the issue whether the firm acted diligently and reasonably in reviewing the attorney's files was an issue of fact that could not be resolved on summary judgment and that the insurer was therefore obligated to continue providing a defense pending further resolution of the coverage issues.

The trial court granted the motion of the law firm that it and the individual attorney defendants (none of whom was the lawyer who engaged in the alleged malpractice) were entitled to independent counsel of their own choosing. The court explained that the insureds were entitled to choose their own counsel because "[a] conflict of interest requiring the retention of independent counsel arises where the question of insurance coverage is intertwined with the question of liability." Here, the court found a conflict because the obligation of the insurer to indemnify might turn on proof of whether the law firm adequately supervised the attorney who engaged in the purported misconduct. The court also held that the law firm and individual attorneys were entitled to separate counsel because "there may be a conflict of interest" among them.

Finally, the court granted the insurer's motion to dismiss the counts in the law firm's complaint for statutory and common law bad faith based on the insurer's alleged violation of New York law concerning "unfair claim settlement practices." The court initially noted that the statute at issue did not create a private cause of action. In addition, it held that the allegations did not state a cause of action because the law firm failed to charge, as is required by statute, conduct that is "consumer oriented." The court reasoned that, while the complaint alleged an impact on the public, the law firm "is a large law firm, which commenced this action to protect its interests under a specific insurance policy.... "[T]here is no allegation that the plaintiff was of disparate bargaining power with defendant when the insurance policy was issued."

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