ETHICS OPINION

RO-90-99

[redacted]

QUESTION:

"This letter is a follow up to our telephone conversation of December 27, 1990 at 9:45 a.m. Back in September of 1990 our firm was retained by an insurance company, which I will hereinafter refer to as ABC Insurance Company or ABC, to defend the owner and the driver of a motor vehicle, which I will refer to as John Doe and Sally Roe respectively, under a policy of liability insurance issued by ABC. John Doe was the named insured and Sally Roe was his girlfriend and was driving the motor vehicle with John Doe's permission at the time of the accident. No coverage questions or reservation of rights have been indicated to me by ABC in any of their correspondence.

I subsequently contacted Sally Roe and she and a third party witness who was in the vehicle with her at the time of the accident came to my office to give me a statement. During the course of obtaining this statement Sally Roe disclosed the following to me. John Doe purchased the insured vehicle in approximately May of 1989 from a local dealer and financed the purchase through the manufacturer's financing agent. Insurance coverage was arranged through an insurance agency which I will refer to as the Brown Agency. Sally Roe stated that she thinks John Doe paid approximately $175.00 on the day the vehicle was purchased as insurance premium and that thereafter his monthly premium was to be approximately $109.00 a month.

Sally Roe further stated that John Doe never received a copy of a policy or binder from the agent or from the insurer and that approximately 3 to 4 weeks later she went by the Brown Agency to see about the matter. The agent informed her that she had been trying to contact John Doe without success and that she had messed everything up concerning their policy and she wrote a new binder at that time with an insurance company that I will refer to as XYZ Company and further informed Sally Roe that John Doe would have insurance for 30 more days for free and not to pay any premium at that time.

On August 17, 1989 Sally Roe's mother went to the Brown Agency and paid the agent a premium and was given a receipt stating 'paid in full'. Later that same day Sally Roe was involved in the accident made the basis of the suit that was subsequently filed against she and John Doe. The next morning Sally Roe and John Doe went to the Brown Agency and talked to the agent about the wreck. The agent informed them that she was going to switch their insurance to ABC Company because they would get their vehicle fixed faster that way and because XYZ Company had experienced several wrecks and it would take a long time for their adjuster to come out on the matter. The agent further told them that they could not tell anybody about this and to keep it hush-hush. The agent further told them that she had put the premium that Sally Roe's mother had paid in the mail to Champion Insurance Company that day but that she had found out that Champion had gone out of business so she had pulled the letter and the check out of the mail and she would use it to switch them to ABC Company. The agency filled out an application with ABC Company and back-dated it to August 17, 1989 at 4:00 p.m. and had John Doe and Sally Roe sign it. Sally Roe informed me that on 08/17/89 at 4:00 p.m. she was at work in Birmingham. She also stated that neither she nor John Doe ever received a policy or binder with ABC Company.

After the accident, Sally Roe and the third party that was in the vehicle with her filed claims with ABC Company for their medical bills. ABC denied the claims and stated that the policy that had been issued by them did not contain med pay coverage. Sally Roe contacted the Brown Agency and informed the agent that she had understood that they had med pay coverage and Sally informed me that the Agent wound up paying the bills for both she and the third party out of her own pocket.

From these facts it appears that a fraud has been perpetrated upon ABC Company by the Brown Agency and/or John Doe and/or Sally Roe. If not for this fraud, ABC would not have coverage for John Doe and Sally Roe in this matter. The questions I have are am I required to disclose this information to ABC Company, whether I may ethically do so and whether I am now required to withdraw from my representation of John Doe and Sally Roe in this case. I have reviewed Canons 4 and 5 of the Code of Professional Responsibility and the ethical considerations and disciplinary rules thereunder. I have also reviewed rules 1.6, 1.7 and 1.8 of the Rules of Professional Conduct that are to take effect January 1, 1991 along with the cases of L & S Roofing Supply Company v. St. Paul Fire and Marine Insurance Company, 521 So. 2d 1298 (Ala. 1987) and Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988).

The Mitchum case indicates that when an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interests of each and that in that type of situation the attorney has two clients. Mitchum at page 198. However, Mitchum also indicates that when a conflict arises involving differing interests ethical considerations prohibit an attorney from continuing to represent both the interests of the insured and the insurer. Id. at page 200. In light of Canon 4 and EC 4-5 and DR 4-101(B) it would seem that I am prohibited from disclosing the information which I have received from Sally Roe to ABC Company. However, in light of Mitchum, I am not sure whether I have a duty to disclose what I have learned to ABC since they may also be my client. Further clouding the matter are the comments to Rule 1.6 of the Rules of Professional Conduct that take effect 01/01/91. The comment under 'Authorized Disclosure' indicates that when coverage is or may be disputed an attorney representing an insured may disclose any information pertinent to the issue of coverage to the insurer as well as to the insured but that the attorney should avoid disclosing information that he knows would adversely effect insurance coverage for the insured unless such disclosure is approved by the insured or the attorney has assurances that the insurer will not use the information to the insured's disadvantage. It appears clear to me that the information that I have obtained would definitely adversely effect insurance coverage for Sally Roe and John Doe. I discussed with Sally Roe the fact that I might be required to disclose the information which she had given me to ABC and she told me that she understood this but I did not obtain her express consent to do so. I am not sure I would be comfortable in obtaining such consent anyway under these circumstances without Sally Roe and John Doe being advised by a disinterested attorney since it seems obvious that such a consent would be extremely adverse to their interests.

I am also troubled by the question of whether I am now required to withdraw from my representation of John Doe and Sally Roe in this matter. It appears to me that my continued representation could be construed as furthering a course of fraudulent conduct which would mandate my withdrawal."

ANSWER:

You have, in your request, set out the countervailing theories that apply on these facts. Rule 1.6(a) of the Rules of Professional Conduct provides as follows:

> "1.6 * * *
>
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after con-

> sultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)."

In relevant part the Comment for Rule 1.6 states as follows:

> "When coverage is or may be disputed, a lawyer representing an insured pursuant to an insurance contract may disclose any information pertinent to the issue of coverage to the insuror as well as to the insured. Although the insuror in such a situation is not the appointed attorney's client, as opposed to the situation in a normal insurance defense relationship, such disclosure is impliedly authorized in order to carry out the representation. However, the lawyer should avoid disclosing information to the insuror that the lawyer knows would adversely affect insurance coverage for the insured, unless either such disclosure is approved by the insured or the lawyer has assurances that the insuror will not use the information to the insured's disadvantage." (emphasis added)

Another portion of the Comment would also appear to be relevant, that being that when disclosure is indicated, "... disclosure adverse to the client's interests should be no greater than the lawyer reasonably believes necessary to the purpose."

The Rules advise a lawyer, when faced with possible continuing client fraud, to encourage the client to rectify the fraud and to counsel the client that the lawyer cannot be a party to continued client fraud. If the client refuses to rectify this course of fraudulent conduct the lawyer, pursuant to Rule 1.16, must withdraw.

This situation, of course, is clouded by the fact that a defacto multiple representation exists with both the insurance company, and Sally Roe, being clients. While there is, obviously, a community of interests between the insurance company and Sally Roe, that community of interest is predicated upon the insurance company's belief that coverage exists. The information you know has undermined that entire relationship. As indicated by the Comment to Rule 1.6, you should encourage your client to allow you to make disclosure to the insurance company. In any event you are impliedly authorized to make disclosure to the insurance company that a coverage question exists. The Rules limit this disclosure, in the Comment to Rule 1.6, to such information "necessary to the purpose". Accordingly, mere disclosure to the insurance company that a coverage question exists, with a

request that special counsel for the insured be appointed, would not, in our view, violate Rule 1.6. However, the arrangement for such appointment should assure special counsel's professional independence (Comment Rule 1.7).

In the absence of this limited disclosure you, as counsel for Sally Roe, are faced with the untenuous, and ethically unsupportable position, of assisting your client in perpetrating a fraud. On those facts, and assuming no disclosure, your withdrawal as provided for in Rule 1.16 would be indicated. In no event can you continue to represent Sally Roe under the facts and circumstances in your request, and you may not represent ABC Insurance Company any further in this cause.

AWJ/vf

1/15/91