Ethics: The Convergence of Ethics and Bad Faith

Ellis Murov
Deutsch Kerrigan & Stiles (New Orleans, LA)

emurov@dkslaw.com | 504.593.0655
http://www.dkslaw.com/attorney/bio?id=42

I. RELEVANT MODEL RULES OF PROFESSIONAL RESPONSIBILITY.

A. Rule 1.1. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

B. Rule 1.2(c). A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

C. Rule 1.3. A lawyer shall act with reasonable diligence and promptness in representing a client.

D. Rule 1.4(a)(3). A lawyer shall: ... (3) keep the client reasonably informed about the status of the matter ...

E. Rule 1.4(b). The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

F. Rule 1.7.

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> > (1) the representation of one client will be directly adverse to another client; or ...

G. Rule 1.9(a). A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirming in writing.

H. Rule 1.16(b)(1). Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client ...

I. Rule 1.16(d). Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

II. BACKGROUND.

A. Gerald Burge v. Parish of St. Tammany, et al., 996 F.2d 786 (5th Cir. 1993).

B. Gerald Burge v. Parish of St. Tammany, et al., 187 F.3d 452 (5th Cir. 1999).

C. Gerald Burge v. Parish of St. Tammany, et al., 336 F.3d 363 (5th Cir. 2003).

D. Stanley v. Trinchard, 500 F.3d 411, 428-29 (5th Cir. 2007).

E. Burge v. Northwestern National, 14 So.3d 616 (La. App. 4th Cir. 2009).

F. Kimberly Lentz in Her Capacity as Trustee of the Bankruptcy Estate of Gary Eugene Hale v. Northwestern National Insurance Company of Milwaukee, Wisconsin, No. 02-1235, United States District Court for the Eastern District of Louisiana.

G. Encapsulation of Decisions/Cases Above.

1. The St. Tammany Parish Sheriff's Office had $100,000 coverage for 1980-81 via a Manuscript Policy through American Druggists Insurance Company. American Druggists provided $1,000,000 for 1982-83 policy period. Coverage expired on September 1, 1983.

2. Douglas Frierson was murdered in 1980 in St. Tammany Parish.

3. Gary Hale, a St. Tammany Sheriff's Office detective, investigated the murder.

4. Gerald Burge was arrested and soon released.

5. Hale married Glenda Frierson, the victim's sister.

6. Burge was re-arrested in 1984 during the time that coverage was provided by Southern American Insurance Company ("Southern").

7. Burge was convicted of first degree murder in September 1986 and sentenced to life in prison at the Louisiana State Penitentiary. At the time, the Sheriff's Office was self-insured.

8. American Druggists and Southern went defunct.

9. Burge was afforded a new trial in 1991 because the Sheriff and/or the District Attorney's Office allegedly withheld exculpatory evidence.

10. Burge sued Hale and the St. Tammany Parish Sheriff's Office, as well as everyone connected to the investigation and prosecution.

11. Louisiana is a direct action state. Burge, therefore, could have sued American Druggists if it was not defunct.

12. Since Northwestern had provided a reinsurance endorsement to American Druggists, Northwestern succeeded to its obligations and became a defendant.

13. The Louisiana Insurance Guaranty Association ("LIGA") succeeded in part to the obligations of Southern American and became a defendant.

14. Northwestern had no files, including underwriting files related to the coverage, since American Druggists shipped their files to the Ohio Liquidator. Northwestern obtained the relevant policies from the Liquidator.

15. Northwestern denied coverage to Hale and the Sheriff's Office. Then, Northwestern hired a New Orleans law firm to defend it.

16. Subsequently, Northwestern decided to defend Hale and the Sheriff's Office for wrongful acts occurring during the 1980-83 policy period under a reservation of rights.

17. Northwestern and its law firm believed that Hale and the Sheriff would benefit from the law firm's knowledge acquired to date. The law firm (sometimes hereinafter referred to as "defense counsel"), accordingly, began to represent Hale as well as the Sheriff.

18. The Hale representation was difficult because:

a) Hale constantly moved around.

b) Hale said not to contact him other than to inform him of a trial date.

19. Another attorney assumed the representation of Northwestern.

20. The Sheriff hired separate counsel for the September 1, 1986 and beyond policy period.

21. Northwestern, the insureds and the Sheriff separately filed motions for summary judgment.

22. The Sheriff's Office opposed Northwestern's motion for summary judgment.

Defense counsel, on behalf of Hale, did not oppose Northwestern's motion.

23. The following had occurred by the end of the summer in 2000:

a) The Sheriff's Office said there was no other coverage, including no excess coverage, in response to discovery directed at trying to show that the Sheriff's Office had $1,000,000 in coverage for 1980-81 policy period.

b) Northwestern had rejected Burge's offers to settle and provide a complete release of Northwestern and its insureds for $800,000, $725,000 and $400,000.

c) Defense counsel and Northwestern's counsel wrote almost identical 10-page letters to Northwestern on July 21, 2000. Both counsel, inter alia, conveyed that there was some evidence showing that there was excess coverage through Lincoln National.

d) The July 21, 2000 letters also contained legal analysis regarding settlement and withdrawal from the case. More specifically, the letters said that it was in Northwestern's interest to pay at least policy limits ($100,000 less $50,000) for its policy period, and obtain a release.

e) Southern America (LIGA) paid its statutory limits and was dismissed.

24. Defense counsel handled negotiations with Burge's counsel. Settlement discussions focused on the existence/non-existence of $1,000,000 of coverage for 1980-81 and the consequences thereof as well as punitive damages.

a) Northwestern represented, with justification, that it provided $100,000 (less $50,000).

b) Northwestern also asserted that it was not liable for acts committed outside of its policy period.

c) Burge contended that the Sheriff procured or intended to procure $1,000,000 and that there was, accordingly, $1,000,000 in coverage for 1980-81.

25. A settlement was confected pursuant to which:

a) Northwestern paid $75,000.

b) Burge released Northwestern for all wrongful acts occurring during the 1980-83 policy period (the "Burge Release").

c) Burge reserved the right to pursue punitive damages against Hale and the Sheriff.

d) Burge reserved claims against Hale and the Sheriff for the 1983-86 and 1986 and beyond policy periods.

e) The phone records of the law firm show calls to Hale the next day.

26. Northwestern required Hale to release it (the "Hale Release") of its obligations under the policy.

27. The law firm obtained the Hale Release.

28. The law firm then withdrew from representing Hale, but not before:

a) Urging Hale to obtain counsel.

b) Obtaining a continuance of trial so that Hale could obtain separate counsel.

29. The case proceeded to trial where:

a) Hale represented himself.

b) The Sheriff was represented by counsel.

30. A jury awarded Burge $4,000,000.

31. Hale, who was impecunious, did not appeal.

32. The Fifth Circuit reversed the award against the Sheriff on appeal.

33. Burge unsuccessfully tried to convince Hale to sue the law firm and Northwestern.

34. Burge placed Hale in involuntary bankruptcy.

35. A Bankruptcy Trustee sued the law firm for malpractice and Northwestern for bad faith, as well as liability for the alleged misdeeds of the law firm.

36. The Trustee learned through discovery in 2004 directly or indirectly from the Ohio Liquidator's office that Lincoln National Insurance Company in fact had provided $900,000 of excess insurance to American Druggists for the 1980-81 policy period.

37. Hale testified in deposition that:

a) The law firm did not contemporaneously convey Burge's settlement offers.

b) The law firm did not adequately explain the Burge Release, much less the difference between the Burge and Hale Releases. He allegedly thought the Burge and Hale Releases were identical.

c) He believed that his only potential exposure at trial was for punitive damages.

d) He signed the Hale Release after a courier from the law firm presented it to him and asked him to sign it.

e) He was not provided with the files of the law firm.

38. In 2007, the Fifth Circuit reversed entry of summary judgment in favor of Northwestern and the law firm. In so doing, the Fifth Circuit noted the existence of disputed material facts regarding the amount of coverage and policy period. Stanley, 500 F.3d at 429. The Stanley court also noted the existence of disputed material facts regarding communication of essential information, including coverage limits, settlement offers and policy periods. Id. Finally, the Stanley court noted the differences in the Burge and Hale Releases. Id. at 430.

III. RULE 1.1 and 1.9(a) ISSUES.

A. The Trustee asserted the existence of a conflict arising out of defense counsel's initial representation of Northwestern and its subsequent representation of both the Sheriff and Hale under a reservation of rights.

B. The Sheriff's counsel purportedly did not want to waive a defense that Hale was acting outside of the course and scope of his employment when he allegedly surreptitiously withheld exculpatory evidence. This arguably created a conflict.

C. Insurers owe their insureds competent defense counsel. See Griffin Dewatering Corp. v. N. Ins. Co. of New York, 176 Cal. App. 4th 172, 196 (2009) (stating that since "insurance companies do not have law degrees, in practical effect the 'duty to defend' means a duty to hire competent counsel to conduct the defense of a lawsuit against the policyholder.").

D. Conflicts affect competency. Cf. Keen v. State, 164 Ga. App. 81 (1982) (stating that "[i]t is a fundamental principle that the Sixth Amendment guarantee of effective assistance of counsel includes the right of an accused to be represented by an attorney free of any conflicts of interest.").

E. But, did the law firm violate ethics rules if Northwestern consented in writing to its representation of Hale/Sheriff?

IV. THE RULE 1.2(c) ISSUE.

A. Insurers do not pay for defense counsel to contest a motion for summary judgment based on lack of coverage.

B. The Trustee did not challenge same.

C. Rather, the Trustee alleged that the law firm was obligated to contest the motion until it informed Hale that it could not do so and advised Hale of the need to procure his own coverage counsel.

D. The law firm correctly asserted that Louisiana custom and practice did not require it to oppose Northwestern's motion.

E. If defense counsel orally communicated with Hale that it could not oppose and advised Hale to obtain separate counsel to contest coverage, was same adequate?

V. THE RULES 1.1 AND 1.3 ISSUE.

A. Northwestern had no duty to locate Lincoln. See Tillman v. Custom Aggregate, 686 So.2d 118 (La. App. 1st Cir. 1986).

B. Defense counsel has a duty to investigate all relevant facts.

C. Defense counsel testified that it looked for other coverage and relied on the Sheriff, who said that there was not any additional coverage.

D. Should defense counsel have, nevertheless, placed Lincoln on notice?

E. The Trustee argued yes, citing Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 A.D.3d 34 (N.Y. S.Ct. App. Div.2d 2006), where the defense lawyers actually placed the excess carrier on notice, but the notification was untimely and the insured filed a legal malpractice claim for the delay. Id. at 36-37. Although the lower court dismissed the case citing a lack of duty, the appellate court reversed. It concluded the defense lawyers had failed to establish they had limited the scope of their representation to exclude dealings with excess insurance. Id. at 41-42. It also determined that the question of whether an attorney is liable for failing to investigate insurance coverage is necessarily based on all the facts, and rejected the contention that an attorney's representation is inherently more limited if an insurer and not the insured is paying him. See id.

VI. THE RULE 1.4 ISSUES.

A. Rule 1.4(a)(3) requires counsel to keep clients abreast of developments.

B. Rule 1.4(b) requires counsel to give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

C. Even though Hale told the law firm not to communicate with him, other than to notify him of trial, the Trustee accused the law firm of failing to keep Hale abreast of settlement offers and asserted that the failure was material because:

1. The law firm or another attorney on Hale's behalf could have supposedly pressured Northwestern to pay enough money to obtain a complete release.

2. The defense afforded Hale by Northwestern was more valuable than an incomplete release.

D. Attorneys violate ethical obligations by failing to communicate settlement offers. See In re Doyle, 978 So.2d 904 (La. 1008); La. Bar Ass'n v. St. Romain, 560 So.2d 820, 824 (La. 1990).

E. The jurisprudence below reflects cases holding/not holding insurers liable for not advising insureds of settlement offers:

1. Roberie v. Southern Farm Bureau Cas. Ins. Co., 250 La. 105, 194 So.2d 713 (1964). There, the insurer was held in bad faith for not conveying settlement discussions, because it would have made a difference to the insured who could have contributed to the settlement and avoided a judgment in excess of policy limits.

2. McGee v. Omni Insurance, 840 So.2d 1248 (La. App. 3d Cir. 2003). There, the insurer refused to pay in settlement a sum in excess of policy limits. The case could have been settled for policy limits plus judicial interest. The insurer did not convey this information to the insured. The insured would and could have paid. As a result, the court found the insurer to be in bad faith.

3. Younger v. Lumbermen's Mutual Casualty Company, 174 So.2d 672 (La. App. 3 Cir.) writ refused, 247 La. 1086, 176 So.2d 145 (1965). This is another bad faith refusal to settle case, but there, the insurer prevailed. Moreover, the insurer prevailed even though it did not convey the settlement offer.[1]

F. Best practice calls for attorneys to always communicate offers to clients in writing. At least, attorneys should write clients asking them to call to discuss recent developments and then memorialize said conversations.

VII. THE RULE 1.4(b) ISSUE.

A. Rule 1.4(b).

B. Northwestern and the former defense counsel

argued that the Trustee could not pursue claims against them due to the Burge and Hale Releases.

C. Releases are enforceable if they are knowing and voluntary. See, e.g., 29 U.S.C. § 626(f).

D. The Trustee was able to argue Hale's consent was not knowingly and voluntarily obtained. The Fifth Circuit recognized the existence of a disputed material fact. Stanley, 500 F.3d at 436.

E. How does defense counsel insure that client's consent is knowing and voluntary?

VIII. THE RULE 1.9(a) ISSUES.

A. Rule 1.9(a).

B. Did the July 21, 2000 letters evince an ethical violation?

C. Why? Why not?

D. The Trustee also attacked the Hale Release, asserting that:

1. It was not in Hale's best interest to sign it.

2. The law firm should not have had it presented to Hale.

E. Was this an exercise that should have been handled by defense or coverage counsel?

IX. THE RULES 1.1 AND 1.16 ISSUES.

A. Rule 1.16.

B. Could this case have been safely settled when:

1. There was a dispute on policy limits?

2. There was a coverage period dispute?

3. Summary judgment had been denied?

4. There are settlement discussions?

5. After the settlement, the law firm withdrew as counsel for Hale (and the Sheriff)?

C. What obligations did defense counsel have?

D. The Trustee contended that defense counsel should not have participated in the settlement recommendation that included withdrawal because Hale needed trial counsel, not an incomplete release.

E. Did defense counsel do anything wrong?

F. Did defense counsel do anything wrong under Pareti v. Sentry Indem. Co., 536 So.2d 417 (La. 1988). There, the Louisiana Supreme Court stated:

> When multiple claims are filed against the insured that have the potential for exceeding the insurer's policy limits, the insurer must act in good faith and with due regard for the insured's best interest in considering whether to settle one or more of the claims. Hotzclaw, 355 So.2d at 858. An insurer which hastily enters a questionable settlement simply to avoid further defense obligations under the policy clearly is not acting in good faith and may be held liable for damages caused to its insured. See Sutton Mutual Cas. Co. v. Rolph, 109 N.H. 142, 244 A.2d 186, 188 (1968); Lumbermen's Mutual Cas. Co. v. McCarthy, 90 N.H. 20, 8 A.2d 750 (1939).
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> If in fact an insurer enters into a good faith settlement for policy limits and thereby terminates its defense obligations under the express terms of the policy, the insurer must make every effort to avoid prejudicing the insured by the timing of its withdrawal from the litigation. The insurer should make allowances for the time that the insured will need to retain new counsel, and should continue to represent the insured after the settlement, if necessary, until new counsel can be retained. See 8 Appleman, Insurance Law and Practice § 4685 (1962).
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> Further, any payment of the policy limits which does not release the insured from a pending claim (e.g., unilateral tender of policy limits to the court, the claimant or the insured), even if sufficient to terminate the duty to defend under the wording of the policy involved, raises serious questions as to whether the insurer has discharged its policy obligations in good faith.

Id. at 423-24.

G. The Trustee also argued that the law firm should have provided Hale with portions of its files so as to facilitate his ability to defend himself. Defense counsel said it was willing to provide materials but was never asked. Is this adequate?

1. The Younger court noted:

Considering all the circumstances in this case, we are unable to say the insurer's failure to keep its insured informed of an offer to compromise within policy limits, even where the insured was clearly exposed to liability in excess of policy limits, amounted to a breach of duty such as to justify a holding of the insurer's bad faith. In this regard, we take into consideration not only that the insurer's defense to liability vel non was not without reasonable basis, but especially that the insured had made adamant, repeated, and consistent statements evidencing her strong and not unreasonable belief that the accident occurred without fault on her part and solely because the little girl ran from behind parked cars into the insured's path at a time when she could not avoid colliding with the child. ... nevertheless, under the present facts, the insurer's failure to communicate information of a compromise offer ... was without consequential connection with the reasonableness or not of the insured's rejection of the compromise offer, based upon its own insured's undeviating and not unreasonable version of the accident, which exculpated her from fault if it had been found by the trier of fact to be correct.

Id. at 679-80.

About Ellis Murov

Partner | **Deutsch Kerrigan & Stiles** | **New Orleans, LA**
504.593.0655 | emurov@dkslaw.com

Ellis B. Murov is a partner in the firm and serves as co-department head of the Labor and Employment Law Section. He advises and litigates in federal and state courts in the areas of business, intellectual property and labor and employment. He also has an administrative law practice before the National Labor Relations Board, Equal Employment Opportunity Commission, and Department of Labor, Wage and Hour Division. Mr. Murov has served as an adjunct professor of labor law at Loyola University School of Law. He is experienced in alternative dispute resolution and the American Arbitration Association has selected him to serve on a panel of arbitrators for employment disputes arising in Texas, Oklahoma, Alabama, Arkansas and Louisiana. He has also served as chairman of the firm's 401k and Profit Sharing Plan Committee since 2004.

Mr. Murov is the Global Law Experts representative for Labor & Employment Law in Louisiana. He has been voted to the Woodward/White list of "The Best Lawyers in America" every year from 2007 through 2012 in the area of Labor & Employment Law. The Best Lawyers list is compiled through an exhaustive peer-review survey in which thousands of the top lawyers in the U.S. confidentially evaluate their professional peers. He has also been selected for inclusion on the list of "Louisiana Super Lawyers" every year from 2007 through 2012, and has been included in the Chamber & Partners list of notable Labor & Employment attorneys from 2009 through 2012.

Mr. Murov's civic involvement has resulted in his being the recipient of the 1986 Louisiana Bar Association Award for Outstanding Achievement in the Area of Pro Bono Legal Services, and a Certificate of Merit from City of New Orleans "For Outstanding Service" in 1987. He also served as a member of the Special Committee for Insurance for the Louisiana Bar Association from 1987-1994. He served as a Vice Chair of the Employer-Employee Relations Committee of TIPS between 1999 and 2004, became Chair of said Committee in August 2004 and currently is a member of said Committee as well as a member of the Board of Editors of the Tort Trial & Insurance Practice Law Journal. He was a head coach for a little league baseball team between 1996-2001 and a manager for a premiere soccer team in 2002-2003.

Practice Areas

- Administrative Law
- Arbitration and Mediation (ADR)
- Class Actions
- Commercial Litigation
- Employment Contracts
- ERISA Litigation
- Labor & Employment

Education

- J.D., summa cum laude, Tulane University, 1979
- -- Tulane Law Review
- -- Order of the Coif
- -- Winner, Moot Court Trial Competition
- B.A., Political Science and Certificate of Russian Area Studies, Louisiana State University, 1972