

# No *Per Se* Conflict With Third-Party Payer

by Fred Dennehy and Carrie Ford

Last fall, the Supreme Court of New Jersey issued a decision that provides key guidelines under which attorneys must evaluate situations where potential clients agree to have their legal expenses paid by a third party. Specifically, *In the Matter of the State Grand Jury Investigation*, the Court upheld a trial court's denial of a motion to disqualify attorneys that a company had retained and paid to represent employees who were potential witnesses against that company.<sup>1</sup> The Court's analysis rested largely on its interpretation of the Rules of Professional Conduct, particularly on the interplay among Rules 1.8(f), 1.7(a)(2), and 5.4(c). A practical application emerged whereby an attorney may represent a client but accept payment, directly or indirectly, from a third party, provided each of six enumerated conditions is satisfied.

The case stemmed from a state grand jury investigation into whether a corporate contractor had submitted fraudulent invoices for services purportedly rendered to a county government. At the heart of the investigation was the company itself, and three of its employees. The company entered into four retainer agreements with four separate lawyers, three of whom were specifically for the three employees under investigation. The fourth attorney was retained for what the company identified as "all non-target current and former employees...in connection with the investigation."<sup>2</sup>

The four retainer agreements were nearly identical. They contained similar language delineating the company's ultimate responsibility for legal fees and costs, stating:

- that the retention of counsel was made with the company's "express understanding that the sole professional obligation" of counsel was to the particular employee;
- that counsel was "not required to disclose any legal strategy, theory, plan of action, or the like to the company;"
- that the company's obligation to pay counsel was "in no way" contingent "upon any such disclosures;"
- that the company's obligation to pay counsel in no way created a "professional relationship between the company

and [the] law firm;"

- that counsel's "reimbursement of legal fees and expenses...[was] neither conditioned upon nor dependent upon" counsel's "cooperation with the company or any other party;"
- that the company would receive only summary invoices while the particular employee would be provided detailed invoices; and
- that "upon receipt" the company was obligated to pay those invoices.<sup>3</sup>

The company notified the three employees in writing, stating that in connection with the state investigation the Attorney General's Office was conducting interviews of company employees. The purpose of the letter was to advise them of the arrangement the company had made to provide them with counsel.

Specifically, the letter stated, "upon advice of our attorneys in New Jersey, we believe it would be prudent to retain separate counsel to represent you personally in connection with the State's investigation...[the company] has retained counsel to represent you in connection with the investigation. You do not have to use [that specifically retained lawyer] as your attorney."<sup>4</sup> The letter further advised the employees that they were "free to hire [their] own attorney, at [their] own costs...[their] personal rights may conflict with the interests of the company...[the company] agrees to pay for [their] legal representation...[the company] has no obligation to do so and may stop paying those legal fees and costs at any time, should it believe it appropriate..."<sup>5</sup>

The company also informed all other employees that it had retained an attorney, at the expense of the company, for them to consult regarding the investigation.

The investigation escalated. The state subpoenaed two of the four attorneys hired to represent the employees. After those attorneys declined to comply, the state withdrew the subpoenas. The state notified the company that it and several unnamed employees had been designated as "targets" of the grand jury investigation.<sup>6</sup> Soon after, the state served grand jury subpoenas

for the company's records in connection with the four attorneys it had retained for its employees. While the company responded to the request, it withheld material it deemed privileged.

The state then filed a motion to disqualify the four attorneys from representing the employees in superior court, citing 1.5, 1.6, 1.7, 1.8 and 1.10 of the Rules of Professional Conduct. The employees submitted affidavits stating essentially that they were satisfied with the arrangement and could not afford to pay for an attorney themselves.

In denying the state's motion, the trial court recognized that RPC 1.5 relates to the reasonableness of attorneys fees; therefore, it had no bearing on the issue presented. Through the examination of the certifications by the four attorneys and the sample redacted invoices, the trial court was satisfied that under RPC 1.6, confidentiality of information between the client and lawyer was not affected by the company's arrangement, with the *caveat* that going forward all invoices sent to the company must be redacted so no specific information was to be included in the bills.

Despite the state's argument to the contrary, the trial court noted that since no specific conflict had been identified, and that pursuant to RPC 1.7, the general conflict of interest rule, clients may waive a potential conflict following disclosure and informed consent, the language contained in the retainer agreements and company's letters to the employees adequately addressed that concern.

The court did impose some restrictions to safeguard the employees. It required that prior to any attempt by the company to terminate payment to any one of the four attorneys, it must seek court approval.

After the Appellate Division denied the state's motion for leave to appeal the trial court's decision, the state petitioned for certification before the New Jersey Supreme Court. In addition to the

submissions by the parties' attorneys, the Court granted leave to the Association of Criminal Defense Lawyers of New Jersey to submit an *amicus* brief.

In its analysis, the Court noted that "to warrant disqualification in this setting, the asserted conflict must have some reasonable basis." In 2003, RPC 1.8(f) was reformulated to provide that "a lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and (3) information relating to representation of a client is protected as required by RPC 1.6."<sup>8</sup>

Thus, RPC 1.8(f) mandates that three factors must be present before a lawyer agrees to be paid by a third party. At the same time, however, RPC 1.7(a) prohibits a "lawyer from representing a client if that representation involves a concurrent conflict of interest."<sup>9</sup> A concurrent conflict can be a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to...a third person or by a personal interest of the lawyer."<sup>10</sup>

Finally, RPC 5.4(c) advises that an attorney "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."<sup>11</sup>

The Court rejected the state's argument that a *per se* conflict of interest exists when a target organization in a grand jury investigation chooses and retains counsel for employees who are potentially adverse witnesses *and* the selected attorney relies on the target organization for payment of services.<sup>12</sup> Instead, the Court fused the core concepts of RPC 1.7(a)(2), 1.8(f), and 5.4(c) to develop a practical and useful standard:

A lawyer may represent a client but

accept payment, directly and indirectly, from a third party provided each of the six conditions is satisfied"<sup>13</sup> –

- (1) securing "informed consent" from the client;
- (2) third party payer is prohibited from, in any way, directing, regulating or interfering with the lawyer's professional judgment in representing his client;
- (3) no current attorney-client relationship between the lawyer and third party payer exists;
- (4) third party is prohibited from communicating with the lawyer regarding the substance of the representation;
- (5) third party payment shall be in the course of regular business with the same speed and frequency it pays its own counsel; and
- (6) a third party payer, once committed as such, must continue to pay until relieved of its obligation by the court.

This analysis is, of course, fact sensitive.

Employing the principle the Court articulated in this decision will assist attorneys in avoiding representations that may run afoul of the conflict rules. More importantly, this decision will enable attorneys to avoid the knee-jerk reaction to decline representation of clients in similar situations. Attorneys who previously labored under draconian understandings of the Rules of Professional Conduct should now take an informed look at how they may evaluate the propriety of representing potential clients. ♪

## Endnotes

1. *In the Matter of State Grand Jury Investigation*, 200 N.J. 481 (2009).
2. *Id.* at 486.
3. *Id.*
4. *Id.* at 487.
5. *Id.*
6. *Id.* FN 1. In the context of grand jury investigations, a target is one at

whom a grand jury investigation is aimed. According to the 'target doctrine,' a person or entity must be advised that he or she is a target of a grand jury proceeding and as such, has a right not to incriminate him or herself. *State v. Vinegra*, 73 N.J. 484, 488 (1977). Furthermore, legislation has been enacted which recognizes the difference between a target and non-target. N.J.S.A. 2B:21-9.

7. *Id.* at 491, citing *State v. Harvey*, 176 N.J. 522, 529 (2003).
8. RPC 1.8 (2010).
9. RPC 1.7 (2010).
10. RPC 1.7(a)(2) (2010).
11. RPC 5.4 (2010).
12. *In the Matter of State Grand Jury Investigation, supra.*, 200 N.J. at 490.
13. *Id.* at 495-96.

**Fred Dennehy** is a shareholder at Wilentz, Goldman & Spitzer, P.A., and a member of the firm's appellate practice group. He has appeared frequently before the Appellate Division and the New Jersey Supreme Court, and has extensive experience in professional ethics and attorney defense work. **Carrie Ford** is an associate with the firm, practicing in the area of commercial litigation.