

Ethical Considerations Facing TRANSPORTATION ATTORNEYS



Teresa A. Gruber and
Noelle M. Natoli-Duffy*



Fact Pattern One

AZZ Trucking, Inc. is a large company with a 350 truck fleet. AZZ has corporate policies which require complete background checks on new hires, an annual review of each driver's DMV status, and regular random audits of the drivers' logs. A recent hire, Joe Driver, who has been working with AZZ for less than six months, fails a random drug test and is terminated immediately. Six months later the AZZ and Driver are sued for personal injuries arising out of an accident involving a load that Driver transported to a state with numerous toll roads. The Complaint includes a cause of action for negligent entrustment against the motor carrier. During the course of written discovery, Driver's logs are turned over to the plaintiff's attorney. At Driver's deposition, he is cross-examined regarding the fact that the times on his driver's logs do not match up with his fuel receipts or his toll receipts. Plaintiff's counsel does not know about the positive drug test, but Driver has admitted to a prior misdemeanor conviction for spousal abuse at his deposition. He swears he disclosed this conviction in his application--which is missing from his personnel.

Communication

Of all ethical obligations owed to our clients, frequent communication is one of the most important. Model Rule 1.4 provides, in pertinent part, as follows:

Attorneys who defend transportation cases face tactical issues and cost concerns, and in addition often must confront ethical dilemmas that require special additional care and caution. The defense of transportation-related lawsuits gives rise to some unique issues. Conflicts of interest often arise when representing both corporate insureds as well as drivers, each of which have different interests. Often sharing information with various interested parties might not be in the best interest of each party. This article will address conundrums which routinely face transportation attorneys and the ethical rules applicable to those situations.

Our discussion centers around two fact patterns which will be analyzed in the context of the American Bar Association's Model Rules of Professional Conduct, adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most states, and for the sake of consistency, they are cited to throughout this discussion. However, when defending accident cases the applicable state's rules of professional conduct must also be consulted, as there may be subtle differences between them and the ABA Model Rules.

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent...
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct...
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The definition of "client" is crucial to the application of this rule. In this fact pattern, both the motor carrier and the driver are clients. Pursuant to this rule, attorneys are not always required to convey everything the employee tells them to the employer motor carrier, but must explain matters to the extent reasonably necessary to permit the motor carrier to make

*Teresa A. Gruber, Molod Spitz & DeSantis, P.C., New York, New York.
Noelle M. Natoli-Duffy, Foley & Mansfield, Los Angeles, California.

informed decisions regarding the representation. If Joe Driver reveals criminal acts of which his employer might not be aware, the lawyer does not have a duty to tell A2Z unless it would have a material affect on the A2Z's defense.

Under this fact pattern, an attorney is not obligated to tell the motor carrier employer everything a driver discloses, but the lawyer is obligated to instruct his client to testify truthfully. Moreover, pursuant to Professional Conduct Rules regarding confidentiality, our next topic, the attorney is likely required to maintain confidentiality on behalf of the driver that he has been assigned to represent.

Confidentiality of Information

Model Rule of Professional Conduct Rule 1.6 provides, in pertinent part, as follows:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, . . .
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . .
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another . . .;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another . . .
 - (6) to comply with other law or a court order . . .

If, as posed above, Joe Driver reveals prior criminal acts of which the company was not previously aware, the lawyer not only does not necessarily have a duty to tell A2Z, he may indeed have has an obligation pursuant to Rule 1.6 to maintain

the confidentiality of the information. Alternatively, if the driver reveals prior criminal convictions, defense counsel should communicate that fact to the company, particularly if A2Z is being sued for negligent hiring and entrustment, because the question will arise at trial as to whether the background check conducted on Driver prior to hiring was adequate. Plaintiff's counsel will question whether "but for" their alleged inadequate background check on Joe, they would not have hired him, and ergo, the accident would not have happened. It is not uncommon for transportation attorneys to defend drivers with a prior criminal infraction, but the question to be asked is whether that infraction has any bearing on the ability to drive his truck in a safe manner. If the prior conviction has no bearing on driving abilities, or driving history, the attorney should argue it is not relevant to the civil case at bar.

Defense counsel also needs to advise the motor carrier of the inconsistencies between logs and the toll road receipts. In particular, A2Z needs to be aware of its failure to catch the inconsistencies between the logs and receipts and to face questions of whether the driver's logs are being audited, and if so, whether the audit procedures are effective.

Attorney's Duty to the Driver as Opposed to the Insurer

Suppose Joe Driver privately reveals to the attorney that he was falsifying his logs because a company supervisor required him do so. On the one hand, the attorney does not have to notify the insurer of this fact, based on the attorney's obligation to the insured to honor the attorney-client privilege. When the insured provides information to defense counsel that, if passed on to the insurer would prejudice the insured's right to coverage, defense counsel may not disclose such information to the insurer, even though acquired during the representation for which the insurer retains

counsel. See ABA Informal Opinion 1402 (1977). This is a direct result of the attorney's duty to honor the attorney-client privilege, and the obligation in this instance is to the insured driver.

On the other hand, the driver's conduct may change the attorney's evaluation as to the probability or extent of an adverse result, and if so, the attorney owes it to the client to communicate that fact to the insurance carrier so that they can raise their reserves, and make sure adequate settlement funds are available in order to avoid personal exposure to A2Z. Therefore, a weighing of interests must take place, and, quite obviously, the attorney much communicate often with the client so the client is fully informed and consents to the disclosure, if any.

If Joe Driver is still employed by the motor carrier, Driver may not want to share this information with A2Z for fear that the motor carrier will discipline him or terminate his employment. A motor carrier would want to be aware of the information. A lawyer can be faced with a difficult decision in determining whether the information learned is information that would keep each client reasonably informed about the status of the matter pursuant to Rule 1.4, or whether it is information that should be kept confidential as a driver might want it to be pursuant to Rule 1.6. As will be seen, a much different result follows if Joe Driver is not a named defendant in the case. See discussion of Rule 1.13 below.

Conflict of Interest

In situations such as these, it becomes glaringly obvious that conflicts of interest can arise, as governed by Model Rule 1.7, which states in pertinent part:

- (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:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Attorneys often encounter potential conflicts between how the motor carrier wants the case defended versus how the driver wants it defended. For instance, in Joe Driver's fact pattern above, let us assume that he was driving home for an unscheduled layover, or worse, using the company truck for a night out on the town when he was not authorized to do so, rather than taking it to a secured lot. There is now a dispute between the company and the driver as to whether he was in the course of his employment on a return trip or off on a personal jaunt. Based on Rule 1.7(a)(1) above, there are often times when the defense of two clients by the same attorney must be split, because the representation of one client will be directly adverse to the other client. However, in a case of pure negligence (no negligent entrustment theory), the trucking company's exposure is derivative and cannot exceed Joe's exposure. Be aware, the attorney should probably keep the insurer apprised of these developments so the reserves can be adjusted. Most importantly, information that could impact coverage should be communicated to all of the clients so they have realistic expectations.

Returning to our fact pattern, either Joe Driver never told the company about the prior misdemeanor conviction for spousal abuse, or he did and the company hired him anyway.

At first glance, this may appear to require a split defense based on Rule 1.7(a)(1), which states that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, where the representation of one client will be directly adverse to another client. However, in this case, a trucking company client might not refuse to hire someone based on such a conviction. Regardless, this is irrelevant to a negligent entrustment claim because it also has no bearing on the driver's alleged negligence. The prior conviction does not provide any insight to the company regarding the driver's ability to drive, and no conflict ensues because the representation of each client will not be directly adverse to the other.

Organization as Client

Conflicts may also arise when representing both a company and an employee, and such scenarios are specifically addressed in Model Rule 1.13, which provides, in pertinent part:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action . . . that is a violation of a legal obligation to the organization, or a violation of law . . . and that is likely to result in substantial injury to the organization, then the lawyer shall proceed . . . in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization

(c) Except as provided in paragraph (d), if

- (1) despite the lawyer's efforts . . . the highest authority . . . insists upon . . . an action, or a refusal to act, that is clearly a violation of law, and
 - (2) . . . the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7

An attorney's obligation is to the organization, not its officers or employees. In the scenario above, if the Vice President of Safety and Compliance admits to the falsification of logs, he creates a potential conflict of interest where the attorney represents the organization, the officers, and the driver—in this instance AZZ Trucking; Safety Director; John Doe; and Joe Driver. If the conduct of falsifying the logs is an ongoing practice, the attorney would have a duty to report it to the organization as it is a violation of law that reasonably might be imputed to the company, which, pursuant to Rule 1.13(b), would require the attorney to refer the matter to higher authority in the company.

Suppose further that the conduct of falsifying the logs is ongoing, and the attorney consults the President of AZZ, who insists on continuing this practice. In this situation, the attorney would be defending a civil suit which includes an allegation of falsification of driver's logs, which would constitute an alleged violation of law. The lawyer cannot reveal this information, even if he reasonably believes doing so would prevent substantial injury to the company as set forth in Rule 1.13(c)(2). This is because Rule 1.13(d), indicates that paragraph (c) will not apply with respect to information regarding a lawyer's representation of a company to defend the organization or an officer or employee against a claim arising out of an alleged violation of law. However, once again, the lawyer would have to examine what conflicts of interest would arise between the driver and the company in such a scenario and depending on whether the parties can agree upon the facts, the lawyer might have to consider recommending splitting the defense of the clients between two new lawyers, pursuant to Rule 1.7 regarding conflicts, above, as he cannot continue to only represent one party in light of the information he has already learned.

Evaluation for Use by Third Persons

Claims such as these require reporting to the insurance company that has retained the lawyer, covered by Model Rule 2.3:

- (a) A lawyer may provide an evaluation of a matter . . . [to] someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
- (b) When the lawyer knows . . . the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
- (c) . . . information relating to the evaluation is otherwise protected by Rule 1.6.

An attorney that is retained by an insurer is expected to provide an evaluation of issues raised by the facts and the applicable legal analysis to the insurance carrier. However, if the insured gives the attorney information that could affect the insured's coverage, attorneys are cautioned to err on the side of non-disclosure to the insurer, because disclosure of information given to the attorney by the insured without a waiver constitutes violation of the attorney-client privilege. If the attorney has any reasonable basis to believe that disclosure could adversely affect the insured's interests, then defense counsel should not provide that information to the insurer.

However, it is also important to note that if the information contained in the evaluation to the insurance carrier will not adversely affect the insured, it should be provided, and the information contained therein remains protected by the attorney-client privilege as set forth in Rule 2.3(c).

Fairness to Opposing Party and Counsel

Model Rule 3.4 addresses ethical considerations about whether and when to share detrimental information with opposing counsel, and is set forth, in pertinent part, as follows:

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or . . . counsel or assist another person to do any such act;
- (b) falsify evidence
- (c) knowingly disobey an obligation under the rules of a tribunal
- (d) . . . make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request

If there is a question as to whether a party must turn over late-disclosed information, such as additional receipts that place the driver at a geographical location at a certain time that is not favorable, the attorney must be candid and up front with opposing counsel as soon as possible.

Sometimes clients want their attorneys to take a very uncompromising approach, and in turn, attorneys take pride in representing clients zealously. However, as demonstrated by Rule 3.4, attorneys are governed by not only their own moral compass, but also by the rules of ethics. Moreover, from a tactical perspective, the sting of unfavorable evidence is always less if a party discloses and presents such evidence itself, rather than allowing the opposing party the upper hand in the dissemination of such information or evidence.

Fact Pattern Two

Jimmy Smalltime, an independent owner-operator of a one truck operation, is involved in an accident with a passenger vehicle, resulting in the death of the vehicle's passenger. The decedent is a famous, young movie star with a known history

of drug abuse, Marlowe Hightower, often referred to in the media by the moniker, “M.Hi.” The accident occurs in inclement weather conditions, and based on the Jimmy’s admissions at the scene, the police conclude he was driving at excessive speeds at the time of the accident. Based on the recommendation of the investigating officer, the district attorney charges Jimmy with negligent homicide. Jimmy has no prior criminal history, and is offered a plea bargain, but does not know what to do and is not comfortable with the lawyer that has been appointed to defend him. While Jimmy is considering the plea bargain, the Department of Motor Vehicles schedules an administrative hearing that may result in the revocation of his commercial driving privileges. The decedent’s family files suit a few days later. The insurer retains an attorney to defend Jimmy and his company, Smalltime Haultime, Inc. against a wrongful death claim brought by M.Hi.’s estate.

Competence

Model Rule 1.1, involves competence of attorneys, and is set forth below:

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

The attorney retained by the insurance company to defend the negligence claims is often faced with the issue of competence in dealing with Jimmy’s DMV administrative hearing and his criminal prosecution. In the face of his own financial struggles, Jimmy might prefer that the attorney retained by the insurance company also handle the DMV administrative hearing and the criminal prosecution, or even file a cross-complaint for malicious prosecution. The insurer’s attorney is likely not the best attorney to handle all of these issues. Issues

of conflict may persist in a case, but issues of competence can be outright avoided.

The attorneys may be compelled to advise the driver that he is unable to represent him in any criminal or administrative proceedings. If the attorney is retained for accident response, he should assist the driver in retaining criminal counsel right away (if authorized by the company) and advise the driver not to talk to anyone until a criminal attorney is retained. If necessary, the attorney should explain to the driver that he can invoke his Fifth Amendment rights against self-incrimination. Attorneys cannot go beyond their expertise, or scope of representation under Rule 1.2. That said, if a driver requests that the attorney ask the carrier to retain an attorney in connection with his criminal or administrative proceedings, the attorney has a duty to report that request, particularly to the extent the outcome of those proceedings (i.e. a criminal conviction) could adversely affect the exposure in the civil action.

Moreover, even though the civil defense attorney does not represent the driver in a criminal suit or administrative proceeding, the civil defense attorney’s attendance should be considered for hearings or other instances where the driver is compelled to testify, since the testimony can impact the civil suit, or at the very least, the civil defense attorney should keep abreast of any important developments which could affect the defense of the civil suit.

Scope of Representation and Allocation of Authority Between Client and Lawyer

Model Rule 1.2 discusses an attorney’s scope of representation, and is set forth below:

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and ... shall consult with the client as to the means by

which they are to be pursued

- (c) A lawyer may limit the scope of the representation

An attorney is often retained to be responsible for only one aspect of litigation, and in the fact scenario above, the lawyer was retained to defend the company and driver for the wrongful death claim brought against them by M.Hi. If Jimmy was also injured and alleges negligence on the part of the driver of M.Hi’s vehicle, or there was property damage or cargo loss on the part of Smalltime Haultime, the insurer’s defense attorney might be asked for assistance in bringing these claims. Attorneys should be aware of the potential conflicts that arise, but also that their assignment can be limited in scope by the insurer. Insurers should be acutely aware of their right to limit the scope of the work for which the attorney is retained. Most importantly, the attorney needs to communicate with the client regarding the scope of the representation so the client has reasonable expectations as to what services the attorney is and is not providing.

Meritorious Claims and Contentions

The reference to the potential plaintiff’s substance abuse problems should be guided by Model Rule 3.1, which is set forth below as follows:

A lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous

Attorneys are often faced with trucking company principals who want them to file cross-complaints for malicious prosecution. Attorneys are sometimes also asked by insurance carriers to assert a theory of defense that they know they do not have the facts to support. Attorneys have an obligation to only put forward truthful assertions that are based on admissible evidence. For example, in

the case of Jimmy Smalltime, M.Hi's medical records could show that she was under the influence of illicit drugs. However, as a passenger in the vehicle, this has limited relevance. Allegations of negligence on the part of the plaintiff who was a passenger, without relevance or evidence of same, can be dangerous and can also appear to be a case of beating up on the victim. On the other hand, if the evidence can be subtly introduced by an expert as part of a reduced life expectancy argument, particularly since the decedent was infamous for her drug use, it can be an effective argument for reducing the damage award, rather than seen as an attack on the victim.

Trial Publicity

This fact scenario is also likely to generate a great deal of trial publicity, which is governed by Model Rule 3.6::

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter

Attorneys are generally required to avoid publicity. The rules that apply to lawyers do not apply to clients. While clients might be tempted to fuel the flames of the publicity the case is already receiving, attorneys are ethically bound not to make public statements that do not fall within one of the exceptions set forth in the rules. Additionally, attorneys should counsel their clients in this regard,

and drivers should be instructed in dealing with the media. If a company does not have a policy in dealing with the media, one should be created.

Conclusion

The ethical considerations facing transportation attorneys which affect their clients are numerous and complex. In addressing these scenarios, we have examined the ethical rules which guide transportation attorneys, as well as suggesting practical ways of handling these situations when they do arise, while simultaneously providing the best defense against the claim. 