PRESERVING THE TRIPARTITE RELATIONSHIP: EXAMPLES OF NAVIGATING THE RELATIONSHIP BETWEEN THE INSURER, INSURED AND ATTORNEY TO AVOID CONFLICTS OF INTEREST

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PRESERVING THE TRIPARTITE RELATIONSHIP: Examples of Navigating the Relationship Between the Insurer, Insured and Attorney to Avoid Conflicts of Interest

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No one can serve two masters; for either they will hate the one and love the other, or they will be devoted to the one and despise the other.

Matthew 6:24

Defense attorneys often find themselves grappling with this concept when they are retained by an insurance carrier to represent an insured. The tripartite relationship is often described as a three-party relationship with mutual obligations owed between the insurer, the insured and the attorney retained to represent the insured. Within the complex relationship, attorneys must finesse a balancing act of the duties they owe to the insured and the insurer that derive from the attorney-client relationship, the rules of professional conduct and the insurance contract.

Certain scenarios often create conflicts for a defense attorney that compromise the duties owed to the client (or often times the "clients" as explained below). This article provides a brief overview of the tripartite relationship, the ethical obligations and duties owed by an attorney to the client (who is not always easy to determine) and some of the common situations that create conflicts of interest during the course of representation. The information and advice in this article is not exclusive to the defense of an insured, but rather applicable to almost any situation in which a third-party is providing the funds to an attorney for the representation of another, the client. Although by no means an exhaustive list of possible conflicts, this article examines some of the common scenarios that create conflicts for defense attorneys and offers some effective examples of proper communication so as to help attorneys in their "service to two masters".

I. The Rules of Professional Conduct

The Rules of Professional Conduct provide guidance for attorneys on the ethical duties owed to a client. Although such ethics vary by jurisdiction, the American Bar Association's Model Rules of Professional Conduct have been adopted by a majority of jurisdictions and provide a general foundation for the ethics attorneys must adhere to while providing legal services. In the tripartite relationship, a number of professional conduct rules are evoked that the attorney should consider in their representation of a client. Some of the most crucial rules of conduct are as follows:

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a. Rule of Professional Conduct 1.6 - Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(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 and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

b. Rule of Professional Conduct 1.4 – Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(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 when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

c. Rule of Professional Conduct 1.7(b) – Conflict of Interest: Current Clients

Under Rule of Professional Conduct 1.7(b), "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." The model rule further explains, "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." Although reading rather straightforward, when viewed through the lens of the tripartite relationship, this rule requires the defense attorney to not only recognize and remedy conflicts between the insured and insurer but also foresee the scenarios in which their representation is potentially conflicted and take all necessary steps to ensure such scenarios do not impair the lawyer's representation of a client.

d. Rule of Professional Conduct 1.8(b) - Conflicts of Interest: Current Client: Specific Rules

Under the tripartite relationship, the requirements of RPC 1.4 and RPC 1.8(b) can present conflicting obligations on the attorney. Rule 1.8(b) provides, "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."

The drafters of the Model Rules of Professional Conduct provide further comment on the importance of independence in the attorney's representation of a client. "Comment [14] - Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another)."

II. Who is the Client?

With the ethical obligations in mind, a threshold question comes to the forefront in the tripartite relationship, "who is the client?" On one hand, upon assignment by the insurer, the attorney enters their appearance before the court on behalf of the insured, obtains valuable information from and works up the case with the insured, and ultimately tries a case with the insured joining them at

counsel's table during trial. On the other hand, the attorney receives its assignment from the insurance carrier who is paying the bills. The insurance carrier may send multiple claims to the attorney or their firm and a business relationship develops over time. The attorney may know the adjuster well and discuss claims with them frequently. Pursuant to most insurance policies, the insurance carrier is the entity with final control over the strategic decisions in the litigation. This begs the question, "who is my client?"

a. Two-Client Model

A majority of jurisdictions say both.[2] Courts have adopted one of two approaches when examining the tripartite relationship. Under the two-client approach, courts essentially acknowledge the existence of two clients, the insured and the insurer, but when there is a conflict, they tend to stress the attorney's obligation to the insured.[3] The Nevada Supreme Court has succinctly provided an explanation of this model holding:

> The majority rule is that counsel represents both the insurer and the insured in the absence of a conflict. This rule requires that the primary client remains the insured, but counsel in this situation has duties to the insurer as well. Courts adopting this rule note that, while the insured is the primary client, counsel generally learns confidential information from both the insured and the insurer and thus owes both of them a duty to maintain this confidentiality; and, since counsel generally offers legal advice to both the insured and the insurer, counsel owes a duty of care to both.

Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court, 152 P.3d 737, 741 (Nev. 2007).

Additionally, Florida law recognizes a tripartite relationship between the insurer, the insured, and the lawyer assigned to defend the insured in which the lawyer owes a duty of care to the insurer as well as the insured. In *U.S. Specialty Ins. Co. v. Burd*, 833 F.Supp.2d 1348, 1350 (M.D. Florida 2011), an insurer that issued a premises liability policy brought a legal malpractice action against an attorney it had hired to defend its insured, an air museum, in a personal injury action involving an aircraft that fell on two people, killing one and seriously injuring the other. The District Court permitted the insurer's malpractice action, holding that it was clear under Florida law that a tripartite relationship normally existed in such cases. *Id*. at 1353. Further, the court noted that the comments to Rule Regulating Fla. Bar 4-1.7(c) recognized that, in the absence of a conflict of interest, **a lawyer may represent both the insurer and the insured.** *Id*., discussing 4-1.7 cmt. "A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." *Id*. at 1355, quoting the Restatement (Third) of the Law Governing Lawyers § 121. The District Court held that because

[2] Nathan M. Crystal, PROFESSIONAL RESPONSIBILITY–PROBLEMS OF PRACTICE AND THE PROFESSION 251 (5th ed. 2012); Czarnecki, supra note 8, at 174 ("The Two-Client Theory is currently the majority view of the tripartite relationship among American courts."). See also *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593, 595 (Ariz. 2001) ("Adopting what it described as the majority rule in this country, the court [of appeals] concluded that absent a real or apparent conflict between the insured and the insurer, the lawyer assigned by the latter to represent the former actually represents both.")

[3] *Id*.

a tripartite relationship existed, the insurer could bring a malpractice action against defense counsel. *Id*. at 1357.

b. One-Client Model

Under the one-client model, the attorney's duties are owed to the insured and to the insured alone. In Colorado, an attorney retained by the insurance carrier owes a duty to the insured only; there is no attorney-client relationship between an insurance carrier and the attorney it hires to represent the insured. *Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270, 1272 (D. Colo. 2004). Additionally, Kansas law has been interpreted to hold, "established insurance law principles, insurance companies often hire independent counsel to represent an insured while reserving the right to later contest coverage." See *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 712, 732 P.2d 741, 745 (1987). In such circumstances, retained counsel owe their duty of loyalty to the insured, not the insurance carrier. *United States v. Daniels*, 163 F. Supp. 2d 1288, 1290 (D. Kan. 2001). In the civil context, insurance companies often provide a defense (at least initially) while contesting an obligation to defend or indemnify an insured. Even in such "voluntary" payment situations, counsel retained by the insurance carrier owes their duty of loyalty to the insured. *Id*. at 1290.

Under the one-client model, the insurance defense attorney represents the insured alone, under the two-client model, the attorney represents both the insured and the insurer who hired them. Thus, under the latter, any potential conflict includes those between two current clients, as opposed to merely arising from the fact that the insurer is paying for the representation. Jean Fleming Powers, *Advantages of the One-Client Model in Insurance Defense*, 45 N.M. L. Rev. 79, 81 (2014).

III. Potential Conflicts that Occur During Representation

With the duties imposed by the rules of professional conduct and with the majority two-client model in mind, let's examine some of the common scenarios that cause potential conflicts of interest for the attorney during representation.

a. Counsel's Acquiring of Information that Could Provide a Coverage Defense

One of the most common conflicts that arises during the representation of an insured is when an attorney, through the course of their investigation, acquires information that could adversely affect coverage from the insurer. Whether through their own investigation efforts or simply disclosure from the insured directly, the attorney may obtain information relating to an intentional act which would negate coverage under most insurance policies. As another example, the insured may be uncooperative and not working with counsel to defend the claim. Generally, an insured's lack of cooperation with counsel negates coverage based on the terms of the insurance policy.

With this acquired information the attorney usually finds themselves in a difficult position when updating an adjuster or responding to requested information from the carrier. Under the two-client model, the attorney must keep the insurer informed pursuant to Rule of Professional Conduct 1.4 and "promptly comply with reasonable requests for information". However, the attorney is also forbidden from disclosing information that could adversely affect the insured (by way of lost coverage) under Rule of Professional Conduct 1.8(b).

Luckily, a number of jurisdictions have spoken on this particular issue. Generally, courts hold that counsel is barred from sharing this information with the insurer. Where, as a result of attorney-client relationship with an insured, an attorney who has been retained by an insurer to represent the insured obtains information that could possibly be detrimental to the insured's interest under the policy, [they] should notify the insurer that [they] can no longer represent its interests. *Parsons v. Cont'l Nat. Am. Grp.*, 550 P.2d 94 (1976). See also *Tiley*, 496 S.W.2d at 558 (Tex. 1973) (holding an insurer was estopped from denying coverage where denial was based largely on evidence developed by the attorney while the attorney was defending counsel on a claim). Some jurisdictions go as far to say that any confidential information disclosed by an insured is owed a duty of confidentiality, regardless of its impact on coverage determination. *American Mut. Liab. Ins. Co. v. Superior Court*, 113 Cal. Rptr. 561, 572 (Cal. Ct. App. 1974).

A prudent approach to this situation is for the attorney to advise the insurance carrier of its obligations as a general matter and prior to being assigned a specific claim. Informing adjusters that in some scenarios the attorney cannot disclose certain information obtained from the insured can avoid a situation that indirectly hints at coverage issues. An occasional reminder to the insurer of the attorney's obligations can help avoid any future situations where an insurer is demanding information from the attorney that they cannot disclose.

b. Punitive Damages, Damages in Excess of Insurance & Other Uninsured Damages

1. Punitive Damages

Cases involving claims for punitive damages also present a conflict between the insured and insurer relating to indemnity coverage afforded under the policy. Punitive damages are usually awarded only if there has been proof of intentional bad acts and most insurance policies exclude coverage for damages caused by intentional acts of the insured. Thus, the insured is facing exposure beyond the insurance policy which the insurer will not pay for, creating a potential conflict amongst the insurer and insured. Therefore, attorneys should advise the insured of the potential exposure to personal assets and their right to retain personal counsel at the insured's own expense.

> Please allow this correspondence to inform you that the Complaint filed against you in the above-referenced action contains a claim against you asking you to pay punitive damages. **Punitive damages are enhanced or extra damages which a jury can award in order to punish an individual. You should know that if punitive damages are assessed against you, your insurance company will not pay those damages and payment of any award of punitive damages will be your own personal responsibly.**
>
> As a result, you need to be aware that your personal assets and property are at risk and that the person who is suing you in the above-referenced action may be able to go after your personal assets and property. Although I will defend you on the claim for punitive

damages, there is no way to guarantee that an award of punitive damages will not be assessed against you. Therefore, it is important for you to understand and be made aware of this possibility. You should also know you have the right to hire your own attorney (at your own cost) to help defend you against the claims which have been asserted against you in the above-referenced action including the punitive damages claim. If you choose to hire your own attorney, I will be glad to work with that individual in your defense.

2. Damages in Excess of Insurance Limits

Another similar issue arises when the damages assessed against the insured may exceed the amount of available insurance afforded under the insurance policy. Similar to claims for punitive damages, attorneys should notify the insured of the potential for damages exceeding the limits of insurance. An attorney may want to advise the insured as follows:

> I would like to address the issue of limits of liability regarding the above-referenced litigation. The insurance coverage available under your policy of insurance with ABC Insurance Company at the time of the motor vehicle accident provides for liability coverage of $X Dollars per person and $X Dollars per occurrence. Therefore, the limits of insurance coverage available to satisfy a judgment entered against you in this litigation are $X Dollars.
>
> As you may recall from earlier correspondence forwarded to you by ABC Insurance Company the limits of liability insurance under your policy are $X Dollars for injuries to any one person and $X Dollars for all injuries arising from a single accident. Therefore, the limits of insurance coverage available to satisfy a judgment entered against you in this litigation would be $X Dollars. In the event you have an umbrella policy, that would come into play after the $X Dollars policy limit is exhausted, please let me know at your earliest opportunity, as that will be an important consideration as relates to Plaintiff's demand.
>
> Please be advised that the attorney representing Plaintiff has agreed to settle its claims for $X Dollars. I have advised your insurance company of this settlement demand. In its letter, ABC Insurance Company explained to you that:
>
> Every insurance policy has a limit of liability and various conditions and exclusions from coverage. The outcome of a lawsuit is an inherently uncertain proposition, and issues of coverage can arise at any stage of the investigation and litigation of a claim. If the lawsuit results in a verdict against you which exceeds the available limit of liability, or if the claim turns out not to be covered by the policy,

you will be the person liable for the amount the verdict exceeds your policy limit, or for the entire claim if it is not covered. The possibility of personal exposure should be seriously considered in determining whether to retain a personal attorney.

It is impossible to predict how this case will progress, yet alone whether it will actually go to trial. Likewise, it is impossible to predict the amount of any verdict which might be rendered by a jury if your case does go to trial. However, if the case proceeds to trial I feel strongly that the Plaintiff will seek damages in excess of $X Dollars, the personal liability limit of your insurance policy.

It is impossible to foresee how a jury might rule on this matter. In light of the nature and extent of the Plaintiff's injuries, I believe that it is certainly possible that if the case goes to trial, a verdict exceeding the policy limits of $X Dollars per person is possible. In the event that a verdict exceeds $X Dollars, it is almost certain that your insurance company will not pay any judgment entered against you in excess of the $X Dollars per person liability limits of coverage. This means that your personal assets are at risk to satisfy any verdict exceeding the limits of your insurance coverage.

The attorney representing the Plaintiff has also advised that if this case is not settled for the policy limits of $X Dollars, he will be requesting that you assign any future claim which you might have against ABC Insurance Company for refusing to settle this claim for the policy limits of $X Dollars. In exchange for this assignment of any claim you may have against ABC Insurance Company, Plaintiff's counsel has stated that they will agree to not pursue any of your personal assets.

You should know that I represent you in this matter even though my bills are paid by your insurance company. Despite this fact, it is within your discretion to hire another attorney, at your own cost, to evaluate any of these issues for you if you desire. In fact, it would probably be in your best interest to do so. If you decide to hire a personal attorney of your own choosing, I would be glad to share any discovery, depositions, or other materials that we possess regarding the Plaintiff's claims filed against you. If you decide to hire a personal attorney to work with you in this matter, I suggest that you do so as soon as possible because the Plaintiff's $X Dollars Demand settlement demand expires soon.

3. Uninsured Damages

Language of the insurance policy itself can also create a conflict amongst the insured and insurer and for the attorney to navigate. For example, a common exclusion under a comprehensive general liability ("CGL") Policy is for damages to an insured's defective work. Much like the scenarios involving punitive damages or damages in excess of insurance, an attorney should also advise the insured of these uninsured damages that will not be covered under the insurance policy. The conflict arises when the insurer is directing the course of the litigation and fails to properly account for the insured's uninsured exposure when making strategic decisions. Correspondence to the insured should advise:

> I recently sent you Plaintiffs Answers to Interrogatories in this matter. As you can see, Plaintiff is claiming damages of $X Dollars. A great deal of these claimed damages are related to the alleged defective work performed by you and/or your company. If such damages are assessed against you, your insurance company will almost certainly refuse to pay those damages and payment will be your own responsibility. As we have previously discussed, it is important for you to understand that your personal assets and property are at risk and that the person who is suing you in the above-referenced action may be able to go after your personal assets and property. Although we will defend you on the claims there is no way to guarantee that an award of damages relating to your allege defective work will not be assessed against you. In fact, it is possible that there will be such an award. Therefore, it is important for you to understand and be made aware of this possibility. You should also know you have the right to hire your own attorney (at your own cost) to help defend you against the claims which have been asserted against you in the above-referenced action. If you choose to hire your own attorney we will be glad to work with that individual in your defense.
>
> We have also forwarded a copy of the Plaintiffs' interrogatory answers to your insurance company for review. In discussions with your insurance company, we have become aware that ABC Insurance Company will claim that that most of the claimed damages are not covered by your insurance policy. Therefore, even though ABC Insurance Company has hired us to defend you, it is likely they will refuse to pay any (or a significant portion) of any judgment entered against you. Again, this places your personal assets and properties at risk.
>
> This is another reason that I strongly encourage you to hire your own attorney to help protect you regarding the issue of lack of insurance

> coverage for damages being claimed in this lawsuit. I would like to schedule a meeting including you, me, and a representative from ABC Insurance Company to discuss these issues in greater detail and discuss what damages ABC Insurance Company intends to cover under the policy. We encourage you to include personal counsel in this meeting. It is our understanding that ABC Insurance Company has assigned someone in their company, other than the claims representative assigned to the defense of this lawsuit, to explore the issue of coverage under your insurance policy. We advise you and your personal attorney to contact ABC Insurance Company to discuss any coverage issues on this matter.

c. Insured has a Counterclaim

Another common scenario that creates a conflict between the insured and insurer occurs when the insured wishes to pursue a counterclaim or other crossclaim. The insurer paying the attorney's fees pursuant to the insurance policy will likely not pay for any fees beyond the scope of the defense of the insured. This situation often comes to a point of conflict when the parties are attempting to settle an underlying case. For example, a condition to the settlement might include a dismissal of the insured's counterclaim. The insurer will be directing the attorney to settle the matter while the insured wishes to continue pursuit of its counterclaim. This scenario is one that the attorney should avoid and advising the insured that it has a right to and should seek independent counsel to pursue its claims is an easy way for the attorney to avoid such a conflict.

d. Conflicts Regarding Litigation Strategy

Pursuant to the insurance contract, the insurer usually retains the ability to to make overall decisions in the litigation strategy. These determinations can often cause disagreements amongst the insurer and insured on how best to proceed. A common situation arises when the insured's business contacts become implicated in the underlying litigation. The insurer directs an attorney to seek other potential sources of indemnity through the insured's business contacts. Whether by identifying these contacts as non-parties or third-party pleading against them, the attorney's actions can or will ultimately bring them into the underlying litigation, causing a strain on the business relationships. This is especially difficult when the insured and/or their business contacts have little experience or understanding of the litigation process.

A practical way to handle such situation is to first ensure the crossclaim or third-party claim is appropriate while also advising the insurer of the likely impact on the insured's business relationship. Aside from seeking all potential claims for indemnity, the insurer also has an incentive to keep the insured happy and a continued purchaser of its policies.

IV. Conclusion

The tripartite relationship, and situations involving a third-party payor for a client's representation at large, present difficult scenarios for counsel to navigate in regard to their ethical duties. The conflicts created from the common situations of the tripartite relationship may not easily appear as the simple examples mentioned in this article. However, an attentive and diligent attorney can be proactive once retained to sidestep any potential conflicts in their representation of clients and preserve the tripartite relationship.

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