IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

JANUARY 2017

CHAIR'S COLUMN

Happy New Year! Your Trial Techniques and Tactics Committee resolves to continue bringing you practical information that will enhance your litigation practice. To that end, this edition contains an insightful article from Matt Cairns, along with a Trial Tip that we hope you'll find helpful.

Please plan to join us at the IADC Midyear Meeting in Scottsdale, Arizona. The meeting runs from February 18th -23rd. Below are details of the programs that the TTT Committee is co-sponsoring:

February 19th; 7:30-8:30am: Epidemiology - What Trial Attorneys and Jurors Really Need to Know
February 21st; 7:30-8:30am: Interactive Deposition Technology for Lawyers Who Want to Win
February 22nd; 7:30-8:30am: Can I Do That? The Ethics of Witness Preparation
February 22nd; 10:30am-12:00pm: IADC Talks: The Defense Lawyer in 2025 - Legal Trends That Will Impact Your Practice, As Told Through Pecha Kucha

Directly following "Interactive Deposition Technology" on February 21st there will be a short Trial Techniques and Tactics Committee Business Meeting. Please stay if you are able.

I hope to see you there!

Chris
Chair, Trial Techniques and Tactics Committee

Chris Kenney is the Managing Partner of Kenney & Sams, P.C. in Boston, MA, where he focuses his practice in litigation, trials and appeals before state and federal courts throughout New England. Mr. Kenney also serves as the Vice President of the Massachusetts Bar Association. He can be reached at cakenney@KandSlegal.com.

IN THIS ISSUE

IN THIS ARTICLE

This article is a discussion of ethical considerations in the tri-partite relationship between the defense counsel, the insurer, and the insured and the duties that flow between them.

Ethical Issues for Defense Counsel: The Tri-Partite Relationship

ABOUT THE AUTHOR

R. Matthew Cairns represents the interests of individuals, insurers, manufacturers, transportation and other companies in diverse commercial, complex and traditional litigation matters in all state and federal courts and state agencies.

He also serves as general counsel to several closely held businesses in New Hampshire. He is also experienced in general corporate and municipal representation, and risk management training. He can be reached at cairns@gcglaw.com.

ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Michael Zullo
Vice Chair of Newsletters
Duane Morris LLP
mszullo@duanemorris.com

The tri-partite relationship describes the relationship between the defense counsel, the insurer, and the insured and the duties that flow between them.[1] Typically the insurance policy gives the insurer the right and duty to defend the insured. Where the carrier retains a defense attorney to represent the insured, in some jurisdictions that defense attorney will be deemed to have two clients: the insured and the insurer. In other jurisdictions, the defense attorney will be viewed as having only one client: the insured. To determine the ethical obligations of the defense attorney with regard to settlement negotiations, it is first important to determine *who* the attorney represents.

Conflicts may arise in some, but certainly not all, tripartite scenarios, because insurers' and insureds' interests are not always aligned. For instance, insurers, who are paying the bills, may be motivated by the desire to quickly resolve claims to avoid incurring future legal fees, whereas the insureds may want to "fight to the death" on the claims because they believe that's why they purchased insurance in the first place. More commonly, conflicts arise because of the most basic divergence of interests of the parties: insureds want to secure and retain insurance coverage on the alleged claims, and insurers are motivated to scrutinize claims very carefully and to limit or deny coverage if their position is justified. When such conflicts arise, defense counsel is often caught between the proverbial rock and hard place. This article explores some of those situations.

1. Most States "Recognize" the Tri-Partite Relationship

Most states have recognized the validity of the tri-partite relationship between insured, appointed defense counsel and insurer. For example, the New Hampshire Supreme Court has held that an insurer's claim of privilege against its insured in subsequent litigation between the two was without merit since it "fails to take into account that the attorney [the insurer] engaged represented both the [insurer] and [the insured]." *Dumas v. State Farm Automobile Insurance*, 111 N.H. 43, 49 (1971). The Court reasoned that:

> (W)here two parties are represented by the same attorneys for their mutual benefit, the communications between the parties are not privileged in later action between such parties or their representatives.

Id. (Citations omitted.) Though not expressly stated, the court's rationale is consistent with the majority view that the tri-partite relationship between insurer, insurance defense counsel and insured involves dual representation of "co-clients;" the tri-partite relationship has dual attorney client relationships: insurer – defense counsel and defense counsel – insured. So long as the interests of the insurer and the insured coincide, they are both the clients of the defense attorney and the defense attorney's fiduciary duty runs to both the insurer and the insured." *National Union Fire Insurance Co. v. Stites Professional Law Association*, 1 Cal Rptr. 2d. 570, 575 (Cal. App. 1991); *see also*

[1] Thanks go out to my friends and colleagues in DRI, IADC and FDCC who wrote the articles and gave the CLE presentations that provided the background and foundation for this paper. Particular thanks to Tom Segalla, Dan Gerber and Shaun McParland Baldwin.

New Hampshire Bar Association, Ethics Committee Advisory Opinion # 2000-01/05 (recognizing tri-partite relationship does not permit sharing of confidential insured – defense counsel information with third party auditors).

The ABA has long been in agreement provided that no conflicts exist. The ABA Committee on Professional Ethics and Grievances noted:

> There is nothing basically unethical in a lawyer, who is employed and compensated by a *collision* insurance company, defending a person in an action based upon damage to person and property brought by a third party. It is conceivable that that there might be some conflict of interest between the "collision" insurance company and the insured, who is the same person which is made defendant in the "person-and-property damage" action. Under Canon 6 if such a conflict should arise, the lawyer could not represent both without "express consent of all concerned given after a full disclosure of the facts." However, if such consent were given there is no ethical obstacle to the lawyer representing both parties.

See ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950). We now turn to that issue.

2. Ethical Considerations in Dual Representation Scenarios

In order to ethically represent two clients, of course, the client's interests must be aligned. *See generally* Model Rule 1.7. If there is <u>any</u> conflict of interest between the two clients (or between any of the insured if counsel has been retained to represent more than one insured), the attorney must provide the clients with a full disclosure of the conflict and seek each client's consent, in writing, to his or her continued representation of both clients, in light of the disclosed conflict.

(a) **<u>Appropriate Communication With Your Clients</u>**

This basic notion falls within the purview of Rule 1.4 which dictates that attorneys maintain good communications with clients. Rule 1.4 states:

(a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent 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;
- (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; and

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

Courts and commentators have gone back and forth on who precisely is the defense counsel's client, in most cases the relationship between the defense counsel, the insurer, and the insured will be determined by an agreement between the parties (e.g. the informed consent agreement). *See* Defense Lawyers' Professional Responsibilities: Part II--Contested Coverage Cases, 15 Geo. J. Legal Ethics 29, 33 (Fall, 2001). For example, if the attorney agrees to represent the insured and the insurer, and the clients similarly agree to the dual representation, then the attorney can represent both clients. The attorney can also contractually limit his scope of representation at the outset. For example, the defense attorney could agree that he will represent both the insured and the insurer in the litigation, but not in any settlement negotiations.

But with respect to an attorney's allegiance to an insured versus an insurer, it is clear that even in dual representation situations, defense counsel owes his primary allegiance to the insured. In 1981, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that stated:

> [B]oth the ethical rules and the insurance law require that an attorney hired by the insurer to defend an insured must treat the insured as "the primary client" whose protection must be the attorney's "dominant" concern. See e.g. ABA Standing Committee on Ethics and Professional Responsibility Informal Op. No. 1476 (1981).

See Formal Ethical Opinion 1991-121 at 3. Even when looking at the insurance policy, "the fact that the insurance contract authorizes the insurance company to employ an attorney to handle the defense of a case in no way impairs or diminishes the duty of the lawyer to the insured client. A contract which authorized any dilution of the ethical obligation of an attorney to the client [sh]ould be void as against public policy." *Hartford Accident & Indem. Co. v. Foster*, 528 So.2d 255 (Miss. 1988).

Thus, an attorney cannot posture the case so that the outcome depends on a theory not covered by insurance without violating the duty of loyalty to his or her client, the insured. Further, the attorney is precluded from sharing privileged information received in the representation of the insured with the insurer, particularly when it might give the insurer coverage defenses. *See* Douglas Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured and Insurance Defense Counsel,* 73 Neb. L.Rev. 265, 225 (1994)("[a]s a general rule, a defense attorney should never share with the insurer confidential information communicated by the insured. If defense counsel learns of information suggesting coverage defenses, such information must be kept confidential. Under no circumstances should appointed counsel attempt to uncover or develop coverage defenses.")

Because the *Foster* case involved a bad faith claim after a failure to settle case, it is now appropriate to turn to conflicts during settlement efforts.

(b) Conflicts Arising in Settlement Negotiations

The *Foster* court summarized the attorney's ethical situation as follows:

> In sum, the ethical dilemma thus imposed upon the carrier-employed defense attorney would tax Socrates, and no decision or authority we have studied furnishes a completely satisfactory answer. We would first observe that it is of the utmost importance that the lawyer promptly recognize the difficult problem which faces him, and which requires the most carefully measured words. The best this Court can offer is that the attorney, after informing his clients of the settlement terms, and giving them the advice as above noted, should not be prohibited from honestly and carefully answering questions pertaining to the law and facts of the case, his impressions of the witnesses, the jury, and the trial judge, such as he would normally be asked as attorney, and expected to be able to answer. At the same time, he must scrupulously guard against violating his absolute, non-delegable responsibility not to urge, recommend or suggest any course of action to the carrier which violates his conflict of interest obligation. This is a tortuous, perilous path.

Id. at 273. Resort must be made to the Rules of Professional Conduct for guidance.

Rule 1.2(a) of the Model Rules of Professional Conduct states that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." In most liability claims, the insurer has the right to settle a matter without the consent of the insured. The insured usually does not have a say in the matter except in the limited circumstances involving professional liability insurance.[2] Even though the insurer does not require the insured's consent before settlement, the attorney's role is problematic especially in cases where (a) the attorney represents both the insured and the insurer and (b) the insurer and the insured are not in agreement on whether or not to settle the matter.

Where the defense attorney is deemed to represent two clients, he or she must consider Rule 1.7, which states:

> (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.

[2] *DiBenedetto v. CLD Consulting Engineers*, 153 NH 793 (2006) spawned further litigation by CLD against its insurer on the issue of whether or not the carrier breached its duties to settle the case. The policy required the insured's (CLD's) informed consent before settlement. One of the issues was whether CLD's refusal to give consent was in fact "informed."

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Therefore, if the insurer wants to settle, and settlement will adversely affect the insured's rights, the attorney must obtain the insured's ***informed consent*** before proceeding with the representation or the course of action proposed by the insurer. Informed consent

"'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e).

Comment 6 explains the informed consent process further:

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or

other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

If the attorney is unable to obtain the insured's consent to settle, then the attorney has no other choice but to withdraw from the representation because the interests of his co-clients are not aligned, or, at the very least, withdraw from any participation in the settlement negotiations. Any other course of action could expose the attorney to a malpractice claim, as well as to charges of ethical violations. In *Rogers v. Robson, Masters, Ryan, Brumund and Belom* 407 N.E.2d 47 (1980), an attorney, who was employed by an insurer to represent both the insurer and insured in a medical malpractice action, negotiated a settlement at the insurer's request, even though the insured had objected to such course of action. The Illinois Supreme Court held that the insured stated a valid cause of action for malpractice against her former defense attorney because the defense attorney failed to make a full disclosure of the conflict of interest between his clients and the intent to settle the litigation, despite the insured's objection. Thus, notwithstanding the fact that the insurer alone might have the right to settle the case without the insured's consent, an attorney that represents the insured and insurer cannot undertake such an action if he is directed by his client, the insured, not to do so.

(c) **Conflicts Arising in Case Strategy**

Conflicts may also arise during the course of the case, even before settlement negotiations begin. Most often this occurs when there are covered and non-covered claims.

Pursuant to an insurer's obligation to provide a defense, it may often appoint defense counsel to represent an insured on all claims, but reserve the right to deny coverage for "non- covered" claims either excluded or otherwise outside the policy's insuring language (*e.g.* intentional acts). In those instances, the insurer may be eager to have the defense attorney file a dispositive motion on the covered claims so that, if successful, the insurer can discontinue any further funding of the insured's defense. The insured, on the other hand, may not want any dispositive motion filed on the covered claims because if such a motion is successful, then the insurer will likely pull its defense of the remaining non-covered claims and the insured will have to pay defense counsel directly.

Can defense counsel move to dismiss or for summary judgment on the covered claims even if doing so may result in his or her client losing their defense cost funding for the remaining claims in the case?[3] Yes. However, before doing so, the defense attorney should make full disclosure to the insured and the insurer of the ramifications of that course of action. One ramification that should be disclosed is that the insured's exposure (albeit covered by insurance) will likely be reduced if the dispositive motion is granted. For example, if the insured is facing enhanced or

[3] The same analysis will apply to situations where the opportunity to settle only the covered claims arises and the plaintiff would not agree to dismiss the non-covered claims.

multiplied damage exposure, if elimination of certain compensatory counts is successful, then the level of enhanced or multiplied damages available may fall. The insured will need to balance whether maintaining a paid defense is worth the risk of uncovered or excess damages being awarded.

Another factor that should be disclosed is whether the scope of discovery, will be reduced if the dispositive motion is granted. Discovery can be very disruptive to an insured's business in many different ways. An insured may prefer to have covered claims removed from the case if doing so will result in less electronic discovery burdens, less prying into otherwise privileged or confidential business affairs, or less inconvenience to the insured's employees.

Whatever the situation, defense counsel should encourage the insured to discuss this issue with its insurance carrier, and obtain independent counsel to advise him or her on the issue. In the end, the defense attorney must get the consent of the insured before proceeding with a strategy that could be perceived as favoring the insurer's interests over the insured's. Rule 1.7 If the defense attorney cannot obtain the informed consent of the insured and insurer to file a dispositive motion on the covered claim, then the attorney cannot undertake that activity. He or she cannot compromise one client's interest over the other. If the insured and insurer continue to disagree over the defense strategy, then the defense attorney may have to withdraw.

3. Conclusion

These have been just a few of the more common areas where defense counsel need to be vigilant when defending insureds. Insurance companies and appointed defense counsel are sensitive to these issues but plaintiff's counsel and insureds often are not. This author suggests that early in the case, these and other potential issues should be identified and discussed with insureds and, where appropriate, with plaintiff's counsel. Doing so early will allow for a smoother case going forward.

TRIAL TIP:
"CLUE THE JURY IN EARLY"
A PITCH FOR
SUBSTANTIVE PRELIMINARY JURY INSTRUCTIONS

BY: CHRISTOPHER A. KENNEY

Traditionally, jury trials have had the peculiar characteristic that jurors are not instructed on the substantive law they must apply in the case until the end of the trial, after the presentation of all the evidence and the arguments of counsel. This practice has been criticized for decades as being out of touch with the natural way in which jurors process information. These criticisms have led to an increased use of preliminary instructions to jurors at the onset of the trial on the substantive principles of law they will be asked to apply at the end of trial.

Most states preferably allow, and a few states even require by court rule, that judges instruct the jury on the substantive legal principles of the case prior before the final instructions at the end of trial. These preliminary instructions typically include matters such as the nature of the plaintiff's claims, the elements of such claims, the burden of proof on the issues in the case, and the defendant's affirmative defenses. Numerous jury reform commissions throughout the country have endorsed this practice. Moreover, increased experimentation with the technique has led to a trend of increased use of preliminary instructions at trial.

Instructing jurors on substantive legal principles early in the trial improves jurors' understanding and recall of both the legal principles they must apply and the facts of the case. Research on human information processing predicts, and studies confirm, that providing a prior cognitive structure, or "schema," for the evidence influences the selection of evidence that is entered into memory and how that evidence is recalled. Outlining the legal issues and applicable law up front focuses juror attention on legally relevant evidence and facilitates juror recollection of probative facts and statements. This helps the jurors to make credibility assessments and drawing reasonable inferences during trial.

Providing substantive instruction early on, rather than after weeks of testimony, capitalizes on the jury's freshness and attentiveness early in the trial. Communicating the governing law at both the beginning and end of trial helps the jury remember and process the law as they begin their deliberations. It also helps jurors resist biases they may bring to the court room by grounding them, from the onset, in a legal framework for the case rather than leaving them to rely on their "gut reaction" to the case until the end of trial.

Substantive preliminary instructions also provide a host of benefits for trial counsel. If the judge instructs the jury on legal principles before opening arguments, the attorneys incorporate those principles into their opening statements in a way favorable to their clients. From the outset, counsel can advocate a view of how the facts of the case will be shown to fit within the legal framework set forth. Substantive preliminary instructions also incidentally create a natural outline for the trial itself. Attorneys can use this outline as an organizational tool for the effective and efficient presentation of their arguments and evidence.

One difficulty that arises with substantive preliminary instructions is that, as a trial progresses, the instructions given at the beginning of trial may need to be changed or supplemented based on the evidence presented. This difficulty can be mitigated through an early instruction from the judge stressing that the jury should deliberate after receiving the final instructions at the close of the evidence. Moreover, to the extent instructions may change as a result of rulings of law by the judge on legal issues in the case, these issues can frequently be resolved through more active pre-trial activity addressing instructions. Dealing with proposed instructions earlier in the trial process may create a slight additional burden on attorneys, but it also helps them focus on a legal outline of the case early on and to streamline the case presentation in a more efficient, effective way.

Preliminary instructions to the jury on the governing law can effectively enhance the jury's understanding of the legal issues in the case, and improve their application of the applicable law to the evidence presented during trial.

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