TRIPARTITE RELATIONSHIP MINEFIELD: LACK OF COOPERATION DISCLOSURE, BY: ALICE SHERREN, ESQ. AND DONALD PATRICK ECKLER, ESQ.

A typical attorney-client relationship involves two people or entities: the lawyer, and the client. If the client stops communicating or cooperating with the lawyer, the lawyer is permitted to withdraw from the representation. But when a lawyer is retained by an insurance company to defend an insured, the attorney-client relationship becomes more complicated. Since not all jurisdictions delineate the obligations owed in the same way, lawyers who are retained by insurance companies to defend insureds should be cognizant of the duties their jurisdiction places on them to maintain the client's confidential information.

Tripartite Relationships: Who Is The Client?

The tripartite relationship among an insurance company, its insured, and counsel retained to defend the insured intends that the three work together to achieve a mutually beneficial resolution to the dispute. The interests of the insurance company and the insured are assumed to be aligned, but the relationship among the insurance company, the insured, and the appointed counsel is treated differently in various jurisdictions.

More than 35 states recognize "dual representation" by the appointed counsel of both the insurance company and the insured client. This allows the insured, insurer and counsel to more easily share information, analyze issues, and develop strategy. Although the insurance company retains and pays the lawyer, retained counsel owes the same professional obligations to the insured as if the attorney were hired personally by the insured.

Some states are more restrictive when it comes to the concept of dual representation. In *Pine Island Farmers Coop v. Erstad & Reimer, P.A.*, 696 N.W.2d 444, 452 (Minn. 2002), the Minnesota Supreme Court determined that, in the absence of conflict of interest between the insurer and the insured, the insurer can become a co-client of defense counsel based on contract or tort theory, but only if the insured gives express consent after an explanation of the advantages and risks of dual representation.

But some jurisdictions reject dual representation entirely, and have determined that defense counsel owes a duty of unqualified loyalty to the insured. In these jurisdictions, the implications of the tripartite relationship can exacerbate conflicts between the insurer and the insured.

While many insurance policies, especially professional liability policies, allow the insurance company to control the defense, restrictions placed on defense counsel by an insurer are disfavored in many jurisdictions. Insurer-imposed restrictions on discovery or other litigation costs may be found to violate the insurer's duty to defend as well as the retained attorney's ethical responsibility to exercise independent professional judgment. As a matter of public policy, the lawyer's obligations to the insured client supersede any restrictions dictated by an insurance company. See *In The Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 299 Mont. 321, 335 (Mont. 2000); *Dynamic Concepts, Inc. v. Truck Insurance Exchange*, 61 Cal.App.4th 999, 1009 (1998) (noting that insurer-imposed restrictions may violate the insurer's duty to defend and the lawyer's ethical obligation to exercise independent professional judgment); *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995) (noting certain insurer-imposed restrictions are prohibited by the rules and inconsistent with public policy).

Regardless of jurisdiction, defense counsel has a duty not to disclose adverse coverage information to the insurer, and the insured has a duty to cooperate even where the insurer has taken an adverse coverage position. Coverage issues may include late reporting, uncovered allegations, dispositive motions that eliminate covered claims and leave only non-covered claims, or damages that are excluded under the policy. In such situations, defense counsel has an obligation to protect confidential information obtained from the insured in the course of the representation – even from the insurance company – all while keeping the insurance company that retained the attorney informed.

Defense counsel's obligations to the insured and the

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> "Insurer-imposed restrictions on discovery or other litigation costs may be found to violate the insurer's duty to defend … ."

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insurer become even trickier if the insured fails to communicate or cooperate in the defense. Can the attorney inform the insurer that the insured is not cooperating in the defense? At least one state bar has opined that a failure to cooperate qualifies as "confidential information" obtained from the client, and the lawyer has an ethical obligation to protect such information and not inform the insurer.

The Texas State Bar Hypothetical

According to recent Texas State Bar Opinion No. 669, a lawyer retained by an insurance company to defend an insured may withdraw from the representation if the insured client fails to cooperate, but *may not* disclose to the insurance company or to the court the specific reason for the withdrawal. In coming to this conclusion, the Texas State Bar proposed a hypothetical in which an insured initially cooperated with counsel retained by his insurance company, but over time stopped communicating with counsel or cooperating in the defense. The lawyer retained an investigator to track down the insured client, presumably without informing the insurer he was doing so, but the client still failed to cooperate. The opinion advised that the lawyer could file a motion to withdraw, but should only provide a general explanation to the insurance company and to the court that "professional considerations require withdrawal."

The advisory opinion determined that an insured client's failure to communicate with the retained lawyer is "unprivileged client communication" which is included in the umbrella of "confidential client information" the lawyer is obligated to protect. Texas ethics rules provide that a lawyer shall not knowingly reveal a client's confidential information to third persons the client has not instructed to receive the information, and shall not use a client's confidential information to the disadvantage of the client unless the client consents after consultation. There is an exception to this rule if the information is disclosed to carry out the representation.

The advisory opinion assumes without discussion that the insured client has not agreed to have the insurer receive confidential information, and further assumes that the insured client would be disadvantaged if the lawyer disclosed the insured client's failure to communicate to the insurer. The opinion observes that since the insured client is not communicating with the lawyer, the lawyer cannot obtain consent from the client to disclose this lack of communication to the insurer. The opinion states without analysis that the cooperation of the insured is not necessary to carry out the representation, and concludes such disclosure should be barred.

Criticisms of the Texas Advisory Opinion

To some, this advisory opinion ignores the realities of the tripartite relationship and makes inaccurate assumptions in addition to those mentioned above. The hypothetical appears to assume that the lawyer is not communicating with the insurance company that retained him, the insurer was not communicating with the insured, and the insurer would be unaware that the insured's failure to cooperate was causing problems in the defense of the claim. This seems unlikely, regardless of whether the lawyer expressly told the insurer that the client was not cooperating.

The opinion also fails to recognize that cooperation of the insured client is in the best interest of each prong of the tripartite relationship. The insured client plainly has an interest in maintaining his insurance coverage, which necessarily requires cooperation and communication with retained defense counsel and the insurer. The lawyer, out of both professional duty to his client and self-interest in continuing to bill on the file, has an interest in obtaining the assistance of the insured client in defending the case and avoiding withdrawal. And the insurer has an interest in fulfilling its obligation to provide an adequate defense to its insureds, which necessarily requires communication with and cooperation from the insured.

The opinion ignores that it is in both the insurer and the insured's best interest that the insured cooperate with defense counsel in the defense of the claim, both to maintain coverage and to best resolve the dispute. The lawyer must have communication with the insured client to defend the case, and the insurance company should be diligent in seeking the cooperation of the insured. The discussion in the opinion correctly notes that failure to cooperate could take an insured out of coverage, but neglects to recognize that insurance companies have "duty to cooperate" clauses to ensure the company can defend the insured, and not primarily as a mechanism to avoid coverage. The insurer has an obligation to provide an adequate defense to its insureds, and would not likely succeed on a "failure to cooperate" coverage defense if the insurer did not take reasonable measures to secure such cooperation. If the lawyer could candidly disclose to the insurer that the insured client was not communicating with counsel, the insurance company could then utilize its resources to secure cooperation and each prong of the tripartite relationship would benefit.

Conclusion

Opinion No. 669 from the Texas State Bar only applies to that jurisdiction, but the assumptions, discussion (or lack thereof), and conclusions of the opinion might guide other jurisdictions to differing determinations. Critics of the opinion observe that it fails to consider the realities of insurance defense practice and the true motivations and interests of insurance

> A withdrawing insurance defense attorney "may not disclose to the insurance company or to the court the specific reason for the withdrawal."

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retained counsel. Contrary to the presumption that underlies the opinion, securing cooperation of the insured benefits the insured, the insurer, and the lawyer in successfully defending the case. A prohibition on a lawyer's disclosure of an insured client's failure to cooperate will likely only increase the chances of the insured client losing coverage, the exact opposite of the interests of the client. Lawyers should consult the rules in their jurisdiction when faced with an insured client who is failing to communicate or cooperate.

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"Some states also have specific statutes which govern circumstances wherein the plaintiff dies after verdict, but before judgment entered"