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Navigating Ethical Challenges in the Tripartite Relationship



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Navigating the Ethics of the Tripartite Relationship

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Disclaimer

This presentation and discussion reflects the personal views of the presenters, not their firms or companies.

The Tripartite Relationship

- ▶ Background – What is it?

- ▶ Unique alignment of interests between:
 - (1) policyholder;
 - (2) policyholder's defense attorney; and
 - (3) the insurer funding and directing defense attorney.

The Tripartite Relationship

The ABA Model Rule of Professional Conduct 1.8(f):

- f. A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.

The Tripartite Relationship

Comment 11 to ABA Model Rule of Professional Conduct 1.8:

“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 ... an indemnitor (such as a liability insurance company)... 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....”

The Tripartite Relationship

- ▶ Who or what is protected?
 - The insurer's interest in prompt and cost-effective resolution of the matter.
 - The policyholder's interest in protection from liability.
 - Information/communication about the underlying case.

Relationship Pitfalls

- ▶ * Likelihood of Verdict Beyond Policy Limits
- ▶ * Claim Seeking Punitive Damages
- ▶ * Substantial Deductible or Self-Insured Retention
- ▶ * Insured Resists Settlement Despite Economic Interest

More Pitfalls

- ▶ * Insurer Defends under ROR
- ▶ * Insurer Restricts Defense Efforts and Expense
- ▶ * Wasting Limits Policies

Selection of Defense Counsel

- ▶ Whose choice is it?
 - Look to Policy Provisions
 - Explicit language not required for Carrier to have choice
 - Exception: Disqualifying Conflict of Interest
 - Criteria Vary by State
 - Circumstances to Consider
 - Counsel's effect on Coverage Existing
 - Insufficient Policy Limits
 - Separate Allegations
 - Punitive Damages (only conflict?)
 - "Panel" Counsel expertise

DEFENSE COUNSEL TOPICS

- ▶ Who is the client?
 - Obviously the insured being defended, but obligations to report to and confer with the insurer to protect client's interests also exist.

- ▶ Carrier reporting
 - Reporting is necessary to assist client's compliance with policy and also to inform all involved so any rights to control the defense can be exercised.

- ▶ Reservations of Rights
 - The existence of ROR's is common in CD defense, but it does not impact obligations to client or reporting obligations to the insurer.

Key Considerations for Defense Counsel—Coverage Issues

- ▶ Report facts and evaluation to both client and insurer without reference to coverage implications.
- ▶ Advise both client and insurer to consult with separately retained coverage counsel if they seek coverage analysis.
- ▶ Confer with both client and carrier to identify all potential sources of insurance and risk transfer, but client and/or carrier exercising control of defense must make decisions on claims as well as tenders.

Key Considerations for Defense Counsel— Settlement Issues

- ▶ It is important to keep insurer and client equally apprised of settlement opportunities, demands and offers.
- ▶ In situations where insurer and client disagree on a settlement approach, there is a need to keep communication ongoing between insurer and client.
- ▶ Counsel cannot take positions on behalf of the insurer and essentially negotiate with their own client on settlement funding or allocation of settlement funds where there are competing interests.

Reporting to Carrier

- ▶ Defense counsel has an obligation of periodic reporting to keep the insurer informed on potential liability and damage issues in the matter only. Coverage should not be addressed.
- ▶ Litigation-management guidelines provided by carrier.
 - Include case-management plan, periodic status reports and assessment of the insured's liability and damages exposure.

Reporting to Carrier

- ▶ Potential conflicts
 - Insured provides instructs defense counsel not to tell the insurer information.
 - Defense counsel should not disclose the information without authority from the insured.
 - Defense counsel's investigation identifies facts or circumstances that could affect the insured's coverage.
 - Some states - prohibit defense counsel from disclosing without insured's consent.
 - Without informed consent, Counsel may need to consider withdrawing from representation if defense counsel.

Reporting to Carrier

- ▶ **Potential Conflicts Continued**
 - Insured and Carrier disagree on a course of action.
i.e. suing subcontractor(s) for contribution.
 - If cannot be resolved – separate coverage counsel.
 - Consent to settle – See policy provisions
- ▶ Key is communication and transparency

Allocation

- ▶ Duty to Defend v. Duty to Indemnify
- Insurer must reserve its right to allocation
- Defense counsel & policyholder's goal: no negligence, no damages
- Intervention – not permitted in most states (no “direct and immediate interest”)

Allocation

Majority Rule: it is the insured's burden to allocate the amount of a judgment between covered and uncovered damages.

➤ Florida:

- “Under Florida law, the party claiming insurance coverage has the initial burden to show that a settlement or judgment represents damages that fall within the coverage provisions of the insurance policy...An insured's inability to allocate the amount of a judgment between covered and uncovered damages is therefore generally fatal to its indemnification claim.” *QBE Specialty Ins. Co. v. Scrap Inc.*, 806 F. App'x 692, 695 (11th Cir. 2020)

Wasting Limits

Wasting limits or defense-within-limits (“DWL”) policy: defense costs paid by carrier reduce the limits available under the policy to pay settlement or judgment.

- ▶ Carrier/defense counsel obligations?

Wasting Limits (continued)

- *Pueblo Country Club v. AXA Corporate Solutions Ins. Co.*, Civ. A. No. 05-cv-01296, 2007 WL 951790 (D. Colo. March 28, 2007) (claim for unreasonable depletion of limits; denying insurer’s MSJ because insurer was aware that fees and costs were reducing available limits and that insured was exposed to an excess judgment, “and nevertheless acted unreasonably with regard to settlement”).
- *Agape Senior Primary Care, Inc. v. Evanston Ins. Co.*, No. 3-16-cv-01610-JFA, 2016 WL 4804066 (D.S.C. Sep. 14, 2016) (insured stated bad faith claim for “unnecessary and unjustifiable wasting” of the policy limits).

Wasting Limits (continued)

- ▶ Early resolution,
- ▶ Accurate budgeting,
- ▶ Discussion with policyholder and carrier over decisions affecting cost of defense, and
- ▶ Accurate disclosure of remaining limits at critical points in the suit.

High Self-Insured Retentions

- ▶ This is becoming increasingly common as the cost for insurance continues to rise in conjunction with the escalation of construction defect claims.
- ▶ Retention under high SIRs is typically through client, but the need to protect client's interests relative to their insurance remains.
- ▶ Reporting on a claim's impact to insurer's layer can be more complicated, but counsel should advise client to consider policy condition compliance.

Questions?

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