Defending Claims While Working Within the 'Tripartite Relationship'

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Navigation of the insurance defense counsel's practice requires an understanding of the triangular relationship between the insurer, the insured and defense counsel. We commonly refer to this as the "tripartite relationship." In order to understand how to approach difficult situations, such as defending claims under a reservation of rights and settling claims with or without the insured's consent or contribution, a brief review of the attorney-client privilege and the rules of professional conduct is necessary.

The Supreme Court of Pennsylvania has not yet specifically ruled on the relationship between the insurer and defense counsel, as in *Camico Mutual Insurance v. Heffler, Radetich & Saitta,* 2013 U.S. Dist. LEXIS 10832 (January 28, 2013). That determination is dependent upon the terms of the agreement between the insurer, the insured and defense counsel. However, when defense counsel communicates with the insurer and the insured, with the permission of each, the communications within the triangular relationship are protected by the attorney-client privilege. The privilege is not in favor of the insurer or the insured, but the common business communications are protected from a mutual adversary, citing *Tracy v. Tracy*, 105 A.2d 122 (Pa. 1954).

Insurance defense counsel must recognize that the relationship between the insurer and the insured is governed by the insurance contract and the duty of good faith that is inherent in all contracts. Standard liability insurance policies allow the insurer to control the defense and settle a claim. The authority the insurer provides to defense counsel is derived from the insurance contract. However, the Rules of Professional Conduct apply to defense counsel, not to the insurer. The pertinent Rules of Professional Conduct with respect to the tripartite relationship are the duty to communicate, the duty to keep information confidential and the rule governing conflicts of interest. The potential of a nonwaivable conflict of interest must be appreciated.

With these principles in mind, we can address the resolution of a claim where the insurer is defending under a reservation of rights and a portion of the claim may be uninsured. In this situation, the insurer and the insured are often at odds. Each of their interests in either proceeding to trial or settling a lawsuit will depend upon the risks presented to each and the damages exposure each may bear.

The insured and the insurer may not agree upon a settlement strategy. Rule 1.4 requires counsel to keep the insured reasonably informed. In most cases, the insurance policy gives the insurer the sole right to settle a claim. Therefore, if counsel is aware of the insurer's settlement strategy, the insured must be so informed. But the insurer has no duty to keep the insured or defense counsel fully informed with respect to its settlement strategy. The insurer must nevertheless refrain from bad-faith conduct, such as misleading the insured, particularly where both the insurer and the insured are contributing to a settlement, as in *McMahon v. Medical Protective*, 92 F. Supp. 3d 367 (W.D. Pa. 2015). As U.S. District Court Judge Joy Flowers Conti of the Western District of Pennsylvania explained in *McMahon*, defense counsel's discussion of the insured's potential monetary contribution to settlement can be benign, as long as counsel does not mislead the insured or pressure the insured for contribution. Counsel may discuss allocation of settlement offers with both the insured and the insurer, but counsel

may not pressure either about percentages of contribution.

The defense of a claim with excess exposure is another difficult issue that defense counsel often faces. The insurer's objective is to minimize its exposure. The insurance contract may give it the right to tender its limits and withdraw the defense. Or an insurer might be inclined to try a case to verdict if its risk of covered damages is minimal. An insurer does not have to accept a settlement offer within policy limits, but it must have a "bona fide belief ... predicated upon all of the circumstances of the case, that it has a good possibility of winning the suit," as in *Cowden v. Aetna Casualty and Surety*, 134 A.2d 223, 228 (Pa. 1957). Defense counsel's role is to defend the insured from all claims, which may include negotiating or trying the case, while ensuring that the insured and the insurer are fully informed of their risks. Defense counsel will not likely find a conflict in discussing these issues with the insurer and the insured as long as advice is not given to either with respect to posturing their positions against the other.

In most cases, the insured and the insurer manage to present a unified defense strategy, with the assistance of experienced defense counsel who knows that communication with both the insurer and the insured is paramount. However, if defense counsel learns information from the insured that may be detrimental to the defense, and the insured does not agree to provide that information to the insurer, a nonwaivable conflict may arise under Rule 1.7. Defense counsel must report to the insurer. If that is no longer possible, counsel must withdraw. (See ABA Formal Ethics Opinions 08-450, where the American Bar Association expressed significant doubt that a conflict waiver could be valid if secured in advance and prior to the time counsel comes to understand the facts giving rise to the conflict.) It is recommended that defense counsel initially explain to the insured that the insurer is entitled to know everything counsel comes to learn from any source. If the insured then communicates information it does not want the insurer to learn, counsel may be able to convince the insured to consent to disclosure to the insurer, given that disclosure is likely unavoidable even if counsel withdraws. The insurer would likely be entitled to learn of all communications between defense counsel and the insured that took place prior to the time the conflict arose. Moreover, counsel's withdraw may send a signal to the insurer that something is amiss, (see Charles Silver and Kent Syverud, "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L.J. 255, 275 (1995).

Insurance defense counsel are often concerned with what information to disclose within the triangle, given counsel's ethical duties owed to the insured. There is a plethora of articles concerning this dilemma, along with numerous cases that exemplify particular circumstances where counsel's actions and the insurer's contractual duties have been scrutinized. It is not possible to discuss herein the myriad practical questions that arise on a regular basis about the tripartite relationship. However, defense counsel may be overly anxious that they might be asked to keep a secret. Proper communication with the client and the insurer will likely foster the tripartite relationship rather than hinder it. Counsel's ultimate goal should be unification of defense strategy, which is usually achievable even in difficult circumstances. The claimant is the common adversary who is best fought with a unified defense.

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