THE MODEL RULES OF PROFESSIONAL RESPONSIBILITY AND THE TRIPARTITE RELATIONSHIP

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The unique nature of the tripartite relationship adds layers of complexity to the already opaque Rules of Professional Responsibility. Here are some of the rules most important for insurance defense counsel to be aware of, together with the most relevant official comments, and a brief discussion of the rules' relevance to tripartite issues**.**

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to 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).*

Comment 5: Authorized Disclosure

(5) Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation . In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm,

unless the client has instructed that particular information be confined to specified lawyers.

The insurance policy's cooperation clause impliedly authorizes defense counsel to provide the insurer with all information material to the defense and settlement evaluations. See New Hampshire Bar Assoc. Ethics Op. 2000-01/05 ("The policy also will typically contain a provision requiring the insured's cooperation in its defense. Accordingly, the insured's execution of this contract will generally constitute an implicit consent (or "implied authorization" for purposes of Rule 1.6(a)) for the exchange of information necessary for the carrier to monitor and evaluate the case . . . .").

What is not impliedly authorized is the provision of information to the carrier that could jeopardize coverage. In that regard, Rule 1.6(a) speaks to the most common ethical dilemma that insurance defense counsel complain about: what can I tell the carrier regarding my client? From a practical standpoint, Rule 1.6(a), together with Rule 1.8(b), require insurance defense lawyers to understand the coverage implications of the information they report to the insurer, so they can tell the difference between which disclosures are impliedly authorized, and which disclosures are potentially to the client's disadvantage. Those latter disclosures require informed consent, defined under Rule 1.0 (e) as "the consent 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." It is impossible to communicate to the client how the reporting of certain information could jeopardize coverage unless defense counsel understands what coverage defenses could be triggered by the reported information.

That being said, the coverage implications of certain facts are often difficult to discern. Under any circumstances, it is essential that the insured client understand that while we do have a duty to warn of known risks, we do not represent our clients as to coverage matters. In that regard, as well as in certain other respects that flow from the nature of the tripartite relationship, our representation is a limited one in the sense contemplated by Rule 1.6(b) -- and, indeed, except in circumstances in which we truly function as independent counsel, the conflict rules, specifically Rule 1.7(a) (2), preclude us from acting both as defense counsel and coverage counsel. Our clients often expect us to act in both capacities; and this expectation triggers the duty of consultation contained in Rule 1.2(e).

As defense counsel, we also have to be able to determine what information has to be reported to the insurer because it is material to the defense, and what information may safely be withheld without jeopardizing the client's duty of cooperation.

One example of coverage-risking information that can be withheld because it is not material to the defense, was provided by the Pennsylvania Bar Association in a 1997 opinion:

> Generally, an attorney representing an insured need only inform the Insurer of the information necessary to evaluate a claim. For example, assume an attorney represents an Insured in a premise liability slip and fall. During the course of the representation, the attorney discovers that the subject property is a rental property, not a residential property as set forth in the policy.
>
> Although this information may radically affect coverage, the attorney is prohibited from releasing this information to the Insurer or any other third parties. In the foregoing hypothetical, the attorney would simply inform the Insurer of the nature of the injuries claimed by plaintiff and the circumstances surrounding the incident. The insurer would have all of the information necessary to evaluate the value and

basis for the claim and the Insured's confidentiality would be protected.

*Pa. Bar Assoc. Comm. On Legal Ethics and Prof. Resp. Informal Op., No. 97-119, 1997 WL 816708 at *2 (Oct. 7, 1997).*

Related discussions of Rules 1.8(b), 1.7(a) (2), and 1.2(e) appear below.

RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. ***A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.*** *A lawyer shall abide by a client's decision whether to settle a matter.* * * *

* * *.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances ***and the client gives informed consent.***

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment 13:

(13) If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Rule 1.2(a), on its face, requires defense counsel to abide by a client's decisions regarding the *objective* of the representation unless that objective exceeds the scope of the representation, or is criminal or fraudulent. In some instances, concealing facts that trigger coverage defenses can constitute fraud. But what if the objective simply violates the cooperation clause of the insurance policy? Rule 1.2 requires compliance with that objective, **subject to the limitations of Rule 1.2(c) and (d).**

Rule 1.2(c) allows the representation to be limited in scope. In the tripartite context, defense counsel's representation is limited in that it does not extend to coverage issues -- which is one reason why withdrawal becomes necessary in circumstances where the client, having been advised that informed consent is necessary prior to forwarding coverage-threatening facts to the carrier, instructs the attorney not to share those facts with the insurer.[1] Defense counsel's scope of representation does not include assisting the client in concealing from the insurer facts it otherwise is entitled to by virtue of the cooperation clause.

Informed Consent in the Tripartite Relationship

One challenge under Rule 1.2(c) -- and under the tripartite relationship in general -- is the informed consent requirement. **Implied** consent to a

[1] See *New Appleman on Insurance Law Library Edition Section 1604[4][b] (*"But withholding information may create a conflict and require withdrawal from further representation, requiring reassignment of the case to other counsel or even permitting the insured to retain independent counsel.").

representation limited in scope is given by virtue of consent to a defense under the terms of the policy -- but **informed** consent, defined at Model Rule 1.0(e) as "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", poses special problems in the tripartite relationship.

Informed consent to a representation limited to defense of the claim only (i.e., not coverage advice) can be memorialized in an engagement letter that recites the client's understanding of defense counsel's role. If insurance company guidelines place significant limitations on defense counsel's decision-making, these can be disclosed, and consent memorialized, in the engagement letter as well.

What about defense under a reservation of rights that includes a reservation of the right to recoup defense costs upon a later determination of no coverage? What about a situation in which the insurer offers a defense but also initiates a declaratory judgment action to determine that it has no duty to defend? Here, there may be a "material risk" to the client in accepting defense counsel's limited engagement, for the reason that the client's interests and the insurer's interests may diverge over such issues as how much money should be spent on defense, when those defense costs should be incurred, and when settlement efforts should be initiated. The client has an "alternative", which is to refuse a defense under a reservation and instead employ counsel and seek to recoup defense costs later (how reasonable it is may depend on whether the client can afford it).

This is one reason why it is important for the attorney to receive a copy of any reservation of rights, and why it is critical for defense counsel to explain to the insured about the importance of talking to their own attorney about coverage issues.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(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.*

(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.

Comment 13: Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of

the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Under Rule 1.7(a)(2), a current conflict exists if there is a significant risk that the representation of a client will be materially limited by a lawyer's responsibilities to a third person.

This conflict exists any time a client directs an attorney not to reveal potentially coverage-threatening information that is nevertheless material to the defense. **The attorney owes a duty to a third person -- the insurer -- regardless of whether an attorney-client relationship exists or not.**

Comment g to section 51(3) of the Restatement of the Law Governing Lawyers states: "[A] lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, **whether or not the insurer is held to be a co-client of the lawyer**." (Emphasis added.) The comment adds, "However, such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured." See also Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 602 (Az. 2001) ("[W]hen an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that the lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide. This duty exists even if the insurer is a nonclient."). See also State &

County Mut. Fire Ins. Co. v. Young, 490 F. Supp. 2d 741, 744 (N.D. W. Va. 2007) (following Langerman and relying expressly on comment g).

One could take the position that, consistent with the Restatement comment above, whatever the attorney's duty to the insurer, it does not encompass sharing information that jeopardizes coverage because such a duty "would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured." However, the lawyer's duties to the insured include taking no steps that would potentially cause the insured to violate the duty of cooperation under the policy.

RULE 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

1.8(b) Use of Information Related to Representation

> *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.*

Like Rule 1.6(a), Rule 1.8(b) forbids insurance defense counsel from sharing with the carrier information that could be detrimental to our client's coverage, without informed consent. Rule 1.8(b) speaks to the lawyer's "use" of such information, which is typically understood as being use for the lawyer's or a third person's advantage.[2] As defense panel counsel, it is to our and the carrier's advantage to ensure that the carrier be kept apprised of facts material to the defense.

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[2] See former Disciplinary Rule 4-101(B)(3),from which Rule 1.8(b) derives, which precluded the use of client confidences or secrets for the advantage of the lawyer or a third person unless the client consented after foreclosure.

Moreover, lawyers are impliedly authorized by their insured clients to provide the carrier with information material to the defense. (Rule 1.2(d) allows us to take such action on behalf of a client as is impliedly authorized.) As is the case with Rule 1.6(a), however, if the facts defense counsel shares trigger defenses to the client's coverage, counsel must obtain informed consent before sharing that information with the insurer. If the facts are material to defense or settlement, by failing to share such information with the client, the attorney jeopardizes the client's coverage as well by creating a potential breach of the cooperation clause. (See the discussion above regarding Rule 1.6(a).)

The answer to the dilemma created by both Rules 1.6(a) and 1.8(b) lies in the rules themselves. Counsel must obtain the client's informed consent before sharing potentially coverage-destroying facts with the carrier. Lacking that, however, Rule 1.7(a) (2) -- or, potentially, Rule 1.2(c) (in conjunction with Rule 1.16(a)(1)) -- require counsel to withdraw, for reasons discussed below.

INDEPENDENCE OF PROFESSIONAL JUDGMENT

Rule 5.4(c). Professional Independence of a Lawyer.

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Rule 1.8 (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.

Comments 11 and 12: Person Paying for a Lawyer's Services

(11) 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).

(12) Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that

paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

As regards Rule 1.8(f) (1), in the tripartite context, consent as to the simple fact that defense counsel is being paid by the insurer is implied from the insured's having previously accepted the terms of the insurance policy. The attorney's actions in cooperating with basic procedural requirements of the carrier are impliedly authorized by virtue of the policy's cooperation clause. See Great Am. Ins. Co. v. Christopher, 2003 U.S. Dist. LEXIS 10076, * 14 (N.D. Tex. June 13, 2003) ("It is undisputed that there was no actual "joint defense" arrangement in the case at hand. Rather, Kalitta disclosed information to counsel for Great American pursuant to the cooperation clause in the D&O policy.").

However, to the extent the insurer imposes rules on defense counsel with regard to how the defense is to be conducted, the client's informed consent requires that the client understand what those rules are. See American Bar Association Formal Opinion 01-421 (If the lawyer believes his representation of the insured will be materially impaired by the insurer's guidelines, or if the insured objects to the defense as limited by the guidelines, the lawyer should consult with the insurer and the insured; and if the cause of the material impairment of the representation is not resolved and the insured refuses to consent to the limitations imposed, then the lawyer must withdraw, either under Rule 1.7(b) or Rule 1.16(b).).

RULE 4.3. DEALING WITH UNREPRESENTED PERSON.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role

in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Because insurance defense counsel's representation is limited in scope and does not extend to coverage matters, any communication with the insured regarding coverage is (assuming the insured does not have coverage counsel) governed by Rule 4.3. Rule 4.3 (b) limits defense counsel to warning the insured that certain facts may pose a coverage issue -- counsel cannot advise the insured whether a coverage defense is in fact triggered by such facts. Rule 4.3(c) requires counsel to remedy any misunderstanding regarding the limited scope of the representation.