

PLAYING TUG-OF WAR IN A MINEFIELD: ETHICS ISSUES IN COVERAGE LITIGATION

Kurt D. Anderson, Esq.



OSBA Certified Specialist, Ohio Insurance Coverage Law
Collins, Roche, Utley & Garner, LLC
216-916-7725
kanderson@cruglaw.com



RULE 1.1: COMPETENCE

A lawyer *shall provide competent representation* to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. *Expertise in a particular field of law may be required in some circumstances.*

INSURANCE COVERAGE LITIGATION

Contract Issues

Dec Pages

Insuring Agreements

Definitions & Conditions

Exclusions

Endorsements

Underwriting issues, intentions

Litigation Issues

Declaratory Judgments

Intervention

Interpleading

Bifurcation

Supplemental Complaints



OHIO RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] As an officer of the court, a lawyer not only *represents clients* but has a special responsibility for the quality of justice.

[2] *In representing clients*, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client and consistent with requirements of honest dealings with others. As an evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others.

HOW IS THE ATTORNEY-CLIENT RELATIONSHIP CREATED?

OHIO RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

...

[17] Furthermore, *for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists.* Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. ... *Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.*

HOW IS THE RELATIONSHIP CREATED?

- May be created by implication
- Reasonable expectations of person seeking representation are determinative:

To determine whether an attorney-client relationship exists, the law looks to the manifest intentions of the attorney and the prospective client. A relationship of attorney and client arises when a person manifests an intention to obtain legal services from an attorney and the attorney either consents or fails to negate consent when the person has reasonably assumed that the relationship has been established. Thus, *the existence of an attorney-client relationship does not depend on an express contract but may be implied based on the conduct of the parties and the reasonable expectations of the putative client.* The determination of whether an attorney-client relationship was created turns largely on *the reasonable belief of the prospective client.*

New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 26, 950 N.E.2d 157 (internal citations omitted).

HYPOTHETICAL:

Generous Guaranty Ins. Co. emails David Diligent asking him to defend Patricia President and her company, President Products, in a new lawsuit.

At the same time, Generous sends an email to President advising her that it has assigned Diligent to be her defense counsel. President promptly sends Diligent a long email describing the history of the conflict behind the litigation.

Diligent hasn't yet seen the email, hasn't performed a conflicts check, and hasn't acknowledged the assignment.

Is there an attorney-client relationship between President and Diligent?

HYPOTHETICAL:

Diligent sees the assignment email from Generous.

What is his first duty?

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To determine whether an attorney-client relationship exists, the law looks to the manifest intentions of the attorney and the prospective client. A relationship of attorney and client arises when a person manifests an intention to obtain legal services from an attorney **and the attorney** either consents **or fails to negate consent when the person has reasonably assumed that the relationship has been established**. Thus, *the existence of an attorney-client relationship does not depend on an express contract but may be implied based on the conduct of the parties and the reasonable expectations of the putative client*. The determination of whether an attorney-client relationship was created turns largely on *the reasonable belief of the prospective client*.

New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 26, 950 N.E.2d 157 (internal citations omitted).

HYPOTHETICAL:

Diligent sees the emails from Generous and from President.

What is his first duty?

1) ACKNOWLEDGE the assignment

2) ADVISE that a conflicts check is being performed

HYPOTHETICAL:

Diligent sees the emails from Generous and from President.

What is his first duty?

- 1) ACKNOWLEDGE the assignment**
- 2) ADVISE that a conflicts check is being performed**
- 3) Perform a CONFLICTS CHECK**

Conflicts of interest, or the appearance of conflicts of interest, may be the greatest source of ethics concerns for insurance defense and insurance coverage attorneys.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

- (1) the representation of that client will *be directly adverse to another current client*;
- (2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

- (1) the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) each affected client gives informed consent, confirmed in writing;
- (3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

- (1) the representation is prohibited by law;
- (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

RULE 1.7 – COMMENT

General Principles

* * *

[2] In order to analyze and resolve a conflict of interest problem under this rule, a lawyer must: (1) ***clearly identify the client or clients***; (2) determine whether a conflict of interest exists; (3) decide whether the representation is barred by either criteria of division (c); (4) evaluate, under division (b)(1), whether the lawyer can competently and diligently represent all clients affected by the conflict of interest; and (5) if representation is otherwise permissible, consult with the clients affected by the conflict and obtain the informed consent of each of them, confirmed in writing.

[3] To determine whether a conflict of interest would be created by accepting or continuing a representation, ***a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, for collecting and reviewing information about the persons and issues*** in all matters handled by the lawyer. ***...Ignorance caused by a failure to institute or follow such procedures will not excuse a lawyer's violation of this rule.*** [derived from Model Rule Comment 3]

HYPOTHETICAL:

Diligent has a conflicts check system.

What information does he need to perform an adequate conflicts check?

Client names

Adverse party names

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Diligent has a conflicts check system.

What information does he need to perform an adequate conflicts check?

Client names

Adverse party names

Assume the litigation against President Products is a products liability claim.

Suppliers and other contractors?

HYPOTHETICAL (CONFLICTS):

Assume the litigation against Patricia President and President Products is a sexual harassment and employment discrimination case by Robert Rejected, who was a former company manager ...and also Patricia's former boyfriend. Robert claims that after he broke up with Patricia, Patricia retaliated by terminating him as an employee.

The complaint makes allegations including intentional misconduct and retaliation, and alleges negligent hiring, training, and supervision and vicarious liability against the company. The complaint also alleges malicious misconduct and seeks punitive damages.

Can Diligent defend both Patricia and the company?

HYPOTHETICAL (CONFLICTS):

Generous Guaranty Ins. Co. has issued policies with D&O and employment practices (EPLI) coverage to President Products, and its assignment is to defend President and company under a reservation of rights. Guaranty issues ROR letters to both President and company noting that its coverage does not apply to intentional and malicious conduct or claims for punitive damages.

What is the scope of the requested defense?

SCOPE OF THE REPRESENTATION--CONFLICTS

Covered v. Non-Covered Claims

“An insurer has an absolute duty to defend an action when the complaint contains an allegation in *any one of its claims that could arguably be covered by the insurance policy, even in part* and even if the allegations are groundless, false, or fraudulent. *Sanderson v. Ohio Edison Co.* (1994), 69 Ohio St.3d 582, 635 N.E.2d 19, at paragraph one of the syllabus. ***Once an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint, even if they bear no relation to the insurance-policy coverage.*** *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78, 80, 23 OBR 208, 491 N.E.2d 688. An insurer need not defend any action or any claims within the complaint when all the claims are clearly and indisputably outside of the contracted policy coverage.”

Sharonville v. Am. Employers Ins. Co., 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833 (emphasis added)

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

- (1) the representation of that client will *be directly adverse to another current client*;
- (2) there is *a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action* for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

- (1) the lawyer will be *able to provide competent and diligent representation* to each affected client;
- (2) each affected client gives informed consent, confirmed in writing;
- (3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer *shall not accept* or continue the representation if either of the following applies:

- (1) the representation is prohibited by law;
- (2) the representation would *involve the assertion of a claim by one client against another client* represented by the lawyer in the same proceeding.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

Comments:

Identifying Conflicts of Interest: Material Limitation Conflicts

[14] Even where clients are not directly adverse, *a conflict of interest exists if there is a substantial risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.* The mere possibility of subsequent harm does not, itself, require disclosure and consent. The critical questions are: (1) whether a difference in interests between the client and lawyer or between two clients exists or is likely to arise; and (2) if it does, whether this difference in interests will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of any affected client. [analogous to Model Rule Comment 8]

HYPOTHETICAL (CONFLICTS):

Generous Guaranty Ins. Co. has issued policies with D&O and employment practices coverage to President Products, and its assignment is to defend President and company under a reservation of rights. Guaranty issues ROR letters to both President and company noting that its coverage does not apply to intentional and malicious conduct or claims for punitive damages. Guaranty reserves the right to amend its coverage position based on information learned in discovery.

Can Diligent represent both Patricia and the company?

HYPOTHETICAL (CONFLICTS):

Diligent resolves the conflict issue and agrees to undertake representation and defense.

What is his next ethical duty?

****Provide the Rule 1.8 Statement of Insured Client's Rights**

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS

* * *

(f) A lawyer **shall not accept** compensation for representing a client *from someone other than the client unless divisions (f)(1) to (3) and, if applicable, division (f)(4) apply:*

(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;

(3) information relating to representation of a client is protected as required by Rule 1.6;

(4) *if the lawyer is compensated by an insurer to represent an insured, the lawyer delivers a copy of the following Statement of Insured Client's Rights to the client in person at the first meeting or by mail within ten days after the lawyer receives notice of retention by the insurer:*

RULE 1.8 -- Comments

* * *

[12A] Divisions (f)(1) to (f)(3) apply to insurance defense counsel compensated by an insurer to defend an insured, subject to the unique aspects of that relationship. *Whether employed or retained by an insurance company, insurance defense counsel owes the insured the same duties to avoid conflicts, keep confidences, exercise independent judgment, and communicate as a lawyer owes any other client.* These duties are subject only to the rights of the insurer, if any, pursuant to the policy contract with its insured, to control the defense, receive information relating to the defense or settlement of the claim, and settle the case. Insurance defense counsel may not permit an insurer's right to control the defense to compromise the lawyer's independent judgment, for example, regarding the legal research or factual investigation necessary to support the defense. The lawyer may not permit an insurer's right to receive information to result in the disclosure to the insurer, or its agent, of confidences of the insured. *The insured's consent to the insurer's payment of defense counsel, required by Rule 1.8(f)(1), can be inferred from the policy contract. Nevertheless, an insured may not understand how defense counsel's relationship with and duties to the insurer will affect the representation. Therefore, to ensure that such consent is informed, these rules require a lawyer who undertakes defense of an insured at the expense of an insurer to provide to the client insured, at the commencement of representation, the "Statement of Insured Client's Rights."*

THE TRI-PARTITE RELATIONSHIP IN OHIO

“Insurance defense counsel routinely and *necessarily represent the interests of both the insurer and the insured*. Although the representation of two clients is not unusual, the manner in which this relationship is created distinguishes it from others. This distinction creates what is appropriately characterized as a tripartite relationship.

...Here [the attorney] represented *both the insurer and the insured*. It is a multiple party, tripartite representation, with each party having different priorities and interests, but nevertheless *one of lawyer-client as to each of the parties*.”

USF&G v. Pietrykowski, 6th Dist. No. E99-38, 2000 WL 204475

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has retained a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation.

1. **Your Lawyer:** Your lawyer has been retained by the insurance company under the terms of your policy. If you have questions about the selection of the lawyer, you should discuss the matter with the insurance company or the lawyer.
2. **Directing the Lawyer:** Your policy may provide that the insurance company can reasonably control the defense of the lawsuit. In addition, your insurance company may establish guidelines governing how lawyers are to proceed in defending you—guidelines that you are entitled to know. However, *the lawyer cannot act on the insurance company's instructions when they are contrary to your interest.*
3. **Communications:** *Your lawyer should keep you informed about your case and respond to your reasonable requests for information.*

STATEMENT OF INSURED CLIENT'S RIGHTS – cont'd

4. Confidentiality: Lawyers have a duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have duty to share with the insurance company information relating to the defense or settlement of the claim. Whenever a waiver of lawyer-client confidentiality is needed, your lawyer has a duty to consult with you and obtain your informed consent.

5. Release of Information for Audits: Some insurance companies retain auditing companies to review the billing and files of the lawyers they hire to represent policyholders. *If the lawyer believes an audit, bill review, or other action initiated by the insurance company may release confidential information in a manner that may be contrary to your interest, the lawyer must advise you regarding the matter and provide an explanation of the purpose of the audit and the procedure involved. Your written consent must be given in order for an audit to be conducted.* If you withhold your consent, the audit shall not be conducted.

6. Conflicts of Interest: **The lawyer is responsible for identifying conflicts of interest and advising you of them.** If at any time you have a concern about a conflict of interest in your case, you should discuss your concern with the lawyer. **If a conflict of interest exists that cannot be resolved, the insurance company may be required to provide you with another lawyer.**

STATEMENT OF INSURED CLIENT’S RIGHTS – cont’d

6. Conflicts of Interest: **The lawyer is responsible for identifying conflicts of interest and advising you of them.** If at any time you have a concern about a conflict of interest in your case, you should discuss your concern with the lawyer. **If a conflict of interest exists that cannot be resolved, the insurance company may be required to provide you with another lawyer.**

Under Ohio law, an insurance company’s reservation of rights regarding coverage does not create an inherently “unreconcilable” conflict of interest. An insurance company may assert its reservation of rights, and may even intervene to obtain a declaration of rights, even while defending the insured. Only when there is an irreconcilable conflict is the carrier required to pay for the insured’s private lawyer.

Defense under ROR: Red Head Brass, Inc. v. Buckeye Union Ins. Co., 135 Ohio App. 3d 616, 735 N.E.2d 48 (1999)

Intervention while defending: Howell v. Richardson, 45 Ohio St.3d 365, 544 N.E.2d 878 (1989); Gehm v. Timberline Post & Frame, 112 Ohio St.3d 514, 2007-Ohio-607 (2007)

STATEMENT OF INSURED CLIENT'S RIGHTS – cont'd

7. Settlement: Many insurance policies state that the insurance company alone may make a decision regarding settlement of a claim. Some policies, however, require your consent. You should discuss with your lawyer your rights under the policy regarding settlement. ***No settlement requiring you to pay money in excess of your policy limits can be reached without your agreement.***

8. Fees and Costs: As provided in your insurance policy, the insurance company usually pays all of the fees and costs of defending the claim. If you are responsible for paying the lawyer any fees and costs, your lawyer must promptly inform you of that.

9. Hiring your own Lawyer: The lawyer hired by the insurance company is only representing you in defending the claim brought against you. ***If you desire to pursue a claim against someone, you will need to hire your own lawyer.*** You may also wish to hire your own lawyer ***if there is a risk that there might be a judgment entered against you for more than the amount of your insurance. Your lawyer has a duty to inform you of this risk*** and other reasonably foreseeable adverse results.

RULE 1.8

Comments

[12A] Whether employed or retained by an insurance company, insurance defense counsel owes the insured the same duties to *avoid conflicts*, *keep confidences*, exercise independent judgment, and *communicate* as a lawyer owes any other client. These duties are subject only to the rights of the insurer, if any, pursuant to the policy contract with its insured, *to control the defense*, receive information relating to the defense or settlement of the claim, and *settle the case*.

R.Prof.Cond. 1.8, comment 12A

- **Duty to Avoid Conflicts (Rule 1.7)**
- **Duty to Preserve Confidences (Rule 1.6)**
- **Duty to Communicate (Rule 1.4)**
- **Duty to Heed the Client's Authority (Rule 1.2)**

CONFLICTS – REPRESENTING THE INSURER

1) Reservation of Rights

- a. Coverage for some claims, but not all claims
- b. No coverage, but will defend

NOTE: A carrier waives coverage defenses if it prejudices the insured by accepting defense without timely reserving rights. *Turner Liquidating Co. v. St. Paul Surplus Lines Ins. Co.*, 93 Ohio App.3d 292, 638 N.E.2d 174 (9th Dist., 1994); *see also Dietz-Britton v. Smythe, Cramer Co.*, 139 Ohio App.3d 337, 743 N.E.2d 960 (8th Dist., 2000); *GuideOne Mut. Ins. Co. v. Reno*, 2nd Dist. No. 01-CA-68, 2002-Ohio-2057, 2002 WL 857682.

The purpose of the reservation of rights is to fairly inform the insured that there may be certain coverage limitations or restrictions, and the reason for such limitations (including specific policy language).

HYPOTHETICAL (CONFLICTS):

The complaint is the first notice that Guaranty has received of Robert Rejected's claims. Having asked Diligent to defend Patricia and President Products, and since under the tripartite relationship, Diligent owes client duties to Guaranty, can Guaranty also request Diligent to review the policies issued to President Products and to provide an opinion as to Guaranty's coverage obligations?

REPRESENTING THE INSURER--CONFLICTS

The “tri-partite relationship” is built on a common interest in defending the claims asserted against the insured. *See, e.g., Bank of America, N.A. v. Superior Court*, 212 Cal. App.4th 1076 (2013)(describing the tri-partite relationship as a “partnership, coalition, or alliance directed toward a common goal.”

Coverage, on the other hand, involves representing and advising the insurer on questions that may have adverse effect on the insured. Counsel cannot represent the insured in defending claims, and simultaneously be giving advice to the insurer regarding its coverage obligations that may be detrimental to the insured. Generally speaking, defense counsel should stay away from involvement in coverage issues.

HYPOTHETICAL (CONFLICTS):

Aware that defense counsel will have conflicts addressing coverage issues, Guaranty engages Curt Coverage to review its policy and issue reservation of rights letters to Patricia President and President Products.

Are either Guaranty or Curt Coverage violating any duties or acting in bad faith toward the insureds?

Does Coverage owe any attorney-client duties to the insureds?

HYPOTHETICAL (CONFLICTS):

Guaranty believes that Patricia President's actions toward Robert Rejected fall outside of the policy coverage.

Can Guaranty simultaneously defend Patricia and the company from Robert's claims, and pursue a declaratory judgment that Patricia's actions are outside the scope of coverage?

REPRESENTING THE INSURER—COVERAGE DJ ACTIONS

“. . . The insurance company may legitimately decline to defend where it believes in good faith that [the policy provides no coverage]. It may nevertheless enter the action and participate as a third-party defendant so as to defeat any liability on its part (i.e., by demonstrating that the acts of the insured/tortfeasor were [outside the policy’s coverage]).

It is this opportunity that must be seized. Otherwise, whether seized or not, *the opportunity to litigate in the original action will preclude relitigation of liability in the supplemental proceeding.*”

Howell v. Richardson, 45 Ohio St.3d 365, 367-368, 544 N.E.2d 878 (1989). *See also Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607 (2007) (clarifying that the underlying litigation is *not* collateral estoppel *if* the insurer has attempted to intervene).

REPRESENTING THE INSURER—COVERAGE DJ ACTIONS

“When the liability insurer of a defendant in a tort action disputes coverage, the insurer has an interest in the outcome of the tort action independent of its insured’s interests.”

Krancevic v. McPherson, 8th Dist. No. 84511, 2004-Ohio-6915 at ¶6. *See also Tomcany v. Range Constr.*, 11th Dist. No. 2003-L-071, 2004-Ohio-5314 at ¶32 (insurer had interest sufficient to warrant intervention when the insurer “wanted to ascertain whether [the claimant’s] various claims and potential damages would be covered under [the insurer’s] policy[.]”

HYPOTHETICAL (CONFLICTS):

Should defense counsel request copies of Guaranty's reservation of rights letters?

RULE 1.8

Comments

* * *

[12A] ...*Whether employed or retained by an insurance company, insurance defense counsel owes the insured the same duties to avoid conflicts, keep confidences, exercise independent judgment, and communicate as a lawyer owes any other client.* These duties are subject only to the rights of the insurer, if any, pursuant to the policy contract with its insured, to control the defense, receive information relating to the defense or settlement of the claim, and settle the case. ...*The lawyer may not permit an insurer's right to receive information to result in the disclosure to the insurer, or its agent, of confidences of the insured.*

HYPOTHETICAL (CONFLICTS/CONFIDENTIALITY):

Should defense counsel request copies of Guaranty's reservation of rights letters?

Recall that upon receiving notice of defense counsel's assignment, Patricia promptly sent Diligent a lengthy email detailing the sordid history of her relationship with Robert. This e-mail would be privileged attorney-client communication (even if Diligent did not assume representation).

Diligent should inform himself of the coverage issues that may be detrimental to Patricia, so that he does not unwittingly divulge attorney-client communication to Guaranty that prejudices Patricia's coverage.

HYPOTHETICAL (CONFLICTS/CONFIDENTIALITY):

In her lengthy email to Diligent, Patricia confessed that she knew the romantic relationship with a subordinate was a violation of company policy, that she and Robert had worked very carefully to keep the relationship a secret, that he had embarrassed her by breaking up and then posting about it on social media, and she had fired him out of pure spite because she now hates his guts.

Can Diligent:

- 1) continue to represent both Patricia and the company?**
- 2) disclose Patricia's information to Guaranty?**
- 3) How does Diligent persuade Guaranty to assign other counsel for the company?**

HYPOTHETICAL (CONFLICTS/CONFIDENTIALITY):

Guaranty has not learned of Patricia's admission of her secret relationship. What it knows is that prior to suing Patricia, Robert's personnel file reflects several complaints from female subordinates for unwanted flirtation and suggestions that, as a manager, he could boost their careers. Guaranty believes the company has a solid defense for Robert's firing and wants to defend aggressively.

Diligent knows that Patricia's confession is likely to come out in discovery, that it will expose her to both compensatory and punitive damages, and that it may be grounds for Guaranty denying coverage.

How does he proceed?

CONFIDENTIALITY

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal *information relating to the representation of a client*, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is *impliedly authorized* in order to carry out the representation, *or* the disclosure is permitted by division (b) or required by division (c) of this rule.

CONFIDENTIALITY

RULE 1.6: CONFIDENTIALITY OF INFORMATION

* * *

(b) A lawyer *may* reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary for any of the following purposes:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the commission of a crime by the client or other person;
- (3) to mitigate substantial injury to the financial interests or property of another that has resulted from the client's commission of an illegal or fraudulent act, *in furtherance of which the client has used the lawyer's services*;
- (4) to secure legal advice about the lawyer's compliance with these rules;
- (5) to establish a claim or defense on behalf of the lawyer *in a controversy between the lawyer and the client*, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order.

CONFIDENTIALITY

RULE 1.6: CONFIDENTIALITY OF INFORMATION

* * *

(c) A lawyer *shall* reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary to comply with Rule 3.3 or 4.1.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly do either of the following:

- (a) make a false statement of material fact or law to a third person;
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client.

CONFIDENTIALITY & BAD FAITH

Both coverage counsel and defense counsel must recognize the limitations of the attorney-client privilege in bad faith litigation (i.e., *Boone v. Vanliner* and R.C. 2317.02(A)(2))

CONFIDENTIALITY & INFORMATION SECURITY

Rule 1.6--Comments

Acting Competently to Preserve Confidentiality

[16] *A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.* See Rules 1.1, 5.1, and 5.3.

[17] *When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions.* ... A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

CONFIDENTIALITY & INFORMATION SECURITY

An attorney lets his wife and children use his laptop and cell phone to send emails, surf the net, or play online games.

CONFIDENTIALITY & INFORMATION SECURITY

A solo attorney shares office space with other attorneys and they all use the same 2 secretaries. All physical files are kept in the same storage room, and the secretaries have access to all the attorney electronic files.

See CPR Opinion 91-9 (under old Code, but insightful).

CONFIDENTIALITY & INFORMATION SECURITY

An attorney is terminating his practice. He puts 200 boxes of files in a dumpster, but many won't fit and he leaves about 50 boxes stacked next to the dumpster. He puts another 100 boxes and his computers in a storage facility and then becomes delinquent on the storage fees, and the owner accesses them to remove them.

See Disciplinary Counsel v. Shaver, 121 Ohio St.3d 393, 904 N.E.2d 883, 2009-Ohio-1385

CLIENT AUTHORITY

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

(a) Subject to divisions (c), (d), and (e) of this rule, 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 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*. ...

(division (c) relates to limitation of the attorney's role, and (d) and (e) related to dishonest, criminal, or fraudulent misconduct).

HYPOTHETICAL (CLIENT AUTHORITY):

Roberts has made a reasonable settlement demand and Guaranty wants to settle.

Patricia contacts Diligent and adamantly insists that Roberts should never get a dime because she hates him and doesn't want the company insurance to pay a lying, deceiving schmuck.

HYPOTHETICAL (CLIENT AUTHORITY):

Assume there was no actual illicit relationship. Roberts was fired for harassing subordinates, and he has invented the story of a relationship with Patricia and retaliation. Patricia admits they socialized but denies any meaningful relationship and both Diligent and Guaranty believe her.

The EPLI policy under which Guaranty is defending Patricia has burning limits. The more expense is incurred in litigation, the less there will be to pay any settlement.

There is exposure to punitive damages and Patricia is adamant about settling “at any cost”. Guaranty believes it needs more discovery to solidify the defense and settlement right now is too expensive, but Patricia and Diligent both believe that once depositions are taken there will not be enough coverage limits left to ever reach a reasonable settlement.

RULE 1.4: COMMUNICATION

(a) A lawyer *shall do all* of the following:

(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) comply as soon as practicable with reasonable requests for information from the client;

(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 Ohio Rules of Professional Conduct or other law.

(b) *A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

CHECKLIST FOR EFFECTIVE CLIENT COMMUNICATION

Communication as customer-service

The insured client is a consumer; make them happy they bought coverage from your carrier.

Assure them you want to end this litigation as efficiently and effectively as possible.

How informed do they want to be?

Be prompt, clear, responsive, caring. Be objective, but be human. Be understanding.

USE PLAIN ENGLISH

Be an active listener; do not assume you know all the problem, all relevant information, or every possible solution.

Ask questions. Learn the insured's goals, intentions, uncertainties, needs.

Get consent on all significant actions, or let them know of the carrier's decisions.

Confirm all advice, recommendations, and decisions in WRITING

Questions:

Kurt D. Anderson, Esq.
Collins, Roche, Utley & Garner, LLC
216-916-7725
kanderson@cruglaw.com