ETHICAL ISSUES
IN INSURANCE COVERAGE LITIGATION
(How to Play Tug-of-War In A Minefield)

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Approximately 80% of civil litigation in the United States involves liability insurance. This means that the vast majority of civil litigation involves multiple layers of issues and potential conflict beyond the claims expressly asserted in the pleadings. It is therefore incumbent on every attorney advising clients facing civil litigation to at least understand the rudimentary principles of insurance defense, and it is even more critical for both insurance defense attorneys (those retained by carriers to defend insureds) and insurance coverage attorneys (those retained by carriers to advise the carrier and represent it in coverage disputes with insureds) to understand the practical and ethical obligations toward their respective clients. Because insurance creates additional relationships and multi-directional responsibilities, insurance defense and insurance coverage are areas fraught with potential ethics pitfalls, especially when liability claims and coverage claims overlap within a single case.

I. UNDERSTANDING THE TRIPARTITE RELATIONSHIP:

A. WHO IS THE CLIENT?

While insurance coverage litigation is distinct from insurance defense, it is critical to understand both the distinct and the overlapping interests and goals of the insured, the insurer, assigned defense counsel, coverage counsel, and the insured's private counsel (if any). Failure to correctly delineate these relationships will create unnecessary ethics problems.

Ethical obligations are primarily (but not exclusively) dictated by the existence and scope of an attorney-client relationship. While ethical rules govern an attorney's conduct within an attorney-client relationship, the rules do not define the relationship itself, which is created by mutual agreement, i.e., by contract, which can be either express or implied.

OHIO RULES OF PROFESSIONAL CONDUCT[1]

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. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. ***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***.

[1] In this paper, quotations from the Ohio Rules of Professional Conduct appear within a boxed border. All italics-bold (***emphasis***) is added; bold-only (**emphasis**) is original.

New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 26, 950 N.E.2d 157 (internal citations omitted); *See also Carnegie Cos., Inc. v. Summit Properties, Inc.,* 183 Ohio App.3d 770, 2009-Ohio-4655, 918 N.E.2d 1052 (9th Dist. 2009)(internal cites omitted); *Svaldi v. Holmes*, 2012-Ohio-6161, 986 N.E.2d 443 (10th Dist. 2012); *Oliver v. Natl. Collegiate Athletic Assn*., 155 Ohio Misc.2d 17, 2009-Ohio-6587, 920 N.E.2d 203 (C.P. 2009).

B. THE INSURER'S DUTY TO DEFEND

> 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.

Focus is the ***scope*** of allegations, not specific factual allegations.

> Like the federal system, Ohio has embraced notice pleading through adoption of the Ohio Rules of Civil Procedure. See Civ.R. 8(A) and (E). No longer must a complaint set forth specific factual allegations. All that Civ.R. *180 8(A) requires is " * * * (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. * * * "

> In addition, no longer is a trial strictly limited to the issues raised in the pleadings. See Civ.R. 15(B).
>
> … ***Thus, the "scope of the allegations" may encompass matters well outside the four corners of the pleadings.***

City of Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St.3d 177, 459 N.E.2d 555 (1984). Duty to defend exists even where allegations are "vague, ambiguous, nebulous or incomplete" and it cannot be determined from the pleadings whether coverage exists. *Zanco, Inc. v. Michigan Mut. Ins. Co.*, 11 Ohio St.3d 114, 464 N.E.2d 513 (1984). This is because, with notice pleading, facts may later develop that establish coverage, and a carrier should not be allowed to avoid the duty of defense "by strictly or narrowly construing a complaint." *Ganim v. Columbia Cas. Co.*, 574 F.2d 305 (6th Cir. 2009).

NOTE: Duty to defend may not extend to known false and groundless allegations, where the true facts are indisputably outside coverage, and the policy provides defense only for claims "to which this coverage applies" and does not provide coverage for allegations that are "groundless, false, or fraudulent." *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108, 507 N.E.2d 1118 (1987); *Twin Maples Veterinary Hosp. v. Cincinnati Ins. Co*., 159 Ohio App.3d 590, 2005-Ohio-430, 824 N.E.2d 1027.

C. THE INSURER'S DUTIES IN COVERAGE DISPUTES

1) Notice: The Reservation of Rights

- **a. Coverage for some claims, but not all claims**
- **b. Disputed coverage, but will defend (indemnity will depend on outcome)**
- **c. Defense and indemnity, but with limitations**

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.

2) Attempted Intervention and/or Declaratory Judgment to Deny or Limit Coverage (for some or all claims)

The carrier may provide a defense subject to reservation of rights, and simultaneously challenge coverage in a DJ action. Otherwise, it risks being collaterally estopped from challenging the factual determinations in the underlying tort action.

> [A]ctions [under R.C. 3929.06], by their nature, are supplemental to the initial proceeding establishing the liability of the tortfeasor. It would make little sense to provide for a "supplemental" action if the acts of the insured were not determined in the previous proceeding. Thus, as to the underlying tort claim the prior action operates to preclude relitigation of the liability of the tortfeasor (collateral estoppel).
>
> Inasmuch as State Farm possessed a contractual relationship with Richardson and, in any event, could have intervened in the prior proceeding, it is precluded from relitigating the issue of Richardson's mental state.
>
> . . . 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).

Civil Rule 24 intervention:

> "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[.]"

3) Responding to Bad Faith Actions

Under Ohio law, "[a]n insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552 (1994), paragraph one of the syllabus,

"Mere refusal to pay insurance is not, in itself, conclusive of bad faith." *Hoskins v. Aetna Life Ins. Co*., 6 Ohio St.3d 272, 277 (1983).

"A lack of reasonable justification exists where an insurer refuses to pay a claim in an arbitrary or capricious manner." *Nationwide Ins. Ent. v. Progressive Specialty Ins. Co*., 10th Dist. No. 01AP–1223, 2002–Ohio–3070, ¶ 19.

NOTE: Bad faith claims are almost universally accompanied by claims for punitive damages, which can be recovered if the carrier's refusal to pay a legitimate claim is not only unjustified and in bad faith, but shows show malice or aggravated or egregious fraud. *Helmick v. Republic–Franklin Ins. Co*., 39 Ohio St.3d 71, 75 (1988). See also R.C. 2315.21(C)(1) (punitive damages require malice or aggravated or egregious fraud).

II. ETHICAL DUTIES AND THE TRI-PARTITE 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***."
>
> R.Prof.Cond. 1.8, comment 12A

- **Duty to Avoid Conflicts**
- **Duty to Heed the Client's Authority**
- **Duty to Communicate**
- **Duty to Preserve Confidences**

A. CONFLICTS OF INTEREST: SPECIAL ISSUES IN COVERAGE LITIGATION

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***.

Comment

General Principles

[1] ***The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. All potential conflicts of interest involving a new or current client must be analyzed under this rule. In addition, a lawyer must consider whether any of the specific rules in Rule 1.8, regarding certain conflicts of interest involving current clients, applies.*** For former clients, see Rule 1.9; for conflicts involving those who have consulted a lawyer about representation but did not retain that lawyer, see Rule 1.18. [analogous to Model Rule Comment 1]

[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. See also Comment to Rule 5.1. ***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]

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[6] Just as conflicts can emerge in the course of a representation, the nature of a known conflict of interest can change in the course of a representation. For example, the proposed joint representation of a driver and her passenger to sue a person believed to

have caused a traffic accident may initially present only a material limitation conflict, as to which the proposed clients may give informed consent. However, if the lawyer's investigation suggests that the driver may be at fault, the interests of the driver and the passenger are then directly adverse, and the joint representation cannot be continued. A lawyer must be alert to the possibility that newly acquired information requires reevaluating of a conflict of interest, and taking different steps to resolve it. [derived from Model Rule Comment 5]

* * *

Identifying the Client

[9] In large part, principles of substantive law outside these rules determine whether a client-lawyer relationship exists or is continuing. See Scope [17]. These rules, including Rules 1.2, 1.8(f)(2), 1.13, and 6.5, must also be considered.

Identifying Conflicts of Interest: Directly Adverse Representation

[10] ***The concurrent representation of clients whose interests are directly adverse always creates a conflict of interest.*** A directly adverse conflict can occur in a litigation or transactional setting. [derived from Model Rule Comment 6]

[11] In litigation. The representation of one client is directly adverse to another in litigation ***when one of the lawyer's clients is asserting a claim against another client of the lawyer***. A directly adverse conflict also may arise when effective representation of a client who is a party in a lawsuit requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in the suit. ***A lawyer may not represent, in the same proceeding, clients who are directly adverse in that proceeding***. See Rule 1.7(c)(2). ***Further, absent consent, a lawyer may not act as an advocate in one proceeding against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.*** [derived from Model Rule Comment 6]

* * *

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]

Lawyer's Responsibility to Current Clients-Same Matter

[15] In litigation. ***A "material limitation" conflict exists when a lawyer represents co-plaintiffs or co-defendants in litigation and there is a substantial discrepancy in the clients' testimony, incompatible positions in relation to another party, potential cross-claims, or substantially different possibilities of settlement of the claims or liabilities in question.***

* * *

Lawyer's Responsibilities to Former Clients and Other Third Persons

[18] A lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as family members or persons to whom the lawyer, in the capacity of a trustee, executor, or corporate director, owes fiduciary duties. [Model Rule Comment 9]

* * *

Interest of Person Paying for a Lawyer's Service

[23] 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), and the special notice requirement for clients of insurance defense counsel in Rule 1.8(f)(4)***. If acceptance of the payment from any other source presents a substantial 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 division (b) before accepting the representation. [analogous to Model Rule Comment 13]

* * *

[30] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. [analogous to Model Rule Comment 19]

Consent Confirmed in Writing

[31] ***Division (b)(2) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document signed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.*** See Rule 1.0(b) and (p) (***writing includes electronic transmission***). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). Written confirmation of consent does not supplant the need, in most cases, for the lawyer to talk with the client: (1) to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives; and (2) to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. The writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of written consent. [Model Rule Comment 20]

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***:

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***.

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.

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.

* * *

Comment

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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 substantial 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.

[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."***

B. CONTROL & COMMUNICATION IN THE TRIPARTITE RELATIONSHIP

1. Selection of Defense Counsel & Independent Counsel

I. CLIENT-LAWYER RELATIONSHIP

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***.

Liability insurance policies issued in Ohio invariably grant the insurer the right to control the defense of litigation, including the selection of defense counsel, and this right has been upheld by Ohio courts. "It is a valuable right of the insurer to be able to control the defense of actions in which the insurer may be required to pay the judgment." *Bruce v. Junghun*, 182 Ohio App. 3d 341, 2009-Ohio-2151, 912 N.E.2d 1144, at ¶ 14 (10th Dist.); *Lusk v. Imperial Cas. & Indem. Co*., 78 Ohio App. 3d 11, 18, 603 N.E.2d 420 (10th Dist. 1992) ("Under the terms of the policies, appellees' duty to defend involved their right to select counsel and to determine the course of the litigation.")

This right of control exists even when the insurer contests coverage, and yields only where there is an intractable conflict between defense and coverage interests. *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973)(an insurer could defend its insured under a reservation of rights without waiving its rights to challenge coverage); *Preferred Risk Insurance Co. v. Gill*, 30 Ohio St. 3d 108, 507 N.E.2d 1118 (1987)(insurer may simultaneously defend the insured and pursue declaratory judgment upon coverage). Only when defense and coverage are "mutually exclusive" does the insurer lose the right to assign defense counsel. *Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 135 Ohio App. 3d 616, 626, 735 N.E.2d 48, 55 (9th Dist. 1999). ("[A]n insurer in Ohio may proceed to defend the insured so long as the situation does not arise that the insurer's defense of the insured and its defense of its own interests are mutually exclusive. In such a case, the insurer, still bound in its duty to defend the insured, would have to pay the cost of the insured's private counsel.")

2. Communication In the Tri-Partite Relationship

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.4: COMMUNICATION

(a) A lawyer ***shall do <u>all</u>*** 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***.

RULE 1.5: FEES AND EXPENSES

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

(b) The nature and scope of the representation and the basis or rate of the fee ***and expenses for which the client will be responsible shall be communicated to the client, preferably***

in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in writing.

NOTE: Good communication is good practice, common sense, good legal service, and good customer service on behalf of the carrier

- Report Diligently, Thoroughly, and Clearly
- Ask for Approval, Comments, Questions
- Think Carefully, Re-Read, Avoid the "Need for Speed"
- Remember Your Audience
- Be Mindful and Courteous of the Insured (schedules, obligations, communication preferences, etc.)

C. CONFIDENTIALITY IN THE TRIPARTITE RELATIONSHIP

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.

(b) A lawyer ***may*** reveal information relating to the representation of a client, <u>including information protected by the attorney-client privilege under applicable law</u>, 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.

(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.

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. ***This contributes to the trust that is the hallmark of the client-lawyer relationship.*** The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in

order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. ***The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Ohio Rules of Professional Conduct or other law.***

[4] ***Division (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.*** A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

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.

Disclosure Adverse to Client

[6] Permitting lawyers to reveal information relating to the representation of clients may create a chilling effect on the client-lawyer relationship, and discourage clients from revealing confidential information to their lawyers at a time when the clients should be making a full disclosure. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Division (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a ***present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat***. Thus, a lawyer who knows that a client has discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

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. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected***

by law or by a confidentiality agreement. 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.

Former Client

[18] ***The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.***

1, Attorney-Client Privilege

R.C. 2317.02(A), in relevant part, provides:

> The following persons ***shall not testify*** in certain respects:
>
> (A) (1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client… However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.
>
> …
>
> (2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, ***subject to an in camera inspection by a court***, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.

(QUESTION: Does the "bad faith, fraud, or criminal misconduct" exception only apply to insurance company clients?)

But in addition:

"The attorney-client privilege reaches far beyond a proscription against testimonial speech. The privilege protects against ***any dissemination of information obtained in the confidential relationship***." *American Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348 (1991)(***emphasis*** added).

NOTE: Ohio recognizes several exceptions to the attorney-client privilege.

- the crime-fraud exception;
- the lack of good faith exception;
- the joint-representation exception; and
- the self-protection exception.

Squire, Sanders & Dempsey, LLP v. Givaudan Flavors Corp.,127 Ohio St.3d 161, 2010-Ohio-4469, at ¶ 47; *See also Buckeye Corrugated, Inc. v. The Cincinnati Insurance Company,* 9th Dist. No. 26634, 2013-Ohio-3508

2. Work Product and Materials Prepared in Anticipation of Litigation

> "Proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. …This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case … as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

Squire, Sanders & Dempsey, LLP v. Givaudan Flavors Corp., 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶54, quoting *Hickman v. Taylor,* 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

And

Civ.R. 26(B)(3):

> (3) *Trial preparation: materials.* Subject to the provisions of subdivision (B)(5) of this rule, a party may obtain discovery of documents, electronically stored information and tangible things ***prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative*** (including his attorney, consultant, surety, indemnitor, insurer, or agent) ***only upon a showing of good cause therefor***. A statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without showing good cause. A statement of a party is (a) a written statement signed or otherwise adopted or approved by the party, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded.

Proper Handling: Sending, Storing, & Disposing

*Unapproved Access: *Disciplinary Counsel v. Shaver*, 121 Ohio St.3d 393, 904 N.E.2d 883, 2009-Ohio-1385 (Lawyer moving out of office left 20 boxes of records near dumpster and left computers in storage garage).

*Identifying/ Sorting E-mails: LABEL E-MAILS TO CLIENTS AS PRIVILEGED

*Cyber-Security: Protections against hacking, phishing, malware, etc.

3. The Lawyer As Witness: Confidentiality In Coverage Disputes And Bad Faith Discovery

Boone v. Vanliner Ins. Co., 91 Ohio St.3d 209 (2001)(no privilege attaches if there is evidence of bad faith)(now codified in R.C. 2317.02(A)(2)).

PRACTICE POINTERS

*_Boone_ is limited to 1) pre-denial documents, and 2) only the insurer's claim file…not the coverage file and not the attorney's file. *Id.; Bausman v. Am. Family Ins. Grp., 2nd Dist. No. 26661, 2016-Ohio-836, ¶ 13; but see Cobb v. Shipman*, 11th Dist. No. 2011–T–0049, 2012-Ohio-1676, *and William Powell Co. v. National Indemnity Co.*, Case No. 1:14-cv-00807, 2017 WL 1326505 (April 11, 2017).

*_In camera_ reviewed required: R.C. 2317.02(B);

*Orders granting discovery of attorney-client communication are 1) final and appealable ("provisional remedy"), and 2) reviewed *de novo*. *Smalley v. Friedman, Domiano & Smith Co., LPA*, 8th Dist. No. 83636, 2004-Ohio-2351, 2004 WL 1048207; *Ward v. Summa Health Sys*., 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 13; *Hartzell v. Breneman*, 7th Dist. No. 10MA67, 2011-Ohio-2472, 2011 WL 2112548, ¶¶7, 12; *Bednarik v. St. Elizabeth Health Center*, 7th Dist. No. 09MA34, 2009–Ohio–6404, 2009 WL 4548889, ¶ 9. *Campolieti v. City of Cleveland*, 184 Ohio App.3d 419, 2009-Ohio-5224 at ¶39 (NOTE: *DeVito* applied the abuse of discretion standard applicable to discovery orders; however, questions of attorney-client privilege are statutory and are subject to de novo review).

*The trial court must conduct an *in camera* review. (R.C. 2317.02(B): "… the trial court ***shall determine by in camera inspection*** which portions of the file, if any, are so privileged.

Please feel free to contact me with any questions or noted corrections:

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