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Riding the E&O Line

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Committee Leadership

In This Issue

Leadership Note

Not My Swan Song

By Seth L. Laver

According to the respected legal resource *Wikipedia*, a swan song is a "metaphorical phrase for a final gesture, effort, or performance given just before death or retirement." As of the 2019 DRI Annual Meeting, I transitioned from Chair to Immediate *Past* Chair of DRI's Professional Liability Committee, but make no mistake. This is *not* my swan song. I have no intention of death or retirement, at least not yet. I have enjoyed serving various positions on the Professional Liability Committee, each with the goal of eventually serving as chair, and I am not about to stop my involvement.

Despite my unsuccessful efforts to eliminate term limits in leadership positions [joking—well half-joking], the one position that I have not really prepared for is that of *past* chair. My first responsibility as past chair is drafting this column, which got me thinking about why I choose to DRI and, ultimately, why I plan to continue to DRI.

During Rosh Hashanah services, our rabbi gave a sermon about the importance of presence—the benefits you can provide others and yourself by simply showing up. Sit quietly with someone in pain. Listen to an opinion you disagree with. Drive a friend to the airport. Go to happy hour at the conference even though you are exhausted and would prefer to nap. The first rule is to show up.

I joined DRI because my managing partner told me to. During my initial interview process, in 2010 or 2011, as I considered switching firms, my soon-to-be managing partner challenged me to join DRI's Professional Liability Committee. He said there would be opportunities to meet professional liability practitioners and claims-handlers, to learn the law as it evolves, and to develop my brand. At a time when I was somewhat overwhelmed with the prospect of transitioning my practice to another firm, the concept of joining a committee in an organization I had never heard of seemed farfetched. It was not.

I have served as Webcast and Communities Chair, Program Vice Chair and Chair, and Committee Vice Chair, and Chair. My big break came when I volunteered to handle a role a bit outside of my comfort zone but one that served as a springboard to leadership roles. Through those roles, through my *presence* in the committee, I have developed friendships that I am confident will survive my professional career and beyond. I have developed clients with mutual trust and respect that form the foundation of my practice. I have learned to design and develop meetings, proposals, board reports, and seminars—all skills that I had not considered and do not recall learning in law school. I have encountered too many practice pointers, risk-management lessons, and developing areas of the law to count. That includes the application of *in pari delicto,* the importance of engagement and disengagement letters, the use of experts, the complicated tripartite relationship, confidentiality and privilege issues, developing technology, reporting and documentation requirements, and scores of other fascinating practice pointers.

But there are too many lawyers in DRI, some say. They say that it's an institution consisting of our competition, not our would-be clients. That the lawyer-to-client ratio is skewed. That it's too large. Too small. I have debated with some who complain about DRI. Are they willing to commit, to volunteer, to participate? DRI was and is the right fit for me because at the committee level I have found that it absolutely rewards those who raise their hands and work toward making the most of the many available opportunities. As I see it, career-altering opportunities are available at any DRI event for those who are accessible and know where to look, and maybe for those who have been a bit lucky, as have I. That is why I DRI.

But what now? Term limits are obviously necessary for the committee and for past chairs. Leadership at the committee level is time-consuming and it is necessary to bring in new ideas. There are only so many hours in a day that we can devote to something other than our clients and personal obligations, so change is necessary. But I do not plan to disappear. I will continue to serve our committee in any role that would be helpful. In the short term, I plan to serve as an industry liaison, somewhat of a conduit between claims personnel and our committee, rather than simply to ride off into the sunset or sing like a swan.

Thank you for the opportunity to serve as chair of this exceptional committee. Congratulations to each of the new leaders, especially my dear friends Melody Jolly

and Jonathan Harwood. I am looking forward to my next DRI chapter.

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Feature Articles

Malpractice on Trial

After a Mistake Is Made—Defense

By Kathryn S. Whitlock

Every lawyer would like to retire without ever facing a legal malpractice claim. Unfortunately, that's unlikely to happen for most lawyers today. The ABA reported that four out of five lawyers will get sued for malpractice at some point in their careers. "Ways to avoid legal malpractice, as claims rise industry-wide," *Around the ABA*, December, 2016. While this statistic is sobering, there are things you can do, even after an error is made, that can reduce your exposure.

Communication is key. Lawyers have an ethical duty to advise their clients if they have made an error. Colo. R. Prof. C. 1.4(a)(3); Ga. R. Prof. R. 1.4 ("A lawyer shall…keep the client reasonably informed about the status of the matter [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.") However, as will be discussed below, an error is a far cry from malpractice and the lawyer should not confess his sins and assure the client that the lawyer's insurance company will handle it. Such a communication is likely to draw at the least a reservation of rights from the insurer. *See*, Saab Fortney, "Legal Malpractice Insurance: Surviving the Perfect Storm," 28 J. of the Legal Profession 41, 61 (2004). Instead, clearly and succinctly inform the client of the problem and its effect on the legal matter. Follow this with a disclaimer, *e.g.*, we do not know what would have happened had the error not occurred. You may have to withdraw as you are now conflicted out of further representation of the client. Finally, assure the client that you have notified your E&O carrier, suggest that another lawyer might be consulted, and, of course, apologize for the error.

You should, as you told the client, have notified your carrier already. Claims-made policies make reporting absolutely necessary in order to ensure coverage. You don't want to jeopardize your coverage by waiting too long to notify your carrier. *See, Craft v. Philadelphia Indem. Ins. Co.*, 343 P.3d 951, 953 (Colo. 2015) ("In a claims-made policy…to excuse late notice…would rewrite a fundamental term of the insurance contract."). Moreover, your carrier can appoint counsel to help you write the letter to your client which, while mandatory, is likely to be used as an exhibit against you should there be a claim. The line you are walking when writing this letter is extremely fine, so the assistance of an attorney is highly recommended.

Furthermore, claim repair may be possible, and the carrier may want to have the defense counsel involved in assessing possibilities and pursuing avenues to eliminate the claim. If this is a possibility, it needs to be handled carefully to avoid creation of additional claims (*e.g.,* breach of fiduciary duty, fraud that tolls the statute of limitations.) But, "repairing" the situation so as to protect the client's interests is by far the best course, if possible. Most carriers will not penalize you for reporting a potential claim.

Then work with your carrier and the lawyer it hires for you. Most carriers will solicit, or at least listen to, your input with respect to who should represent you. You are your own worst client, even though you "know the file better than anyone," so it should not be you. But let the carrier know if there is someone with whom you think you would be comfortable. Defense counsel will be more objective about the relative strengths and weaknesses of your case and can focus on the most important and relevant aspects

of the case. Defense counsel also will have much more experience with legal malpractice claims than you have.

You'll need to collect and produce that file that you have so carefully created and maintained. Organize your file materials and deliver them to your defense counsel as quickly as possible. Include items that may not normally be kept within the file, including time slips, billing statements, invoices, e-mails which were not printed and filed previously, personal Day-Timer and calendar entries, the retention agreement, draft documents. Make the entire underlying file available to your defense counsel.

You will also need to make all this material available to the client. In most states, the file belongs to the client, not the lawyer. *McVeigh v. Fleming*, 410 S.W.3d 287 (Mo. 2013); *Quantitative Fin. Strategies v. Morgan Lewis & Bockius LLP*, 2002 Pa. Dist. & Cnty. Dec. LEXIS 148, 55 Pa. D. & C.4th 265 (2002). And, in some states, like Georgia, the client is entitled to the file even if he has not paid your bill. *Mary A. Stearns, P.C. v. Williams-Murphy*, 263 Ga. App. 239, 587 S.E.2d 247 (2003). There are some items in the file that may be legitimately withheld, such as your personal notes, and this is a discussion you want to have early on with your attorney. *See, Swift, Currie, McGhee & Hiers v. Henry*, 276 Ga. 571, 581 S.E.2d 37 (2003).

Be forthcoming with your defense counsel and the insurance carrier so that they can put together the best defense possible. Do not try to fix, hide, or cover up any of your actions and/or inactions. A legal malpractice claim is no different from any claim or legal issue you deal with day in and day out—the lawyer can work with any fact, good or bad, but she has to have the fact to work with it. Surprise facts are not helpful. Cooperate to provide requested and necessary information and documents to develop the defenses and address discovery.

There are a number of common defenses your lawyer might want to develop:

- Expiration of the statute of limitations (O. C.G.A. §§9-3-24, 9-3-25, 53-12-307; *Newell Recycling of Atlanta, Inc. v. Jordon Jones & Goulding, Inc.*, 288 Ga. 236, 703 S.E.2d 323 (2010); *Dauterive Contrs., Inc. v. Landry & Watkins*, 811 So. 2d 1242 (La. 2002); *Laird v. Blacker,* 2 Cal. 4th 606, 828 P.2d 691 (1992);
- Absence of proximately caused damages by the attorney's conduct (*Lalonde v. Taylor English Duma, LLP*, 349 Ga. App. 853, 825 S.E.2d 237 (2019); *Huang v. Brenson*, 2014 IL App (1st) 123231, 7 N.E.3d 729 (2014); *Crestwood Cove Apts. Bus. Trust v. Turner*, 2007 UT 48, 164 P.3d 1247 (2007); *Szurovy v. Olderman,* 243 Ga. App. 449 (2000));
- The breach of fiduciary duty claims duplicate the legal malpractice claims and therefore is barred (*Donalson v. Martin*, 2003 WL 22145667, at *2, 2003 Tex. App. LEXIS 8070 (Tex. Ct. App. 2003); *Griffin v. Fowler*, 260 Ga. App. 443, 446, 579 S.E.2d 848 (2003); *McMann v. Mockler*, 233 Ga. App. 279, 282, 503 S.E.2d 894 (1998); Mallen & Smith, Legal Malpractice §14:2 (2007 ed.); Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach As Legal Malpractice*, 34 Hofstra L. Rev. 689, 738 (2006); or
- Judgmental immunity bars the claim (an honest exercise of professional judgment, even if it turns out wrong, is not malpractice) (*Air Turbine Tech., Inc. v. Quarles & Brady, LLC*, 165 So. 3d 816 (Fla. 2015); *Adney v. USAA Prop. & Cas. Ins.*, 253 Wis. 2d 847, 644 N.W.2d 294 (2002); *Hudson v. Windholz*, 202 Ga. App. 882, 886, 416 S.E.2d 120 (1992).

Finally, be reasonable about the outcome. Agree to suggested resolution of liability cases as soon as it is possible to do so for a fair amount. Also, be prepared to take cases of no liability to verdict. Keep in mind, though, that litigation is time-consuming and expensive in more ways than one. You can end up with a Pyrrhic victory if you win at jury verdict after years of responding to discovery and motions and having your name reported in the law books because of an appealed issue. Keeping reason and good judgment front and center will ease the pain of surviving the claim.

Kathryn S. (Kate) Whitlock serves as the chair of DRI's Professional Liability publications committee. She has spent her 30+ year professional liability, products liability, and premises liability career defending professionals who are accused of not doing their jobs right. Clients include lawyers, insurance claims handlers, product designers, construction professionals, property managers and more in matters involving selling businesses, litigating cases, appraising land, complying with mandatory guidelines, and designing buildings, among other things. Kate appears in state and federal trial courts, courts of appeal, and alternative dispute forums. She has tried more than 50 cases to verdict and has a long list of appellate decisions to her credit. She has received several professional honors, including AV Preeminent (Peer Review Rated by Martindale-Hubbell), Super Lawyer (Super Lawyers Magazine), and America's Top Lawyers (The American Law Society). She speaks and writes on numerous subjects, including professional malpractice, legal ethics, trial practice, products liability, and premises

liability. She is active in multiple professional organizations in addition to DRI (e.g., Executive Committee, Professional Liability Section State Bar of Georgia). She has been married to her lawyer-husband for over 30 years, has three grown children (none of whom are lawyers), and two dogs. She can be reached at kwhitlock@hpylaw.com or404.614.7483.

Navigating the Perils and Pitfalls of the "Bad Faith Set-up" in Potential Excess Exposure Cases

By Karen Wheeler and Jami Maul


Recovery of damages for bad faith claims against insurance companies can be lucrative business for plaintiff's lawyers. In third-party actions, although a judgment may be large, recovery is limited based on the available insurance and the assets of the insureds. There has been a recent trend of attorneys embracing the idea of "setting-up" the insurance company to create a bad faith case. The end goal becomes not that of amicably resolving the claim with the defendant and their insurance company, but rather the object becomes seeking an assignment of the insured's rights against the insurance company. This allows the plaintiff to bring a bad faith claim against the defendant's insurer where collectable damages could greatly exceed the policy limit. Although this set-up and assignment tactic is not without risk of professional liability to the plaintiff's lawyer, those risks are not discussed herein. Instead, this article will address the perils the insurance defense lawyer may face when encountering the bad faith set-up in the context of third-party defense litigation. Insurance carrier-retained lawyers must be mindful of their role and duties to their client(s) and avoid blurring the lines of duties and ethical obligations to the insured and the insurance company. This article will discuss how to avoid the potential perils and pitfalls a defense lawyer may encounter during an attempt by the plaintiff's lawyer to set-up a bad faith claim against an insurance company in the context of the assignment of a bad faith claim in third-party litigation by the insured defendant.

What Is the Bad Faith Set-Up?

The profitable nature of insurance bad faith claims combined with certain states sanctioning assignment of certain policy rights either pre or post judgment, has catalyzed the trend of misuse of these tools. *See, e.g., Coblentz v. American Sur. Co. of New York*, 416 F.2d 1059 (5th Cir. 1969); *Damron v. Sledge*, 105. Ariz. 151, 460 P.2d 997 (Ariz. 1969); *Nunn v. Mid- Century Ins. Co.*, 244 P.3d 116 (Colo. 2010); *Northland Ins. Co., v. Bashor*, 494 P.2d 1292 (Colo. 1972). Many states have enacted statutes that provide for additional penalties for bad faith above and beyond just attorney fees and compensatory damages. *See, e.g.,* Colo. Rev. Stat. §10-3-1115 and 1116; Ga. Code Ann. §33-4-6; 215 Ill. Comp. Stat. Ann. §5/155; La. Rev. Stat. Ann. §22:1973; Minn. Stat. §604.18; Mo. Rev. St. §375.420; 42 Pa. Cons. Stat. Ann. §8371; Wash. Rev. Code Ann. §48.30.015 .We are seeing a trend of pre-litigation set-up tactics (ranging from providing minimal information and giving an unreasonably short time-limited demand, to sending the demand to a home-office location to induce a breach) immediately followed, very early in the litigation, by obtaining an assignment of a bad faith claim from the insured to the plaintiff allowing action against an insurance company. A common scenario in which this can be seen is where there are low liability limits and potentially high damages resulting in a high risk of excess exposure to the insured. In such cases, the plaintiff's lawyer likely sees the possibility of a much higher recovery from an assigned bad faith claim against the insurer verses the recovery of minimal policy limits.

In the context of a third-party claim, the insurer often has the discretion to settle a claim or suit. Most ISO policies provide, inter alia: "We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." See ISO Form CG 00 01 04 13, ¶ I.A.1.a.

Some courts have taken this discretionary right and found an insurer has a duty to settle. "The implied covenant of good faith and fair dealing requires an insurer to settle where appropriate even if the duty is not expressly imposed in the terms of the policy." 14 Couch on Ins. 3d §203:14 (2015).Under certain circumstances, the insurer

may have an implied legal duty to settle within policy limits where recovery in excess of those limits is substantially likely. *See* 14 Couch on Ins. 3d §203:13 (2015); *see Martin v. Travelers Indemnity Co.*, 450F.2d 542, 551 (5th Cir. 1971); *Jordan v. United States Fidelity & Guar. Co.*, 843 F. Supp. 164, 171 (S.D. Miss. 1993); *Hartford Accident & Indemnity Co. v. Foster*, 528 So.2d 255, 282 (Miss. 1988).

Many jurisdictions have found when an insurance company controls the defense of its insured, it does so in a fiduciary or quasi-fiduciary capacity, requiring it to give "equal consideration" to the interests of the insureds as its own interests. *See*, *e.g.*, *Travelers Ins. Co., v. Savio*, 706 P.2d 1258, 1274 (Colo. 1985); *Hortica-Florists' Mutual Insurance Company v. Pitman Nursery Corporation*, 729F.3d 846, 858 (8th Cir. 2013); *Craft v. Econ. Fire & Cas. Co.*, 572 F/2d 565, 569 (7th Cir. 1978); *American Fidelity & Casualty Co. v. G.A. Nichols Co.*, 173 F.3d 830, 832 (10th Cir. 1949); *Ki Sin Kim v. Allstate Ins. Co., Inc.*, 223 P.3d 1180, 1192 (Wash. App. Ct. 2009). An insurer maintains control of the decision to settle and may, in appropriate circumstances, refuse to settle within policy limits. When an excess verdict ensues, the insured may assert the insurer's evaluation and refusal to settle were in bad faith. Although clearly an insured may file a complaint alleging bad faith failure to settle, the insured may in certain jurisdictions assign to the plaintiff the right to pursue recovery against the insurer in exchange for consideration. Sometimes the consideration is a consent judgment and/or the plaintiff's agreement not to attempt collection against the insured on the judgment.

The potential duty to settle may be triggered when there is a demand (or a reasonable opportunity to settle) within policy limits and a risk of an excess verdict to the insured. Some courts hold the insured must actually demand the insurer accept the demand within policy limits, and the insurer must in turn refuse to do so in order to give rise to a bad faith claim. *See, e.g., Purscell v. Tico Ins. Co.*, 959 F.Supp.2d 1195, 1202 (W.D.Mo. 2013); *American Mut. Ins. Co., of Boston v. Bittle*, 26 Md.App. 434, 439, 338 A.2d 306, 309 (Md. Ct. Spec. App. 1975). A majority of jurisdictions hold the insurer's duty to settle a third-party claim does not arise where there is not settlement offer within policy limits on the table. *See, e.g., McLaughlin v. Nat'l Union Fire Ins. Co.,* 29 Cal. Rptr. 2d 559, 566–67 (Cal Ct. App. 1994); *State Farm Fire & Cas. Co. v. Metcalf*, 861 S.W.2d 751, 756 (Mo. Ct. App. 1993). In a minority of jurisdictions, an insurer must continue to evaluate and make undisputed payments even after the filing of a lawsuit. *See, e.g., Roberts v. Printup*, 422 F.3d 1211, 1219 (10th Cir. 2005); *Moutsopoulos v. Am. Mut. Ins. Co. of Boston*, 607 F.2d 1185, 1187–88 (7th Cir. 1979). Some jurisdictions, however, have held it is not even necessary that a policy limit demand be made in order to give rise to a bad faith claim. *See Kelly v. State Farm Fire & Cas. Co.*, 2014-1921, p. 21 (La. 5/5/15), 169 So.3d 328, 341 (La. 2015).If an insurer rejects a settlement demand that is within policy limits, and an excess judgment is entered against the insured, the insurer may be subject to a bad faith suit requesting the entire amount of the judgment, even though it exceeds the limits of the policy. In a pre-litigation context, this effectively requires an insurer to proactively pursue a settlement, even if there is no demand by the claimant. The insurers duties to its insured may change post-litigation. *See, e.g., Sanderson v. American Family Mut. Ins. Co.,* 251 P.3d 1213, 1217(Colo. App. 2010)(The duty to negotiate a settlement may be suspended following filing of the suit).

Professional Considerations While Representing an Insured Faced with a "Bad Faith Set-Up"

A lawyer owes a duty to their clients to avoid any potential conflicts of interest. *See* Model Rules of Prof'l Conduct R. 1.7; 1.8.Ordinarily in the course of third-party litigation, the interests of the insurance company and their insured are aligned. This can, however, change when the insurance company's risk of liability is contractually limited to the policy limit but the insured has a potential for liability above and beyond the contractual limitation. Insurance defense counsel in third-party litigation must take careful steps to consider their ethical obligations and that are somewhat unique given the tripartite relationship.

The American Bar Association Standing Committee on Ethics and Professional Responsibility has declined to weigh-in on who the client is in the tripartite relationship, but indicated the lawyer may represent only the insured, both the insured and the insurer, or both the insured and the insurer in a limited scope. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-403, at 2 (1996). There is a jurisdictional split regarding who the retained defense counsel represents in the tripartite relationship, with a majority holding that the client is both the insured and the insurer. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421, at 3 n.6, 7 (2001). Even in circumstances where only the insured is the client, there is a significant risk for conflicts, ethical issues, and even potential liability for the lawyer. *See* Model Rules of Prof'l Conduct R 1.8.(f) (requiring informed consent when the lawyer accepts payment for services from someone other than the client). In every case, particularly where there is a risk of excess exposure, a lawyer should at the outset of the representation clearly define and explain, ideally

in writing, the scope of the representation to the insured defendant-client, the potential areas of conflict between the insured and the insurer and the tripartite relationship.

There appears to be a growing trend by plaintiffs' lawyers at the outset of litigation sending a demand letter proposing a consent judgment, prior to the completion or even the start of discovery. In such a context, insurance defense counsel must take careful steps to best represent their client(s), and comply with their ethical obligations. Careful attention can avoid any potential claims that could be made against or implicate the lawyer in any assignment of bad faith claims. When a defense lawyer receives such a letter, the lawyer's protocols will depend on their jurisdiction and that jurisdiction's determination of who is the client(s). At least one court has held, upon receipt of a within-policy-limits settlement demand, a lawyer's first step should be an attempt to halt the proceedings in order to give the client(s) time to make a decision on the settlement offer before any further trial developments that may harm the interests of either the insured or the insurer. *Hartford Acc. & Indem. Co. v. Foster*, 528 SO.2d 255, 270 (Miss. 1988).

The lawyer should transmit a copy of any letter proposing an assignment and/or consent judgment to both the insurance company and insured as soon as possible. *See* Model Rules of Prof'l Conduct R. 1.4. The defense lawyer must fully inform their client(s) regarding the terms of the settlement offer. *See id.* The lawyer has a duty to inform their client(s) of any potential conflicts as they arise. The defense lawyer should advise the insured it cannot advise it regarding any potential claims against the insurance company. Any specific conflicts or potential conflicts should be explicitly explained. Likewise, the lawyer should be clear with the insurance company that, in order to avoid conflicts, the lawyer cannot advise the insurance company regarding its response to any demand from the insured to settle the claim. The defense lawyer should advise the client to retain personal counsel who can advise them regarding any proposed consent judgment or agreement proposed by plaintiff's counsel. *See Bankruptcy Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519, 524–25 (Colo. App. 2008). A lawyer can face possible liability by implicating a possible conflict of interest by not advising the client of this potential conflict and their need to obtain personal counsel. A lawyer could also face possible liability in participating in representing the insured in entering into a consent judgment agreement. It is particularly important in this situation that the lawyer outline both orally and in writing the scope of the representation and relationship between the lawyer, insured, and insurance company.

There is a delicate balance a defense lawyer must obtain when faced with a potential bad faith set-up during the course of third-party litigation A lawyer must be careful to not implicate themselves in any possible bad faith claim (there have been recent filing implicating lawyers in a conspiracy to commit bad faith) but to continue communicating with the insured's personal attorney and keeping them apprised of all matters involved in the case. At the same time, the lawyer must ensure the client is continuing to cooperate with the insurance company as required to avoid any loss of coverage, which also could result in a malpractice claim by the insured. *See, e.g., Murphy-Sims v. Owners Insurance Company*, 10th Circuit Court of Appeals Case No. 18-1392 (whether an agreement assigning rights under the policy is, in and of itself, a failure to cooperate under the insurance policy). Likewise, if the jurisdiction requires the insured demand the policy be settled within policy limits and relays that demand to the lawyer, it is crucial to pass on any such demands to the insurance company to avoid any potential future claims by the insured against the lawyer. *See, e.g., Hartford Acc. & Indem. Co. v. Foster,* 528 SO.2d 255, 270–73 (Miss. 1988)(for a detailed example of a court's complex analysis regarding the duties owed to the insurer and insured).

If any consent judgment agreement is offered to the named insured by the plaintiff, it is important to immediately advise the insured client to retain personal counsel and explain that an insurance-retained attorney is unable to advise them on such issues. The lawyer should be sure to communicate *in writing* with the insured's personal counsel regarding their preferences for involvement in the case (*i.e.* does personal counsel wish to attend hearings, review pleadings before filed, etc.) and be sure to comply with these requests regarding involvement and copy the insured's personal counsel on all pertinent documents.

In cases where a consent judgment has been agreed to insurance defense counsel may continue to remain on the case through litigation related to the consent judgment, and continues to owe duties to the insured. Counsel's duties to attempt to maintain coverage for the insured continue. However, in the event of an irreconcilable conflict, the lawyer will be required to withdraw from the litigation. In the event the lawyer remains counsel for the insured, the lawyer is required to continue to vigorously defend. Model Rules of Prof'l Conduct R. 1.1, 1.3.

Conclusion

In sum, the potential ethical issues and risks of liability for lawyers practicing in the context of the tripartite relation-

ship continue to rise as the use of the "bad faith set-up" in potential excess exposure cases increases. Lawyers must take careful steps to comply with their ethical and legal obligations in order to avoid these potential perils and pitfalls. The greatest prophylactic measure to protect against problems remains communication with both the insured and the insurer—ideally, clear and confirmed in writing.

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